

## DISSENTING OPINION OF JUDGE YUSUF

*The key question in these proceedings was whether Italian courts violated the jurisdictional immunity of Germany — The Italian courts set aside the immunity of Germany with respect to claims for reparation of serious humanitarian law violations in the absence of other remedial avenues — The Court failed to adequately address this core issue — The Court instead focused on the extent of immunity for acts jure imperii when committed by armed forces during armed conflict and the strength of jus cogens norms — The Court's analysis does not adequately address the real-life situation of the victims of Nazi atrocities without other means of redress — Immunity should not be used as a screen where no other remedial avenues are available — The victims' petition to Italian domestic courts was a last attempt to obtain reparation — Immunity is not an immutable value in international law — The scope of immunity has been contracting over the past century as the international legal system shifted from a State-centred model to one that also protects the rights of human beings — It is as full of holes as Swiss cheese — There is considerable divergence in the extent and scope of immunity in State practice — Uncertainties on customary rules cannot be resolved by a formalistic exercise of surveying divergent judicial decisions — Customary international law is not a question of relative numbers — Consideration must be given to the circumstances and nature of each case and the factors underlying it — Resort may also be had to the general principles underlying human rights and humanitarian law — A balance must be sought between the function of immunity and the realization of fundamental human rights and humanitarian law — There should be a proportionality and legitimacy assessment with respect to granting immunity when the customary rules are found to be fragmentary or unsettled — The evolution of the law on immunity has often occurred through isolated domestic court decisions that gradually become mainstream — Assertion of jurisdiction by domestic courts crystallizes an emerging exception to State immunity — Domestic courts cannot set aside immunity every time there is a claim for reparation for violations of international humanitarian law or human rights — In exceptional circumstances, assertion of jurisdiction where there is no other remedial avenue contributes to a better observance of international humanitarian law without unjustifiably indenting immunity.*

### I. INTRODUCTION

1. I am regrettably unable to concur with the Court's majority in finding that:

“[t]he Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under interna-

tional law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945”.

2. I am also in disagreement with the reasoning and consideration on which this finding is based.

3. My disagreements relate in particular to the marginal way in which the core issues in dispute between the Parties have been dealt with in the Judgment; the lack of an adequate analysis of the obligation to make reparations for violations of international humanitarian law (hereinafter IHL), which is intimately linked to the denial of State immunity in the dispute before the Court; the reasoning and conclusions of the majority on the scope and extent of State immunity in international law and the derogations that may be made from it; and the approach adopted in the Judgment towards the role of domestic courts in the identification and evolution of international customary norms, particularly in the area of State immunity.

I will elaborate my views on these matters below.

## II. THE CORE ISSUES BEFORE THE COURT

4. The jurisdictional immunity of foreign States before national courts in cases concerning serious violations of human rights or humanitarian law has been extensively debated in recent years in scholarly literature and has given rise to conflicting judicial decisions by courts of various jurisdictions. The core issues before the Court in these proceedings are however of a much more limited and narrower scope. They concern decisions by Italian courts to set aside Germany’s immunity in proceedings regarding claims for reparation arising out of acts committed by the Third Reich in the period 1943-1945 whose illegality has been admitted by Germany.

5. The claims before the Italian courts concerned certain categories of victims (for a description of these categories, see paragraph 52 of the Judgment) to whom Germany allegedly failed to pay compensation, thus leaving them without other means of redress for the harm suffered. The Court had therefore to determine whether the refusal of Italian courts to grant jurisdictional immunity to Germany with respect to claims of victims of Nazi crimes in search of redress and reparation constitutes an internationally wrongful act, in the absence of other remedial avenues. The Court’s answer to this question is positive, and I disagree with it. But my disagreement concerns also the approach adopted by the Court to reach this conclusion.

6. The Court recognizes that it has jurisdiction to determine whether Germany’s failure to pay compensation to those categories of victims, whose illegal treatment by the Third Reich has been admitted by Germany, is capable of having an effect on the existence and scope of Germany’s jurisdictional

immunity before Italian courts, and consequently whether the Italian courts were legally justified, under these specific circumstances, to deny immunity to Germany (Judgment, para. 50). The Court, however, in its consideration of the merits, limits its examination, almost entirely, to the issue of “whether . . . immunity is applicable to acts committed by the armed forces of a State . . . in the course of conducting an armed conflict” (*ibid.*, para. 61).

