INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

JURISDICTIONAL IMMUNITIES OF THE STATE

(GERMANY V. ITALY)

REJOINDER

OF ITALY

10 JANUARY 2011

SUMMARY

In this Rejoinder, presented within the time-limits fixed by the International Court of Justice (hereinafter the Court) in the Order of 6 July 2010, the Italian Republic (hereinafter Italy) intends to submit its objections to the arguments raised in the Reply of the Federal Republic of Germany (hereinafter Germany), highlighting in particular why the Court's decision to consider the Italian counter-claim inadmissible *ratione temporis* does not change its request that the Court adjudge and declare that all the claims of Germany are rejected.

I – The Subject-Matter of the Dispute after the Court's Order of 6 July 2010

1.1 The Court ruled the Italian counter-claim inadmissible because it found that "the dispute that Italy intend(ed) to bring before the Court by way of its counter-claim relates to facts and situations existing prior to the entry into force of the European Convention as between the Parties", and "accordingly falls outside the temporal scope of this Convention".[1] But if the Court has defined the counter-claim "inadmissible as such",[2] it also stated that by contrast "the proceedings relating to the claims brought by Germany continue"[3] and did not in any way preclude the invoking by Italy of the events to which the counter-claim referred and Germany's unfulfilled reparation obligations by way of a "defence on the merits"[4] against Germany's claims, that is, in order to decide whether the failure to recognize jurisdictional immunity to Germany by Italian judges approached by victims of Nazi crimes in search of redress does or does not constitute an internationally wrongful act attributable to the Italian State.

1.2 This is, moreover, implicitly but clearly admitted by Germany itself in its Reply. The numerous arguments on which it dwells in seeking to show that Germany did not commit an internationally wrongful act despite its non-reparation of the IMIs (or of the victims of Nazi massacres in Italy, completely forgotten in the latest German submissions) are proof in themselves that Germany is fully aware that the Court cannot fail to analyse this issue in deciding whether the conduct of Germany in this respect

[1] Order of 6 July 2010, para. 30.
[2] Order, finding, para. 35 *(A)*.
[3] Order, para. 34.
[4] Order, para. 13.

does or does not justify the denial of immunity. In other words, if the Order prevents Italy from pursuing its counter-claim in the present case, it obviously does not in any way affect the solution of the question raised by Germany's main claim, and in particular does not prevent Italy's using the arguments on which the counter-claim was based in order to disprove it. Therefore, the startling allegation by Germany that "the Italian defence has virtually collapsed as a consequence of the Court's decision of 6 July 2010"[5] has no merit; nor does the claim that what Italy points out regarding reparations "lies outside the scope of the Court's task" and is therefore "irrelevant for the purposes of the present proceedings".[6] On the contrary, the question of non-reparation is crucial for resolving the dispute over immunity: the Court's jurisdiction to take cognizance of it incidentally is thus indisputable.

1.3 It should be stressed again, in fact, that the root cause of the dispute brought by Germany to the Court is constituted precisely by the failure to make reparations to the vast majority of Italian victims of atrocious war crimes and crimes against humanity perpetrated by the Nazis in the last phase of World War II. The question on which the Court is called upon to answer is whether the refusal of reparations must – as Italy requests and Germany disputes – be given importance in order to ascertain whether indeed the cases brought by victims of these crimes before Italian judges have given rise to international responsibility of Italy for the fact that these judges felt unable exceptionally to recognize Germany's immunity from jurisdiction, in view of the very special features of the cases submitted to them. These are, in fact, cases of individuals to whom no possibility of obtaining compensation was ever granted, even though they had suffered acts which indisputably engage the international responsibility of Germany and of which no one doubts the character as war crimes and crimes against humanity.

II – General Observations on Germany's Reply

2.1 The central assumption from which Germany starts is summarized thus in the Reply: "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

[5] Reply of the Federal Republic of Germany (hereinafter GR), para. 9.
[6] GR, para. 39.

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*."[7]

2.2 Contrary to what Germany claims, Italy has not challenged in the Counter-Memorial – and is careful not to challenge today – the importance of the rule of international law that in principle every State shall grant the other States immunity from jurisdiction before its domestic courts with respect to acts *jure imperii*. However, it should be immediately stressed that such recognition does not imply acceptance of the idea suggested by Germany (and surely incorrect) that the rule is to be classified as belonging to *jus cogens*: unquestionably, for example, the beneficiary of a rule of *jus cogens* may not renounce its application in their own favour and exempt another State from compliance with it, whereas no one doubts that a State may legitimately renounce its judicial immunity and voluntarily submit to a foreign court. Similarly, a waiver of sovereign immunity agreed between States through a special international agreement would certainly not void the agreement (as it should if the immunity rule were peremptory in nature).

2.3 Italy, however, while unhesitatingly seeing as fundamental in nature (though not *jus cogens*) the rule of immunity with regard to acts *jure imperii*, is convinced that – as already illustrated in the Counter-Memorial – this rule is subject to derogations or allows for exceptions broader than those admitted by Germany, and growing. In assessing the likelihood and extent of these exemptions and exceptions Italy is not asking the Court to "invent" new law, but simply to determine the legal consequences arising from principles of international law which are already fully in force. It is in this very limited perspective that it is possible to identify borderline cases where it may be justified not to recognize the immunity of a State in respect of acts *jure imperii*: borderline cases concerning very special situations involving serious and unanimously recognized violations of peremptory norms followed by a basic refusal of reparation in favour of the victims. Admitting the existence of such extreme cases would not entail any of the catastrophic consequences envisaged by Germany.

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[7] GR, para. 3.

2.4 Germany seeks instead specifically to allege that the Italian argument would have catastrophic consequences because it would reopen before domestic courts a dispute without end regarding all the violations of international humanitarian law committed in World War II, whereas such litigations had been permanently closed by a series of agreements between States that took into account and resolved at international level the issues of reparations, and that it would be unthinkable to call in question again.

2.5 But this is not Italy's position. Italy does not in any way deny that "in the relationship between States at the international level, settlement of harm caused [is permitted] in a well-pondered manner, through negotiation and treaty".[8] For Italy, the point is first to analyse and interpret the agreements to which Germany refers, to ascertain if they truly and clearly closed, in a legally correct way, the issue of reparations in favour of Italian victims of the serious crimes committed by the Nazi authorities. To the extent that they had not, then the reparation obligation on Germany would remain, and as this was denied to most of the victims, the question arises whether the non-application of jurisdictional immunity *in casu* may be justified in order to allow the victims themselves to access the only tool left that may be usable in order to secure it, namely recourse to domestic courts.

2.6 But there is a further perspective to consider: if the agreements in question were to be interpreted as having simply discharged Germany from its obligation to grant reparation to the Italian victims of the heinous crimes committed by the Nazi authorities, then it is not possible to pretend that they have been made "in a well-pondered manner": they would *ipso facto*, in this respect at least, be contrary to the peremptory principles of international law which already existed at the time, and at any rate indisputably exist at the present day. These principles would therefore be relevant in any case, namely even in respect of pre-existing international treaties, as they would then appear to constitute *jus cogens superveniens* (1969 Vienna Convention on the Law of Treaties, Article 64).[9] In other words, these agreements must be interpreted in a

[8] GR, para. 4.

[9] It should be emphasized that even if the claims in the German Reply, para. 57, (according to which "*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") were correct, this would not preclude the need to take into account new peremptory rules of international law for the purpose of interpreting and applying existing treaties.

manner consistent with those principles, excluding that they could have *sic et simpliciter* abolished the reparation obligation. It therefore remains necessary for the Court to determine whether the illegal refusal of reparation for Nazi crimes has implications with regard to State immunity before the domestic courts, when recourse to the domestic judge appears the only viable way for the victims to seek redress.

2.7 Obviously, the matter would look completely different if the victims were offered the possibility, which they at present do not enjoy, of access to adequate reparations without the need for recourse to the Italian courts. Italy wishes to reiterate its full readiness – already displayed earlier through the formulation of the counter-claim – to open new negotiations with Germany in this connection, in the firm conviction that they would make it possible to find satisfactory solutions to overcome the current situation.

