

**Speech by H.E. Judge Peter Tomka, President of the International Court
of Justice, at the Sixth-fourth Session of the
International Law Commission**

24 July 2012

Mr. Chairman,

Ladies and Gentlemen,

Colleagues and Friends,

I am pleased to address the International Law Commission on the occasion of its Sixty-fourth Session. I would like to take this opportunity to congratulate the members elected to the Commission last November and the newly elected officers, including the Chairman, Mr. Lucius Caflisch.

For many years now, the International Law Commission has invited the President of the International Court of Justice to address the plenary meeting and engage in an exchange of views with the Commission. The Court is, of course, privileged to be able to take part in this enriching dialogue and to benefit from the collegiality and sharing of ideas made possible by the links forged between our respective institutions. I am happy to have the opportunity to continue the tradition today and am very grateful to you for that.

There is also a “personal” link between the Court and the Commission. Of the 103 Members of the Court who have to date served as judges, 34 were members of the Commission before their election to the Court, including nine who later became President of the highest court of the United Nations.

The topic of sharing and mutual enrichment between our respective institutions provides the underlying theme of my speech today. In my brief remarks, I would in particular like to highlight aspects of cases recently decided by the Court which draw on the work of the Commission or which are particularly relevant to activities undertaken by the Commission.

First, it should be pointed out that the Court’s recent decisions confirm the well-established trend towards interaction between our respective institutions, especially with regard to the law of State responsibility and other related issues. Those decisions illustrate the particular influence, whether express or implied, of the work of the Commission in that regard on the reasoning followed by the Court.

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This interaction emerges from the Judgment delivered by the Court a few days ago in the case concerning *Questions relating to the Obligation to Prosecute or Extradite* between Belgium and Senegal. In that case, Belgium complained of Senegal’s conduct and its failure to comply with its obligations under the Convention against Torture. In short, Belgium maintained that Senegal, where Mr. Hissène Habré has been living in exile since 1990, had taken no action on its repeated requests to ensure that the former President of Chad be brought to trial in Senegal, failing his extradition to Belgium, for acts characterized as including crimes of torture. Belgium contended that, under the said Convention, Senegal’s failure to prosecute Mr. Habré, if he is not extradited to Belgium to answer for the acts of torture that are alleged against him, violated this multilateral treaty, in particular Article 5, paragraph 2, Article 6, paragraph 2, and Article 7, paragraph 1.

It will come as no surprise that the law governing the international responsibility of a State played an important role in this dispute. Moreover, it provided support to Belgium's pleadings in respect of what it considered to be its right to seek, either under Article 42 (b) (i) of the Commission's Articles on State Responsibility or, at least, under Article 48 of that instrument, a finding of wrongful conduct on account of Senegal's breaches of the Convention against Torture.

In its Judgment, the Court considered this aspect when it addressed the questions of the admissibility of Belgium's claims. First, the Court noted that Senegal disputed the admissibility of those claims, observing that Senegal contested Belgium's right to invoke Senegal's international responsibility for its alleged breach of its obligation to submit Mr. Habré's case to its competent authorities for the purpose of prosecution, unless it extradites him. In support of that argument, Senegal asserted that none of the alleged victims of the crimes ascribed to Mr. Habré had Belgian nationality at the time when those acts were committed, a fact which Belgium did not contest.

However, Belgium requested the Court to rule that the claim asserted in its Application was admissible. In that Application, it had stated that "[a]s the present jurisdiction of the Belgian courts is based on the complaint filed by a Belgian national of Chadian origin, the Belgian courts intend to exercise passive personal jurisdiction"¹. During the oral proceedings, Belgium also claimed to be in what it described as a "particular position", since it had availed itself of an entitlement by deciding to exercise its jurisdiction and to request the extradition of Mr. Habré under the Convention against Torture. Belgium's argument in that regard was further developed when counsel for that Party, again during the hearings, stated that "[u]nder the Convention, every State party, irrespective of the nationality of the victims, is entitled to claim performance of the obligation concerned, and, therefore, can invoke the responsibility resulting from the failure to perform"².