7. This formulation of the core issues is, in my view, too abstract and formalistic as compared to the real life situation of the victims of Nazi atrocities who, for the lack of any alternative means of redress, had to submit their claims for reparation to Italian courts. The dispute before the Court is not about the general applicability of immunity to unlawful acts committed by the armed forces of a State in a situation of armed conflict. This is a very broad subject which is best left for academic papers and scholarly discussions. The dispute in this case is about the decisions of Italian courts to set aside the jurisdictional immunity of Germany to allow certain categories of Italian victims, who were unable to obtain effective reparations for crimes committed by the Third Reich and admitted by Germany, to have an alternative means of redress.

8. Italy has repeatedly emphasized this point both in its written submissions (Counter-Memorial of Italy, pp. 87-122; and Rejoinder of Italy, pp. 11-26) and during the oral proceedings (CR 2011/18, para. 11; CR 2011/21, paras. 4-12; CR 2011/21, p. 17, paras. 1-37). Germany has also abundantly responded to it (CR 2011/17, paras. 14-42; CR 2011/20, p. 30, paras. 11-36). The Court should have therefore adequately addressed it.

9. Unfortunately, as a result of the above-mentioned approach by the Court, the centrality to the dispute between the Parties of the link between the lack of reparations and the denial of immunity by the Italian courts in order to provide an alternative means of redress to the victims, has been substantially overlooked, if not completely sidelined, in the Judgment. The only exception is a short section (Judgment, paras. 98-104), which deals with the “last resort” argument put forward by Italy with regard to the lack of reparations for certain categories of victims.

10. In that section, the Court notes that

“Germany decided to deny compensation to a group of victims on the ground that they had been entitled to a status which, at the relevant time, Germany had refused to recognize, particularly since those victims had thereby been denied the legal protection to which that status entitled them” (*ibid.*, para. 99).

However, instead of assessing the impact that this failure to make reparations — and the absence of alternative means of redress — could have on the granting or denial of State immunity to Germany in the courts of the forum State under international law, the Court limits itself to state that “the Court considers that it is a matter of surprise — and regret — that Germany decided to deny compensation . . .” (*ibid.*). It bears to be recalled in this connection that disputes between States are not submitted to an

international adjudicatory body, and particularly to the principal judicial organ of the United Nations, for expressions of surprise and regret, but for their appropriate settlement on the basis of international law.

11. On the other hand, I agree with the Court's statement that: "the Court is not unaware that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned" (Judgment, para. 104). Nevertheless, the Court should have, in my view, drawn some legal conclusions from this statement, particularly with respect to the legality or illegality of the decisions of the Italian courts in this specific context. Instead, the Court goes on to state that the claims of the Italian military internees (IMIs), together with other claims of Italian nationals, "could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue" (*ibid.*); thus, suggesting a diplomatic approach, rather than a legal determination by the Court itself, to some of the core issues of the dispute submitted to it for adjudication.

### III. THE OBLIGATION TO MAKE REPARATIONS FOR VIOLATIONS OF IHL

12. In view of the direct bearing that the lack of reparations for IHL violations by the Third Reich had on the refusal by Italian courts to grant immunity to Germany, I find it also regrettable that the Court, despite recognizing this close relationship, has not considered it necessary to examine, at least in a general manner, the obligation to make reparations for violations of IHL in international law.

13. The obligation to make reparations for damages suffered as a result of breaches of humanitarian law is enshrined in Article 3 of the 1907 Hague Convention IV which provides that:

"[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts forming part of its armed forces."

14. A similar provision is to be found in Article 91 of the Additional Protocol I of 1977 to the Geneva Conventions of 1949 (hereinafter "Protocol I"). These provisions do not indicate whether the beneficiaries of such compensation are individuals or States. It can, however, be said that they clearly establish the existence of an obligation under international law to pay compensation and make reparations for violations of humanitarian law.

15. It is only in the past two decades or so that one may find examples of individual claimants seeking compensation for damages suffered as a result of violations of humanitarian law. Such examples include the claims brought before Japanese courts in the 1990s on behalf of the victims of IHL violations during the Second World War including slave labourers, comfort women, and torture victims; or the legal suits brought before United States courts by the Holocaust Restitution Movement against Ger-

many on behalf of wartime “labour slaves”, which have now been settled by Germany; the *Distomo* case brought by the relations of the victims of a massacre by the Nazi armed forces before Greek courts against Germany in 1995; and the *Ferrini* case brought against Germany before Italian courts by Mr. Luigi Ferrini, an Italian national who had been arrested in August 1944, and deported to Germany, where he was detained and forced to work in a munitions factory until the end of the war.