2.8 Before coming to the central issues raised by this case in order to take a position on the arguments set out in the German Reply, Italy considers that some unjustified criticisms of language used in its Counter-Memorial should be rejected at the outset: this language is judged by the German side as wrong and excessive, whereas it has simply been misunderstood. The criticisms in question concern the expression *immunity does not mean impunity*, used several times by Italy, taking over a famous phrase of the International Court of Justice.[10] Germany expresses vigorous but inappropriate protest to challenge the use by the Italian side of this expression, arguing that it had been referred by the Court to criminal responsibility of individuals accused of international crimes, whereas in this case what is at stake is the international (not criminal) responsibility of the German State.[11]

2.9 Italy is well aware that the responsibility of Nazi Germany for its war crimes and crimes against humanity, a responsibility which now rests upon democratic Germany (as it admits *de plano*),[12] has an international and not a criminal character, as

[10] *Arrest Warrant of 11 April 2000, I.C.J. Reports 2002*, para. 60.
[11] GR, para. 11.
[12] Memorial of the Federal Republic of Germany (hereinafter GM), pp. 1-2, and paras. 3, 7, 15, 59.

is moreover confirmed by the Court's well-known case law.[13] In citing the expression *immunity does not mean impunity*, then, Italy had no intention of alluding to some sort of collective criminal responsibility of the German State; nor does it question the considerable financial effort made by Germany to make reparations for war damage. It is also undeniable – and not disputed in the Italian Counter-Memorial – that the expression was used by the International Court of Justice with respect to individual crimes. It should be stressed, however, that the basic concept set out in the expression in question is perfectly relevant with regard to the immunity of States too. The point is, in effect, to highlight a truth that is incontrovertible, and that Germany – we feel – cannot but share: the immunity from jurisdiction enjoyed by a subject under international law cannot imply either exemption from compliance with the international obligations to which that subject is bound, or absolution from liability for their violation (with all resulting consequences, including that of reparations). Now, the Italian argument with reference to the present case is precisely that "*immunity would mean impunity*" if Germany's jurisdictional immunity were also recognized in those exceptional cases in which: a) serious violations of international peremptory norms for which Germany admits it bears the international responsibility were undoubtedly committed; b) no effective redress was provided to victims, either directly (through the creation of effective domestic remedies) or through international agreements with the State of nationality; and c) the only way left open to the victims to secure reparation remains recourse to their own national courts. These are precisely the conditions in the case of

[13] *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. 170: "The Court now considers three arguments, advanced by the Respondent which may be seen as contradicting the proposition that the Convention imposes a duty on the Contracting Parties not to commit genocide and the other acts enumerated in Article III. The first is that, as a matter of general principle, international law does not recognize the criminal responsibility of the State, and the Genocide Convention does not provide a vehicle for the imposition of such criminal responsibility. On the matter of principle the Respondent calls attention to the rejection by the ILC of the concept of international crimes when it prepared the final draft of its Articles on State Responsibility, a decision reflecting the strongly negative reactions of a number of States to any such concept. The Applicant accepts that general international law does not recognize the criminal responsibility of States. It contends, on the specific issue, that the obligation for which the Respondent may be held responsible, in the event of breach, in proceedings under Article IX, is simply an obligation arising under international law, in this case the provisions of the Convention. *The Court observes that the obligations in question in this case, arising from the terms of the Convention, and the responsibilities of States that would arise from breach of such obligations, are obligations and responsibilities under international law. They are not of a criminal nature. This argument accordingly cannot be accepted*." (*Emphasis added*).

the IMIs and the victims of the massacres, as demonstrated in the Italian Counter-Memorial and repeated in the present Rejoinder.

2.10 One final point of a general nature should still be made regarding the accusation made by Germany of the inconsistency of the Italian judges. This charge is based on an order of the Italian Court of Cassation of 5 June 2002, no. 8157 (the *Markovic* case)[14] in which the Court declared the lack of jurisdiction of the Italian courts in respect of an application to enforce the (civil) liability of the Italian State, as well as its obligation to make reparations, for damage resulting from an act of military violence (jointly) attributable to Italy, carried out within the framework of the NATO operations in Serbia and Montenegro in 1999 (the bombing of the radio and television station in Belgrade). In the words of the Supreme Court, the individuals' request sought to obtain a determination by the Italian court that the Italian State had "... a responsibility claimed to depend on an act of war, particularly from one mode of conduct of military hostilities represented by air war"; according to the individuals concerned, in fact, the court was required to investigate whether, in this case, the bombing was directed against a target to be characterized as civilian, not military, and therefore – it was alleged – in violation of the relevant rules of international law of armed conflict. As Germany correctly points out, the Supreme Court denied the existence of jurisdiction in this case, stating that "(t)he choice of the means that will be used to conduct hostilities is an act of government. These are acts through which political functions are performed and the Constitution provides for them to be assigned to a constitutional body. The nature of such functions precludes any claim to a protected interest in relation thereto …. With respect to acts of this type, no court has the power to review the manner in which the function was performed."[15] Now, according to Germany, between this case-law approach in favour of the Italian State and the one adopted by the same Supreme Court in the *Ferrini* and subsequent cases in relation to Germany a flagrant inconsistency leaps to the eye: "the Supreme Court – alleges the German Reply – ... considers actions brought against Italy before Italian courts to be inadmissible to the extent that military activities are concerned, while on the other hand

[14] Annex 28 to the GM.
[15] Germany's translation of the Order, GM, para. 57.

it has no scruples to rule on the merits of claims brought against Germany on account of military activities on Italian soil."[16]

2.11 The German critical remarks do not, however, hit the mark, since the situations are quite different and not comparable in any relevant respect. First, in the *Markovic* case what was at issue was the application of rules and principles of Italian domestic law relating to the allocation of powers between the executive and judiciary, not the application of rules of international law on the immunity of States from jurisdiction: as was, moreover, duly noted by the European Court of Human Rights.[17] But above all, what the petitioners, Markovic and others, were asking the Italian court was to analyse and evaluate a piece of wartime conduct (jointly) attributable to the Italian State to determine whether or not it constituted a war crime and draw, if appropriate, the consequences in terms of reparation obligations in their favour. In the *Ferrini* and subsequent judgments, on the contrary, neither the nature as war crimes and crimes against humanity of the relevant acts of the Nazi authorities, nor the responsibility of Germany in this respect, were challenged by the German side (Germany having instead only claimed State immunity from the jurisdiction of the Italian courts). The same applies to this present case before the International Court of Justice, by express and repeated admission of Germany.

2.12 Nor is it irrelevant to note also that the 1999 NATO military actions in Serbia were subjected to judicial scrutiny by the *ad hoc* International Criminal Tribunal for the Former Yugoslavia, which has the power to determine whether war crimes were committed or not in the course of those actions. It is known that determinations of this kind have not been made, since the Prosecutor of the ICTY found that there were no sufficient grounds to urge the judicial bodies to do so.[18] Thus in that case there was an international court competent to decide whether war crimes had been committed by NATO forces, and it is clear that any positive decision to this effect would have meant for the victims the opening of channels likely to ensure the obtaining of redress from the

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[16] GR, para. 55.

[17] European Court of Human Rights [GC], Case of *Markovic and Others v. Italy*, Application no. 1398/03, Judgment, 14 December 2006, para. 111 and 113.

[18] See *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, at http://www.icty.org/x/file/Press/nato061300.pdf.

responsible parties. Instead, the Italian victims of war crimes and crimes against humanity indisputably perpetrated by Nazi Germany (and for which today's democratic Germany has taken on full responsibility) have not been offered access to any viable way to obtain reparations. The application by the Italian courts of the principle put forward by Germany concerning immunity from jurisdiction would therefore, in this case, preclude the only way to avoid a substantial denial of justice.

III – The Lack of Reparation in favour of Italian Victims of Nazi Crimes as the Main Convincing Reason for the Italian Judges Not to Accord Jurisdictional Immunity to Germany

Section 1 – The Issue of Reparation is Still at the Core of the Present Dispute.

3.1 As clarified above, Italy considers that it is important to look at what was called the other side of the coin, *i.e*. the issue of reparations. There is nothing that prevents the Court from examining this crucial issue when addressing the issue of determining whether or not Italy has violated any obligation concerning the jurisdictional immunities accruing to Germany under international law.[19]

3.2 Italy argues that the substantial lack of reparation for hundreds of thousands of Italian victims of war crimes, and the lack of possible avenues for victims to pursue effective remedies in any other way, have justified Italian judges in setting aside the immunity of Germany.

3.3 In the present case, there is no dispute on the characterization of Germany's wrongdoing during World War II as "serious violations of the laws of war"[20]. Nor is there any dispute as to Germany's responsibility for those violations. Nor is there a dispute about the fact that the immunity of Germany as a State was set aside by Italian Courts in cases in which the victims of those violations had received no compensation. In reality, what is fundamentally disputed is whether or not reparation for the heinous

[19] *Supra*, paras. 1.1-1.3.
[20] GR, para. 2.

crimes committed against specific Italian victims (those to whom the case law of the Supreme Court applies) has been provided and whether or not the fact that reparation has not been offered justifies setting immunity aside. That the issue of reparations is central to the present dispute is attested by the very fact that Germany devoted large portions of its Reply to the issue.[21]

In this section Italy will demonstrate that reparation for the large majority of Italian victims of serious war crimes for which Germany assumed responsibility has not, contrary to what Germany claims in its Reply, been made, nor does any effective remedy exist for them.

Section 2 – Lack of Appropriate Reparations as the Background to the Italian Case Law which Gave Rise to the Present Dispute.

3.4 In its Reply Germany argues that "the charge that Germany did not bother to compensate the victims is totally misplaced and misleading. It distorts the truth".[22] Italy does not deny (and has never denied) that post-war Germany has made efforts worldwide to try to make reparations for the evil done by the Nazi regime. Nonetheless, there is also little doubt that with specific regard to Italian victims these measures have been very partial. Germany itself recognized this in its Reply, where it states that it made "partial" compensation.[23] Furthermore, at least broadly speaking the fact that Germany has had to intervene in numerous subsequent rounds progressively to adjust the reparation mechanisms originally set up shows that the measures taken just after World War II were far from being exhaustive. Without engaging in a reconstruction of the entire range of reparation *régimes* for victims of serious violations of International Humanitarian Law (hereinafter IHL) and human rights committed by the Third Reich, let us focus on the specific situation of reparations due to Italy and to Italian victims.

