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Summary
Not an official document

Summary 2012/2
3 February 2012

Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)

Summary of the Judgment of 3 February 2012

I. Historical and factual background of the case (paras. 20-36)

The Court recalls that, on 23 December 2008, the Federal Republic of Germany (hereinafter "Germany") filed in the Registry of the Court an Application instituting proceedings against the Italian Republic (hereinafter "Italy") in respect of a dispute originating in "violations of obligations under international law" allegedly committed by Italy through its judicial practice "in that it has failed to respect the jurisdictional immunity which . . . Germany enjoys under international law". The Court further recalls that, by an Order of 4 July 2011, the Court authorized Greece to intervene in the case as a non-party, in so far as this intervention was limited to the decisions of Greek courts which were declared as enforceable in Italy. The Court then briefly describes the historical and factual background of the case, and in particular the proceedings brought before Italian courts by Italian and Greek nationals.

II. The subject-matter of the dispute and the jurisdiction of the Court (paras. 37-51)

Germany requests the Court, in substance, to find that Italy has failed to respect the jurisdictional immunity which Germany enjoys under international law by allowing civil claims to be brought against it in the Italian courts, seeking reparation for injuries caused by violations of international humanitarian law committed by the German Reich during the Second World War; that Italy has also violated Germany's immunity by taking measures of constraint against Villa Vigoni, German State property situated in Italian territory; and that it has further breached Germany's jurisdictional immunity by declaring enforceable in Italy decisions of Greek civil courts rendered against Germany on the basis of acts similar to those which gave rise to the claims brought before Italian courts.

Italy, for its part, requests the Court to adjudge Germany's claims to be unfounded and therefore to reject them, apart from the submission regarding the measures of constraint taken against Villa Vigoni, on which point the Respondent indicates to the Court that it would have no objection to the latter ordering it to bring the said measures to an end. In its Counter-Memorial, Italy submitted a counter-claim "with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich"; this claim was dismissed by the Court's Order of 6 July 2010, on the grounds that it did not fall within the jurisdiction of the Court and was consequently inadmissible under Article 80, paragraph 1, of the Rules of Court.

The Court recalls that Germany's Application was filed on the basis of Article 1 of the European Convention for the Peaceful Settlement of Disputes, under the terms of which:

> "The High Contracting Parties shall submit to the judgement of the International Court of Justice all international legal disputes which may arise between them including, in particular, those concerning:
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> (a) the interpretation of a treaty;
>
> (b) any question of international law;
>
> (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
>
> (d) the nature or extent of the reparation to be made for the breach of an international obligation."

The Court notes that Article 27, subparagraph (a), of the same Convention limits the scope of that instrument ratione temporis by stating that it shall not apply to "disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute". It states in this connection that the Convention entered into force as between Germany and Italy on 18 April 1961.

Having observed that the claims submitted by Germany related to "international legal disputes" within the meaning of Article 1 as cited above, between two States which were both parties to the European Convention on the date when the Application was filed, the Court finds that the clause in the above-mentioned Article 27 imposing a limitation ratione temporis is not applicable to Germany's claims. In fact, the "facts or situations" which have given rise to the dispute before the Court are constituted by Italian judicial decisions that denied Germany the jurisdictional immunity which it claimed, and by measures of constraint applied to property belonging to Germany. The Court observes, however, that those decisions and measures were adopted between 2004 and 2011, thus well after the European Convention entered into force as between the Parties. The Court therefore has jurisdiction to deal with the dispute.

The Court notes that, while the Parties have not disagreed on the analysis set out above, they have on the other hand debated the extent of the Court's jurisdiction in the context of some of the arguments put forward by Italy and relating to the alleged non-performance by Germany of its obligation to make reparation to the Italian and Greek victims of the crimes committed by the German Reich in 1943-1945. It states in that connection that, although it is no longer called upon to rule on the question of whether Germany has a duty of reparation towards the Italian victims of the crimes committed by the German Reich, having decided, by Order of 6 July 2010, that Italy's counter-claim was inadmissible, it must nevertheless determine whether the failure of a State to perform completely a duty of reparation which it allegedly bears is capable of having an effect, in law, on the existence and scope of that State's jurisdictional immunity before foreign courts. The Court observes that, if this answer is in the affirmative, the second question will be whether, in the specific circumstances of the case, taking account in particular of Germany's conduct on the issue of reparation, the Italian courts had sufficient grounds for setting aside Germany's immunity.

III. Alleged violations of Germany's jurisdictional immunity in the proceedings brought by the Italian claimants (paras. 52-108)

The Court first considers the issues raised by Germany's first submission, namely whether, by exercising jurisdiction over Germany with regard to the claims brought before them by the various Italian claimants, the Italian courts acted in breach of Italy's obligation to accord jurisdictional immunity to Germany.

1. The issues before the Court (paras. 52-61)

The Court begins by observing that the proceedings in the Italian courts have their origins in acts perpetrated by German armed forces and other organs of the German Reich. It distinguishes three categories of cases: the first concerns the large-scale killing of civilians in occupied territory as part of a policy of reprisals, exemplified by the massacres committed on 29 June 1944 in Civitella in Val di Chiana, Cornia and San Pancrazio by members of the "Hermann Göring" division of the German armed forces, involving the killing of 203 civilians taken as hostages after resistance fighters had killed four German soldiers a few days earlier; the second involves members of the civilian population who, like Mr. Luigi Ferrini, were deported from Italy to what was in substance slave labour in Germany; the third concerns members of the Italian armed forces who were denied the status of prisoner of war, together with the protections which that status entailed, to which they were entitled, and who were similarly used as forced labourers.

While the Court finds that there can be no doubt that this conduct was a serious violation of the international law of armed conflict applicable in 1943-1945, it considers that it is not called upon to decide whether these acts were illegal, a point which is not contested, but whether, in proceedings regarding claims for compensation arising out of those acts, the Italian courts were obliged to accord Germany immunity. In that context, the Court notes that there is a considerable measure of agreement between the Parties regarding the fact that immunity is governed by international law and is not a mere matter of comity. It states that, as between the Parties, the entitlement to immunity can be derived only from customary international law. Therefore, the Court must determine, in accordance with Article 38 (1) (b) of its Statute, whether "international custom, as evidence of a general practice accepted as law" conferring immunity on States, exists and, if so, what is the scope and extent of that immunity.

The Court notes that, although there has been much debate regarding the origins of State immunity and the identification of the principles underlying that immunity in the past, the International Law Commission (hereinafter the "ILC") concluded in 1980 that the rule of State immunity had been "adopted as a general rule of customary international law solidly rooted in the current practice of States". In the opinion of the Court, that conclusion was based upon an extensive survey of State practice and is confirmed by the record of national legislation, judicial decisions and the comments of States on what became the United Nations Convention on the Jurisdictional Immunities of States and their Property (hereinafter the "United Nations Convention"). It believes that practice to show that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.

The Court observes that the Parties are thus in broad agreement regarding the validity and importance of State immunity as a part of customary international law. It notes that their views differ, however, as to whether, as Germany contends, the law to be applied is that which determined the scope and extent of State immunity in 1943-1945, i.e., at the time that the events giving rise to the proceedings in the Italian courts took place, or, as Italy maintains, that which applied at the time the proceedings themselves occurred. The Court states that, in accordance with the principle stated in Article 13 of the ILC Articles on Responsibility of States for Internationally

Wrongful Acts, the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred. Since the relevant Italian acts, namely the denial of immunity and exercise of jurisdiction by the Italian courts, did not occur until the proceedings in the Italian courts took place, the Court concludes that it must examine and apply the law on State immunity as it existed at the time of the Italian proceedings, rather than that which existed in 1943-1945. In support of that conclusion, the Court adds that the law of immunity is essentially procedural in nature; it regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful.