In that connection, the Court of course noted that the Parties' disagreement on this point highlighted the issue of Belgium's *locus standi*. Moreover, it stressed that Belgium's claims were based not only on that State's status as a party to the Convention, but also on "the existence of a special interest that would distinguish Belgium from the other parties to the Convention and give it a specific entitlement in the case of Mr. Habré"³. The Court stated that it would first consider whether a submission requesting it to order the cessation of alleged violations of obligations under the Convention could be based solely on the fact that the applicant State is party to the said instrument.

In this context, the Court recalled that the Preamble states that the object and purpose of the Convention is "to make more effective the struggle against torture . . . throughout the world"⁴. Referring to the values shared by the parties to the Convention, the Court observed that those States "have a common interest to ensure . . . that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity"⁵. In the Court's opinion, it follows that this common interest requires the State in whose territory an alleged perpetrator of breaches of the Convention is present to comply with its obligations under that instrument, including those considered by the Court in the present case. In short, the Court noted that the "obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution

¹*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, para. 65.

²*Ibid.*

³*Ibid.*, para. 66.

⁴*Ibid.*, para. 68.

⁵*Ibid.*

are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred”⁶.

Referring to the well-known *Barcelona Traction* case, the Court, expanding on the issue of common interest, stated that:

“That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties ‘have a legal interest’ in the protection of the rights involved . . . These obligations may be defined as ‘obligations *erga omnes partes*’ in the sense that each State party has an interest in compliance with them in any given case.”⁷

In support of its reasoning, the Court drew a parallel between the Convention against Torture and the Convention on the Prevention and Punishment of the Crime of Genocide, considering that the relevant provisions of the Convention against Torture were akin to similar provisions contained in the Genocide Convention. Moreover, on this point the Court cited its 1951 Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, in which the Court observed that: “In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the Convention.”⁸

In practical terms, the Court pointed out that that common interest implies the entitlement of each State party to the Convention against Torture to make a claim concerning the cessation of an alleged breach by another State party of its obligations under the Convention. The Court went on to state that the need to show a special interest in that regard would, in many cases, prevent States from making such a claim. In its Judgment, the Court made clear that “any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end”⁹.

Needless to say, in the light of the facts of the case, the Court found that Belgium, as a party to that multilateral instrument, had standing to invoke the responsibility of Senegal for the latter’s alleged breaches of its obligations under the Convention. Therefore, Belgium’s claims based on Article 6, paragraph 2, and Article 7, paragraph 1, were admissible in the Court’s opinion. Consequently, the Court considered that there was no need for it to pronounce on whether Belgium also had a special interest which might have supported its claims.

After considering the questions relating to the merits, the Court “emphasize[d] that, in failing to comply with its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, Senegal ha[d] engaged its international responsibility”¹⁰. Furthermore, from a perspective that is entirely compatible with the Commission’s work in the field concerned¹¹, the Court also noted the continuing character of Senegal’s breaches of its obligations under the Convention. In that regard, it observed that: “Senegal is required to cease this continuing wrongful act, in accordance with general international law on the responsibility of States for internationally

⁶*Ibid.*

⁷*Ibid.*

⁸*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23.*

⁹*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, para. 69.

¹⁰*Ibid.*, para. 121.

¹¹See *Articles on Responsibility of States for Internationally Wrongful Acts, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr. 1), Art. 14, paras. 1-2, and Art. 30.

wrongful acts”¹². In short, “Senegal must therefore take without further delay the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr. Habré”¹³.

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Another recent ruling of the Court highlighted the importance of the principles considered by the Commission in its work in the field of State responsibility. This is the Judgment delivered in the *Ahmadou Sadio Diallo* case between the Republic of Guinea and the Democratic Republic of the Congo relating to the question of compensation owed by the DRC to Guinea.

The Judgment rendered on the question of compensation followed from the Court’s earlier Judgment on the merits of the case of 30 November 2010¹⁴. In that case, the Court noted that the DRC had breached certain international obligations since Mr. Diallo, a Guinean national, had been continuously detained in Congolese territory for 66 days, from 5 November 1995 until 10 January 1996 and had been detained for a second time between 25 and 31 January 1996, that is, for a total of 72 days. In that connection, the Court found that Guinea had failed to demonstrate that Mr. Diallo had been subjected to inhuman or degrading treatment during his detentions. Furthermore, the Court noted that Mr. Diallo had been expelled by the DRC on 31 January 1996 and that he had received notice of his expulsion on the same day.