16. Historically, there is ample evidence that compensation for such breaches was for a long period of time handled at the inter-State level either through peace treaties or through settlement agreements. More recently, other mechanisms have been used such as the Iraq Compensation Commission established by the United Nations Security Council and the Eritrea-Ethiopia Claims Commission created through a bilateral agreement. This does not however mean that individuals are not or were not intended to be the ultimate beneficiaries of such mechanisms; or that they do not possess the right to make claims for compensation. It only indicates that the national State of the victims receives a lump sum to be distributed to the victims of such breaches. Such arrangements appear to have been resorted to for policy or practical reasons aimed at avoiding the prospect of innumerable private suits, or a delay in the conclusion of peace treaties and the resumption of normal relations between formerly belligerent States.

17. What is at issue here is the question of State responsibility. If crimes are committed by the agents of a State during an armed conflict, such a State has to assume responsibility for the unlawful acts of its agents, and to provide reparation to the victims. Such reparation is most often made through inter-State mechanisms, or through special funds set up by the State responsible for the violation. But, the law of State responsibility does not rule out the possibility that rights may accrue to individuals as a result of a wrongful act committed by a State. As a matter of fact, it is stated in Article 33, paragraph 2, of the ILC Articles on the Responsibility of States for internationally wrongful acts, that: “This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than the State.”

18. Moreover, the ILC commentary clearly states that there are cases where individuals are the holders of the rights resulting from international rules regarding State responsibility. This is the case, in my view, not only in human rights treaties, but also in humanitarian law conventions. Article 3 of Hague Convention IV and Article 91 of Protocol I are good examples of such rules, particularly when interpreted in light of the recent evolution of international law in the area of human rights and humanitarian law. The International Committee of the Red Cross

commentary to Article 91, Protocol I, appears to recognize this evolution:

“Those entitled to compensation will normally be Parties to the conflict or their nationals, though in exceptional cases they may also be neutral countries, in the case of violation of the rules on neutrality or of unlawful conduct with respect to neutral nationals in the territory of a Party to the conflict . . . However, since 1945 a tendency has emerged to recognize the exercise of rights by individuals.” (See ICRC, [www.icrc.org/ihl.nsf/COM/470-750117](http://www.icrc.org/ihl.nsf/COM/470-750117), paras. 3656 and 3657.)

19. It may therefore be stated that Article 3 of the Hague Convention IV — or for that matter, Article 91 of Protocol I — does not exclude the right of individuals to make claims for compensation for damages arising from breaches of IHL, despite the fact that the practice of States has been for a very long time to establish bilateral mechanisms through peace treaties and other agreements, and to have the issue of compensation handled by the State whose nationals have suffered damage as a result of such breaches.

20. The question, however, arises as to what happens in case some of the victims of IHL violations, for which responsibility has been recognized by the foreign State, are not covered through such schemes, and consequently are deprived of the possibility of being beneficiaries of the right to receive compensation for such breaches. Should such a State be allowed to use immunity before domestic courts as a screen against the obligation to make reparations, particularly when resort to such courts may be the only means of redress available to the victims? This is in my view the fundamental issue that the Court should have examined in this case.

#### IV. ASSESSMENT OF THE SCOPE OF STATE IMMUNITY AND ITS POSSIBLE CONFLICT WITH CLAIMS FOR REPARATIONS

21. My disagreement with the Court also extends to the approach and reasoning of the majority, which I find unpersuasive, on the scope and extent of the jurisdictional immunity of States under international law, as well as its exceptions and derogations. It is true that State immunity is a rule of customary international law, and not merely a matter of comity, although some legal scholars consider it only as an exception to the principle of territorial sovereignty and jurisdiction of States (see, for example, R. Higgins, “Certain Unresolved Aspects of the Law of State Immunity”, 29 *Netherlands Yearbook of International Law* (1982), pp. 265-276). Its coverage has, however, been contracting over the past century, in light of the evolution of international law from a State-centred legal system to one which also protects the rights of human beings vis-à-vis the State.

22. The shrinking of immunity coverage has been spearheaded by the decisions of domestic courts and largely prompted by the growing recognition of the rights of individuals involved in transactions with States or State-owned entities. It was indeed for the purpose of protecting the rights of individuals or juridical persons vis-à-vis States that a restrictive doctrine of immunities was introduced by national courts as early as the nineteenth century. Similarly, the tort exception to immunity has been conceived for the protection of individual rights against States.

