INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

JURISDICTIONAL IMMUNITIES OF THE STATE

(GERMANY V. ITALY)

REPLY

OF

THE FEDERAL REPUBLIC OF GERMANY

5 OCTOBER 2010

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I. The Subject-Matter of the Dispute

1. In its Counter-Memorial (CM) of 22 December 2009, Italy argues that the instant dispute cannot be confined to the issue of whether Italy has respected and is respecting Germany's jurisdictional immunity. Already in the introduction of the CM it contends that *ratione materiae* and *ratione temporis* the alleged breach by Germany of the obligation "to make reparation for the extremely severe violations of international humanitarian law" must be seen as an integral element of the factual and legal factors to be ruled upon by the Court (p. 6, para. 1.3). This contention is reiterated in the Conclusions. Italy points out that the counter-claim, which it felt entitled to introduce because of its expansive interpretation of the subject-matter of the dispute, "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" (p. 133, para. 7.14).

2. It stands to reason that this attempt to extend the scope of the dispute has failed. In its decision of 6 July 2010 the Court made unmistakably clear that under the European Convention for the Peaceful Settlement of Disputes of 29 April 1957 only facts occurring after 18 April 1961, the date of the entry into force of the Convention as between the two Parties, may be legitimately brought before it as the source or real cause of the dispute. The horrendous events of World War II, when German occupation forces perpetrated indeed serious violations of the laws of war, lie therefore outside the jurisdiction of the Court. Accordingly, the only issue to be discussed at the present merits stage is the observance or non-observance by Italy of its commitments under general international law to respect Germany's jurisdictional immunity. Germany's wrongdoing during World War II does not allow Italy to set aside the principle of consent which provides the foundation of the settlement of international disputes. No legal justification can be found

that would bring events predating 1961 within the jurisdiction of the Court. Italy's "grand design", its intent to construe a complex and indissoluble package of facts reaching from September 1943 to the present day, is an artful but futile construction. It has not survived the Court's decision on the counter-claim.

II. Introductory Observations

3. As already demonstrated in the Memorial, the principle of State immunity has kept its full validity and effectiveness for the purposes of the instant case. It is true that regarding commercial activities States have lost their former absolute immunity. One of the prominent judicial bodies to buttress this fundamental change of the legal position was the German Constitutional Court.[1] However, with regard to sovereign acts, the traditional rule stands unaffected. Recent developments in the field of human rights, in particular the emergence of the concept of *jus cogens*, have not overturned the regime of jurisdictional immunity. States derive their exemption from the jurisdiction of the courts of other States from the principle of sovereign equality, which constitutes one of the basic pillars of the international legal order (UN Charter, Art. 2 (1)) and may also be regarded as a rule of *jus cogens*. By disregarding immunity, foreign courts arrogate to themselves powers which are denied to them under the fundamental rules of the international community. Notwithstanding the growing importance of human rights in international law, the collective framework of equal sovereignties provides the essential framework for the effective functioning of the international legal order. Unilateral departures from the consolidated legal regime threaten the mechanisms of peaceful settlement of disputes which the international community has evolved by consensus over many decades since the Hague Peace Conferences more than 100 years ago.

[1] Judgment of 30 April 1963, 16 *Entscheidungen des Bundesverfassungsgerichts* 27; English translation: 45 *ILR* 57.

4. In particular in respect of international armed conflict, immunity has kept its justification as a rule of reason which permits, in the relationship between States at the international level, settlement of harm caused in a well-pondered manner, through negotiation and treaty. Wars could never be brought to an end if after the actual cessation of hostilities every individual injured by a violation of international humanitarian law (IHL) were able to raise a personal claim against the State whose armed forces have to shoulder responsibility for the injury caused. Thousands or even millions of claims could not be adequately dealt with by the domestic judges of either one of the parties. Following the Italian viewpoint, World War II would not yet be closed in legal terms. Victims on both sides would be entitled to initiate civil proceedings before their own national courts, notwithstanding any agreements concluded by their home countries with the adversaries of the time which now lies 65 years back.

5. Unfortunately, Italy does not reflect on the consequences of the views which it defends in the present proceedings. If any major violation of IHL had entailed an individual right to compensation during the time of World War II, a right untouchable for the home States of the victims, a huge legal battleground would be re-opened. Apart from the population of the former adversaries of Germany and Italy, all other victims of unlawful acts of war perpetrated by any of the powers involved in World War II would also enjoy the same rights. One only needs to read any book on the history of this war in order to realize the dimensions of the barbarity that permeated those years. Suits could be brought all over Europe before domestic courts, notwithstanding settlements that were reached years and decades ago. Germany dismisses resolutely such a horrendous vision of interminable legal battles that would produce unrest and enmity without any legal borders.

6. No lengthy comments are needed to explain that States would hardly be prepared to comply with decisions dealing with their governmental functions, handed down against them by judges of another

country – judges who notwithstanding their best intentions to proceed impartially and objectively can hardly be free from any bias, viewed in an institutional perspective. It should be reiterated that sovereign States are not subject to the jurisdiction of other sovereign entities, except on the basis of their clear and unreserved consent. Accordingly, the settlement of war damages is generally effected through the usual mechanisms of international diplomacy. At the inter-State level, a careful balancing of the reciprocal rights and obligations can be effected, taking into account, *inter alia*, the economic capacity of the responsible State.

7. In fact, the international practice has overwhelmingly remained faithful to the traditional rule of State immunity. The CM has not been able to show that a new rule has emerged that would have set aside the customary norm with its deep foundations in the general conduct of States. The one and only exception is the judgment of the Greek Areios Pagos in the *Distomo* case of 4 May 2000,[2] which was later rejected in the *Margellos* case as not reflecting the actual position under international law by the Special Supreme Court under Art. 100 of the Greek Constitution,[3] which in Greece discharges the functions of a Constitutional Court. Thus, not even in Greece has the new line of jurisprudence been acknowledged as a valid precedent. The same is true of the courts of other countries. Nowhere have the *Distomo* decision and later the *Ferrini* decision of the Italian Corte di Cassazione[4] found followers. Quite visibly, the *Ferrini* decision has remained an isolated incident.

8. In its more recent decisions of 29 May 2008,[5] the Italian Corte di Cassazione has attempted to justify its position by invoking paramount principles of justice encapsulated in the body of human

[2] German Memorial (GM), ANNEX 9.
[3] Judgment of 17 September 2002, 129 *ILR* 526.
[4] GM, ANNEX 1.
[5] GM, ANNEX 13.

rights norms.[6] But it has not succeeded to produce a single foreign judgment that would support its views. In order to hide the emptiness of its reasoning, it observes that the number of cases and decisions taking the same direction cannot be decisive. It may well be that a pure counting of decisions would not do justice to the complexity of the issue. However, it is more than telling that the Corte di Cassazione is ostensibly alone. It does not have a single supporter. Implicitly, it recognizes its isolation by observing that the rule it is applying is a rule "in the process of formation".[7] The absolute lack of supporting practice becomes also apparent through a perusal of the CM. Since the Corte di Cassazione stands in splendid isolation, the CM is not in a position to point to any factual element that could be characterized as a piece of evidence susceptible of founding a new customary rule derogating from the established principle of State immunity regarding sovereign acts. In the brief of the Procura Generale della Repubblica of 31 December 2009 in the case of *Ugo Bonaiuti v. Germany*[8] the arguments relied upon by the Corte di Cassazione to find civil suits against Germany based on events of World War II admissible, are meticulously examined and convincingly rejected one by one. Germany has little to add to that careful review of the legal position. Never has the erroneous position adopted by the Corte di Cassazione been exposed more drastically not by some academic voice, but by one of the institutions of the Italian judicial system itself.