Accordingly, in its 2010 Judgment, the Court stated that the DRC was required to compensate Guinea for breaches of its obligations under certain human rights conventions committed against Mr. Diallo. Under the terms of the Judgment on the merits, it followed that the amount of compensation to be paid by the DRC had to be set “for the injury flowing from the wrongful detentions and expulsion of Mr. Diallo in 1995-1996, including the resulting loss of his personal belongings”¹⁵. The Court delivered its Judgment on the question of compensation on 19 June 2012.

The Court pointed out that it had been called upon to fix an amount of compensation in a case in 1949, namely the *Corfu Channel* case between the United Kingdom and Albania.¹⁶ In the same line of thinking, the Court used the wording from the *Factory at Chorzów* case, which had been reproduced in the commentary to the Articles on State Responsibility, in order to stress that “[i]t is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law”¹⁷.

In order to properly assess the general principles of compensation, including compensation in respect of unlawful detention or expulsion, the Court pointed out that it had taken into account the practice of other courts and international commissions such as the International Tribunal for the Law of the Sea, the European Court of Human Rights, the Inter-American Court of Human Rights,

¹²*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, para. 121.

¹³*Ibid.*

¹⁴*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, *I.C.J. Reports 2010 (II)*, p. 640.

¹⁵*Ibid.*, para. 163.

¹⁶See *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, *I.C.J. Reports 1949*, p. 244.

¹⁷*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea), Judgment of 19 June 2012, para. 13. See also *Factory at Chorzów*, Merits, Judgment No. 13, 1928, *P.C.I.J., Series A, No. 17*, pp. 27-28.

the Iran-United States Claims Tribunal, the Eritrea-Ethiopia Claims Commission and the United Nations Compensation Commission.

In the final stage of the proceedings, Guinea sought compensation under four heads of damage: non-material damage and three heads of material damage, namely an alleged loss of personal property, an alleged loss of earnings suffered by Mr. Diallo during his detentions and as a result of his expulsion and an alleged loss of potential earnings. In reaching its ruling on compensation for non-material injury, the Court referred to a number of analytical factors and decisions which are consonant with the work of the Commission on compensation and international responsibility and acknowledged that “[n]on-material injury to a person which is cognizable under international law may take various forms”¹⁸.

In considering the relevant and/or aggravating factors that informed its ruling on compensation, such as the number of days that Mr. Diallo was detained, the fact that he was not subjected to prohibited treatment during his detention and the context in which the unlawful arrests and detentions took place, the Court referred to analytical factors which are indicative of an approach that takes into account discussions held within the Commission and reflected in its commentary to the Articles on State Responsibility. In particular, relying on the extensive case law of various international courts, the Court reached the conclusion that “[q]uantification of compensation for non-material injury necessarily rests on equitable considerations”¹⁹. Ultimately, the Court considered that the amount of US\$85,000 would provide appropriate compensation for the non-material injury suffered by Mr. Diallo.

When assessing the compensation to be paid by the DRC for the alleged loss of Mr. Diallo’s personal property, the Court again relied on the notion of equity and was guided by judgments of the European Court of Human Rights and the Inter-American Court of Human Rights. It thus stated that it “consider[ed] it appropriate to award an amount of compensation based on equitable considerations”²⁰. Accordingly, and for the reasons set out above, the Court awarded the sum of US\$10,000 under this head of damage.

The Court again relied on the case law of various international courts to support the following finding: it can adjudicate a claim for loss of earnings resulting from unlawful detention, even if estimation may be appropriate when the amount of the lost income cannot be calculated precisely. Ultimately, however, the Court considered that “Guinea ha[d] not proven to the satisfaction of the Court that Mr. Diallo [had] suffered a loss of professional remuneration as a result of his unlawful detentions”²¹.