23. Thus, although State immunity is important to the conduct of harmonious and friendly relations between States, it is not a rule of law whose coverage is well defined for all circumstances or whose consistency and stability is unimpaired. There is indeed considerable divergence in the manner in which the scope and extent of such immunity is interpreted and applied in the practice of States, and particularly in the judicial decisions of their courts. It is not therefore very persuasive to characterize some of the exceptions to immunity as part of customary international law, despite the continued existence of conflicting domestic judicial decisions on their application, while interpreting other exceptions, similarly based on divergent domestic courts' decisions, as supporting the non-existence of customary norms. This may give the impression of cherry-picking, particularly where the number of cases invoked is rather limited on both sides of the equation.

24. It may, for example, be asked whether the judicial decisions of a handful of domestic courts (see paragraphs 73-74 of the Judgment) could serve to substantiate the existence of customary international law based on State practice which supports the proposition that:

“State immunity for *acta jure imperii* continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State” (Judgment, para. 77).

It could equally be asked why more weight should be attached, in terms of the existence of customary law norms, to those decisions as opposed to the Italian and Greek Supreme Courts' decisions (*ibid.*, paras. 27-36). Is customary international law a question of relative numbers?

Would it not have been more appropriate to recognize, in light of conflicting judicial decisions and other practices of States, that customary international law in this area remains fragmentary and unsettled?

25. It should be recalled that even the traditional distinction between *jure gestionis* and *jure imperii*, which is often used for practical purposes to group together certain exceptions, depending on the nature of the acts involved, is far from being universally applied in a uniform manner, since the categorization of certain acts under one class of acts or the other still remains

a matter of controversy among States and national courts. Moreover, the definition of the basic concept underlying the distinction, namely commercial transactions, remains elusive. In the meantime, the exceptions and derogations to which State immunity is subject keep growing all the time.

26. State immunity is, as a matter of fact, as full of holes as Swiss cheese. Thus, to the extent that customary norms of international law are to be found in the practice and *opinio juris* of States, such practice clearly attests to the fact that the scope and extent of State immunity, particularly in the area of violations of human rights and humanitarian law, which is currently characterized by conflicting decisions of national courts in its interpretation and application, remains an uncertain and unsettled area of international custom, whose contours are ill-defined.

27. These uncertainties cannot adequately be resolved, in my view, through a formalistic exercise of surveying conflicting judicial decisions of domestic courts, which remain sparse as regards human rights and humanitarian law violations arising from armed conflict (or the lack of reparations for such violations), and counting those in favour of applying immunity and those against it. Such a process is unlikely to yield very useful results or to contribute to the clarification of the law in this field. Moreover, State immunity from jurisdiction cannot be interpreted in an abstract manner or applied in a vacuum. The specific features and circumstances of each case, and the factors underlying it, have to be fully taken into account. In the present case, it is claims for reparations for unlawful acts admitted by the responsible State that are at issue, where no alternative means of redress appear to be available. This is the reason why this case is rather unusual, as recognized in the Judgment (para. 60).

28. When jurisdictional immunities come into conflict with fundamental rights consecrated under human rights or humanitarian law, for which a forum State has an obligation to secure and enforce in its territory, and whose realization reflects basic values of the international community, it is much more appropriate to have regard to the manner in which, under contemporary international law, “[a] balance . . . must be struck between two sets of functions which are both valued by the international community” (see *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Judgment*, *I.C.J. Reports 2002*, joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal, p. 85, para. 75). In today’s world, the use of State immunity to obstruct the right of access to justice and the right to an effective remedy may be seen as a misuse of such immunity.

29. Such a balance has to be sought between the intrinsic functions and purposes of immunity, and the protection and realization of fundamental human rights and humanitarian law principles. The European Court of Human Rights (ECHR) recognized the necessity of balancing the granting of immunity (in the case of international organizations) with



the right of access to courts and the right to an effective remedy in *Waite and Kennedy v. Germany* and *Beer and Regan v. Germany* by underlining that:

“For the Court, a material factor in determining whether granting ESA (the European Space Agency) immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.” (ECHR, *Waite and Kennedy v. Germany* (application No. 26083/94, judgment of 18 February 1999, para. 68); and ECHR, *Beer and Regan v. Germany* (application No. 28934/95, judgment of 18 February 1999, para. 58).)

30. The assessment of whether, in the present case, immunity should have been granted or could have been denied under international law by the Italian courts cannot exclude, in my view, the application of the general principles underlying human rights and humanitarian law and embodying basic rights such as the right to an effective remedy, the right to compensation for damages suffered as a result of breaches of humanitarian law, and the right to protection from denial of justice, which are directly relevant to the particular circumstances of the claims submitted to those courts. Nor can the law of State immunity, as raised by the cases before the Italian courts, be interpreted in a way which conflicts with the realization of those rights in the context of contemporary international law. Even more importantly, recourse should be had to those principles, and to an assessment of the proportionality and legitimacy of purpose of granting immunity, when the rules on State immunity or the exceptions to it are either fragmentary or unsettled, such as in the case of human rights or humanitarian law violations for which appropriate reparations have not been made.