9. Germany is of the view that the Italian defence has virtually collapsed as a consequence of the Court's decision of 6 July 2010. Italy has not been able to demonstrate that the well-established rule of jurisdictional immunity has yielded to any new tendencies that would make it retrospectively inapplicable. Accordingly, Germany could confine itself to referring to its Memorial where the relevant legal issues have been discussed in depth. Nonetheless, Germany feels it necessary

[6] Without saying so explicitly, the Corte di Cassazione implicitly follows the doctrine of *jus cogens*.
[7] GM, ANNEX 13, translation, p. 6; Italian: "in via di formazione".
[8] ANNEX 1.

to deal with a number of contentions and allegations contained in the CM that do not correspond to the true position. Some of the observations in the CM deserve indeed a definite rejection because they distort the state of the relationship between the two Parties. It is precisely in the interest of maintaining the good neighbourly friendship currently existing between Germany and Italy that Germany feels impelled to set the record straight with regard to a number of misleading contentions in the CM.

10. However, before taking up a number of specific details, Germany wishes to put on record its strong misgivings about the observation, reiterated several times and serving as the title of an entire section of the CM and therefore not an accidental slip of tongue, that "immunity cannot mean impunity".[9] Italy refers in this connection to a passage in the Court's judgment in the *Arrest Warrant* case.[10] But the Court's words are completely taken out of context. The Court had to deal with the immunity of an individual, the Congolese Minister for Foreign Affairs, who, according to credible allegations, had committed serious violations of human rights through various speeches inciting racial hatred. It stands to reason that immunity before foreign courts does not amount to impunity *tout court*. The Congolese Minister could be prosecuted, above all, before the courts of his own country.

11. Through using, in the present context, the words said by the Court in respect of a case where individual criminal responsibility was in issue, Italy manifests a regrettable misunderstanding of the object and purpose of litigation regarding reparation for war damages. Italian citizens have brought civil claims against Germany as a sovereign State. None of the plaintiffs has denounced Germany as a defendant under criminal prosecution. Germany may be allowed to recall that there is no international regime of criminal law operating against States. This lack of criminal sanctions to be imposed on a State relies on good reasons

[9] See heading of Section IV, p. 80.
[10] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports* 2002, p. 3, at 25 para. 60.

since it would necessarily be based on the assumption of collective guilt of an entire people. Of course, after World War II war criminals were pursued and convicted in Germany, first of all through the International Military Tribunal at Nürnberg in 1945/1946 and later in a multitude of domestic trials. Criminal guilt is always individual guilt. On the other hand, international responsibility of a State amounts indeed to collective responsibility of the entire national community. But it does not cast a shadow of criminal guilt on the people concerned. Accordingly, a State liable to make reparation enjoys a large measure of discretion as to ways and means to discharge its duty. In any event, Germany is confident that in the further course of the proceedings before this Court the general climate of the legal controversy will be free from such unfortunate overtones.

III. Reparation Issues Concerning Italy and Italian Citizens

1) General Observations

12. One of the leitmotivs of the Italian argumentation as presented in the CM is the complaint that Germany has never made any effort to compensate the Italian victims of the violations of IHL that occurred during the period when Italy was subjected to German occupation from September 1943 to April/May 1945. In the introductory paragraphs already, this line of reasoning finds a vivid expression. In para. 1.3 (p. 6), it is stated that

> "the 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 few lines further down (p. 6, para. 1.4, p. 6) the CM speaks of a "blatant denial of justice". In similar terms, Italy charges Germany with not having complied with its obligations of reparation so that recourse to

domestic procedures was the only way to obtain the requisite redress (p. 8, para. 1.9):

"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."

Essentially, Italy presents the violation of Germany's sovereign immunity as a remedy of last resort, as a measure of self-help designed to remedy a situation fundamentally in disharmony with fundamental principles of the international legal order.

13. Obviously, these submissions ignore a number of basic facts. First of all, there is no escaping the conclusion that, in any event during the time of World War II, violations of IHL did not entail individual reparation claims to the benefit of persons harmed by serious violations of the regime of *jus in bello*. The entire system of reparation for damages caused during World War II, as it was determined and shaped by the victorious Allied Powers originally through the Potsdam Accord, relied on the assumption that reparation had to be effected on the inter-State level through traditional mechanisms. Never was it imagined that, additionally, reparation claims could accrue to individual victims. In addition, Germany cannot avoid emphasizing that Italy was involved in the postwar reparation scheme and that it received appreciable amounts of compensation from Germany. Lastly, victims were never denied access to the German judicial system. Nor did Italy as the power entitled to bring claims on behalf of its citizens make the slightest effort for almost four decades to vindicate such claims after the conclusion of the two Agreements of 1961. It is only after the adoption of the 2000 German law on the "Remembrance, Responsibility and Future" Foundation[11] that Italy made representations to Germany on account of the exclusion of the Italian military internees ("IMIs") from the scope *ratione personae* of that law. As prisoners of war, this group

[11] CM, ANNEX 7.

of persons was not taken into account for the purposes of that belated reparation scheme.

2) The Waiver Clause in Article 77(4) of the Peace Treaty

14. It was pointed out in the German Memorial (GM) that under the Peace Treaty concluded with the victorious Allied Powers Italy renounced all claims against Germany "on its own behalf and on behalf of Italian nationals" (Article 77(4)). There is no need for Germany to set out at great length the reasons underlying this contractual stipulation. It is a matter of public knowledge that for many years Italy had been an ally of Nazi Germany. On the other hand, the economic and financial capacity of Germany to make good the damages it had caused during the war was limited. Therefore, priority was given to the nations which could be considered innocent victims of German aggression. Apparently, the Allied Powers saw no justification for Italy's participation in the reparation scheme as a quasi-victorious power.

15. In this connection, regard must be had to the fact that Article 77(4) of the Peace Treaty constitutes a standard clause which was included, in more or less identical terms, in the peace treaties of 10 February 1947 concluded by the Allied Powers with the other former allies of Nazi Germany, namely Bulgaria (Article 26 (4)), Hungary (Article 30 (4)) and Romania (Article 28 (4)). Under all of these provisions, those nations had to renounce any claims against Germany and German nationals outstanding on 8 May 1945. Two purposes were pursued by the victorious Allied Powers, which had much leeway in designing the contents of the treaties they wished to bring about. On the one hand, their intention was to clear up the rubble caused by the war, putting a brake on endless juridical fighting over reparation for war damages that otherwise would have had to be expected. On the other hand, as already hinted, the imposed waiver was also meant as a kind of sanction against the States that had formed an Alliance with Germany and Italy, the so-called "Axis". Those States could not hope to overcome the end of the war totally unscathed. In the same way as

Germany had to renounce any claims against them, they also had to waive, on their part, any claims against Germany.

16. Evidently, the considerations regarding the interpretation of the waiver clauses just exposed apply in respect of Article 77(4) of the Peace Treaty with Italy as well. Since the intention was to lay the foundations for a fresh start in a peaceful Europe, the nature of the waiver had to be general and comprehensive.

17. The question remains to be addressed whether Germany can derive any rights from the Peace Treaty with Italy to which it was not a party. It is clear that according to the plain language of the text Germany is the beneficiary of the waiver clause in Article 77(4). In accordance with the object and purpose of that clause, the conclusion seems inescapable that indeed the waiver clause is not confined to bestowing only a gratuity or mere benefit on Germany, instead of conferring on it a true entitlement which can be invoked in the present proceeding.