With regard to Mr. Diallo’s alleged loss of professional income during the period prior to his expulsion, the Court referred to its earlier analysis indicating that the DRC cannot be required to compensate Guinea for damage allegedly suffered by Mr. Diallo during his detentions. Moreover, relying on, *inter alia*, the work of the Commission and, in particular, the commentary to Article 36 of the Articles on State Responsibility, the Court added that:

“Guinea’s claim with respect to Mr. Diallo’s post-expulsion remuneration is highly speculative and assumes that Mr. Diallo would have continued to receive US\$25,000 per month had he not been unlawfully expelled. While an award of compensation relating to loss of future earnings inevitably involves some uncertainty, such a claim cannot be purely speculative . . . Thus, the Court concludes that no

¹⁸ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea), Judgment of 19 June 2012, para. 18.

¹⁹ *Ibid.*, para. 24.

²⁰ *Ibid.*, para. 33.

²¹ *Ibid.*, para. 46.

compensation can be awarded for Guinea's claim relating to unpaid remuneration following Mr. Diallo's expulsion."²²

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The Court recently delivered another Judgment which provides a particularly good illustration of the interaction between the Commission and the Court. The Judgment handed down last February in the case concerning *Jurisdictional Immunities of the State* between Germany and Italy, in which Greece intervened, raises two sets of interesting issues for our purposes: namely, issues relating to State responsibility and issues relating to the work of the Commission in drawing up the draft which was later transformed into the United Nations Convention on Jurisdictional Immunities of States and their Property.

In this case, Germany claimed that Italy had failed to respect the jurisdictional immunity to which it was entitled under international law by allowing civil claims to be brought against it in Italian courts. The purpose of those claims was to seek reparation for injuries caused by violations of international humanitarian law committed by the German Reich during the Second World War. In addition, Germany requested the Court to find that Italy had also committed violations of Germany's jurisdictional immunity by taking measures of constraint against "Villa Vigoni", German State property situated in Italian territory, and by declaring enforceable in Italy decisions of Greek civil courts rendered against Germany on the basis of acts similar to those which had given rise to the claims brought before Italian courts.

In its Judgment, the Court drew extensively on the Commission's Articles on State Responsibility and those on Jurisdictional Immunities and the accompanying Commentary in order to expand on its findings by asking whether Italy had breached its international obligations regarding the jurisdictional immunity of the State when its national courts denied Germany the immunity to which it otherwise would have been entitled. The Court first had to consider the relevance of the principles governing the jurisdictional immunity of States within the broader framework of the body of rules of international law.

First of all, the Court noted that the Parties "[were] in broad agreement regarding the validity and importance of State immunity as a part of customary international law"²³. However, the Court went on to note that the Parties disagreed over the law to be applied: Germany proposed applying the law which determined the scope and extent of State immunity in 1943-1945, that is, at the time that the events giving rise to the proceedings in the Italian courts took place, while Italy maintained that the law which applied at the time the proceedings themselves unfolded should prevail.

When addressing these issues, the Court referred to the principle established in Article 13 of the Commission's Articles on State Responsibility, which states that "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs"²⁴. Thus, the Court noted that, in accordance with the principle stated therein, "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"²⁵.

²²*Ibid.*, para. 49.

²³*Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, para. 58.

²⁴See above note 11.

²⁵*Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, para. 58.

Before stressing that the law governing State immunity “is essentially procedural in nature”, the Court explained that: “Since the claim before the Court concern[ed] the actions of the Italian courts, it [was] the international law in force at the time of those proceedings which the Court ha[d] to apply.”²⁶ In the end, the Court’s finding in that regard was directly based on the principle set forth in Article 13 of the Commission’s finalized text; the Judgment stated that “the Court consider[ed] 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”²⁷.

At a later stage in its reasoning, the Court had to address the question of whether there is a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another; in this instance, the Court answered the question in the negative. The Court reiterated the procedural nature of the rules governing State immunity, which led it to conclude that the rules of international law governing the events which gave rise to the proceedings in the Italian courts, namely the events which occurred during the Second World War, related to different issues. In short, in the opinion of the Court, the rules governing State immunity have no bearing on the legality of the acts committed by the German army during the Second World War, the acts underlying the proceedings in the Italian courts.