3.5 The fact that Germany has not made satisfactory reparations in favour of Italian victims is indirectly attested and demonstrated by Germany's very arguments with regard to the issue of reparations. The position of Germany concerning Italy and

[21] GR, paras. 10-32 and 37-47.
[22] GR, para. 33.
[23] *Ibid*.

Italian victims of war crimes and crimes against humanity is pretty clear. First of all, Italy (and Italian victims) had no right to invoke reparation, since Article 77(4) of the 1947 Peace Treaty contained, according to Germany, a wide-ranging waiver of all claims. This is a fundamental position of Germany which from the outset has vitiated, and still vitiates, its appraisal of this matter. Secondly, Germany argues that the conclusion of the two Agreements of 1961 was done *ex gratia*. And it clarifies that "on grounds of equity, the Federal Republic of Germany later agreed to provide at least *partial compensation to Italy*".[24] The erroneous belief that no reparation was due explains why Germany has only made very partial reparations. Thirdly, Germany states that Italian victims could always turn to German national legislation to seek compensation under the various applicable national laws (which have never provided an effective avenue of reparation for the large majority of Italian victims). That substantially no reparation was made directly flows from Germany's incorrect assumption that all Italian claims were waived after the war. This position clearly confirms what Italy has explained in its Counter-Memorial, viz. the fact that hundreds of thousands of victims did not receive any compensation for serious IHL violations committed against them by the Third Reich.

3.6 Italy reiterates that although the arguments provided by Germany may seem convincing at first glance, none of them is really conclusive and all must fail on a closer look. In particular, Italy will demonstrate again that Germany's position is vitiated by a wrong interpretation of Article 77(4) of the 1947 Peace Treaty, as well as a mistaken reading of the obligation to provide reparation for serious violations of IHL amounting to war crimes and crimes against humanity. Italy also reaffirms that the subsequent 1961 Agreements, providing some measure of reparation (according to Germany exclusively *ex gratia*), were of limited scope and did not cover serious violations of IHL, apart from those originating in discriminatory practices. In addition, the waiver clauses contained therein logically covered only the claims within the limited subject matter of the agreements themselves. Finally, Italy maintains that the temporal sequence of reparation agreements and the overall policy towards German reparations clarifies that the issue of reparation of crimes committed against Italian victims was not settled definitively in the immediate aftermath of the war, as Germany contends. On the contrary, the London

[24] GR, para. 33. (*Emphasis added*).

Agreement on External Debt of 1953 clearly shows that the overall settlement of reparation for war crimes of World War II was postponed to a later date; it was to be resumed only after Germany's reunification, in the 1990s.[25]

Section 3 – Article 77(4) of the 1947 Peace Treaty and Subsequent Developments.

3.7 At the outset it is important to restate that Italy considers that Germany bases its position on an unconvincing interpretation of the scope of Article 77(4) of the 1947 Peace Treaty in two main respects. First, as already explained in the Counter-Memorial, this clause was not intended to operate to the benefit of postwar Germany, but only in favour of the Allied Powers, to allow them to preserve and use Germany's reduced economic potential after the war for their benefit and for the goals they had chosen.[26] Secondly, even assuming that the clause operates to the benefit of Germany as a third State, this provision was never intended to cover reparation claims relating to serious violations of IHL by the Third Reich authorities.[27] In particular, Article 77(4) did not and could not cover reparation claims involving the rights of individuals who were victims of serious violations of IHL amounting to war crimes and crimes against humanity. Without going back to the arguments already set out in the Counter-Memorial on the interpretation of Article 77(4), Italy merely wishes to recall that the above-mentioned provision cannot be interpreted as simply wiping out State responsibility for serious violations of IHL. There are only two possible interpretations of this provision: first, Italy argues that it does not (and was never intended to) cover State responsibility for serious IHL violations. Secondly, even assuming that it did encompass war-crimes reparation claims (which is not the case), the effects of the provision are to be considered as only temporary in nature, given that the provision was simply intended to allow the Allied Powers to use the economic potential of Germany for their own goals.

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[25] The Law on the Foundation of 2000 confirms that this was done in broader terms. However, the measures adopted in this case were insufficient to provide reparation to the vast majority of Italian victims. Thereafter, Italian victims realized that there were no further measures to wait for and thus filed their claims with Italian judges. Against this background, the Italian Supreme Court felt that all avenues for obtaining reparation had been exhausted and that there was no other option than to rely on the exercise of jurisdiction by Italian courts setting immunity aside, see Counter-Memorial of Italy (hereinafter CM) at paras. 6.4-6.6 and 6.19-6.35.

[26] CM, paras. 5.47 and 5.51.

[27] CM, paras. 5.48-5.55.

3.8 It may be useful to recall that Article 77(4) reads as follows:

> "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." (*Emphasis added*).

This provision must be interpreted in the light of the criteria set out in Article 31 of the Vienna Convention on the Law of the Treaties. Firstly, according to the literal interpretation of this provision, it seems pretty clear that the subject matter revolves around economic matters. No reference is made to State responsibility for serious violations of IHL. Italy waived its claims "except those arising out of *contracts and other obligations entered into* … before September 1 1939" and "in respect of *arrangements*". There is no doubt that this provision *a contrario* means that Italy waives all its claims (and those of its nationals) arising out of contracts and other obligations entered into after 1 September 1939, until 8 May 1945. The text is clear in that it covers only economic arrangements, and as will be shown, this seems to be the only reasonable interpretation of the provision.

3.9 Secondly, this reading of Article 77(4) is confirmed by a systematic interpretation of the provision. Placing Article 77(4) in context and comparing it to other provisions in the same Article as well as in other Articles of the same Treaty, it becomes evident that the clause refers merely to economic relationships. In particular, it must be noted that the waiver clause of Article 77(4) is included in a provision dealing with *questions of property*: Italian property in Germany (in paras. 1 to 3),[28] and German

[28] Article 77 paras. 1 to 3 read as follows: "1. From the coming into force of the present Treaty property in Germany of Italy and of Italian nationals shall no longer be treated as enemy property and all restrictions based on such treatment shall be removed. 2. Identifiable property of Italy and of Italian nationals removed by force or duress from Italian territory to Germany by German forces or authorities after 8 September 1943 shall be eligible for restitution. 3. The restoration and restitution of Italian

assets in Italy (in para. 5).[29] As mentioned above paragraph 4 itself specifically mentions in a sub-clause "[claims] arising out of contracts and other obligations entered into, and rights acquired". It appears that the focus of the provision is only on economic relationships and contracts between German and Italian parties.

3.10 Thirdly, the Italian waiver in Article 77(4) must be seen in the context of, and in comparison with, another waiver clause of the Peace Treaty: Article 76, by which Italy waived claims against the Allied and Associated Powers. This provision states that

> "1. Italy waives *all claims of any description* against the Allied and Associated Powers on behalf of the Italian Government or Italian nationals arising directly out of the war or out of actions taken because of the existence of a state of war in Europe after September 1, 1939, whether or not the Allied or Associated Power was at war with Italy at the time, including the following:
>
> (a) *Claims for losses or damages sustained as a consequence of acts of forces or authorities of Allied or Associated Powers*;
>
> (b) *Claims arising from the presence, operations, or actions of forces or authorities of Allied or Associated Powers in Italian territory*;
>
> (c) Claims with respect to the decrees or orders of Prize Courts of Allied or Associated Powers, Italy agreeing to accept as valid and binding all decrees and orders of such Prize Courts on or after September 1, 1939, concerning Italian ships or Italian goods or the payment of costs;
>
> (d) *Claims arising out of the exercise or purported exercise of belligerent rights*." (*Emphasis added*).

Moreover, paragraph 2 adds that

> "[the] provisions of this Article shall bar, completely and finally, all claims of the nature referred to herein, which *will be henceforward extinguished*, whoever may be the parties in interest. The Italian

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property in Germany shall be effected in accordance with measures which will be determined by the Powers in occupation of Germany."

[29] Article 77(5) provides that "Italy agrees to take all necessary measures to facilitate such transfers of German assets in Italy as may be determined by those of the Powers occupying Germany which are empowered to dispose of the said assets." See Annex 2 to the CM.

> Government agrees to make equitable compensation in lire to persons who furnished supplies or services on requisition to the forces of Allied or Associated Powers in Italian territory and in satisfaction of non-combat damage claims against the forces of Allied or Associated Powers arising in Italian territory…." (*Emphasis added*).

3.11 A comparison of Article 77(4) with Article 76 of the Peace Treaty reveals certain important differences. While Article 77(4) uses the phrase "all claims against Germany and German nationals" (implying *all* claims relating to issues concerning *properties and other economic questions*), Article 76(1) refers to "all claims of *any* description". Moreover, Article 76(1) mentions specifically "claims for losses or damages sustained as a consequence of acts of forces or authorities of Allied or Associated Powers" (subpara. a), "claims arising from the presence, operations, or actions of forces or authorities of Allied or Associated Powers in Italy" (subpara. b), and "claims arising out of the exercise or purported exercise of belligerent rights" (subpara. c). None of these claims are specifically mentioned in Article 77(4) which, in contrast, only speaks in general terms of "all claims for loss or damage arising during the war".