31. Such principles include those proclaimed by the United Nations General Assembly as “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” (resolution 60/147 of 16 December 2005) according to which:

“11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.”

The UN basic principles further provide that:

“12. A victim of a gross violation of international humanitarian law . . . shall have equal access to an effective judicial remedy as provided for under international law.”

32. In explaining the provisions of the General Assembly resolution, the United Nations Special Rapporteur Theo van Boven noted that:

“From the outset the Principles and Guidelines were based on the law of State responsibility . . . It was argued, however, by some Governments that the Articles on State responsibility were drawn up with inter-State relations in mind and would not per se apply to relations between States and individuals. This argument was countered in that it ignored the historic evolution since the Second World War of human rights having become an integral and dynamic part of international law as endorsed by numerous widely ratified international human rights treaties. It was also said to ignore that the duty of affording remedies for governmental misconduct was so widely acknowledged that the right to an effective remedy for violations of human rights and *a fortiori* of gross human rights violations, may be regarded as forming part of customary international law.” (Theo van Boven, *The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, United Nations Audiovisual Library of International Law, pp. 1-2.)

33. Similarly, the Report of the United Nations Commission on Darfur states that:

“at present, whenever a gross breach of human rights is committed which also amounts to an international crime, customary international law not only provides for the criminal liability of the individuals who have committed that breach, but also imposes an obligation on the States of which the perpetrators are nationals, or for which they acted as *de jure* or *de facto* organs, to make reparations (including compensation) for the damage done” (*Report of the International Commission of Enquiry on Darfur*, 25 January 2005, paras. 598-599).

34. Among the three categories of Italian victims of unlawful acts committed by the Nazi régime mentioned in paragraph 52 of the Judgment, the Court highlights in particular the plight of the Italian military internees (IMIs) who were excluded by Germany from eligibility for reparations on the ground that prisoners of war were not entitled to compensation for

forced labour, although they were, as a matter of fact, denied treatment as prisoners of war by the Nazi authorities. Having determined that at least this category of victims had no possibility of receiving compensation from Germany through other mechanisms such as inter-State agreements or the national legislation of Germany, the Court, should have, in my view, conducted an assessment of whether by granting immunity to Germany the Italian courts would have impaired the IMIs' right to reparation, or their access to justice, or their right to an effective remedy for the damages suffered.

35. Immunity is not an immutable value in international law. Its adjustability to the evolution of the international society, and its flexibility, are evidenced by the number of exceptions built gradually into it over the past century, most of which reflect the growing normative weight attached to the protection of the rights of the individual against the State, be that as a private party to commercial transactions with the State or as a victim of tortious acts by State officials. This is not to say that the importance of immunity to the stability of relations among States or to the orderly allocation and exercise of jurisdiction in proceedings concerning States has been weakened. Immunity continues to perform those functions, despite the growing number of exceptions.

36. The granting or denial of immunity by domestic courts, in cases involving claims arising from international crimes where the law of State immunity, and exceptions thereto, is still uncertain or unsettled, requires a contextual assessment not only to ensure the proper characterization of the nature of the claims involved, but also to review the effect that such a decision may have on other normative values to which the international community attaches similar importance. It is indeed widely recognized in the jurisprudence of domestic courts that, before ruling on the existence of immunity as a right of the foreign State, a review of the underlying factors of the case has to be conducted to determine whether or not an exception applies (see, for example, *Conrades v. United Kingdom* (1981), 65 *ILR* 205 (Hanover Labour Court); *Farouk Abdul Aziz v. Yemen* (2005) the Court of Appeal (Civil Division) of England, [2005] *EWCA* civ 745, paras. 61-62; Supreme Court of Canada, *Kuwait Airways Corp. v. Iraq*, 2010 *SCC* 40, [2010] 2 *SCR* 571, para. 33). In this context, the *Cour de cassation* in France declared, in the *Bucheron* case, that:

“whereas the jurisdictional immunity of foreign States, while automatic, is only relative and admits some exceptions; whereas, therefore, the court before which it is invoked must assess its validity in the light of the merits of the case, in order to determine whether or not there is cause to uphold the special motion to dismiss” (No. 02-45961, 16 December 2003, *Bull. civ.*, 2003, No. 258, p. 206).  
[Translation by the Registry.]