Pursuing its consideration of Article 13 of the Commission’s finalised text and referring to another of its provisions, the Court stated the following:

“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 . . . For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission’s Articles on State Responsibility.”²⁸

In addressing Germany’s final submissions and the remedies sought, the Court again expressly relied on the Commission’s work in the field of State responsibility. The Court noted that Germany’s fifth submission largely amounted to asking it to order Italy to take the steps necessary to ensure that all the decisions of its courts and other judicial authorities infringing Germany’s immunity should become unenforceable and cease to have effect.

In upholding Germany’s fifth submission, the Court again invoked principles that are deeply rooted in the Commission’s work. It expressly referred to two provisions of the Articles on State Responsibility in its examination of the consequences arising from this submission. The Court stated the following:

“According to general international law on the responsibility of States for internationally wrongful acts, as expressed in this respect by Article 30 (a) of the International Law Commission’s Articles on the subject, the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing. Furthermore, 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

²⁶*Ibid.*

²⁷*Ibid.*

²⁸*Ibid.*, para. 93.

the benefit deriving from restitution instead of compensation. This rule is reflected in Article 35 of the International Law Commission's Articles."²⁹

Moreover, the case concerning *Jurisdictional Immunities of the State* is relevant for our purposes for another reason to which I alluded earlier. The case lays emphasis on the work of the Commission in formulating and drawing up the United Nations Convention on Jurisdictional Immunities of States and their Property, which was adopted on 2 December 2004. Of course, this instrument informed the Court's reasoning and played an important role in its Judgment. Furthermore, the Court referred to the significant State practice to be found in the judgments of national courts in the field of jurisdictional immunity. According to the Court, this practice is also reflected in both the domestic legislation of some States and the claims to immunity asserted by certain States before foreign courts, and, moreover, in "statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention"³⁰.

In the opinion of the Court, it is clear from this context that *opinio juris* relating to the rules governing the jurisdictional immunity of the State "is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States"; "in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so"; and "conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States"³¹.

Furthermore, the Court relied on conclusions drawn by the Commission more than 30 years ago in order to point out the prevalence of the relevant rule of customary international law. The Court stated 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 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' . . . That conclusion was based upon an extensive survey of State practice and, in the opinion of the Court, is confirmed by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States on what became the United Nations Convention. That practice shows 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."³²

Later in its Judgment, the Court turned to the question of whether national legislation which provides for a "territorial tort exception" expressly distinguishes between *acta jure gestionis* and *acta jure imperii*; the Court gave a negative response to this question. Previously, it had observed that "the notion that State immunity d[id] not extend to civil proceedings in respect of acts committed on the territory of the forum State causing death, personal injury or damage to property originated in cases concerning road traffic accidents and other 'insurable risks'"³³.

²⁹*Ibid.*, para. 137 (2).

³⁰*Ibid.*, para. 55.

³¹*Ibid.*

³²*Ibid.*, para. 56.

³³*Ibid.*, para. 64.

The Court further noted that, amongst others, Article 12 of the United Nations Convention also does not distinguish between *acta jure gestionis* and *acta jure imperii* in this context. It should be recalled that this Article renders the jurisdictional immunity of the State inapplicable

“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”³⁴.

With this in mind, the Court referred again to the relevant work of the Commission and stated that: “The International Law Commission’s commentary on the text of what became Article 12 of the United Nations Convention makes clear that this was a deliberate choice and that the provision was not intended to be restricted to *acta jure gestionis*.”³⁵ Moreover, on the basis of the views expressed by some States during the drafting of the Convention, the Court added the following:

“In criticizing the International Law Commission’s draft of what became Article 12, China commented in 1990 that ‘the article had gone even further than the restrictive doctrine, for it made no distinction between sovereign acts and private law acts’ . . . the United States, commenting in 2004 on the draft United Nations Convention, stated that Article 12 ‘must be interpreted and applied consistently with the time-honoured distinction between acts *jure imperii* and acts *jure gestionis*’ since to extend jurisdiction without regard to that distinction ‘would be contrary to the existing principles of international law’”³⁶.

