INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

JURISDICTIONAL IMMUNITIES OF THE STATE

(GERMANY V. ITALY)

COUNTER-MEMORIAL

OF ITALY

22 DECEMBER 2009

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CHAPTER I

GENERAL REMARKS

Section I. Introduction

1.1 In this Counter-Memorial, presented within the deadline laid down by the International Court of Justice (hereinafter the Court) by order of 29 April 2009, the Italian Republic (hereinafter Italy) intends, first, to set out the arguments that lead it to ask the Court to reject the request submitted on 23 December 2008 by the Federal Republic of Germany (hereinafter Germany), illustrated in its Memorial of 12 June 2009. Secondly, Italy intends to explain the reasons on which its own counter-claim, submitted in the same context, is based.

1.2 In its Memorial, Germany emphasizes that the strong links of friendship and cooperation between Italy and Germany are not being called in question in any way by the initiative of bringing before the Court a delicate controversy it seems impossible to resolve any other way. For, starting with the decision of the Italian *Corte di Cassazione* in the *Ferrini* case of 11 March 2004[1], an approach has been becoming consolidated in the case law that Germany's immunity from jurisdiction cannot be recognized by Italian judges in cases of legal actions brought by victims of crimes committed by the Nazi authorities during the Second World War aimed at securing reparation. According to Germany, denial of immunity to the German State by Italian judges should be regarded as internationally wrongful conduct by Italy, which the Court ought to find, drawing all the appropriate consequences in international law.

1.3 Italy fully shares the conviction that the solid bonds of friendship between the two countries absolutely do not risk being disturbed by the present proceedings and "respects the German decision to apply to the International Court of Justice for a ruling on the principle of State immunity", as solemnly stated in the Joint Declaration adopted on the occasion of

[1] ANNEX 1 to the Memorial of the Federal Republic of Germany (hereinafter GM).

German-Italian governmental consultations held on 18 November 2008 in Trieste[2]. Obviously, Italy equally trusts that Germany will in the same spirit of profound friendship in turn respect the Italian decision not only to rebut the German request on the merits but further to submit with the present Counter-Memorial its own counter-claim, so that under the guidance of the Court the complex issue at the heart of the dispute can be fully, not merely partially, resolved. For the Italian case law denying the immunity of the German State from jurisdiction in connection with requests for reparation submitted by victims of crimes committed by the Nazi authorities during the Second World War is inseparably linked with the finding that these victims have suffered, and continue to suffer, a flagrant denial of justice, since every attempt over a span of over 60 years to secure compliance by Germany with the peremptory principle of international law imposing an absolute obligation of reparation in such cases has failed. A complete solution to the dispute accordingly requires the Court to be called on not only to answer the question whether there has been a breach by Italy of Germany's jurisdictional immunity (as the latter claims), but also the closely connected question whether Germany has breached, and continues to breach, its obligation to make reparation for the extremely severe violations of international humanitarian law for which it is internationally responsible (as Italy holds).

1.4 As Germany admits, the Italian Government has consistently tried to avoid immunity becoming a contentious issue before Italian courts. The positions taken in the framework of judicial proceedings by the *Avvocatura dello Stato* and by the *Procura Generale*[3] can be explained in this light. Italian courts were, however, faced with a clear dilemma: to condone a blatant denial of justice or to render justice to victims of heinous crimes. Confronted with this dilemma, Italian judges made the only possible, logical and rational choice for any judicial institution: considering that an imperative obligation of reparation existed, considering that several attempts had been made to obtain satisfactory reparation from Germany, and considering that all other remedial avenues seemed to have been exhausted, they had to render justice even at the price of setting aside the principle of immunity. Now that Germany has decided to approach the Court on only one aspect of this complex situation, it seems to Italy highly desirable, indeed necessary, for the Court to be asked to deal with it and resolve it in its entirety.

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[2] ANNEX 1.
[3] GM, paras. 24 and 26; ANNEXES 10 and 11 to GM.

Section II. The Agreement Between the Parties on the Jurisdiction of the Court

1.5 As emerges from the Joint Declaration of 18 November 2008, Italy not only respects Germany's decision to apply to the Court in this case, but has also stated its conviction that the Court's decision "will help to clarify this complex issue"[4]. The Joint Declaration might thus in itself constitute an adequate consensual basis for the Court's jurisdiction in the present case, even independently of the reference to the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, invoked by Germany[5]. And it is a matter of course, in full respect for the letter and the spirit of the Joint Declaration, that Italy considers itself in any case bound not to raise objections regarding the Court's jurisdiction to decide on the German claim and its admissibility.

1.6 As will be shown in Chapter III below, the principles laid down in the 1957 European Convention, on which Germany bases the Court's jurisdiction in relation to its own claim, also fully establish the Court's jurisdiction in reference to the counter-claim submitted by Italy. It should however be noted that the Joint Declaration of 2008 implies that Germany fully shares with Italy the trust that the Court's decision will "clarify this complex issue". And the complexity of the issue brought before the Court derives from the very fact that the question of the State's jurisdictional immunity arises in the case in point not abstractly and in general, but with specific reference to disputes regarding the reparation denied to Italian victims of war crimes and crimes against humanity. It follows that any objections from the German side regarding the admissibility of the counter-claim submitted by Italy or regarding the Court's jurisdiction in relation to it would appear to be in sharp contrast with the common intent of the Parties as solemnly expressed by them jointly.

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[4] Joint Declaration by the Government of the Federal Republic of Germany and the Italian Republic, 18 November 2008 (ANNEX 1).
[5] GM, para. 1.

Section III. The Real Scope of the Dispute

1.7 In its claim, Germany asks the Court to find that Italy, through its judicial practice starting with the *Ferrini* judgement, has infringed and continues to infringe towards Germany the principle of sovereign immunity which debars private parties from bringing suits against a State before the courts of another State.

1.8 As it will be underlined in Chapter IV below, Italy fully agrees with Germany that sovereign jurisdictional immunity is a fundamental principle of international law. But this principle, though undeniably always in force, should be properly interpreted. Conceived in other times as absolute, it is today commonly seen as relative: the important developments of international law in this respect have progressively highlighted that immunity has to be understood as subject to various exceptions. In other words, it is recognized that in a whole series of situations it cannot be validly invoked by one State brought before the judge of another State.

1.9 However, over and above the exceptions specifically identifiable according to the standards of international practice, the interplay of the immunity principle with other rules of positive international law of paramount importance must be assessed taking into account the potential impact of the normative hierarchy. For in the present case the Court is being asked to say, not whether the principle of State jurisdictional immunity exists or not, but whether it should or should not be applied even in a case where it is essentially being used to exonerate the State itself from complying with international obligations of an imperative nature, that is, when recourse to the domestic judge appears to be the only path to pursue in order to secure compliance with those obligations, since every other way has been tried without success or is in any case precluded as a consequence of postwar Germany's choice not to provide compensation to a multitude of Italian victims of horrendous crimes committed by the German Reich.

1.10 Italy is convinced, and asks the Court to say, that the application *in concreto* of State jurisdictional immunity must be balanced in terms of the need to avoid such application leading to the sanctioning of an irremediable breach of the principle of international law, itself fundamental and, moreover, non-derogable, regarding the obligation to offer effective reparation to the victims of war crimes and crimes against humanity. Chapters V and VI of this Counter-Memorial are specifically dedicated, respectively, the former to identifying the fundamental

international principles applicable as regards reparation for damage caused by severe breaches of international humanitarian law, and the latter to the necessary balancing to be done in the case in point between immunity and reparation.

1.11 Finding the existence of the international obligation of reparation and of its continuing breach by Germany thus appears to be a necessary stage in order to establish whether Italy has indeed breached Germany's jurisdictional immunity or not. With its own counter-claim, as clarified in Chapter VII below, Italy further asks the Court to draw all the consequences of this finding, indicating in particular that Germany has in any case the obligation to cease its own wrongful conduct and the consequent obligation to offer the victims appropriate and effective reparation.

Section IV. The Position of the Federal Republic of Germany and its International Responsibility for the Crimes Committed by the Third Reich

1.12 The German Memorial admits *de plano* from the outset that "in respect of acts *jure imperii* performed by the authorities of the Third Reich […] present-day Germany has to assume international responsibility"[6] and describes "the steps undertaken by post-war Germany […] to give effect to the international responsibility of Germany" relating to "the unlawful conduct of the forces of the German Reich"[7]. But not only is the international responsibility of "present-day Germany" for the conduct of the German authorities of the times indisputable and undisputed: also indisputable, and moreover openly recognized by Germany, is the wrongful, indeed criminal[8], nature of the "egregious violations of international humanitarian law perpetrated by the German forces during the period from 8/9 September 1943 until the liberation of Italy"[9] as well as "the untold suffering inflicted on Italian men and women in particular during massacres, and on former Italian military internees"[10].

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[6] GM, p. 1.
[7] GM, para. 7.
[8] GM, para. 59.
[9] GM, para. 15.
[10] *Ibid*., and Joint Declaration.

1.13 Italy invites the Court to find that no dispute thus exists between the Parties as regards Germany's responsibility for the indisputably criminal acts committed by the Third Reich against Italians to which the Italian case law denying jurisdictional immunity to the German State refers. In other words, the existence of the obligation to make reparation for the crimes committed, its non-derogable nature and its permanence in relation to today's democratic Germany can and must be analysed and ascertained by the international judge on the basis of these certain and incontrovertible data.

Section V. The Time Element in the Present Case

1.14 Both the German claim and the Italian counter-claim relate to the same extremely severe wrongful acts, perpetrated between 1943 and 1945 during the Second World War. The disputed questions that the Court is called on to resolve today thus inevitably raise inter-temporal problems, given that there is a need to determine the legal effects of the lapse of time, taking into account the undoubted evolution of the relevant principles of international law over this span of more than 60 years. The position asserted by Germany in this connection in its Memorial is that the events of the past cannot be assessed on the basis of the standards of the international norms currently in force, given that these are not to be applied retroactively[11]. The crimes in question, it affirms, "belong to the past" and "the set of rights and obligations which they engendered is closed"[12]. And Germany adds: "(s)ince that time, no injurious new element was added to the damage originally caused". Consequently, "the requirement that any legal obligation must be interpreted within its legal context, cannot be extended to reshaping a legal relationship that received its contours pursuant the proposition: *tempus regit actum*"[13].

1.15 Such argumentation cannot be supported. Moreover, it is not at all relevant in the case in point, whether in connection with the German principal claim or in reference to the Italian counter-claim.

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[11] GM, para. 91.
[12] GM, para. 95.
[13] GM, para. 94.

1.16 In its claim, Germany seeks to assert that the approach adopted by the Italian judges in their case law, from the *Ferrini* judgment onwards, breaches Germany's right to enjoy jurisdictional immunity. These allegedly wrongful acts do not date from more or less remote times but from today: it is, accordingly, inevitably in the light of international law in force currently – not that which existed in the past – that the Court must judge whether the Italian judges have or have not acted correctly in denying jurisdictional immunity. It is true that *tempus regit actum*. But the acts *sub judice* in the case in point are not the crimes committed in the 1940s by the Third Reich (as to the perpetration of which, and Germany's consequent responsibility, there is not – as already pointed out – any disagreement), but the decisions of the Italian judges who from 2004 onwards have asserted the existence of Italian jurisdiction vis-à-vis the German State. The principles of international law invoked by Germany, in other words, are concerned with regulating – and where appropriate limiting – the exercise of the national jurisdictional function vis-à-vis foreign States. It is, accordingly, on the basis of the principles in being at the time when the judge is resorted to vis-à-vis the foreign State that the question whether immunity is to be acknowledged or not has to be answered. In other words, it should be held that – as will be shown at greater length in Chapter IV below – immunity is a procedural rule which affects the jurisdictional competence of a court and, in accordance with a general principle of law, it has to be assessed on the basis of the law in force at the time when the court is seized.

1.17 Coming now to the Italian counter-claim, it is true that it refers to internationally wrongful acts indubitably attributable to Germany which, as the German Memorial asserts, "belong to the past", given that they were perpetrated in the 1940s. It is not, however, in any way true that "the set of rights and obligations which they engendered is closed"[14], as it is not true that "no injurious new element was added to the damage originally caused"[15]. On the contrary, the counter-claim arises from the very finding that the obligation of reparation has been and continues today to be breached by the German side in relation to a great number of victims, despite all the endeavours to secure it made by the latter (Chapters II and IV below). Even if the crimes from which the obligation of reparation takes its origins have to be assessed

[14] GM, para. 95.
[15] GM, para. 94.

as "faits instantanés" (as Germany asserts)[16], it is certain that the same cannot be said of the breach of this obligation. The internationally wrongful act consisting in breach of the obligation of reparation is by no means "instantaneous": instead, it falls fully within the definition contained in Article 14(2) of the ILC Articles on State Responsibility, according to which:

> "The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation."

In other words, the breach by Germany of the obligation to provide reparation to war-crimes victims began at the time of the relevant facts, but still continues today. Hence, Germany's continuing violation of its obligations under international law to provide appropriate and effective reparation to Italian victims of war crimes cannot be assessed otherwise than in the light of the present state of international law.

[16] GM, para. 94.

CHAPTER II

THE FACTS

Section I. The Events of the Second World War Concerning the Parties

2.1 The real subject-matter of this case is not just immunity, as Germany presents it in its Memorial, but also, and above all, the ongoing non-compliance by Germany with its obligations of reparation for the egregious violations of International Humanitarian Law (hereinafter IHL) committed in the final years of the Second World War against Italian victims by the Third Reich. Since these violations are intrinsically linked to the events which took place towards the end of the Second World War and, more specifically, between 3 September 1943 and 8 May 1945, it is apposite briefly to mention the historical background.

2.2 It is well known that Italy, having started the war as an ally of the German Reich in June 1940, had eventually surrendered unconditionally on 3 September 1943. Subsequently, on 13 October 1943, it declared war on Germany, joining the Allied Powers in their fight against the Nazi system.

2.3 Thus, while until September 1943 Fascist Italy and Nazi Germany were close allies, during the war – due to the sufferings caused by the war itself – the political conditions in Italy evolved and after a significant change in government (involving *inter alia* the arrest of Benito Mussolini), Italy found itself in a rather difficult position exposing both its troops and its civilian population to one and a half years of serious distress, largely due to German occupation of considerable parts of Italian territory.

2.4 This was, broadly speaking, the historical background against which the serious and massive violations of IHL under scrutiny in the present case took place. The fluctuation of Italy's position during the final part of the war does not of course justify, nor condone in any way, the atrocities committed by the Third Reich against Italian civilians and Italian soldiers

both in Italy and abroad, though it certainly helps explain the context in which the war crimes and crimes against humanity took place, and also – at least to a certain extent – the postwar reluctance to make appropriate reparation.

A. IMPRISONMENT AND FORCED LABOUR OF BOTH ITALIAN MILITARY PERSONNEL AND CIVILIANS

2.5 Numerous units of the Third Reich were already on Italian territory, and as a consequence of Italy's change of side large portions of Italian territory came under the control and occupation of Germany. By the time the declaration of war against Germany was issued the Reich had already started to consider Italy and all Italian troops refusing to fight alongside Germany as enemies and, even worse, as traitors.

2.6 Italy had been an ally of the German Reich, but after Mussolini's fall the new Italian Government first concluded a truce with the Allied forces and then declared war to Germany. Thus German armed forces disarmed and captured Italian soldiers. Those captured were offered the choice of either joining the German armed forces or becoming prisoners of war. The latter were detained in labour camps and used as forced labourers in German industry in violation of IHL. As of 20 September 1943 those detainees were called "Italian Military Internees" (*Italienische Militärinternierte*) (hereinafter IMIs). Beginning in the summer of 1944 the internees were transferred from war captivity (*Kriegsgefangenschaft*) to so-called "civilian employment" (*Ziviles Arbeitsverhältnis*). At first, the internees were asked to sign a declaration consenting to the change of their status. Despite pressure exercised by the German authorities, only a few internees agreed to the transfer of their status. The Government of the German Reich then abstained from obtaining those declarations and transferred the internees to civilian status without any formal declaration. They were subsequently registered as civilian forced labourers. The working conditions and the detention in labour camps, however, did not change. The internees had to carry out physically hard work without receiving adequate nutrition and many of them died as a consequence. Here reference is clearly made to a variety of extremely serious violations of IHL and human rights law, amounting to international crimes, including deportation, enslavement, violence to life and person, cruel treatment, outrages upon personal dignity, inflicting inhuman, humiliating and degrading treatment, wilfully causing great suffering. The living conditions imposed on all these internees amounted to enslavement: this is why these prisoners were often referred to as "Hitler's slaves".

B. CRIMES AGAINST THE CIVILIAN POPULATION

2.7 While thousands and thousands of Italian soldiers made prisoners both in Italy and abroad were imprisoned and employed as forced labour (according to the calculations made by a committee representing some IMIs their overall number was nearly 700,000), the situation was not any better for the civilian population in the occupied territories of central and northern Italy. Here the civilians were the victims of unspeakable atrocities and, especially as the fight against the occupiers by partisans started, several massacres occurred in towns and villages (for example in Civitella,[17] Marzabotto, Sant'Anna di Stazzema, Onna) as measures of reprisals against the civilian population. These actions entailed the extermination of civilians, including women, children and elderly persons, tortures, rapes and wilful killings, the extensive destruction of property, deportation and many other unspeakable atrocities amounting to war crimes and crimes against humanity. War crimes were widely committed against the civilian population, and thousands of civilians of military age, among them Mr. Ferrini, Mr. Mantelli, and Mr. Maietta (whose cases are referred to by the Applicant in its Memorial[18]), were also transferred to detention camps in Germany, or in territories controlled by Germany, where they were employed as forced labour as another form of retaliation against the Italian civilian population. Given that most criminal proceedings are still pending and these contribute to the establishment of the facts, it is not easy to give precise numbers as far as these massacres are concerned, but there would seem to be thousands of victims. Researches made by historians suggest that between September 1943 and May 1945 at least 10,000 innocent civilians were exterminated in about 400 massacres carried out by Third Reich troops occupying Italy.

2.8 Hence, there are at least three categories of victims of serious violations of IHL who have a right to obtain reparation, and none, or very few, of them has obtained it so far: (i) soldiers who were imprisoned, denied the status of prisoners of war, and sent to forced labour; (ii) civilians who were detained and transferred to detention camps where they were sent to forced labour; (iii) civilian populations who were massacred as part of a strategy of terror and reprisals against the actions of freedom fighters.

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[17] GM, paras. 29-32.
[18] GM, paras. 23-28.

Section II. The Exclusion of Italian Victims from Reparations on the Basis of a Mistaken Interpretation of the 1947 and 1961 Waiver Clauses

2.9 As is well known, after the war the 1947 Peace Agreement between Italy and the Allies seemed at first sight to set aside completely the issue of reparations. However, the provisions of Article 77(4) of the Peace Treaty were not, as will be shown in more detail in Chapter V, aimed at absolving Germany of its responsibilities under international humanitarian law, but simply at allowing the Allied Powers controlling Germany to use all German resources for their own purposes, without having to divert them for the payment of reparations to Germany's former ally. The underlying intention was not to exclude compensation but simply to ensure that any issue relating to reparation for serious violations of IHL committed by Germany against Italian citizens would have to be addressed by the parties at a later stage, in a different context. The powers administering Germany did not want to deal with this issue. The provisions of Article 77(4) deferred the treatment of reparations to a later stage so that, at least for some time, all German proceeds would be used only by the Allies.

2.10 As one author has written,

> "the waiver clauses [of the 1947 Peace Treaties] [were] provisional arrangements. They were put in force in 1946-7 in order not to burden the conclusion of the peace treaties with the problem of German foreign debts. In the meantime, a significant part of that problem was solved with the London Agreement. The remaining issues of German debts will have to be solved in the future."[19]

This is the correct and more logical interpretation of Article 77 of the 1947 Peace Treaty; and this is confirmed by all subsequent developments.

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[19] W. Wilmanns, "Die Forderungen der Verbündeten des Deutschen Reiches gegen deutsche Schuldner nach dem Londoner Schuldenabkommen", 10 *Der Betriebs-Berater* (1955), p. 820 et seq., at 821 (our translation). See also G. Henn, "Forderungen der „Eingegliederten" und „Verbündeten" gegen deutsche Schuldner nach dem Londoner Schuldenabkommen", 10 *Der Betriebs-Berater* (1955), p. 1115 ss, at 1117.

2.11 After the end of the immediate post-War phase, in the early fifties, there was the clear idea that the bulk of the reparation issues would have to be handled after a more complete settlement of the German situation and probably even after reunification. This is confirmed by the London Agreement on German debt, which explicitly postponed reparation for serious violations of IHL. Under the London Agreement on Germany's External Debts (London Debt Agreement) of 27 February 1953, the regulation of compensation claims was deferred until the final settlement of reparations.

2.12 The Federal Republic of Germany, after its foundation on 23 May 1949, did not establish any compensation schemes specifically for forced labourers. It provided *inter alia* compensation for detention in a concentration camp and damage caused to the detainees' health. However, forced labour as such was not covered by the existing legislation.

2.13 The Federal Republic of Germany paid compensation to some victims of the Nazi regime; this was however limited to those who were living in Israel, Germany and other Western European States. This occurred in particular pursuant to the provisions of the Federal Act on Compensation for Victims of Nazi Persecution (*Bundes-entschädigungsgesetz*, Federal Indemnification Act), which entered into force on 1 October 1953[20].

2.14 Therefore, no special German legislation explicitly addressed the compensation claims of persons belonging to the three groups of Italian victims. And although in principle Italian victims could rely on the general West German legislation concerning the reparation of National Socialist wrongs, broadly speaking they did not succeed in obtaining compensation, for several reasons which excluded them from the scope of these laws.

2.15 Among the steps taken to address the issue of reparations to victims of violations of IHL, the two 1961 Agreements between Italy and Germany are also of course of direct relevance. From the Italian perspective these Agreements are first and foremost a confirmation that Germany recognizes it is under an obligation to offer compensation to Italian victims of serious violations of IHL. However, Italy considers that these Agreements by their very provisions did not exhaust the range of reparatory measures, but should have simply represented

[20] See *infra*, section III of present Chapter.

a first step in a broader process of providing appropriate reparations to all Italian victims of serious IHL violations.

2.16 The two Agreements are different in scope and do not specifically address the issue of victims of serious violations of IHL. The first Agreement refers to pending economic questions, and it does not refer to the rights of victims of serious IHL violations. The second Agreement, although it more specifically deals with victims of Nazi violence, is confined to victims of persecution by the Nazi system. Under both Agreements the Federal Republic of Germany undertook to pay a lump sum to the Italian State of 40 million DM under each Agreement; the Italian Government would then award compensation to individual claimants. The two Agreements are, however, clearly limited in scope. They do not cover all serious violations of IHL but only the victims of persecution by the Nazi regime and other natural or legal persons that had pending economic claims against Germany or German citizens.

2.17 Moreover, the Agreement on victims of persecution also contains a clause under Article 3 which establishes that the provisions of the Agreement are without prejudice to any potential claims Italian victims may have under German legislation on reparations ("senza pregiudizio delle eventuali pretese di cittadini italiani in base alla legislazione tedesca sui risarcimenti").

2.18 In sum, these Agreements are an explicit recognition of the existence of an obligation of reparation towards Italian victims which had not been waived in 1947. They also clarify that some questions were finally settled (i.e. pending economic questions and reparations to those persecuted by the Nazi system). However, it cannot be inferred that these two relatively limited Agreements would definitively close the whole issue of reparation claims. A very large number of victims remained uncovered and has never received appropriate reparation.

2.19 As will be shown below, many of these Italian victims have also tried to obtain justice from courts and administrative bodies in Germany under applicable German legislation. However, for several reasons (very perplexing indeed), they were denied compensation. As a consequence, after decades of unfulfilled promises and renewed disappointments they filed compensation claims before Italian courts, initiating the trend which brings us here today.

Section III. The Mechanisms for Reparation Established by Germany and the Persistent Lack of Effective Reparation for a Very Large Number of Italian Victims

2.20 Over the last decades Germany has adopted and implemented a number of measures in order to address the compensation claims of victims of war atrocities. While there is no special German legislation addressing claims to compensation of Italian nationals belonging to the abovementioned groups – namely forced labourers and victims of massacres – Italian victims could in principle rely on certain general redress mechanisms provided under German law. In particular, reference must be made to the two most important pieces of German legislation concerning the reparation of National Socialist wrongs: the Federal Compensation Law of 1953 and the Compensation Law of 2 August 2000.

2.21 As will be shown in this Section, neither of these two laws was able to provide an effective legal avenue for Italian victims to obtain reparation. On the one hand, foreign nationals were generally excluded from compensation paid under the rules of the Federal Compensation Law of 1953. On the other hand, while more than 130,000 Italian forced labourers lodged requests for compensation under the Law of 2 August 2000, the great majority of such requests (more than 127,000) was rejected because of the unduly strict requirements for compensation set under that Law. Lawsuits by Italian victims in German courts were also unsuccessful.

A. The Federal Compensation Law of 1953

2.22 The *Bundesgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung* (Federal Compensation Law Concerning Victims of National Socialist Persecution), or *Bundesentschädigungsgesetz* (Federal Compensation Law, in German law abbreviated as BEG) was adopted in 1953 and amended many times since. In 1965, the BEG was supplemented by the '*BEG Schlussgesetz*' (BEG Final Law, abbreviated as BEGSchlG). Both laws are still in force[21].

[21] For the texts of these laws (excerpts) as they are presently in force, see ANNEXES 5 and 6.

2.23 In the first years after the adoption of the *Bundesentschädigungsgesetz*, it was controversial whether the waiver clause of Article 77(4) of the Peace Treaty with Italy covered claims made by Italian victims in accordance with that Law. The question was resolved in favour of the Italian claimants by the Treaty Concerning Compensation for Italian Nationals Subjected to National-Socialist Measures of Persecution, concluded in 1961 between Italy and Germany. In the exchange of letters accompanying the Treaty[22], the Secretary of State of the German Foreign Office informed the Italian Government that the German Government would see to it that claims made by Italian nationals under the *Bundesentschädigungsgesetz* would be dealt with without raising objections based on Article 77(4) of the Peace Treaty with Italy of 1947.

2.24 However, claims of Italian nationals belonging to one of the three groups mentioned above in para. 2.8 met with two major obstacles. *Firstly*, the *Bundesentschädigungsgesetz* only entitles persons *specifically* affected by measures of National Socialist persecution. Sec. 1, para. 1 of the Law defines a "victim of National Socialist persecution" as someone persecuted because he or she was a political enemy of the National Socialists, or persecuted on grounds of race, faith or ideology (*Weltanschauung*), who suffered certain damage because of that persecution[23]. Paragraphs 2 and 3 of the same Section set out additional requirements. Generally, Italian civilians or soldiers deported to Germany to perform forced labour did not meet the conditions defined in paragraphs 1 to 3. They were persecuted on grounds of their nationality, and not because of their political belief, race or faith. The same is generally true for civilian victims of massacres perpetrated by German forces in retaliation for attacks by partisans. *Secondly*, the *Bundesentschädigungsgesetz* only entitled persecutees who had their domicile or place of permanent sojourn in the Federal Republic of Germany on 31 December 1952 (Sec. 4, para. 1(a)), and certain other groups of persecutees with a particular territorial link to Germany. Thus, persons living outside of Germany were generally excluded from claims to compensation under the Law.

2.25 With the 'BEG Final Law' of 1965, an additional category of persons eligible for benefits under the *Bundesentschädigungsgesetz* was established – the so-called *Nationalgeschädigten*. They were defined as "persons who were injured under the National

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[22] ANNEX 4.
[23] ANNEX 5.

Socialist dictatorship, in disregard of human rights, on grounds of their nationality (*aus Gründen ihrer Nationalität*)" (Article VI of the BEG Final Law)[24]. In the case of these persons (as distinct from the persecutees defined in Sec. 1 of the BEG), their belonging to a foreign State or non-German ethnic group constituted the main reason for the action causing the damage. While at first appearance the Italian civilians forced to perform labour in Germany fall into this category (prisoners of war were generally not considered to have suffered damage "on grounds of nationality"), another criterion of the Law excluded them, namely the requirement that the persons in question should also, on 1 October 1953, have been refugees as defined by the 1951 Geneva Convention.

2.26 Because of the narrow terms of the *Bundesentschädigungsgesetz* and of the BEG Final Law, lawsuits of victims having foreign nationality based on such laws were generally dismissed by German courts. Most prominently, in the *Distomo* case, the Federal Supreme Court (*Bundesgerichtshof*) decided in 2003 that the Greek plaintiffs could not base their claims on the *Bundesentschädigungsgesetz* because the execution by shooting of the more than three hundred inhabitants of the Distomo village was not a measure of National Socialist persecution within the meaning of the Law[25]. That view was shared by the Federal Constitutional Court in 2006[26]. Thus, as the *Distomo* case clearly shows, the *Bundesentschädigungsgesetz* provides no reasonable possibility for Italian civilian victims of massacres perpetrated by German forces to obtain effective redress.