According to Article 76(5), the waiver of claims by Italy under Article 76(1) includes, *inter alia*, "any claims and debts arising out of the Conventions on prisoners of war now in force". Again, a similar term is missing in Article 77(4), where the question of prisoners of war is not mentioned at all.

Even more importantly, according to Article 76(2), the claims waived by Italy in accordance with the article "will be henceforward extinguished". No similar expression is included in Article 77(4). Here again it cannot be that the drafters forgot to add the expression. The thing is that the meaning of the two provisions and of the waiver clauses is very different.

We must therefore rule out the possibility that the waiver clause of Article 77(4), despite the expression "*all* claims for loss or damage arising during the war", covers claims arising out of the war crimes or crimes against humanity committed against members of the Italian armed forces or of the Italian civil population in violation

of international law.[30] While such claims – based on conduct arising from torts – could possibly be covered, in relation to the Allied and Associated Powers, by the terms of Article 76,[31] such claims are not arguably addressed by Article 77(4), the focus of which – in the context of the other paragraphs of the article, all of which deal with private property rights – is clearly on claims arising under private law, in particular "claims arising out of contracts and other obligations entered into" as well as "debts" and "claims in respect of arrangements entered into the course of war",[32] and not on claims arising from violations of the laws of war and humanitarian law by Germany. This is confirmed by the plain language of Article 77(4), which in essence refers to contractual claims and "ordinary" war damage, in particular damage to property.[33]

3.12 There is really no need to add any further words commenting on the two provisions. It seems pretty clear that, as in the well-known maxim *ubi lex voluit dixit, ubi noluit tacuit*, where the drafters wanted to cover the "claims for losses or damages sustained as a consequence of *acts of forces or authorities* of Allied or Associated Powers" they did it explicitly; where they did not mention them, clearly they never intended to cover those claims. Thus, in Article 76 they explicitly referred to actions by forces or authorities of the Allied countries, occupation powers, and other forms of exercise of the rightful activities of the belligerents. On the other hand, in Article 77(4) they did not refer to these, because they did not intend to cover these claims and because they were fully aware of the gravity of the crimes committed by the personnel of the Third Reich. There was no justification for absolving Germany of State responsibility for those serious violations of IHL.

3.13 Fourthly, the provision must be construed taking into account the object and purpose of the Treaty. In this respect, it is clear that the scope and the purpose of Article 77(4) could not have been to brush aside all reparation claims forever; it was

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[30] CM, paras. 2.5-2.8.

[31] Art. 76(1): "claims for losses or damages sustained as a consequence of acts of forces or authorities", "claims arising from the presence, operations, or actions of forces or authorities" and, especially, "claims arising out of the exercise or *purported exercise of belligerent rights*", and Art. 76(5): "any claims and debts arising out of the Conventions on prisoners of war now in force". (*Emphasis added*).

[32] In the French version of the Treaty, the expression "inter-governmental claims in respect of *arrangements* entered into the course of the war" reads "toutes les réclamations de caractère intergouvernemental relatives à des *accords* conclus au cours de la guerre". (*Emphasis added*).

[33] CM, para. 5.49.

merely intended to preserve for the Allies, and in their exclusive interest, the economic resources of Germany. In that framework, the question of reparations to Italy, which had been a former Ally of Germany, could be postponed to a later date. In addition, Italy never intended to waive those claims and could not have done so: as clarified in the Counter-Memorial those claims cannot be waived, since they are the object of a *régime* of reparations which cannot be the object of derogation by States. Italy thus maintains that the only interpretation of Article 77(4) which is in line with Article 31(3) of the Vienna Convention on the Law of Treaties is that this provision did not cover claims for war crimes. This would be the only interpretation consistent with the *régime* of IHL, which imposes obligations of reparation that cannot be simply brushed away by States. Hence, reparation claims for war crimes and other international crimes committed against the civilian population have always been outside the scope of that provision.

3.14 Finally, a last argument must be made relating to the nature of the stipulation in Article 77(4), which Germany considers to be a provision in favour of a Third State. While it is true that such provisions can be formulated in international treaties, it is also clear that in their interpretation the principle of *lex mitior* must be applied. If between two equally possible interpretations there is one which is less burdensome for the State which is assuming obligations in favour of a third State, the less onerous interpretation must prevail. Hence, assuming that Germany's interpretation is also possible – which Italy does not believe can really be maintained – it would clearly be unreasonably burdensome for Italy and Italian victims of war crimes.

3.15 Even turning to the hypothetical argument that Article 77(4) could cover all claims irrespective of their nature, there are good arguments to suggest that in any case the provision would only produce effects to the benefit of the occupying powers. Italy's reparation claims were frozen for the time necessary to the Allied Powers to use Germany's economic potential for their goals, not to provide Germany with an unjustified advantage. As Germany itself states in the Reply "*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".[34] The reasoning is quite correct and rightly uses the word

[34] GR, para. 14. (*Emphasis added*).

priority! This means that at the outset the Allied Powers wanted to use the German economic potential for themselves and other nations victims of aggression;[35] however nothing in Article 77, nor in the rest of the Treaty, suggests that after the fulfilment of this goal, ordinary reparation regimes could not be put in place in the bilateral relationships between Germany and Italy, once these resumed. In this regard it must be clarified that the waiver clauses were in fact not so much clauses in favour of Germany but in favour of the Allied Powers themselves.[36] Moreover, this is confirmed by the subsequent developments in the 1950s and 60s, and after Germany's reunification.

3.16 In particular, relevance in this respect must be given to the 1953 London Agreement on German External Debts. This Agreement, concluded in 1953 and ratified by Italy in 1966, established that matters relating to reparations were frozen and postponed to a later date, after Germany's reunification. This explains why in the relationships between Germany and Italy in the years 1966 to 1989 nothing happened: reparation was explicitly postponed to the moment of Germany's reunification. It is only after reunification that the issue of reparation for war crimes committed against Italian victims could be resumed.[37]

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[35] See Eberhard Menzel (ed.), Introduction to *Die Friedensverträge von 1947 mit Italien, Ungarn, Bulgarien, Rumänien und Finnland, 1948*, p. 53. See also Menzel, *Die Forderungsverzichtsklauseln gegenüber Deutschland in den Friedensverträgen von 1947 – Rechtsgutachten* – (Hektographierte Veröffentlichungen der Forschungsstelle für Völkerrecht und ausländisches öffentliches Recht der Universität Hamburg, Nr. 20), Hamburg 1955, p. 21 *et seq*. That reason was also stated in a decision of the Civil Court of L'Aquila of 7 December 1960 in the case *Ditta Pomante v. Federal Republic of Germany*. See Pierre d'Argent, *Les réparations de guerre en droit international public: La responsabilité internationale des États à l'épreuve de la guerre*, Bruxelles/Paris 2002, p. 266 (referring to 40 *ILR* 64, p. 71): "Son objectif [the objective of Art. 77(4) of the Peace Treaty] était d'éviter que les ressources de l'Allemagne, qui devaient servir à compenser les dommages de puissances victorieuses, puissent être partiellement affectées au bénéfice de ses anciens alliés."

[36] That view was also taken by the German Supreme Court (Bundesgerichtshof) in a decision of 14 December 1955 (Decisions of the Bundesgerichtshof in Civil Matters [BGHZ] vol. 19, p. 258 *et seq*., at 265): "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."

[37] In this connection, it must be noted 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

Prior to becoming a party to the 1953 Agreement, in the late 1950s Italy joined a number of other countries that requested reparations from Germany. This led to the 1961 Agreements; showing that already at that time the interpretation given by Italy to Article 77 was precisely that it was temporary in character. Let us now turn to the examination of these Agreements and of some waiver clauses contained therein.

Section 4 – The 1961 Agreements and Their Waiver Clauses.

3.17 The two Agreements of 1961 to which Germany refers did cover some damages, but their scope *ratione materiae* was clearly limited. As already clarified in the Counter-Memorial and in the Observation on the counter-claim,[38] the two 1961 Agreements[39] do not cover claims for serious violations of IHL, and logically the waiver clauses do not relate to these claims either. The first Agreement has nothing to do with the subject matter of the cases which have led to this dispute. It refers to the settlement of economic claims, and it is only concerned with economic matters. The second Agreement is to a certain extent even narrower in that it specifically, and exclusively, refers to persons who were victims of persecution on discriminatory grounds. On the basis of these agreements Italy received substantial amounts of money, which it distributed to those falling within the scope of the Agreements on the basis of their requests and in compliance with the Decrees implementing the Agreements.

3.18 As Germany correctly states, both Agreements contain waiver clauses. Germany's arguments, however, are unconvincing where they try to imply that these waiver clauses covered any other present and future claim of any nature. Clearly, this was not and could not be the case. The two waiver clauses, which are nearly identical, merely cover claims within the subject-matter of the Agreements. Since the scope of the Agreements was limited on the one hand to economic questions and on the other to

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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 get through 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.