18. Germany relies on the customary rule[12] reflected in Article 36 of the Vienna Convention on the Law of Treaties, which provides for rights for third States. According to that provision, a right arises for a third party from a treaty concluded between other parties if those parties intended to create a right for the third party and if the beneficiary assents to that transaction. There can be no doubt that Germany has given such assent, both implicitly and explicitly. A renewed implicit manifestation of that assent is, for instance, the present action. One may also see in the conclusion of the Peace Treaty itself a manifestation of Germany's consent inasmuch as the Allied Powers, with whom Italy had to negotiate, held at the same time "supreme authority with respect to Germany", which they had assumed by virtue of the Berlin Declaration of 5 June 1945.[13] When two years later they concluded the

[12] See Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden – Boston, 2009), p. 488.
[13] Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by the Allied Powers, reprinted in: Ingo von Münch (ed.), *Dokumente des geteilten Deutschland* (Stuttgart, 1968), p. 19.

Treaty of Peace with Italy, they acted at the same time as trustees safeguarding Germany's interests.

19. Therefore, the only question is whether the parties to the Peace Treaty of 1947 had the intention of according a genuine right to Germany, as provided for in Article 36(1) of the Vienna Convention on the Law of Treaties. In this regard, one should first of all re-emphasize that Germany was specifically mentioned by its name. If indeed a State is identified in that way, it would seem to be illogical not to allow it to invoke a stipulation which in any event has been established in its favour. Essentially, this would deprive the clause of its object and purpose, namely, as already pointed out, to clear the ground in the midst of the ruins left by the war and to make a fresh start possible for the former enemy which, in 1947, was in a dire situation. The deplorable economic conditions obtaining in post-war Germany directly affected the Allied Powers who at that time, as occupation forces, had to take care of Germany and the German population. In particular, the Allied Powers did not want their own reparation claims, which had been determined by the Potsdam Accord, to be affected by reparation claims originating from former allies of Nazi Germany. In other words, they wanted the stipulations laid down in the peace treaties to be effective. A waiver which could not be invoked by its beneficiary would have made absolutely no sense.

20. The conclusion reached is buttressed by the official commentary of the ILC on the draft articles on the law of treaties. The ILC finalized its work in 1966. In the commentary on Article 32, the draft provision which dealt with treaties providing for rights for third States, the ILC specifically referred to the waiver clauses in peace treaties, presenting them as examples of treaties establishing rights for third States:

"In some instances, [the stipulation] is in favour of a group of States, as in the case of the provisions in the Peace Treaties after the two world wars which stipulated that the defeated States should waive any claims

arising out of the war in favour of certain States not parties to the treaties ... Examples of stipulations in favour of individual States, groups of States or States generally have already been mentioned".[14]

Hence, the ILC was convinced that the peace treaties concluded after World War II, including the Peace Treaty with Italy, had to be acknowledged as treaties that go beyond setting forth only benefits that are not legally enforceable, but have brought into being true legal entitlements for their beneficiaries.

21. In the case of an Italian ship, the *S.S. Fausto*, the third-party effect of the waiver clauses of the Peace Treaty with Italy was indeed recognized. The former Italian owner of the ship instituted a claim for reparation in the Uruguayan courts because Uruguay had requisitioned the ship during the war. Although Uruguay was not a party to the Peace Treaty, the courts found that the government was entitled to invoke the waiver clause contained in Article 76 of the Treaty as a bar to the claim.[15]

22. Doubts have been raised by the Respondent regarding the scope of the waiver clause. It contends that the focus of the clause is on private-law relationships arising out of commercial and contractual obligations. This entails according to its reading that claims arising from violations of the laws of war and IHL attributable to the German Reich were not included in the scope of Article 77 (4).[16] Italy's views can neither be reconciled with the plain text of the clause nor with its objective.

23. It is true that the first sentence deals primarily with private rights. On the other hand, the second sentence changes the perspective. The text mentions "all intergovernmental claims in respect of arrangement entered into in the course of the war", and ultimately, in the

[14] *Yearbook of the ILC* (*YILC*) 1966, Vol. II, p. 228 para. 2, p. 229 para. 7.
[15] Sir Humphrey Waldock, *Third Report on the Law of Treaties*, UN doc. A/CN.4/167, *YILC* 1964, Vol. II, p. 24 para. 18.
[16] CM, p. 105 s. para. 5.49.

last phrase, it includes also "all claims for loss or damage arising during the war". No differentiation is introduced regarding specific categories of claims. The waiver clause has a sweeping character. Any conceivable claims against Germany are encompassed. To split the unity of the text up into different segments stands in contradiction to established rules of interpretation.

24. If the view defended by the Respondent were followed, the waiver could not have reached its objective. Clearly, the authors of the Peace Treaty had no intention of allowing Italy or Italian citizens to assert and enforce claims against Germany, given the precarious economic situation of the defeated country. For that purpose, it was necessary to establish a wall shielding Germany from such demands. It must have been clear to the parties concerned that claims for reparation of war damages constituted the main bulk of any outstanding claims to be settled.

25. Judicial authorities in both countries have confirmed that the waiver clause produced indeed the effects it was intended to do. In a judgment of 2 February 1953 the Corte di Cassazione acknowledged that no claim could be brought against Germany or German citizens by persons of Italian nationality.[17] On the German side, contrary to the allegations to the Respondent,[18] the Federal Supreme Court (*Bundesgerichtshof*) came to the same conclusion.[19] It dismissed an application by an Italian citizen against the German Reich through which the plaintiff sought reparation for the requisitioning of a private car, holding that by virtue of the waiver clause, which had become applicable in Germany on the basis of Article 5(4)[20] of the London

[17] *Giurisprudenza Italiana* 1953, Section I, p. 317; ANNEX 2.
[18] CM, p. 108 para. 5.53.
[19] *Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ*) 19, 258, 14 December 1955; ANNEX 3.
[20] "Claims against Germany or German nationals by countries which were, before 1 September 1939, incorporated in, or which were, on or after 1 September 1939, allied to, the Reich, and of nationals of such countries, arising out of obligations undertaken or rights acquired between the date of incorporation (or, in the case of countries allied to the Reich, 1 September 1939) and 8 May 1945, shall be dealt with in accordance with the provisions made or to be made in the relevant treaties. To the extent that,

Agreement on German External Debts,[21] the plaintiff had lost his claim against Germany. In other words, the full effect of the waiver clause was confirmed.

26. The reservation made by the victorious Allied Powers in the introductory sentence of Article 77(4) of the Peace Treaty does not alter the conclusion that the waiver was definitive and final in the relationship between the two countries as long as the Allied Powers did not make use of the authority they had reserved to themselves. No such determinations have been made. Article 77(4) of the Peace Treaty has remained unchanged to this very date. Accordingly, the waiver clause continues to deploy its full effect.

27. Not a single one of the other waiver clauses contained in the peace treaties with the former allies of the Axis Powers has been interpreted in the narrow sense now suggested by the Respondent. No claims for the reparation of war damages have been directed against Germany from Bulgaria, Hungary or Romania. In all of these countries the view has prevailed to this very date, more than 60 years after the Paris Conference of 1947, that the clauses bar any attempt to require Germany to make compensation payments. As the only country, Italy departs from this consensus.

28. That Italy has embraced a wrong interpretation of the waiver clause contained in its Peace Treaty results also from the fact that the Allied Powers themselves, who also suffered breaches of IHL committed by German armed forces, renounced exactly in the same way any reparation claim against Germany not only for themselves, but also on behalf of their nationals. They did so on account of the reparations imposed on Germany by virtue of the Potsdam Accord and implemented by the Paris Agreement on reparation from Germany, on the

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under the terms of such treaties, any such debts may be settled, the terms of the present Agreement shall apply."

[21] Of 27 February 1953, 333 *UNTS* 2.

establishment of an inter-allied reparation agency and on the restitution of monetary gold (Article 2 (A)):

”The Signatory Governments agree among themselves that their respective shares of reparation, as determined by the present Agreement, shall be regarded by each of them as covering all its claims and those of its nationals against the former German Government and its Agencies, of a governmental or private nature, arising out of the war (which are not otherwise provided for), including costs of German occupation, credits acquired during occupation on clearing accounts and claims against the Reichskreditkassen.”[22]

The Preamble to this Agreement clarifies explicitly that the instrument is designed to settle the reparation issue.[23] It would be outright absurd to maintain that those nations which sustained even more serious damage during World War II should have definitely abandoned any corresponding claims whereas Italy, a former ally of Nazi Germany, should be free to raise such claims. In fact, the States Parties to the Paris Agreement have abstained from making any further demands for compensation of war time injuries.