The Court notes that the Parties also differ as to the scope and extent of the rule of State immunity. Although both agree that States are generally entitled to immunity in respect of acta jure imperii, they disagree as to whether immunity is applicable to acts committed by the armed forces of a State (and other organs of that State acting in co-operation with the armed forces) in the course of conducting an armed conflict. Germany maintains that immunity is applicable and that there is no relevant limitation on the immunity to which a State is entitled in respect of acta jure imperii. Italy, for its part, maintains that Germany is not entitled to immunity in respect of the cases before the Italian courts for two reasons: first, that immunity as to acta jure imperii does not extend to torts or delicts occasioning death, personal injury or damage to property committed on the territory of the forum State, and, secondly, that, irrespective of where the relevant acts took place, Germany was not entitled to immunity because those acts involved the most serious violations of rules of international law of a peremptory character for which no alternative means of redress was available. The Court addresses each of Italy's arguments in turn.

2. Italy's first argument: the territorial tort principle (paras. 62-79)

The Court considers that it is not called upon in the present proceedings to resolve the question whether there is in customary international law a "tort exception" to State immunity applicable to acta jure imperii in general. The issue before the Court is confined to acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those armed forces, in the course of conducting an armed conflict.

The Court begins by examining whether Article 11 of the European Convention or Article 12 of the United Nations Convention affords any support to Italy's contention that States are no longer entitled to immunity in respect of the type of acts specified above. It explains that, as neither Convention is in force between the Parties to the present case, they are relevant only in so far as their provisions and the process of their adoption and implementation shed light on the content of customary international law.

Article 11 of the European Convention sets out the territorial tort principle in broad terms:

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

The Court notes that that provision must, however, be read in the light of Article 31, which provides:

> "Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State."

The Court finds that Article 31 excludes from the scope of the Convention all proceedings relating to acts of foreign armed forces, irrespective of whether those forces are present in the territory of the forum with the consent of the forum State and whether their acts take place in peacetime or in conditions of armed conflict. It considers that Article 31 takes effect as a "saving clause", with the result that the immunity of a State for the acts of its armed forces falls entirely outside the Convention and has to be determined by reference to customary international law. In the Court's view, however, the consequence is that the inclusion of the "territorial tort principle" in Article 11 of the Convention cannot be treated as support for the argument that a State is not entitled to immunity for torts committed by its armed forces.

The Court notes that, unlike the European Convention, the United Nations Convention contains no express provision excluding the acts of armed forces from its scope. However, the ILC's commentary on the text of Article 12[1] states that that provision does not apply to "situations involving armed conflicts". The Court further observes that no State questioned this interpretation and that two of the States which have so far ratified the Convention made declarations in identical terms stating their understanding that the Convention does not apply to military activities, including the activities of armed forces during an armed conflict and activities undertaken by military forces of a State in the exercise of their official duties. The Court concludes that the inclusion in the Convention of Article 12 cannot be taken as affording any support to the contention that customary international law denies State immunity in tort proceedings relating to acts occasioning death, personal injury or damage to property committed in the territory of the forum State by the armed forces and associated organs of another State in the context of an armed conflict.

Turning to State practice in the form of national legislation, the Court notes that nine of the ten States referred to by the Parties which have legislated specifically for the subject of State immunity have adopted provisions to the effect that a State is not entitled to immunity in respect of torts occasioning death, personal injury or damage to property occurring on the territory of the forum State. The Court observes that two of these statutes contain provisions that exclude proceedings relating to the acts of foreign armed forces from their application. It further observes that, while none of the other seven States referred to by the Parties makes provision in its legislation for the acts of armed forces, the courts have not been called upon to apply that legislation in a case involving the armed forces of a foreign State, and associated organs of State, acting in the context of an armed conflict.

The Court next turns to State practice in the form of the judgments of national courts regarding State immunity in relation to the acts of armed forces. In the Court's opinion, that practice supports the proposition that State immunity for acta jure imperii continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State. The Court notes that that practice is accompanied by opinio juris, as demonstrated by the positions taken by States and the jurisprudence of a number of national courts which have made clear that they considered that customary international law required immunity. It finds that the almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by States in connection with the work of the ILC regarding State immunity and the adoption of the United Nations Convention or, so far as the Court has been able to discover, in any other context asserting that customary international law does not require immunity in such cases.

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[1] Article 12 of the United Nations Convention provides:

> "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."

In light of the foregoing, the Court concludes that customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict. It adds that that conclusion is confirmed by the judgments of the European Court of Human Rights. Accordingly, the Court finds that the decision of the Italian courts to deny immunity to Germany cannot be justified on the basis of the territorial tort principle.

3. Italy's second argument: the subject-matter and circumstances of the claims in the Italian courts (paras. 80-106)

The Court notes that Italy's second argument, which, unlike its first argument, applies to all of the claims brought before the Italian courts, is that the denial of immunity was justified on account of the particular nature of the acts forming the subject-matter of the claims before the Italian courts and the circumstances in which those claims were made. There are three strands to this argument. Firstly, Italy contends that the acts which gave rise to the claims constituted serious violations of the principles of international law applicable to the conduct of armed conflict, amounting to war crimes and crimes against humanity. Secondly, Italy maintains that the rules of international law thus contravened were peremptory norms (jus cogens). Thirdly, Italy argues that the claimants having been denied all other forms of redress, the exercise of jurisdiction by the Italian courts was necessary as a matter of last resort. The Court considers each of these strands in turn, while recognizing that, in the oral proceedings, Italy contended that its courts had been entitled to deny immunity to Germany because of the combined effect of these three strands.

The gravity of the violations (paras. 81-91)

The Court notes that the first strand is based upon the proposition that international law does not accord immunity to a State, or at least restricts its right to immunity, when that State has committed serious violations of the law of armed conflict. It recalls that, in the present case, the Court has already made clear that the actions of the German armed forces and other organs of the German Reich giving rise to the proceedings before the Italian courts were serious violations of the law of armed conflict which amounted to crimes under international law. In the Court's view, the question is, therefore, whether that fact operates to deprive Germany of its entitlement to immunity.

The Court begins by inquiring whether customary international law has developed to the point where a State is not entitled to immunity in the case of serious violations of human rights law or the law of armed conflict. After examining State and international practice, the Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the Court emphasizes that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.

The relationship between jus cogens and the rule of State immunity (paras. 92-97)

The Court next turns to the second strand in Italy's argument, which emphasizes the jus cogens status of the rules which were violated by Germany during the period 1943-1945. It notes that this strand of the argument rests on the premise that there is a conflict between jus cogens rules forming part of the law of armed conflict and according immunity to Germany. According to Italy, since jus cogens rules always prevail over any inconsistent rule of international law, and since the rule which accords one State immunity before the courts of another does not have the status of jus cogens, the rule of immunity must give way.

The Court is of the opinion that there is no conflict between a rule, or rules, of jus cogens, and the rule of customary law which requires one State to accord immunity to another. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of jus cogens, the Court takes the view that there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. That is why the application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943-1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility.