B. THE COMPENSATION LAW OF 2 AUGUST 2000

2.27 In 1999 and 2000, the German Government conducted diplomatic negotiations with a number of States which were belligerent parties in the Second World War about financial compensation for individuals who had, during the war, been subjected to forced labour in German companies and in the public sector. Most significantly in the light of the dispute now opposing Italy to Germany, the negotiations were triggered by lawsuits brought by former

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[24] ANNEX 6.
[25] Judgment of 26 June 2003 (case no. III ZR 245/98), 155 *Entscheidungen des Bundesgerichtshofs in Zivilsachen* (BGHZ), p. 279 (= *Neue Juristische Wochenschrift* (2003), p. 3488, at 3489 *et seq.*)(ANNEX 11).
[26] Decision of the First Chamber of the Second Senate, 15 February 2006 (case no. 2 BvR 1476/03), *Neue Juristische Wochenschrift* (2006), p. 2542, at 2544.

forced labourers against German companies in United States courts. Against that background Germany and the United States of America concluded a treaty that envisaged the establishment of a mechanism for addressing reparation claims of former forced labourers.

2.28 Following the conclusion of the American-German executive Agreement of 17 July 2000[27], on 2 August 2000 a German Federal Law was adopted setting up a Foundation "Remembrance, Responsibility and Future" (*Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft"*)[28]. The purpose of the Foundation was to make funds available to individuals who had been subjected to forced labour "and other injustices from the National Socialist period" (Sec. 2, para. 1 of the Law). The Foundation did not give money directly to individuals defined by the Law but instead to so-called "partner organizations," which received specified global amounts (Sec. 9 of the Law). One of these organizations was the International Organization for Migration (IOM) in Geneva. According to Sec. 11 of the Law, individuals detained in a concentration camp, or in another prison or camp, or in a ghetto under comparable conditions, and subjected to forced labour (Sec. 11, para. 1(1)) are entitled to compensation, as are individuals deported from their homelands into the territory of the German Reich within the borders of 1937, or a territory occupied by Germany, and subjected to forced labour in a commercial enterprise or for public authorities there, or subjected to conditions resembling detention or similar extremely harsh living conditions (Sec. 11, para. 1(2)). Sec. 11, para. 3 of the Law explicitly states that the status of a prisoner of war does not give entitlement to payments or benefits under the Law. However, in the official commentary on the draft law, the Federal Government recognized that persons released as prisoners of war who were made 'civilian workers' can be entitled under the Law if the other requirements are met[29].

2.29 Thousands of "Italian Military Internees" lodged requests for compensation on the basis of the Law of 2 August 2000. They had a reasonable expectation to be regarded as entitled to receive compensation under that Law. In particular, the exclusionary clause set out under Sec. 11, para. 3 did not seem to be applicable in respect of the IMIs. As already explained, the Government of the German Reich had in fact deprived Italian internees of the status and the

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[27] *Bundesgesetzblatt* 2000 II, 1372.
[28] ANNEX 7.
[29] See "Entwurf eines Gesetzes zur Errichtung einer Stiftung „Erinnerung, Verantwortung und Zukunft"", 13 April 2000, *Drucksache des Deutschen Bundestages* 14/3206, at 16 (reported also in the decision of the German Constitutional Court of 28 June 2004, para. 5 (ANNEX 9)).

rights of prisoners of war and transferred these internees to civilian status. Thus, the German Government's decision to exclude IMIs from benefits under the Foundation Law came as a surprise. This decision was based on an expert opinion requested in 2001 by the German Federal Ministry of Finance[30]. According to the opinion, under the rules of international law the German Reich had not been able unilaterally to change the status of the Italian prisoners of war. Based on this premise, the opinion concluded that IMIs had never lost their prisoner-of-war status, so that they were also prisoners of war for the purposes of the Law establishing the Foundation. On the basis of this opinion, the Federal Ministry of Finance instructed the Foundation that former Italian Military Internees were excluded from benefit under the Foundation Law. As a consequence, more than 127,000 of the 130,000 requests for compensation lodged by IMIs were rejected by the Foundation.

2.30 When informed that IMIs were not considered to be entitled to reparation under the Foundation Law, Italian authorities represented to Germany that they strongly deplored this decision, which they regarded as being unjust and not supported by facts. Italian authorities also expressed the view that the decision of the German Government would be resented by former Italian forced labourers as a new injustice which added to the one suffered during wartime, when the German Reich had deprived IMIs of their status as prisoners of war and subjected them and other Italian civilian workers to forced labour under conditions of intolerable hardship. IMI's profound dissatisfaction and disappointment was understandable. After almost 60 years, the German Government recognizes that IMIs were entitled to the status of prisoners of war. However, it uses this late recognition of the rights to which IMIs were entitled (but which were in fact denied to them) as a reason to reject IMIs' legitimate claims for reparation of the wrongs suffered.

2.31 IMIs then sought to obtain justice before German courts. In the first place, a number of IMIs filed lawsuits before the *Verwaltungsgericht* (Administrative Court) Berlin. They asked the Court to order the Foundation to recognize that they, as former Italian Military Internees, were entitled to benefits under Section 11 of the Foundation Law. In 2003 the *Verwaltungsgericht*

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[30] *Leistungsberechtigung der Italienischen Militärinternierten nach dem Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft", Rechtgutachten erstattet von Professor Dr. Christian Tomuschat*, 31 Juli 2001 (ANNEX 8).

Berlin[31] and the *Oberverwaltungsgericht* (Higher Administrative Court) Berlin[32] dismissed these lawsuits. In particular, in a decision of 4 November 2003[33], the *Oberverwaltungsgericht* Berlin confirmed its earlier case law with regard to the IMIs, holding that soldiers of the Italian Army who had in 1943 been taken to Germany after the conclusion of the armistice but before Italy's declaration of war against Germany in order to perform forced labour had the international legal status of prisoners of war. In the view of the court, the soldiers also did not lose that status when in August and September 1944 the German National Socialist Government decided to treat the soldiers as "civilian workers" (*Zivilarbeiter*), because Germany was not able unilaterally to change the legal status of prisoners of war as defined by international law. Thus, the Court followed the legal opinion written for the Federal Ministry of Finance. The result of that line of argument was to confirm that former IMIs were not entitled to compensation under the Law establishing the Foundation.

2.32 On 28 June 2004, a Chamber of the German Constitutional Court (*Bundesverfassungsgericht*) decided to not adjudicate constitutional complaints brought before the Court by an association of former Italian military detainees and 942 such former detainees individually[34]. The Chamber held that Sec. 11, para. 3 of the Foundation Law, which excludes prisoners of war from the benefits of the Law, does not violate the right to equality before the law guaranteed by the German Constitution (Article 3(1) of the Basic Law). The Chamber referred to the fact that a State may utilize the labour of prisoners of war. Moreover, the Chamber, referring to the Hague Convention on the Laws and Customs of War on Land, found that public international law does not establish an individual right to compensation for forced labour. In particular, it held that Article 3 of the 1907 Hague Convention only establishes the international responsibility of Germany *vis-à-vis* another State Party to the Convention, and does not entitle an individual victim.

2.33 After the unsuccessful attempt to obtain justice before German courts, on 20 December 2004 an application was even lodged before the European Court of Human Rights by the

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[31] Decisions of 28 February 2003, case No. VG 9 A 435.02 and case No. VG 9 A 336.02.
[32] Decision of 18 June 2003, case No. 6 S 35.03.
[33] Case No. 6 M 20.03, available in the JURIS database.
[34] Case no. 2 BvR 1379/01 (ANNEX 9). For a critical review of the decision, see B. Fassbender, "Compensation for Forced Labour in World War II: The German Compensation Law of 2 August 2000", 3 *Journal of International Criminal Justice* (2005), pp. 243-252.

Associazione nazionale reduci dalla prigionia dall'internamento e dalla guerra di liberazione (A.N.R.P.) and 275 other Italian nationals. The applicants had complained under Articles 5(4) and (5), 6(1) and 14 of the European Convention on Human Rights and Article 1 of Protocol No. 1 to the Convention about the decisions regarding their claims to compensation rendered by the International Organization for Migration (IOM), the German Federal Constitutional Court and two German administrative courts. On 4 September 2007, the European Court of Human Rights declared the application inadmissible[35].

2.34 The denial opposed by German authorities and courts to IMIs' legitimate claims for compensation has an important role in the context of the present dispute between Italy and Germany. It is only after, and as a result of, this denial of effective reparation that IMIs decided to resort to Italian judges to obtain the protection of their rights at last. The denial of effective reparation by German authorities, and not the decision of Italian courts with respect to the jurisdictional immunity of Germany, must be regarded as the real cause of the present dispute.

Section IV. The Search for an Effective Remedy in the Light of a Denial of Justice: Access to Justice before Italian Courts and the Derogation from the Principle of Immunity

2.35 On 11 March 2004, the Italian *Corte di Cassazione* held that Italy has jurisdiction over the civil claim for reparation brought against Germany by Luigi Ferrini, an Italian national who in August 1944 was arrested near Arezzo, Italy, by soldiers of the German army, and deported to Germany to perform forced labour[36]. The *Corte di Cassazione* based its decision on the consideration that the operation of the rule on State immunity from civil jurisdiction may in certain cases give rise to a conflict with fundamental rules of the international legal system that has to be resolved in favour of the latter. In particular, it found that Germany was not entitled to immunity from jurisdiction in respect of the civil claim brought by Ferrini, since this claim derived from the commission by Germany of international crimes.

[35] Application no. 45563/04 (ANNEX 10).
[36] Text in ANNEX 1 of GM.

2.36 In subsequent decisions taken in 2008 the *Corte di Cassazione* upheld the principle established in the 2004 *Ferrini* decision. In particular, on 29 May 2008 the *Corte di Cassazione* rendered twelve identical decisions in respect of cases concerning compensation claims submitted by Italian victims of deportation and forced labour[37]. The facts underlying these cases are similar to those underlying the *Ferrini* case. Claimants were either members of the Italian armed forces or civilians who were taken prisoner or arrested by the German armed forces, deported to Germany and assigned to forced labour under conditions of intolerable hardship.

2.37 On 21 October 2008 the *Corte di Cassazione* upheld the decision of the Military Court of Appeals in Rome, by which that Court had denied Germany immunity from jurisdiction in relation to compensation claims brought by relatives or descendants of the victims of massacres committed by German armed forces on 29 June 1944 in Civitella[38]. Claimants appeared as civil parties in the criminal proceedings instituted against Max Josef Milde for his role in the Civitella massacre. In the same proceedings, the Military Court of La Spezia had ordered Milde and Germany, jointly and severally, to make immediately enforceable interim payments to compensate for the massacre[39].

2.38 A considerable number of cases concerning claims for reparation against Germany are now pending before Italian courts. They have been brought either by individuals who, after September 1943, were deported to Germany and employed as forced labourers, or by victims of the massacres perpetrated against civilians by the German armed forces which occupied Italy in the last two years of the Second World War.

2.39 In addition to the above-mentioned cases, the *Corte di Cassazione*, by an order of 29 May 2008, denied immunity to Germany in respect of the enforcement against German property assets located in Italy of the Greek decision requesting payment by Germany of the expenses incurred by Greek authorities during the proceedings resulting in the *Distomo* judgment[40]. In reaching this conclusion, the *Corte di Cassazione* relied on the same principle as that underlying its *Ferrini* decision. An appeal against the enforceability of the *Distomo* jugdgment is now pending before the *Corte di Cassazione*.

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[37] For the text of the orders in the *Mantelli* and *Liberato* cases, see ANNEX 13 of GM.
[38] Text of the judgment of the *Corte di Cassazione* in ANNEX 16 to GM.
[39] ANNEX 14 to GM.
[40] ANNEX 20 to GM.

2.40 In its Memorial, Germany discusses at length the reasoning applied by the *Corte di Cassazione* in its *Ferrini* judgment as well as in the other decisions addressing the issue of Germany's immunity. Italy does not intend here to embark on a similar exercise, since it serves little purpose in the context of the present dispute to examine each and every detail of the reasoning applied by Italian judges. In the next chapters, and particularly in Chapter VI, Italy will indicate what is the position of Italian judges with respect to the issues raised by the compensation claims against Germany and will demonstrate that, by denying immunity, Italian judges did not commit any internationally wrongful act for which Italy must bear international responsibility.

2.41 What is important to stress here is that an examination of the factual context surrounding the submission of compensation claims to Italian judges clearly reveals that the decision of Italian victims to resort to their national judges has been mainly dictated by the attitude previously taken by German authorities in respect to such claims. For them, resort to Italian courts constituted the only means, the *ultima ratio*, for obtaining redress for the injuries suffered.

2.42 In its Memorial, Germany seems to argue for a different interpretation of the relevant facts. When reading Germany's Memorial, one is left with the impression that the growing number of claims for compensation filed against Germany before Italian courts is simply the result of the awkward and mistaken decision taken by the *Corte di Cassazione* in the *Ferrini* case. Several assertions, as well as important omissions, in Germany's Memorial contribute to build this impression. For instance, in introducing the facts underlying the *Mantelli* case, Germany thus describes the reasons leading Mantelli to submit his claims to the *Tribunale di Torino*:

> "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 decision, he and the other claimants filed a suit against Germany on 13 April 2004 before the Tribunale di Torino"[41].

From this passage (and from other similar passages contained in Germany's Memorial)[42], one is led to believe that Italian victims had long since waived or abandoned any claim for compensation against Germany and that the *Ferrini* decision had suddenly come along to reopen an already settled issue.

2.43 As shown in Section III of this Chapter, this picture is far from the truth. Germany's Memorial completely omits to mention that since 2000 thousands of IMIs and Italian civilians subjected to forced labour had lodged requests for compensation on the basis of the Law establishing the "Remembrance, Responsibility and Future" Foundation and that these requests were almost all rejected. In 2003, German administrative courts had dismissed the lawsuits filed by a certain number of IMIs. With the sole exception of the *Ferrini* case[43], all the claims submitted before Italian courts were filed starting from 2004[44]. At that time it was already evident that Italian forced labourers had no possibility of obtaining redress from German authorities. If one considers the cases brought before Italian judges against the background of these facts, it is easy to detect a clear link between Germany's denial of justice and the resort to national courts by Italian victims. The existence of such a link is further demonstrated by the fact that in several cases lawsuits were also filed against the "Remembrance, Responsibility and Future" Foundation and the International Organization for Migration (IOM)[45]. Significantly, Mantelli too brought lawsuits against the Foundation and the IOM.

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[41] GM, para. 24 (emphasis added).
[42] GM, p. 1, p. 6 (para. 3) and p. 16 (para. 23).
[43] It must be noted, however, that, while Mr. Ferrini already instituted proceedings before the *Tribunale di Arezzo* in 1998, he also sought to obtain compensation before German authorities. He considered lodging a request for compensation under the Law establishing the Foundation but decided not to pursue this avenue "since he had not been detained in 'another place of confinement' within the meaning of section 11 § 1 no. 1 of the Foundation Act and was furthermore not in a position to demonstrate that he met the requirements as set up by the guidelines of the Foundation" (see the summary of facts reported in *Associazione nazionale reduci dalla prigionia dall'internamento e dalla guerra di liberazione (A.N.R.P.) and 275 others v. Germany*, p. 5 (ANNEX 10). In 2001 Mr Ferrini, together with other complainants, also lodged a constitutional complaint against sections 10 § 1, 11 § 3 and 16 §§ 1 and 2 of the Foundation Law with the Federal Constitutional Court. This complaint was later rejected by the Federal Constitutional Court (ANNEX 9).
[44] See the list of all pending judicial cases against Germany, ANNEX 8 to GM.
[45] *Ibid*.

2.44 What has now been said with regard to cases submitted by individuals who had been subjected to forced labour equally applies to the cases recently brought against Germany by victims of the massacres committed by the armed forces of the German Reich. In this respect, the fact that these cases have only recently been brought before Italian judges is not a consequence of the *Ferrini* decision. Rather, it reflects an increasing world-wide awareness, among judicial authorities and in public opinion, of the need to investigate atrocious events, both past and present, in order to determine the responsibilities and hold the authors accountable for their crimes[46]. As part of this world-wide trend, Italian judicial authorities have recently instituted criminal proceedings against individuals implicated in massacres such as those committed in Civitella, Marzabotto and Sant'Anna di Stazzema. As the above-mentioned *Milde* case shows, these criminal proceedings inevitably also raise the question of the compensation owed to the victims or to their relatives and descendants. Since claimants cannot rely on a reasonable prospect of obtaining effective redress from German authorities and courts, resort to Italian judges represents the only legal avenue available to that end.

Section V. Conclusions

2.45 The analysis of the relevant facts conducted in the present Chapter shows that the dispute submitted to the Court on the issue of immunity is inextricably linked with the issue of reparation. Italian forced labourers and victims of the massacres perpetrated by the German Reich after 1943 have never received effective reparation for the grave injuries suffered. On the one hand, the Agreements concluded in 1961 between Italy and Germany do not apply to such victims; on the other, the mechanisms for compensation unilaterally set up by Germany do not cover their claims. Moreover, Germany has systematically denied reparation to many of these victims and appears to argue that there is no longer any reparation obligation in respect of them. This situation of denial of justice explains the decisions of the Italian victims to submit their compensation claims to national courts. It is against the background of this situation that the

[46] Criminal proceedings against former members of the armed forces of the German Reich have been recently instituted also in Germany. For instance, on 10 August 2009 a Munich State court found a former German infantry commander guilty for his role in the killing of 14 civilians, which took place in Falzano di Cortona, Tuscany, on 26 June 1944 (see "Nazi Criminal Jailed for Life" available at http://news.bbc.co.uk/2/hi/8194691.stm).

lifting of Germany's immunity must be assessed. As will be shown in the next Chapters, Italy submits that under the circumstances of the present case Italian courts were entitled to deny immunity to Germany.

CHAPTER III

JURISDICTION

Section I. Introduction

3.1 In bringing the case concerning *Jurisdictional Immunities (Federal Republic of Germany* v. *Republic of Italy)*, Germany has based the jurisdiction of the Court on Article 1 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957 (hereinafter: European Convention), taken together with Article 36(1) of the Statute of the Court[47]. 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".

Germany argues that the applicability of the European Convention is not excluded by the provisions of Article 27, which establishes:

> "The provisions of this Convention shall not apply to:
>
> (a) disputes relating to facts or situations prior to entry into force of this Convention as between the parties to the dispute;

[47] GM, para. 2.

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

3.2 In its Application and Memorial, Germany has also defended the admissibility of its claims by addressing three possible grounds for objections – namely, the need for exhaustion of local remedies, the need for prior exhaustion of diplomatic negotiations and the jurisdiction of the Court of Justice of the European Communities. Germany argues that none of these objections can be raised in the present case[48].

3.3 On the occasion of the Italian-German Governmental Consultation, which took place on 18 November 2008 in Trieste, the Italian Government solemnly declared that it "respect[ed] Germany's decision to apply to the International Court of Justice for a ruling on the principle of State immunity" and expressed the view that "the ICJ's ruling will help to clarify this complex issue"[49]. Italy intends now to confirm its previously held position. In the interest of a complete settlement of the present dispute, Italy fully recognizes the Court's jurisdiction over the dispute submitted to it by Germany's Application of 23 December 2008 and refrains from taking issue with Germany's assertions concerning the admissibility of its claims.

3.4 However, Italy draws the Court's attention to the fact that, in the context of the above-mentioned German-Italian Joint Declaration, reference was already made to the complexity of the dispute that Germany intended to bring before the Court. The complexity of the present case is due to the inextricable link between the dispute on immunity brought by Germany and the issue of the reparation owed by Germany to Italian victims of the crimes committed by Nazi authorities during the Second World War. As far as the jurisdiction of the Court is concerned, this strict link between the issue of immunity and that concerning reparation has one relevant implication, which relates to the determination of the "facts or situations" constituting the "source or real cause of the dispute" for the purposes of applying Article 27(a) of the 1957 European Convention. In this respect, while Italy accepts that the Court has jurisdiction under the European Convention, its view differs from that of Germany over the identification of the "real cause" of the dispute submitted by the Applicant State. Italy submits that the dispute on immunity has its "real cause" in Germany's refusal to compensate the Italian

[48] GM, paras 4-6.
[49] ANNEX 1.

victims of the grave violations of international humanitarian law committed by Nazi authorities during the Second World War. It follows that the dispute on immunity brought by Germany and the dispute on reparation brought by Italy through its counterclaim arose out of the same "facts and circumstances".

3.5 In this Chapter, Italy will state its views on the jurisdiction of the Court in the present case. The jurisdiction of the Court will be analysed in relation not only to the dispute on State immunity brought by Germany, but also to the dispute on reparation brought by Italy through its counter-claim. In Section I Italy will show that the "real cause" of the dispute on immunity brought by Germany is to be found in the conduct adopted by organs of the German State in relation to the issue of reparation. In Section II it will establish that the dispute on immunity and the dispute on reparation fall within the jurisdiction of the Court, as they both relate to facts or situations that arose after 18 April 1961, the date when the European Convention entered into force between Germany and Italy.

Section II. Identification of the Real Cause of the Dispute Submitted by Germany for the Purposes of the Court's Jurisdiction

3.6 As already indicated, Article 27(a) of the European Convention establishes that the provisions of the European Convention do not apply to "disputes relating to facts or situations prior to entry into force of this Convention as between the parties to the dispute". In the *Right of Passage over Indian Territory* case, where the interpretation of a temporal limitation clause comparable to that in Article 27(a) was at issue, the Court defined the content of such clauses in the following terms:

> "[t]he facts or situations to which regard must be had […] are those with regard to which the dispute has arisen or, in other words, as was said by the Permanent Court in the case concerning the *Electricity Company of Sofia and*

Bulgaria, only 'those which must be considered as being the source of the dispute', those which are its 'real cause'."[50]

As acknowledged by the Court in the *Certain Property* case, this legal test for temporal limitation is also relevant to the interpretation of Article 27(a). In the Court's words:

> "The Court considers that, in so far as it has to determine the facts or situations to which this dispute relates, the foregoing test of finding the source or real cause of the dispute is equally applicable to this case."[51]

3.7 Germany argues that it is the judgment of the Italian *Corte di Cassazione* in the *Ferrini* case, of 11 March 2004, which gave rise to the dispute brought to the Court by the Applicant State. In Germany's view, this judgment "opened the gates for claims seeking reparation for injury sustained as a consequence of events situated within the framework of World War II"[52]. Furthermore, while recognizing that all the claims brought against Germany before Italian courts relate to events of the Second World War, "when German troops committed grave violations of international humanitarian law", Germany excludes that those events constitute the real cause of the present dispute. This is because "the proceedings instituted against Italy do not deal with the substance of those claims."[53]

3.8 Italy agrees with Germany that the occurrences during the Second World War referred to in Germany's Memorial do not constitute the real cause of the dispute on immunity. Nor, in fact, as it will be shown later, do they constitute the real cause of the dispute on reparation brought by Italy. However, Italy refutes Germany's contention that the real cause of the dispute on immunity is to be found in the *Ferrini* judgment of the *Corte di Cassazione*.

3.9 First, with regard to Germany's argument that it was the *Ferrini* judgment that "opened the gates for claims seeking reparation" for Nazi crimes, the least that can be said is that Germany's account of the events leading Italian nationals to seek reparation for Nazi crimes before Italian courts offers only a very partial picture of the relevant facts. No doubt, the case law inaugurated by the *Corte di Cassazione* in *Ferrini* has provided an incentive for Italian

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[50] *I.C.J. Reports 1960*, p. 35.
[51] *I.C.J. Reports 2005*, p. 25, para. 46.
[52] GM, para. 3.
[53] *Ibid*.

victims of Nazi crimes to submit their cases before national courts. However, the real reason why claims for reparation were brought before Italian judges, as well as the reason behind the case law inaugurated by the *Ferrini* judgment, has to be sought in the attitude taken by Germany towards the claims for reparation submitted by Italian nationals to German authorities.

3.10 The case of the Italian Military Internees (IMIs) is paradigmatic in this respect. As already shown[54], when, on 2 August 2000, the German Parliament adopted the Law establishing the "Remembrance, Responsibility and Future" Foundation with a view to compensating individuals who had been subjected to forced labour by Nazi Germany[55], thousands of IMIs filed their applications for reparation to the International Organization for Migration. Most of these claims were dismissed following the decision of the German Executive to consider that IMIs were not entitled to reparation under the Law establishing the Foundation. IMIs also lodged unsuccessful complaints against this decision before German courts. It was only because of the refusal opposed by German authorities that many IMIs decided to lodge their claims for reparation before Italian courts[56]. It is significant in this respect that in many cases complaints against the Foundation have also been lodged.

3.11 Italy also refutes Germany's argument suggesting that the case submitted against Italy has nothing to do with the substance of the claims for reparation lodged before Italian courts. In Germany's view, since the case submitted against Italy deals exclusively with the issue of Germany's immunity before Italian courts, then the real cause of the dispute has to be found in the judgment of the *Corte di Cassazione* denying that immunity. This argument collapses for the simple reason Italy has now made clear: in the present case the issue of the jurisdictional immunity enjoyed by the German State before Italian courts cannot be considered separately from the issue of reparation owed by Germany to the Italian victims of the crimes committed by Nazi authorities. The decisions taken by Italian courts in 2004 and later with regard to Germany's jurisdictional immunity cannot be fully assessed without taking into account the broader context relating to the issue of reparation for Nazi crimes. As Italy will show in more detail later, in the specific circumstances of the present case Italian courts have considered that they are entitled to lift immunity because of Germany's refusal to compensate Italian victims of

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[54] Chapter II, Section III.
[55] ANNEX 7.
[56] The *Ferrini* case was the only one which was submitted to Italian courts before the decision of the German authorities dismissing IMIs' claims. But see Chapter II, note 43.

Nazi crimes. Thus, for the purposes of determining the real cause of the dispute, the decisions taken by Italian courts with regard to the issue of the immunity of the German State have to be regarded as being a consequence of the legal and factual situation created by Germany's refusal to compensate Italian victims. Germany's argument that in the present case the issue of immunity can be separated from the issue of reparation is unacceptable. In fact, the issue of reparation, far from being extraneous to the case submitted by Germany, lies at the very heart of it.

3.12 In its judgment in the *Certain Property* case the Court found

> "that the decisions of the German courts in the *Pieter van Laer Painting* case cannot be separated from the Settlement Convention and the Benes Decrees, and that these decisions cannot consequently be considered as the source or real cause of the dispute between Liechtenstein and Germany".[57]

Along much the same lines, it must be acknowledged that in the present case the decisions of the *Corte di Cassazione* on the issue of immunity of the German State cannot be separated from the issue of reparation owed by Germany to victims of Nazi crimes, and that these decisions cannot consequently be considered as the source or real cause of the dispute brought by Germany: the real cause of the dispute brought by the Applicant State has to be found in Germany's refusal to compensate the Italian victims of the grave violations of international humanitarian law committed by authorities of the Third Reich during the Second World War. It is because of the attitude taken in this regard by organs of the German State that most Italian victims decided to lodge their complaints before Italian courts; and it is because of Germany's denial of justice in respect to such claims that Italian judges have lifted State immunity. The conclusion seems therefore to be warranted that the dispute on immunity brought by Germany and the dispute on reparation brought by Italy originate out of the same fact: the refusal of Germany to compensate Italian victims.

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[57] *I.C.J. Reports 2005*, p. 26, para. 51.

Section III. The Dispute on Immunity Brought by Germany and the Dispute on Reparation Brought by Italy Fall within the Scope *Ratione Temporis* of the 1957 European Convention

3.13 The conclusion now reached with regard to the origin of the dispute has no repercussions on the question of the Court's jurisdiction. The limitation *ratione temporis* provided under Article 27(a) of the European Convention does not apply to the dispute brought by Germany even if, as submitted by Italy, it is acknowledged that the real cause of this dispute is constituted by the attitude taken by the German authorities with regard to the issue of reparation. As it will be shown in this Section, the issue of reparation, which constitutes the subject-matter of the dispute brought by Italy through its counter-claim, relates to facts or situations that arose after 18 April 1961, i.e. the date when the European Convention entered into force between Germany and Italy. Accordingly, this Court has jurisdiction to rule on both Germany's claim on immunity and Italy's counter-claim on reparation.

3.14 Before identifying the facts with regard to which the dispute on reparation arose, a preliminary remark must be made. In its Memorial Germany asserts that the temporal limitation provided by Article 27(a) of the European Convention does not apply to the dispute on immunity even if part of the factual background to that dispute is constituted by events that took place during the Second World War[58]. Italy submits that the same holds true with regard to the dispute on reparation.

3.15 Two major considerations come into play. First, Germany and Italy are in clear agreement concerning the occurrence and the legal qualification of the facts which gave rise to the claims for reparation. There is no dispute between the parties that these claims arose out of the grave violations of international humanitarian law committed by Nazi Germany during the Second World War. It is the issue of reparation, and not the factual and legal assessment of events of the Second World War, which forms the central point of the dispute brought by Italy. Secondly, as clearly indicated by the Permanent Court of International Justice in the *Electricity Company of Sofia and Bulgaria* case and later confirmed by this Court in the *Right of Passage* case, a distinction must be drawn between "situations or facts which constitute the source of the

[58] GM, para. 7.

rights claimed by one of the Parties and the situations and facts which are the source of the dispute".[59] The grave violations of international humanitarian law committed by the Third Reich during the Second World War constitute the source of the right of reparation claimed by the Italian victims. The "real cause" of the present disputes has instead to be found in the conduct of organs of the German State with regard to the issue of the reparation owed by Germany to the Italian victims.

