DISSENTING OPINION OF JUDGE CANÇADO TRINDADE

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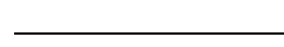

I. *Prolegomena*

1. I regret not to be able to follow the Court's majority in the decision which the Court has just adopted in the present Order, in the case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy)* (original claim and counter-claim). I care to leave on the records the foundations of my dissenting position, in view of the considerable importance that I attach to the issues raised by both Italy and Germany in the *cas d'espèce*, bearing in mind not only the settlement of the dispute at issue (in respect of the counter-claim), but also the need to clarify a matter (in order to say what the law is — *juris dictio*) which I regard as of the utmost importance for the present state as well as the progressive development of the law of nations (the *jus gentium*). I thus present with care the foundations of my dissenting position on the matter dealt with by the Court in the Order which it has just adopted, out of respect for, and zeal in, the exercise of the international judicial function, guided above all by the ultimate goal of the *realization of justice*.

2. To that effect, I shall dwell on all the aspects concerning the issue brought before the Court which form the object of the present Order of the Court. My first line of consideration concerns the emergence and *rationale* of counter-claims in international legal procedure, including their prerequisites, other characteristics and effects. I shall next turn to the question of the admissibility of counter-claims in the case law of the International Court of Justice (ICJ), and the question of the *admissibility* of the Italian counter-claim in the present case. After examining, in sequence, the *factual complex* of the present case and the arguments submitted by Germany and Italy, I shall turn to my following line of consideration concerning the notion of a "continuing situation": its origins in international legal doctrine, its configuration in international litigation and case law (in public international law and in international law of human rights), as well as in international legal conceptualization at normative level.

3. The way will thus be paved for a consideration of that notion in the present case, as well as of the scope of the present dispute lodged with the Court. Next, I shall turn to my remaining line of considerations, on the following points: *(a)* the true bearers *(titulaires)* of the originally violated rights and the pitfalls of State voluntarism (the identification of the "real cause" of the present dispute, the inconsistencies of State practice, and the need to avoid paying lip service to State voluntarism); *(b)* the incidence of *jus cogens*: waiver of vindication of rights inherent to the human person being devoid of juridical effects. I shall consider this last point in the light of both conventional international law (international

humanitarian law, international labour Conventions, and the international law of human rights) and general international law, and assess the incidence of *jus cogens* in the light of the submissions of the contending Parties. The way will then be paved, last but not least, for the presentation of my conclusions.

II. The Emergence of Counter-Claims in International Legal Procedure

4. Counter-claims are a juridical institute historically transposed from domestic procedural law into international procedural law. Another example of a transposition of the kind is afforded by provisional measures of protection[1]. But unlike these latter, counter-claims have not received sufficient attention from expert writing to date. Although counter-claims were never set forth in the Statute of The Hague Court (PCIJ and ICJ), they were promptly provided for in the first Rules of Court (of 1922, of the old Permanent Court of International Justice [PCIJ], Article 40), and remained unchanged in the revised Rules of 1926 and 1931.

5. In the early days of the PCIJ, the institute of counter-claims appeared to be surrounded by hesitations and uncertainties[2], which began to dissipate gradually with the Court's practice on the matter. In the *Factory at Chorzów* (Germany *v.* Poland) case (1928), for example, the PCIJ had the occasion to pronounce such counter-claims, stressing their need to be "juridically connected" (*P.C.I.J., Series A, No. 17*, p. 38) to the original claim. In the years that followed, the Hague Court showed increasing preparedness to dwell further on the matter.

6. The next revised Rules of Court, of 1936, looked in fact more closely at counter-claims, which became regulated by the new Article 63. Emphasis was put on the requisites that a counter-claim was to fall under the jurisdiction of the PCIJ, and was to be presented in the Counter-Memorial, guarding a "direct connection" with the subject of the original claim. Such early developments were regarded as having been influenced, e.g., by an article by Judge Dionisio Anzilotti, of the PCIJ, on *"La riconvenzione nella procedura internazionale"*,

[1] As I pointed out in my dissenting opinion in the case concerning *Questions relating to the Obligation to Prosecute or to Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, pp. 165-200.