[38] CM, paras. 2.15, and 5.57-5.59; see also the Observations of Italy on the Preliminary Objections of the Federal Republic of Germany Regarding Italy's Counter-Claim, Section IV, paras. 39-58.

[39] Annexes 3 and 4 to the CM.

persecutions on discriminatory grounds, clearly other claims for serious violations of IHL were not waived.

3.19 Moreover, that this is the correct interpretation in this case is indirectly confirmed by Germany's other argument, which basically implies that these two Agreements were made *ex gratia* and that for the rest (i.e. what was not covered by the Agreements) the waiver clause of Article 77(4) would still apply. This indirectly confirms that the serious violations of IHL are not covered by the Agreements; for it is by the waiver clause of Article 77(4) that they would be covered. On the contrary, as clarified above, the 1947 waiver clause has a very different explanation than the one provided by Germany and thus the claims for serious violations of IHL are still unanswered.

Section 5 – The Large Number of Victims that Remain Without any Reparation

3.20 The claims referred to above have remained unanswered for several decades, and they involve a substantial tally of victims. There are three categories of victims: the members of the Italian army that were not granted the treatment of prisoners of war, the civilians that had been unlawfully deported to Germany and compelled to forced labour, and the civilian victims of mass atrocities in various villages attacked by the forces of the Third Reich.

3.21 The first category of victims consists of the so-called IMIs – the Italian military internees. These people were taken in Italy and elsewhere, and then deported to Germany to be employed as forced labourers. According to the data collected by various organizations of victims there are about 700,000 persons that have never received compensation for forced labour.[40] For the reasons set out in more detail in the Counter-Memorial, these people were first denied the status of prisoners of war by Nazi Germany, and subsequently denied reparations by the new post-war Germany on the

[40] CM, para. 2.7.

grounds that prisoners of war were excluded from the reparation laws adopted by post-war Germany.[41]

3.22 The second category consists of civilians unlawfully deported to Germany to be employed as forced labourers. No specific figure is possible to produce concerning the very many civilians involved.

3.23 Concerning the third category, one should note that cases relating to thousands of civilians, victims of massacres carried out by German forces during the retreat in 1944-45 in numerous villages mainly in the Apennines, came to the courts only in very recent times, since for a long time the documents and other evidentiary materials establishing the criminal responsibility of several members of the German forces had not been discovered and criminal prosecution had not started.[42]

The waiver clauses could not cover claims which were not pending at the time or which, as is the case with the mass murders which occurred in several villages in the Appenines (e.g. Civitella, Marzabotto, Sant'Anna di Stazzema, etc.), had not even been established. Most of the victims were patiently waiting for a solution which would be designed for their situations. Therefore, the vast majority of the other victims were not compensated in any way.

Now these victims were not compensated and perhaps could not even be compensated since the crimes were largely undemonstrated at the time. Today there are a number of proceedings taking place, and the truth about many of those massacres has only recently been discovered and revealed. How could these victims be covered by the 1947 waiver and 1961 agreements? Clearly the claim of these victims materializes today, and it is today that they must obtain reparation.

Section 6 – The Power of States to Enter into Agreements to Organize Reparation for Serious IHL Violations

3.24 Italy must also make a few remarks on a recurrent statement made by Germany in its submissions to the Court, both in the Memorial and in the Reply.

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[41] CM, e.g. at paras. 2.30, 5.19.
[42] See the cases referred to in the CM, paras. 2.7, 2.37, 2.44, 5.13.

Germany has often stated that "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"[43]. Italy cannot but agree with this statement. However, it must qualify it in the sense that in these treaties and in these negotiations States cannot do whatever they want; they must ensure that certain rules are indeed respected. One of these is that no State is authorized to just be absolved of any responsibility for war crimes. Victims must receive some form of recognition and reparation. The problem with the Italian victims referred to above is that they have never received any form of reparation.

Italy does not claim (and has never claimed) that "after the actual cessation of hostilities every individual injured by a violation of international humanitarian law (IHL) [should be] able to raise a personal claim against the State whose armed forces have to shoulder responsibility for the injury caused" and agrees that "[t]housands or even millions of claims could not be adequately dealt with by the domestic judges of either one of the parties"[44]. Here the issue is that the States involved in the conflict and mainly the State responsible for serious war crimes stigmatized by the whole international community (a State which has made vast reparations to many other categories of victims) did not adopt sufficient measures to make reparations available for several categories of Italian victims.

3.25 As far as the issue of waiver of individual reparation claims is concerned, Italy believes that some clarification should be made regarding the observations made by Germany in paras. 43-47 of its Reply.

Italy does not, as Germany suggests, imply that reparation claims are untouchable. Italy argues, and Germany does not seem having produced any convincing argument to the contrary, that the reparation regime set out in IHL cannot be simply wiped out by States in their negotiations. In other words, there is no prohibition on arranging the modalities and amounts of reparation due through inter-state arrangements, but it is not possible to simply cancel such reparations. Otherwise, what

[43] GR, para. 4.
[44] *Ibid.*

would be the point in having set up a system which Germany recognizes could be seen as a precursor of *jus cogens* – which means not open to derogation by States?[45]

3.26 Italy concurs that arrangements between States are the proper way to proceed in these cases. The problem with regard to Italian victims of serious IHL violations for which Germany has assumed responsibility is precisely that such an inter-state arrangement has never been satisfactorily made. First, Germany denied having any obligation towards Italy and Italian victims; subsequently, it entered into *ex gratia* agreements which did not cover these victims; finally, Germany proclaimed that its national system was open to receiving the claims of these victims of serious IHL violations, but even these measures resulted ineffective.

Italy is still ready to enter into inter-state arrangements for the purpose of granting reparation to the three categories of victims referred to above, but in the first place Germany should be available to enter into negotiations for the conclusion of such an agreement. In the absence of any agreement the fact remains that these victims have never received compensation and that a denial of justice is still ongoing.

3.27 Germany brings, as an example of agreements through which waivers of claims for violations of IHL were made, the Potsdam Accord between Germany and the Allied Countries. However, in the case of that agreement, as Germany itself puts it, the Allied waived claims for IHL violations "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 establishment of an inter-allied reparation agency and on the restitution of monetary gold".[46]

Italy reiterates that it does not challenge the idea that reparations can be made through negotiations and lump-sum agreements between the Parties, such as those concluded by Germany with the Allied Powers. However, in the case of Italy and Italian victims no such agreement between Germany and Italy has ever been concluded. In none of the agreements cited by Germany, neither the 1947 Peace Treaty nor the 1961 Agreements, was the issue of serious violations of IHL specifically addressed, nor was

[45] GR, para. 45.
[46] GR, para. 28.

any reparation for this purpose made. Italy's position remains that no waiver has been made for claims concerning serious violations of IHL. Furthermore, no waiver could have been made without reasonable compensation in exchange, which is exactly what happened in the relationships between Germany and the Allied Powers. Therefore the arguments by Germany must fail also in this regard.

Section 7 – Conclusion

3.28 It is clear on the basis of the factual circumstances evidenced above that no reparation has been made for a large number of victims. This is a circumstance that Germany does not deny. On this basis, and considering that no effective remedy was available to these victims, Italian judges set aside immunity and accorded reparations. Although Italy recognizes that after a conflict States can enter into agreements to organize reparation *régimes* for war damages and all sort of other claims, Italy also suggests that these agreements must be well pondered and balanced and that their effects cannot amount to a denial of reparation for victims of serious IHL violations. In this connection it is slightly paradoxical to note that Germany insists in its Reply, as it had in its Memorial, on the fact that States can enter into such agreements and that immunity protects such a right. The position of Germany in this respect is surprising, since Germany has never entered into any such agreements with Italy. First, it invoked and still invokes the waiver clause of Article 77(4) of 1947; secondly, it considers the 1961 Agreements were made purely *ex gratia*. Hence, Germany does not deny that it never entered into agreements with Italy to make reparations to the benefit of victims of serious violations of IHL.

Italy is still convinced that entering into such agreements is indeed the best way to settle these matters, but it cannot agree with Germany's position that the reparation issue is definitively closed. This position was not accepted in 1947, and was rejected again after the conclusion of the 1961 Agreements (and confirmed by subsequent agreements such as, for example, the treaty concluded on 19 October 1967 "about the settlement of issues of a proprietary, economic and financial character connected with

the Second World War"[47]); and this is evidenced also by the Italian ratification, in 1966, of the London Agreement of 1953, which postponed the issue of reparations to a later date.

If Germany agrees to enter into such agreements, Italy is ready to consider any proposal, but it does not understand why and where its judges erred in setting aside Germany's immunity in the light of such an evident denial of justice for a very large number of victims of serious IHL violations, amounting to war crimes and crimes against humanity, which had occurred immediately after the decision by Italy to break the insane alliance with the Third Reich and to join the Allies in the fight against Nazi Germany.