3.16 Two different, albeit interrelated, sets of facts must be regarded as constituting the real source of the dispute on reparation. First, and in most general terms, the dispute is directly related to the two international Agreements – namely the Treaty on the Settlement of Certain Property-Related, Economic and Financial Questions and the Treaty Concerning Compensation for Italian Nationals Subjected to National-Socialist Measures of Persecution, both signed on 2 June 1961[60], which entered into force, respectively, on 16 September 1963 and on 31 July 1963 – by which Germany, for the first time, agreed to compensate Italy and Italian nationals for its conduct during the Second World War. The second, and more recent, source of the present dispute is constituted by the events following the establishment in 2000 of the "Remembrance, Responsibility and Future" Foundation, and in particular by the decision taken by the German Executive, and later confirmed by German judges, not to provide compensation to Italian nationals who, during the Second World War, were subjected to forced labour by the authorities of the Third Reich[61].

3.17 The two Agreements concluded in 1961 between Italy and Germany lie at the centre of the dispute concerning the reparation owed by Germany to Italian victims of Nazi crimes. In the Memorial Germany argues that, by concluding the two Agreements of 1961, Germany and Italy put a definitive end to any litigation about the financial consequences of the Second World War. In particular, Germany claims that, "[i]n 1961, pursuant to the two treaties concluded for the settlement of any and all outstanding claims, Italy declared once again for itself and for its nationals that indeed all such claims [*i.e.*, claims against Germany and German nationals resulting from the period of the Second World War] were settled".[62] This same argument was advanced by Germany when considering whether IMIs were entitled to reparation on the basis

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[59] *I.C.J. Reports 1960*, p. 35. See also *P.C.I.J.*, Series A/B, No. 77, p. 82.
[60] ANNEXES 3 and 4.
[61] ANNEXES 7 and 9.
[62] GM, para. 56.

of the system created by the German statute establishing the "Remembrance, Responsibility and Future" Foundation[63]. Italy disagrees with Germany about the scope of the waiver clauses contained in these two Agreements. Leaving aside here the merits of the parties' respective claims, what must be stressed is that the position held by Germany in the Memorial confirms the central role played by the 1961 Agreements in the present case. For the purposes of applying the temporal limitation clause contained in Article 27(a) of the European Convention, these Agreements must therefore be regarded as constituting the source or real cause of the dispute on reparation brought by Italy – and consequently also of the dispute on immunity submitted by Germany.

3.18 In the Memorial, when discussing the issue of war reparation between Italy and Germany, Germany also made reference to the waiver clause contained in Article 77(4) of the 1947 Peace Agreement. However, the Peace Agreement cannot be regarded as the source or real cause of the present disputes for the purposes of applying Article 27(a) of the European Convention. As is made clear by the subsequent conclusion of the 1961 Settlement Conventions, and as admitted by Germany in its Memorial[64], the waiver clause of the Peace Treaty did not settle the issue of reparation between Germany and Italy. In fact, by concluding the 1961 Agreements, Germany renounced its availing itself of any claim based on an interpretation of the 1947 Peace Treaty to the effect that Italy had waived its rights of reparation for war damages, including reparation owed to Italian victims of Nazi crimes. At the same time, in 1961 Germany acknowledged its obligation of reparation towards Italy and Italian nationals. To use the Court's words in the *Certain Property* case[65], the conclusion of the 1961 Agreements created a "new situation" between Italy and Germany with regard to the issue of reparation. It is the 1961 Agreements – and more particularly the questions concerning their scope, as well as the scope of the waiver clause therein contained – which form the central point of the differences between Italy and Germany on the issue of reparation. The 1961 Agreements, and not the Peace Treaty, must therefore be regarded as constituting the source or real cause of the disputes submitted to the Court.

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[63] *Leistungsberechtigung der Italienischen Militärinternierten nach dem Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft", Rechtgutachten erstattet von Professor Dr. Christian Tomuschat*, 31 Juli 2001 (ANNEX 8).
[64] GM, para. 10.
[65] *I.C.J. Reports 2005*, p. 26, para. 51.

3.19 The present dispute does not originate only out of the reparation system established by the 1961 Agreements. An additional source is to be found in the more recent decisions of German authorities regarding the claims of reparation put forward by IMIs. As we have seen, when, in 2000, the German State set up the most comprehensive programme aimed at providing individual compensation for forced labour imposed by the Nazi German State, thousands of IMIs submitted claims of reparation for forced labour. The submission of these claims provided one of the first instances in which the German Government and courts had to face individual claims of reparation submitted by Italian nationals who were victims of grave violations of international humanitarian law committed by the German Third Reich. To use the Court's words in the *Certain Property* case again, when dealing with such claims the German Executive and German courts faced a "new situation" for the purposes of applying Article 27(a) of the 1957 European Convention. This is all the more so since what happened in 2000 and later was not merely the application of the reparation system established by the 1961 Agreements. The decisions of the German authorities dismissing the claims brought by Italian nationals were mainly grounded upon the view that individuals who are victims of grave violations of international humanitarian law would not be entitled to an individual right of reparation because the issue of reparation in such cases has to be dealt with exclusively at the inter-State level. This view was expressed in the legal opinion accompanying the Executive decision concerning the rights of IMIs[66]; it also had a prominent role in the decision of the German Constitutional Court[67]. In this respect, the decisions of the German authorities regarding the rights of IMIs can be separated from the 1961 Agreements. Consequently, they can be considered as a distinct source of the dispute between Italy and Germany.

Section IV. Conclusions

3.20 For all the reasons stated in the previous Sections of the present Chapter, Italy submits that the Court has jurisdiction to deal with the dispute on immunity brought by Germany as well as with the dispute on reparation brought by Italy. There is no relevant temporal limitation on the Court's jurisdiction since both disputes relate to facts and situations –

[66] ANNEX 8.
[67] ANNEX 9.

the conclusion of the 1961 Compensation Agreements between Italy and Germany and Germany's refusal to address the claims for reparation by IMIs – which took place after the entry into force of the European Convention as between the parties to the disputes.

CHAPTER IV

IMMUNITY

Section I. Introduction

4.1 This Chapter analyses the law of jurisdictional immunity of States with a view to framing the legal context applicable in respect of the claims submitted by Germany in its Application of 23 December 2008. Germany argues that, by certain decisions of Italian judicial authorities, Italy has violated the principle of sovereign immunity which debars individuals from bringing claims against a foreign State before the courts of the forum State. Germany also contends that Italy could not rely on any justification for disregarding Germany's immunity. This Chapter sets out Italy's view of the rules pertinent to the issues of State immunity raised in the present case. Together with Chapters V and VI, this Chapter exposes the fallacy in Germany's legal argument.

4.2 Both Parties agree that the source of the legal obligations which are relevant in the present case is customary international law. In particular, Italy fully acknowledges that sovereign immunity is a fundamental principle of international law which every State is bound to respect.

4.3 In this Chapter, however, Italy will show that, while recognizing sovereign immunity as a fundamental principle of international law, States have also accepted the fact that sovereign immunity is not an absolute principle. The rule of sovereign immunity has been subjected over time to a process of progressive redefinition of its content in the direction of a restriction of the scope of State activities covered by immunity. The evolution towards a restrictive immunity has been fuelled by the increasing concern not to unjustly limit the possibility for individuals to have access to courts against a foreign State. Significantly, domestic courts have always had a major role in contributing to the evolution of the law of State immunity.

4.4 The fact that States have come over time to agree to balance immunity against other values widely perceived as deserving protection assumes particular significance at a time at which fundamental developments in international law show the paramount importance assigned by the international community to the protection of certain shared values. These recent developments must inevitably be taken into account when determining whether a State may be considered to be entitled to invoke immunity. Italy submits that, under certain circumstances in which immunity does not appear to be reconcilable with the effective protection of these fundamental values, immunity must be set aside.

4.5 The present Chapter is articulated as follows. In Section II Italy will illustrate the evolution of the rule of State immunity. It will show the progressive acceptance by States of the restricted scope of the immunity enjoyed by a State before the courts of another State. Section III will examine the rule of immunity against the background of certain fundamental developments of contemporary international law; it will show that these developments affect the applicability of State immunity. Finally, in Section IV, Italy will draw the conclusion of its reasoning by showing that a State responsible for violations of fundamental rules is not entitled to immunity in cases in which, if granted, immunity would be tantamount to exonerating the State from bearing the legal consequences of its violation of principles of paramount importance.

Section II. The Principle of State Immunity from Jurisdiction and Its Limits

4.6 As already indicated, Italy fully agrees with Germany that immunity is a fundamental principle of the international legal order. However, Italy's view on the evolution of this principle in international law differs from that of Germany.

4.7 In this Section Italy will, firstly, analyse the evolution from absolute immunity towards relative immunity and will demonstrate that, contrary to what is claimed by Germany, such an evolution started well before the Second World War. Secondly, Italy will show that since their first introduction, exceptions to immunity have been an answer to the need to protect private persons and avoid denial of justice, i.e. the same concern underlying recent case law of Italian judicial authorities. Thirdly, Italy will demonstrate that the distinction between *acta jure imperii* and *acta jure gestionis* does not always operate as the leading criterion for establishing

jurisdiction. In particular, this distinction does not always apply in lawsuits concerning claims for damages arising out of injurious acts committed by foreign States against individuals, i.e. the kind of case which has given rise to the present dispute.

A. IMMUNITY FROM JURISDICTION AS A CONSEQUENCE OF THE STATE SOVEREIGNTY PRINCIPLE

4.8 The obligation of domestic courts to decline jurisdiction in cases brought against foreign States is generally considered as firmly grounded in the principles of independence, equality, and dignity of States. Since the opinion delivered by Chief Justice Marshall in *The Schooner Exchange* case[68], State immunity has been considered as a corollary of the "perfect equality and absolute independence of sovereigns", indeed a "constitutional" principle of international law, linked to the very structure of the international legal order.

4.9 In 1978, the ILC Working Group on jurisdictional immunities of States and their property described the doctrine of State immunity as

> "the result of an interplay of two fundamental principles of international law: the principle of territoriality and the principle of State personality, both being aspects of State sovereignty. Thus, State immunity is sometimes expressed in the maxim *par in parem imperium non habet*"[69].

4.10 Italian courts have always recognized the customary nature of the rule on State immunity, even when, because of the circumstances of the case, they have agreed to exercise jurisdiction. In the *Ferrini* case, the *Corte di Cassazione* held that

> "the existence and operation of a norm of customary international law which imposes on States the duty to abstain from exercising jurisdictional power over other States, enacted in our system by virtue of the provision laid down in Article 10(1) of the Constitution, are beyond question."[70]

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[68] U.S. Supreme Court, *The Schooner Exchange v. McFaddon*, 24 February 1812, 11 u.s. 116 (1812). For a rationalization of different traditional doctrines see S. Sucharitkul, *Second report on jurisdictional immunities of States and their property,* YbILC 1980, vol. II, Part One, p. 214 *et seq*.

[69] *Report of the Working Group on jurisdictional immunities of States and their property*, YbILC 1978, Vol. II, Part Two, p. 153.

[70] Judgment No. 5044/2004, *Ferrini*, para. 5, ANNEX 1 to GM.

Furthermore, in the *Mantelli* case the *Corte di Cassazione* reasserted that the customary principle of State immunity aims at fostering international relations based on mutual respect for sovereignty[71].

4.11 Nevertheless, immunity has never been considered to be a non-derogable principle of international law. And, as Italy will demonstrate in the following sections, the number and the scope of exceptions generally accepted are continually increasing.

B. DEVELOPMENTS OF IMMUNITY LAW

1. Evolution from Absolute to Relative Immunity

4.12 To accept that State immunity is grounded in the most fundamental principles of international law does not mean that it is a principle absolute in character. Indeed, immunity rules form part of customary international law, but they do not constitute *jus cogens* and they have never been considered to be imperative or non-derogable. Indeed, even when States were agreed to have absolute immunity from jurisdiction, they always had the option of waiving this privilege[72]. The validity of express consent to jurisdiction has never been questioned. Moreover, immunity was not granted in disputes relating to real property acquired in the territory of the *forum* State.

4.13 Since the very beginning of the twentieth century, and even in the second half of the nineteenth century, the changing relationship between States and private persons has driven a consistent trend towards restricting immunity. At first the exercise of jurisdiction was made exclusively on the basis of the distinction between *acta jure imperii* and *acta jure gestionis*; more recently the law and practice of many States has also supported exceptions to State immunity for some activities in the domain of sovereign acts.

4.14 As is generally known, the evolution from the principle of absolute immunity towards the relative immunity doctrine has its origins in successive rulings of municipal courts[73]. Italy considers that the role played by domestic courts in promoting the evolution of the law of State

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[71] Order n. 14201/08, *Mantelli*, ANNEX 13 to GM.
[72] See *Turkish Purchases Commission Case*, Germany, Prussian Tribunal for Conflicts of Jurisdiction, 29 May 1920, in 1 *ILR* (1919-1922), p. 114, in which the consent to jurisdiction was extended even to measures of execution.
[73] See ILC, Report on the work of its 32nd session, YbILC 1980, Vol. II, Part Two, pp. 143.

immunity has to be taken into account when assessing the case law of the *Corte di Cassazione* at issue in the present case.

4.15 The first proposal for restrictive immunity dates from as early as 1840, when the Attorney-General of the Court of Appeals of Brussels argued in favour of the denial of foreign State immunity with regard to non-public acts. A few years later, in 1857, the same Court of Appeals affirmed its competence over cases involving commercial suits[74]. In 1903, the *Cour de Cassation* definitely confirmed the lower court's theory of a restrictive immunity rule, and denied immunity to the Netherlands in a case concerning railway works[75]. The *Cour de Cassation* motivated the decision by two main arguments. Firstly, the Court considered that the foreign State was acting in a private-law capacity, and the acts in question were not sovereign or governmental. Secondly, the Court considered that in similar cases it was possible for private parties to bring a case against the Belgian Government in local courts, without affecting Belgian sovereignty; therefore, for the same reason, it was possible to sue a foreign State. This decision of the Belgian *Cour de Cassation* can be considered the leading case for the restrictive immunity theory because it overruled the two main theoretical arguments for the immunity principle: the mutual respect for sovereignty between equal and independent States; and the analogy with the immunity of the local sovereign. The first theoretical argument is no longer valid if the State could act as a private person; neither is the second in cases where even the local sovereign can be sued.

4.16 Belgian case law was the pioneer in the evolution of the private-acts exception to immunity. Italian case law followed very soon. Since the end of the nineteenth century, or at least at the very beginning of the twentieth, Italian case law has been consistent in distinguishing the State as a political entity exercising sovereign powers and entitled to immunity and the State as a legal person not entitled to immunity[76]. In both the Belgian and the Italian case law the distinction between private and public acts has since the beginning been established on the basis of the nature of the act and not its purpose. This principle was clearly expressed in the *Soviet*

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[74] References in G.M. Badr, *State Immunity. An Analytical and Prognostic view* (The Hague, 1984), p. 21 *et seq.*

[75] *Compagnie des chemins de fer liégeois-luxembourgeois c. Etat néerlandais*, in *Journal de droit international* (1904), p. 417.

[76] See *Corte di Cassazione*, Torino, 1882 (*Giurisprudenza italiana* (1883), I, 125); *Corte di Cassazione*, Florence, 1886 (*Foro italiano* (1886), I, 913); *Corte di Cassazione*, Naples, 1886 (*Foro italiano* (1887), I, 474). All these decisions are reported by G.M. Badr, *State Immunity. An Analytical and Prognostic View* (The Hague, 1984), p. 23 *et seq.*

Trade Delegation case of 1925 in which the *Corte di Cassazione* held that the monopolization of foreign trade for political reasons by the Soviet Government cannot modify the commercial nature of a transaction[77]. Accordingly, since this decision the trend has been towards expansion of the range of acts over which jurisdiction was to be exercised.

4.17 Belgian and Italian case law did not long remain isolated. The distinction between *acta jure imperii* and *jure gestionis* was immediately appreciated by scholars[78], and well before the Second World War the principle of restrictive immunity was being applied, and still is applied, by the municipal courts of an increasing number of European countries. For example, in the *Immunities (Foreign State in Private Contract) Case*, of 5 January 1920, the Austrian Supreme Court in Civil Matters held that the sovereignty of a State does not involve absolute freedom from responsibility for that State. Indeed, if the foreign State concludes contracts to be fulfilled in Austria it "enters the legal system of the Austrian State", and can no longer be independent of it. As a consequence, it is subject to the jurisdiction of the courts of the territorial State in matters concerning contracts[79]. In 1918 Swiss Federal Courts declared admissible under international law the arrest of deposits belonging to the Austrian State[80]. In 1928 the Court of Athens denied immunity to the Soviet Union in a commercial suit[81]; the decision was upheld by the *Areios Pagos* on appeal.

4.18 In 1929, the Mixed Court of Appeals in Egypt affirmed that to grant immunity to the State for a non-political act would be

> "a *denial of justice* because it would deprive of its help people whose interests are in conflict with the private interest of the State"[82].

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[77] Corte di Cassazione, Roma, *Foro italiano*, 1925, I, 830.
[78] See Institut de droit international, Hamburg session, 1891, *Projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers*, esp. Article 4, points 3, 5 and 6.
[79] *Immunities (Foreign State in Private Contract) Case*, 5 January 1920, in 1 *ILR* (1919-1922), p. 119.
[80] *K.K. Oesterreichisches Finanzministerium v. Dreyfus,*13 March 1918, cited with reference to the subsequent decision of the same Court in *Greek Republic v. Walder*, 28 March 1930, in 5 *ILR* (1929-1930), pp. 121-122.
[81] *Soviet Republic (Immunity in Greece) Case*, 1928, no. 1681, 4 *ILR* (1927-1928), p.172.
[82] *Capitaine Hall, commandant le « Sumatra » c. Capitaine Bengoa, commandant le « Mercédès »*, in *Journal du droit international* (1921), p. 271 (emphasis added). See also the decision of the same court in *Monopole des Tabacs de Turquie and Another v. Régie Co-Intéressée des tabacs de Turquie*, 22 January 1930, in 5 *ILR* (1929-1930), p. 123.

4.19 In 1938 the *Tribunal de commerce de Marseille* argued that to grant State immunity with respect to commercial activities would be contrary to French public order because

> "l'Etat étranger pouvant poursuivre ses cocontractants devant les juridictions françaises sans pouvoir être poursuivi par eux devant elles, il s'ensuivrait que les tribunaux français qui sont institués en premier lieu pour protéger les droits de leurs nationaux, ne pourraient jamais en pareil cas que condamner ceux-ci sans avoir la possibilité de faire respecter leur droits, ce qui serait manifestement contraire au fondement même de l'organisation judiciaire"[83]

In 1936 the French *Cour de Cassation* confirmed the denial of immunity in relation to an operation of a commercial character[84].

4.20 Germany considers that the "turnaround" between absolute and restrictive immunity is represented by the United States Tate Letter of 1952[85]. The brief description of the case law just set forth however shows, firstly, that the evolution towards the restrictive immunity principle started well before and was not limited – as indicated by Germany – to the case law of Italian courts. In fact the Tate Letter was no more than the recognition of some decades of previous judicial practice in other countries. With the Letter, the Legal Adviser of the U.S. Department of State merely conformed the United States governmental position to the consistent practice, and *opinio juris*, of the majority of Western countries[86]. This means that well before the Second World War, the denial of State immunity before municipal courts was not considered prejudicial to the dignity or sovereignty of a foreign State; and the exercise of jurisdiction, at least in respect to commercial activities, was not considered to be incompatible with the fundamental principles of equality and reciprocal independence of States. Even scholars who considered that a State has always to be apprehended as a sovereign entity, and does not change

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[83], Cited by I. Pingel-Lenuzza, *Les immunités des Etats en droit international* (Bruxelles, 1997), p. 47 *et seq.* (original in *Gazette du Palais* (1938), 2, 580).
[84] *Chaliapine v. Union of Socialist Soviet Republics*, 15 December 1936, in 8 *ILR* (1935-1937), p. 225.
[85] See esp. GM, para. 91.
[86] J. Combacau, "L'Immunité de l'Etat étranger aux Etats-Unis: la lettre Tate vingt ans après", in 18 *Annuaire Français de Droit International* (1972), p. 455.

its personality by undertaking commercial activities, acknowledged that sovereignty was not always challenged by the exercise of jurisdiction by municipal courts[87].

4.21 Secondly, the case law set forth above demonstrates that the evolution towards restrictive immunity has its *ratio* in the necessity of protecting private persons. On this point Italy fully agrees with Germany that the reason for the development towards restrictive immunity was the feeling that to grant the privilege of immunity to a State acting in a private capacity was an unjust limitation of the rights of private contractors[88].

4.22 In fact, since the very beginning the progressive limitation of immunity from jurisdiction was linked to the development of rule-of-law principles. The aim of preserving individual rights from an unjust privilege and granting the individual access to justice and to tort reparation also characterized further developments of the immunity rule and its exceptions.

4.23 Germany considers that the distinction between *acta jure imperii* and *acta jure gestionis* remains the parameter which is still determinative today regarding the scope *ratione materiae* of the jurisdictional immunity of States. Italy only partially agrees with this assertion. In the following paragraphs Italy will demonstrate that exceptions to immunity are not limited to *acta jure gestionis*.

4.24 In labour-law litigation, the distinction based on nationality or residence of the employee and on the place where the work has to be performed have often been preferred to the distinction based on the public or private character of the employee's functions. In this respect, for instance, Article 5(1) of the *European Convention on State Immunity* (1972) establishes that a Contracting State

> "cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed on the territory of the State of the forum".

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[87] A. Weiss, "Compétence ou incompétence des tribunaux à l'égard des États étrangers", *Recueil des Cours*, vol. 1 (1923), p. 544.
[88] GM, para. 49.

The only exceptions to this restriction of immunity, listed in paragraph 2, concern the nationality of the worker or the existence of a written provision in the contract of employment, the character *jure gestionis* or *jure imperii* of the performed functions being generally irrelevant[89]. The same provision is accepted in Section 4 of the United Kingdom *State Immunity Act* (1978)[90].

4.25 Article 11 of the United Nations *Convention on Jurisdictional Immunities of States and their Propertie*s establishes, as a general rule, that a State is not entitled to immunity "in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State". The subsequent paragraph 2 of this article limits this general exception and grants immunity if "the employee has been recruited to perform particular functions in the exercise of governmental authority". So even though the Convention does not completely abandon the distinction based on functions performed, the exception to jurisdiction is limited to "*particular functions* in the exercise of governmental authority", and therefore does not cover the whole public-functions domain. The preparatory works on this provision demonstrate the already-mentioned trend to a progressive restriction of State immunity even in respect of activities concerning governmental functions. The draft Article 12, provisionally adopted by the International Law Commission on first reading in 1986, provided immunity whenever "the employee has been recruited to perform *services associated with* the exercise of governmental authority"[91]. In its comments and observations on the draft article mentioned, the Federal Republic of Germany considered that such an exception was "extraordinary broad and could serve to invalidate the whole provision" because "a link with the exercise of 'governmental authority' can probably be established in practically all contracts of employment". Therefore the proposal of the Federal Republic of Germany was to delete the paragraph, adopting the same solution as the European Convention[92]. This proposal demonstrates that, in the opinion of Germany, the exercise of jurisdiction in cases

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[89] In the terms of Article 32, the Convention shall not "affect privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them". It seems possible to deduce from this norm that labour litigation between the State and its diplomatic personnel are also exempted from municipal jurisdiction.

[90] 17 *International Legal Materials* (1978), p. 1123. Like the European Convention, the *SIA* too provides an exception for employment controversies with diplomatic personnel (Section 16).

[91] ILC, *Report on the work of its thirty-eighth session*, YbILC 1986, Vol. II, Part Two, p. 10. For the Commentary see ILC, *Report on the work of its thirty-sixth session*, YbILC 1984, Vol. II, Part Two, p. 63.

[92] *Comments and observations received from Governments*, YbILC 1988, Vol. II, Part One, pp. 70-71.

involving some *jure imperii* activities does not always affect the independence and equality of sovereign States.

4.26 The evolution of the immunity rule concerning employment disputes shows the tendency of State practice to reduce the domain of State immunity and to grant individuals access to justice to the maximum extent possible, even when *jure imperii* activities are involved. This trend is even clearer in an area which is more relevant for the present case, that of personal injuries.

2. The Exceptions to State Immunity for Personal Injuries

4.27 The evolution of immunity rules also concerns cases in which reparation claims for personal injuries are brought by individuals against a foreign State before domestic courts. In this respect too the need to give adequate protection to individual rights has led to limiting the protection accorded to State sovereignty. In this Section Italy will show, first, that in tort litigation jurisdiction is exercised even in relation to sovereign activities. Second, Italy will show that the application of this exception to immunity cannot be excluded in relation to war damages.

(a) *Irrelevance of* Imperii-Gestionis *Distinction in Tort Litigation*

4.28 Nearly all recent national and international codifications of State immunity provide, to some extent, for the removal of immunity for illegal acts of foreign States which cause death or personal injury, or damage to or loss of property[93]. Such a removal, generally known as 'the torts exception', was already provided for in the 1891 Hamburg resolution of the Institut de droit international[94]. This exception represents the most relevant departure from the distinction between *acta jure gestionis* and *acta jure imperii*.

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[93] See Article 11 of the European Convention on State Immunity, and Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property.
As examples of national codification, see the U.S. Foreign Sovereign Immunities Act (1976), section 1605(a)(5); U.K. State Immunity Act (1978), section 5; Australian Sovereign Immunities Act (1985), section 13; Singapore State Immunity Act (1979), section 7; Canadian State Immunity Act (1982), section 6 ; South African Foreign State Immunity Act (1981), section 6. The Pakistani State Immunity Ordinance (1981) is the only national codification of State immunity that does not provide for a torts exception.

[94] Institut de Droit International, Hamburg session, 1891, *Projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers*, Article 4(6).

4.29 Germany argues that this exception is most commonly used in relation to damage produced in situations in which States are not exercising their specifically sovereign powers. Italy considers that the exercise of jurisdiction in relation to damage produced by governmental activities cannot be underestimated. The only condition for the application of the torts exception in national regulation of State immunity is the link between the injury and the territory of the forum State[95].

4.30 The European Convention on State Immunity requires a double connection. In accordance with Article 11, jurisdiction can be exercised "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*" (emphasis added). The Convention codified the law of State immunity at a relatively early stage, when the restrictive immunity doctrine was not yet universally accepted. Moreover, the majority of the signatory countries were civil-law countries, whose courts had traditionally been cautious in extending judicial control to damage caused as a result of performance of acts in exercise of sovereign authority[96]. Nevertheless, the wording of the article makes it quite clear that the *gestionis-imperii* distinction finds no place in the regulation of tortious claims provided for by the Convention[97].

4.31 The International Law Commission's codification work confirms the idea that the *gestionis-imperii* distinction is no longer maintained with regard to tortious conduct. Article 12 of the United Nations Convention on Jurisdictional Immunities of States and their Properties requires the same double connection provided for by the European Convention. A brief analysis

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[95] Both the U.S. Foreign Sovereign Immunities Act and the Canadian State Immunity Act require that the damage occur on the territory of the State. The British State Immunity Act, Australian Foreign Sovereign Immunities Act and Singapore State Immunity Act give relevance to the place where the tortious act was perpetrated. The irrelevance of the *imperii-gestionis* distinction for the applicability of the torts exception has been affirmed by the Canadian Supreme Court in *Schreiber v. Federal Republic of Germany and the Attorney General of Canada*, [2002] 3 S.C.R. 269, 2002 SCC 62, decision of 12 September 2002, para. 32 (on line at http://csc.lexum.umontreal.ca/en/2002/2002scc62/2002scc62.html).

[96] The Federal Republic of Germany embraced the doctrine based on the *gestionis-imperii* distinction with the decision of the Federal Constitutional Court in the *Iranian Embassy case* of 30 April 1963 (BVerfGE 16, 27 *et seq*.). Nevertheless, the Federal Republic ratified the European Convention on 22 January 1990, and therefore accepted the possibility of being subject to jurisdiction in relation to *jure imperii* activities too.

[97] For a deep analysis of States' legislation and case law, confirming the conclusion that the distinction between acts *jure imperii* and acts *jure gestionis* does not apply in torts claims, see J. Brömer, *State Immunity and the Violation of Human Rights* (The Hague, 1997), pp. 51-121. See also C. Schreuer, *State Immunity: some recent developments* (Cambridge, 1988), pp. 45-62.

of the debates concerning the redaction of this rule demonstrates that its main purpose was to assure the protection of individual rights and to avoid denial of justice.