[2] Cf., e.g., the account by G. Guyomar, *Commentaire du Règlement de la Cour Internationale de Justice — Interprétation et pratique*, Paris, Pedone, 1973, pp. 372-377.

published in the late 1920s[3]. In 1930 he republished it in French (one of the two official languages of the Court), shedding some light into the *rationale* of counter-claims (cf. *infra*).

7. The next steps were taken by the International Court of Justice (ICJ), which slightly amended the phrasing of Article 63 of the Rules of Court in 1946, and, four years later, pronounced on the matter in the (right of) *Asylum* case *(Colombia/Peru)*, drawing attention to the requirement of "connexité directe" (*Judgment, I.C.J. Reports 1950*, pp. 279-280) between the counter-claim and the original claim (cf. *infra*). In the 1978 revised Rules of Court, the provision on counter-claims was renumbered as Article 80, under "Proceedings in Contentious Cases — Incidental Proceedings"[4].

8. That provision, as amended on 5 December 2000, and in force as from 1 February 2001, reads today as follows:

> "1. The Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party.
> 2. A counter-claim shall be made in the Counter-Memorial and shall appear as part of the submissions contained therein. The right of the other party to present its views in writing on the counter-claim, in an additional pleading, shall be preserved, irrespective of any decision of the Court, in accordance with Article 45 (2) of these Rules, concerning the filing of further written pleadings.
>
> 3. Where an objection is raised concerning the application of paragraph 1 or whenever the Court deems necessary, the Court shall take its decision thereon after hearing the parties."

9. Both in its present (2000) version and in its prior (1978) drafting, the ICJ had the occasion to apply Article 80 in a few cases (cf. *infra*), notably in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, Order of 17 December 1997, in the case of the *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, Order of 10 March 1998, in the case of the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, Order of 30 June

[3] Originally in *Scritti della Facoltà Giuridica di Roma in Onore di A. Salandra* (1928), pp. 341 *et seq.*, and in *Rivista di Diritto Internazionale*, 1929, Vol. 21, pp. 309 *et seq.*

[4] Part III, section D; and no longer presented solely in "Incidental Proceedings" instituted only by unilateral applications.

1999, and in the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Order of 29 November 2001. And the ICJ has now, one decade later, another occasion to apply Article 80 (on counter-claims) of its Rules, in the current and pending case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy)*.

III. The *Rationale* of Counter-Claims in International Legal Procedure

10. Yet, well before this jurisprudential construction or development, the *rationale* of counter-claims was gradually identified and clarified by international legal doctrine. Thus, in his aforementioned article, D. Anzilotti pondered that

> "(. . .) once the system of unilateral application had been accepted, which allows the Applicant to establish the limits of the dispute as it sees fit, it was only natural that the Respondent be given the means to claim, in the same proceedings, that which is owed to it by the Applicant for a reason related to the dispute already pending"[5]. *[Translation by the Registry.]*

11. Underlying this outlook was the concern to ensure that the contending parties shared identity in the process. As pointed out by Raoul Genet still in the 1930s, "the Respondent in the initiated proceedings becomes the Applicant": *reus in excipiendo fit actor*, "the original Applicant falls back into the role of counter-claim Respondent". A new front of litigation is opened before the same jurisdiction, "but the parties remain precisely the same". These latter conduct an enlarged debate before the same tribunal, which is to settle the dispute opposing the same adversaries "on what is virtually one and the same issue"[6]. And R. Genet considered that it was particularly necessary

> "that the counter-claim should be in the nature of an act having serious intent, that is to say, (1) that it serve as a defence against the principal action; (2) that its purpose is to neutralize either the claim itself or the legal grounds on which the claim is based. These two features are also reflected in the concerns of the Court."[7] *[Translations by the Registry.]*

[5] D. Anzilotti, "La demande reconventionnelle en procédure internationale", 57 *Journal du droit international* — Clunet (1930), p. 870.