29. In other words, the Peace Treaty of 1947 did away with any reparation claims against Germany in favour of Italy and Italian nationals. For this reason alone, the Italian contention that there has been a continuous denial of justice is devoid of any substance.

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[22] Agreement of 14 January 1946, http://www.mzv.cz/jnp/en/foreign_relations/neverejne/second_world_war_and_its_impact/documents/agreement_on_reparation_from_germany.html.

[23] “The Governments of Albania, the United States of America, Australia, Belgium, Canada, Denmark, Egypt, France, the United Kingdom of Great Britain and Northern Ireland, Greece, India, Luxembourg, Norway, New Zealand, the Netherlands, Czechoslovakia, the Union of South Africa and Yugoslavia, in order to obtain an equitable distribution among themselves of the total assets which, in accordance with the provisions of this Agreement and the provisions agreed upon at Potsdam on 1 August 1945 between the Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics,[1] are or may be declared to be available as reparation from Germany (hereinafter referred to as German reparation), in order to establish an Inter-Allied Reparation Agency, and to settle an equitable procedure for the restitution of monetary gold, have agreed as follows:”

3) The Waiver Clauses in the Two Treaties of 1961

30. Furthermore, Germany wishes to recall once again the two agreements that were signed on 2 June 1961 (GM, para. 11). Under both agreements, considerable payments were made to Italy. From today's viewpoint the amounts stipulated almost half a century ago (twice 40 million DM) do not seem to be considerable. This is a wrong impression, however. In 1961, the budget of the Federal Republic of Germany amounted to less than 48 billion DM, roughly a thirteenth of today's figures (2010: 319,5 billion Euros). Accordingly, in order to obtain a figure that can be compared with today's economic and financial situation, the amounts should at least be multiplied by a factor between 12 and 14. Yet whatever the assessment of the appropriateness of the sums agreed upon, the fact is that Italy accepted these payments to which it was not entitled under any legal rule or principle, given the waiver in the Peace Treaty. Moreover, as the consideration for the payment pledged by Germany, Italy accepted two further waiver clauses, the first one of which (Treaty on the Settlement of Certain Property-Related, Economic and Financial Questions) is framed categorically and permits of no doubts. Italy declared in Article 2 (1) of that agreement:

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

4) Reparation Payments

31. Accordingly, monies were provided to Italy for reparation purposes, and Italy apparently felt that any expectations it may had had were adequately satisfied. Otherwise, it would not have subscribed to the waiver clause. No reservation was made. In fact, as already hinted, the Italian Government remained absolutely passive for almost 40 years after the conclusion of the two agreements. Its conduct permits the inference that indeed it regarded the settlement of 1961 as a

considerable achievement since under the Peace Treaty it had not been left with any claims against Germany. On the part of Germany, the conclusion of the two agreements was indeed a gesture of good will with the intent to definitively normalize the relations with Italy, a country that had in the meantime become a close ally and friend within the framework of the three European Communities.

32. This is not the place to provide a complete balance sheet of all the reparations which the Allied Powers received from Germany after 1945. We confine ourselves to briefly mentioning that huge amounts of goods *in natura* were taken out of the four occupation zones and that all German foreign assets were confiscated. Furthermore, it cannot go unmentioned that Germany had to renounce more than 114,000 square kilometres of its territory. Lastly, German domestic legislation has introduced regulations for the injuries caused by the Nazi regime on a case-by-case basis. No blanket norms were enacted, taking into account, in particular, that Germany had been compelled, as just indicated, to make reparations in a global fashion at the inter-State level.

33. The preceding observations solely serve to dispel the erroneous impression created by Italy in the sense that Germany has not done anything to compensate the victims. Because of the waiver clause in Art. 77(4) of its Peace Treaty, Italy's share of the reparation scheme established on the basis of the Potsdam Agreements was originally reduced to nil. However, on grounds of equity, the Federal Republic of Germany later agreed to provide at least partial compensation to Italy, to the full satisfaction of its Government. Therefore, the charge that Germany did not bother to compensate the victims is totally misplaced and misleading. It distorts the truth.

5) Denial of Justice?

34. Lastly, Germany wishes to point out that Italy falls prey to a misinterpretation of basic concepts when it speaks of a "flagrant" or "blatant" denial of justice. Italian citizens have never been denied access

to the German judicial system on account of the grievances they held against Germany. Access to the courts is guaranteed to everyone according to Article 19(4) of the German Basic Law, to German citizens and to aliens alike, the nationality being irrelevant in this respect. It is another matter, however, whether a plaintiff has a genuine legal claim which he/she can assert. On the one hand, general international law did not, at the time of World War II, bestow individual reparation claims on persons victims of violations of IHL. On the other hand, German domestic legislation has nonetheless included several specific groups of victims of war injuries in reparation programmes. Civilian victims of forced labour were compensated, among them roughly 4,000 Italian citizens, and in particular the victims of persecution on racist grounds benefited from such programmes. Otherwise, war injuries were not made good by Germany on an individual basis, given the fact, outlined above, that large material sacrifices were imposed on it through the traditional mechanisms of war reparation. Thus, individual claims filed with German courts could generally not be successful. But their failure does not reflect a basic unwillingness of Germany to remedy the damages it caused during World War II. Germany is of the view that through the different mechanisms of reparation, in particular through collective reparations, it has lived up to its duty of reparation in a fully satisfactory manner.

IV. New Developments in the Field of State Responsibility and State Immunity?

35. In the following passages, Germany will confine itself to providing short answers to the Italian observations concerning the alleged new configuration which the law of international responsibility and State immunity has taken in recent years. Essentially, Germany refers to its submissions in the Memorial where the true legal position was set out. None of the arguments advanced by the Respondent permits the inference that individuals harmed by the armed conflict between the

German Reich and Italy are entitled to bring individual claims which Italian courts are empowered to adjudicate. The Italian judiciary has no jurisdiction over such claims.

1) The Anachronistic Nature of Italy's Arguments

36. In the first place, Germany wishes to point out that the Italian argumentation relies entirely on developments that have taken place after World War II, where the dramatic turning point was the United States "Tate letter" written by the Legal Adviser of the Department of State in 1952.[24] Before that date, there existed broad consensus as to the absolute character of the jurisdictional immunity enjoyed by States. Germany is well aware of the fact that Italian courts had followed the new tendency for many decades long before that date. However, their jurisprudence remained controversial. In any event, it was never contended that there could be any justification for restricting immunity also with regard to acts *jure imperii*. The debate centred exclusively on acts *jure gestionis* – or commercial acts. Eventually, the consolidation of the new regime came about in the fifties and sixties of the last century, and even later.[25] Up to 1945, not even hints could be found anywhere that individuals should be allowed to sue foreign States before their own courts on account of sovereign acts.