4.32 When proposing the draft article on the torts exception, in 1983, the then Special *Rapporteur* Sucharitkul considered that

> "[t]he distinction between *jus imperii* and *jus gestionis*, or the two types of activities attributable to the State, appears to have little or no bearing in regard to this exception, which is designated *to allow normal proceedings to lie and to provide relief for the individual* who has suffered an otherwise actionable physical damage to his own person or his deceased ancestor or to his property." [98]

4.33 Accordingly, since its first drafting the purpose of the rule was to grant individuals access to judicial proceedings in order to obtain reparation for wrongful injuries. The need to provide individual access to justice is made even clearer in the 1991 ILC Commentary on this article. The Commission observed that

> "[t]he injured *individual would have been without recourse to justice* had the State been entitled to invoke its jurisdictional immunity."[99]

The same rationale which fuelled the abandon of absolute immunity in favour of the distinction *imperii-gestionis* underlies these further developments in the context of torts claims: the feeling of injustice and the necessity to protect individual rights.

4.34 The intention to improve the protection of individual rights expressed by the Special Rapporteur was shared by a number of States. Some of them even proposed enlarging the scope of the exception. Among them, the Federal Republic of Germany did not oppose the abandonment of the *imperii-gestionis* distinction, nor did it propose the maintenance of immunity with respect to particular governmental acts. Rather, Germany criticized the fact that, by requiring the presence of the author of the injurious acts on the territory of the forum State, this exception risked being unsuitable for transboundary injuries.

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[98] S. Sucharitkul, *Fifth report on jurisdictional immunities of States and their property,* YbILC 1983, Vol. II, Part One, p. 39 (emphasis added).
[99] ILC, *Report on the work of its forty-third session*, YbILC 1991, Vol. II, Part Two, p. 44 (emphasis added).

4.35 The ILC *Commentary* to the 1991 draft articles made it clear that the torts exception may also apply to governmental activities. The ILC pointed out that

> "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"[100].

4.36 The insertion of a torts exception clause, not limited to non-sovereign activities, in almost all national statutes and international conventions – particularly in a convention characterized by its universal vocation such as the United Nations Convention on Jurisdictional Immunities – demonstrates that there is no peremptory or absolute principle which requires that immunity is to be granted whenever public activities are involved. In the following paragraphs, Italy will demonstrate that there is no absolute principle requiring foreign States to be granted immunity from jurisdiction in cases concerning war damage.

(b) *Applicability of the Torts Exception in Cases Concerning War Damage*

4.37 Germany asserts that the torts exception cannot be extended to war damage, and more generally, that State immunity regulations never apply to war conduct. Italy considers that, in its absolute terms, this assertion is questionable. Indeed, there seems not to be any absolute principle entailing the exclusion of situations relating to armed conflicts from the application of the restrictive immunity rule.

4.38 Article 31 of the European Convention on State Immunity explicitly excludes the applicability of the Convention in relation to conduct of foreign-State armed forces taking place on the territory of the forum State[101].

4.39 Such an explicit exclusion is not provided for in the United Nations Convention. Italy considers that there are reasons to believe that the UN Convention does apply to military activities. Indeed, it appears difficult to agree, without further explanation, with the statement of the Chairman of the *Ad Hoc* Committee according to which a general understanding had always

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[100] ILC, *Report on the work of its forty-third session*, YbILC 1991, Vol. II, Part Two, p. 45.
[101] Article 31: "Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State".

prevailed in the Sixth Committee debate that military activities were excluded from the scope of the Convention[102].

4.40 When the Convention intends to limit its scope of application in respect to a certain subject, it says so explicitly. Significantly, in listing the categories of privileges and immunities not affected by the Convention, Article 3 mentions diplomatic immunities, head-of-State immunities and immunities relating to aircraft or space objects. It does not mention military activities. Another exclusion, namely criminal proceedings, was explicitly mentioned in General Assembly resolution 59/38[103]. No reference to military activities or war damages can be found in the Convention nor in the General Assembly resolution.

4.41 The 1991 Commentary to draft Article 12 seems contradictory on this issue. The Commentary affirms that the article "does not apply in case of armed conflict". However, concerning the non-applicability of the article to transboundary damage, the Commentary gives as an example the fact that "cases of shooting or firing across a boundary or of spill-over across the border of shelling as a result of an armed conflict are excluded from the areas covered by Article 12". This example suggests, *a contrario*, the idea that the context of armed conflict is not *a priori* excluded from the application of the article in cases of non-transboundary damage[104]. Thus, genuine doubts remain as to whether war damage is excluded from the applicability of the torts exception provided for by the United Nations Convention.

4.42 Moreover, case law is not as unanimous as Germany pretends in excluding war damage from the scope of the torts exceptions provided under national legislations. As to United States practice, for example, Germany states that "the courts of the United States would never entertain a suit through which a claimant would seek reparation for injury suffered during armed conflict."[105] Italy notices that the Supreme Court decision in *Republic of Iraq v. Simon et al.*[106] seems to support quite the opposite. Some American citizens who had been captured and tortured by Iraqi agents during the Gulf War in 1991 brought a suit for damages against Iraq

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[102] *Summary record of the 13th meeting of the Sixth Committee*, 25 October 2004, A/C.6/59/SR.13. See A. Dickinson, "Status of Forces under the UN Convention On State Immunity", in 55 *International & Comparative Law Quarterly* (2006), p. 428.
[103] GA Res. 59/38 of 2 December 2004.
[104] ILC, *Report on the work of its forty-third session*, YbILC 1991, vol. II, Part Two, p. 46.
[105] GM, para. 101.
[106] *Republic of Iraq v. Jordan Beaty et al.*, *Republic of Iraq et al., v. Robert Simon et al.*, Nos. 07–1090 and 08–539, 8 June 2009, on line at http://www.supremecourtus.gov/opinions/08pdf/07-1090.pdf .

before US courts. They alleged that Iraq was not entitled to State immunity because since 1990 Iraq was included in the State Department list of States supporting terrorism, so that the exception to State immunity provided under the amendment to the FSIA introduced by the Antiterrorism and Effective Death Penalty Act and codified at 28 U. S. C. §1605(a)(7) would apply. The Supreme Court considered that the FSIA and the relevant amendment were applicable in the case at issue, giving no relevance to the fact that the injuries had occurred during and in relation to the Gulf War. Immunity was finally granted to Iraq because the District Court lost jurisdiction over suits against Iraq in May 2003, when the President made §1605(a)(7) inapplicable with respect to Iraq.

3. Inter-Temporal Application of the Rules of State Immunity

4.43 Germany considers that, by denying immunity in relation to occurrences dating back to the period between 1943 and 1945, the *Corte di Cassazione* erroneously applies the extended doctrine of restrictive immunity retroactively[107]. From the principle according to which "the rules governing facts of international life must be assessed according to the law in force at the time when those facts occurred", Germany infers that Italian judges should apply the rules governing sovereign immunity in force at the moment of the injurious activities, i.e. during the Second World War[108].

4.44 The issue of inter-temporal application of substantive rules of international law in the present dispute is dealt with in several parts of this counter-memorial, and particularly in Chapter V. As stated in Section V of Chapter I, Italy considers that the conclusion reached there according to which international law has to be interpreted in the light of the development of the international legal order is also valid in relation to the rule of jurisdictional immunity. Moreover, immunity is a procedural rule[109] which affects the jurisdictional competence of a court and, in accordance with a general principle of law, has to be assessed according to the rules in force at the time when the court is appealed. National and international practice supports this statement.

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[107] GM, para. 91 *et seq.*
[108] GM, para. 93 *et seq.*
[109] See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports 2002*, para. 60.

4.45 The Italian Code of Civil Procedure specifically provides, at Article 5, that

> "Jurisdiction and competence shall be determined having regard to the law in force and the factual situation in being at the time of submitting the application […]"[110].

In Germany, the issue of inter-temporal procedural law (*Intertemporales Prozessrecht*) is generally resolved in favour of the application of new relevant rules. Even pending proceedings should be assessed according to new rules as from the entry into force of the amending act. Nevertheless, legitimate expectations of claimants are protected; indeed, if a remedy admissible at the moment of the action becomes inadmissible under the new statute, the old one remains applicable[111]. In French law there is no provision on the matter, but the general principle according to which the competence of the tribunal is assessed at the moment of submission of the application is accepted[112].

4.46 The application of this principle in relation to jurisdictional immunity too has characterized the relevant practice. Germany seems to consider that the judgment of the United States Supreme Court in *Altmann v. Austria* is the only example of application of restrictive immunity doctrine to facts dating back to the Second World War period[113]. Italy does not share this opinion. Quite the opposite: *Altmann* is far from being an isolated example.

4.47 Whatever the conclusion reached by the judges in cases in which foreign State immunity for grave breach of human rights and humanitarian law was at issue, courts have generally approached the question in the light of the moment of the judicial action and not of the original injurious facts. It is worth noting that this is specifically the case in relation to complaints against Germany relating to crimes committed during the Second World War. In *Princz v. Federal Republic of Germany* the Court of Appeal for the District of Columbia granted foreign immunity to Germany by applying the Foreign Sovereign Immunities Act of 1976[114]. In the *Distomo* case, the Greek *Areios Pagos* explicitly applied what it considered contemporary

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[110] "Art. 5 (Momento determinante della giurisdizione e della competenza) - La giurisdizione e la competenza si determinano con riguardo alla legge vigente e allo stato di fatto esistente al momento della proposizione della domanda, […]".
[111] H.-J. Musielak, *Kommentar zur Zivilprozessordnung* (2007), Einleitung No. 13.
[112] See *infra*, § 4.48.
[113] GM, para. 96 *et seq.*
[114] Decision of 1 July 1994, in 103 *ILR* (1996), p. 606.

international law at the moment of the decision, taking into account the evolution of general international law and of the rule of State immunity[115]. The same is to be noticed concerning the decision of the Greek Special Highest Court in the *Margellos* case[116]; the Court granted immunity to Germany because it considered that "in the present state of development of international law" a norm of customary international law excluding crimes committed by armed forces from the law of State immunity does not exist, and not because it applied the immunity rule in force at the time of the crimes.

4.48 In two cases concerning people deported and forced to work by Germany during the Second World War, the French *Cour de Cassation* granted immunity to the Federal Republic of Germany, but stressed that

> "le bénéficiaire de celle-ci [of immunity] est l'Etat étranger tel qu'il se présente au moment de l'assignation en justice, en l'occurrence, la République fédérale d'Allemagne, et non tel qu'il était à l'époque des actes ou faits litigieux."[117]

4.49 European Court of Human Rights case law confirms the idea that the time of injurious acts or facts in dispute is not relevant to establishing the applicable immunity rule. The arguments for the decision are almost the same in *Al-Adsani v. United Kingdom*[118], where the beginning of judicial action immediately followed the tortious acts, and in *Kalogeropoulou and Others v. Greece and Germany*[119] or in *Grosz v. France*,[120] concerning crimes committed during the Second World War. In all those decisions the European Court investigated the contemporary rules of international law governing State immunity. In *Grosz v. France* the stress on contemporary law is so important that the Court seems to feel obliged to underline that its conclusion

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[115] ANNEX 9 to GM.
[116] Anotato Eidiko Dikastirio, *Margellos and Others v. Federal Republic of Germany*, case No 6/2002, judgment of 17 September 2002, in 129 *ILR* (2007), p. 526 *et seq.*
[117] Cour de Cassation, 1ère chambre civile, case No. 03-41851, decision of 2 June 2004, and case No. 04-47504, decision of 3 January 2006, both at http://www.legifrance.gouv.fr/initRechJuriJudi.do .
[118] Application no. 35763/97, judgment of 21 November 2001.
[119] Application no. 59021/00, judgment of 12 December 2002.
[120] Application no. 14717/06, judgment of 16 June 2009.

> "vaut du moins *en l'état actuel du droit international public*, ce qui n'exclut pas pour l'avenir un développement du droit international coutumier ou conventionnel."[121]

4.50 Finally, it is worth noting that Article 4 of the United Nations Convention on Jurisdictional Immunities of States and Their Property defines the *non-retroactivity* of the Convention as follows :

> "[…] the present Convention shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the present Convention for the States concerned."

It seems quite evident from this article that the relevant moment for the determination of the rule of State immunity to be applied is that of the institution of judicial proceedings and not that of the disputed facts.

C. CONCLUSIONS

4.51 Jurisdictional immunity of foreign States is not an absolute or peremptory rule of international law. Quite the opposite: it is continuously subject to limitations and must be interpreted taking into account developments in contemporary international law. Exceptions to immunity are increasingly broad in scope, and in certain cases the removal of immunity also applies to acts *jure imperii*. The number and scope of exceptions is so important that scholars are beginning "to think of immunity as not normally being allowed" unless in exceptional cases:

> "An exception to the normal rule of jurisdiction should only be granted when international law requires – that is to say, *when it is consonant with justice and with the equitable protection of the parties*. It is not to be granted 'as of right'." [122]

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[121] Application no. 14717/06, judgment of 16 June 2009, p. 7 (emphasis added).
[122] R. Higgins, "Certain Unresolved Aspects of the law of State Immunity", in 29 *Netherlands International Law Review* (1982), p. 271 (emphasis added).

4.52 The function of exceptions to immunity is to give protection to two of the most important principles of contemporary international law: respect for individual rights and for rule-of-law principles. It is in this context and in the light of these fundamental principles that the evolution of immunity and its exceptions must be appraised.

4.53 This progressive restriction of the scope of State activities covered by immunity is further driven by certain recent developments in international law. In the following section Italy will analyse the impact of those developments on immunity rules.

Section III. The Principles of State Immunity in the Context of Developments of International Law

4.54 So far Italy has described the 'internal' evolution which the law of State immunity has undergone in order to protect individual rights. In this Section the law of State immunity will be looked at in relation to other rules of international law.

4.55 In particular, in the following paragraphs Italy will assess the impact on the rule of immunity of certain developments in international law, such as the recognition of the existence of international rules having a *jus cogens* character (A); the existence of a body of rules criminalizing the conduct of individuals responsible for specified international crimes (B); and finally, the increasing acceptance of the existence of a right of access to courts by individuals (C). Italy will demonstrate that, when no other means of implementing the fundamental rights of human beings are available, the recognition of immunity may be precluded by the need to avoid situations which appear to be irreconcilable with the effectiveness of the fundamental values of the international community.

A. JUS COGENS

4.56 Germany considers that the removal of immunity in cases relating to damage suffered by victims of Nazi atrocities during the Second World War is the consequence of an erroneous

reliance on *jus cogens*[123]. The German assertion is based on two main points. Firstly, "*jus cogens* did not exist at the time when the violations occurred from which the plaintiffs attempt to derive their claims"[124]. Secondly, Germany assumes that "there exists no comprehensive special regime that applies to the breach of a *jus cogens* rule" and that the denial of State immunity is a consequence that cannot be freely inferred from the breach of a *jus cogens* rule[125]. Italy considers that both these arguments are only partially valid and only partially relevant.

4.57 Firstly, Italy will show that that the concept of *jus cogens* had already emerged before the Second World War, and particularly that it included rules concerning the treatment of prisoners of war. Secondly, Italy will demonstrate that *jus cogens* has some consequence on the way in which immunity has to be applied.

4.58 The idea of an 'international public order', whose function is to protect general values and common concerns of the international community, dates back to Grotius, Vitoria and Wolff, and has never disappeared with the rise of positive-law doctrine[126]. It is worth noting that quite often such rules were associated with human rights and humanitarian principles, such as the universal recognition of the prohibition of slavery and the slave trade, or the protection of wounded soldiers as soon as the First Geneva Convention of 1864 was adopted.

4.59 In the era between the two World Wars, the idea of superior principles was taken up again. In his separate opinion in the *Oscar Chinn case*, Judge Schücking asserted the existence of *jus cogens* rules in international law and affirmed that the Permanent Court of International Justice would never "apply a convention the terms of which were contrary to public morality"[127].

4.60 The idea of invalidity of "immoral" treaties was shared by scholars. Verdross considered "the general principle prohibiting States from concluding treaties *contra bonos mores*", i.e. "in contradiction to the ethics" of the community, as a peremptory norm of general

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[123] GM, paras. 83 to 90.
[124] GM, para. 85.
[125] GM, para. 87.
[126] See for references S. Kadelbach, "Jus Cogens, Obligations Erga Omnes and Other Rules – The identification of Fundamental Norms", in *The Fundamental Rules of International Legal Order*, C. Tomuschat and J.-M. Thouvenin (eds.) (Leiden, 2006), pp. 21 *et seq.*
[127] *P.C.I.J.*, Judgment of 12 December 1934, Series A/B n. 63, p. 149-150.

international law determining the limits of the freedom of the parties to conclude treaties[128]. In order to determine when treaties were to be considered immoral, he proposed as a criterion "to find the *ethical minimum* recognised by all the States of the international community". One of the most important of such minimum ethical principles was the right of the State to protect "the life, the liberty, the honor or the property of men on its territory"[129].

4.61 Again, the work of the International Law Commission on codification of the law of treaties supports the idea that 'non-derogable' principles of international law already existed before the Second World War[130]. As to the content of *jus cogens* rules, examples given by the Special *Rapporteur*, Fitzmaurice, are revealing. He affirmed, in fact, that

> "[m]ost of the cases in this class are *cases where the position of the individual is involved*, and where the rules contravened are *rules instituted for the protection of the individua*l"[131].

The first example of such a rule, having an "absolute and non-rejectable character" is that concerning the treatment of prisoners of war[132].

4.62 It seems to be universally accepted that, even before the Second World War, provisions concerning the treatment of prisoners had a non-derogable character. Such a character is expressed by Article 6(1) of the Geneva Convention (III) relative to the Treatment of Prisoners of War of 1949 providing that "no special agreement shall adversely affect the situation of prisoners of war, as defined by the present Convention, nor restrict the rights which it confers upon them". Despite the fact that the 1929 Convention relative to the Treatment of Prisoners of War did not contain an identical provision, the reference in Article 83 to "more favourable measures" has been authoritatively interpreted as excluding the possibility for a State to deprive prisoners of the rights conferred by the Convention[133]. As will be set forth in detail in

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[128] A. von Verdross, "Forbidden Treaties in International Law", in 31 *American Journal of International Law* (1937), pp. 571-577, at 572; *Id.,* "Règles générales du droit de la paix", *Recueil des Cours*, vol. 30 (1929), p. 304.
[129] A. von Verdross, "Forbidden Treaties in International Law", p. 574.
[130] See H. Lauterpacht, *Report on the Law of Treaties*, YbILC 1953, Vol. II, p. 154.
[131] G. Fitzmaurice, *Third Report on the Law of Treaties*, YbILC 1958, Vol. II, p. 40 (emphasis added).
[132] *Ibid*.
[133] In its *Commentary* to Article 6 of the 1949 Third Convention, the ICRC recalls the case of French prisoners in Germany. In response to offers made by the German Government, in agreement with the Vichy Government, these prisoners abandoned some of their rights in exchange for certain material advantages, but in the end they suffered

Chapter V[134], the non-derogable character of norms protecting prisoners of war during the Second World War is recognized even in the opinion delivered to the German Government by Professor Tomuschat[135].

4.63 The Charter annexed to the Agreement of 8 August 1945 establishing the Nuremberg International Military Tribunal qualified as war crimes the violations of the laws or customs of war[136]. The Tribunal found that, by 1939, the humanitarian rules included in the Regulations annexed to the Hague Convention IV of 1907 "were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war"[137].

In 1946, General Assembly resolution 95(I) confirmed the Nuremberg Principles as regards international crimes. Even if the context was that of individual criminal responsibility and not that of State responsibility and *jus cogens* definition, it cannot be denied that the criminalization of violations of humanitarian law committed during the Second World War is indicative of the idea that such violations were considered, already at that time, as affecting the most fundamental values of the international community.

It is significant in this respect that, in draft Article 13(2), defining when treaties are to be regarded as contrary to *jus cogens*, Special *Rapporteur* Waldock proposed the following definition:

> "a treaty is contrary to international law and void if its object or execution involves […] (b) any act or omission characterized by international law as an international crime; or (c) any act or omission in the suppression or punishment of which every State is required by international law to co-operate"[138].

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rather serious disadvantages. The ICRC affirms that "[a]lthough it is less explicit than [Article 6(1) of the 1949 Convention], Article 83 of the 1929 Convention should have prevented agreements of this kind".

[134] See *infra* para. 5.19.

[135] *Leistungsberechtigung der Italienischen Militärinternierten nach dem Gesetz zur Errichtung einer Stiftung „Erinnerung, Verantwortung und Zukunft"? Rechtsgutachten*, erstattet von Professor Dr. Christian Tomuschat, Annex X

[136] Charter of the International Military Tribunal, Article 6(2).

[137] *Trial of the Major War Criminals*, 14 November 1945 - 1 October 1946, Nuremberg, 1947, Vol. 1, p. 254.

[138] H. Waldock, *Second Report on the Law of Treaties*, YbILC 1963, vol. II, p. 52. The commentary is also meaningful: "if a treaty contemplates the performance of an act criminal under international law, its object is clearly illegal. […] Where international law, as in the cases of the slave-trade, piracy and genocide, places a general

4.64 Furthermore, in its Advisory Opinion on the *Legality of Nuclear Weapons*, the Court affirmed that a large number of rules of international humanitarian law

> "constitute intransgressible principles of international customary law"[139].

As a confirmation of this conclusion the Court cited exactly the passage of the Nuremberg judgment mentioned above. Thus, the Court has confirmed the link between international crimes and *jus cogens* outlined above.

4.65 Thus, it is clear that, even at the time of the Second World War, the idea of superior, peremptory and non-derogable values shared by the international community already existed. Such values have been undisputedly trampled on by crimes committed by Germany. Germany itself recognized the seriousness of the crimes in question with the law of 2 August 2000 establishing the "Remembrance, Responsibility and the Future" Foundation. Moreover, Germany unconditionally acknowledges that "very serious violations, even crimes, were committed by its occupation forces in Italy"[140].

4.66 Nevertheless the dispute on the existence and scope of the concept of *jus cogens* during the Second World War seems, in the case under discussion, a quite sterile one. The problem in fact is not how the violations committed by Germany were to be qualified at that time. The problem is whether the absolute denial of access to justice, and the denial of any form of reparation, to victims of behaviours that were unquestionably forbidden by customary international law when they were committed, and unquestionably constitute violations of *jus cogens* today, is compatible with the contemporary concept of *jus cogens*.

4.67 This last consideration also raises some criticism on the second argument proposed by Germany. Germany's second main point is based on the indisputable distinction between primary norms, admittedly peremptory, forbidding some grave violations of international humanitarian law and of human rights law, and secondary norms concerning the consequences of violations of such primary norms. Germany argues that there is no conflict between the peremptory norms of humanitarian law forbidding deportation, forced labour or massacre of the

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obligation upon every State to co-operate in the suppression and punishment of certain acts, a treaty contemplating or conniving at their commission must clearly be tainted with illegality" (*ibid*. p. 53).

[139] *I.C.J. Reports 1996*, p. 257, par. 79.

[140] GM, para. 59.

civilian population, and the general customary rule granting State immunity from jurisdiction, because these two rules have completely different contents. This argument, already put forward among scholars by Zimmermann[141] and Bröhmer,[142] is formally unquestionable, but rather irrelevant in the case under discussion. In fact, Italian case law is not based on the *formal*, *a priori*, prevalence of *jus cogens* primary rules over immunity procedural rules. Italy does not pretend in general terms that when confronted with a claim arising out of the violation of a *jus cogens* norm municipal courts have jurisdiction. Italy fully agrees with Germany that such a general exception to immunity does not yet find confirmation in international practice, nor can it be theoretically inferred from the *jus cogens* character of the rule violated. Italy subscribes to the idea that immunity and *jus cogens* rules on human rights and humanitarian law can generally coexist in the international legal system. However, there is a *substantive* inconsistency in the legal system if immunity is used by a State responsible for grave breaches of international law in order to avoid its responsibility.

4.68 The inconsistency of a legal system that considers human rights and human dignity as its paramount values endorsed by *jus cogens* norms and, at the same time, protects violators of such norms by granting them sovereign immunity is the fundamental premise of a number of theories concerning the relationship between State immunity and *jus cogens* norms. All those doctrines, whose echoes are noticeable also in some judicial opinions, examine the way in which *jus cogens* may prevent a State from relying on immunity.

4.69 Two main ideas are at the basis of those theories. The first one is that the violation of peremptory norms of international law cannot be considered to be a sovereign act. This idea has been expounded since 1989 by Professors Belsky, Roth-Arriaza and Merva:

> "the existence of a system of rules that States may not violate [i.e. *jus cogens*] implies that when a State acts in violation of such a rule, the act is not recognised as a sovereign act. When a State act is no longer recognised as sovereign, the State is no longer entitled to invoke the defense of sovereign immunity."[143]

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[141] A. Zimmermann, "Sovereign Immunity and Violation of International Jus Cogens. Some Critical Remarks", 16 *Michigan Journal of International Law* (1995), p. 438.
[142] J. Bröhmer, *State Immunity and the Violation of Human Rights* (The Hague, 1997), p. 195.
[143] A. Belsky, N. Roth-Arriaza, M. Merva, "Implied Waiver Under the FSIA: A Proposed Exception to Immunity for violation of Peremptory Norms of International Law", 77 *California Law Review* (1989), p. 394.

On the basis of an analogous idea Professor Kokott stated that the loss of immunity is the consequence of the 'abuse of sovereignty' caused by the violation of fundamental rights[144]. Indeed sovereign immunity cannot be invoked when sovereignty is used to criminal ends.

4.70 This idea was first applied by the United States District Court for the District of Columbia in *Princz v. Federal Republic of Germany*. The Court held that

> "the Federal Sovereign Immunity Act [i.e. immunity] has no role to play where the claims involve undisputable acts of barbarism committed by a one-time *outlaw nation*"[145]

and

> "a nation that does not respect the civil and human rights of an American citizen is barred from invoking United States law to block the citizen in its effort to vindicate his rights"[146].

Despite the wording of the decision, relating to United States domestic law, the argument would be the same in relation to international norms on international immunity. The District Court's decision was overruled by the Court of Appeals, but it is worth noting that Circuit Judge Wald, dissenting, considered that

> "Germany's treatment of Princz violated *jus cogens* norms of the law of nations, and that by engaging in such conduct, Germany implicitly waived its immunity from suit"[147].

4.71 This theory was also accepted by the majority of the Greek Supreme Court in the *Distomo* case. The *Areios Pagos* stated that

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[144] J. Kokott, „Mißbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstößen", in *Recht zwischen Umbruch und Bewahrung : Völkerrecht, Europarecht, Staatsrecht : Festschrift für Rudolf Bernhardt* (Berlin, 1995), pp. 135-151.
[145] Judgment of 23 December 1992,in 103 *ILR* (1996), p. 598 *et seq.*, at 601.
[146] *Ibidem*, p. 602.
[147] Court of Appeals, District of Columbia Circuit, 1 July 1994, Wald, Circuit Judge, dissenting, in 103 *ILR* (1996), p. 614.

> "the defendant State could not invoke its right of immunity, which it had tacitly waived since the acts for which it was being sued were carried out by its organs in contravention of the rules of *jus cogens* […] and did not have the character of acts of sovereign power."[148]

It is true that few years later, in a similar case, the Greek Special Supreme Court decided that Germany enjoyed immunity[149]. Nevertheless, it is worth noting that this conclusion was reached by a majority of only six votes to five.

4.72 The second main idea is that States responsible for violations of *jus cogens* norms would no longer be entitled to sovereign immunity because of the hierarchical supremacy of the former norms[150]. This theory was supported by a minority of eight to nine judges of the European Court of Human Rights in *Al-Adsani v. United Kingdom*, and it is significant that this minority included almost all members of the Court who were scholars of international law. In their dissenting opinion, Judges Rozakis, Caflisch, Wildhaber, Costa, Cabral Barreto and Vajić stated that

> "The acceptance therefore 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."[151]

4.73 Whatever the merit and the final outcome of these views, the increased recognition of individual interests and rights under international law has already lead to a restrictive application of the doctrine of immunity in commercial matters. As the *Corte di Cassazione* pointed out in

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[148] Areios Pagos, *Prefecture of Voiotia v. Federal Republic of Germany*, case n. 11/2000, 4 May 2000, ILR vol, 129 (2007), pp. 514-524, at. 521 (ANNEX 9 to GM).
[149] Anotato Eidiko Dikastirio, *Margellos and Others v. Federal Republic of Germany*, case No 6/2002, judgment of 17 September 2002, ILR, vol. 129 (2007), p. 526 *et seq.*
[150] M. Reimann, "A Human Rights Exception to Sovereign Immunity: some Thoughts on Princz v. Federal Republic of Germany", 16 *Michigan Journal of International Law* (1995), p. 407. J.A. Gergen "Human Rights and the Foreign Sovereign Immunities", 36 *Virginia Journal of International Law* (1996), p. 765.
[151] Application no. 35763/97, judgment of 21 November 2001, Joint Dissenting Opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, para. 3.

Mantelli, it would be quite *paradoxical* for the international legal system, which allows the exercise of civil jurisdiction vis-à-vis foreign States in the event of violation of contractual obligations, to exclude it when faced with much graver violations, such as those which constitute crimes against humanity and which mark the breaking-point of the tolerable exercise of sovereignty[152]. To state the contrary would mean to use a merely procedural rule to achieve an aim of paramount injustice.