The Court observes that, in the present case, the violation of the rules prohibiting murder, deportation and slave labour took place in the period 1943-1945. The illegality of these acts is openly acknowledged by all concerned. The application of rules of State immunity to determine whether or not the Italian courts have jurisdiction to hear claims arising out of those violations cannot involve any conflict with the rules which were violated. The Court adds that the argument about the effect of jus cogens displacing the law of State immunity has been rejected by the national courts. It states that the judgments of the Italian courts which are the subject of the present proceedings are the only decisions of national courts to have accepted the reasoning on which Italy's argument is based. It observes, moreover, that none of the national legislation on State immunity has limited immunity in cases where violations of jus cogens are alleged.

The Court concludes that, even assuming that the proceedings in the Italian courts involved violations of jus cogens rules, the applicability of the customary international law on State immunity was not affected.

The "last resort" argument (paras. 98-104)

The Court notes that the third and final strand of the Italian argument is that the Italian courts were justified in denying Germany the immunity to which it would otherwise have been entitled, because all other attempts to secure compensation for the various groups of victims involved in the Italian proceedings had failed.

The Court considers that it cannot accept Italy's contention that the alleged shortcomings in Germany's provisions for reparation to Italian victims entitled the Italian courts to deprive Germany of jurisdictional immunity. It can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress. Neither in the national legislation on the subject, nor in the jurisprudence of the national courts which have been faced with objections based on immunity is there any evidence that entitlement to immunity is subjected to such a precondition. States also did not include any such condition in either the European Convention or the United Nations Convention. Moreover, the Court cannot fail to observe that the application of any such condition, if it indeed existed, would be exceptionally difficult in practice, particularly in a context such as that of the present case, when claims have been the subject of extensive intergovernmental discussion.

Accordingly, the Court rejects Italy's argument that Germany could be refused immunity on this basis.

The combined effect of the circumstances relied upon by Italy (paras. 105-106)

The Court observes that, in the course of the oral proceedings, counsel for Italy maintained that the three strands of Italy's second argument had to be viewed together; it was because of the cumulative effect of the gravity of the violations, the status of the rules violated and the absence of alternative means of redress that the Italian courts had been justified in refusing to accord immunity to Germany.

The Court states that it has already determined that none of the three strands of the second Italian argument would, of itself, justify the action of the Italian courts. It is not persuaded that they would have that effect if taken together. According to the Court, in so far as the argument based on the combined effect of the circumstances is to be understood as meaning that the national court should balance the different factors, assessing the respective weight, on the one hand, of the various circumstances that might justify the exercise of its jurisdiction, and, on the other hand, of the interests attaching to the protection of immunity, such an approach would disregard the very nature of State immunity.

4. Conclusions (paras. 107-108)

The Court holds that the action of the Italian courts in denying Germany the immunity to which the Court has held it was entitled under customary international law constitutes a breach of the obligations owed by the Italian State to Germany.

IV. The measures of constraint taken against property belonging to Germany located on Italian territory (paras. 109-120)

The Court recalls that, on 7 June 2007, certain Greek claimants, in reliance on a decision of the Florence Court of Appeal of 13 June 2006, declaring enforceable in Italy the judgment rendered by the Court of First Instance of Livadia, in Greece, which had ordered Germany to pay them compensation, entered in the Land Registry of the Province of Como a legal charge against Villa Vigoni, a property of the German State located near Lake Como. It further recalls that Germany argued that such a measure of constraint violates the immunity from enforcement to which it is entitled under international law and that Italy, for its part, has not sought to justify that measure. It notes that the charge in question was suspended, in order to take account of the pending proceedings before the Court in the present case. The Court further notes that a dispute still exists between the Parties, inasmuch as Italy has not formally admitted that the legal charge on Villa Vigoni constituted a measure contrary to its international obligations; nor has it put an end to the effects of that measure.

The Court observes that the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts. Even if a judgment has been lawfully rendered against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow ipso facto that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question. Similarly, any waiver by a State of its jurisdictional immunity before a foreign court does not in itself mean that that State has waived its immunity from enforcement as regards property belonging to it situated in foreign territory. The Court considers that, in the present case, the distinction between the rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity (understood stricto sensu as the right of a State not to be the subject of judicial proceedings in the courts of another State) means that the Court may rule on the issue of whether the charge on Villa Vigoni constitutes a measure of constraint in violation of Germany's immunity from enforcement, without needing to determine whether the decisions of the Greek courts awarding pecuniary damages against

Germany, for purposes of whose enforcement that measure was taken, were themselves in breach of that State's jurisdictional immunity.

Relying on Article 19 of the United Nations Convention, inasmuch as it reflects customary law on the matter, the Court finds that there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State: that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim. However, the Court concludes that it is clear in the present case that the property which was the subject of the measure of constraint at issue is being used for governmental purposes that are entirely non-commercial, and hence for purposes falling within Germany's sovereign functions. Villa Vigoni is in fact the seat of a cultural centre intended to promote cultural exchanges between Germany and Italy. Nor, the Court adds, has Germany in any way expressly consented to the taking of a measure such as the legal charge in question, or allocated Villa Vigoni for the satisfaction of the judicial claims against it.

In these circumstances, the Court finds that the registration of a legal charge on Villa Vigoni constitutes a violation by Italy of its obligation to respect the immunity owed to Germany.

V. The decisions of the Italian courts declaring enforceable in Italy decisions of Greek courts upholding civil claims against Germany (paras. 121-133)

The Court notes that, in its third submission, Germany complains that its jurisdictional immunity was also violated by decisions of the Italian courts declaring enforceable in Italy judgments rendered by Greek courts against Germany in proceedings arising out of the Distomo massacre, committed by the armed forces of the German Reich in 1944.

According to the Court, the relevant question is whether the Italian courts did themselves respect Germany's immunity from jurisdiction in allowing the application for exequatur, and not whether the Greek court having rendered the judgment of which exequatur is sought had respected Germany's jurisdictional immunity. The Court observes that when a court is seised, as in the present case, of an application for exequatur of a foreign judgment against a third State, it is itself being called upon to exercise its jurisdiction in respect of the third State in question. Although the purpose of exequatur proceedings is not to decide on the merits of a dispute, but simply to render an existing judgment enforceable on the territory of a State other than that of the court which ruled on the merits, the fact nonetheless remains that, in granting or refusing exequatur, the court exercises a jurisdictional power which results in the foreign judgment being given effects corresponding to those of a judgment rendered on the merits in the requested State. The proceedings brought before that court must therefore be regarded as being conducted against the third State which was the subject of the foreign judgment. According to the Court, it follows that the court seised of an application for exequatur of a foreign judgment rendered against a third State has to ask itself whether the respondent State enjoys immunity from jurisdiction — having regard to the nature of the case in which that judgment was given — before the courts of the State in which exequatur proceedings have been instituted. In other words, it has to ask itself whether, in the event that it had itself been seised of the merits of a dispute identical to that which was the subject of the foreign judgment, it would have been obliged under international law to accord immunity to the respondent State. The Court concludes that, in the light of this reasoning, it follows that the Italian courts which declared enforceable in Italy the decisions of Greek courts rendered against Germany have violated the latter's immunity. The Court considers that, in order to reach such a decision, it is unnecessary to rule on the question whether the Greek courts did themselves violate Germany's immunity, a question which is not before the Court, and on which, moreover, it cannot rule.

The Court concludes, therefore, that the decisions of the Italian courts declaring enforceable in Italy judgments rendered by Greek courts against Germany in proceedings arising out of the Distomo massacre constitute a violation by Italy of its obligation to respect the jurisdictional immunity of Germany.