2) Rules on State Immunity as Substantive Rules

37. In its Memorial, Germany shows that the customary rules on jurisdictional immunity do not primarily pertain to the class of procedural rules that fall to be applied in accordance with the specific scope and content they have reached at the time when the judge of the forum has to deliver his decision.[26] Jurisdictional immunity is an outflow from the principle of sovereign equality of States. It regulates to what extent a State is subject to the jurisdiction of another State. The regime thus established does not vary continuously over the years. The

[24] GM, para. 49.
[25] GM, paras. 49-51.
[26] GM, paras. 91 *et seq.*

commission of an internationally wrongful act brings into being a specific configuration between the States involved, the wrongdoing State and the victim State. That configuration comprises not only the well-known substantive secondary rights of the victim State as they have been defined in the ILC's Articles on State Responsibility,[27] but also the ways and means defining the relevant mechanisms for the assertion of those rights. In fact, the manner in which injury caused can and must be repaired constitutes a key element of any reparation regime. As underlined in the Memorial, the victorious Allied Powers proceeded from the conviction that Germany had to face up to its responsibility for causing huge damages through its war operations by way of reparations to be provided to all of the States that had defeated the Axis States. The mechanism that was put into place was a classic inter-State mechanism. No provision was made for parallel provision of reparations in favour of individual victims. The contention that pursuant to the general rules of procedural law State immunity should be applied in accordance with the development of its legal regime at the time of the delivery of the relevant judgment would lead to absurd results. Essentially, it would mean that with regard to one and the same injurious occurrence a claim could be dealt with differently, depending on the point of time when the plaintiff has introduced his/her claim. Germany sees its viewpoint furthermore buttressed by the UK State Immunity Act 1978,[28] which provides explicitly in section 23, para. 3, that the Act does not apply to "proceedings in respect of matters that occurred before the date of [its] coming into force". Accordingly, Germany holds the relevant observations in the Italian Counter-Memorial (p. 56-59, paras. 4.43-4.50) to be unfounded.

38. However, there is no need for Germany to discuss this issue in greater detail. The basic fact is that the rules on State immunity regarding sovereign acts have not changed during the last decades in the sense contended by Italy. Even taking the law as it stands today, the Italian courts should have dismissed the claims introduced before them

[27] Taken note of by General Assembly resolution 56/83, 12 December 2001.
[28] 17 *ILM* 1123 (1978).

because the relevant customary rules deny them the requisite jurisdictional powers.

3) No Individual Reparation Claims Arising from Violations of IHL

39. The CM shows (p. 90-94, paras. 5.7-5.14) that violations of IHL lead to international responsibility. This principle was already laid down in Art. 3 of Hague Convention IV and finds today its reflection in Art. 91 AP I. Germany does not call into question this part of Italy's argumentation. State responsibility is a cornerstone of the entire edifice of international law. However, the observations put forward are irrelevant for the purposes of the present proceeding. First of all, Germany's responsibility deriving from the occupation of Italy and its capturing Italian military agents outside Italy lies outside the scope of the Court's task. Second, the submissions do not support the allegation that Germany has failed to satisfy individual claims of Italian victims. Indeed, the relevant instruments do not provide for individual entitlements. This was the *communis opinio* in 1907, and even after the conclusion of the four Geneva conventions of 1949 the legal position had not changed. Without any modifying nuance, the official Pictet Commentary of the ICRC states:

"As regards material compensation for breaches of the Convention, it is inconceivable, at least as the law stands today, that claimants should be able to bring a direct action for damages against the State in whose service the person committing the breach was working. Only a State can make such claims on another State …".[29]

Not even in 1977 had such a structural revolution come to completion. Reference may be made to the Commentary of the ICRC:

"Apart from exceptional cases, persons with a foreign nationality who have been wronged by the unlawful conduct of a Party to the conflict should address themselves to their own government, which will submit their complaints to the Party or Parties which committed the violation.

[29] Jean Pictet (ed.), *III Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva, 1960), Art. 131, p. 630.

However, since 1945, a tendency has emerged to recognize the exercise of rights by individuals".[30]

One cannot fail to note with what degree of caution the remarks on the present legal position have been formulated. The Commentary speaks of a "tendency", and it stresses that this "tendency" has not emerged earlier than 1945.

40. Germany refers furthermore, in this connection, to the decision of the European Court of Human Rights of 4 September 2007 in the case of *Associazione Nazionale Reduci dalla Prigionia, dall Internamento e dalla Guerra di Liberazione*.[31] In very clear terms, the European Court observes several times that the persons transferred to Germany to perform forced labour enjoyed no individual right to reparation under international law. Consequently, they could not plausibly complain of a violation of the right to the protection of "possessions" under Art. 1 of the [First] Protocol to the European Convention of Human Rights by being not included in the scope the Law on the Creation of the Foundation "Remembrance, Responsibility and Future" that was adopted by Germany in 2000.

41. Germany is well aware of the resolution adopted by the General Assembly on 16 December 2005 on "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".[32] This resolution recommends that States should provide victims of serious violations of IHL and international human rights law with "adequate, effective and prompt reparation for harm suffered" (para. 11(c)). However, this resolution does not add anything to the legal yardsticks against which the present dispute must be measured. On the one hand, the resolution is generally couched in language which discloses its hortatory character.

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[30] Jean Pictet *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, 1987), p. 1056 margin number 3657.
[31] CM, ANNEX 10.
[32] UN General Assembly resolution 60/147, 16 December 2005.

The General Assembly did not engage in codifying existing customary law, but was intent on progressively developing the law as it currently stands. Second, the resolution reflects trends and tendencies that have emerged at the earliest in the last two decades. Accordingly, the "Basic Principles and Guidelines" lack any relevance for the legal assessment of the instant case.

42. Another attempt to progressively develop the law as it stands has been made by the Committee on "Reparation for victims of armed conflict" of the International Law Association. In a draft report[33] submitted to the forthcoming session of this Committee in August 2010 in The Hague, the Co-Rapporteur, Professor Rainer Hofmann from Frankfurt/Main, suggests that the following proposition should be adopted as part of a declaration on the topic (Article 6):

"Victims of armed conflict have a right to reparation from the responsible parties."

It is clear from the explanations given by the Rapporteur that his proposal is meant to introduce new rules, rules that to date have no firm foundation in international law. This is also corroborated by Article 15(1) of the draft declaration according to which the rights and obligations reflected in the text shall have no retroactive effect. Whatever the justifiability of the suggested reform, the reformers themselves acknowledge quite openly that they would turn a historic page in the history of international law.

43. Further support for the slow emergence of a new rule may also be derived from the Advisory Opinion in the *Wall* case where the Court held that

"Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned"

[33] See http://www.ila-hq.org/en/committees/index.cfm/cid/1018.

on account of the requisition and destruction of homes, businesses and agricultural holdings.[34] However, this observation cannot really be considered as a general breakthrough to a new concept of reparation in situations of armed conflict since the Palestinian territories are still placed under Israeli occupation. The Palestinian National Authority has been endowed with certain powers; but it does not have the full status of a government that could claim reparation for its citizens by way of diplomatic protection. In any event, however, the holding of the Court cannot be applied retrospectively to occurrences that took place during World War II.

4) Waiver of Individual Reparation Claims

44. Germany cannot agree with the subsequent observations advanced by Italy to the effect that reparation claims can under no circumstances be waived (pp. 94-97, paras. 5.15-5.21). This contention comprises two elements. On the one hand, Italy argues that individual entitlements may not be restricted by the responsible home State of the person concerned. On the other hand, Italy also maintains that States may not renounce the reparation claims that have accrued to them.

45. Regarding the first element of its submission, Italy is right in drawing attention in particular to Art. 6 of Geneva Convention III and Art. 7 of Geneva Convention IV. It is true that these provisions may be seen as precursors of the current concept of *jus cogens*, intended to secure the status of the persons under the protection of the two Conventions. However, it should be pointed out that no individual entitlements arose from the breaches of IHL perpetrated by Germany. Therefore, the relevant instruments – first the Peace Treaty of 1947 and thereafter the two Agreements of 1961 – did not encroach upon legal rights protected against any kind of interference. Second, the two provisions operate as a shield against any restriction of the primary rights which are granted to the protected persons. States are prevented from lowering the standard of treatment of prisoners or of civilians

[34] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports* 2004, p. 136, at 198 para. 152.

below the level peremptorily determined by the clauses of the applicable regime. Within the present context, another configuration must be analyzed. When the Peace Treaty was concluded in 1947, the war was over by definition, and the same holds true of the two agreements of 1961. The objects of the contractual stipulations were reparation claims that might – or might not – have arisen. Neither in 1947 nor in 1961 was any attempt made to go against the letter and the spirit of the applicable regime of armed conflict.