4.74 Furthermore, the incompatibility revealed by the Italian case law in the cases of claims for compensation brought by Italian deported persons, forced labourers and relatives of civilians massacred in reprisal actions is not formal but substantive. Italy does not assert the abstract incompatibility of immunity law with humanitarian law, but the fact that immunity law cannot be applied in such a way as to hamper the fulfilment of some of the most fundamental values and humanitarian principles shared by the international community and recognized as such by *jus cogens* norms[153].

4.75 To clarify this point, a comparison between Italian cases and similar United States case law is useful. The best-known case concerning a civil action for damages for atrocities committed by Nazi Germany is the *Princz case*. In that case, the Federal Republic of Germany was sued by a Jewish American citizen who had been interned in a concentration camp. The District Court for the District of Columbia denied immunity[154]. The Court of Appeals reversed the decision and affirmed that "the fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA"[155]. Two main points, deeply differentiating the *Princz case* from the Italian cases, need to be stressed. Firstly, it was controversial whether Mr Princz could have benefited from any compensation programmes in Germany. Secondly, it is worth stressing that the final solution of the controversy consisted of an agreement between Germany and the United States for the compensation of Mr Princz as well as other U.S. nationals who were victims of Nazi persecution. Under the Agreement, which was signed on 19 September 1995, the German Government provided three million marks to be distributed by the U.S. Department

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[152] ANNEX 13 to GM.
[153] For an appraisal of the Italian case law not as a consequence of the formal superiority of *jus cogens* rules but as a result of the *substantive* importance that must be given to the value of human rights protection see P. De Sena, F. De Vittor, "State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case", in 16 *European Journal of International Law* (2005), pp. 89-112.
[154] See *supra* para. 4.70.
[155] Judgment of 1 July 1994, 26 F 3d 1166 (1994), in 103 *ILR* (1996), p. 610.

of State to Mr Princz and other victims[156]. Thus, even though immunity was granted, Germany felt obliged to grant compensation and reparation even to people who did not attempt to claim reparation before German authorities.

4.76 In the majority of U.S. cases in which the question of denial of State immunity in relation to violation of *jus cogens* norms and particularly human rights law was at issue, the case ended with some form of reparation to individuals. In *Letelier v. Chile* (concerning the extrajudicial killing of Letelier and his interpreter by Chilean secret services on U.S. territory), the District Court for the District of Columbia affirmed its jurisdiction and denied immunity to Chile on the basis of the consideration that a foreign country

> "has no 'discretion' to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity"[157].

In this case the District Court condemned Chile to pay damages to the relatives of the victims. Chile, though refusing to execute the decision because it considered it a violation of international immunity law, agreed to pay an *ex gratia* compensation to the victims[158]. In *Siderman de Blake and others v. Republic of Argentina* (concerning torture and other ill-treatments committed by Argentinian officers on their territory), the Court of Appeals for the 9th Circuit denied the existence of a *jus cogens* exception to State immunity, but ultimately affirmed jurisdiction on other procedural grounds[159]. In that case too Argentina did not recognize the decision, but eventually paid compensation to Mr Siderman on the base of an extrajudicial transaction[160].

4.77 Italy considers that international immunity law must be interpreted and applied consistently with the fundamental values shared by the international community and embodied

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[156] *Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning Final Benefits to Certain United States Nationals Who Were Victims of National Socialist Measures of Persecution*, Bonn 19 September 1995, 35 *ILM* (1996), p. 193 *et seq.*
[157] Judgment of 11 March 1980, 488 F. Supp. 665 (D.D.C. 1980), in 63 *ILR* (1982), pp. 378-390, at 388.
[158] See *Agreement between the United States and Chile with regard to the dispute concerning responsibility for the deaths of Letelier and Moffit* (Washington, 11 January 1992), in 31 *ILM* (1992), p. 3; and Chile-United States Commission convened under the 1914 Treaty for the settlement of disputes, *Decision with regard to the dispute concerning responsibility for the deaths of Letelier and Moffitt*, *Ibid*., p. 9.
[159] Judgment of 22 May 1992, 965 F 2d 699 (1992), in 103 *ILR* (1996), pp. 454-479.
[160] T. Golden, "Argentina Settles Lawsuit by a Victim of Torture", in *N.Y. Times*, 14 September 1996, p. 6.

in peremptory norms of international law. A systematic interpretation of the international legal system – an interpretation consistent with the hierarchy of norms – does not imply the removal of State immunity in any case of violation of *jus cogens* norms. Nevertheless, the invocation of immunity from jurisdiction cannot be used by States to avoid their responsibility and deny to individuals any forms of reparation and compensation. The practice set forth above confirms the conclusion according to which the recognition of immunity seems fair only when other mechanisms for obtaining reparation are available. Otherwise, the withdrawal of immunity seems to be the only way to establish the consistency of the international legal system.

B. INTERNATIONAL CRIMINAL LAW

4.78 In this Section Italy will analyse the impact of the evolution of international criminal law on immunity rules. Particularly, Italy will assess whether the limitation of the functional immunity of State organs responsible for international crimes is also able to affect State immunity.

4.79 One of the main characteristics of contemporary international law is the development of international criminal law and the idea that State officials are always responsible for their international crimes even though those crimes were committed in the exercise of sovereign functions.

4.80 Since the institution of the Nuremberg Tribunal and the approval of Nuremberg principles, the official position of persons indicted for international crimes "shall not be considered as freeing them from responsibility or mitigating punishment" (Article 7 of the Charter of the International Military Tribunal). Nor can compliance with higher orders free them from their responsibility (Article 8).

4.81 Functional immunity of State organs responsible for crimes against humanity or violations of *jus cogens* norms has been considered irrelevant not only before the International Criminal Court, but also before national jurisdictions, in both criminal prosecutions[161] and civil

[161] See namely, Israel Supreme Court, *Eichmann case*, judgment of 29 May 1962, in 36 *ILR* (1968), pp. 277-342; House of Lords, *Ex parte Pinochet*, judgment of 24 March 1999, in 38 *ILM* (1999), pp. 581-663.

actions[162]. This constitutes another important context in which State immunity needs to be reappraised. In fact, 'functional immunity' and State immunity express the same international obligation to refrain from the exercise of jurisdiction over foreign States for their sovereign acts. The most common justification for 'functional immunity' is that the action in question is not attributable to the individual person but directly to the State. By consequence, it has been asserted that if the Government could claim sovereign immunity in relation to sovereign acts, it would not seem surprising that the same immunity could be claimed by its officers[163].

4.82 In the light of the close relation between functional immunity and State immunity, it seems legitimate also to refer to the practice relating to the punishment of State officials responsible for international crimes, and to infer from this the possibility of also subjecting foreign States to jurisdiction[164].

4.83 The main reason behind the development of international criminal law towards the punishment of officials responsible for international crimes, regardless of where crimes have been committed or of the nationality of the victims, is the necessity not to leave unpunished acts contrary to basic values of the community and affecting the dignity inherent in any human being. As pointed out by Special *Rapporteur* Ago in his *Fifth Report on State Responsibility*:

> "If […] we deem it necessary to point out that if State organs which have committed certain acts have been regarded as liable to personal punishment, it is primarily [because] this fact in itself unquestionably testifies to the exceptional importance attached by the international community to respect for certain obligations. It is, moreover, no accident that the obligations whose breach entails, as

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[162] The most known examples are in United States case law. See, namely, Federal Court of Appeals, 9th Circuit, *In re Estate of Ferdinando Marcos Human Rights Litigation*, in 32 *ILM* (1993), p. 107; District Court, District of Massachusetts, *Xuncax and Others v. Gramajo, Ortiz v. Gramajo*, 12 April 1995, in 104 *ILR* (1987) p. 165 *et seq.*; Court of Appeals, 2nd Circuit, *Kadic v. Karadzic, Doe I and Doe II v. Karadzic*, 13 October 1995, in 104 *ILR* (1997), p. 149 *et seq.*

[163] See, *mutatis mutandis*, the argument of Lord Chief Justice Bingham in the decision of the Queen's Bench Division, Divisional Court, 28 October 1998 in the *Pinochet case*, in 38 *ILM* (1999), pp. 70-90, at 85 para. 73. As is well known, the decision was finally overturned by the House of Lords.

[164] See A. Bianchi, "Immunity versus Human Rights: The Pinochet Case", in 10 *European Journal of International Law* (1999), p. 264. For a comment on the utilization of this argument by the Corte di Cassazione in the *Ferrini* case, see De Sena in P. De Sena, F. De Vittor, "State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case", in 16 *European Journal of International Law* (2005), p. 104.

already indicated, the personal punishment of the perpetrators correspond largely to those imposed by the rules of *jus cogens*."[165]

4.84 Additionally, such acts are not justified by the fact that they were perpetrated in accordance with domestic law. As affirmed by the British Chief Prosecutor, Sir Hartley Shawcross, the approval of the Charter of the International Military Tribunal in 1945 demonstrates that the "omnipotence of the State" is limited and that

> "the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the State tramples upon his rights in a manner which outrages the conscience of mankind"[166].

4.85 If the State's international responsibility and the international criminal responsibility of the individual are effectively complementary, it would be inconsistent to hold, on the one hand, that the individual victim of barbarian acts is entitled to the protection of the international community as a whole in relation to the punishment of the perpetrator of such acts, but that, on the other, the victims have no rights when they attempt to have satisfaction directly from the State which ordered the commission of those acts.

4.86 This inconsistency has recently also been stressed by the Canadian Supreme Court. In an obiter dictum, it refused a restrictive interpretation of the torts exception in the State Immunity Act that

> "would deprive the victims of the worst breaches of basic rights of any possibility of redress in national courts. Given the recent trends in the development of international humanitarian law enlarging this possibility in cases of international crime, as evidenced in the case before the House of Lords, *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [1999] 2

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[165] R. Ago, *Fifth report on State responsibility*, YbILC 1976, Vol. II, Part. 1, p. 33.
[166] Sir H. Shawcross, "Speeches of the Chief Prosecutors at the Close of the Case Against the Individual Defendants", London: H.M. Stationery Office, Cmd. 6964, 1946, p. 63. See A. Cassese, *International law* (Oxford 2001), p. 249.

W.L.R. 827, such a result would jeopardize at least in Canada a potentially important progress in the protection of the rights of the person"[167].

The necessity, for fundamental reasons of justice, of such a progress has been recently endorsed also by Canadian legislator. The House of Commons is in fact discussing an amendment to the State Immunity Act, significantly called 'Redress for Victims of International Crimes Act', providing that

> "a foreign state is not immune from jurisdiction of a court in any proceedings that relate to genocide, a crime against humanity, a war crime or torture"[168].

4.87 The judgments of the Italian *Corte di Cassazione* aim to grant access to justice to victims of grave breaches of humanitarian law otherwise deprived of any form of redress. By avoiding the risk of impunity, such judgments fit in perfectly with the progress just delineated.

C. ACCESS TO JUSTICE

4.88 The right of access to justice, in its double significance of right to a remedy and right to due process of law, is provided for by all recent instruments of human rights protection, and has to be considered part of customary human rights law. There is an irreducible contradiction between the acknowledgement of this right to the individual and the privilege of immunity granted to the State. In the following paragraphs Italy will evaluate the impact of this fundamental principle on the application of immunity rules in instances concerning violations of the most fundamental human rights.

4.89 Even before the emergence of the modern law of human rights the question of an individual right of access to domestic justice arose in the context of injuries to aliens. In that context "access to justice was and remains a component of the complex system of guarantees to aliens recognized under the law of State responsibility for injuries to nationals of another State,

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[167] *Schreiber v. Federal Republic of Germany and the Attorney General of Canada*, [2002] 3 S.C.R. 269, 2002 SCC 62, decision of 12 September 2002, para. 37.
[168] See Bill C 14 October 2009, 2nd session, 40th Parliament, 57-58 Elizabeth II, 2009, House of Commons of Canada.

and constitutes the indispensable condition for the operation of the rule of prior exhaustion of local remedies"[169]. In this context, access to justice is an integral part of the guarantees provided by international standards on treatment of aliens[170], and denial of justice has always been considered a violation of international law. Of course in this particular context the right of access to justice is limited to the domestic jurisdiction of the State responsible for the violation. Nevertheless, it is important to note that the right of access to justice has had some recognition since the first examples of State obligations relating to the treatment of individuals.

4.90 Concerning access to international remedies, as early as after the First World War, forms of access to independent authorities for individuals asking compensation for war damages were established under Article 304 of the Treaty of Versailles. Mixed Arbitral Tribunals were competent to adjudicate a large variety of claims lodged by citizens of the Allied and associated powers against Germany, including loss of property for exceptional war measures. The operation of Mixed Arbitral Tribunals in the post-First World War era contributed significantly to the development of the principle of direct access for individuals to international adjudication machinery[171]. It also shows the recognition, even before the Second World War, of an individual right to compensation for some war damage and demonstrates that the idea of direct participation of the individual in the compensation machinery was already accepted by the international community.

4.91 After Second World War the practice of peace treaties showed a tendency to return to State-to-State claims. Article 83 of the 1947 Paris Treaty between Italy and the Allied Powers established the constitution of conciliation commissions to adjudicate claims for damages suffered by citizens of a United Nations country. In the conciliation procedure the individual had no role to play; conversely, the claimant State had absolute discretion. It is interesting to note that the existence of an inter-State mechanism for settlement of compensation disputes did not deprive the individual of the right of access to domestic jurisdiction. The Italian *Corte di Cassazione*, in a series of decisions, asserted the competence of Italian courts to

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[169] F. Francioni, "Access to Justice in Customary International Law", in Francioni (ed.), *Access to Justice as a Human Right* (Oxford, 2007), p. 9.
[170] *Ibid.*, p. 10.
[171] F. Francioni, "Access to Justice in Customary International Law", p. 17.

adjudicate on lawsuits for compensation brought by private actors against the Italian State[172]. The court affirmed that:

> "Art. 78, para. 4, of the Peace Treaty between Italy and the Allied Powers, in providing that the Italian Government be charged with the obligation to indemnify citizens of the United Nations for loss suffered, from wartime events, following injury or damages caused to their property in Italy, gives rise, along with an international obligation of the Italian State vis-à-vis the other Contracting States, to a *direct legal relation of a binding character, between the first State and the individual citizens of the United Nations*. Such relation, complete in all its essential elements, is immediately effective in the domestic legal system […] and therefore […] it is *actionable by the same citizens before Italian courts*. To this effect no obstacle can be found in the jurisdictional competence reserved by Art. 83 of the Treaty to the Special International Conciliation Commission with regard to disputes arising from the above-mentioned Art. 78, in that such international jurisdiction can be resorted to only by the Contracting States and by no means has been intended to provide a domestic legal remedy open to the individual citizens concerned."[173]

4.92 Furthermore, Italian case law also qualified as legal rights actionable in Italian courts the claims of Italian citizens of Jewish origin[174]. Thus, relevant Italian case law concerning the responsibility of the Italian State for war damages is consistent in affirming the individual right to reparation and the individual right of access to justice. In the argument of the *Corte di Cassazione*, only the existence of an alternative international procedure directly open to individuals seems to be appropriate for excluding access to domestic remedies[175]. In fact, only under this condition can the fundamental principle of access to justice embodied in Article 24 of the Italian Constitution, which, as we will see, is today also recognized by general international law, be respected.

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[172] See Corte di Cassazione, sezioni unite, 13 November 1974, n. 3592, English translation in 2 *Italian Yearbook of International Law* (1976), p. 364.
[173] Corte di Cassazione, *Ministero del tesoro c. Soc. Mander Bros Ltd*, n. 107, 14 January 1976, in *Foro italiano* (1976-I), c. 2463. English translation with comment by F. Francioni, in 3 *Italian Yearbook of International Law* (1977), p. 347 *et seq.*
[174] See G. Sacerdoti, "L'assimilazione degli ebrei italiani ai cittadini delle Nazioni Unite nell'applicazione del Trattato di pace", in *Rivista di diritto internazionale* (1972), p. 468.
[175] On this point see esp. Corte di Cassazione, sezioni unite, 13 November 1974, n. 3592.

4.93 Since the first development of international human rights law the idea of the need to grant remedies in case of violation has also developed. As there is no right without remedy, almost all catalogues of human rights approved since the Universal Declaration of Human Rights of 1948 include provisions relating to access to justice and remedies, at least at the domestic level. Article 8 of the Universal Declaration provides "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". Article 2(3) of the International Covenant on Civil and Political Rights obliges States Parties to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". On the terms of Article 13 of the European Convention of Human Rights "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". Article 25 of the American Convention on Human Rights grants the "Right to Judicial Protection" to everyone "against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties". Article 7(1)(a) of the African Charter on Human and Peoples' Rights grants everyone the right to "an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force". Finally, the Charter of Fundamental Rights of the European Union establishes that "everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal". In all these conventions, the right to an effective remedy is strictly linked to the right to a fair trial, provided under the same articles (as is the case for the Universal Declaration, the African Charter and the European Union Charter) or under a different article of the same Convention (Article 6 in the European Convention, Article 8 in the American Convention). In fact States are generally obliged to provide effective judicial remedies to the victims of human rights violations according to the rules of due process of law.

4.94 Thus, the right of 'access to justice' is conceived in all systems of human rights protection as a necessary complement of the rights substantively granted. Accordingly, it is not

surprising that the Inter-American Court of Human Rights has described access to justice as a peremptory norm of international law in a case in which the substantive rights violated were also granted by *jus cogens* norms[176].

4.95 The right of access to justice is not limited to the right to a judge. Historically, access to justice can be regarded as part of the core contents of the principle of the rule of law, and it also incorporates the rights to due process and a fair trial. All European constitutions which provide for the right of a 'natural judge' (see Article 101 of the German Constitution, Article 24 of the Italian Constitution, Article 83 of the Austrian one, Article 13 of Chapter II of the Belgian one, Article 13 of the Constitution of Luxembourg, Article 38 of the Constitution of the Czech Republic, Article 24 of the Spanish Constitution) have to be interpreted accordingly. They all provide a right to a court established by law and in consequence a right to an independent and impartial trial[177]. Article 6(1) of the European Convention of Human Rights represents the most complete catalogue of necessary elements of a due process in civil matters.

4.96 Thus, at least the right to access to domestic justice has to be considered granted by international law and to be termed a human right. Of course, the right of access to a court and of due process of law is not absolute. Indeed it may be subject to limitations. In particular, respect for sovereign immunity has been considered such a legitimate limitation. Germany relies on the European Court of Human Rights to assert that there is no inconsistency between the human right of access to justice and State immunity[178]. Italy considers that no one of the cases cited by Germany prevents international practice from further developments in line with rule-of-law principles.

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[176] *Case of Goiburú et al. v. Paraguay***,** Merits, Reparations and Costs, judgment of September 22, 2006, Series C, No. 153, para. 131.
[177] See E. Storskrubb and J. Ziller, "Access to Justice in European Comparative Law", in F. Francioni (ed.), *Access to Justice as a Human Right* (Oxford, 2007), pp. 178-180.
[178] GM, p. 71 *et seq.*

4.97 Concerning the *Al-Adsani* case, it is to be stressed that the European Court 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 for alleged torture committed outside the forum State"[179].

Thus the Court left open the possibility of a further evolution in the immediate future. Moreover, it is worth noting that almost all international-law scholars who are members of the Court considered that a consistent interpretation of the "now vertical international legal system" would have already led to the loss of State immunity in that case; the minority judges sharply criticized the decision held by the majority, considering that

> "The majority, while accepting that the rule on the prohibition of torture is a *jus cogens* norm, refuse to draw the consequences of such acceptance"[180].

4.98 The suggestion of a possible development of international law toward the restriction of immunity in relation to State crimes is even clearer in *Grozs v. France*, where the European Court clarifies that the conclusion according to which, at the present state of international law, the recognition of State immunity is not contrary to the right of access to justice

> "does not exclude the future development of customary or treaty law."[181]

4.99 The 1999 Report of the Working Group on Jurisdictional Immunities of States and their Property drawn up by the International Law Commission has to be considered along the same line. The Working Group affirmed that the question of denial of immunity in the case of injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens* was a relevant development in international immunity law that "should not be ignored".[182] Unfortunately, further codification work, until the approval of the United Nation Convention on Jurisdictional Immunity of States and Their Properties in 2004, did not follow the Working Group's advice. Nevertheless the position of the Working Group, like the judgment

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[179] Application no. 35763/97, judgment of 21 November 2001, para. 66 (emphasis added).
[180] Joint Dissenting Opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, para. 4.
[181] Application no. 14717/06, judgment of 16 June 2009, p. 7.
[182] *Report of the Working Group on jurisdictional immunities of States and their property*, YbILC 1999, vol. II, Part Two, pp. 149-173, at 171 *et seq*.

of the European Court, demonstrates how international law in this field is subject to important developments. The jurisprudence of the Italian *Corte di Cassazione* is perfectly consistent with such developments.

4.100 A further important aspect of the European Court of Human Rights case law concerning the relationship between immunity and access to justice needs to be stressed. The European Court has, in fact, always recalled that the limitation applied to the right of access to justice must "not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired"[183]. As a consequence of this principle, the Court has sometimes evaluated the availability to the applicants of reasonable alternative means to protect their rights effectively. In *Waite and Kennedy v. Germany*, and in *Beer and Regan v. Germany*, for example, the Court considered that the jurisdictional immunity in labour litigation granted to the European Space Agency was a legitimate limitation of the right of access to justice of the employed persons because the agreement between Germany and the Agency "expressly provides for various modes of settlement of private-law disputes, in staff matters as well as in other litigation"[184]. In *McElhinney v. Ireland*, the Court noted that it would have been "open to the applicant to bring an action in Northern Ireland against the United Kingdom Secretary of State for Defence"[185]; such a possibility had already been indicated by the United Kingdom's representatives at the beginning of the proceedings before Irish domestic courts, so that it was the injured person's own choice not to seek reparation directly in the United Kingdom legal system[186].

4.101 In conclusion, access to justice is a fundamental guarantee of respect for the rule of law in modern democracies. International rules on State immunity from jurisdiction cannot but be balanced against respect for this principle. The restriction of immunity in cases of individuals bringing lawsuits to obtain redress for a grave breach of the most fundamental principles of human dignity granted by *jus cogens* rules seems to be a reasonably balanced solution.

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[183] *Al-Adsani v. United Kingdom*, Application No. 35763/97, judgment of 21 November 2001, para. 53; *Kalogeropoulou and others v. Greece and Germany*, Application No. 59021/00, decision of 12 December 2002, p. 7-8; *Waite and Kennedy v. Germany* [GC], No. 26083/94, judgment of 18 February 1999, para. 59; *McElhinney v. Ireland*, Application No. 31253/96, judgment of 21 November 2001, para. 34; *Fogarty v. United Kingdom*, Application no. 37112/97, judgment of 21 November 2001, para. 33; *Beer and Regan v. Germany*, Application No. 28934/95, judgment of 18 February 1999, para. 49.
[184] *Beer and Regan*, para. 59; *Waite and Kennedy*, para. 69.
[185] *McElhinney v. Ireland*, Application no. 31253/96, judgment of 21 November 2001, para. 39.
[186] See para. 39 and para. 11 of the judgment.

D. CONCLUSIONS

4.102 In this Section Italy has shown the evolution of international law toward the recognition of fundamental values that must be protected in any circumstance. The paramount importance attributed by the international-law community to those values is testified by their inclusion in *jus cogens* rules of international law and by the necessity to punish, in accordance with the requirements of international criminal law, State organs that have committed acts contrary to those values. Moreover, recent developments concerning the individual right of access to justice testify that the primary object of this evolution in the protection of human dignity is the fundamental rights of every individual person.

4.103 Italy considers that the interplay of the immunity principle with other rules of positive international law endorsing values of paramount importance shall be assessed taking into account the hierarchical superiority of the latter. When the victims of violations of fundamental rules of the international legal order, deprived of any other means of redress, resort to national courts, the procedural bars of State immunity cannot bring the effect of depriving such victims of the only available remedy. As Italy will demonstrate in the next Section, the implication of the immunity principle cannot be impunity.

Section IV. Immunity Cannot Mean Impunity

4.104 Section II of this Chapter has demonstrated that the law on State immunity has undergone a process of progressive redefinition of its scope of application. The evolution of the law of State immunity has involved a shift away from an absolute immunity to a restrictive immunity. Even the distinction between *acta jure imperii* and *acta jure gestionis* no longer represents the dividing line between State activities that are covered by immunity and activities that do not enjoy immunity, as under certain circumstances a State may not be entitled to immunity even for conduct which falls within the category of *acta jure imperii*.

4.105 Nowadays, the most contentious issue arising in the field of the law of State immunity is to establish whether a State is entitled to immunity in cases where the breach by that State of fundamental rules of international law is at issue. This is not an issue which has been suddenly unearthed by the Italian *Corte di Cassazione* with the *Ferrini* judgment, as

sometimes Germany appears to suggest. Nor is it a subject which, until the *Ferrini* judgment, was merely confined to a scholarly debate. In fact, there are signs which show that, independently of the *Ferrini* judgment, this issue has already acquired and is increasingly destined to acquire great significance. This is clearly shown by the fact that already in 1999 the ILC's Working Group on Jurisdictional Immunities of States and their Properties noted that "there has been an additional recent development in State practice and legislation on the subject of immunities of States since the adoption of the draft articles":

> "This development concerns the argument *increasingly* put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*, particularly the prohibition of torture"[187].

4.106 The fundamental developments in international law examined in Section III have set a process into motion that inevitably also affects the law of State immunity. These developments compel reconsideration of the applicability of the rule of immunity at least in those cases in which the recognition of immunity would lead to a result which is irreconcilable with the basic principles underlying these developments. The end results of such a process are to a certain extent still surrounded by uncertainties. In particular, it is not yet clear whether it would lead to a new rule denying in general terms the immunity of the State in respect to violations of fundamental norms of international law. However, Italy submits that certain conclusions which affect the applicability of the rule of State immunity and are relevant to the settlement of the present case may already be deduced from the existing general principles.

4.107 Before addressing this point, it may here be appropriate to mark the difference between the approach followed by Germany as regards the point of law at issue in the present case and the position defended by Italy. Germany argues that Italy committed a violation of Germany's jurisdictional immunity since there is no rule of general international law permitting the removal of immunity in cases involving claims for reparation against a State responsible for the violation of fundamental norms of international law. Germany's main argument in this

[187] YbILC 1999, Vol. II, Part Two, p. 172, para. 3 (emphasis added).

respect is that the existence of such an exception to immunity is not supported by general practice or the *opinio juris*[188].

4.108 Germany's approach is misleading. The question at issue in the present case is not whether there is a widespread and consistent practice, supported by the *opinio juris*, pointing to the existence of an international customary rule permitting in general terms the denial of immunity in cases involving gross violations of international humanitarian law or human rights law. Italy is not asking the Court to anticipate events and to declare that a rule to that effect is already part of international customary law. In other words, Italy is not asking the Court to embark on an exercise *de lege ferenda*. Indeed, there is no need in the present case to rely on such a general exception. The conduct of Italian judges may be justified by reference to an exception to immunity which is far more limited in scope but whose existence may clearly be inferred from the fundamental principles of contemporary international law described above in Section III.

4.109 When fundamental values of general interest for the international community are at issue, contemporary international law does not tolerate the use of immunity as a tool for exonerating a State from bearing the consequences of its unlawful acts. Jurisdictional immunity is a procedural rule that cannot exempt the State from its responsibility towards other States and towards individuals who personally suffered as a consequence of a violation of international humanitarian law and human rights committed by that State. In cases of violation of fundamental rules, the developments in contemporary international law show a shift of the balance between sovereign immunity and accountability in the direction of greater accountability.

4.110 The conclusion to be drawn is not that immunity must always be denied in cases involving claims for reparation against a State for grave violations of fundamental rules. Italy sees no inconsistency between State immunity and the protection of fundamental values of human dignity whenever other mechanisms are available to the victims seeking reparation. The problem arises when, as in the present case, other mechanisms are not available, either because negotiations between the States concerned did not lead to a settlement capable of ensuring a form of reparation to the victims of the grave violations of fundamental rules, or because the

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[188] GM, para. 55.

authorities and judges of the responsible State refuse to address the claims for reparation. When mechanisms for redressing grave violations of fundamental rules are not put in place by the State which is responsible for such violations, then resort by the individual victims to the judicial authorities of the forum State constitutes in fact the ultimate and sole avenue for obtaining redress. In such a situation, the State which has committed grave violations of fundamental rules cannot be regarded as being entitled to invoke immunity for its wrongful acts, even if these acts are to be qualified as *acta jure imperii*. If granted, immunity would amount to an absolute denial of justice for the victims and to impunity for the State.

4.111 The international legal order cannot, on the one hand, establish that there are some fundamental substantive rules, which cannot be derogated from and whose violation cannot be condoned, and on the other grant immunity to the author of violations of these fundamental rules in situations in which it is clear that immunity substantially amounts to impunity. The paramount importance of the primary rules has as a necessary corollary that in case of breach of these rules the author of the breach must be held accountable and cannot avail itself of rights granted to it by other rules of international law in order to avoid the legal consequences stemming from its unlawful conduct.