VI. Germany's final submissions and the remedies sought (paras. 134-138)

The Court upholds Germany's first three requests, which ask it to declare, in turn, that Italy has violated the jurisdictional immunity which Germany enjoys under international law by allowing civil claims based on violations of international humanitarian law by the German Reich between 1943 and 1945; that Italy has also committed violations of the immunity owed to Germany by taking enforcement measures against Villa Vigoni; and, lastly, that Italy has violated Germany's immunity by declaring enforceable in Italy Greek judgments based on occurrences similar to those referred to above.

In respect of Germany's fourth submission, the Court does not consider it necessary to include an express declaration in the operative clause that Italy's international responsibility is engaged.

With regard to Germany's fifth submission, in which it asks the Court to order Italy to take, by means of its own choosing, any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable, the Court begins by recalling that the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing, and, even if the act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed, provided that re-establishment is not materially impossible and that it does not involve a burden for that State out of all proportion to the benefit deriving from restitution instead of compensation. The Court finds that the decisions and measures infringing Germany's jurisdictional immunities which are still in force must cease to have effect, and the effects which have already been produced by those decisions and measures must be reversed, in such a way that the situation which existed before the wrongful acts were committed is re-established. The Court adds that it has not been alleged or demonstrated that restitution would be materially impossible in this case, or that it would involve a burden for Italy out of all proportion to the benefit deriving from it. On the other hand, it observes that Italy has the right to choose the means it considers best suited to achieve the required result. Thus the Respondent is under an obligation to achieve this result by enacting appropriate legislation or by resorting to other methods of its choosing having the same effect.

The Court, however, does not uphold Germany's sixth submission, in which it asks the Court to order Italy to take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in its first submission (namely violations of international humanitarian law committed by the German Reich between 1943 and 1945). As it has stated in previous cases, the Court recalls that, as a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed. Accordingly, while the Court may order the State responsible for an internationally wrongful act to offer assurances of non-repetition to the injured State, or to take specific measures to ensure that the wrongful act is not repeated, it may only do so when there are special circumstances which justify this, which the Court must assess on a case-by-case basis. In the present case, however, the Court has no reason to believe that such circumstances exist.

VII. Operative clause (para. 139)

For these reasons,

THE COURT,

(1) By twelve votes to three,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Greenwood, Xue, Donoghue;

AGAINST: Judges Cançado Trindade, Yusuf; Judge ad hoc Gaja;

(2) By fourteen votes to one,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by taking measures of constraint against Villa Vigoni;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue; Judge ad hoc Gaja;

AGAINST: Judge Cançado Trindade;

(3) By fourteen votes to one,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by declaring enforceable in Italy decisions of Greek courts based on violations of international humanitarian law committed in Greece by the German Reich;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue; Judge ad hoc Gaja;

AGAINST: Judge Cançado Trindade;

(4) By fourteen votes to one,

Finds that the Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue; Judge ad hoc Gaja;

AGAINST: Judge Cançado Trindade;

(5) Unanimously,

Rejects all other submissions made by the Federal Republic of Germany.

Judges Koroma, Keith and Bennouna append separate opinions to the Judgment of the Court; Judges Cançado Trindade and Yusuf append dissenting opinions to the Judgment of the Court; Judge ad hoc Gaja appends a dissenting opinion to the Judgment of the Court.

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Separate opinion of Judge Koroma

In his separate opinion, Judge Koroma states that he has voted in favour of the Court's Judgment, which in his view accurately reflects the current state of international law with respect to the jurisdictional immunity of a State. Judge Koroma emphasizes, however, that the Court's Judgment should not be read as a licence for States to commit acts of torture or other similar acts tantamount to crimes against humanity.

Judge Koroma states that the case before the Court is not about the conduct of Germany's armed forces during the Second World War or Germany's international responsibility for such conduct. The question, in his view, is limited to whether Germany is legally entitled to immunity before the Italian domestic courts with respect to the conduct of its armed forces in the course of the armed conflict. Judge Koroma adds that the Court's jurisdiction is limited to addressing only the issue of immunity. According to Judge Koroma, the Court did not need to address the substantive matter of the legality of Germany's conduct to resolve the issue of jurisdictional immunity.

Judge Koroma notes that it is clear that the acts of the German armed forces in Italy during the Second World War constitute acta jure imperii. According to Judge Koroma, acts committed by a State's armed forces in the course of an international armed conflict are acts taken in exercise of sovereign power, because the execution of such acts is necessarily the sovereign prerogative of a State. Judge Koroma adds that it is well established that States are generally entitled to immunity for acta jure imperii. The question, in his view, is whether any exception to this general rule exists that would deny States sovereign immunity for unlawful actions committed by their armed forces on the territory of another State during armed conflict or in the course of an occupation.

Judge Koroma observes that the law on sovereign immunity has evolved to provide a limited exception to immunity for certain types of tortious acts. He notes that this exception is codified in Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which can be considered to reflect the current state of customary international law. Judge Koroma points out, however, that the International Law Commission's commentary on the Convention makes clear that the drafters intended Article 12 to apply mainly to situations such as traffic accidents, and did not intend for the Article to apply to situations involving armed conflicts. Judge Koroma concludes that, therefore, States continue to be entitled to sovereign immunity for acta jure imperii committed by their armed forces during armed conflict. He emphasizes, however, that the Court's task is to apply the existing law, and that nothing in the Court's Judgment prevents the continued evolution of the law on State immunity.

Judge Koroma also considers it important to acknowledge and address the arguments made by Greece, a non-party intervenor in this case. In its written statement, Greece emphasized, inter alia, the "individual right to reparation in the event of grave violations of humanitarian law". Judge Koroma states that Greece is correct that international humanitarian law now regards individuals as the ultimate beneficiaries of reparations for human rights violations. In his view, however, it does not follow that international law provides individuals with a legal right to make claims for reparation directly against a State. Judge Koroma notes that nothing in the Fourth Hague Convention of 1907 or Article 91 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 supports such a proposition. The relevant Articles of these two Conventions provide that States must "pay compensation" if they violate the Conventions, but, according to Judge Koroma, they do not purport to require that States pay compensation directly to aggrieved individuals. Judge Koroma observes that a provision requiring State payments to individuals would have been inconceivable in 1907, when the Fourth Hague Convention was concluded.

Judge Koroma concludes that the Court correctly found that Germany is entitled to sovereign immunity for the acts committed by its armed forces in Italy during the Second World War. He adds, however, that this finding does not preclude the Parties from entering into negotiations to resolve outstanding issues raised in this case, but that its resolution does not necessitate the overthrow of the existing law on jurisdictional immunity, which justly protects and preserves the sovereignty and sovereign equality of States.

Separate opinion of Judge Keith

Judge Keith agrees with the conclusions of the Court, and largely with its reasons. His purpose in preparing the opinion is to emphasize how international rules on State immunity are firmly based on principles of international law and on policies of the international legal order.

A fundamental principle at play in this area is that of the sovereign equality of States, according to which all States have equal rights and duties and are juridically equal. In cases raising issues of State immunity, that principle applies to two States: the State in whose court the case is brought and the foreign State which is the intended defendant. While, on the one hand, the court's jurisdiction arises from the sovereignty of the forum State, conversely, the sovereign equality and independence of the foreign State are principles supporting immunity from that jurisdiction.