[6] R. Genet, "Les demandes reconventionnelles et la procédure de la Cour Permanente de Justice Internationale", 19 *Revue de droit international et de législation comparée* (1938), p. 148.

[7] *Ibid.*, p. 175.

1. Prerequisites

12. Once the *raison d'être* of the counter-claim was identified, attention was turned to its prerequisites and other characteristics. As to the former, it was beyond doubt that the first requirement had to do with jurisdiction itself: the counter-claim had to come within the jurisdiction of the Court concerned. And, secondly, there was the requirement of direct connection, both in fact and in law: the counter-claim had to be directly connected with the original claim of the contending party.

13. In an article published in 1975, Adolfo Miaja de la Muela observed that the counter-claim was based upon "constitutive facts" somewhat distinct from those alleged by the complainant, almost always not raised by this latter; yet, there was "the degree of connection" between them required by the procedural system at issue. The counter-claim was endowed with autonomy, though related to the original claim. Although the qualification of the "connection" should be direct, it could not be undertaken, he warned, on the basis of "aprioristic criteria"[8].

14. The Court should thus examine the circumstances of the *cas d'espèce*, and the final qualification was at the discretion of the Court. The "direct connection" between the original claim and the counter-claim was thus to be assessed, both in fact and in law, with the needed flexibility, in the light of the circumstances of each case. This requisite did not appear as one of mechanical application[9]. Counter-claims, going much further than defences, aimed at establishing — just like the original claims and in the same process — State responsibility.

2. Other Characteristics and Effects

15. In addition to the aforementioned prerequisites, international legal doctrine was soon to identify also certain characteristics and effects of counter-claims. The counter-claim in a way *enlarged* the object of the contentious case at issue, lodged with the Court by the original claim. It thus widened the overview of the Court, as to both claims (the original and the counter-claim), enabling it to decide them more consistently. The counter-claim came thus to be regarded as a means of achieving more consistency in the Court's decision.

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[8] A. Miaja de la Muela, "La Reconvención ante el Tribunal Internacional de Justicia", 8 *Boletín Mexicano de Derecho Comparado* (1975), No. 24, p. 757, and cf., pp. 751-753 and 760.

[9] As early as in 1930, for his part, D. Anzilotti pointed out, in relation to the admissibility of counter-claims, that "the jurisdiction of the Court is one condition for admissibility, but other conditions are undoubtedly necessary and . . . must be established through interpretation" *[translation by the Registry]*, D. Anzilotti, *op. cit. supra* note 5, p. 868.

16. The counter-claim — in the observation of Charles de Visscher in the mid-1960s — enabled the Court to "rule on the reciprocal claims in the course of the same proceedings, affording the Court an overview of the parties' respective legal positions"[10] *[translation by the Registry]*. This is what happened, *inter alia*, as early as in the case of *Diversion of Water from the Meuse* (the Netherlands *v.* Belgium, 1937), wherein the PCIJ applied the requisite of the "direct connection" (cf. *supra*) between the original claim and the counter-claim. In the perception of Raoul Genet in the mid-1930s, "counter-claims (. . .) are by their very nature aimed at neutralizing the principal action and (. . .) imply that the Respondent has an equivalent and counter entitlement to that which the Applicant may invoke"[11] *[translation by the Registry]*.

17. Directly connected as they are, each of them maintains its identity. The counter-claim has an autonomous nature, as opposed to defences. The ICJ itself differentiated a counter-claim from a defence, in the *United States Diplomatic and Consular Staff in Tehran* (Hostages) case *(United States of America* v. *Iran), Order of 15 December 1979, I.C.J. Reports 1979*, p. 15, para. 24). Rather than a defence, a counter-claim appears as a counter-attack. The counter-claim is independent from the original claim (though directly connected with it), it has an autonomous character. In S. Rosenne's view, while it is true that the counter-claim, by means of the "direct connection" with the original claim, has to rely on arguments related to the *factual complex*, it is also certain that "the counter-claim is a purely self-standing institution following its own logic, its own procedure, and its own rules"[12].

