

SEPARATE OPINION OF JUDGE KEITH

1. I agree with the conclusions the Court has reached and largely with its reasons. My purpose in preparing this opinion is to emphasize how the rules of international law recognizing or not the immunity of a foreign State from the jurisdiction of the courts of another State are firmly based on principles of international law and on policies of the international legal order. That emphasis is designed to supplement the exhaustive and persuasive discussion of State practice included in the Judgment.

2. A basic principle of international law at play in this area of law is the principle of sovereign equality of States, the first principle declared in Article 2 of the Charter of the United Nations. In terms of the elaboration of that principle in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, all States have equal rights and duties and are juridically equal (General Assembly resolution 2625 (XXV)). By definition, in cases raising issues of State immunity, that principle and the rights and obligations arising from it apply to two States — the State of the forum where the case is being brought and the foreign State which is the defendant or intended defendant. The jurisdiction of the courts of the former State arises from the sovereignty of that State. If the particular court has jurisdiction over the matter brought before it when the defendant is an individual or a legal person, why should the fact that the defendant be a foreign State make a difference? But to the contrary are the sovereign equality and the independence of the foreign State, principles supporting immunity: an equal cannot have jurisdiction over an equal.

3. How are those two propositions to be reconciled? Answers are to be found in the decisions given by national courts, the laws passed by national parliaments, the treaties and the law reform and the diplomatic processes and negotiations leading to them, and other State practice, much of it reviewed in the Judgment in this case, as well as in scholarly writing. The answers have given and continue to give particular attention to the character of the act at issue in the litigation. In broad terms, is the act an act of a public character or, in other words, to be seen as the exercise of the sovereign authority of the State, or is the act one of a private character, indistinguishable from the act of any other person acting under the local law? In the former case, the need for respect for another sovereignty, the ideas of reciprocity and the possible risks to international rela-

tions may have major significance and indicate that immunity is available. In the latter case, the similarities of the foreign State's acts to the acts of other persons under local law and the correlative rights and obligations of the other (non-State) party in the litigation may indicate that immunity should not be available. That may be so if, for instance, the act is of a commercial or trading character; or the act is an alleged delict or tort under local law committed on the territory of the forum State; or the action relates to locally situated property. The answers, based on those matters, have changed over time and no doubt will continue to change, in the direction of a narrowing of immunity. In this case, Italy contends that the position taken by its courts conforms with that narrowing. Germany argues to the contrary.

4. Those matters began to appear 200 years ago. To demonstrate that, I take from the nineteenth century two judgments and a resolution adopted by the Institut de droit international. I make those choices from the many available because they highlight the principles and the other factors I have mentioned; they show that the common law and lawyers from that tradition — often represented as adhering to a rule of absolute immunity well into the twentieth century — had, along with those in other jurisdictions, early recognized the balance of the factors mentioned; and they usefully present the law in two parts: those areas where the local courts have jurisdiction over foreign States and those where they do not because of the immunity of the foreign State. I do of course appreciate that it is unusual in the practice of this Court and its predecessor to draw on the decisions of national courts. But, as appears from the Judgment in this case, the Court, for good reason, does give such decisions a major role. In this area of law it is such decisions, along with the reaction, or not, of the foreign State involved, which provide many instances of State practice. Further, the reasoning of the judges by reference to principle is of real value.

5. I begin with Chief Justice Marshall, speaking 200 years ago for the United States Supreme Court. In *Schooner Exchange v. McFaddon* (11 US 116 (1812)), he began with these propositions:

“The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction." (11 *US* 116, 136.)

He then examined what he referred to as several instances of consent of the territorial State tested by common usage, and by common opinion, growing out of that usage. Sixty years later, an English judge, Sir Robert Phillimore, rejected a plea of immunity made by the Khedive of Egypt. He began his examination of the immunity of the sovereign prince from the court's jurisdiction, by

"stat[ing] with precision the foundation upon which this privilege rests. Upon principles of general jurisprudence the presence of a person or of property within the limits of a State founds the jurisdiction of the tribunals of that State . . . The sovereign prince or his representative is exempted from the operation of this principle, absolutely, so far as his person is concerned, and with respect to his property, at least so far as that property is connected with the dignity of his position and the exercise of his public functions.