The Court ultimately considered that “it [was] not called upon in [those] 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”³⁷. Rather, the Court noted that the issue before it was “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”³⁸.

As part of this analysis, the Court studied the wording of Article 12 of the United Nations Convention and considered that this provision— and the Convention as a whole— did not expressly exclude the acts of armed forces from their scope. The Court went on to underscore that “the International Law Commission’s commentary on the text of Article 12 state[d] that that provision d[id] not apply to ‘situations involving armed conflicts’”³⁹. The Court further stressed that this understanding also appeared in the Report of the *Ad hoc* Committee on Jurisdictional Immunities of States and Their Property which had been presented to the Sixth Committee of the General Assembly. In addition, as the Court pointed out, this understanding has not been the subject of any protest by States and is reflected in the declarations made on ratification of the Convention by some States. The Court thus endorsed this understanding of the rules governing jurisdictional immunity.

³⁴United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted by the General Assembly of the United Nations on 2 December 2004, General Assembly resolution 59/38, Annex, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49 (A/59/49)*.

³⁵*Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, para. 64.

³⁶*Ibid.*

³⁷*Ibid.*, para. 65.

³⁸*Ibid.*

³⁹*Ibid.*, para. 69 (1).

The Court also noted that the maintenance of immunity is established in national jurisprudence in such circumstances, that is, the State is entitled to invoke immunity “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”⁴⁰. Referring to *opinio juris* which supports such an interpretation, the Court noted 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 International Law Commission 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.”⁴¹

While considering the scope of jurisdictional immunity, the Court also had to consider Italy’s claim that a limitation of this rule might follow from the gravity of the breach or the peremptory character of the rule breached, a possibility that is not provided for in the United Nations Convention or other relevant instruments, according to the Court. In that regard, the Court noted that the absence of any such provision from the United Nations Convention was particularly significant.

The Court therefore recalled that in 1999 the International Law Commission had established a Working Group to consider various developments in practice regarding some issues of State immunity which had been highlighted by the Sixth Committee of the General Assembly. The Court noted that, in an appendix to its report,

“the Working Group referred, as an additional matter, to developments regarding 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*’ and stated that this issue was one which should not be ignored, although it did not recommend any amendment to the text of the International Law Commission Articles”⁴².

The Court stated that the matter had then been considered by the Working Group established by the Sixth Committee of the General Assembly, which decided to discontinue it because it was not yet ready for a codification exercise. During subsequent debates in the Sixth Committee, no State raised any objection to this decision. In fact, the Court “consider[ed] that this history indicate[d] that, at the time of adoption of the United Nations Convention in 2004, States did not consider that customary international law limited immunity in the manner now suggested by Italy”⁴³.

* * *

Similarly, the Judgment rendered by the Court in the case concerning the *Application of the Interim Accord of 13 September 1995* between the former Yugoslav Republic of Macedonia and Greece raises some pertinent questions with respect to the work of the Commission. In this case, the former Yugoslav Republic of Macedonia claimed that Greece had breached Article 11,

⁴⁰*Ibid.*, para. 77.

⁴¹*Ibid.*

⁴²*Ibid.*, para. 89.

⁴³*Ibid.*

paragraph 1⁴⁴, of the 1995 Interim Accord by objecting to the Applicant's admission to NATO. In paragraph 2 of its resolution 817 (1993), the Security Council had recommended that the Applicant be admitted to membership in the United Nations and that it be "provisionally referred to for all purposes within [that Organization] as 'the former Yugoslav Republic of Macedonia' pending settlement of the difference that ha[d] arisen over the name of the State"⁴⁵.

References to aspects of the law of State responsibility appeared in the justifications advanced by Greece in response to the allegation that it had breached the Interim Accord of 1995. In its Judgment, the Court noted that Greece argued that any failure by that State to comply with its obligations under the Interim Accord was justified by the requirement for it to take countermeasures pursuant to the law of State responsibility. It then observed that Greece had raised the question of countermeasures before the Court by referring to the conditions governing them, as set out in the Commission's Articles on State Responsibility. The Court thus noted

"that the Applicant's violations [alleged by Greece] were serious and that the Respondent's responses were consistent with the conditions reflected in the ILC Articles on State Responsibility, which [Greece] describes as requiring that countermeasures be proportionate, be taken for the purpose of achieving cessation of the wrongful act and be confined to the temporary non-performance of the Respondent's obligation not to object [to FYROM's admission to NATO]"⁴⁶.