IV – The Impact of Developments in International Law on the Application of the Principles on State Immunity

Section 1 – The Time Element Issue

4.1 In its Counter-Memorial, Italy showed that the customary rule on State immunity to be applied in the present case must be assessed in accordance with the specific content of this rule at the time when judicial proceedings were instituted against Germany before Italian courts. In its Reply Germany failed to engage itself in any meaningful discussion of the several instances of practice referred to by Italy to support its view. Instead, it continued to argue that since the proceedings before Italian courts relate to facts which occurred in the period between 1943 and 1945, it is in the light of the international law in force at that time that the Court should assess the content of the rule of immunity to be applied in the present case. For this purpose, it relied on the contention that, if the rule of State immunity was to be applied according to its content at the time when proceedings are instituted, this would lead to "absurd results".

[47] This is the *Abkommen zwischen der Bundesrepublik Deutschland und der Italienischen Republik über die Regelung vermögensrechtlicher, wirtschaftlicher und finanzieller, mit dem Zweiten Weltkrieg zusammenhängender Angelegenheiten – Accordo fra la Repubblica Federale di Germania e la Repubblica Italiana per il regolamento di questioni patrimoniali, economiche e finanziarie connesse alla Seconda Guerra Mondiale*, whereby Italy and Germany agreed that Italian nationals who suffered war damage to property in Germany shall have the same rights for compensation as enjoyed by German nationals under the relevant German legislation (Art. 2(1). See *Bundesgesetzblatt* 1969 II, 356).

Germany also found its view buttressed by the specific solution retained in respect to this issue by the UK State Immunity Act of 1978.[48]

4.2 With regard to the time element issue, Italy stands by the analysis presented in paragraphs 1.14-1.17 and 4.43-4.50 of its Counter-Memorial. It does not find it useful to reiterate here the reasons why it considers that immunity, being a procedural rule, has to be assessed in the light of the law in force at the time when domestic courts are seized. This is all the more so since, as already observed, Germany's Reply makes substantially no efforts to dispute Italy's analysis of the national and international practice pertinent to the issue under examination.

4.3 It is hard to see why the acceptance of Italy's view would lead to absurd results. To the contrary, it is quite logical that, immunity being a rule which affects the jurisdictional competence of domestic judges, the content of that rule must be assessed in the light of the law in force at the time when judges are asked to exercise their jurisdictional competence in cases in which foreign States are involved. When codifying the rule on jurisdictional immunities of States, the International Law Commission (hereinafter ILC) faced the question of the nature and extent of the non-retroactive effect of the application of the draft articles. It identified the time when proceedings are instituted as the relevant point in time at which the articles would apply as between the States that had accepted these provisions.[49] Significantly, in their comments on the ILC's work, States did not oppose this solution, nor argued that it would lead to absurd results.[50] The same solution was later incorporated in Article 4 of the United Nations Convention on Jurisdictional Immunities of States and Their Property.[51] Against the clear indication which comes from the work of the ILC and from the 2004 New York Convention, Germany attempts to bolster its argument by referring to section 23, para. 3, of the 1978 UK State Immunity Act. Leaving aside here any assessment of the precedential value of this Act, it must be highlighted that this is the only piece of evidence referred to by Germany – a clear sign that Germany's view does not find effective support in State practice.

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[48] GR, paras. 36-38.

[49] See Article 4 of the Draft Articles on Jurisdictional Immunities of States and their Property, *Yearbook of the International Law Commission*, 1991, vol. II, Part 2, p. 22.

[50] *Yearbook of the International Law Commission*, 1988, vol. II, Part 1, p. 46 *et seq.*

[51] See the text in CM, para. 4.50.

4.4 Since the question of whether Italy has violated its obligation to accord immunity to Germany must be assessed according to the law of State immunity in force at the time when proceedings against Germany were brought before Italian courts, there is little point in determining what was the content of the rule of immunity at the time of the facts which gave rise to the proceedings. The existence of exceptions to the rule of immunity, particularly in the case of breaches of *jus cogens* rules, must be determined in the light of the law as it stands today, and not as it was at the end of World War II. This notwithstanding, Italy wishes to reiterate its conviction that already during World War II there were rules having a non-derogable character, which represented a sort of *jus cogens*. As has already been noted, international humanitarian rules concerning protected persons, and in particular prisoners of war, were generally regarded as presenting such a character.[52] While in its Reply Germany emphasizes that "*jus cogens*, taken as a concept of positive international law, is an offspring of the last four decades",[53] Italy recalls that on at least one previous occasion, Germany itself appeared to accept the view that in some areas non-derogable obligations existed prior to the 1969 Vienna Convention on the Law of Treaties.[54]

Section 2 – The Territorial Clause

4.5 In its Reply, Germany has not disputed that immunity from jurisdiction does not cover all acts *jure imperii*. In particular, Germany acknowledges that the distinction between *acta jure imperii* and *acta jure gestionis* does not always apply in lawsuits concerning personal injuries caused by a State's activities on the territory of the forum State.[55] Germany only disputes that the enlargement of the scope *ratione materiae* of the tort exception to acts *jure imperii* also covers situations involving armed conflicts.

4.6 In its Counter-Memorial, Italy had given a number of reasons supporting the applicability of the personal-injuries territorial clause to situations relating to armed conflicts.[56] At present, Italy limits its arguments to replying to Germany's narrow

[52] CM, paras. 5.15-5.21.
[53] GR, para. 57.
[54] CM, para. 5.19. Anyhow, as it has been stressed *supra*, para. 2.6, and will be stressed again *infra*, para. 4.26, the impact of peremptory rules of international law cannot be excluded even if they constitute *jus cogens superveniens.*
[55] GR, para. 52.
[56] CM, paras. 4.37-4.42.

interpretation of the rule now embodied in Article 12 of the UN Convention on Jurisdictional Immunities of States and Their Property[57] – a Convention that is the culmination of more than 25 years of works of the ILC and of the General Assembly's Sixth Committee, and represents a compromise upon which the great majority of States in the world have agreed as a codification of a body of universally-recognized law.

First of all, Italy would like to stress that nothing in the letter of Article 12 precludes its application to situations involving armed conflicts, nor is there a general clause excluding the application of the UN Convention to such a situation. To support its interpretation of Article 12, Germany has no other option than to give weight to certain elements of the *travaux préparatoires*. Such an approach does not fit with the general rules of treaty interpretation codified by the Vienna Convention on the Law of Treaties. Article 32 of the Convention allows recourse to supplementary means of interpretation, including the preparatory work, only in order to confirm the meaning resulting from the application of general rules of interpretation provided in Article 31, or when the application of those rules leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. However, the ordinary meaning to be given to the terms of Article 12 fairly clearly establishes only three conditions for its applicability: the proceeding must relate to pecuniary compensation for death or injury, the injurious act or omission has to have occurred in whole or in part in the territory of the *forum* State, and the author of the act or omission has to have been present in that territory at the time of the act or omission. Since the meaning of Article 12 is neither ambiguous nor obscure, recourse to the *travaux préparatoires* seems inappropriate.

Secondly, it is doubtful that the *travaux préparatoires* really support Germany's narrow interpretation of the rule provided in Article 12. In its Reply, Germany reiterated

[57] GR, paras. 52-55. United Nations Convention on Jurisdictional Immunities of States and Their Property, Article 12: "*Personal injuries and damage to property*. - Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission."

the reference to the statement of the Chairman of the working group of the Sixth Committee of the General Assembly, Gerhard Hafner, according to which

> "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."[58]

Italy is well aware that General Assembly resolution 59/38 adopting the Convention contains a general reference to statements of the Chairman of the Ad Hoc Committee. However, this general reference cannot be considered as an endorsement of each and every view expressed by Hafner in his statement. This is confirmed by the fact that when the General Assembly expressed its agreement with certain understandings reached within the Ad Hoc Committee with regard to the scope of the Convention – in particular with regard to the exclusion of criminal proceedings – it did so explicitly. Moreover, the ILC and States within the Sixth Committee addressed the question of the general scope of the Convention. Article 3 expressly defines privileges and immunities not affected by the Convention. No mention is made of the fact that armed forces and their activities are excluded from the scope of the Convention. It is revealing that within the Sixth Committee, the Netherlands had proposed to introduce into the draft Convention a provision clarifying that Article 12 would not apply in cases relating to armed conflict.[59] This proposal did not meet with support from other States, and there are no echoes of it in the Convention, nor is there any reference in the *Understandings* annexed to the Convention to the proposition that Article 12 does not apply to armed conflicts.

4.7 To confirm its assertion, Germany cites the declarations of Norway and Sweden annexed to their instruments of ratification of the Convention, to the effect that the Convention does not apply to military activities.[60] Italy considers that those declarations, far from proving the existence of a general opinion of non-applicability of the Convention to situations relating to armed conflicts, show quite the opposite. If Norway and Sweden felt the need to make such a declaration it is exactly because the text of Article 12 points to a different interpretation.

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[58] UN Doc. A/C.6/59/SR.13, para. 36.
[59] Statement by Mr. Lammers, in A/C.6/54/SR.18, para. 45.
[60] GR, para. 55.

