

DISSENTING OPINION OF JUDGE *AD HOC* GAJA

1. The Court's Judgment accepts the view that the jurisdictional immunity of a foreign State does not cover certain claims concerning reparation for torts committed in the forum State. However, the Court

“considers 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” (para. 78).

This point is decisive for rejecting the applicability of the so-called “tort exception” in the case at hand. The Court consequently concludes that the Italian courts breached an international obligation when they asserted their jurisdiction over claims relating to wrongful acts committed by Germany in Italy during the Second World War.

The Court's argument is well built and includes a wide survey of relevant State practice. However, the scope of the “tort exception” deserves further analysis, also because this is an area where the law, according to several judicial decisions, is currently “developing”.

2. The “tort exception” has found expression in Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, according to which:

“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.”

This codification Convention, which was adopted by the General Assembly in 2004, has so far been ratified by 13 States and is not yet in force. It would be in any event unwarranted to assume that all its substantive provisions correspond to rules of general international law. On

the other hand, many of its provisions cannot be regarded as fully innovative. This certainly applies to Article 12, which finds precedents in several provisions of municipal legislation which will be referred to later and, before these statutes were enacted, in Article 11 of the 1972 European Convention on State Immunity. The latter text reads as follows:

“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.”

In the following paragraphs there will be only a few references to the European Convention, because it is clearly of limited significance for the purpose of ascertaining the existing rules of general international law on State immunity. It received only eight ratifications, all by States from a defined geographical area (Austria, Belgium, Cyprus, Germany, Luxembourg, Netherlands, Switzerland and United Kingdom). Moreover, it does not attempt to state general rules, but only considers the immunity of a Contracting State from the jurisdiction of other Contracting States.

3. The “tort exception” has also been expressed in statutes concerning the jurisdictional immunity of foreign States that nine States have enacted. Only one State (Pakistan) has not included the “tort exception” in its legislation on this subject.

Legislation is an important aspect of State practice. It is significant also when the object of a rule of international law is the conduct of judicial authorities, as with regard to the exercise of jurisdiction by courts. One may assume that only in exceptional circumstances will judicial authorities depart from what is required from them by the respective legislator. To my knowledge, no court of any of the States which enacted legislation incorporating the “tort exception” has raised any question of consistency between the relevant legislation and general international law.

The number of States in question may at first sight seem insufficient to represent the attitude of the generality of States, since most States have not adopted statutes on jurisdictional immunity and directly rely on general international law. However, it would be difficult to consider the legislative practice of ten States, which spans a period of more than 30 years, as insignificant for the purpose of ascertaining the current status of general international law. The criterion adopted by these States was not intended to codify a standard that all the States would be required to follow. On certain issues, the legislation of some States was arguably

more favourable to immunity than general international law. This is certainly lawful, which would not be the case for a more restrictive approach. When asserting a "tort exception", the States concerned no doubt assumed that they were entitled to exercise their jurisdiction lawfully in applying the exception. Should their view be regarded as unfounded under general international law, all these States would incur international responsibility when applying the "tort exception". One would have expected some form of protest on the part of other States at the international level, since the legislation in question was well known and many States were likely to be affected. The silence kept by the majority of States cannot be interpreted as an implicit criticism of the lawfulness of resorting to the "tort exception".

4. In the nine States that have enacted legislation on jurisdictional immunity of foreign States including a "tort exception" this exception has a similar content. It may be appropriate to quote the texts of the pertinent provisions. I shall follow a chronological order.

According to Section 1605 (a) of the United States Foreign Sovereign Immunities Act 1976:

"(a) A foreign State shall not be immune from the jurisdiction of courts of the United States or of the States in any case

- .....
- (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign State for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign State or of any official or employee of that foreign State while acting within the scope of his office or employment; except that this paragraph shall not apply to
    - (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
    - (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

Section 5 of the United Kingdom State Immunity Act 1978 runs as follows: "A foreign State is not immune from the jurisdiction of a court in any proceedings that relate to (a) death or personal injury; or (b) damage to or loss of tangible property, caused by an act or omission in the United Kingdom."

Section 7 of Singapore's State Immunity Act is identical to this text, with only replacement of the words "the United Kingdom" with "Singapore".