For the last 200 years, national courts and national legislatures, in seeking to reconcile these two propositions, have given particular attention to the character of the act in issue: is it to be seen as the exercise of sovereign authority, or is it indistinguishable from the act of any other person subject to the local law? The same approach has been followed in more recent treaties and the diplomatic and other processes leading to them. Long-standing practice also underlines the distinction, critical in this case, between the substantive obligations of a foreign State and the procedural or institutional means by which that obligation is to be enforced.

With respect to the claims brought before Italian courts, Judge Keith emphasizes that Germany has accepted responsibility for the untold suffering which resulted from its illegal acts between 1943 and 1945. However it is not that illegality which is the subject of the present case. It is rather the question whether Italian courts may exercise jurisdiction over claims based on those facts, brought against Germany.

One basis for exercising that jurisdiction, Italy had argued, was the local tort rule. While that rule has long been recognized, Judge Keith concludes that it does not encompass the conduct in question in this case. First, this rule would apply to what were in essence damages claims under local law in respect of injury and damage which would in general be insurable. It would not apply to acts committed in the course of armed conflict between States: those are acts at the international level, of a sovereign nature and are to be assessed according to international law rather than local law. Second, Judge Keith notes the analogy between foreign State immunity and the rules on the immunity of the domestic sovereign from proceedings in their own courts, and recalls that domestic legislation even as it has narrowed that immunity has generally precluded claims arising from actions of the armed forces of the State. Third, at the international level claims in respect of war damages and losses against former belligerents are in practice dealt with by inter-State negotiations and agreements. This practice reflects post-war realities and strongly supports the conclusion that a former belligerent State may not be subject, without its consent, to the jurisdiction of a foreign court in cases such as those which are the subject of these proceedings.

Separate opinion of Judge Bennouna

Although he voted in favour of that part of the operative clause which found that Italy had violated Germany's jurisdictional immunity, Judge Bennouna considers that he cannot endorse the approach adopted by the Court, or support the logic of its reasoning. In Judge Bennouna's view, the fact that responsibility is indissociable from the exercise of sovereignty means that it is only, where appropriate, by assuming its responsibility that a State can justify its claim to immunity before foreign courts on the basis of sovereign equality. Judge Bennouna takes the view that it is only in exceptional circumstances, where a State presumed to be the author of unlawful acts rejects any attribution of responsibility, in whatever form, that it could lose the benefit of immunity before the courts of the forum State. It is for the Court, in ruling on immunity, to ensure the unity of international law by taking account of all of its constituent elements.

Dissenting opinion of Judge Cançado Trindade

1. In his Dissenting Opinion, composed of 27 parts, Judge Cançado Trindade presents the foundations of his personal dissenting position, pertaining to the Court's decision as a whole, encompassing the adopted methodology, the approach pursued, the whole reasoning in its treatment of issues of substance, as well as the conclusions of the Judgment. He begins his Dissenting Opinion by identifying (part I) the wider framework of the settlement of the dispute at issue, ineluctably linked to the imperative of the realization of justice, in particular in the international adjudication by the Court of cases of the kind on the basis of fundamental considerations of humanity, whenever grave breaches of human rights and of international humanitarian law lie at their factual origins, as in the cas d'espèce.

2. Preliminarily, as to the inter-temporal dimension in the consideration of State immunity (part II), he sustains that one cannot take account of inter-temporal law only in a way that serves one's interests in litigation, accepting the passing of time and the evolution of law in relation to certain facts but not to others, of the same continuing situation. In approaching the interrelatedness between State immunities and war reparations claims, the evolution of law is to be kept in mind. The relationship between State immunities and war reparation claims in the present case is, in his view, indeed an ineluctable one.

3. Thus, despite the Court's Order of 06 July 2010 summarily dismissing the Italian counter-claim (with his dissent), it so happens that the facts underlying the dispute between the Parties, and conforming its historical background, continued to be referred to by the contending parties (Germany and Italy), throughout the whole proceedings (written and oral phases) before the Court. Judge Cançado Trindade adds that this confirms what he upheld in his previous Dissenting Opinion in the Court's Order of 06.07.2010 in the present case, namely, that State immunities cannot be considered in the void, and they constitute a matter which is ineluctably linked to the facts which give origin to a contentious case (part III).

4. Next, Judge Cançado Trindade singles out the significance of the commendable initiative of Germany to recognize, repeatedly before the Court (in the written and oral phases), State responsibility for the wrongful acts lying in the factual origins of the cas d'espèce, i.e., for the crimes committed by the Third Reich during the II world war (part IV). This discloses the uniqueness of the present case concerning the Jurisdictional Immunities of the State, an unprecedented one in the history of the ICJ, in that the complainant State recognizes its own responsibility for the harmful acts forming the factual background of the cas d'espèce.

5. In sequence, he reviews some doctrinal developments (part V), from a generation of jurists which witnessed the horrors of two world wars in the XXth century, which did not pursue a strict State-centric approach, and were centred on fundamental human values, and on the human person, guarding faithfulness to the historical origins of the droit des gens, as Judge Cançado Trindade thinks ought to be done nowadays as well. In his view, State immunities are a prerogative or a privilege, and they cannot keep on making abstraction of the evolution of international law, taking place nowadays in the light of fundamental human values. He adds that the work of learned institutions in international law (such as, e.g., the Institut de Droit International and the International Law Association) can further be recalled to the same effect.

6. Judge Cançado Trindade observes that the tension between State immunity and the right of access to justice is thus to be rightly resolved in favour of the latter, particularly in cases of international crimes (part VI). He expresses the concern with the need to abide by the imperatives of justice and to avoid impunity in cases of perpetration of international crimes, thus seeking to guarantee their non-repetition in the future. And he proceeds that the threshold of the gravity of the breaches of human rights and of international humanitarian law removes any bar to jurisdiction, in the quest for reparation to the victimized individuals (part VII). All mass atrocities are nowadays to be considered, in his view, in the light of the threshold of gravity, irrespective of who committed them; criminal State policies and the ensuing perpetration of State atrocities are not to be covered up by the shield of State immunity.

7. In part VIII of his Dissenting Opinion, Judge Cançado Trindade sustains that States cannot waive, inter se, rights which are not their own, but which are rather inherent to human beings. Purported inter-State waivers of rights inherent to the human person are, in his view, inadmissible; they stand against the international ordre public, and are to be deprived of any juridical effects. This is deeply-engraved in human conscience, in the universal juridical conscience, the ultimate material source of all Law.

8. He demonstrates, in part IX of his dissent, that, well before the II world war, deportation to forced labour (as a form of slave work) was already prohibited by international law. Its wrongfulness was widely acknowledged, at normative level, by the IV Hague Convention of 1907 and by the 1930 ILO Convention on Forced Labour. There was recognition of that prohibition in works of codification of the epoch, and that prohibition has, furthermore, met with judicial recognition. The right to war reparation claims was likewise recognized well before the end of the II world war (in the IV Hague Convention of 1907) (part XII).

9. To Judge Cançado Trindade, what jeopardizes or destabilizes the international legal order, are the international crimes, and not the individuals' quest for reparation. What troubles the international legal order, are the cover-up of such international crimes accompanied by the impunity of the perpetrators, and not the victims' search for justice (parts X and XIII). When a State pursues a criminal policy of murdering segments of its own population, and of the population of other States, it cannot, later on, place itself behind the shield of sovereign immunities, as these latter were never conceived for that purpose.