4.8 In its Memorial, Germany recognizes that almost all the lawsuits object of the present dispute originate in acts which occurred in Italy.[61] This is clearly the case for massacres of civilian population, but also for the great majority of deported people who were captured in Italy. As a consequence, according to the rule embodied in Article 12 of the UN Convention, which can be considered as declaratory of general international law, Italian Courts were not under a duty to recognize immunity to Germany on almost all the lawsuits, independently of the circumstance that the injurious acts were also violations of *jus cogens*.

Section 3 – The Impact of *Jus Cogens* on the Law of State Immunity

4.9 There is little doubt that the grave violations of human rights and humanitarian law which gave rise to the proceedings brought before Italian courts may be characterized as violations of *jus cogens* rules. Germany does not dispute that "egregious violations of international humanitarian law" were perpetrated by Nazi Germany against Italian citizens.[62] However, at the heart of this case there continues to be a substantial disagreement between the Parties concerning the consequences of the violations of *jus cogens* rules with regard to the recognition to the wrongdoing State of immunity from the jurisdiction of another State. Italy submits that, under international law as it stands today, there may be cases in which a State is entitled to deny immunity to another State in case of breaches of *jus cogens* rules. This is so, in particular, when the recognition of immunity would inevitably lead to denying the victims of such breaches any possibility of obtaining redress from the wrongdoing State. Germany, for its part, denies that immunity of a State may be affected by the *jus cogens* character of the breaches attributable to it.

4.10 In its Reply, Germany attempts to buttress its view by arguing that "*jus cogens* is entirely made up of primary rules, rules of conduct that prohibit specific conduct".[63] It also argues that "the character of a rule as *jus cogens* does not determine what consequences are entailed by its breach".[64] In Italy's view, the position held by Germany reflects a far too narrow concept of *jus cogens*. This position does not find

[61] GM, para. 71.
[62] GM, para. 15.
[63] GR, para. 65.
[64] *Ibid*.

support in the work of such an authoritative body as the ILC nor in the *opinio juris* of States. It is also contradicted by previous statements by Germany.

4.11 In its Commentary to the Articles on State Responsibility, the ILC observed that "it is necessary for the articles to reflect that there are certain *consequences* flowing from the basic concepts of peremptory norms of international law and obligations to the international community as a whole within the field of State responsibility".[65] Thus, the ILC expressly acknowledged that, contrary to Germany's contention, peremptory rules do not simply regulate substantive conduct. The very concept of peremptory rules implies that there are certain inherent consequential effects flowing from such rules.

4.12 In its Reply Germany refers to the consequences which, in the ILC's view, flow from the concept of *jus cogens* within the field of State responsibility, and attempts to show that the ILC's Articles tend to support its view. This it sees as being so because "Article 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".[66] This argument is clearly mistaken. True, Article 41 does not expressly contemplate, among the consequences of a serious breach of an obligation arising under a peremptory norm of general international law, the possibility of denying immunity to the wrongdoing State. However, first, it might be held that, under specific circumstances, the denial of immunity might be regarded as a consequence of the obligation laid down in Article 41(2) of the ILC's Articles, not to recognize violations of peremptory rules and not to assist in maintaining the situation arising from such violations.[67] But above all, Germany's contention is clearly contradicted by the non-prejudice clause contained in paragraph 3 of Article 41. Paragraph 3 provides that "[t]his article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law". This clause is of the utmost interest for the purposes of the present analysis because, contrary to what Germany contends, it

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[65] *Yearbook of the International Law Commission*, 2001, vol. II, Part 2, p. 111. (*Emphasis* in the original).

[66] GR, para. 66.

[67] Alexander Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong', 18 *European Journal of International Law* (2007), 955-970, p. 967.

points to the existence of possible additional consequences stemming from the concept of peremptory rules. This point has been clearly stated by the ILC in the following terms:

> "Paragraph 3 accordingly allows that international law may recognize additional legal consequences flowing from the commission of a serious breach in the sense of article 40. The fact that such further consequences are not expressly referred to in Chapter III does not prejudice *their recognition in present-day international law*, or to their further development."[68]

4.13 The fact that in 2001 the ILC felt the need to insert a non-prejudice clause with regard to additional legal consequences stemming from the concept of *jus cogens* is not surprising if one considers that, in 1999, the ILC's Working Group on Jurisdictional Immunities of States and Their Property had considered it necessary to draw the attention of the General Assembly's Sixth Committee to a "recent development in State practice and legislation" concerning "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".[69]

4.14 As is well-known, at that time the Sixth Committee decided not to reopen the codification exercise so as to include in the Draft Articles on Jurisdictional Immunities a provision dealing with the issue of immunity in the case of breaches of *jus cogens* rules. However, a brief examination of the discussion held on this issue in the Sixth Committee is particularly instructive, as it reveals that States were well aware of the impact of the concept of *jus cogens* on the law of State immunity.

4.15 Among the views expressed by States in that context, attention must be drawn in particular to the position taken in 1999 by the Director-General of Legal Affairs of Germany's Ministry for Foreign Affairs. He observed :

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[68] *Yearbook of the International Law Commission*, 2001, vol. II, Part 2, p. 116. (*Emphasis added*).

[69] *Yearbook of the International Law Commission*, 1999, vol. II, Part 2, p. 172. See also CM, para. 4.99.

> "Recent developments in State practice and legislation had shown that the issue of jurisdictional immunity in the case of violations by acts of States of human rights norms having the character of *jus cogens* was central to the subject of jurisdictional immunity and deserved further attention."[70]

Thus, at that time Germany, far from holding the view that immunity was not affected by the *jus cogens* character of the norms violated, acknowledged the existence of an inevitable interaction between *jus cogens* rules and the law of State immunity. It also recognized the existence of "developments in State practice and legislation" relevant to this issue.

4.16 The position of Germany on this issue was far from being isolated within the Sixth Committee. Thus, for instance, the representative of Cyprus, referring to the question of the existence of immunity in actions arising out of breaches of *jus cogens* rules, stated that "[h]is delegation noted and agreed with the view of the German delegation that the question was of enormous importance and was an essential part of the subject of jurisdictional immunity".[71] With regard to the same issue, the representative of Mexico observed that, "[l]ike the Commission, it [i.e. the Mexican delegation] believed that such questions were not dealt with directly in the draft articles on jurisdictional immunities of States and their property, but that the evolution of the principles referred to would have a major impact on the international legal order and relations between States".[72]

4.17 It may be noted incidentally here that the view that, as regards cases of serious breaches of international rules of fundamental importance, the law of State immunity is undergoing a process of change appears to be finding more and more support in statements and declarations by States. Suffice it here to refer to the following interpretative declaration made by Switzerland when depositing its instrument of ratification of the 2004 New York Convention on 16 April 2010:

> "Switzerland considers that article 12 does not govern the question of pecuniary compensation for serious human rights violations which are

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[70] Statement by Mr. Westdickenberg, in A/C.6/54/SR.15, para. 56, p. 6.
[71] Statement by Mr. Jacovides, in A/C.6/54/SR.26, para. 77, p. 10.
[72] Statement by Mr. Sepulveda, in A/C.6/54/SR.18, para. 36, p. 7.

alleged to be attributable to a State and are committed outside the State of the forum. Consequently, this Convention is without prejudice to *developments in international law in this regard*."[73]

4.18 Statements whereby States acknowledge the impact of the concept of *jus cogens* on the law of State immunity or refer to developments in international law in this regard must necessarily be taken into account when assessing the content of the rule of immunity. These statements testify to the increasing awareness of States that with regard to breaches of *jus cogens* rules the law of State immunity is in a state of flux and that the current movement – aimed at reconciling immunity with the effective enforcement of *jus cogens* rules – is towards a narrowing of the scope of immunity. They can therefore be regarded as an expression of the *opinio juris*,[74] namely the *opinio* that the law of State immunity is not impermeable to the legal consequences stemming from the existence of *jus cogens* rules.

4.19 In its Reply, Germany attempts to portray the decisions rendered by Italian courts as "an isolated incident", which has no other precedent than, possibly, the awkward views expressed by certain authors.[75] It is apparent, however, that the picture is far more complex than Germany pretends. In its Counter-Memorial, Italy has already referred to several pieces of evidence showing that domestic judges and legislators are increasingly challenging the rule of immunity in cases of breaches of *jus cogens* rules. Germany's Reply seeks to downplay the relevance of these elements by arguing that they do not corroborate the contention that "State immunity must yield in case an applicant pursues a claim based upon an alleged infringement of *jus cogens*".[76] However, Germany's position appears to be founded on an error of perspective. According to Germany, reference to practice would serve only to prove the existence *vel non* of a new customary rule allowing States to deny immunity with regard to each and every case arising from a breach of a *jus cogens* rule. In Italy's view, practice must not be looked at having in mind only the problem of determining whether a new rule

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[73] Switzerland's Interpretative Declaration Concerning Article 12, 16 April 2010, available at http://treaties.un.org. (*emphasis added*). See also the declarations made by Sweden and Norway when ratifying the same Convention.

[74] *Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, paras. 188-190, p. 100.

[75] GR, para. 7. See also paras. 58 and 64.