Upon what grounds is this exemption allowed? Not upon the possession on behalf of the sovereign of any absolute right in virtue of his sovereignty to this exemption; such a right on his part would be incompatible with the right of the territorial sovereign . . . The true foundation is the consent and usage of independent States, which have universally granted this exemption from local jurisdiction in order that the functions of the representative of the sovereignty of a foreign State may be discharged with dignity and freedom, unembarrassed by any of the circumstances to which litigation might give rise." (*The Charkieh* (1873), *LR* 4 A & E 59, 88.)

The references by the judges to common usage and common opinion arising out of that usage tend to suggest that the consent of the territorial State was coming to be seen as a fiction. The reconciliation between the competing sovereignties, in my understanding of the development of the law, ceased to rely on ideas of consent, but weighed the other matters mentioned above and, in particular, the character of the act in issue. The combination of that matter, (implied) consent, and principle may be seen in a second feature of the two judgments in which the judges indicated situations in which territorial sovereignty may prevail over the sovereignty of the foreign State.

6. Chief Justice Marshall looked at what he saw as a manifestly distinct situation. That situation concerned the private property of the

prince. A prince, by acquiring private property in a foreign country, may possibly be considered, he said, "as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual" (11 *US* 116, 145); or, it may be added, the elements of sovereignty, equality, independence and dignity are absent and the consent, this time of the foreign State and generally implicit, may, with that absence, be seen as denying immunity. Similarly, Sir Robert Phillimore focused on the fact that the vessel which was the subject of the proceeding before him was "employed for the ordinary purposes of trading. She belongs to what may be called a commercial fleet." (*LR* 4 A & E 59, 99.) He had earlier said:

"The object of international law, in this as in other matters, is not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiations between governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign State; and if the suit takes a shape which avoids this inconvenience, the object both of international and of ordinary law is attained — of the former, by respecting the personal dignity and convenience of the sovereign; of the latter, by the administration of justice to the subject.

The universally acknowledged exceptions to the general rule of the sovereign's immunity when examined prove the truth of this proposition. For instance, the exemption from suit is admitted not to apply to immoveable property. One reason may be that the owner of such property has so incorporated himself into the jural system of the state in which he holds such property, that the argument of general inconvenience to States from allowing the exemption outweighs the argument from convenience on which the exemption in other matters is bottomed. But another reason surely is . . . that such a suit can be carried on without the necessity of serving process upon the sovereign, or of interfering in any way with such personal property as may be requisite for the due discharge of his functions. The exemption must be taken away for one of three reasons, either those which I have suggested, or a third, that the acquisition of immoveable property amounts to a waiver of privilege." (*LR* 4 A & E 59, 97-98.)

7. The first of those two paragraphs valuably highlights the distinction between the substantive obligation of the foreign State and the procedural or institutional means by which it is to be enforced or pursued — in the one case the "just demand" was pursued through a court process and

in the other the available means was negotiation between States. That distinction between right and process is critical in the law in general and in the present case in particular (see Part III (3) of the Judgment). The second paragraph, in addition to recalling other instances where territorial sovereignty prevails, gives reasons for that result.

8. The Institut de droit international in 1891 in its draft International Rules on the jurisdiction of courts over proceedings against foreign States, sovereigns and heads of State provided an exhaustive list of six situations in which court actions against foreign States were permitted. Included on that list were actions for damages arising from a delict or quasi delict committed on the territory of the forum State (Art. 4 (6)). That list was immediately followed by a bar, among other things, on actions brought against acts of sovereignty (Art. 5). A similar approach can be seen in the resolution on State immunity in relation to jurisdiction and enforcement adopted by the Institut a century later with Ian Brownlie as the Rapporteur (“Contemporary Problems concerning the Immunity of States in relation to Questions of Jurisdiction and Enforcement” (1991)). Nine criteria are listed as indicating that judicial and other organs of the forum State have jurisdiction and five as giving the opposite indication. Among the first are proceedings “concerning the death of, or personal injury to, a person, or loss of or damage to tangible property, which are attributable to activities of a foreign State and its agents within the national jurisdiction of the forum State” (Art. 2 (2) (*e*)). Among the latter indications, tending to deny jurisdiction, are (1) “the relation between the subject-matter of the dispute and the validity of the transactions of the defendant State in terms of public international law” (Art. 2 (3) (*b*)), and (2) “the organs of the forum State should not assume the competence to inquire into the content or implementation of the foreign, defence and security policies of the defendant State” (Art. 2 (3) (*d*)).