37. Thus, the preliminary nature of immunity from jurisdiction does not preclude national courts, in this case the Italian courts, from assessing the context in which the claim has been made to ensure a proper legal characterization of the acts for which immunity is claimed, and where necessary, to balance the different factors underlying the case to determine whether the court has jurisdiction.

38. In the present case, Germany's arguments revolved around the idea that there is no relevant limitation on the immunity to which a State is entitled in respect of *acta jure imperii* in the sense that:

“[n]o general practice, supported by *opinio juris*, exists as to any enlargement of the derogation from the principle of State immunity in respect of violations of humanitarian law committed by military forces during an armed conflict” (Memorial of Germany, para. 55).

According to Germany,

“[t]he practice regarding the settlement of war claims is very consistent. Such claims are generally settled under international treaties in the relationship between the States concerned. Specifically with regard to all the claims resulting from World War II, this traditional course was followed.” (*Ibid.*)

39. Italy, on the other hand, maintained that:

“The ongoing German denial of appropriate and effective reparation to a large number of Italian victims of IHL committed by German authorities during the final part of the Second World War, as recognized and renewed by Germany through the 1961 Agreements as well as subsequent unilateral measures, needed to be addressed.” (Counter-Memorial of Italy, para. 6.15.)

In the view of the Italian side:

“Italian judges, facing such a blatant and long-lasting denial of reparation in violation of all relevant rules of international law, could not simply turn down victims' claims by recognizing the principle of State immunity. Clearly, the judges had the feeling that by applying a purely procedural principle in the face of the gravity of crimes for which no reparation has yet been made, they would create a typical situation of denial of justice. Had Italian courts granted immunity they would have put a full stop to the entire question of reparation to thousands of victims. They would have effectively denied any possibility for these claims to achieve any objective. On the contrary, they had very serious justifications for setting aside the immunity of Germany and verifying whether the claims were substantiated on the merits.” (*Ibid.*, para. 6.16.)

40. The issue of the possible conflict between State immunity and reparations arising from violations of humanitarian law has recently been dealt with in a report and a resolution of the Institut de droit international. In introducing the report, which was titled “The Fundamental Rights of the Person and the Immunity from Jurisdiction of States” to the Naples Session of the Institut in 2009, Lady Fox stated that

“a further difficulty arose as regards State immunity, namely whether it was illogical and possibly morally unjustifiable that an individual official might currently be subject to criminal persecution in national courts but that the State which ordered the acts might be sheltered by immunity from civil proceedings for reparation for the consequences of such crimes” (*Annuaire de l’Institut de droit international, session de Naples*, Vol. 73, p. 110).

41. In its resolution on the report presented by Lady Fox, the Institut considered among other things, “the underlying conflict between immunity from jurisdiction of States and their agents, and claims arising from international crimes” and made two statements which are relevant to the issues in dispute before the Court. First, it is recognized, in a preambular paragraph, that “the removal of immunity from proceedings in national courts is one way by which effective reparation for the commission of international crimes may be achieved”. Secondly, it is stated in paragraph 2, of Article II, on Principles that: “Immunities should not constitute an obstacle to the appropriate reparation to which victims of crimes addressed by this resolution are entitled.” (*Ibid.*, pp. 228-230.)

42. I believe that these statements reflect the current state of international law as regards the relationship between State immunity and claims for reparations arising from unlawful acts committed in the course of an armed conflict, particularly in exceptional circumstances such as those faced by the Italian victims of atrocities committed by the Third Reich during the Second World War where no other means of redress appear to be available. The statements cannot be taken to mean, in my view, that immunity should be set aside whenever claims for reparation of crimes committed by the agents of a foreign State are submitted to domestic courts. They rather indicate the necessity of appropriate and effective reparations to victims of crimes, and that immunity should not be an obstacle to such reparation in those exceptional circumstances where no other means of redress is available. This is a very limited exception to immunity bounded by the special circumstances arising from the lack of other remedial avenues for the victims. The manner in which these considerations could be applied to the present case is discussed in paragraphs 49-54 below.

V. DOMESTIC COURTS, STATE IMMUNITY AND THE RIGHT  
TO REPARATION FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN  
LAW COMMITTED IN THE FORUM STATE

43. The law relating to State immunity has historically evolved through the decisions of domestic courts. It is in such domestic courts that the nature and scope of State immunity has most often been determined and developed over the ages. It is to them that we owe the distinction between *jure gestionis* and *jure imperii* as well as other derogations and exceptions to State immunity. Divergences and conflicts in the interpretation and application of the law to specific circumstances are bound to arise in such a diversified setting. It is not therefore surprising that many aspects of these exceptions and derogations remain unsettled.