Greece contended that it had repeatedly informed the former Yugoslav Republic of Macedonia of its positions.

On the other hand, the Court summarized as follows the arguments put forward by the former Yugoslav Republic of Macedonia on the question of countermeasures: "[t]he Applicant calls attention to the requirements in the ILC Articles on State Responsibility that countermeasures must be taken in response to a breach by the other State, must be proportionate to those breaches and must be taken only after notice to the other State"; and, according to FYROM, "none of these requirements were met. The Applicant further states its view that the requirements for the imposition of countermeasures contained in the ILC Articles on State Responsibility reflect 'general international law'."⁴⁷

Greece also relied on the *exceptio non adimpleti contractus* — which it described as a general principle of international law — in support of its assertion that a State suffering breaches of treaty obligations has the right to suspend the execution of corresponding obligations in respect of the State at fault. In particular, Greece argued that there was a synallagmatic relationship between its obligation not to object under Article 11, paragraph 1, of the Interim Accord, on the one hand, and the former Yugoslav Republic of Macedonia's obligations under Articles 5, 6, 7 and 11 of the same instrument, on the other. In short, Greece considered that the Applicant's breach of its treaty commitments precluded the wrongfulness of any suspension by Greece of the execution of its obligations in response to that breach. Furthermore, Greece contended that the conditions governing the *exceptio* were much less rigid than those relating to the suspension of a treaty "or

⁴⁴The text of that provision reads as follows:

"Upon entry into force of this Interim Accord, the Party of the First Part agrees not to object to the application by or the membership of the Party of the Second Part in international, multilateral and regional organizations and institutions of which the Party of the First Part is a member; however, the Party of the First Part reserves the right to object to any membership referred to above if and to the extent the Party of the Second Part is to be referred to in such organization or institution differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)."

⁴⁵Security Council resolution 817, UN SCOR, 3196th Meeting, UN doc. S/RES/817 (1993).

⁴⁶*Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, para. 121.

⁴⁷*Ibid.*, para. 122.

precluding wrongfulness by way of countermeasures”, because exercise of the *exceptio* is not subject to any procedural requirements⁴⁸.

For its part, the former Yugoslav Republic of Macedonia asserted that the allegedly customary status of the *exceptio* had not been demonstrated by Greece. It further observed that the law governing State responsibility does not accept the *exceptio* as justification for suspending the execution of international obligations. It argued instead that Article 60 of the 1969 Vienna Convention — as a body of rules and procedure — should be applied in response to material breaches of treaty commitments. Furthermore, the Applicant challenged Greece’s argument aimed at drawing attention to a purported synallagmatic relationship between the obligations set forth in the relevant provisions of the Interim Accord.

In the end, the Court found that Greece had failed to demonstrate that the Applicant had breached the Interim Accord, except in relation to the use of the symbol prohibited by Article 7, paragraph 2. The Court further observed that Greece “ha[d] failed to show a connection between the Applicant’s use of the symbol in 2004 and the Respondent’s objection [to the Applicant’s admission to NATO] in 2008”⁴⁹. Consequently, the Court stated that the arguments put forward by Greece did not indicate that the latter objected to the Applicant’s admission to NATO “on the basis of any belief that the *exceptio* precluded the wrongfulness of its objection”⁵⁰. In short, the Court believed that Greece had failed to observe the conditions of application of the *exceptio*, as it had set them out in its own pleadings. Accordingly, the Court did not consider that it was called upon to determine the question as to whether the *exceptio* forms part of contemporary international law.

* * *

Finally, I should like to draw your attention to a decision delivered recently by the Court, namely its Advisory Opinion in the case concerning *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a complaint filed against the International Fund for Agricultural Development*. In this case, the Court was asked to examine the validity of a judgment rendered by the Administrative Tribunal of the International Labour Organization concerning the contract of employment of Ms Saez García.