9. That resolution was adopted just a few weeks after the International Law Commission had completed its draft articles on jurisdictional immunities of States and their property, the draft which became the basis of the 2004 United Nations Convention. In 1991 the Commission reaffirmed as still generally applicable the commentary it had adopted in 1980, a commentary based on a review of much State practice, including legislation, executive action and court decisions, treaties, and many authorities. The commentary said this, under the heading “Rational Basis of State Immunity”:

“The most convincing arguments in support of the principle of State immunity may be found in international law as evidenced in the usage and practice of States and as expressed in terms of the sovereignty, independence, equality and dignity of States. All these notions seem to coalesce, together constituting a firm international

legal basis for State immunity. State immunity is derived from sovereignty. Between two co-equals, one cannot exercise sovereign will or authority over the other: *par in parem imperium non habet*." (*Yearbook of the International Law Commission (YBILC)*, 1980, Vol. II (2), p. 156, para. 55 of commentary to draft Article 6; *ibid.*, 1991, Vol. II (2), pp. 22-23, para. 5 of commentary to Article 5.)

10. Throughout its work on the topic, the Commission continued to draw the distinction, which had been appearing since early in the nineteenth century between the public and the private, to use that shorthand. In the former sphere, the principles of sovereign equality, independence, reciprocity and dignity, possible risks to international relations, and, if needed, the (implied) consent of the territorial State to the waiving of its territorial jurisdiction prevailed. In the latter, the foreign State, by operating in effect as a private person within the local legal system, either subjected itself to the local law and judicial system or became subject to that law and system. A choice between those alternatives was made by the International Law Commission in its drafting of the eight provisions which now appear in Part III of the United Nations Convention under the heading "Proceedings in which State Immunity Cannot Be Invoked". The phrase "the State is considered to have consented to the exercise of" the local jurisdiction which had been included in four of the provisions in that part was replaced by the phrase "the State cannot invoke" immunity from that jurisdiction (*YBILC*, 1991, Vol. II (2), p. 34, para. 2 of commentary to Article 10). The implied or fictional consent of the foreign State has gone. The propositions supporting territorial sovereignty now appear as statements of general law.

11. With that consideration of principle in mind, I go to the facts which lie at the heart of the claims brought before the Italian courts. German forces inflicted untold suffering on the Italian people during the period from September 1943 until the liberation of Italy in May 1945. Germany acknowledges those facts and their illegality and says that it accepts full responsibility for those terrible events. May the Italian courts exercise jurisdiction over claims, based on those facts, brought against Germany? How is the contest of equal sovereignties to be resolved?

12. One answer proposed by Italy was based on the local tort or delict rule. As indicated, that rule has been long recognized, at least in doctrine; the acts in issue in this case would be plainly unlawful under any conceivable system of national law, as well as under international law. But what is the extent of that rule? The 1891 and 1991 formulations by the Institut de droit international require a territorial element: that the wrong was committed in the territory or within the national jurisdiction of the forum

State (see para. 8 above). The same element appears in a more detailed form in Article 12 of the 2004 United Nations Convention:

“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.”

13. The whole emphasis in the text of Article 12 and the International Law Commission commentary on it is on the local character of that legal proceeding as well as on its private nature. There must be a right under local law to compensation; the actor must have been in the territory when the act occurred; and that act must have occurred there in whole or in part. According to the Commission, the exception to immunity is “applicable only to cases or circumstances in which the State concerned would have been liable under the *lex loci delicti commissi*”; a local court is the most convenient; and the rule of non-immunity would prevent the possibility of the insurance company hiding behind the cloak of State immunity (most of the injury and damages likely to be covered will be insurable) (*YBILC*, 1991, Vol. II (2), pp. 44-45, paras. 2-4 of commentary to Article 12). The proposition stated in Article 12, assuming it to be a statement of customary international law, and its rationale plainly do not address delictual or tortious acts committed elsewhere, in this case outside Italy.

14. The Commission also contemplates that political assassinations (at the direction or with the knowledge of the foreign State, I assume) would be covered. I can see the force of that even though the act might be said in one sense to be of a very public, governmental, character; it is likely also to be a serious breach of the local law giving rise to civil liability and proceedings in the local courts. To return to the beginning point, as stated by Chief Justice Marshall, of the exclusive jurisdiction of the courts of the local sovereign, I can see no justification in terms of equal sovereignty, independence, dignity, reciprocity or possible risks to international relations, or the implied consent of the territorial sovereign for denying jurisdiction in respect of that violation of the law of the land.