44. The decisions of the Italian courts, as well as the *Distomo* decision in Greece, may be viewed as part of a broader evolutionary process, in the context of judicial decisions by domestic courts, which has given rise to a number of exceptions to the jurisdictional immunity of States, such as the tort exception, the employment exception and the intellectual property exception. The question of course may be asked whether any of these exceptions should have been considered as violations of international law when they were first established by one or two national courts, given the unsettled nature of the scope and extent of State immunity in customary international law at the time of the decision.

45. In this connection, it is of particular interest that the Court refers approvingly to the 1961 judgment of the Supreme Court of Austria in *Holubek v. Government of the United States of America* (*ILR*, Vol. 40, 1962, p. 73), which may have been one of the first decisions to recognize the notion of tort exception to State immunity. One could perhaps try to imagine the fate of this important exception, which is now widely applied and has been codified into all the existing conventions on State immunity, had the Austrian judgment been found to be in violation of the law of State immunity by an international judicial body in the mid-sixties. A nascent norm, which has come to reflect a widely held *opinio juris* and State practice, would have been undoubtedly nipped in the bud.

46. As Lord Denning commented with respect to the exception of *acta jure gestionis*: “Whenever a change is made, someone some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood.” (Quoted in *Brohmer, State Immunity and the Violation of Human Rights*, 1997, p. 20, note 85.)

47. Certain rules of international law may remain in a grey zone, and their existence may be debated in legal scholarship, until such time as a court of law — in the case of State immunities, a domestic court of law —

clarifies their status and establishes their legal quality. This has happened many times with respect to the exceptions and derogations to State immunity. It is not indeed through diplomatic exchanges, or through the conclusion of conventions, or even through the pronouncements of international judicial or arbitral bodies that the exceptions and derogations to State immunity have developed. It has most often occurred through single, and sometimes isolated, domestic court decisions, which gradually turned mainstream.

48. Thus, in the area of State immunity it is not to be excluded that such domestic courts may be performing a law-development function, even when their decisions are not yet shared by other jurisdictions or are considered, at first sight, not to conform to what may have hitherto been viewed as State practice. The Court itself appears to recognize the potential of domestic courts for further development of the law of immunity through its references to certain judicial decisions which were the first to formulate some of the derogations and exceptions to State immunity.

49. In his report to the Institut de droit international on "The Activities of National Judges and the International Relations of Their State", Professor Benedetto Conforti stated the following:

"In Articles 4-7 of the draft resolution, the independence of national courts . . . is considered in relation to the various sources of international law. Beginning with customary law, it does not seem that there has ever been any doubt that national courts, when they are called upon to apply a customary rule, are fully independent with respect to its ascertainment. There are, however, at least two aspects of such ascertainment which have a rather problematic nature: one concerns the court's participation in the formation and modification of customary law . . .

As far as the first aspect is concerned, we can say, in keeping with the main trend in domestic case law, that the courts are able to review whether a customary rule corresponds to the exigencies of equity and justice, and if it does not, to refuse to apply it, provided that such course of action has a basis in State practice, even if it is still fragmentary and at a formative stage."

He then added:

"To conclude on this point, we can say that the judge may refuse to apply an international customary norm or consider it wholly or in part modified if he ascertains the existence of an *opinio necessitates* in this sense, and if the extinction of the norm or the formation of a new norm has its basis in an international and/or domestic practice, even if such practice is fragmentary." (Provisional Report, Part 2 — Judicial Independence and the Sources of International Law, pp. 386-387.)

50. Both the rules on State immunity and the entitlement of individuals to reparations following the commission by State agents of international crimes are undergoing transformation. The Institut de droit international recognized as much in its above-mentioned Naples resolution in which reference was made to “the underlying conflict between immunity from jurisdiction of States and their agents and claims arising from international crimes”. Such conflict did not exist in the past. It is of recent origin. It has arisen as a result of a widely held view in the international community (some sort of an *opinio juris necessitates*) according to which State immunity should not be used as a screen to avoid reparations to which victims of crimes are entitled. This is the situation in my view with which the Italian “Corte di Cassazione” was faced in the *Ferrini* case and in subsequent cases.