4.112 In its judgment in *Arrest Warrant of 11 April 2000*, this Court observed:

> "The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. […] Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal prosecution."[189]

4.113 The Court's statement mainly intended to convey the idea that in principle immunity is reconcilable with the need to ensure that the author of a wrongful act be held accountable for his conduct. Yet a further message may be read off the Court's statement, namely that immunity cannot be used as a tool for exonerating the author of a wrongful act from bearing the consequences of his faults. Italy submits that the message underlying the Court's statement is of

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[189] *I.C.J. Reports 2002*, para. 60.

great legal significance particularly in cases involving claims for reparation against a State responsible for violations of fundamental rules of international law. It implies that a State is not entitled to invoke immunity if granting immunity would substantially amount to exonerating the State from bearing the consequences of its unlawful acts.

4.114 It is surprising that Germany itself, when defining the function of the rule of State immunity in contemporary international law, appears to reach the same conclusion. According to Germany:

> "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."[190]

4.115 Italy fully subscribes to this statement. At the same time, however, Italy asks Germany to accept the inescapable conclusion inherent in this statement: if immunity does not serve the purpose of protecting a State against the judges of another State but rather that of entrusting "other mechanisms than the judicial authorities of the forum State with the regulation of reparation claims"; then, when all other mechanisms put in place by the responsible State have proved to be unable to provide any form of redress to individuals claiming reparation, immunity loses its primary function and the judicial authorities of the forum State can be entrusted with the regulation of the reparation claims.

4.116 Remarkably, in order to support its claim for jurisdictional immunity before Italian courts, Germany repeatedly resorts to the argument that "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"[191]. In principle, this argument is unobjectionable. When damages can be repaired in other ways, including through mechanisms established on the basis of specific conventional understandings, there is no reason for derogating from the principle of jurisdictional immunity of States. The fact is, however, that in the present case the measures

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[190] GM, para. 55 (emphasis added).
[191] GM, para. 32. See also *ibid*., para. 59.

adopted so far by Germany, both under the relevant agreements and as unilateral acts, have proved completely insufficient. They did not cover several categories of victims, who were in fact denied any legal avenues for obtaining reparation. In its Memorial Germany has acknowledged this situation and sought to justify it by referring to the waiver clauses contained in the 1947 Peace Treaty and the 1961 Agreements between Italy and Germany. As will be shown in Chapter V, Germany's reliance on the waiver clauses is completely mistaken. For the purposes of the present Chapter, it suffices to note that Germany cannot base its claim for jurisdictional immunity on the argument that the damage suffered by Italian victims could be repaired in other ways than by resorting to Italian judges. In fact, no other ways were offered to Italian victims. Italy submits that, under these particular circumstances, Italian judges were entitled to deny Germany immunity from jurisdiction.

Section V. Conclusions

4.117 Italy acknowledges that jurisdictional immunity of States is a fundamental rule of the international legal order. As has been shown in this Chapter, this rule has evolved over time in the direction of a progressive restriction of the scope of State activities covered by immunity. Moreover, significant developments in international law – such as, in particular, the recognition of the existence of international rules having a *jus cogens* character, the formation of a body of rules criminalizing the conduct of individuals responsible for specified international crimes and the increasing acceptance of the existence of a right of access to courts by individuals – are inevitably having an impact on the rule of immunity. The most notable consequence in this respect is the fact that under certain circumstances the recognition of immunity may be precluded by the need to avoid situations which appear to be irreconcilable with the basic principles underlying these developments. In particular, Italy has shown that, in cases involving claims for reparation against a State responsible for grave violations of international humanitarian law and human rights law, immunity must be denied when, if granted, it would amount to an absolute denial of justice for the victims and to impunity for the State. The importance of this exception to immunity for the purposes of the present case will be revealed in the chapters that immediately follow. In Chapter V Italy will address the issue of reparation owed by Germany to Italian victims of its grave breaches of international humanitarian law; it will demonstrate that no alternative mechanisms for the settlement of the claims for reparation

by Italian victims have been put in place by Germany in the more than 60 years since those crimes were committed. In Chapter VI Italy will examine the facts bearing on Italy's compliance with the legal obligation described in this Chapter; it will demonstrate why the Court must reject Germany's argument that Italy committed violations of its legal obligation to grant immunity to Germany.

CHAPTER V

REPARATION

Section I. Introduction

5.1 It is an undisputed principle of law that all unlawful acts causing damage must be redressed. This principle has been restated several times by a variety of authorities under both national and international law, and courts of justice have always had a crucial role in ensuring respect for this pillar of the rule of law. A cursory look at municipal systems highlights the fundamental nature of this principle[192]. The basic principle goes back to Roman Law (see e.g. the *lex aquilia* of 287-6 B.C.) and reaches our days. It may suffice to look at Article 2043 of the Italian Civil Code[193], Article 1382 of the French Civil Code[194], Section 823 of the German Civil Code[195]. In international law the principle equally applies. The draft articles on State responsibility provide that "every internationally wrongful act of a State entails the international responsibility of that State" (Article 1) and that "[the] responsible State is under an obligation to

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[192] See C. Tomuschat, "La protection internationale des victimes", in 18 *Revue universelle des droits de l'homme* (2006), pp. 1-11, at 3.

[193] Article 2043 *Risarcimento per fatto illecito* – "Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno". (Our translation: *Reparation for tort (non-contractual) liability* - "Any act committed either with intent or with negligence causing an unjustified injury to another person obliges the person who has committed the act to compensate damage".

[194] Article 1382 (Créé par Loi 1804-02-09 promulguée le 19 février 1804) - "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer".

[195] § 823 BGB, *Schadensersatzpflicht* "(1) Wer vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatz des daraus entstehenden Schadens verpflichtet. (2) Die gleiche Verpflichtung trifft denjenigen, welcher gegen ein den Schutz eines anderen bezweckendes Gesetz verstößt. Ist nach dem Inhalt des Gesetzes ein Verstoß gegen dieses auch ohne Verschulden möglich, so tritt die Ersatzpflicht nur im Falle des Verschuldens ein." (Section 823, *Liability in damage* "(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this. (2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault". *Übersetzung des Bürgerlichen Gesetzbuches durch ein Übersetzer-Team des Langenscheidt Übersetzungsservice*. Translation provided by the Langenscheidt Translation Service. © 2009 juris GmbH, Saarbrücken).

make *full reparation* for the injury caused by the internationally wrongful act' (Article 31. Emphasis added).

5.2 In this context, reference is often also made to the well-known *Chorzów Factory* case (1928), where the PCIJ clarified that

> "The essential principle contained in the actual notion of an *illegal act* – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that *reparation* must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[196]

There is no need to recall the numerous instances in which this Court as the principal organ of world justice has clearly restated this principle. And this principle applies also in time of war and in particular regarding territories under foreign occupation; in this regard this Court appears to have been very clear in recognizing, under the specific circumstances of military occupation, an explicit obligation of States vis-à-vis individual victims of serious violations of international law. For example, in the *Wall Advisory Opinion* the Court recognized the obligations of Israel "to compensate […] all natural or legal persons having suffered any form of material damage as a result of [the unlawful act]"[197].

And it might be worth emphasizing that the violations underlying the present dispute were committed by the Third Reich against Italian victims while Germany was effectively acting as an occupying power over large parts of the territory of Italy[198].

5.3 In the present case, there are several intertwined issues that justify a slightly deeper examination of the matter, which revolves around the issue of understanding how State responsibility operates in the framework of IHL. Given that the specific purpose of IHL is to provide persons with enhanced protection during armed conflicts it would be hard to consider that the régime of responsibility be less demanding than under general international law. On the contrary, the reparation obligations are imposed on States to further strengthen the probability of

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[196] *P.C.I.J.*, Series A, No. 17, p. 47 (emphasis added).
[197] *I.C.J. Reports 2004*, para. 153.
[198] This is admitted by Germany. See GM, para. 13.

compliance with the primary rules. Allowing States to set aside reparation obligations would have the undesirable effect of lowering the guarantees of implementation.

5.4 The relevant norms, which are enshrined both in treaties ratified by the Parties to this dispute and in customary international law, will be discussed below.

5.5 This Chapter will establish three key points underlying the present dispute: (a) Germany has *obligations of reparation* arising out of the serious violations of IHL committed by the Third Reich against Italian victims as recognized, confirmed and renewed by Germany itself through the 1961 Agreements; (b) the *measures adopted so far* by Germany (under both the relevant agreements and unilateral acts) have proved *insufficient* for several reasons (and above all for the fact that they did *not* cover *all victims* and did *not provide effective reparations*); hence, (c) Germany is still under an *ongoing obligation*, clearly recognized by the 1961 Agreements, to make reparations for the unlawful acts committed by the Third Reich, which have not yet been repaired.

These three elements must be taken into account since they are essential in trying to clarify and understand the factual and legal background against which the decisions of Italian judges relating to immunity were adopted (as further explained in Chapter VI below). These elements are also necessary to set the real substance of the present dispute and the third one is clearly at the very basis of Italy's counter-claim.

5.6 Before moving more specifically to these three key points, however, it is appropriate to sketch a *general outline of the reparation régime* for serious violations of IHL, emphasize its *non-derogable* character, and highlight the prevailing trends under international law to strengthen the rights of individuals to obtain reparation for serious violations of human rights and of IHL. In particular, since these bodies of law have the specific purpose of ensuring the protection of persons, the relevant reparation régimes appear to be inspired by the common goal of ensuring the highest standards of protection for individual rights.

Section II. The General Principle of Effective Reparation for Serious Violations of IHL

A. The Reparation Régime for Serious Violations of IHL

5.7 There are two main points which must be dealt with. First, the foundation and scope, as well as the object and purpose, of the principle that States must be liable to pay compensation for violations of IHL committed by their armed forces. Secondly, it is important to understand in which way(s) States can discharge their obligations to make reparations for serious violations of IHL, and whether or not there are limits to their discretion in the implementation of these obligations. And this is indeed the most delicate aspect of the present dispute, on which Italy and Germany might have different views.

5.8 A preliminary clarification is apposite: here reference is not made to the entire, and largely undefined, set of reparations owed at the end of a conflict by a State for damage and suffering caused by that State during the war. The focus must be only on the much more limited régime applicable to serious violations of IHL (i.e. war crimes) attributable to the belligerents, which does not necessarily equate to the broader régime of war reparations.

5.9 The reparation régime for serious violations of IHL finds its historical roots in Article 3 of the 1907 Hague Convention IV, which admittedly was broader in scope (covering all violations in a more undefined way) but captured the need for an *explicit provision on reparation* to avoid compensation claims being simply wiped out by post-conflict agreements, as had regularly occurred in the nineteenth century[199].

According to this principle "[a] belligerent party which violates the provisions of the […] Regulations [annexed to the Convention] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces"[200].

No such provision existed in prior treaties; neither the 1864 and 1906 Geneva Conventions nor the 1868 Saint Petersburg Declaration nor the 1899 Hague Conventions

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[199] *ICRC Commentary on the Additional Protocols of 1977 to the Geneva Conventions of 1949*, para. 3646, p. 1053.
[200] Article 3 HC IV 1907.

contained rules on this point[201]. These instruments did not specifically provide for any obligation to make reparations for damage caused during the war because the approach taken was that States were free to handle the matter through bilateral or multilateral treaties, concluded at the end of the hostilities. The consequence was generally that reparations were made only by the vanquished States in favour of victorious Powers[202]. Against this background, in 1907 States thus decided, on the basis of a German proposal, to specifically impose a general obligation incumbent on *all* Parties to a conflict to make reparations[203]. The adoption of such a provision is a clear indication that there was the conviction that *specific regulation* of the obligation of reparation was necessary, in order to avoid unfair post-war solutions.

5.10 Hence, Article 3 Hague Convention IV, on the one hand, amounts to an application to IHL of the broader principle of State responsibility under general international law. However, on the other hand, it is the first provision laying down the essential elements for a specific reparation régime for violations of IHL, which implies that the provision aims at something more than merely restating the general principle of State responsibility for unlawful acts. In this regard, Article 3 certainly aims at triggering a broader set of consequences for States Parties, including at least establishing the principle that reparation must take the form of compensation and must be effective (i.e. must reach the individual victims and be satisfactory).

5.11 The obligation to make reparations is not imposed in the exclusive interest of the States concerned; it is rather conceived as a form of additional guarantee to ensure compliance with the provisions of the Convention and ultimately it should protect the interests of the victims of the violations. Arguably, the intent of such a provision could not be merely to restate the general principle of State responsibility for unlawful acts. The drafters obviously sought to go further through a set of implicit corollaries that are to be derived by the interpreter from the logic of the system, which is premised on the assumption that the protection afforded by IHL must apply beyond States' interests.

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[201] See A. Zemmali, "Reparations for victims of violations of international humanitarian law", in *Netherlands Institute of Human Rights (ed.) SIM Special no. 12* (1992), pp. 61-73, online at http://www.uu.nl/NL/faculteiten/rebo/organisatie/departementen/departementrechtsgeleerdheid/organisatie/institutenencentra/studieeninformatiecentrummensenrechten/publicaties/simspecials/12/Documents/12-07.pdf, at 65.
[202] *ICRC Commentary* at pp. 1053-55.
[203] Zemmali, *supra* note 201, p. 65.

Therefore, even though Article 3 may seem to merely restate the principle that an unlawful act entails State responsibility, on a closer reading it clearly appears that it does much more than that. In the light of the context and of the subsequent practice and progressive clarification of the rules flowing from this basic principle two main further consequences can be identified: first, *reparation claims cannot be merely waived* at the end of the conflict; secondly, States, although they can enter into agreements to regulate the forms, means and methods of reparation, must ensure *effective reparation to the victims*.

5.12 This implied meaning of the provision of Article 3 has been confirmed by the evolution of the relevant normative framework, which still considers the text of this provision as the fundamental bedrock of the entire reparation régime for serious violations of IHL.

As is well known, today the same provision is reproduced *verbatim* in Article 91 of the 1977 First Protocol to the 1949 Geneva Conventions, and represents (as it did already at the time of its adoption) customary international law. As stated in the ICRC Commentary to the First Protocol "Article 91 literally reproduces Article 3 of the Hague Convention Concerning the Laws and Customs of War on Land of 1907, and does not abrogate it in any way, which means that *it continues to be customary law for all nations*."[204]

The ICRC Commentary also appropriately specifies that

> "[such] a provision […] corresponded to the general principles of law on international responsibility. Moreover, any recourse by wronged persons to the law was considered illusory if this could not be exercised against the government of the perpetrators of these violations, through their own government."[205]

The *primary purpose* of this provision was to impose some *limitations* on the discretion of States *to make post-war agreements* to settle compensation claims. The Commentary does not at all exclude that the principle had broader implications and the subsequent developments of the law spelled out what these implications were (i.e. the reparation system ought to be non-derogable and compensation had to be effective). The idea already

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[204] *ICRC Commentary*, para. 3645, at p. 1053 (emphasis added).
[205] *Ibidem*.

implicit in Article 3 was that violations of IHL had to engage an obligation of effective reparation towards individual victims.

5.13 It is precisely against this background that the Diplomatic Conference of 1949 revisiting IHL adopted an article common to the four Geneva Conventions (Convention I, Article 51 ; Convention II, Article 52; Convention III, Article 131; Convention IV, Article 148) entitled "Responsibilities of the Contracting Parties", which reads as follows:

> "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article."

This provision, which again corresponded to customary law, seeks to

> "prevent the vanquished from being compelled in an armistice agreement or peace treaty to renounce all compensation due for breaches committed by persons in the service of the victor."[206]

The underlying idea, however, preexists the Geneva Conventions, which merely restate what was already implicit in the system.

These provisions (Articles 51, 52, 131 and 148, 1949 Geneva Conventions) clearly refer to the liability of States for the breaches of IHL for which individuals are to be held criminally responsible (i.e. war crimes). It naturally covers reparations and it has the specific purpose of avoiding the paradoxical consequence that individuals be punished while the State in whose behalf they have acted be absolved of all responsibility [e.g. this would be the case with German cases pending before Italian criminal courts for the massacres of Civitella, Marzabotto, Sant'Anna di Stazzema, in which the plaintiffs participate in the proceedings as *parties civiles* (and hence with the specific purpose of seeking reparations) and have, following the logic inherent in these provisions, filed claims against not only the defendants but also Germany].

5.14 The Geneva Conventions provisions, although new in their drafting, are not at all new in their content. They simply represent a clarification and explanation of the consequences

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[206] *ICRC Commentary*, para. 3649, at p. 1054.

already underlying Article 3 of Hague Convention IV. As clearly stated in the ICRC Commentary to the Additional Protocols of 1977 referring back to the provisions contained in Articles 51, 52, 131 and 148, Geneva Conventions

> "*this is clearly the same principle* as that contained in the present Article 91 [1977 First Protocol] and in Article 3 of Hague Convention IV of 1907."[207]

The arguments set out above do not, of course, mean that States cannot enter into agreements to organize and appropriately proceduralize the actual phase of reparations. This, however, can only be done keeping in mind the foundation and scope of the provisions on reparations, which is ultimately to ensure effective reparation to the victims of the violations, and without frustrating their ultimate object and purpose.

B. The Non-Derogable Character of the Obligation of Reparation in War Crimes Cases

5.15 To shed a clearer light on the reparation régime for war crimes and to understand better the logic of the system it is thus apposite to emphasize the non-derogable nature of the reparation régime for serious IHL violations on the basis of Articles 6 and 7 Geneva Convention I 1949, as well as the above-mentioned Articles 51, 52, 131, and 148 Geneva Conventions.

5.16 The 1949 Geneva Conventions contain provisions (Article 6 Geneva Convention I, Article 6 Geneva Convention II, Article 6 Geneva Convention III, and Article 7 Geneva Convention IV) establishing that

> "No special agreement shall adversely affect the situation of [protected persons], as defined by the present Convention, nor restrict the rights which it confers upon them."

And there are also other provisions (Article 7 Geneva Conventions I, II and III, and Article 8 Geneva Convention IV) further specifying that even the protected persons themselves

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[207] *ICRC Commentary*, para. 3649, at p. 1054.

"may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention."

On the basis of these provisions it clearly appears that neither the State nor the individual concerned are allowed to agree to any derogation lowering the standards of protection set out in the Conventions[208].

5.17 Moreover, as mentioned above, under the grave breaches régime the provisions are also very clear: "no High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article".

These provisions reflect the assumption underlying the whole body of IHL that States must not have at their disposal the standards of protection for individuals in their hands. States cannot trade off the rights of those protected by the provisions of IHL by entering into derogatory agreements. But there is even more; in some instances not even the individuals concerned are entitled to waive their rights. In other words no derogation *in peius* is allowed to the protection régime.

5.18 Hence, there is broad agreement on the fact that already during the Second World War the law concerning protected persons, and in particular prisoners of war, represented a sort of *jus cogens* which was largely not at the disposal of to negotiations between States[209]. The provisions of Article 6 simply clarified and explicitly restated a principle that was already implied in the previous law.

5.19 The lesson one may draw from these provisions is that of course States are entitled to conclude treaties on a variety of issues; however, as held by Professor Tomuschat in his expert opinion on the Italian Military Internees,

"[such] agreements may not however in any way affect the protected status of the prisoner of war. The home country too is barred from sacrificing the rights of

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[208] GM, para. 85 is inaccurate in two respects: first because it denies that non-derogable regimes existed prior to the recognition of the notion of *jus cogens* in the Vienna Convention; secondly, because it takes for granted that new law may never apply.
[209] ANNEX 8, p. 28 (English translation).

its own soldiers who are in foreign custody, in order, say, to secure advantages in some other area. Of course, at the level of international law the States continue to be the competent legislators. But they are not entitled to interfere with rights that have after all been created on the basis of treaties put in force by them to protect prisoners of war.

It is clear that this provision goes back to the negative experiences of the Second World War, in particular, to the agreements that the French Vichy government concluded with the German Reich, and also the arrangement between Germany and Fascist Italy. Nonetheless, the opinion in the literature is to the effect that such agreements were unlawful even in the light of the 1929 Convention. Art. 3 of the 1929 Convention did not explicitly regulate the matter, but Art. 83(2) explicitly refers to the principle of favourableness ["*Guenstigkeitsprinzip*"]. It is to be concluded from this that States Parties were entitled only to conclude such agreements as provided for yet more favourable treatment of prisoners of war."[210]

This clearly means that the *minimum standard* set by IHL provisions on the treatment of prisoners of war cannot be lessened neither by mutual agreement between States nor, *a fortiori*, unilaterally. Hence this standard should be considered as being non-derogable by the Parties.

5.20 It is important to observe that the ICRC too in its commentary on the GC explains that

"Nor does Article 7 express an entirely novel principle as compared with the earlier Geneva Conventions. As in the case of the provision on special agreements, it embodies the *reasonable interpretation implicit in those Conventions*. States which are party to them are required to apply them when certain objective conditions exist; but there is nothing in the texts which would justify those States in taking refuge behind the will of the "prisoners of war" to withhold application either in entirety or in part. The authors of those solemn instruments were prompted by a keen desire to provide war victims with complete protection. Had they wanted to make

[210] ANNEX 8, p. 28 (English translation).

concessions to the wishes of those victims, they would not have failed to provide safeguards and forms of procedure permitting those wishes to be expressed freely, knowing as they did how great the possibilities of misrepresentation were in wartime. They did not do so, however."[211]

It is therefore clear that the spirit of the 1949 provisions is the same one as animated previous undertakings, and this should inspire the interpretation of the previous Hague and Geneva law applicable to the cases underlying the present dispute. This perspective should lead to a reading which implies that it is not for States to decide whether or not protection should be accorded to 'protected persons', nor should States determine whether or not compensation should be paid to protected persons who are victims of serious violations of IHL. States are given discretion *only as far as the methods and procedures for implementation* of these obligations are concerned. The obligations as such are not negotiable and they must eventually be fulfilled[212].

5.21 The fact that broadly speaking IHL is not based on the principle of reciprocity testifies to the same logic. IHL does not pose rights and obligations in the interests of the Contracting Parties, but to protect persons; thus it logically follows that it cannot allow the Contracting Parties to engage in negotiations to lessen the standard of protection enshrined in the relevant provisions or to waive such protection altogether. This is more than a fundamental principle of IHL, it is its very *raison d'être*. To allow States to simply waive the reparation rights of individual victims of serious IHL violations would amount to depriving the primary rules of all their strength.

What would be the preventive effect of those provisions establishing the standards of protection, the obligation of reparation and the obligation of punishment of serious violations of IHL if, after the conflict, the Parties were entitled to enter into agreements to condone the violations and wipe out the consequences through inter-state agreements?

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[211] *ICRC Commentary on the Four 1949 Geneva Conventions*, p. 90 (emphasis added).

[212] In a totally different area, relating to EC Directives (which in a way bear some similarities with these obligations), the European Court of Justice has developed an interpretation whereby States have a primary duty to implement the Directives and possess broad discretion as to the way in which implementation is to be carried out. However, if they fail to implement the Directives national judges will be entitled to draw direct effects from the Directive, or – in case the provisions of the Directive are not self-executing – States will have to pay compensation.

C. The Need for 'Effective' Reparation and the Ways in which States Fulfil their Reparation Obligations

5.22 Finally, there is also another general principle of international law which entails that reparations must eventually reach the individual victims. This is the general principle of 'effectiveness'.

The effect of the provisions on reparation examined above may not be circumvented by simply paying 'lip service' to the rights of victims in Peace Treaties or in other lump-sum arrangements. It is necessary – if the rule is to be respected in substance – that reparations ultimately be made to the final beneficiaries.

This is a burden which rests both on the State which has provoked the violations and on the State of nationality of the victims. The former cannot simply claim it has fulfilled its obligations by negotiating with the latter forms of collective and yet undefined reparation. To fulfil its obligations under international law it must conclude agreements which possess all the necessary requirements for ensuring bona fide final reparation to individual victims. Any other solution would frustrate the object and purpose of the provisions on reparations for serious violations of IHL.

5.23 Now, of course, there is little or no doubt that the issue of reparations may be settled and handled by States on the basis of treaties. However, what is really important is to understand whether States possess unfettered discretion in regulating these matters through bilateral or multilateral agreements. In this respect, it appears that there are two requirements that must apply: (a) the *régime* of reparations under IHL appears to be considered non-derogable, thus States could in no case be entitled to set aside reparation rights by merely renouncing them in the name of their nationals; (b) secondly, the rights of individuals provided for by IHL provisions imply that any inter-state arrangement not only cannot lead to completely setting aside individual reparations, but must lead to *effective* reparation, which – at least broadly speaking – implies that the demand of individual victims for justice must somehow eventually be satisfied.

5.24 As mentioned above, the underlying idea behind this obligation is that individuals must eventually be compensated. The mechanisms are at the disposal of States, which can

negotiate as they prefer the means and methods for reparation, but the result is not derogable. From the moment in which there are individual victims of serious violations of IHL who have not been adequately compensated, the responsible State is not relieved from its obligations under the relevant conventions and under international customary law.

5.25 The final relevant issue is, thus, to discuss how on the conclusion of a peace treaty, the Parties can deal with the problems relating to compensation for violations occurred during the war, taking into account that not all of them can be considered serious violations of IHL.

5.26 Broadly speaking, parties can decide most issues relating to war damage as they see fit, including by waiving most claims. However, as far as serious violations of IHL are concerned the situation would seem radically different. In this context Parties are bound

> "[not] to forego the prosecution of war criminals, nor to deny compensation to which the victims of violations of the rules of the Conventions and the Protocol are entitled."[213]

Therefore, States (both the State of the victims and the State which is responsible for the violations) when negotiating such agreements must ensure that (a) all categories of (if not all individual) victims of war crimes are covered; (b) there be sufficient financial means to make the reparation more than symbolic; (c) there be appropriate mechanisms for ensuring that the reparation is made to the victims. Thus, it would not be sufficient for a State just to say that the counterpart agreed to waive all claims in exchange for a sum of money. There must be certainty that the sum of money is sufficient and appropriate; there must be criteria for the identification of victims and for its distribution to victims.

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[213] See *ICRC Commentary to the Additional Protocols of 1977 to the Four Geneva Conventions of 1949*, para. 3651, p. 1055.

Section III. Developments in International Criminal Law, Human Rights Law and Other Relevant Principles Concerning Reparation to Victims of International Crimes

5.27 In order to better clarify the legal context in which the Italian judges operated and to enable the Court to appreciate the reasons why Italian judges have acted in keeping with international law, it is apposite to take a look at more recent developments of international law concerning the rights of victims of international crimes to obtain compensation.

5.28 This brief survey of post Second World War developments concerning the rights of victims in the field of international criminal law and human rights law helps to set the background against which the decisions of Italian judges are to be evaluated. There has been a consistent trend starting with the end of the Second World War in reaffirming that the suffering of victims of serious IHL and human rights violations must receive reparation through effective measures.

5.29 The arguments set out above concerning the régime of reparations for serious violations of IHL are confirmed by the whole process of criminalization of those violations amounting to war crimes, as well as of the violation of fundamental human rights, amounting to crimes against humanity and genocide.

5.30 The consistent trend towards the criminalization of serious violations of international law should not be seen in isolation, merely as a move to punish individuals who have committed war crimes, crimes against humanity or genocide, and leave the responsibilities of States aside. Criminalization is not a tool for singling out individual responsibility and setting aside the responsibility of States. This would be a mistaken interpretation of the provisions on international crimes. The responsibility of both the individual and the State are simultaneously engaged by serious IHL violations. As this learned Court observed "[the] duality of responsibility continues to be a constant feature of international law"[214]; international crimes attract both individual criminal responsibility and State responsibility[215]. Criminalization is just

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[214] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, para. 173, see more in general paras. 172-174.

[215] As recalled by the ILC in its *Commentary on the Drafts Articles on Responsibility of States for Internationally Wrongful Acts*, Commentary on Article 58, para. 3, "the State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State official who carried it out", YbILC

an additional tool to strengthen the chances of respect for IHL provisions. And, as seen above, an equally strong and non-derogable reparation régime is also a guarantee that the rules will be respected.

5.31 The fact that there are no statutes of limitations for individual criminal responsibility is the actual counterpart of the prohibition on derogating from the reparation régime. As there is no possibility to cancel the responsibilities of individual perpetrators of international crimes, in the same way there is no option for wiping out State responsibility for these crimes, not even through negotiations with the State of nationality of the victims.

5.32 That there should be no temptation to allow States to free themselves from these obligations is testified by the evolution of the mechanisms to impose criminal responsibility on individuals. Originally, the first and priority goal of criminalization rules was to impose on States the obligation to adopt national provisions criminalizing the violations and establishing jurisdiction over them. States were (and still are) under an obligation to prosecute and punish the offenders; the implementation of these obligations was left to States. However, the obligation was incumbent not only on the State of nationality of the offender, but also on the State of the territory in which the crimes were committed and in some instances on all States (e.g. think of the grave breaches régime). Subsequently, a variety of international institutions were created to fill the impunity gap. This was mainly a consequence of the widespread unwillingness or inability of States to carry out proceedings at national level, and the relative lack of prosecutions.