18. This led to yet another characteristic of counter-claims, namely, they constitute a means of achieving essentially procedural economy, in enabling the Court to have "an overview of the respective claims" of the contending parties, and thereby to decide them "more consistently"[13]. In this respect, once again D. Anzilotti anticipated, with foresight, in the early stage of operation of the PCIJ, that: "The principle of the autonamy

[10] Ch. de Visscher, *Aspects récents du droit procédural de la Cour Internationale de Justice*, Paris, Pedone, 1966, p. 114. In the same line of thinking, the Report of Georges Scelle for the [ILC's] Model Rules on Arbitral Procedure (adopted in 1958) stated that the counter-claim "emanates from the party against which the principal claim is directed and seeks to obtain *more than* the straightforward rejection of the Applicant's submissions" *[translation by the Registry]* (UN doc. A/CN.4/18, note 78), in: Union Académique Internationale, *Dictionnaire de la terminologie du droit international*, Paris, Sirey, 1960, p. 199. The ILC's Model Rules on Arbitral Procedure are also mentioned, in connection specifically with counter-claims, in: J. Salmon (dir.), *Dictionnaire de droit international public*, Brussels, Bruylant, 2001, p. 316.

[11] R. Genet, *op. cit. supra* note 6, p. 155, and cf. p. 165.

[12] S. Rosenne, "Counter-Claims in the International Court of Justice Revisited", in *Liber Amicorum 'In Memoriam' of Judge J. M. Ruda* (C. A. Armas Barea, J. A. Barberis *et al.* (eds.)), The Hague, Kluwer, 2000, p. 476.

[13] Cf. *ibid.*, p. 470.

of the counter-claim also entails a requirement that the principal Applicant have the same advantages in respect of the counter-claim as enjoyed by the Respondent in respect of the principal claim." [14] *[Translation by the Registry.]*

19. Having considered the *rationale* of counter-claims in international legal procedure, and having identified its characteristics and effects, the way is now paved for me to move on the consideration of their admissibility in the case law of the ICJ. Before doing so, I allow myself to sum up what I have examined so far. If I were to single out the major concern of jurists of the past with the juridical institute of counter-claims in international legal procedure, I would surely elect the underlying and most commendable preoccupation to secure the *realization of justice* at international level.

IV. The Question of the Admissibility of Counter-Claims in the Case Law of the ICJ

20. Turning now to the issue of the admissibility of counter-claims in the case law of the ICJ, I shall concentrate on the Court's decisions under Article 80 of its Rules, both under its 1978 version and under its revised 2000 version (in force as from 2001). Four Orders of the Court had been issued thereunder, before the Court's present Order in the pending case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy)*.

In the first of those four Orders (and probably the most elaborate one), in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, Order of 17 December 1997, the ICJ began by conceptualizing the counter-claim.

21. In the Court's view, a counter-claim has a "dual character" in relation to the original claim; it is both "independent of the principal claim", it is "an autonomous legal act", while, at the same time, it is "linked" to the original claim. The "thrust" of a counter-claim is thus "to widen the original subject-matter of the dispute by pursuing objectives other than the mere dismissal of the claim of the Applicant in the main proceedings". Filed against the Applicant, the counter-claim is thus "distinguishable from a defence on the merits" (*I.C.J. Reports 1997*, p. 256, para. 27). Moving on to the criteria of admissibility, the Court added:

> "Whereas, (. . .) a claim should normally be made before the Court by means of an application instituting proceedings; whereas, although it is permitted for certain types of claim to be set out as incidental proceedings, that is to say, within the context of a case

[14] D. Anzilotti, *op. cit. supra* note 5, p. 876.

which is already in progress, this is merely in order to ensure better administration of justice, given the specific nature of the claims in question; whereas, as far as counter-claims are concerned, the idea is essentially to achieve a procedural economy whilst enabling the Court to have an overview of the respective claims of the parties and to decide them more consistently; and whereas the admissibility of the counter-claims must necessarily relate to the aims thus pursued and be subject to conditions designed to prevent abuse;

Whereas the Respondent cannot use a counter-claim as a means of referring to an international court claims which exceed the limits of its jurisdiction as recognized by the parties; and whereas the Respondent cannot use that means either to impose on the Applicant any claim it chooses, at the risk of infringing the Applicant's rights and of compromising the proper administration of justice; and whereas it is for that reason that paragraph 1 of Article 80 of the Rules of Court requires that the counter-claim 'comes within the jurisdiction of the Court' and 'that it is directly connected with the subject-matter of the claim of the other party'; (. . .)