51. The assertion of jurisdiction by domestic courts for a failure to make reparations for serious breaches of the law of armed conflict admitted by the responsible State, particularly where no other means of redress is available, could not, in my view, harm the independence or the sovereignty of another State. It simply contributes to the crystallization of an emerging exception to State immunity, which is based on the principles underlying human rights and humanitarian law and on the widely-held *opinio juris* of ensuring the realization of those rights, including the right to an effective remedy, in those circumstances where the victims would have no other means of redress.

52. Recognizing that a failure to make reparations for war crimes or crimes against humanity may result in non-immunity before domestic courts, particularly when no other means of redress is available, is not so much about further narrowing the scope of State immunity, but about bringing it in line with the growing normative weight attached by the international community to the protection of human rights and humanitarian law, and the realization of the right to effective remedy for human beings. It could also have a deterrent effect on the non-observance of humanitarian law by States.

53. I am not sure that it is sufficient to state, in the context of the exceptional circumstances surrounding the claims of the Italian victims for reparations, that: “the fact that immunity may bar the exercise of jurisdiction in a particular case does not alter the applicability of the substantive rules of international law” (Judgment, para. 100). A question that may arise, in this context, is whether, if immunity were granted in such a case, the defendant State would be under an obligation to afford an alternative remedy to the victims of the breaches to which it has admitted? This is an important question to which an answer should have been provided in the proceedings or in the Judgment. Moreover, it is doubtful whether a responsibility that does not afford a means of redress or a remedial context within which the claims may be settled can be of much use to such victims.



54. The above arguments do not imply that each time there is a claim for reparation of breaches of international humanitarian law or human rights, the domestic courts of the State where the breaches had been committed, are entitled to set aside the immunity of the State responsible for such breaches. This may result in countless lawsuits that may overwhelm both the judicial system of the State where the claims are made and the governmental machinery of the responsible State. Moreover, in addition to the traditional inter-State or compensation mechanisms of the past mentioned above, new practices have been developed at the international level in recent years, such as the United Nations Compensation Commission for Iraq, instituted by the Security Council by resolution 687 (1991), and the Claims Commission instituted by the Agreement of 12 December 2000 between Ethiopia and Eritrea, to offer the possibility of compensation to victims of breaches of international law.

55. Although the claims of individuals before such commissions must be put forward by States, what matters most is the availability of a remedial context to which such claims for reparations are assigned, and where an effective means of redress can be obtained. It is only where reparations for certain categories of victims, as in the Italian cases, are not covered by inter-State compensation schemes, by other international mechanisms, or by the legislation of the responsible State, and the victims concerned have, so to say, fallen through the cracks of the system, that the courts of the forum are, in my view, entitled to offer an alternative and “ultimate” means of redress, and an effective remedy to the victims of grave breaches of humanitarian law, to avoid a denial of justice. The “underlying conflict” to which reference was made in the Naples resolution of the Institut de droit international should, in such exceptional circumstances, be resolved in favour of the victims of grave breaches of international humanitarian law.

## VI. FINAL OBSERVATIONS

56. The core issue in this dispute was not that in each and every case of an alleged violation of human rights or humanitarian law, immunity should be derogated from, or that there is, generally speaking, a human rights or humanitarian law exception to jurisdictional immunity. The core issue was whether, in those exceptional circumstances where immunity may prevent the victims of international crimes from obtaining an effective remedy or where no other means of redress is available, such immunity should be granted or set aside by domestic courts. In other words, where reparation has not been assigned to another contextual remedy, should immunity be used as a screen to ward off the obligation to make reparations to the victims before domestic courts?

57. I believe that, in such a case, by lifting the bar of immunity in the very limited way suggested above (paras. 49-54 *supra*), humanitarian law would be better enforced and the human rights-based values of the international community as a whole would be better protected.

58. As the principal judicial organ of the United Nations, the Court has an important role to play to provide guidance on rules of international law and to clarify them, particularly where the law is uncertain or unsettled. It had a unique opportunity to do so in this case. It could have clarified the law in the sense in which it is already evolving of a limited and workable exception to jurisdictional immunity in those circumstances where the victims have no other means of redress. Such an exception would bring immunity in line with the growing normative weight attached by the international community to the protection of human rights and humanitarian law, and the realization of the right to effective remedy for victims of international crimes, without unjustifiably indenting the jurisdictional immunity of States.

59. The assertion of jurisdiction by domestic courts in those exceptional circumstances where there is a failure to make reparations, and where the responsible State has admitted to the commission of serious violations of humanitarian law, without providing a contextual remedy for the victims, does not, in my view, upset the harmonious relations between States, but contributes to a better observance of international human rights and humanitarian law.

(Signed) Abdulqawi A. YUSUF.

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