5.33 Hence criminalization, before becoming a reality enforced by international institutions (only in the 1990s), was essentially the object of obligations imposed on States to try and punish at national level the alleged perpetrators of international crimes. In other words, States had parallel obligations to prosecute and punish individual offenders and to provide reparation to victims. Both obligations have the essential purpose of *ensuring that the primary norms are respected*. They are means of guaranteeing compliance with the fundamental rules of IHL.

2001, Vol. II, Part Two, pp. 142-143. No need to mention that only in very few of the cases underlying the present dispute Germany did bring to justice the individual perpetrators.

5.34 The principle that egregious IHL violations are to be criminalized entails two interlocking corollaries: the obligation on States to prevent and punish such violations and the obligation to make appropriate effective reparations. Both aspects of the régime are intertwined and must be considered as having a non-derogable nature, otherwise these tools would lose any preventive or deterrent effect.

5.35 Against this background it is clear that reparation obligations have not been set aside by the criminalization of serious violations of IHL. The fact that a number of Third Reich officials have been prosecuted and punished for war crimes and crimes against humanity does not per se absolve Germany of its reparation obligations. As has been the case with prosecution and punishment of war criminals, if Germany does not carry out the trials by herself it will be for other States to enforce those obligations.

5.36 Furthermore, in international criminal law there have been major developments concerning the status of victims with the adoption of the International Criminal Court Statute and the establishment of the Trust Fund for Victims. These are further testimonies that the international community has no doubts in recognizing that the claims of victims of serious international crimes cannot be set aside. The criticisms of the UN *ad hoc* Tribunals, which did not allow for victim participation, led to the recognition of an actionable right of compensation for victims. The International Criminal Court Statute itself did not create the right of victims to compensation; it merely recognized that victims had a right to make reparation claims before the Court. It gave victims a procedural avenue for the exercise of their preexisting rights. This explains why the provisions on victim reparations before the International Criminal Court apply irrespective of whether the State of nationality of the offender, the victim or the territory where the crimes were committed is a party to the Statute.

5.37 The trend towards the progressive strengthening of reparation régimes through the recognition of specific rights for individuals to go before courts to obtain reparations is evidenced by other post Second World War developments.

5.38 Under human rights law and the responsibility régimes associated with it, there has been a consistent endeavour to grant individuals enforceable rights of compensation. In the European Convention system as well as in the Inter-American system (and prospectively in the African system), individuals have been granted a right to obtain compensation from the relevant

regional courts against States violating the provisions of the Conventions, without any immunity protection being available.

5.39 The same holds true, although in a radically different context, in the EU system, in which natural or legal persons can obtain reparation before national courts for failure of Member States to comply with obligations incumbent on them on the basis of EU law.

5.40 Finally, beside developments in regional human rights conventions and in international criminal law, there have been various soft-law instruments of universal character, which confirm an approach to victim rights which increases the demand for a direct recognition of the obligations of States towards individual victims.

5.41 The UN General Assembly has adopted two important declarations on the rights of victims. The first Declaration, of 1985, essentially deals with the victims of crimes under domestic law and of abuses of power committed by public authorities even if these abuses are not criminalized under national law. This Declaration represents an attempt to build upon the protection of individual rights vis-à-vis State authorities along the lines of traditional human rights law. At the same time, the Declaration aims at ensuring that States operate to grant a *right to justice and reparation* to victims of serious crimes irrespective of the involvement of public authorities in such crimes. Specifically, under the 1985 Declaration victims are "entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered"[216].

5.42 The second UN General Assembly declaration was adopted twenty years later, in 2005, and is entitled "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law". The 2005 Declaration goes a step further in strengthening the protection of victims' rights at the international level. The declaration explicitly affirms that its binding legal value essentially rests on pre-existing legal obligations of States. To this end, the declaration specifically recalls all international human rights and humanitarian law instruments that grant rights to victims of violations (Article 8 UDHR, Article 2 ICCPR, Article 6 International Convention Against Racial Discrimination, Article 14 CAT, Article 39 Convention

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[216] *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res. 40/34 of 29 November 1985, Annex I, para. 4.

on the Rights of the Child, Article 3 of the Hague Convention of 18 October 1907, Article 91 of I Additional Protocol of 1977, and Articles 68 and 75 of the ICC Statute) and codifies the rights attributed by international law to victims of serious crimes.

5.43 The idea is that States are already under various obligations to ensure appropriate reparation to victims of serious violations of international law, including compensation. In this respect, the declaration is very clear in saying that it does not aim at imposing new international or domestic legal obligations but (merely) seeks to identify mechanisms, modalities, procedures and methods for the implementation of pre-existing legal obligations (Preamble at § 7). In particular, paragraph 3(c) of the Resolution calls upon States to provide "victims of a human rights or humanitarian law violation with equal and *effective access to justice* […] irrespective of who may ultimately be the bearer of responsibility for the violation"[217].

5.44 All these developments show a widespread recognition of the rights of individual victims to obtain reparation by presenting claims before a judge (i.e. the so-called right to access to justice). This right is part and parcel of the notion of the rule of law, which both Germany and Italy are bound to recognize by their constitutional provisions as well as by treaties to which they are parties, such as the EU Treaties.

5.45 This is the legal background against which Italian judges were called to pronounce on the admissibility of victim reparation claims.

Section IV. Germany's Obligations of Reparation for Serious Violations of IHL Against Italian Victims

5.46 The events described in Chapter II determine the original factual basis for the obligation of reparation incumbent on Germany under Article 3 Hague Convention III as well as subsequent amendments and customary rules. Italy is aware that Germany sets forth several arguments to deny it has reparation obligations or to suggest it has already fulfilled. Italy assumes that the basis of Germany's obligation to make reparations to Italian victims of serious

[217] GA Res. 60/147 of 16 December 2005, Annex (emphasis added).

violations of IHL is the acceptance of such obligations by Germany through the two Agreements concluded in 1961 with Italy, which provided for reparations to some Italian victims.

5.47 Germany seems to maintain that reparation claims had been waived by Italy through the 1947 Peace Treaty, to which Germany is not a party though it claims it may benefit from it. As is well known Article 77 of the Peace Treaty between Italy and the Allied Powers provides that

> "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 intergovernmental claims in respect of arrangements entered into in the course of the war, and all claims for loss or damage arising during the war."

This provision cannot, however, be seen as a stipulation in favour of Germany itself and, even if it were, it could not cover serious violations of IHL.

5.48 Article 77(4) contains no reference to claims arising out of violations of international law and in particular IHL. Italy, as well as any other State, could not waive the underlying claims of its nationals since, as shown above, the reparation regime set out by the provisions of IHL is not at the disposal of the contracting parties. The parties can organize the means and methods through which reparations be granted but cannot simply wipe them out by waiving the claims.

5.49 Italy wishes to draw attention to three elements which clarify the scope and purpose of Article 77(4) and indicate that this clause was never intended to cover reparations for war crimes and other serious violations of IHL. First, there is a systematic and contextual argument. The focus of Article 77 – in the context of the other paragraphs of the same Article as well as the other Articles preceding it – is on private-law rights. This implies that this specific provision is intended as applying to claims arising out of commercial and contractual obligations, in particular "claims arising out of contracts and other obligations entered into" as well as "debts" and "claims in respect of arrangements entered into in the course of the war". This entails that

claims arising from violations of the laws of war and humanitarian law attributable to the German Reich were not included in the scope of Article 77(4). This also follows from the language used in Article 77(4), "claims […] outstanding on May 8, 1945", which is appropriate for contractual claims but not for claims arising out from violations of IHL. In that context, the term "claims for loss or damage arising during the war" appears to refer to 'ordinary' war damage, in particular damage to property. As clarified by Fitzmaurice, although in a slightly different context,

> "[I]t is far from clear whether this declaration on the part of the Allies operates as a complete renunciation of all possible war claims other than those specifically covered by the Articles mentioned. In other words, it is not clear that it necessarily applies to absolve the ex-enemy countries from claims in respect of actual illegalities or breaches of the rules of war on their part. It is arguable that its scope was intended to be confined to the type of claim which can only be made good against an enemy country by express provision in the Treaty of Peace, and for which no claim would exist independently on the basis of general rules of law."[218]

5.50 Secondly, there is a teleological argument which confirms the above reasoning. The Allies had no reason to preserve or shield Germany from reparation claims, as subsequent developments have proven. After the war, the Allies fundamental interest was to be allowed to use the entire German economic potential for their own purposes. Against this background, it is improbable that Article 77(4) was intended to relieve Germany from its responsibilities for war crimes committed in Italy or against Italian nationals since July 1943. Nor would it be more logical to argue that the Allies wanted to shield Germany from responsibility to compensate victims of Nazi persecution, which in theory would have been included in a broad reading of the term 'all claims'. The fundamental principles of Allied postwar policy in respect of Germany were to establish responsibility and ensure appropriate reparation as evidenced by the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis of 8 August 1945[219]; the Law No. 10 of the Control Council for Germany about the Punishment of Persons guilty of War Crimes, Crimes against Peace and against Humanity of 20

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[218] See G.G. Fitzmaurice, "The Juridical Clauses of the Peace Treaties", in *Recueil des Cours*, vol. 73 (1948-II), pp. 255-367, at 340 note 1.
[219] For text, see I. von Münch (ed.), *Dokumente des geteilten Deutschland*, vol. I, 2nd (Stuttgart, 1976), p. 43 *et seq.*

December 1945[220]; Directive No. 38 of the Control Council for Germany about "The Arrest and Punishment of War Criminals, Nazis and Militarists and the Internment, Control and Surveillance of Potentially Dangerous Germans" of 12 October 1946[221]. Articles 2(2) and (3) of the latter Directive defined as "major offenders" to be held responsible "Anyone who, in Germany or in the occupied areas, treated foreign civilians or prisoners of war contrary to International Law", and "Anyone who is responsible for outrages, pillaging, deportations, or other acts of brutality, even if committed in fighting against resistance movements". Post-war German law on the compensation of victims of National Socialist persecution has its roots in legislation by the Allied occupation authorities and

> "was inspired by the Occupation Powers; compensation of Nazi victims belonged to the fundamental aims of the Allied occupation policy; the respective rules could only be issued by German authorities with the approval of the Allied Military Governments. Accordingly, the present German law on compensation is a cluster of rules originating in dispositions of the Occupation Powers."[222]

5.51 Ultimately Article 77(4) of the 1947 Peace Treaty constituted a guarantee for the Allied Powers governing Germany at the time that they would be able to use all German proceeds to fulfil their goals and they not be obliged to take into account at that stage the obligation to make reparations to Italy, which – among other things – had been an ally of Germany for most of the war.

5.52 Moreover, it must be clarified that through Article 77 of the 1947 Peace Treaty, Italy did not and could not have waived all claims. For the reasons set out above, even assuming that Italy had wanted to, it could not have waived the reparation claims of victims of serious violations of IHL as the reparation régime for war crimes is not at the disposal of the States concerned.

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[220] Official Gazette of the Control Council for Germany, No. 3 of 31 January 1946, p. 22 *et seq*.
[221] For text, see W. Friedmann, *The Allied Military Government of Germany*, (London, 1947), p. 314 *et seq*.
[222] A. Schüler, "Österreicher von der Wiedergutmachung ausgeschlossen? Zum Urteil des BGH vom 22. 6. 1960", in *Rechtsprechung zum Wiedergutmachungsrecht* 1960, pp. 535-538, at 537. The author concluded that therefore claims of Austrian nationals arising from German legislation on compensation of Nazi victims were generally excluded from the waiver declared in Article 23(3) of the Austrian State Treaty because of the provision "*Without prejudice to* (…) *dispositions* in favor of Austria and Austrian nationals *by the Powers occupying Germany*" (emphasis added). The same argument can be used with regard to Article 77(4) of the Peace Treaty with Italy.

5.53 Finally, subsequent practice has shown that Germany was fully aware of the real scope of such a clause, which could not and did not cover war crimes reparations. For example, in a decision of 14 December 1955,[223] the German Supreme Court (*Bundesgerichtshof*), although in the instant case it denied the underlying claim, clearly held that the waiver declared by Italy had not brought about a final settlement of the matter because, according to the very wording of the clause, it had been made "without prejudice […] to any […] dispositions in favour of Italy and Italian nationals by the Powers occupying Germany". Accordingly, the Court admitted that Italian claims and corresponding German obligations still existed.

5.54 However, clearly today Germany cannot rely on the 1947 waiver clause because more than a decade after the 1947 Peace Treaty, through the 1961 Agreements with Italy, Germany accepted it had reparation obligations concerning some economic questions relating to pending claims and for victims of persecutions. In so doing Germany explicitly laid down the basis for its obligations of reparation towards Italian victims of war crimes.

5.55 The conclusion of the 1961 Agreements represents a clear renunciation by Germany to rely on the alleged 'waiver clause' of Article 77 (4) of the Peace Treaty of 1947. Even assuming that Italy through that provision had intended to waive all claims, including those (under discussion in the present case) relating to serious violations of IHL, the conclusion of the 1961 Agreements prevents once for all Germany from attempting to resort to the 1947 alleged waiver clause.

5.56 Through the 1961 Agreements Germany assumed the obligation not to invoke Article 77(4) of the 1947 Peace Treaty. Germany itself argued that "the differences of opinion about the meaning of that waiver arose between the Federal Republic and Italy" and it was thus necessary to conclude new agreements to overcome these differences. These new agreements (the 1961 treaties) imply that Germany waives its right to resort to the alleged 1947 Italian renunciation clause. Moreover, these Agreements also represent the recognition by Germany that reparation obligations exist. As clearly indicated in the Exchange of Letters dated 2 June 1961 between RFG and Italy, Germany undertook that "claims brought by Italian nationals which ha[d] been rejected with final and binding effect on the basis of Article 77(4) of the Italian Peace Treaty

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[223] *Decisions of the Bundesgerichtshof in Civil Matters* [BGHZ] vol. 19, p. 258 *et seq*., at 265 stating that "The Allied Powers demanded the waiver from Italy exclusively in their own interest. They wanted to prevent that the economic capabilities of Germany would be impaired by claims of states formerly allied with the Reich and by claims of nationals of these states, in order better to realize their own claims and those of their nationals." (Our translation).

[were to be] re-examined"[224]. In this respect it is also worth emphasizing that in a Memorandum (*Denkschrift*) submitted to the legislative bodies on May 30, 1962, the Federal Government recalled Article 77(4) of the Peace Treaty as generally excluding Italian claims against Germany and German nationals arising out of the Second World War, and added:

> "However, the special character of the claims to compensation for measures of National Socialist persecution (*Ansprüche auf Wiedergutmachung nationalsozialistischer Verfolgungsmaßnahmen*) justifies not to raise objections, based on Art. 77(4), to applications according to the *Bundesentschädigungsgesetz*. […] Regarding the *Bundesrückerstattungsgesetz* of July 19, 1957, the Federal Government had already before the signing of the German-Italian treaty of June 2, 1961 instructed the German authorities in charge not to raise objections based on Art. 77(4) of the Peace Treaty with Italy of February 10, 1947, in the case of claims to restitution."[225]

5.57 Contrary to what Germany suggests[226], however, the 1961 Agreements are not the final word on reparations. This is also attested by the provisions of the Agreements themselves, which recognize the rights of victims to request compensation under German law, whenever applicable, and by the provisions determining the scope of the Agreements which revolve around pending economic questions and reparations to victims of persecution.

5.58 The two 1961 treaties are a clear recognition of Germany's obligations to make reparations towards Italian victims. However, they represent only a partial implementation of these obligations. The first treaty, the so called 'Settlement Treaty' refers in general terms to the aim of settling "pending economic questions" (which the governmental memorandum specified as "all kinds of claims […] based on rights and facts originating in the time of the Second World War which were barred by the Italian waiver of claims"); the second treaty (the 'Indemnity Treaty') provided for a lump-sum payment in favour of Italian victims of National Socialist persecution. The questions settled through the 1961 Agreements were thus limited to, on the one hand, the pending economic questions to be identified merely as those covered by the 1947 waiver clause, and, on the other, compensation to victims of National Socialist persecution.

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[224] See the Exchange of Letters of 2 June 1961 between the State Secretary of the Federal Foreign Office, H.E. Karl Carstens and the Italian Ambassador, H.E. Pietro Quaroni (ANNEX 4).
[225] *Drucksache des Deutschen Bundestages* IV/438, p. 9.
[226] GM, para. 11.

Compensation to all other victims of war crimes was not mentioned nor dealt with by these Agreements, being left to German national legislation and to further negotiations between the two States.

5.59 Germany can hardly deny that in 1961 it confirmed and renewed the reparation obligations owed to Italian victims by creating a 'new situation', which determined the expectation in Italian victim communities that the suffering and damage caused by the war crimes would be compensated. The 1961 Agreements, while they represent the basis for the obligation to provide reparation to Italian victims of serious violations of IHL, were not the only instrument on which victims could rely. By express mention in the Agreements themselves, measures under German law could recognize additional avenues for Italian victims. Moreover, the agreements were clearly limited in scope, not covering all potential claims, and there should have been other supplementary measures suitable for providing reparation to all victims.

5.60 It is not too late to try to understand why such supplementary measures were never adopted. Here Italy can only restate that the principle of effective reparation must apply equally to those who received reparation under the Agreements and to those not covered by it. It would be cumbersome and unfair to victims (as well as very hard to justify in the light of the fundamental principle of equality of treatment) why some victims of serious violations of international law should receive compensation and others not.

5.61 Nearly forty years after, in 2000, as a consequence of the pressure deriving from several cases pending or decided by national courts all over the world, Germany adopted the Law on the "Remembrance, Responsibility and Future" Foundation providing for reparations to some victims of persecutions. But here again the rights of Italian victims were denied reparation, through an extremely contorted argument which deserves to be stigmatized (and was immediately stigmatized by Italy) for the extremely perplexing reasoning on which it is based.

5.62 In summary: a number of Italian Military Internees filed compensation claims before the relevant authorities on the basis of the 2000 Law. This law provided for compensation to some victims of the Third Reich crimes, excluding – however – prisoners of war from its field of application (on the basis of Section 11.3). The claims of Italian IMIs were examined and they were turned down because it was considered that these persons were, for the purposes of application of the 2000 Law, to be considered as prisoners of war. Hence these persons, who had actually been denied the status of prisoners of war at the time when this status would have

ensured them protection (and had thus been mistreated in various ways), were eventually recognized such a status in a situation where the recognition of such a status would exclude them from any benefit. The perplexing reasoning is as follows: since these Military Internees could not be deprived of the status of prisoners of war (which is not derogable) they should be considered, for the purpose of application of the 2000 Law, as prisoners of war and thus not be entitled to any reparation. This reasoning testifies the substantive unwillingness of the German authorities to fulfil their obligations. It is in the wake of this line of argument that Italian judges had to take their determinations.

5.63 For all the reasons set out above, Germany continues to bear an ongoing obligation of effective reparation in respect of Italian victims of serious IHL violations. This obligation, which only historically derives from the crimes committed by Third Reich officials during the Second World War, is essentially based on the decision of post-war Germany, formalized through the 1961 Agreements to take upon its shoulders the obligation to make reparation to Italian victims. These Agreements are at the same time the foundation of the obligation and an imperfect and partial fulfilment of it. In any case, they necessarily imply renunciation of the waiver clause, and represent the foundation of all subsequent claims by Italian victims, including those on the basis of German law.

5.64 Unfortunately, after the 1961 Agreements nothing or very little was done in favour of Italian victims. As indicated above IHL does not impose on States one single specific way in which they must discharge their obligations; however, IHL does not allow States to trade off the protection enjoyed by protected persons and victims through agreements between them. Italy's position is that Germany has only partially fulfilled its obligations towards Italian victims and thus is still under an ongoing obligation to provide effective reparation.

5.65 An analysis of the position of Germany relating to its obligations of reparation towards Italian victims of serious violations of IHL indicates that the perception of these obligations has been rather weak from the outset. In a way there seems to be some reluctance of Germany to recognize and fulfil these obligations. This approach might be explained by referring to the historical developments of the final years of the Second World War and its immediate aftermath. It must be recognized that Germany in 1961 moved away from the idea that no reparation had to be made to a more nuanced approach and opted for an approach leading to the recognition of its obligations. However, it only gave limited implementation to

these obligations. The 1961 Agreements with Italy have been seen (here again erroneously) as a final settlement of *all* matters relating to reparation obligations. This idea underlies the approach of Germany to the entire question. This approach is however flawed. The 1961 Agreements contain clauses that clearly limit their scope, making them intrinsically unsuitable to cover all claims and all reparation obligations.

5.66 The 1961 Agreements represent a 'new situation' whereby Germany has (a) recognized the obligation towards Italian victims of serious violations of IHL; (b) they contain some limited measures of reparation (covering pending economic claims as well as claims by victims of persecution on various specific grounds); but, at the same time, (c) they left several other situations uncovered. In this respect, after a long period of uncertainty and several unfulfilled promises, Italian victims were eventually excluded from the application of the 2000 Law, on rather unconvincing arguments.

5.67 The situation described above created the legal background that prevented Italian judges from turning down reparation claims which had been unfulfilled for too long and forced them to reject the plea of immunity advanced by Germany.

5.68 The arguments made by Germany that Italian judges erred in retroactively applying contemporary-law notions are flawed in three respects.

First, as far as non-derogable obligations are concerned, Italy has shown that in some areas – and specifically in the area of reparation obligations of serious IHL violations – these existed prior to the Vienna Convention of 1969.

Secondly, Germany, like any party failing to fulfil an obligation, exposed herself to risks in the development of law which may make the position of the subject to whom the obligation is owed more favourable.

Thirdly, in the light of the object and purpose of the provisions establishing the obligation of reparation for serious IHL violations, it is logical to consider that any new provisions which make reparation effective or more effective must apply.

5.69 Finally, the German violation of the obligations of reparation is a breach of a continuing character. As clarified by Article 14(2) ILC Articles on State Responsibility,

> "[the] breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation".

In such cases the applicable law is not merely the law existing at the time of the initial breach, but includes any evolution of the said law, in particular as far as its procedural aspects are concerned.

CHAPTER VI

BALANCING IMMUNITY AND THE OBLIGATION OF REPARATION

Section I. The Position of the Italian Judges with Respect to the Conflict Between Immunity and Reparation

A. INTRODUCTION

6.1 Italian courts have always consistently upheld the principle of State immunity whenever appropriate[227]. This has been clearly shown in Chapter IV. However, starting with the end of the 1990s, and in particular in the last five years (when all residual hopes of obtaining due reparation under German law evaporated), Italian judges have been confronted with several applications by victims of serious IHL violations, who for over fifty years had not received effective reparation for crimes committed against them by the German Reich.

6.2 True, the existence of reparation obligations owed to victims of serious violations of IHL does not automatically entail that individuals are entitled to bring judicial claims before national or international courts against the States bearing the obligation, nor does it normally imply that States, in the context of the proceedings following the filing of those claims before national courts, necessarily lose their right to immunity from jurisdiction. Reparation obligations do not *per se* entail these consequences; however, they do not exclude them either. How the principles relating to claims to be brought before national courts operate in every single case depends on the specificities of each case, its background, as well as national rules existing in municipal systems for the implementation of international law.

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[227] See above Chapter IV, section II.

6.3 As seen above, in Chapter V, the obligation of reparation for serious violations of IHL inevitably implies that effective reparation must ultimately be granted to victims. In this respect, immunity cannot represent a tool for States to avoid complying with their international obligations, in particular when the rights of individuals are at issue and when the fulfilment of these obligations has been due for over half a century. As this Court has unambiguously stated, particularly in the area of international crimes, "immunity from jurisdiction does not mean […]impunity"[228].

6.4 This important statement by the principal judicial organ of the United Nations cannot be without consequences even in the present case. True, immunity could, for example, imply that petitioners may be barred from seizing a court in their own country (although it is the country in the territory of which the crimes took place), but they should be entitled to file a claim before the national courts or other administrative organs of the responsible State, or such a State must enter into relevant agreements to ensure reparation to the benefit of victims.

However, in the cases underlying the present dispute several plaintiffs had indeed already tried to obtain reparation before German competent authorities, but were consistently denied due reparation. This means that in such cases immunity would effectively amount to impunity. Moreover, the principles set out in Germany by both judicial and administrative bodies, which on a variety of grounds excluded Italian victims from reparations under German legislation, inevitably lead to the conclusion that any seeking of a remedy before German authorities appears to be very likely to be wholly ineffective. And this is also attested by the claim made by Germany that the waiver clauses contained in the 1947 Peace Treaty and in the 1961 Agreements with Italy bar all claims underlying the present dispute. All these elements entail only one possible consequence: granting immunity in the present case equates to absolving Germany of its responsibilities.

6.5 Although in a slightly different context (individual criminal responsibility for international crimes), this Court has been very clear in stating that "jurisdictional immunity […]

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[228] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports 2002*, para. 60.

cannot exonerate the person to whom it applies from all criminal responsibility"[229]. Why should immunity exonerate the State from all responsibility?

6.6 It is only against this background that Italian courts exercised jurisdiction over claims of Italian victims of serious IHL violations by setting aside Germany's immunity. Italian judges were confronted with highly complex cases in which the procedural bar of immunity was not the only important principle of international law at issue. Alongside immunity, equally important principles, reflecting the views of States under international law, were to be given appropriate consideration in the cases under discussion. In particular, the long-lasting principle whereby violations of IHL require appropriate reparation (shown above in Chapter V), the existence of the notion that there are rules which cannot be derogated from by States with all its consequences (Chapters IV and V), the clear affirmation that there are serious violations of international law (i.e. *crimina juris gentium*) that national legislation cannot authorize nor condone, the absence of statutes of limitation for such serious violations, the human rights discourse relating to the right to have appropriate remedies to redress wrongs (also known as 'access to justice') and the increasing attention to the rights of victims of serious human rights and IHL violations. All these elements, which are undoubtedly based on existing international law (enshrined in both custom and numerous treaties), inevitably had an influence on the decisions of Italian courts. Moreover, the judges also took into account the fact that Italian victims had been awaiting reparations for over fifty years. Against this legal and factual background, the idea to simply apply the principle of State immunity did not and does not appear to be the most appropriate solution. Not only judges but also legislators have started to realize that it is necessary to spell out the intrinsic logic of existing international rules in this area by explicitly reaffirming that State immunity must be set aside in cases of serious international crimes, whenever reparation cannot be obtained through other appropriate means[230].

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[229] *I.C.J. Reports 2002*, para. 60.
[230] See Bill C 14 October 2009, 2nd session, 40th Parliament, 57-58 Elizabeth II, 2009, House of Commons of Canada.

B. National Judges and International Law

6.7 The situation of internal judges vis-à-vis the fluctuating developments of international law compels them to take into account a variety of factors, ranging from the protection of State sovereignty to the obligation to implement the fundamental rights of individuals. However, if judges do not appropriately take into account the prospects of effective satisfaction of these rights they betray their proper function, i.e. to ensure that rights are implemented and wrongs remedied.

6.8 Naturally, municipal judges are fully aware of the obligation to respect the principle of State immunity. Nonetheless, they are now used to setting it aside in all cases involving *jure gestionis* activities, as well as in other specific cases, as set forth in Chapter IV. In this respect, they have become accustomed to the notion that immunity is no longer an absolute impediment to the exercise of jurisdiction but needs to be put in the balance together with other values and principles. In particular, when the prospects of securing compliance with the law through other means (inter-state negotiations, international agreements), or through proceedings before other courts are minimal or simply do not exist, or when – as it is in the present case – they have proved or are likely to be ineffective, municipal judges cannot simply ratify a denial of justice.

6.9 Municipal judges, like all State officials, bear the obligation to respect and ensure respect for international law, which of course means, on the one hand, to respect State immunity, but also, on the other, to ensure respect for and compliance with international humanitarian law as well as human rights obligations. In particular, when these obligations result from a system of imperative rules of international law (as is the case with the reparation regime for serious violations of IHL, as shown above in Chapter V), municipal judges are obliged under international law to follow the intrinsic logic deriving from the existence of these obligations. This is especially true when both international law and the constitutional provisions of their national system impose on them the obligation to protect the fundamental rights of individuals, as is the case in Italy and in Germany. Additionally, the national judge has no other choice when confronted with a situation in which the State bearing these imperative obligations has had over sixty years to fulfil them but has not done so (or only to a very limited extent), and there appear to be no prospects that it will.

6.10 In cases such as those underlying the present dispute, municipal judges are in the uncomfortable position (to which however they are used at national level) of being faced

(moreover, increasingly) with hard cases in which important international law principles are in conflict. In these cases judges must balance competing values and principles against each other, taking into account the specificities of each case and the evolution of international law. One must remember that the notion of immunity is procedural in nature[231] and thus must be interpreted according to the law existing at the time when the proceedings in which it is invoked are taking place. In so doing they have to rely on notions which enable them to strike the appropriate balance and/or to choose which competing interest must prevail in a given case. One of these notions is certainly *jus cogens*, which refers to the idea that there exist provisions which cannot be derogated from by States through agreements. *Jus cogens* inevitably places the municipal judge in the difficult position of being entrusted with the task of identifying, through a normative hierarchy, the right balance between apparently conflicting international rules and drawing the relevant consequences on the basis of the logic of the system. Undoubtedly, municipal judges are used to the inherent logic of a substantive hierarchy of norms within national legal orders (e.g. through the rules of 'public policy' or the notion of '*ordre public'*). Hence, the idea of resorting to its equivalent at the international level (the notion of *jus cogens*) appears to any national judge very logical and fully justified.