It should be recalled that the latter had accepted from the International Fund for Agricultural Development an offer of a two-year fixed-term contract serving as a Programme Officer in the Global Mechanism, an institution housed at the Fund. That contract of employment had been renewed on two occasions. The ILOAT was seized of a dispute concerning the decision of the President of the Fund to reject the recommendations of the Fund’s Joint Appeals Board following several internal procedures relating to the non-renewal of the contract of the individual concerned and the abolition of her post. In its judgment, the Tribunal set aside the President’s decision and ordered the Fund to pay damages and expenses.

For our present purposes, it is interesting to focus on the Court’s treatment of the notion of “equality” between the key “parties” [stakeholders] involved in this Advisory Opinion. In particular, the Court examined the principle of the equality before the Court of the Fund and Ms Saez García, not only in terms of access to the Court, but also from a procedural perspective. The Court was in full agreement in this respect: the “principle [of equality] must now be

⁴⁸*Ibid.*, para. 116.

⁴⁹*Ibid.*, para. 161.

⁵⁰*Ibid.*

understood as including access on an equal basis to available appellate or similar remedies unless an exception can be justified on objective and reasonable grounds”⁵¹.

In this connection, the Court questioned whether the system established in 1946 allowed for the implementation of this modern-day concept of the principle of equality and access to justice, stating, however, that it did not fall to it to reform the current system. Its role, rather, was confined to ensuring equality in the proceedings brought before it. In the case in question, the Court found that “the unequal position before the Court of the employing institution and its official, arising from provisions of the Court’s Statute, ha[d] been substantially alleviated” by its decision that “the President of the Fund was to transmit to the Court any statement setting forth the views of Ms Saez García which she might wish to bring to the attention of the Court and [to fix] the same time-limits for her as for the Fund for the filing of written statements in the first round of written argument and comments in the second round”⁵². Moreover, the Court concluded that the situation of inequality was also alleviated by its decision not to hold hearings, pointing out that its “Statute does not allow individuals to appear in hearings in such cases, by contrast to international organizations concerned”⁵³.

In spite of the difficulties which it encountered along the way, the Court found that “it [did] have the information it require[d] to decide on the questions submitted”; “that both the Fund and Ms Saez García ha[d] had adequate and in large measure equal opportunities to present their case and to answer that made by the other”; and “that, in essence, the principle of equality in the proceedings before the Court, required by its inherent judicial character and by the good administration of justice, ha[d] been met”⁵⁴.

The Court was satisfied that, in light of its treatment of the principle of equality, it had sufficiently alleviated the situation of inequality which might have compromised the exercise of its judicial function and its jurisdiction to entertain the request for an Advisory Opinion in this case. On the other hand, it reiterated its concern “about the inequality of access to the Court arising from the review process under Article XII of the Annex to the Statute of the ILOAT”⁵⁵.

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This concludes my brief account of the recent cases decided by the Court. They are likely not only to be of particular interest in light of the work carried out by your institution, but they also confirm the rich — and now well-established — interaction which exists between the work and the mandates of the International Law Commission and the International Court of Justice⁵⁶.

⁵¹*Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization Upon a Complaint Filed Against the International Fund for Agricultural Development*, Judgment of 1 February 2012, paras. 44, 47.

⁵²*Ibid.*, para. 45.

⁵³*Ibid.*

⁵⁴*Ibid.*, para. 47.

⁵⁵*Ibid.*, para. 48.

⁵⁶See, e.g., Stephen M. Schwebel, “The Inter-active Influence of the International Court of Justice and the International Law Commission” in Calixto A. Armas Barea *et al.* (eds.), *Liber Amicorum “In Memoriam” of Judge José María Ruda* (The Hague, Kluwer Law International, 2000), pp. 479-505.

This interaction should continue in the future and encourage the further development of the bonds of harmony and co-operation, as well as the dialogue, between our respective institutions. The subjects addressed by the Commission remain of vital importance for the Court and we will continue to follow its work with great interest.