15. Acts committed in the course of armed conflict between States, are, in my view, of a markedly different kind. They are acts at the interna-

tional, inter-State level, of a sovereign nature relating to the implementation of foreign, security and defence policies of the defendant State and are to be assessed according to international law, to return to the terms of the Institut texts (see para. 8 above). Those acts are not acts to be assessed primarily by reference to local law, although they might also involve breaches of local criminal law so far as it incorporates provisions of international law, for instance creating or declaring crimes for which individuals may be individually responsible and in respect of which they are not likely to have immunity.

16. The International Law Commission commentary states flatly that its draft Article 12 does not “apply to situations involving armed conflicts” (*YBILC*, 1991, Vol. II (2), p. 46, para. 10 of commentary to Article 12). While it would have been helpful had the United Nations Convention made it express, as the European Convention does, that the Convention does not apply to claims arising from armed conflicts or from actions of the armed forces (1972 European Convention on State Immunity, Art. 31), the statement of 25 October 2004 by the Chairman of the *Ad Hoc* Committee when introducing the report of that Committee on the draft Convention follows the Commission’s position and is clear: one of the issues that had been raised was whether military activities were covered by the Convention; the general understanding had always prevailed that they were not (*A/C6/59/SR13*, para. 36; see also the reference in the last preambular paragraphs of General Assembly resolution 59/38, adopting the Convention, to the “statement of the Chairman of the *Ad Hoc* Committee”). Norway and Sweden when ratifying the Convention have made explicit their understandings to similar effect. The Chairman’s statement indicates to me that the exclusion of war claims went almost without saying.

17. Also supporting that exclusion is the analogy provided by national law which in many countries at first recognized the absolute immunity of States from proceedings in their own courts, and later limited it. The ILC said this about the earlier period:

“It was in the nineteenth century that the doctrine of State immunity came to be established in the practice of a large number of States. In common law jurisdictions, especially in the United Kingdom and the United States of America, the principle that foreign States are immune from the jurisdiction of the territorial States has to a large extent been influenced by the traditional immunity of the local sovereign, apart altogether from the application of international comity or *comitas gentium*. In the United Kingdom, at any rate, the doctrine

of sovereign immunity has been a direct result of the British constitutional usage expressed in the maxim ‘The King cannot be sued in his own courts’. To implead the national sovereign was therefore a constitutional impossibility . . . The immunity of the Crown was later extended to cover also the sovereign heads of other nations, or foreign sovereigns with whom at a subsequent stage of legal development foreign States have been identified.” (*YBILC*, 1980, Vol. II (2), p. 144, para. 9.)

But by 1932 it was possible for those responsible for the extensively researched and carefully prepared Harvard draft convention on the Competence of Courts in regard to foreign States to say that

“Exceptions [to the rule of absolute immunity] . . . have made their appearance as the necessities of modern life have changed and developed. More and more States have adopted legislation by which they have submitted to suits by private persons in their own courts. The old English principle that the King can do no wrong has lost much of its force as an operative legal doctrine.” ((1932) 26 *AJIL* Supp. 527-528; the text was prepared by a group with Professor Philip C. Jessup as reporter.)

The draft accordingly included a number of exceptions to immunity. Twenty years later, Professor Hersch Lauterpacht pressed the national law analogy with reference to recent legislative changes in common law countries limiting the immunity of the local state from court proceedings (“The Problem of the Jurisdictional Immunities of Foreign States” (1951), 28 *BYBIL* 220-221, 233-235). Many of those changes in national law had as their purpose, with reference to the principles of the rule of law and the equality of the State and its citizens under the law, the placing of the State as litigant in the same position as the individual as litigant. To recall the distinction made earlier in this opinion, the new legislation was concerned with the State being made subject to jurisdiction in respect of private law claims. That legislation did not, by contrast, allow claims arising from actions of the armed forces of the State in defence of the State or even more broadly. Such matters were dealt with at the national level by general policies such as war pensions and other measures for the rehabilitation of returned members of the armed forces. (See e.g., P. W. Hogg and P. J. Monahan, *Liability of the Crown*, 3rd ed., 2000, 7 (6) (b).) While that parallelism with private acts is not to be pressed beyond its limits, it is of interest, as Sompong Sucharitkul, the ILC’s first special Rapporteur wrote in 1959, that in Italy