46. It is clear, on the other hand, that claims to reparation can indeed be disposed of by States for the benefit or to the detriment of their nationals. All the treaties concluded after World War II are premised on that assumption. International practice had no doubts, at that time, that when settling the financial consequences of armed conflicts it is necessary to establish general regimes, comprehending both governmental and private assets and liabilities. There is not a single case in which an international judicial body would have declared that a State is juridically prevented from disposing of assets of its nationals when such measures are necessary for the conclusion of a peace treaty. Such measures have a specific nature. They cannot be characterized as unlawful confiscation contrary to the guarantee of property as it exists in some international instruments for the protection of human rights, the African Charter on Human and Peoples' Rights (Art. 14), the American Convention on Human Rights (Art. 21), and the European Convention on Human Rights ([First] Protocol, Art. 1). Peace treaties are almost unavoidably required to address a general situation of death and destruction. Only courageous and forward-looking decisions are able to bring about redress by laying the groundwork for peace and reconciliation between former enemies. If every single violation had to be accounted for as an occurrence requiring separate treatment, that paramount aim would be frustrated. Indeed, Italy has not been able to refer to hard international practice to buttress its contention.

47. Even less convincing is the reference to the common clause contained in the four Geneva Conventions establishing a prohibition for States to absolve themselves from liability incurred by breaches of the applicable regime of IHL (GC I, Art. 51; GC II, Art. 52; GC III, Art. 131; GC IV, Art. 148). These clauses bear no relationship with the subject-matter of the present dispute. They relate to international reparation claims held by States against other States. Therefore, they do not fit into the intellectual framework discussed here where the main argument advanced by Italy is that Germany did not satisfy individual reparation claims – claims which never arose, as has been shown.

48. Second, Italy was not a vanquished State at the time it concluded the Peace Treaty with the Allied Powers. Obviously, it was in a somewhat delicate position. On the one hand, it had joined the alliance of the victorious powers in 1943; on the other hand, it could not totally shed its past of an ally of Nazi Germany. For this reason, the conclusion of a peace treaty proved indispensable. However, given its ambiguous situation, Italy did not meet the criteria of a "vanquished" State. Since its rupture with Nazi Germany, it had left the Axis long before its final defeat.

49. Lastly, Art. 131 GC III and 148 GC IV contemplate an entirely different factual configuration. The two provisions are intended to prevent the abusive exploitation of a position of superior military strength at the end of a war. They prohibit a victor to shed its own responsibility by compelling the defeated nation to renounce all of its claims. The Peace Treaty of 1947 did not purport to protect the alliance of the victorious nations with whom Italy established a peace settlement from being made accountable by Italy. The victors did not seek any such advantages for themselves. Instead, they acted on behalf of Germany for the well-founded reasons set out above. They wanted to achieve nothing else than to lay the groundwork for a fresh start between the two nations who had first been close allies and thereafter declared enemies. That at the same time they were concerned to protect German assets for their

own reparation purposes is a motivation which is irreproachable and does not, in any event, come within the purview of the two provisions.

5) The Territorial Clause

50. Germany has discussed the meaning and scope of the territorial clause at great length in its Memorial (paras. 71-82). The arguments raised by Italy to rebut that interpretation of the legal position do not seem to be convincing. The territorial clause opens up only a rather narrow window in respect of factual configurations which essentially consist of specific, isolated incidents. Organized armed hostilities have never been subsumed under the territorial clause.

51. In the first place, Germany recalls that the territorial clause is a child of recent times. Italy has drawn the attention to a resolution of a learned society, the *Institut de droit international*, which advocated the introduction of such a clause already at the end of the 19th century (CM, para. 4.28, p. 51).[35] But the Institut clearly was intent on engaging in progressive development. It proclaimed (Art. 4 (6)):

« Les seules actions recevables contre un Etat étranger sont:
….
6. Les actions en dommages-intérêts nées d'un délit ou d'un quasi-délit, commis sur le territoire. »

At that time, this assertion meant a courageous leap into an unknown future. At the same time, Franz v. Liszt, reflecting the unanimous opinion of his time, wrote:

"It results from the mutual independence of States that no State may be sued before the courts of another State, except if the suit concerns immovable property or if it [the State] voluntarily submits to the domestic jurisdiction."[36]

[35] Hans Wehberg (ed.), *Tableau général des résolutions (1873-1956)* (Basel, 1957), p. 14.

[36] "Aus der gegenseitigen Unabhängigkeit der Staaten voneinander folgt, dass kein Staat vor die Gerichte eines andern Staates gestellt werden kann, es sei denn, dass es sich … um dingliche Klagen in Bezug auf unbewegliches Gut handelt oder er sich freiwillig der inländischen Gerichtsbarkeit unterwirft", *Das Völkerrecht* (Berlin 1898), p. 39.

In fact, the CM cites as the first international instrument in which the territorial clause has found acceptance the European Convention on State Immunity of 16 May 1972[37] (Art. 11). Being aware of the dangers inherent in this provision, the drafters took care to exclude from its scope *ratione materiae* any proceedings relating to the armed forces of a State party (Art. 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."

All the other territorial clauses, in particular the clause contained in Art. 12 of the UN Convention on Jurisdictional Immunities of States and Their Property,[38] pertain to a more recent past. Again, Italy attempts to apply retrospectively to the occurrences of World War II legal rules that have arisen in a slow process of progressive development after the founding of the United Nations.

52. It can hardly be said that the territorial clause has led to the disappearance of the former distinction between acts *jure gestionis* and acts *jure imperii*. In particular, attention is drawn once again to the commentaries on the two relevant provisions. Art. 11 of the European Convention has been unmistakably confined to configurations like traffic accidents (GM, p. 44, para. 72), and the same philosophy underlies Art. 12 of the UN Convention. It is true that the commentary on the draft prepared by the ILC mentions also

"intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination."

[37] *CETS* No. 74.
[38] Adopted by General Assembly Resolution 59/83, 2 December 2004, not yet in force.

This enlargement of the scope *ratione materiae* should not be overrated. The examples given are far away from armed conflict. They presuppose a generally peaceful relationship where the good climate of mutual understanding is disturbed only by some incidents that were either unplanned and unforeseen or were perpetrated in secrecy by agents of the wrong-doing State. It is visibly in particular the *Letelier* case that has inspired the explanatory comment on the extension of the clause to "assassinations". No matter how despicable the murder of general Letelier in Washington was, the relationship between Chile and the United States had by no means evolved to a situation of armed conflict.

53. Mass phenomena like armed conflicts cannot be measured by the same yardstick as minor incidents. To entrust the settlement of armed conflicts to judicial settlement through individual actions would inevitably destroy the well-woven texture of time-honoured and well-proven institutions and mechanisms of international law. Domestic judges are not sufficiently equipped for handling such complex situations which require the best expertise not only in law, but also in respect of the historical circumstances of the conflict concerned. Thus, the two territorial clauses are not appropriate as precedents in the present dispute.