Section 6 of South Africa's Foreign States Immunities Act declares that: "A foreign State shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to (a) the death or injury of any person; or (b) damage to or loss of tangible property, caused by an act or omission in the Republic."

According to Section 13 of Australia's Foreign States Immunities Act 1985: "A foreign State is not immune in a proceeding in so far as the proceeding concerns (a) the death of, or personal injury to, a person; or (b) loss of or damage to tangible property, caused by an act or omission done or omitted to be done in Australia."

Section 6 of Canada's State Immunity Act reads as follows: "A foreign State is not immune from the jurisdiction of a court in any proceedings that relate to (a) any death or personal or bodily injury, or (b) any damage to or loss of property, that occurs in Canada."

In Argentina, Article 2 of Law No. 24,488 on jurisdictional immunity of foreign States provides that: "Foreign States may not invoke jurisdictional immunity in the following cases: . . . (e) where the foreign State is subject to a claim for losses or damages derived from crimes or offences committed in Argentina" ["(e) cuando fueren demandados por daños y perjuicios derivados de delitos o cuasidelitos cometidos en el territorio"].

According to Section 5 of Israel's Foreign States Immunity Law No. 5769-2008: "A foreign State shall not have immunity from jurisdiction in an action in tort where personal injury or damage to tangible property has occurred, provided the tort was committed in Israel."

Finally, Article 10 of the Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc., provides that:

"In cases where the death of or injury to a person or the loss of or damage to a tangible object resulted from an act for which it is claimed a Foreign State, etc., should take responsibility, if all or part of said act took place in Japan and the person who performed said act was in Japan at the time it was committed, said Foreign State, etc., shall not be immune from jurisdiction with respect to judicial proceedings in which monetary compensation for the damage or loss resulting from said act is being sought."

Although the wording varies, all these texts contain a general statement which appears to cover claims for all the acts or omissions attributable to a foreign State that take place in the territory of the forum State and cause death or personal injury or damage to tangible property.

5. None of the legislative acts quoted in the previous paragraph restricts the applicability of the "tort exception" when the act or omission

of the foreign State is taken within an activity which may be described *jure imperii* because it occurs in the exercise of a sovereign power by the foreign State.

The commentary of the International Law Commission (ILC) on draft Article 12, which later became without change Article 12 of the 2004 UN Convention, noted that “[t]he areas of damage envisaged in Article 12 are mainly concerned with accidental death or physical injuries to persons or damage to tangible property involved in traffic accidents”, but that “the scope of Article 12 is wide enough to cover also intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination”. The ILC commentary also noted that, while “the case law of some States” maintained the distinction between acts *jure imperii* and acts *jure gestionis*, the “tort exception” in Article 12 “makes no such distinction” (*Yearbook of the International Law Commission*, 1991, Vol. II, Part Two, p. 45). According to the commentary:

“The *locus delicti commissi* offers a substantial territorial connection regardless of the motivation of the act or omission, whether intentional or even malicious, or whether accidental, negligent, inadvertent, reckless or careless, and indeed irrespective of the nature of the activities involved, whether *jure imperii* or *jure gestionis*.”

There is nothing in the text of the UN Convention or in the preparatory work that suggests that the “tort exception” should not apply when the foreign State acts *jure imperii*.

On the basis of the ILC commentary, the Italian *Corte di Cassazione* stressed in *Ferrini* that, according to Article 12 of the ILC draft Articles,

“the distinction between acts performed *jure imperii* and acts carried out *jure gestionis* assumes no relevance in respect of damages claims arising from ‘assaults on the physical integrity of a person’ or from loss or damage of a ‘bodily’ nature” (judgment No. 5044 of 11 March 2004, English translation in *International Law Reports (ILR)*, Vol. 128, p. 672).

The Supreme Court of Canada in *Schreiber v. Federal Republic of Germany and the Attorney General of Canada* agreed that the “tort exception” also covered acts *jure imperii*, adding the observation that if one restricted the exception in this regard, one “would deprive the victims of the worst breaches of basic rights of any possibility of redress in national courts” ([2002] *Supreme Court Reports*, Vol. 3, p. 269, para. 37).