10. Judge Cançado Trindade proceeds to a review of all the responses provided by the contending parties (Germany and Italy), as well as the intervening State (Greece), to the questions he put to them at the end of the oral hearings before the Court, on 16.09.2011 (part XI). He sustains that grave breaches of human rights and of international humanitarian law, amounting to international crimes, are anti-juridical acts, are breaches of jus cogens, that cannot simply be removed or thrown into oblivion by reliance on State immunity (parts XII-XIII).

11. In sequence, Judge Cançado Trindade proceeds to a review of the prevailing tension, in the international and national case-law, between State immunity and the individual victims' right of access to justice (part XIV); he ascribes greater weight to this latter, in the current age of the rule of law at national and international levels (as reckoned nowadays by the United Nations General Assembly itself). Furthermore, he discards the traditional and eroded distinction between acta jure gestionis and acta jure imperii as being immaterial in the present case; in his understanding, international crimes perpetrated by States (such as those committed by the Third Reich in the II world war) are not acts jure gestionis, nor acts jure imperii; they are crimes, delicta imperii, for which there is no immunity (part XV).

12. The next line of considerations by Judge Cançado Trindade pertains to the human person and State immunities. This counterposition leads international law (the droit des gens) to free itself from the strict and short-sighted inter-State outlook (part XVI) of times past. He recalls that the term "immunity" (from Latin immunitas, deriving from immunis) entered the lexicon of international law by reference to "prerogatives" of the sovereign State, being associated with "cause of impunity". The term was meant to refer to something quite exceptional, an exemption from jurisdiction or from execution. It was never meant to be a principle, nor a norm of general application. It has certainly never been intended to except jurisdiction on, and to cover-up, international crimes, grave violations of human rights and of international humanitarian law.

13. Thus, in case of such crimes or grave violations, Judge Cançado Trindade sustains that the direct access of the individuals concerned to the international jurisdiction is thus fully justified, to vindicate the individual victims' rights, even against their own State (part XVII). To him, beyond the inter-State myopia, individuals are indeed subjects of international law (not merely "actors"), and whenever legal doctrine departed from this, the consequences and results were catastrophic. Individuals are titulaires of rights and bearers of duties which emanate directly from international law (the jus gentium). Converging developments, in recent decades, of the International Law of Human Rights, of International Humanitarian Law, and of the International Law of Refugees, followed by those of International Criminal Law, give unequivocal testimony of this.

14. To Judge Cançado Trindade, it is not at all State immunity that cannot be waived. There is no immunity for crimes against humanity (part XVIII-XIX). In cases of international crimes, of delicta imperii, what cannot be waived is the individual's right of access to justice, encompassing the right to reparation for the grave violations of the rights inherent to him as a human being. Without that right, there is no credible legal system at all, at national or international levels. One is here in the domain of jus cogens.

15. Accordingly, there are no State immunities for delicta imperii, such as massacres of civilians in situations of defencelessness (e.g., the massacre of Distomo, in Greece, in 1944, and the massacre of Civitella, in Italy, also in 1944), or deportation and subjection to forced labour in war industry (e.g., in 1943-1945) (part XVIIII). In the understanding of Judge Cançado Trindade, the finding of particularly grave violations of human rights and of international humanitarian law provides a valuable test for the removal of any bar to jurisdiction, in pursuance of the necessary realization of justice. It is immaterial whether the harmful act in grave breach of human rights was a governmental one, or a private one with the acquiescence of the State, or whether it was committed entirely in the forum State or not (deportation to forced labour is a trans-frontier crime). State immunity does not stand in the domain of redress for grave violations of the fundamental rights of the human person.

16. In sequence, Judge Cançado Trindade sustains that the right of access to justice lato sensu comprises not only the formal access to justice (the right to institute legal proceedings), by means of an effective remedy, but also the guarantees of the due process of law (with equality of arms, conforming the procès équitable), up to the judgment (as the prestation juridictionnelle), with its faithful execution, with the provision of the reparation due (part XIX). Contemporary international case-law contains elements to this effect, pointing towards jus cogens (parts XX-XXI). The realization of justice is in itself a form of reparation, granting satisfaction to the victim. In this way those victimized by oppression have their right to the Law (droit au Droit) duly vindicated (part XXII).

17. Even in the domain of State immunities properly, — he proceeds, — there has been acknowledgment of the changes undergone by it, in the sense of restricting or discarding such immunities in the occurrence of those grave breaches, due to the advent of the International Law of Human Rights, with attention focused on the right of access to justice and international accountability. Judge Cançado Trindade adds that the State's duty to provide reparation to individual victims of grave violations of human rights and of international humanitarian law is a duty under customary international law and pursuant to a fundamental general principle of law (part XXII).

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

19. Judge Cançado Trindade asserts that, in cases disclosing such gravity as the present one opposing Germany to Italy (and with Greece intervening), the right of access to justice lato sensu is to be approached with attention focused on its essence as a fundamental right (as in the case-law of the Inter-American Court of Human Rights), rather than on permissible or implicit "limitations" to it (as in the case-law of the European Court of Human Rights). In his understanding, grave breaches of human rights and of international humanitarian law amount to breaches of jus cogens, entailing State responsibility and the right to reparation to the victims (parts XXI and XXIII). This is in line, — he adds, — with the idea of rectitude (in conformity with the recta ratio of natural law), underlying the conception of Law (in distinct legal systems — Recht / Diritto / Droit / Direito / Derecho / Right) as a whole (part XXIII).

20. The next line of reflections by Judge Cançado Trindade pertains to the individual victims' right to reparation, the indispensable complement of the grave breaches of international law which harmed them. This indissoluble whole, of breach and reparations, — he adds, — is recognized in the jurisprudence constante of The Hague Court (PCIJ and ICJ), and the wrongly assumed incidence of State immunity herein cannot dismantle that indissoluble whole. It appears groundless to him to claim that the regime of reparations for grave breaches of human rights and of international humanitarian law would exhaust itself at inter-State level, to the detriment of the individuals who suffered the consequences of war crimes and crimes against humanity.

21. Judge Cançado Trindade adds that it is clear from the records of the present case that there are "Italian Military Internees" (IMIs, i.e., former soldiers who were imprisoned and denied the status of prisoners of war), — who were sent, also with civilians, to forced labour in the

German war industry in the II world war (in 1943-1945), — victims of Nazi Germany's grave violations of human rights and of international humanitarian law, who have in fact been left without reparation to date (part XXIV). Despite the fact that, as a result of the two 1961 Agreements between Germany and Italy, payments for reparation were made by Germany to Italy, it so remains that there were victims who remained uncovered by those Agreements. And Germany itself admits that there are "IMIs" who have not received reparation, on the basis of an interpretation given of the 2000 German law on the "Remembrance, Responsibility and Future" Foundation.

22. On the basis of an expert opinion, Germany did not make reparation to the "IMIs" through the Foundation; it resorted instead to an appraisal which led to a treatment of those victims which incurs, in Judge Cançado Trindade's understanding, into a double injustice to them: first, when they could have benefited from the rights attached to the status of prisoners of war, such status was denied to them; and secondly, now that they seek reparation for violations of international humanitarian law of which they were victims (including the violation of denying them the status of prisoners of war), they are seen to be treated as prisoners of war (part XXV). It is regrettably too late to consider them prisoners of war (and, worse still, to deny them reparation): they should have been so considered during the II world war and in its immediate aftermath (for the purpose of protection), but they were not.