54. Lastly, Germany refers again to the statement made by Mr. Gerhard Hafner, chairman of the working group of the Sixth Committee of the General Assembly entrusted with examining the draft of the ILC before its adoption by the General Assembly itself. Hafner was authorized to make a statement in respect of the applicability of the Convention to military activities. Because of its importance, that statement may be reiterated. It was phrased as follows:

> "One of the issues that had been raised was whether military activities were covered by the Convention. The general understanding had always prevailed that they were not."[39]

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

This was not a personal comment by Mr. Hafner. In consonance with usual diplomatic practices, he was specifically empowered to make that comment, which may be decisive for many States when considering the suitability of ratifying the Convention. Precisely States that normally offer their assistance very generously to other States, including military assistance in the form of UN contingents, the prospect of having to endure being sued before the domestic courts of the countries where such troops are deployed could be an enormous deterrent. This consideration may have been of decisive importance for the European Court of Human Rights when, in *Behrami and Saramati v. France, Germany and Norway*,[40] it held that an arrest effected in Kosovo had not taken place under the jurisdiction of the three troop-contributing countries against which the application had been directed, but under the jurisdiction of the UN Security Council.

55. In fact, when depositing its instrument of ratification of the UN Convention on 23 December 2009, Sweden made the following declaration:

> "Recalling *inter alia* resolution 59/38, adopted by the General Assembly on 16 December 2004, taking into account *inter alia* the statement of the Chairman of the Ad Hoc Committee introducing the report of the Ad Hoc Committee to the General Assembly, as well as the report of the Ad Hoc Committee, Sweden hereby declares its understanding that the Convention does not apply to military activities, including the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, and activities undertaken by military forces of a State in the exercise of their official functions."

It thereby followed the example of Norway which had made the same declaration when it handed over its instrument of ratification to the Secretary-General of the United Nations. The two declarations evidence that there can be no question of *opinio juris* supporting a new rule to the effect that military operations are not shielded from judicial scrutiny before domestic courts in foreign countries. The exercise of military power pertains indeed to the core elements of sovereign powers. The

[40] Decision of 2 May 2007, Applications 71412/01 and 78166/01.

Corte di Cassazione itself was right when in the *Markovic* case[41] it held that the discharge of military functions constitutes an "act of government" ("atto di Governo"). However, Germany may be allowed to express once again its amazement over the fact that the Corte di Cassazione considers actions brought against Italy before Italian courts to be inadmissible to the extent that military activities are concerned, while on the other hand it has no scruples to rule on the merits of claims brought against Germany on account of military activities on Italian soil. In the CM, not a single word explaining this inconsistency can be found.

6) *Jus cogens*

56. Regarding the issue of *jus cogens*, hardly any enlightenment can be derived from the CM (pp. 60-70, paras. 4.54-4.77). Germany does not challenge the concept of *jus cogens*, quite to the contrary. Germany is of the view that the concept of *jus cogens* has added an important new element to the international legal order. *Jus cogens* provides a hard backbone to the new value orientation which international law has received under the impact of the UN Charter. Whereas international law, as from its inception, was always designed to promote peace and good order among nations, it did not protect directly the values that secure a civilized state of affairs in the international community. Since the individual made his/her appearance on the international stage as bearer of rights that even the home State must respect, the ground is prepared for denying absolute sovereignty to transactions between, and unilateral actions of, States. Undeniably, this new philosophy has become part and parcel of present-day international law.

57. The Respondent is right in recalling that in the legal literature early voices claimed already in past centuries that international law had a hard core of fundamental values that should enjoy protection under any circumstances (CM, pp. 60-64, paras. 4.56-4.66). However,

[41] GM, ANNEX 28.

these academic invocations of the ethical and moral underpinnings of international law were never acknowledged in actual State practice. Until the outbreak of World War II, the most horrendous treaties were concluded by States without any great hesitation, and never were such treaties challenged as being invalid. It is only the Vienna Convention on the Law of Treaties of 1969 which introduced the concept of *jus cogens* into the body of positive international law (Art. 53, 64), first against a large measure of resistance which was overcome only slowly.[42] During many years, the Court shrank away from speaking of *jus cogens*. In the advisory opinion on *Nuclear Weapons* it coined the term "intransgressible principles of international law".[43] Only in the most recent past has it overcome its inhibition to recognize *jus cogens* as a class of norms that form part of the general body of international law.[44] In other words, *jus cogens*, taken as a concept of positive international law, is an offspring of the last four decades, long after the occurrences of World War II from which Italy derives its claims. In this regard, the Vienna Convention on the Law of Treaties does not reflect customary law that existed already existed in 1969, but makes a qualitative leap forward.[45]

58. The "evidence" which the Respondent has gathered to support its claims about the impact of *jus cogens* on the law of State immunity do not corroborate its contentions. There is not a single precedent that would confirm that State immunity must yield in case an applicant pursues a claim based upon an alleged infringement of *jus cogens*.

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[42] To this very day, France has refrained from ratifying the Vienna Convention on the Law of Treaties; see Hélène Ruiz-Fabri, « La France et la Convention de Vienne sur le droit des traités : éléments de réflexion pour une éventuelle ratification », in : Gérard Cahin *et al*. (eds.), *La France et le droit international* (Paris, 2007), p. 137, at 139-150.
[43] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports* 1996, p. 226, at 257 para. 79.
[44] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, ICJ Reports* 2006, p. 6, at 32 para. 64.
[45] See Villiger, *op. cit* (above note 12), p. 676.

59. The excerpt from the article written in 1989 by Professors Belsky, Merva and Roht-Arriaza (CM, p. 65, para. 4.69,) should be reproduced at greater length. It reads:

> "The existence of a system of rules that states may not violate implies that when a state acts in violation of such a rule, the act is not recognized as a sovereign act. When a state act is no longer recognized as sovereign, the state is no longer entitled to invoke the defence of sovereign immunity. Thus, in recognizing a group of peremptory norms states are implicitly consenting to waive their immunity when they violate one of these norms."[46]

Obviously, the observation by the three authors is based on a hypothetical assumption that has nothing to do with the realities of international practice. It is no more than an unfounded speculation to maintain that States, by recognizing peremptory norms or *jus cogens* as a special class of rules of international law, thereby implicitly waive their immunity. A waiver cannot be construed on a fictitious basis. A waiver is a declaration of will that unequivocally expresses the intention to renounce certain rights or entitlements which the State concerned possesses under conventional or customary law. What the authors wish to achieve is to undermine a basic rule of international law through an argument that sounds convincing at face value, but lacks any real foundation in State practice, thereby completely distorting the concept of waiver.

60. It is true that German author Juliane Kokott suggested a few years ago that a loss of immunity might be entailed by an abuse of sovereignty (CM, p. 66 para 4.69).[47] This affirmation has not found any positive echo in later legal writings or in the judicial practice anywhere in the world. It should also be added that Kokott's suggestion was derived from an extremely narrow field of observation, namely US judicial practice which was not really relevant for the inferences she

[46] Adam C. Belsky, Mark Merva & Naomi Roht-Arriaza, "Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law", 77 *California Law Review* 365, at 394 (1989).
[47] "Missbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstößen", in: *Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt* (Berlin *et al.*, 1995), p. 135, at 148 s.

drew therefrom. In order to become the point of departure for the crystallization of a new rule of international law, her views would have needed some support which simply has not been forthcoming. On the whole, the article is the fruit of theoretical speculation, born on the spur of the moment, without any regard for the wider implications of the propagated views.

61. A similar comment is deserved by the observations in the CM which refer to the *Princz* case that was adjudicated in the United States a few years ago (CM, p. 66 para. 4.70). Although the court of first instance declared a suit against Germany admissible,[48] the Court of Appeals rejected the application, pointing to the fact that the United States Foreign Sovereign Immunities Act (FSIA)[49] did not allow for an exception to the rule of immunity in cases where allegation of serious violations of human rights are in issue.[50] It is only in a dissenting voice (Judge Wald) that the argument was emphasized that a State engaging in serious misconduct implicitly waives its immunity.[51] This was a view not shared by the majority of the judges on the bench. Judge Ginsburg, who delivered the opinion of the court, clearly stated that waiver must be intentional. "In sum, an implied waiver depends upon the foreign government's having at some point indicated its amenability to suit."[52] Accordingly, the *Princz* case cannot serve as a precedent in the present proceedings.