A different view was expressed by the Supreme Court of Ireland in *McElhinney v. Williams* when Chief Justice Hamilton held that, even if

the tortious act of a British soldier had occurred in the forum State, immunity had to be granted to the foreign State “when such act or omission is committed *jure imperii*” (*ILR*, Vol. 104, p. 703). Ireland has not enacted legislation on jurisdictional immunity, nor is it a party to the European Convention on State Immunity. An application to the European Court of Human Rights was later made by Mr. McElhinney against Ireland. This court said that the “tort exception” corresponded to a “trend in international and comparative law”, but that:

“the trend may primarily refer to ‘insurable’ personal injury, that is incidents arising out of ordinary road traffic accidents, rather than matters relating to the core area of State sovereignty such as the acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security. Certainly, it cannot be said that Ireland is alone in holding that immunity attaches to suits in respect of such torts committed by *acta jure imperii* or that, in affording this immunity, Ireland falls outside any currently accepted international standards.” (*ILR*, Vol. 123, p. 85, para. 38.)

It is to be noted that the question before the European court in *McElhinney v. Ireland* was not whether the respondent State had an obligation to grant jurisdictional immunity to the United Kingdom, but whether Ireland was in breach of an obligation under Article 6 of the European Convention on Human Rights by denying the applicant access to justice. The majority of the court did not endorse the idea that States were required to apply a “tort exception”. It found that, “given the present state of the development of international law” on jurisdictional immunity, there was no breach by Ireland of an obligation to exercise jurisdiction. However, the court did not go as far as to say that, had the Irish courts hypothetically entertained the claim, Ireland would have been in breach of its obligations under international law with regard to jurisdictional immunity.

6. The European Convention on State Immunity contains various clauses which restrict the scope of the Convention. What is relevant for our purposes is Article 31, which runs as follows:

“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 ILC draft Articles do not contain a similar clause. However, the ILC commentary on draft Article 12 observes that this provision does not “apply to situations involving armed conflicts” (*Yearbook of the International Law Commission*, 1991, Vol. II, Part Two, p. 46). No explanation is given, nor is there an indication of the intended consequences of the fact

that draft Article 12 does not apply. It is not clear in particular whether “situations involving armed conflicts” are considered to be outside the scope of the UN Convention or whether another rule set forth in the Convention becomes applicable.

The exclusion suggested in the ILC commentary has not found its way either into the text of the UN Convention or into the understandings which represent an annex to the Convention. Nor is there anything on this matter in the report presented to the General Assembly by the *Ad Hoc* Committee which recommended the adoption of the Convention (A/59/22). However, when introducing this report to the Sixth Committee, the Chairman of the *Ad Hoc* Committee, Mr. Gerhard Hafner, made, among others, the following statement: “[o]ne of the issues that had been raised was whether military activities were covered by the Convention. The general understanding had always prevailed that they were not”. He then referred to the exclusion of “situations involving armed conflicts” suggested by the ILC in its commentary (A/C.6/59/SR.13, para. 36), which is a narrower subject than “military activities”. The Chairman of the *Ad Hoc* Committee expressed the opinion that this matter was not regulated by the UN Convention. The legal significance of this statement is not altogether clear. GA resolution 59/38, which adopted the Convention, said in its last preambular paragraph: “Taking into account the statement of the Chairman of the *Ad Hoc* Committee introducing the report of the *Ad Hoc* Committee.” This paragraph also does not entirely clarify matters.

Norway and Sweden, when ratifying the UN Convention, declared that they understood the Convention not to apply to “military activities”. These two States shared Mr. Hafner’s view that “military activities” are not covered by the UN Convention. These interpretative declarations support the idea that “military activities” are not regulated by the UN Convention, but do not provide a solution binding all the contracting States.

7. None of the legislative acts referred to above in paragraph 3 contains a general exclusion concerning claims relating to “situations involving armed conflicts” or to “military activities”. There are, however, some provisions concerning these matters.

Section 16 (2) of the United Kingdom State Immunity Act 1978 states:

“This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the Visiting Forces Act 1952.”