23. In sum, there are victims of Nazi Germany's grave violations of human rights and of international humanitarian law who have in fact been left without reparation. In Judge Cançado Trindade's assessment, such individual victims of State atrocities cannot be left without any form of redress. State immunity is not supposed to operate as a bar to jurisdiction in circumstances such as those prevailing in the present case concerning the Jurisdictional Immunities of the State. It is not to stand in the way of the realization of justice. The pursuit of justice is to be preserved as the ultimate goal; securing justice to victims encompasses, inter alia, enabling them to seek and obtain redress for the crimes they suffered.

24. And the realization of justice is in itself a form of reparation (satisfaction) to the victims. It is the reaction of the Law to those grave violations, bringing one into the realm of jus cogens. In Judge Cançado Trindade's conception, through reparatio (from the Latin term reparare, "to dispose again"), the Law intervenes to cease the effects of its violations, and to guarantee the non-repetition of the harmful acts. The reparatio does not put an end to the human rights violations already perpetrated, but, in ceasing its effects, it at least avoids the aggravation of the harm already done (by the indifference of the social milieu, by impunity or by oblivion).

25. The reparatio is endowed, in Judge Cançado Trindade's understanding, with a double meaning: it provides satisfaction (as a form of reparation) to the victims, and at the same time it re-establishes the legal order broken by such violations, — a legal order erected on the basis of the full respect for the rights inherent to the human person. The legal order, thus re-established, requires the guarantee of non-repetition of the harmful acts.

26. In the remaining line of reflections of his Dissenting Opinion, Judge Cançado Trindade sustains the primacy of jus cogens and presents a rebuttal of its deconstruction (part XXVI). In his view, one cannot embark on a wrongfully assumed and formalist lack of conflict between "procedural" and "substantive" rules (cf. infra), unduly depriving jus cogens of its effects and legal consequences. The fact remains that a conflict does exist, and the primacy is of jus cogens, which resists to, and survives, such groundless attempt at its deconstruction. There can be no prerogative or privilege of State immunity in cases of international crimes, such as massacres of the civilian

population, and deportation of civilians and prisoners of war to subjection to slave labour: these are grave breaches of absolute prohibitions of jus cogens, for which there can be no immunities.

27. He stresses that one cannot approach cases of the kind — involving grave breaches of human rights and of international humanitarian law — without close attention to fundamental human values. Unlike what legal positivism assumes, law and ethics go ineluctably together, and this should be kept in mind for the faithful realization of justice, at national and international levels. The central principles at issue here are, in his perception, the principle of humanity and the principle of human dignity. State immunity cannot, in his view, be unduly placed above State responsibility for international crimes and its ineluctable complement, the responsible State's duty of reparation to the victims.

28. The opposite (majority) view is arrived at, in pursuance of an empirical factual exercise of identifying the incongruous case-law of national courts and the inconsistent practice of a few national legislations on the subject-matter at issue. This exercise is characteristic of the methodology of legal positivism, over-attentive to facts and oblivious of values. Be that as it may, even in its own outlook, the examination of national courts' decisions, — in Judge Cançado Trindade's view, — is not at all conclusive for upholding State immunity in cases of international crimes.

29. Such are, in his perception, positivist exercises leading to the fossilization of international law, and disclosing its persistent underdevelopment, rather than its progressive development, as one would expect. Such undue methodology is coupled with inadequate and unpersuasive conceptualizations, such as that of the counterposition between "procedural" and "substantive" rules. It is, in his understanding, wrong to assume that no conflict exists, or can exist, between the substantive "rules of jus cogens" (imposing the prohibitions of "the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour") and the procedural rules of State immunity. This tautological assumption leads to the upholding of State immunity even in the grave circumstances of the present case.

30. There is thus a material conflict, even though a formalist one may not prima facie be discernible. To him, the fact remains that a conflict does exist, and it is regrettable to embark on such a groundless deconstruction of jus cogens, depriving this latter of its effects and legal consequences. Judge Cançado Trindade observes that this is not the first time that this happens; it has happened before, e.g., in the last decade, in the Court's Judgments in the cases of the Arrest Warrant (2002) and of the Armed Activities on the Territory of the Congo (D.R. Congo versus Rwanda, 2006), recalled by the Court with approval in the present Judgment. It is, in his view, high time to give jus cogens the attention it requires and deserves.

31. Its deconstruction, as in the present case, is — in his perception — to the detriment not only of the individual victims of grave violations of human rights and of international humanitarian law, but also of contemporary international law itself. In sum, in his understanding, there can be no prerogative or privilege of State immunity in cases of international crimes, such as massacres of the civilian population, and deportation of civilians and prisoners of war to subjection to slave labour: these are grave breaches of absolute prohibitions of jus cogens, for which there can be no immunities.

32. State immunities cannot keep on being approached in the light of an atomized or self-sufficient outlook (contemplating State immunities in a void), but rather pursuant to a comprehensive view of contemporary international law as a whole, and its role in the international community. He adds that international law cannot be "frozen" by continued and prolonged reliance on omissions of the past, either at normative level (e.g., in the drafting of the 2004 U.N. Convention on Jurisdictional Immunities of States and Their Property), or at judicial level (e.g., the majority decision of the Grand Chamber of the European Court of Human Rights in the Al-Adsani case, 2001, invoked by the Court in the present case).

33. In sum, — Judge Cançado Trindade concludes, — jus cogens stands above the prerogative or privilege of State immunity, with all the consequences that ensue therefrom, thus avoiding denial of justice and impunity. On the basis of all the aforesaid, his firm position is that there is no State immunity for international crimes, for grave violations of human rights and of international humanitarian law. In his understanding, this is what the International Court of Justice should have decided in the present Judgment.

Dissenting opinion of Judge Yusuf

In his dissenting opinion, Judge Yusuf states that he is unable to concur with the Court's majority in its finding because of the marginal way in which the core issue in dispute between the Parties was dealt with in the Judgment. This core issue is the link between the lack of reparations for international crimes and the denial of jurisdictional immunity to Germany. Could the protection of victims of international crimes from denial of justice constitute a violation of international law? Judge Yusuf considers that the Court has failed to seize a unique opportunity to clarify the law and to pronounce itself on the effect that the absence of other remedial avenues for reparations could have on immunity before domestic courts. This is an area in which international law is clearly evolving, and the Court, as the principal judicial organ of the United Nations, should have provided guidance on this evolution.

In addition, his disagreement relates to the following main points: the lack of adequate analysis of the obligation to make reparations after violations of international humanitarian law (an issue intimately linked to the denial of State immunity); the reasoning and conclusions on the scope and extent of immunity and the derogations that may be made from it; and the majority's approach towards the role of domestic courts in the identification and evolution of international customary norms particularly in the area of State immunity.

Noting that the issue of jurisdictional immunity of foreign States before national courts for cases concerning serious violations of international humanitarian law (hereafter, IHL) has been the subject of significant scholarly debate and has recently given rise to conflicting judicial decisions, Judge Yusuf states that the question presented to the Court is of a much limited and narrower scope, namely whether the refusal of Italian courts to grant jurisdictional immunity to Germany with respect to claims for reparation of victims of Nazi crimes who lacked other remedial avenues constituted an internationally wrongful act. The Court, however, directs its analysis to the more general issue of whether immunity is applicable to unlawful acts committed by armed forces of a State during armed conflict. In Judge Yusuf's view, this formulation of the core issues is "too abstract and formalistic" as compared to the real life situation of certain categories of Italian victims of Nazi crimes who have sought redress for over 50 years, found it lacking, and have consequently submitted their claims to Italian courts in search of an alternative means of redress. This "last resort" argument is central to the dispute between Germany and Italy, but the Court does not assess the legal implications of Germany's failure to provide reparations to certain categories of victims on the grant or denial of immunity to Germany in the courts of the forum State under international law, and instead only expresses "regret" that this has been the case.