62. Once again, when referring to the *Al-Adsani* case before the European Court of Human Rights,[53] the Respondent relies essentially on a minority opinion. In that case, a Kuwaiti/British citizen was denied access to court in the United Kingdom regarding an application he wished to pursue against the State of Kuwait, claiming compensation in respect of injury to his physical and mental health caused by torture in

[48] Judgment of 23 December 1992, 103 *ILR* 598.
[49] 15 *ILM* 1388 (1976).
[50] Judgment of 1 July 1994, 26 F.3d 1166 (D.C. Cir. 1994); 33 *ILM* 1483.
[51] *Ibid*., at 1497.
[52] *Ibid*., at 1492.
[53] Judgment of 21 November 2001, Application 35763/97.

Kuwait in May 1991 and threats against his life and well-being made after his return to the United Kingdom. Having failed to obtain redress by judicial means in the United Kingdom, he complained in Strasbourg of a violation of his rights under Art. 6 (1) of the European Convention on Human Rights. Indeed, this provision grants everyone access to a judicial body for the vindication of his "civil rights and obligations". However, the guarantee of access to a judge does not stand alone; it is enmeshed in the general framework of international law, which is explicitly emphasized by Art. 31(3)(c) of the Vienna Convention on the Law of Treaties. It seems worthwhile to cite the relevant passages of the decision where the European Court of Human Rights explains why State immunity falls to be respected:

"It reiterates that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969, and that Article 31 § 3 (c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (see, *mutatis mutandis*, *Loizidou v. Turkey* (merits), judgment of 18 December 1996, *Reports* 1996-VI, p. 2231, § 43). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.

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

63. The wisdom of this decision, which is determinative of the jurisprudence of the Strasbourg Court up to this very date,[54] has sensible foundations. States that would open their courts and tribunals to applicants seeking redress for injustices they have suffered abroad might

[54] See, for instance, *Cudak v. Lithuania*, application 15869/02, 23 March 2010.

be overflooded with claims against third States. On the one hand, such claims are not easily manageable. The taking of evidence with regard to occurrences that have taken place abroad encounters regularly serious obstacles. On the other hand, very understandable, such "liberal" States would unavoidably create serious political tensions by trying to investigate the offences complained of. Regarding the prosecution of criminal perpetrators under the principle of universal jurisdiction, these inconveniences are accepted by the international community. However, proceedings against a foreign State would generally discredit that State, creating resentment and enmity. It turns out, once again, that the principle of State immunity is a device that secures orderly co-existence in the relationship between sovereign States.

64. In the final analysis, when trying to prove that the legal position has changed, the Respondent has no other piece of evidence than the jurisprudence of the Corte di Cassazione itself (CM, p. 67 para. 4.73). The logic of the argument put forward by that court in the *Mantelli* case is highly debatable:

> "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 violations of contractual obligation, 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. To state the contrary would mean to use a merely procedural rule to achieve an aim of paramount injustice".

It is not by accident that since many decades a distinction is drawn between acts *jure imperii* and acts *jure gestionis*. When performing acts *jure imperii*, States act in the exercise of their sovereign powers. By contrast, when they conclude commercial contracts, they enter the market place and act as merchantmen. To argue *a maiore a minus* in comparing these two different situations, overlooks their basic structural differences. Being sued on account of a commercial contract does not put in jeopardy the sovereignty of a State. However, when its acts *jure imperii* are reviewed by judges in another country not only incidentally,

but as the main subject-matter of a dispute, such assessment amounts inevitably to interference in its reserved sovereign space.

65. Summing up our argument, it should be said that *jus cogens* is entirely made up of primary rules, rules of conduct that prohibit specific conduct. *Jus cogens* is intended to avert occurrences that are commonly rejected as being incompatible with the basic moral and ethical foundations of the international community. Just to give a few examples: States are prohibited from agreeing in an international treaty on the extermination of an ethnic group, they cannot divest themselves of the rules of IHL, and any treaty providing for the occupation and carving up of a third country would be considered null and void. However, the character of a rule as *jus cogens* does not determine what consequences are entailed by its breach. Modern international law has brought into operation quite a number of special consequences in particular with regard to persons who are individually responsible for the breaches that have been committed by them in their capacity as State agents: criminal prosecution is the most prominent example of the new emphasis on minimum world order.

66. In general, however, a *jus cogens* rule remains essentially part and parcel of the common body of international law. One does not have to conceive of two chapters of international law, one that deals with “ordinary” rules and another one, to be newly invented, dealing with *jus cogens* and its specific legal framework. The most significant statement about the legal position is the provision which the ILC has devoted to “Particular consequences of a serious breach of an obligation under this chapter” (Art. 41), namely serious breaches of obligations under peremptory norms of general international law. The provision confines itself to requiring that States shall “cooperate” to bring to an end through lawful means any such breach (1) and that, additionally, States shall not “recognize as lawful” a situation created by such a breach (2). No further, more far-reaching consequences are mentioned. Obviously, the ILC proceeded with great caution, recommending above

all that through a cooperative process of negotiation a sensible solution should be found in such instances. Art. 41 does not provide a victim State with extra-legal remedies that would allow it to assert the rights it believes to have by way of self-help, resorting for that purpose to its judicial machinery. The Respondent would have to show that the codification drawn up by the ILC does not correctly reflect the actual position under international law. However, no clue could be found for such a departure from the legal framework which, since its adoption by the ILC in 2001, has been generally acknowledged as a faithful embodiment of the relevant regime of State responsibility.

67. It results also from the constant jurisprudence of the Court that a sharp distinction between primary rules pertaining to the class of *jus cogens* and the secondary rules governing the legal consequences of their breach is necessary. Indeed, the requirement of consent to jurisdiction applies without any exception, even in instances where the applicant bases its claims on a violation of *jus cogens*.[55] A State which has allegedly been the victim of an act of aggression cannot simply submit its claims for reparation to the Court, arguing that because of the gravity of the violation suffered by it it should not be prevented from instituting legal proceedings before the highest judicial body of the international community. And the same is true for other alleged infringements of *jus cogens* rules. Reference should be made in this connection to the careful attention which the Court devoted to the issue of jurisdiction in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.[56] Bosnia-Herzegovina was required to show that indeed its application came under the jurisdiction of the Court and was admissible, and the Court

[55] See ultimately *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, ICJ Reports* 2006, p. 6, at 32 para. 64. It is well known that the application brought against Rwanda was dismissed for lack of jurisdiction notwithstanding the gruesome character of the atrocities upon which the application was founded. For the former jurisprudence see references in Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm (eds.), *The Statute of the International Court of Justice. A Commentary* (Oxford, 2006), p. 606 margin number 25.

[56] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, ICJ Reports* 1996, p. 595; judgment of 26 February 2007, 46 *ILM* 188 (2007).

scrutinized its reasoning in a punctilious manner. Even a case of alleged genocide does not amount to an exception from the rule of consent.

68. It should be reiterated that the relationship between sovereign States is governed by the principle of equality. No single State can sit as an arbitrator over other States. Even a State that has committed a breach of fundamental norm of the international community remains a sovereign entity. It does not forfeit its right to see its sovereign prerogatives respected. No international procedure for that purpose has ever been put into place. At the United Nations, the expulsion of a State (Art. 6 UN Charter) is surrounded by elaborated procedural guarantees. Obviously, to deprive a State of the status rights which it enjoys by virtue of its sovereignty cannot be left to the whims and fancies of another State, acting alone. The aim of securing international peace and justice must be pursued by the international community within the framework of well-ordered mechanism, but not through unilateral, uncoordinated steps.

V. Requests

69. Germany maintains all of its requests as they are set out in its Memorial (p. 83, para. 132).

Berlin, 5 October 2010

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List of Annexes

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