Section 19 (2) (a) of Singapore’s State Immunity Act is similarly worded. These provisions appear concerned with claims that may be

brought against a State whose forces are present on the territory of the forum State with its consent. Special rules would apply to these claims. Section 22 of the Israeli Foreign States Immunities Law is more explicit on this point:

“Notwithstanding the provisions of this statute, legal actions based on any act or omission committed by foreign military forces whose rights and status in Israel were determined by agreement between the State of Israel and the State to which the foreign military forces belong shall be governed by that agreement.”

Also Section 6 of Australia’s Foreign States Immunities Act 1985, which excludes immunities or privileges “by or under ... the Defence (Visiting Forces) Act 1963”, and Section 16 of Canada’s State Immunity Act, which mentions “the Visiting Forces Act”, only refer to forces stationed on the territory of the forum State with the consent of the latter.

None of these texts specifically considers the “tort exception”. They all relate more generally to the legislation concerning immunities of foreign States. In any event, the implication of these texts is that claims relating to armed activities that are not covered by the exclusion clauses come within the rules on immunity expressed in the statute, including the “tort exception”.

8. The courts of several States considered the jurisdictional immunity of Germany in relation to acts of its armed forces during World War II.

In *Ferrini* the Italian *Corte di Cassazione* based its main argument against immunity on a different basis but also gave weight to the fact that the wrongful act, consisting of the deportation of an Italian national to Germany where he underwent forced labour, “was commenced in the country in which the legal proceedings have since been brought” (judgment No. 5044 of 11 March 2004, English translation in *ILR*, Vol. 128, pp. 670-671). In a group of later decisions the same court denied immunity “also in view of the fact that the wrongful act had occurred also in Italy” (thus, for example, order No. 14209 of 29 May 2008; *Rivista di diritto internazionale*, Vol. 91 (2008), p. 900).

The French *Cour de cassation* recognized on the contrary Germany’s immunity in *Bucheron* (16 December 2003, case 02-45961) and later in *Grosz* (3 January 2006, case 04-47504). Both decisions concerned the deportation and subjection of French citizens to forced labour in Germany. The *Cour de cassation* based its argument on the *jure imperii* character of the act, without considering the possibility of applying a “tort exception”.

Greek courts were divided on the issue. The Greek *Areios Pagos* found in the *Distomo* case (judgment of 4 May 2000; English translation in *ILR*, Vol. 129, p. 519) that a rule of international customary law:

“requires, by way of exception from the principle of immunity, that national courts may exercise international jurisdiction over claims for damages in relation to torts committed against persons and property on the territory of the forum State by organs of a foreign State present on that territory at the time of the commission of these torts even if they resulted from acts of sovereign power (*acta jure imperii*)”.

The majority held that this would also apply to “damages arising [from military action] in situations of armed conflict” when “the offences for which compensation is sought (especially crimes against humanity) did not target civilians generally, but specific individuals in a given place who were neither directly nor indirectly connected with the military operations”.

Two years later in *Margellos*, the Greek Special Supreme Court, *Anotato Eidiko Dikastirio* (judgment of 17 September 2002; English translation in *ILR*, Vol. 129, p. 525) came (albeit by a 6 to 5 majority) to the almost opposite conclusion that the “tort exception” does not apply to activities of a foreign State’s military force:

“in the present state of development of international law, there is no generally accepted rule which, as an exception to the rule of sovereign immunity, would allow proceedings to be brought against a foreign State before the courts of another State, relating to a claim for compensation for a tort committed in the forum State in which the armed forces of the defendant State participated — in whatever manner and whether in time of war or peace” (*ibid.*, p. 532).

A similar approach was taken by the Polish Supreme Court in *Natoniewski* (judgment of 29 October 2010; English translation in *Polish Yearbook of International Law*, Vol. XXX (2010), p. 299). The court reached the conclusion that:

“there are insufficient grounds for recognizing an exception to State immunity in cases concerning redress for breaches of human rights occasioned by unlawful acts committed in the territory of the forum State which come within the category of armed activities”.

Some further decisions that recognized immunity of a foreign State for military activity on the territory of the forum State will be referred to in paragraph 11.