[76] GR, para. 58.

providing for a general exception to immunity has crystallized. Statements of States as well as decisions of domestic and international courts are of major significance insofar as they show how Germany errs in pretending to deny the existence of any relations between the substance of *jus cogens* rules and their enforcement. Contrary to Germany's contention, States are increasingly aware of the overriding impact of the existence of *jus cogens* rules on the law of State immunity. It is primarily with this question in mind that State practice must be assessed. Seen from this perspective, the fact, for instance, that in the *Al-Adsani* case eight out of seventeen judges of the European Court of Human Rights were ready to admit the existence of an exception to the rule of immunity is far from being irrelevant;[77] it rather reveals the mounting conviction among judges that *jus cogens* rules have consequential effects which also affect the scope of the rule on State immunity.

4.20 Germany's strategy in focusing exclusively on the existence *vel non* of a general exception to immunity is clear. By simply relying on the contention that there is not yet a wide and consistent practice supporting the existence of a rule to that effect, Germany seeks to achieve the broader result of demonstrating that nowadays the existence of *jus cogens* rules has no legal consequences at all as regards the law of immunity. In fact, however, what Germany is asking the Court has broader implications. Germany is asking it, in clear contradiction with the indications emerging from the work of the ILC within the context of the law of State responsibility, to reject the view that the concept of *jus cogens* has inherent consequential effects. Germany is also asking it to brush aside the statements of States acknowledging the impact of *jus cogens* rules on the law of State immunity, and to consider these statements as devoid of any legal significance. Finally, Germany is asking it to disregard the several signs coming from domestic and international courts that testify to the existence of an ongoing process of change in the law of State immunity in cases of breaches of *jus cogens* rules.

4.21 Italy is well aware of the difficulties faced by the Court when it is called upon to determine the content of a given rule at a time when that rule is undergoing a process of change. However, Italy is convinced that the question for the Court is not so

[77] GR, para. 62.

much that of assessing whether the threshold has been crossed and a new customary rule providing for a general exception to immunity in every case of breach of *jus cogens* rules has crystallized. The question before the Court is very specific and must be addressed and answered in the light of the unique circumstances of the present case. Italy has already referred several times to the particular circumstances which make the present case exceptional. They are: a) that the violations of IHL committed by Nazi Germany, most of them on Italian territory, undeniably amounted to grave breaches of *jus cogens* rules; b) that Germany has acknowledged that those most serious crimes, of concern to the international community as a whole, were committed and that it has to bear responsibility for such crimes; c) that Germany did not enter into any agreement with Italy in order to provide reparation for the victims of these crimes; d) that, despite all the attempts made by the victims to obtain redress by resorting directly to German authorities, including German courts, they were not given effective remedies under German law; finally, e) that after more than 50 years since the criminal acts of which they were victims, resort to Italian courts represented for these individuals the last and only possibility of obtaining some form of redress.

4.22 It is because of such unique circumstances that it is easy to detect in the present case the existence of an irreconcilable conflict between the recognition of immunity and the enforcement of peremptory rules. Germany seeks to minimize any such conflict by repeating the argument that immunity does not exclude a possibility of obtaining redress by other means, in particular by resorting to agreements between States, and by observing that "Italian citizens have never been denied access to the German judicial system on account of the grievances they held against Germany".[78] However, Germany's representation of the situation which lies at the heart of the present dispute is misleading. As has been said, the truth is that most of the Italian victims of the grave violations of humanitarian law committed by Nazi Germany were not included in any postwar reparation scheme agreed upon between Italy and Germany nor were they included in the reparation schemes set up unilaterally by Germany. These victims attempted to obtain redress before the German judicial system, but the remedies available under German law provided no reasonable possibility of obtaining effective

[78] GR, para. 34.

redress. In fact, the lawsuits submitted by Italian victims were all dismissed by German courts.

4.23 It is submitted that, given the unique features of the present case, where according immunity to the wrongdoing State would inevitably be tantamount to denying any possibility of enforcing obligations having a *jus cogens* character, Italian judges rightly thought to be under no obligation to recognize immunity to Germany. Thus, there is no need to address the question of whether a new rule providing for a general exception to immunity has crystallized. The question to be addressed is that of assessing, in the light of the current principles of international law, the consequences stemming from an exceptional situation in which a clear and inescapable conflict is detectable between immunity and enforcement of *jus cogens* rules. In these exceptional circumstances, *jus cogens* rules, by reason of their operation, must have the effect of exempting from the obligation to accord immunity. Immunity cannot be used as a tool for exonerating the State which is the author of grave breaches of *jus cogens* rules from bearing the consequences of its wrongful conduct. In situations in which the victims of grave crimes, having been denied any effective avenues for obtaining reparation, including resort to the domestic courts of the wrongdoing State, have no other means at their disposal than resorting to the domestic courts of the State of which they are citizens and where the crimes were committed, the scope of the obligation to recognize immunity must be considered to be already limited under current international law. This is so because of the overriding normative force of *jus cogens* rules. Italian judges were therefore entitled to deny Germany immunity from jurisdiction.

Section 4 – In the Circumstances, the Conduct of Italian Judges Has to Be Considered as Justified

4.24 In the previous section Italy has demonstrated that in exceptional circumstances *jus cogens* rules, by reason of their operation, have the effect of limiting the scope of the obligation to accord immunity to a foreign State for acts *jure imperii*. Thus, taking into account the unique circumstances of the present case, it must be concluded that Italian judges were under no obligation to accord immunity to Germany with regard to the cases brought before them by the victims of the grave violations of IHL committed by Nazi Germany during World War II. In the present section Italy will show that even admitting that it was under an obligation to recognize

immunity to Germany, non-performance of that obligation did not engage the international responsibility of Italy vis-à-vis Germany, because in the circumstances Italy's conduct was dictated by the need not to contribute to maintaining a situation which was clearly inconsistent with the effective enforcement of *jus cogens* rules.

4.25 Within the context of its work of codification of the rules on State responsibility, the ILC referred to the possibility that a treaty or a rule of customary international law, "apparently lawful on its face and innocent in its purpose, might fail to be performed in circumstances where its performance would produce, or substantially assist in, a breach of a peremptory norm".[79] There was broad agreement within the ILC that, if a situation of this kind arises, peremptory norms would have the effect of excusing non-compliance with the conflicting obligations.[80] In the end the ILC decided not to include in the draft articles a provision dealing specifically with this situation; it found it unnecessary to insert such a provision because "peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts".[81]

4.26 The ILC's recognition that "peremptory norms of general international law generate strong interpretative principles" is highly significant for the purposes of the present case. It confirms Italy's view that, when a conflict between immunity and the effective enforcement of *jus cogens* rules arises, it must be resolved taking into account the overriding impact of *jus cogens* rules. Moreover, it provides further support to what has been said in previous sections of this Rejoinder with regard to the interpretation of the waiver clauses of the 1947 Peace Treaty and the 1961 Agreements: these clauses must be interpreted in a manner consistent with the principles governing reparation of grave violations of IHL, independently of whether these principles had already acquired the status of *jus cogens* rules in 1947 – as Italy submits – or not. While in this regard Italy cannot but reiterate its position, the point Italy wishes to make here is that the work of the ILC clearly supports the view that under specific circumstances

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[79] James Crawford, *Second report on State responsibility*, UN doc. A/CN.4/498/Add.2, p. 38.

[80] See Draft Article 29 *bis* formulated in 1999 by the Special Rapporteur, James Crawford, *ibid*., p. 56. It provided that "[t]he wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is required in the circumstances by a peremptory norm of general international law".

[81] *Yearbook of the International Law Commission*, 2001, vol. II, Part 2, p. 85.

peremptory rules have the effect of excusing non-compliance with an international obligation.

4.27 In his well-known Separate Opinion rendered in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judge ad hoc Lauterpacht referred to a situation which presented certain analogies with the one under discussion here. He observed:

> "Now, it is not to be contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately flouting a rule of *jus cogens* or requiring a violation of human rights. But the possibility that a Security Council resolution might inadvertently or in an unforeseen manner lead to such a situation cannot be excluded."[82]

Significantly, Judge *ad hoc* Lauterpacht noted that, if situations of this kind were to arise, UN Member States would be "free to disregard" the obligations flowing from the Security Council resolution.[83]

4.28 There is little doubt that, if Italian courts had recognized immunity to Germany, the ensuing result would have been to deny to Italian victims of Nazi crimes the very last possibility of obtaining redress. Italian courts therefore had no choice: either they recognized immunity to Germany with reference to the cases in point, but by so doing they would have substantially contributed to the definitive consolidation of a situation of complete lack of enforcement of the legal consequences flowing from the crimes committed more than 50 years ago by Nazi Germany; or they lifted immunity, thereby rendering justice to the victims of those crimes. They opted for this second solution. Italy submits that, even assuming, *arguendo*, that Italy was under an obligation to recognize immunity to Germany, in the circumstances of the present case denial of immunity is to be considered as justified because of the overriding effect of *jus cogens* rules. Accordingly, the conduct of Italian courts did not give rise to responsibility of Italy vis-à-vis Germany.

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[82] *I.C.J. Reports 1993*, para. 102, pp. 440-441.
[83] *Ibid*, para. 103, p. 441.

Submission

On the basis of the facts and arguments set out above and in its Counter-Memorial, 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.

Rome, 10th January 2011

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

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