6.11 The very notion of *jus cogens* implies the possibility (or even the need) to refer to international judges for its identification and interpretation. However, the procedural conditions for the intervention of the ICJ as defined in Article 66 of the Vienna Convention (1969) do not allow the Court easily to exercise jurisdiction in this area. Moreover, even in its case law, apart from the case of genocide, the Court has not so far had a chance to specify and set out in detail the criteria for identifying and interpreting all the consequences of the *jus cogens* nature of a provision of international law. In the absence of specific guidance, municipal judges have a natural tendency to assimilate that notion to the more familiar one of *ordre public*, as known in their internal legal orders. This notion, *ordre public*, is certainly more familiar to them, and they have often contributed to developing it, with specific regard to the human rights provisions of their national constitutions.

6.12 National judges did not create the notion that there are violations of international law which are so serious that no immunity can be granted to their authors, nor that there are some

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[231] *I.C.J. Reports 2002*, para. 60. For further details see also *supra* in this Counter-Memorial, paras. 4.43-4.50.

international rules which possess imperative character, nor did the judges establish by themselves that such rules must prevail over any other conflicting principle not possessing the same character. All these principles and the set of consequences attached to them were laid down by States and are part of customary international law as well as treaty law. Italian judges simply exercised their judicial function in drawing the normative consequences of the existence of certain imperative rules, and did so in trying to weigh conflicting principles and identify the appropriate balance, in the light of the specificities of the cases pending before them (the crimes were committed on Italian territory or against Italian victims, the reparation obligations had been ignored for over half a century, many claimants had tried to obtain justice from German authorities, the crimes were committed by the Nazi State, which has notoriously been defined as the epitome of evil).

6.13 In the present state of development of institutions at the international level, national judges – in applying Scelle's notion of *dédoublement fonctionnel*[232] – provide their jurisdictional services to an international legal order which lacks the appropriate means of systematically addressing these issues. This is precisely what the Italian *Corte di Cassazione* has done. And it would be unfair to argue that the Italian Court has done more than simply draw the logical consequences ensuing from the existence of norms that cannot be derogated (as is the case with the reparation regime for serious IHL violations and with the provisions proscribing war crimes, crimes against humanity and genocide)[233].

6.14 The logic underlying the position of Italian *Corte di Cassazione* is that a normative conflict existed and the conflict had to be solved applying the criteria for the identification of the competing values behind the principles in the balance. It then decided that the conflict could be solved on the basis of imperative norms of international law taking into account the need to implement the obligation to make effective reparation to victims of serious IHL violations.

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[232] G. Scelle, *Précis de droit des Gens, Principes et systématique*, Vol. I. (1932), pp. 43, 54-56, 217 and Vol. II (1934), pp. 10, 319, 450. See also, by the same author, "Le phénomène du dédoublement fonctionnel", in *Rechtsfragen der Internationalen Organisation, Festschrift für H. Weberg* (1956), pp. 324-342. For a commented presentation of the theory, see H. Thierry, "The Thought of Georges Scelle", in 1 *European Journal of International Law* (1990), pp. 193-209, and A. Cassese, "Remarks on Scelles's Theory of 'Role Splitting'", *Ibid.*, pp. 210-231. .

[233] As far as genocide is concerned the Court clearly stated "that the norm prohibiting genocide was assuredly a peremptory norm of international law (*jus cogens*)", *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 161.

6.15 Italy considers that this is precisely the real issue underlying the present dispute. The ongoing German denial of appropriate and effective reparation to a large number of Italian victims of serious violations of IHL committed by German authorities during the final part of the Second World War, as recognized and renewed by Germany through the 1961 Agreements as well as subsequent unilateral measures, needed to be addressed.

6.16 Italian judges, facing such a blatant and long-lasting denial of reparation in violation of all relevant rules of international law, could not simply turn down victims' claims by recognizing the principle of State immunity. Clearly, the judges had the feeling that by applying a purely procedural principle in the face of the gravity of crimes for which no reparation has yet been made, they would create a typical situation of denial of justice. Had Italian courts granted immunity they would have put a full stop to the entire question of reparation to thousands of victims. They would have effectively denied any possibility for these claims to achieve any objective. On the contrary, they had very serious justifications for setting aside the immunity of Germany and verifying whether the claims were substantiated on the merits.

6.17 Italian judges had good reasons to deny immunity to Germany on account of the extremely serious nature of the violations of IHL for which reparation had been requested, on account of the non-derogable nature of the reparation regime for these violations, and on account of Germany's ongoing failure to comply with its reparation obligations.

6.18 This was particularly justified in the light of all the developments which have occurred in international law concerning the rights of individuals to effective reparation for violations of human rights and IHL, including their emerging right of access to courts for the proper determination of their case. As has been shown in detail in Chapter IV, international law has progressively developed a set of measures to ensure that individuals are granted a right to access to justice.

6.19 Italian judges were confronted with conflicting principles of fundamental importance which they had to compare and balance against one another. They were not in a position to grant immunity, since the obligations of reparation owed by Germany to Italian victims were non-derogable from the outset, they have not been fulfilled for over fifty years, despite numerous attempts to obtain reparation, and in the light of all the developments in international law since the Second World War to promote the right of individuals to access to justice.

6.20 As is well known (and as has been shown in Chapter IV) the principle of State immunity, although fundamental in international relations, can be set aside in a variety of situations in which the values put in balance are far less compelling than those at stake in the present case. Moreover, immunity seeks to prevent the national courts of one State from pronouncing upon the State policies of another, implying that there might well be diverging evaluations but assuming that it would not be permissible to allow one State's courts to decide on the appropriateness of the policies of another State. However, in the present case, there is nothing contentious about the appropriateness, let alone the lawfulness, of the behaviour of Nazi Germany. The blatant illegality of the Third Reich system and the appalling character of the crimes committed by the Nazi regime are unchallenged. Hence, by simply recognizing immunity in these cases, Italian courts would have prevented logical consequences being drawn from the violations of IHL committed by agents of the Third Reich.

6.21 The claimant in its Memorial analyses in the detail the decisions of various Italian judges and patronizingly underscores their alleged mistakes in understanding and interpreting international law. Italy does not intend to engage here in a specific rebuttal of these arguments (most of which are far less clear than Germany pretends), nor does Italy believe that it is proper to transform the proceedings before this Court into trivial third-instance proceedings revolving around the details of specific municipal cases.

6.22 It is well known that a difference should be clearly made between the reasoning underlying national decisions and the results of the decisions in themselves. Here, there is no need to discuss the reasoning in the decisions. The crucial point is to determine whether or not their outcome and their (potential) impact on the rights and obligations of the States involved amounts to a violation of international law.

6.23 Therefore, irrespective of the reasoning of the Italian judges on the normative ranking of the various rules involved, it must be emphasized that the main justification for setting aside Germany's immunity was to avoid an otherwise inescapable denial of justice. It is with this in mind that the Italian *Corte di Cassazione* affirmed the primacy over the principle of immunity of imperative norms enshrining the need to ensure effective reparation to victims of international crimes.

6.24 Was there a 'good way' for Italian judges to solve this delicate issue, without betraying their function of ensuring respect for and compliance with law, including international law, and allowing individuals effectively to obtain respect for their rights?

Section II. The Reasons Why, by Denying Immunity, Italy Did Not Commit an Internationally Wrongful Act

6.25 That any illegal act entails obligations of reparation is certainly part of the fundamental tenets of any legal system, including the international legal order. Moreover, there are no doubts that the provisions establishing obligations of reparation for serious violations of IHL cannot be derogated from by States. This makes it extremely difficult for national judges to consider them on the same footing as rules on immunity. Hence, the approach taken to the balancing between immunity and reparation was made in favour of the latter instead of the former. Had Italian judges decided that immunity had to prevail, no other avenues would have been available to victims. In essence a denial of justice would have been endorsed by the Italian judicial system. To ratify such a violation of international law is something that could not be asked of any judge.

6.26 The solution reached by Italian courts is fully justified on the basis of existing principles of positive international law. In the absence of a specific conventional régime that determines how victims should have access to reparations, victims are entitled, as a measures of last resort, to appeal to the courts of the State where the egregious violations of international humanitarian law were committed (which in the instant case is also their State of nationality), and to obtain a derogation from the principle of immunity, whenever applying this principle would entail the denial of any reparation.

6.27 In the first place, it should be recognized that it is for the State responsible for the crimes under international law to ensure, through its tribunals or any other appropriate means, reparation to the victims of the crimes. However, when the State responsible fails to comply with its reparation obligations other avenues are open.

6.28 In these cases, whenever the judges of the State in which the crimes were committed and/or of nationality of the victims are called upon to intervene, they must be considered as authorized to set aside immunity only under the very specific and exceptional circumstances that

all other avenues have been explored and that there are no effective prospects of obtaining reparation in other ways.

6.29 In the present case, the conditions set out above are clearly met: Italian judges had no other option than to set aside Germany's immunity. As mentioned above (Chapter IV), Germany repeatedly resorts to the argument that "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"[234]. Now, while in principle this argument is unobjectionable, in the present cases the measures adopted so far by Germany, both under the relevant agreements as well as through unilateral acts, have proved totally insufficient and created a situation in which there were no prospects that due reparation in favour of Italian victims would ever occur. As a consequence, very large numbers of Italian victims were denied any legal avenues for obtaining reparation. Germany acknowledges this situation, and even confirms that Italian victims would have no chance of obtaining any reparation since it seeks to rely on the waiver clauses of the 1947 Peace Treaty and the 1961 Agreements with Italy. As clarified in Chapter V, Germany's reliance on the waiver clauses is mistaken, but the very fact that Germany continues to invoke those 'waiver' or 'renunciation clauses'[235] clearly indicates that Germany has no intention of complying with its reparation obligations.

6.30 Germany cannot genuinely claim that it has jurisdictional immunity and that the damage suffered by Italian victims could be repaired in other ways, since in invoking the waiver clauses it implicitly affirms that Italian victims would never obtain any reparation in any other way (as has happened in the past) because Germany has no obligations of reparation toward them. Therefore, Germany's position is quite clear: there must be immunity and there will be no reparation, apart from some ex *gratia* measures[236].

6.31 Against this background, although some doubts may be expressed as to a few aspects of the reasoning adopted and some of the arguments used by Italian courts, Italy considers that, under the very unique circumstances of the present case, Italian judges were fully justified in denying Germany's immunity from jurisdiction. As will be clarified, if one looks at the

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[234] GM, para. 32.
[235] See e.g. GM, paras. 9-12 and 56.
[236] As seems implicit in its Memorial, e.g. at para. 15.

substance of the balancing of competing values one can hardly deny that the solution reached is indeed in keeping with the fundamental principles of international law.

6.32 Having in mind Germany's ongoing denial of reparation to Italian victims of war crimes committed by Third Reich officials, Italian judges rightly decided to set aside immunity, for three main reasons.

First of all, the crimes involved are serious violations of international law for which no statute of limitation applies, for which State officials can be punished having no right to immunity, and which neither superior orders nor the command of the law can authorize.

Secondly, the special IHL reparation regime prevents States from avoiding the implementation of the ensuing obligations. States may only have a choice as to the modalities and procedures for their implementation. Hence, States must provide effective reparation, be it by unilateral administrative measures, or through their court system or through international agreements, or through a combination of all these or other instruments.

Thirdly, in most Italian cases many victims had already tried to obtain justice from German authorities and, at any rate, in all cases they had been waiting such a long time for the fulfilment of these obligations that there seemed to be no point in waiting for other measures to be adopted by Germany. In this respect, it is clear that there is no need to ask for the exhaustion of local remedies before German courts or other administrative bodies, since after several decades of denied reparation there are no chances that such remedies can be effective.

6.33 In this situation, there was little else that Italian judges could do. The duty to protect the right to access to justice is part and parcel of the judicial function. Of course, it is also inherent in the judicial function to verify whether applicable law provides for reparation to be obtained elsewhere and through other means. However, in the instant cases Italian judges were examining claims which had been pending for a very long time, for which Germany had had every chance to make appropriate reparations. In some instances reparation had been explicitly refused by German authorities on extremely perplexing grounds. The Italian Government had cautioned Germany about the possible consequences of such an approach and informed Germany of the profound dissatisfaction and disappointment which followed the decision to exclude the IMIs from the reparation provided under the Foundation Law. Therefore, since judges were not in a position to open negotiations between the States involved (something which this Court can do),

they did the only thing judges could reasonably be expected to do: rendered justice to the victims of serious IHL violations by lifting immunity.

6.34 Italian judges correctly interpreted contemporary international law when they considered that immunity had to be set aside. There are various reasons which provide ample justification for these decisions. First, serious violations of IHL cannot go unpunished and such violations entail not only individual but also State responsibility (what would be the impact of the obligation to make reparations if States could circumvent it by merely invoking immunity?). Secondly, the ensuing obligations of reparation owed to victims of serious violations of IHL cannot be derogated from by States. Thirdly, there are several developments in international law that recognize the rights of individuals to obtain compensation from the State without any obstacles relating to immunities (e.g. in international criminal law or under human rights or IHL reparation régimes). On account of all these developments Italian judges could hardly have turned down the victims' requests, particularly given the absence of any other realistic alternative.

6.35 Finally, it is worth stressing that Italian judges lifted State immunity concerning war actions by the Nazi State – actions which have already been condemned by the entire world community on numerous occasions. In so doing Italian judges did little else than adhere to the precedents set by the assessments of the Nuremberg Tribunal, of the United Nations General Assembly, of several hundred judges all over the world, and ultimately of history. True, it is today's Germany that has been held accountable, but this is simply a mere consequence of Germany's position with regard to the acts of the Third Reich (and the obligations following from them), and, in particular, of Germany's recognition, through several agreements (including the 1961 Agreements with Italy), of the obligation of reparation towards the victims of the Reich. There is nothing in the decisions of Italian judges which implies any involvement of today's Germany with the crimes. However, there is the clear recognition that those acts, those crimes of a horrendous nature, cannot enjoy any immunity, in the light of the fact that reparation has been (and is still being) denied and thus the consequences of the unlawful act have not yet been wiped out.

6.36 It is often argued that State responsibility for infringements of international obligations exists only between the States concerned. Although this is no longer necessarily true in contemporary international law, the present case is precisely about the responsibility of the

States concerned. Germany claims Italy violated international law because Italian judges set aside Germany's immunity from jurisdiction; Italy responds that there is no violation, because the Italian judges' decisions are justified on account of Germany's failure to ensure appropriate and effective compensation to Italian victims of serious IHL violations and further requests the Court to establish Germany's responsibility for the ongoing failure to comply with the reparation obligations.

6.37 The negative implications of accepting the German approach of imposing State immunity in the present case, would be as follows: (a) a rule of non-reparation for damage caused by war crimes and crimes against humanity would be enforced; (b) a denial of justice concerning a large number of Italian victims of such crimes would materialize; (c) some of the most fundamental developments of general international law, based on values enshrined, *inter alia*, in the UN Charter and in the Geneva Conventions, would be weakened.

6.38 The principle of State immunity from jurisdiction should not be applied in a *vacuum*: the specificities of the case at issue must be considered. Here we are at the intersection of a variety of legal issues, the complexity of which is attested by the Joint Declaration; this complexity requires enlightenment from the International Court of Justice. A *non liquet* decision would not be the solution in this case. There is no doubt that *jus cogens* is part of positive international law, and it is also, to a certain extent, possible to identify its content. However, in the area of determining all its consequences and its interplay with other rules there is the overriding need for its régime to be identified by the activity of interpretation of the International Court of Justice, provided that in a given case the conditions for such a determination exist. It is submitted that this is so in the present case, in the context of contentious proceedings which allow the Court to pronounce on several sensitive issues without exceeding the boundaries of its jurisdiction.

6.39 Italy believes, without going into the discussion about the *jus cogens* nature of the violations and without aiming at a general holding that *jus cogens* violations require that immunities of all kinds be set aside, that in the present cases Italian judges did not commit an unlawful act since lifting Germany's immunity was the only appropriate and proportionate remedy to the ongoing violation by Germany of its obligations to offer effective reparation to Italian war crimes victims. Such a measure was adopted only after several attempts by the victims to institute proceedings in Germany and it was the only possible means to ensure respect

for and implementation of the imperative reparation regime established for serious violations of IHL.

6.40 The reasoning and the conclusions set out above for Italian victims, apply *mutatis mutandis* to the proceedings relating to the enforcement in Italy of the Greek judgment on the *Distomo* massacre[237]. Since the Greek judgment concerns a case which presented much of same features which are present in the Italian cases, including the fact that Greek victims had tried to obtain reparation before German courts and were repeatedly confronted with a denial of justice, the recognition that the Greek judgment on the *Distomo* case could be enforced in Italy does not amount to a violation of international law.

[237] See *supra* paras. 2.27 and 2.39.

CHAPTER VII

COUNTER-CLAIM

Section I. Introduction

7.1 As permitted by Article 80 of the Court's Rules, Italy hereby submits a counter-claim with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich. Article 80 of the Rules of the Court provides as follows:

> "1. The Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party.
>
> 2. A counter-claim shall be made in the Counter-Memorial and shall appear as part of the submissions contained therein. The right of the other party to present its views in writing on the counter-claim, in an additional pleading, shall be preserved, irrespective of any decision of the Court, in accordance with Article 45, paragraph 2, of these Rules, concerning the filing of further written pleadings.
>
> 3. Where an objection is raised concerning the application of paragraph 1 or whenever the Court deems necessary, the Court shall take its decision thereon after hearing the parties."

7.2 The present Chapter sets forth Italy's counter-claim in this case. Italy asks the Court to find that Germany has violated its obligation of reparation owed to Italian victims of the crimes committed by Nazi Germany during the Second World War and that, accordingly, Germany must cease its wrongful conduct and offer effective and appropriate reparation to these victims. Section I of this Chapter will address the question of the Court's jurisdiction over the counter-claim as well as the question of its admissibility. Section II will indicate the remedies

sought by Italy for the breaches by Germany of its obligation of reparation owed to Italian victims.

7.3 Most of the factual and legal issues at stake in this counter-claim have been addressed in establishing Italy's defence to Germany's claim. Indeed, the previous chapters of this Counter-Memorial have already demonstrated that Germany has violated its obligation of reparation owed to Italian victims. Since a detailed assessment of the facts and law upon which Italy relies in presenting its counter-claim has already been made in previous chapters, examination of such issues in the context of the present Chapter will be kept to an essential minimum. Italy reserves the right to introduce and present to the Court in due course additional facts and legal considerations in respect to the present counter-claim.

Section II. Jurisdiction and Admissibility of the Counter-Claim

7.4 The Court's jurisdiction over this counter-claim is based on Article 1 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, taken together with Article 36(1) of the Statute of the Court. As demonstrated in Chapter III, the applicability of the European Convention to Italy's counter-claim is not excluded by Article 27(a) of the Convention. Italy has already shown that the dispute on immunity brought by Germany and the dispute on reparation brought by Italy originate out of the same facts. In particular, the source or real cause of the disputes submitted to the Court in the present case is to be found in the reparation regime established by the two 1961 Agreements between Germany and Italy. An additional source is constituted by events following the establishment in 2000 of the "Remembrance, Responsibility and Future" Foundation. Since both disputes relate to facts that arose after 18 April 1961, i.e., the date when the European Convention entered into force between Germany and Italy, the limitation *ratione temporis* provided for by Article 27(a) of the European Convention does not apply to the dispute brought by Italy through its counter-claim.

7.5 Italy's counter-claim is also directly connected with the subject-matter of Germany's claim. In its Order of 29 November 2001 in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, this Court observed:

> "Whereas the Rules of Court do not however define what is meant by 'directly connected'; whereas it is for the Court to assess whether the counter-claim is sufficiently connected to the principal claim, taking account of the particular aspects of each case; and whereas, as a general rule, whether there is the necessary direct connection between the claims must be assessed both in fact and in law"[238].

7.6 Manifestly, there is a direct connection between the facts and law upon which Italy relies in rebutting Germany's claim and the facts and law upon which Italy relies to support its counter-claim. While Germany has claimed that Italy violated Germany's jurisdictional immunity, Italy submits that no violation has been committed since, under international law, a State responsible for violations of fundamental rules is not entitled to immunity in cases in which, if granted, immunity would be tantamount to exonerating the State from bearing the legal consequences of its unlawful conduct. Thus, in assessing the well-foundedness of Germany's claim, the Court will have to address many of the same factual and legal issues as lie at the heart of Italy's counter-claim. Under such circumstances, it seems inevitable to conclude that Germany's principal claim and Italy's counter-claim "form part of the same factual complex" and that, by submitting their respective claims, both parties "are pursuing the same legal aims"[239].

7.7 Obviously, Italy's counter-claim does not simply aim to "counter" Germany's principal claim. However, the fact that this counter-claim has also the effect of widening the subject-matter of the dispute to be decided by the Court does not affect its admissibility. As this Court stated in its Order of 17 December 1997 in the *Application of the Genocide Convention* case,

> "the thrust of a counter-claim is thus to widen the original subject-matter of the dispute by pursuing objectives other than the mere dismissal of the claim of the Applicant in the main proceedings"[240].

7.8 Significantly, even before submitting its Application to the Court, Germany was well aware of the strict link existing in the present case between immunity and reparation. The

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[238] *I.C.J. Reports 2001*, p. 678, para. 36.
[239] *Ibid.*, p. 679, para. 38.
[240] *I.C.J. Reports 1997*, p. 256, para. 27.

existence of a complex issue linking together questions of immunity with questions of reparation emerges unequivocally from the Joint Declaration adopted on the occasion of the German-Italian governmental consultation held on 18 November 2008 in Trieste. In the Joint Declaration, while Germany, together with Italy, fully acknowledged "the untold suffering inflicted on Italian men and women in particular during massacres and on former Italian military internees" (i.e., the groups of individuals who have instituted proceedings before Italian courts in order to obtain financial compensation for the harm suffered as a result of the activities of German armed forces)[241], Italy declared that it respected "Germany's decision to apply to the International Court of Justice for a ruling on the principle of State immunity", finding that "the ICJ's ruling on State immunity will help to clarify this complex issue"[242]. Now that Germany has brought proceedings on the question of immunity, Italy finds it important to seize this opportunity and to entrust the Court with the task of rendering a decision with regard to the entire "complex issue" dividing the parties.

Section III. Remedies Sought by Italy

7.9 In Chapter V Italy has demonstrated that Germany has obligations of reparation arising out of the serious violations of international humanitarian law committed by the Third Reich against Italian victims. However, as clearly emerges from the facts described in Chapter II, the measures adopted so far by Germany (both under the relevant agreements as well as in unilateral acts) have proved insufficient, in particular because such measures did not cover several categories of victims such as the Italian military internees and the victims of massacres perpetrated by German forces during the last months of Second World War. In its Memorial Germany argues that the conclusion of the two 1961 Agreements between Italy and Germany extinguished all reparation claims, since Italy agreed to waive for itself and for all of its nationals all claims against Germany resulting from the period of Second World War.[243] This argument has been disproved in Chapter V.

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[241] GM, para. 13.
[242] ANNEX 1.
[243] GM, para. 11.

7.10 For all these reasons, Italy asks the Court to adjudge that Germany is still under an ongoing obligation to make reparations for the large number of the unlawful acts committed by the Third Reich and that Germany's international responsibility is engaged by its failure to provide effective reparation more than 60 years after the relevant facts.

7.11 The remedy to make good this violation should consist in an obligation on Germany to establish an appropriate and effective mechanism for addressing the reparation claims of Italian victims. The establishment of such a mechanism would not only provide the necessary remedy for the breaches by Germany of its international obligations. It would also provide Italian victims with a legal avenue other than resort to national judges. As already indicated in the previous chapters, it is because of the absence of any alternative mechanism for reparation that Italian victims of Nazi crimes brought their claims before Italian judges; and it is because of Germany's failure to offer effective reparation that Italian judges have lifted State immunity.

7.12 While Italy is entitled to an order from the Court that Germany must cease its wrongful conduct and provide reparation to Italian victims of Nazi crimes, admittedly the choice of means as to how reparation should be provided is to be left primarily to Germany. However, this freedom in the choice of means is not without qualification: any mechanism to which Germany may entrust the assessment of the reparation claims must ensure that Italian victims are offered appropriate and effective reparation.

7.13 Among the available options, due consideration must be given to the possibility that the Parties find an agreed solution through negotiations. In its Memorial, Germany repeatedly asserts that the traditional and preferred method of settling war claims consists of concluding agreements at inter-State level[244]. While Germany argues that in the relationship between Italy and Germany there was (and there is) no need for a new agreement covering the reparation claims of the victims of grave violations of humanitarian law committed by Nazi Germany, its view is based solely on the claim that Italy, by concluding the 1947 Peace Treaty and the 1961 Agreements, has renounced all claims against Germany and German nationals resulting from the period of Second World War[245]. Now, as shown above Italy did not waive all the claims, since the 1947 clause had a very specific and limited scope, and the 1961 Agreements only partially

[244] GM, paras. 32, 55 and 59.
[245] GM, para. 59.

addressed the issue of reparations. In any case, the question whether Italy has validly renounced all reparation claims against Germany is now before the Court. Once the Court has clarified that Germany's position concerning Italy's renunciation to all claims is completely unfounded, the negotiation of an agreement at inter-State level may be regarded as a viable solution for sorting out the complex situation arising as a result of the denial of effective reparation suffered by Italian victims of Nazi crimes. Italy would certainly welcome any initiative on the part of Germany leading to the establishment, on the basis of specific conventional understandings, of mechanisms for addressing reparation claims. Thus, in Italy's view, a declaration by the Court ordering Germany to provide effective reparation, including through negotiation of an agreement with Italy, may, under the circumstances of the present case, constitute an appropriate remedy.

Section IV. Conclusions

7.14 Italy's counter-claim is based on Germany's denial of effective reparation to Italian victims of the grave violations of international humanitarian law committed by Nazi Germany during the Second World War. This counter-claim is within the jurisdiction of the Court and is directly connected with the subject-matter of Germany's claim. Italy asks the Court to find that Germany has violated its ongoing obligation to provide effective reparation to Italian victims of Nazi crimes and that Germany must cease its wrongful conduct and bear international responsibility for such conduct. Italy finds that under the circumstances of the present case an appropriate remedy consists in an order of the Court that Germany must offer effective reparation to Italian victims of Nazi crimes by means of its own choosing as well as through the conclusion of an agreement with Italy.

SUBMISSIONS

On the basis of the facts and arguments set out above, and reserving its right to supplement or amend these Submissions, Italy respectfully requests that the Court adjudge and declare that all the claims of Germany are rejected.

With respect to its counter-claim, and in accordance with Article 80 of the Rules of the Court, Italy asks respectfully the Court to adjudge and declare that, considering the existence under international law of an obligation of reparation owed to the victims of war crimes and crimes against humanity perpetrated by the III° Reich:

1. Germany has violated this obligation with regard to Italian victims of such crimes by denying them effective reparation.

2. Germany's international responsibility is engaged for this conduct.

3. Germany must cease its wrongful conduct and offer appropriate and effective reparation to these victims, by means of its own choosing, as well as through the conclusion of agreements with Italy.

Rome, 22 December 2009

Ambassador Paolo Pucci di Benisichi
Agent of the Government of the Italian Republic

Dr. Giacomo Aiello
Agent of the Government of the Italian Republic

LIST OF ANNEXES

Annex 6 Zweites Gesetz zur Änderung des Bundesentschädigungsgesetzes (BEG-Schlussgesetz), 14 September 1965; Second Law Amending the Federal Compensation Law (BEG Final Law), 14 September 1965, Article VI.

Annex 7 Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft", 2 August 2000; Law on the Creation of a Foundation "Remembrance, Responsibility and Future", 2 August 2000; English translation: http://www.stiftung-evz.de/eng/about-us/foundation_law.

Annex 8 Leistungsberechtigung der Italienischen Militärinternierten nach dem Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft", Rechtgutachten erstattet von Professor Dr. Christian Tomuschat, 31 Juli 2001; Entitlement of Italian Military Internees to Benefit under the Law Creating a Foundation "Remembrance, Responsibility and Future"?, Legal Opinion drawn up by Professor Dr. Christian Tomuschat, 31 July 2001.

Annex 9 German Federal Constitutional Court, cases of *A. and 942 further complainants*, decision of 28 June 2004.

Annex 10 European Court of Human Rights, *Associazione nazionale reduci dalla prigionia, dall'internamento e dalla guerra di liberazione (A.N.R.P.) and 275 others* v. *Germany*, decision of 4 September 2007.

Annex 11 German Federal Supreme Court, case of the *Distomo Massacre*, judgment of 26 June 2003; English translation: 42 ILM 1030 (2003).