9. The analysis of State practice concerning the “tort exception” in general and injuries caused by military activities more specifically shows

that State authorities have taken a variety of approaches. One can apply to the issue of State immunity under consideration the introductory remark made by the ILC in its commentary, that there is a “grey area in which opinions and existing case law and, indeed, legislation still vary” (*Yearbook of the International Law Commission*, 1991, Vol. II, Part Two, p. 23). In this “grey area” States may take different positions without necessarily departing from what is required by general international law.

The rationale of the suggested restriction to the “tort exception” concerning military activities is not clear. First of all, the conduct of all State organs is equally attributed to the State, as expressed in Article 4 of the ILC Articles on the responsibility of States for internationally wrongful acts. Why should a distinction be made between military and other organs of the same State? Moreover, when the forum State gives its consent to the presence on its territory of foreign troops, a specific, and more favourable, régime of immunities is understandable. This will normally be established by an agreement between the States concerned. It is more difficult to understand why there should be a favourable régime for a hostile State that would prevail over the sovereign right of the territorial State to exercise its jurisdiction concerning conduct taking place on its territory.

The fact that military activities may cause injuries on a large scale does not seem a good reason for depriving the many potential claimants of their judicial remedy. It may be that in practice this remedy will not be effective, but this applies more generally to all claims brought against foreign States given the difficulty for a successful claimant of enforcing any judgment that may be obtained.

10. One factor that could contribute to justifying a restrictive approach to State immunity when applying the “tort exception” is the nature of the obligation for the breach of which a claim to reparation is brought against a foreign State. This may be an obligation only covered by municipal law; it may also be the breach of an obligation under international law and, in the latter case, of an obligation under a peremptory norm, which can reasonably be evoked at least with regard to the massacres of civilians.

What is in fact in question is not the exercise of jurisdiction for preventing the breach of an obligation under a peremptory norm or for obtaining the cessation of the breach, but a judicial remedy for the reparation of the injury caused by the alleged breach. It would be difficult to maintain that the obligation to provide reparation of a breach of an obligation under *jus cogens* is also set forth by a peremptory norm.

Thus, for example, while Article 91 of Additional Protocol I to the Geneva Conventions of 1949 considers that “[a] Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation”, the commentary by the International Committee of the Red Cross observes that “[o]n the conclusion of a peace treaty, the Parties can in principle deal with the problems relating to war damage in general and those relating to the responsibility for starting the war, as they see fit” (C. Pilloud, J. de Preux, Y. Sandoz, B. Zimmermann, P. Eberlin, H.-P. Gasser and C. F. Wenger, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987, p. 1055).

While the obligation of reparation can hardly be viewed as an obligation under a peremptory norm, the fact that the alleged breach concerns an obligation of *jus cogens* may have some relevant consequences. Article 41 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts lists some consequences of a serious breach by a State of an obligation under a peremptory norm of general international law that are additional to those following from an ordinary wrongful act. Paragraphs 1 and 2 enumerate some specific consequences and paragraph 3 refers to “further consequences that a breach to which this chapter applies may entail under international law”. While the issue of jurisdictional immunity has not been mentioned either in the text of the article or in the related commentary, a restriction of immunity could well be regarded as an appropriate consequence which would strengthen the effectiveness of compliance with the obligation to make reparation. This would contribute to removing doubts about the lawfulness for a State of exercising its jurisdiction in the “grey area” of injury caused by military activity of a foreign State on the territory of the forum State. In other words, even if immunity covered in general claims regarding damages caused by military activities in the territory of the forum State, it would not extend to claims relating to massacres of civilians or torture in the same territory.

11. It would be more difficult to infer from the nature of the breach a restriction of the jurisdictional immunity of foreign States that would cover injuries caused by a foreign State wherever they occur.

This conclusion was suggested by a minority opinion in the European Court of Human Rights in *Al-Adsani v. United Kingdom* and by the Italian *Corte di Cassazione* in a number of judgments, especially those in *Ferrini* (judgment No. 5044 of 11 March 2004; English translation in *ILR*, Vol. 128, pp. 668-669) and in *Milde* (judgment No. 1072 of 13 January 2009). Also a decision by the French *Cour de cassation* in *La Réunion*

*aérienne v. Libyan Arab Jamahiriya* (case No. 09-14743 of 9 March 2011) pointed to the existence of a restriction of immunity when a claim concerns reparation of the breach of an obligation under *jus cogens*, provided that the breach consists in a positive conduct of the foreign State.

