

SEPARATE OPINION OF JUDGE KOROMA

1. I have voted in favour of the Court's Judgment, which in my view accurately reflects the current state of international law with respect to the jurisdictional immunity of a State.

2. The Court has made a finding that Italy has violated the immunity which Germany enjoys under international law by allowing civil claims to be brought against it relating to violations of international humanitarian law by Germany. It is worth emphasizing, however, that the Court's Judgment should not be read as a licence for States to commit acts of torture, crimes against humanity or violations of international humanitarian law in situations of armed conflict. Rather, the Court examined the facts of this case and concluded that the acts committed by Germany were *acta jure imperii* and that no exception to immunity was applicable. Therefore the Court found that Germany was entitled to immunity from suit in Italian courts.

3. Germany has acknowledged the serious nature of the acts committed by its armed forces in Italy during the Second World War. The Court took cognizance of this in paragraph 52 of its Judgment. The case before the Court, however, is not about the legality of the conduct of Germany's armed forces during the Second World War or Germany's international responsibility for such conduct. The question in this case 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. The Court did not need to address the substantive matter of the legality of Germany's conduct to resolve the issue of sovereign immunity. Indeed, the Court's jurisdiction in this case is limited to addressing *only* the issue of jurisdictional immunity; to examine other matters related to Germany's conduct would be *ultra petita*. The fact that the Parties do not dispute that Germany committed illegal acts, as well as the fact that the acts involved serious and grave violations of international humanitarian law, does not alter the nature of the Court's jurisdiction. Unless Germany consents to jurisdiction, or is found to not have sovereign immunity with respect to certain conduct committed by it, neither this Court nor a foreign domestic court has the jurisdiction to examine the legality of Germany's conduct or issues of reparation arising from such actions.

4. It is clear that the acts of the German armed forces in Italy during the Second World War constitute *acta jure imperii* as a decision to deploy

a nation's armed forces in an armed conflict is quintessentially a sovereign act. Acts committed by a State's armed forces in furtherance of an international armed conflict are, by definition, acts taken in exercise of sovereign power. To hold that such acts were not subject to jurisdictional immunity would be to deprive the concept of sovereign immunity of its meaning and significance. The doctrine of sovereign immunity developed to protect the sovereignty and sovereign equality of States. Sovereign immunity accomplishes these aims by preventing one State from exercising jurisdiction over another without the latter's consent. To preserve sovereign equality among States, the doctrine holds that States are generally immune from suit for acts taken in exercise of their sovereign power.

5. It is well established that States are generally entitled to immunity for *acta jure imperii*. The question 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. It was argued that an exception exists that permits States to deny sovereign immunity in cases involving torts committed on the territory of the forum State. It was also contended that this exception enables Italy to deny immunity to Germany for those acts committed by its armed forces which could be characterized as intentional torts.

6. There is no dispute that the law on sovereign immunity has evolved to provide a limited exception to immunity for certain types of tortious acts. This exception is codified in Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property. Although the Convention has not yet entered into force, Article 12 can be considered to reflect the current state of customary international law. That Article provides that a State cannot invoke immunity

“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”,

and occurred on the forum State's territory. The International Law Commission's commentary on the text of the Convention, however, makes it clear that the drafters of the Convention intended Article 12 to apply mainly to situations such as traffic accidents, to prevent insurance companies from evading liability to injured individuals under the cloak of State immunity. The commentary states further that Article 12 does not apply to situations involving armed conflicts. The distinction drawn by the International Law Commission between isolated and insurable torts such as traffic accidents, and acts committed by armed forces during armed

conflict, is understandable. Cases involving the former would entail limited liability for the tortfeasor State, whereas cases involving the latter could expose a State to nearly limitless liability. The former can thus be appropriately dealt with by the forum State's judiciary, while the inevitably political nature of the latter suggests strongly that resolution should be pursued via inter-State processes.

7. Under current international law, therefore, States continue to be entitled to sovereign immunity for *acta jure imperii* committed by their armed forces during armed conflict. Given that the Court's task is to apply the existing law, nothing in the Court's Judgment today prevents the continued evolution of the law on State immunity. In the past century, the law on State immunity has evolved considerably in a manner that has significantly circumscribed the circumstances in which a State is entitled to immunity. It is possible that further exceptions to State immunity will continue to develop in the future. The Court's Judgment applies the law as it exists today.

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8. I also consider it important to acknowledge and address the arguments made by Greece. As a non-party intervenor in this case, Greece submitted a written statement in which it emphasized, *inter alia*, the "individual right to reparation in the event of grave violations of humanitarian law" (para. 34). Greece maintains that international humanitarian law confers "direct rights on individuals which are opposable to States" (para. 35). In support of its argument Greece cites, among other provisions, Article 3 of the Hague Convention (IV) of 1907 and Article 91 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I).

9. Greece is correct in stating that international humanitarian law now regards individuals as the ultimate beneficiaries of reparations for human rights violations (see International Law Commission, draft Articles on Responsibility of States for Internationally Wrongful Acts (A/56/10), Art. 33, comment 3). This is a positive development that should certainly be welcomed, as it reflects the increasing importance of individual human rights in international law. It does not follow, however, that international law provides individuals with a legal right to make claims for reparation *directly* against a foreign State. Nothing in the Hague Convention (IV) or the 1977 Protocol I supports such a proposition. The relevant Articles of these two Conventions provide only that States must "pay compensation" if they violate the provisions of the Conventions. They do not purport to require that States pay compensation *directly to aggrieved individuals*. Further, the two Conventions as a whole, read in context, do not provide for compensation to be made in such a manner. Indeed, a

provision requiring State payments to individuals would have been inconceivable in 1907, when the Hague Convention IV was concluded, as international law at that time did not recognize the rights of individuals to the extent that it does today.

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10. In conclusion, 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, since the acts committed by the German armed forces constituted *acta jure imperii*, and no exception to this general rule of immunity applies. This finding, however, does not preclude the Parties from entering into negotiations to resolve issues which came to the fore in the course of the present proceedings. Nor does the attainment of justice in the factual and historical context of this case necessitate the overthrow of the existing law on jurisdictional immunity, which justly protects and preserves the sovereignty and sovereign equality of States.

(Signed) Abdul G. KOROMA.