Judge Yusuf finds it regrettable that the Court did not examine the obligation to make reparations for violations of IHL in international law in as far as it has a direct bearing on the granting of immunity in the current proceedings. He states that this obligation is enshrined in Article 3 of the Hague Convention IV (1907) and Article 91 of the Additional Protocol I of 1977 to the Geneva Conventions (1949), and while compensation for such breaches has been handled at the inter-State level for a long time, this does not mean that individuals are not or were not meant to be the ultimate beneficiaries of such mechanisms or that they do not possess the right to make claims for compensation. In the last two decades, there have been more and more examples of individual claimants seeking compensation for serious breaches of IHL, e.g., the claims brought before the Japanese courts in the 1990s by persons who were subject to slave labour or torture, or were forced to work as comfort women during the Second World War; claims brought before United States courts by the Holocaust Restitution Movement on behalf of wartime labour slaves; the Distomo case in Greece and the Ferrini case in Italy. The law on State responsibility does not rule out the possibility that rights may accrue to individuals as a result of a wrongful act committed by a State and the International Committee of the Red Cross Commentary to Article 91 of the Additional Protocol I recognizes that since 1945 there has been a tendency to recognize the exercise of such rights by individuals. The key question before the Court therefore is what happens in the case of humanitarian law violations for which responsibility has been recognized by the foreign State but some victims are not covered by reparation schemes and are thus deprived of compensation. Should such a State be allowed to use immunity before domestic courts to shield against the obligation to make reparations?

On the scope of jurisdictional immunity, Judge Yusuf states that while State immunity is a rule of customary law and not merely a matter of comity, its coverage has been contracting over the past century as international law evolves from a State-centred legal system to one which also protects the rights of human beings vis-à-vis the State. The shrinking of immunity coverage has been spearheaded by domestic courts, and while immunity law is significant for the conduct of harmonious relations between States, it is not a rule of law whose coverage is well defined for all circumstances or whose stability is unimpaired. State immunity is as full of holes as Swiss cheese. Thus, it is not persuasive to characterize some exceptions to immunity as part of customary international law, despite the continued existence of divergent domestic judicial decisions, while interpreting other exceptions, based on similarly conflicting decisions, as supporting the non-existence of customary norms. It would be more appropriate, in his view, to recognize that customary law in this area remains fragmentary and unsettled. Judge Yusuf contends that these uncertainties of customary law cannot be resolved through a formalistic exercise that surveys the conflicting judicial decisions of domestic courts, which are already sparse as regards human rights and humanitarian law violations, and by conducting a mathematical calculation. For him, customary international law is not a question of relative numbers. Further, State immunity from jurisdiction cannot be interpreted in a vacuum. The specific features and circumstances of each case, the nature of the issues involved and the evolution of international law all have to be fully taken into account. Thus, when jurisdictional immunities come into conflict with basic rights consecrated under human rights or humanitarian law, a balance has to be sought between the intrinsic functions and purposes of immunity and the protection and realization of fundamental human rights and humanitarian law principles. In the present case these are the right to an effective remedy, the right to compensation for damages suffered as a result of breaches of humanitarian law, and the right to protection from denial of justice. Recourse should be had to those principles and there should be an assessment of the proportionality and legitimacy of purpose of granting immunity, whenever the customary law rules on State immunity or the exceptions to it are found to be either fragmentary or unsettled, as is the case here. Finally, the preliminary nature of immunity from jurisdiction does not preclude national courts, in this case the Italian courts, from assessing the context in which the claim has been made to ensure a proper legal characterization of the acts for which immunity is claimed and, where necessary, to balance the different factors underlying the case to determine whether the Court can assert jurisdiction.

Judge Yusuf further observes that the law relating to State immunity has historically evolved through the decisions of domestic courts and many exceptions currently accepted as such, for example the tort exception or the employment exception, were initially established by one or two courts at a time. Important exceptions to immunity, such as these, could have met a very different fate if, for example, the Austrian judgment in Holubek v. Government of the United States of America (ILR, Vol. 40, 1962, p. 73) had been found to be in violation of the international law on immunity. A nascent norm, which has come to reflect a widely-held opinio juris and State practice, would have been nipped in the bud. Similarly, the Italian decisions, as well as the Distomo decision, may be viewed as part of a broader evolutionary process in which decisions of domestic courts have given rise to a number of exceptions to jurisdictional immunity. It is evident that the rules on State immunity and the entitlement of individuals to reparations for international crimes committed by State agents are undergoing transformation. To the extent that there is a conflict between immunity from jurisdiction of States and claims arising from international crimes, State immunity should not be used as a screen to avoid reparations to which victims of crimes are entitled. In exceptional circumstances, such as those before the Court, where no other means of redress is available, such a conflict should be resolved in favour of the victims of grave breaches of international humanitarian law. This does not harm the independence or the sovereignty of States. It simply contributes to the crystallization of an emerging exception to State immunity, which is based on the widely-held opinio juris of ensuring the realization of certain basic rights of human beings such as the right to an effective remedy, in those circumstances where otherwise the victims would otherwise remain deprived of remedial avenues.

In the final analysis, Judge Yusuf states that his comments should not be taken to mean that immunity is to be set aside whenever claims for reparations of international crimes committed by a foreign State are submitted to domestic courts. They rather indicate the necessity of interpreting the law in the sense in which it is already evolving of a limited and workable exception to State immunity in those circumstances where the victims of international crimes have no other means of redress. The assertion of jurisdiction by domestic courts in those exceptional circumstances where there is a failure to make reparations through other remedial avenues cannot upset the harmonious relations between States nor affect the sovereignty of another State. The protection of victims of international crimes from denial of justice by domestic courts cannot constitute a violation of international law. Such an exception to jurisdictional immunity, according to Judge Yusuf, brings the law on State immunity in line with the growing normative weight attached by the international community to the protection of human rights and humanitarian law and the realization of the right to effective remedy for victims of international crimes.

Dissenting opinion of Judge ad hoc Gaja

1. The Court finds that "customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict". However, an analysis of the relevant State practice concerning the "tort exception" to State immunity does not appear to justify such a clear-cut conclusion.

2. The United Nations Convention on Jurisdictional Immunities of States and Their Property provides for a "tort exception". It does not grant foreign States immunity with regard to their military activities although the preparatory work includes elements suggesting that "situations involving armed conflicts" are not covered by the Convention.

3. Nine out of ten States which enacted legislation on foreign State immunity provide for a "tort exception". Some of these statutes consider that immunity nevertheless exists with regard to the conduct of foreign military forces, but they only refer to visiting forces, not to those of an

occupying foreign State. The unchallenged practice of these nine States is significant. Were the stated exceptions to immunity unfounded under general international law, these States would incur international responsibility.

4. The variety of national judicial decisions shows that the issue lies in a "grey area" in which States may take different positions without necessarily departing from the requirements of general international law.

5. One factor that could contribute to justifying a restrictive approach to State immunity when applying the "tort exception" is the nature of the obligation (e.g., an obligation under a peremptory norm) for the breach of which a claim to reparation is brought against a foreign State.

6. The Court should have considered that at least for certain decisions of Italian courts the exercise of jurisdiction could not be regarded as contravening general international law.

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