The European Convention on State Immunity and the UN Convention do not lend support to this view, because they do not establish any exception to immunity which is based on the nature of the obligation breached by the foreign State.

In 1999 the denial of jurisdictional immunity with regard to claims “in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*” was considered by an ILC working group chaired by Mr. Hafner as a “recent development” which the working group took the initiative of highlighting, suggesting to the General Assembly that it “should not be ignored” (*Yearbook of the International Law Commission*, 1999, Vol. II, Part Two, p. 172). The report of the Chairman of the GA Working Group (again Mr. Hafner) found that it did not “seem advisable to include this matter among the issues to be covered by the forthcoming considerations on the topic” (A/C.6/54/L.12, p. 9, para. 67). This cannot be taken as a total rejection of the suggested exception.

It is to be noted that the ILC working group had referred only to two decisions restricting State immunity, both based on the United States Anti-Terrorism and Effective Death Penalty Act of 1996. This had amended the Foreign Sovereign Immunity Act in order to restrict immunity of foreign States with regard to claims for damages caused by acts of torture, extrajudicial killings and some other acts wherever committed, but only if these acts had been committed by a foreign State designated by the Secretary of State as a State sponsor of terrorism and if the claimant or victim was a national of the United States. Given these conditions, the United States Act is not indicative of the existence of a possible exception to immunity based on the nature of the obligation under international law which is at the origin of the claim.

What appears more significant for that issue is that none of the legislative acts referred to above in paragraph 3 contains any reference to a similar exception.

The matter was thoroughly debated in the European Court of Human Rights in *Al-Adsani v. United Kingdom*. By a majority of nine votes to eight, the court stated that it did not

“find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of

civil claims for damages for alleged torture committed outside the forum State”.

Also the Ontario Court of Appeal stressed in *Bouzari and Others v. Islamic Republic of Iran* (judgment of 30 June 2004, *ILR*, Vol. 128, p. 605) the distinction according to the place where the injury occurred. While implicitly acknowledging the applicability of the “tort exception” provided by Canadian legislation, this court said that: “practice reflects the customary international law principle that State immunity is provided for acts of torture committed outside the forum state . . .”.

The Constitutional Court of Slovenia (judgment of 8 March 2001, case Up-13/99) found that there was a “trend”, but no

“rule of international customary law, which would in the case of violations of the cogent norms of international law in the area of human rights protection as a consequence of state activities in the framework of *iure imperii* . . . allow Slovenian courts to try foreign states in such cases”.

The court was here considering an activity which had occurred on what had become Slovenian territory.

A similar approach was taken by the German *Bundesgerichtshof* in a judgment of 26 June 2003 when it was faced with the request to enforce the Greek judgment on the merits in the *Distomo* case (English translation in *International Legal Materials*, Vol. 42 (2003), p. 1033).

A flat rejection of the existence of an exception to immunity covering claims for breaches of obligations under peremptory norms was expressed by the House of Lords in *Jones v. Saudi Arabia* ([2007] 1 *AC* 270). This judgment concerned a claim relating to an act of torture that had taken place outside the territory of the forum State.

If one takes into consideration all these elements of practice, one has to reach the conclusion that the nature of the obligation under international law which is at the origin of the claim does not per se provide sufficient evidence that jurisdiction may be exercised over foreign States in case of a claim for reparation for the breach of an obligation under a peremptory norm wherever committed. On the other hand, one cannot infer from this practice that the nature of the obligation breached negatively affects the applicability of the “tort exception”. It would indeed be extraordinary if a claim could be entertained on the basis of the “tort exception” when the obligation breached is of a minor character while this exception would not apply to claims relating to breaches of obligations under peremptory norms.

12. The application of the criteria above would have required the Court to examine in greater detail, in relation to the facts of each case,

the various decisions of Italian courts to which the Application of Germany refers. This should have led the Court to conclude that, at least for certain decisions of Italian courts, the exercise of jurisdiction could not be regarded as being in breach of an obligation under general international law.

*(Signed)* Giorgio GAJA.

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