“[t]he doctrine of State immunity was also generally applied by Italian courts in the nineteenth century. But at the very beginning, Italian courts adopted a restrictive view of immunity based upon the

double personality of the State. This was principally because in Italy the local sovereign himself was subject to the jurisdiction of an Italian judge in respect of acts performed in his private capacity.” (*State Immunities and Trading Activities in International Law*, 1959, p. 11.)

18. At the international level, claims in respect of war damages and losses against former belligerents are in practice dealt with by inter-State negotiations and agreements, as shown in the present case by the treaties of 1947 and 1961 (see paragraphs 22 and 24-25 of the Judgment); such agreements deal with the claims of loss on a general footing, often on a reciprocal basis and not by way of individual claims, whether based on fault or not. That international practice recognizes consequences of the widespread devastation and destruction that follow major armed conflicts. That destruction, along with the overwhelming need for former belligerent States to reconstruct their societies and their economies, as recognized in that practice, makes completely impracticable, as best as I understand the matter, the Italian proposition in these terms:

“States (both the State of the victims and the State which is responsible for the violations) when negotiating . . . agreements [for war damages] must ensure that (a) all categories of (if not all individual) victims of war crimes are covered; (b) there be sufficient financial means to make the reparation more than symbolic; (c) there be appropriate mechanisms for ensuring that the reparation is made to the victims. Thus, it would not be sufficient for a State just to say that the counterpart agreed to waive all claims in exchange for a sum of money. There must be certainty that the sum of money is sufficient and appropriate; there must be criteria for the identification of victims and for its distribution to victims.” (Counter-Memorial of Italy, para. 5.26.)

How could the stated requirements (a) and (b) possibly be satisfied in Europe following six years of unrelenting warfare? In practice any reparation received has often, and understandably, been used by States for general recovery purposes. And (c) is not an obligation recognized in law or always in fact.

19. Professor Louis Henkin, referring primarily to many post-war settlement agreements concluded by the United States throughout its history, has said that:

“governments have dealt with such private claims as their own, treating them as national assets, and as counters, ‘chips’, in international bargaining. Settlement agreements have lumped, or linked, claims deriving from private debts with others that were intergovernmental in origin, and concessions in regard to one category of claims might be set off against concessions in the other, or against larger political

considerations unrelated to debts. In result, except as an agreement might provide otherwise, international claims settlements generally wipe out the underlying private debt, terminating any recourse under domestic law as well . . .

Often there was no assurance that the lump sum settlement was the best ‘deal’ that citizens were not sacrificed to some other national interest; often, surely, one could not be certain that the private party recovered the full ‘value’ of his (her) claim.” (*Foreign Affairs and the US Constitution*, 2nd ed., 1996, p. 300.)

The United States Court of Appeals for the District of Columbia recently quoted the first part of that passage and, in terms of “larger political considerations”, recalled a position stated in 1952 by the United States in relation to the Peace Treaty with Japan of 1951 :

“Obviously insistence upon payment of reparations in any proportion commensurate with the claims of the injured countries and their nationals would wreck Japan’s economy, dissipate any credit that it may possess at present, destroy the initiative of its people, and create misery and chaos in which the seeds of discontent and communism would flourish.” (*Joo v. Japan* (2005) 413 F. 3d 45, 52.)

That very long-established practice, recognizing harsh post-war realities and the need for former enemy States to establish new relationships, strongly supports the conclusion that a former belligerent State may not be subject, without its consent, to the jurisdiction of a foreign court in cases such as those which are the subject of the present proceedings.

20. To conclude, I emphasize again that the Judgment in the present case does not in any way deny the responsibility of Germany for the dreadful violations of international law it committed against Italian citizens between 1943 and 1945. Germany has indeed, in the words of its Agent before the Court, “accepted full responsibility [for] the terrible war time events”. But that responsibility, along with the related obligations, is not before the Court. What is before the Court is only Germany’s claim to immunity from the jurisdiction of Italian courts over the proceedings based on those events brought against it by individual Italian citizens.

(Signed) Kenneth KEITH.