Whereas the Rules of Court do not define what is meant by 'directly connected'; whereas it is for the Court, in its sole discretion, to assess whether the counter-claim is sufficiently connected to the principal claim, taking account of the particular aspects of each case; and whereas, as a general rule, the degree of connection between the claims must be assessed both in fact and in law" (*I.C.J. Reports 1997*, pp. 257-258, paras. 30-31 and 33).

22. Thus, it was clarified by the Court, in its aforementioned Order in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (1997), that, pursuant to its own analytical framework, in order to rule on the admissibility of a counter-claim, it was incumbent upon it, first of all, to determine whether the submissions presented by the Respondent State constituted a true counter-claim; in the affirmative, the Court was to ascertain whether the counter-claim fell under its own jurisdiction, already established for the adjudication of the contentious case at issue. And, in the affirmative, the Court was further to ascertain whether the counter-claim was "directly connected" with the subject-matter of the original claim, submitted by the Applicant State. The Court was to proceed to this assessment in the exercise of its own discretion, as a general rule on the basis of "fact and law"; in order to determine whether the claims are directly connected in fact and law.

23. In its following Order concerning counter-claims (of 10 March 1998), in the case concerning *Oil Platforms (Iran* v. *United States of America)*, the Court saw it fit to dwell upon the exercise of determining whether the counter-claim was "directly connected" with the original claim, since the Rules of Court did not define what was meant by that

requirement (*I.C.J. Reports 1998*, pp. 196-197, para. 13). In order to determine whether the counter-claim was "directly connected", on the basis of fact and law, with the subject-matter of the original claim, the Court was to ascertain, first, whether the claim and the counter-claim rested on "facts of the same nature", i.e., whether they formed part of "the same factual complex" (*ibid.*, pp. 204-205, para. 37); and, secondly, whether the claim and counter-claim pursued "the same legal aim", namely, the establishment of legal responsibility (*ibid.*, p. 205, para. 38).

24. The ICJ added that a decision on the admissibility of a counter-claim, under Article 80 of the Rules of Court, "in no way prejudges any question which the Court will be called upon to hear during the remainder of the proceedings" (*ibid.*, p. 205, para. 41), a point which, by the way, also applies to provisional measures of protection. In that case, the ICJ concluded, as to the admissibility of the counter-claim, that the contending parties' submissions rested on "facts of the same nature", and formed "part of the same factual complex" (*ibid.*, p. 205, para. 38).

25. Over a year later, in the case of the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, Order of 30 June 1999, the ICJ again found that the counter-claims of Nigeria met the requirement of jurisdiction set out in Article 80 of the Rules of Court, as they rested on "facts of the same nature" as those in the corresponding claims of Cameroon, and both parties pursued "the same legal aim, namely the establishment of legal responsibility and the determination of the reparation due on this account". The counter-claims were thus "directly connected" with the subject-matter of the claims of the other party, and were therefore found admissible (*I.C.J. Reports 1999 (II)*, pp. 985-986) by the Court.

26. Subsequently, in its Order (of 29 November 2001) in the case of the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, the ICJ, stressing the requirement of "direct connection" (cf. *supra*) as a condition of admissibility of a counter-claim (*I.C.J. Reports 2001*, p. 678, paras. 35-36), decided that the first two of Uganda's counter-claims (but not the third one) and the respective original claims of Congo related to "facts of the same nature" and concerned "a conflict in existence between the two neighbouring States" since 1994, and were thus "directly connected", pursuing "the same legal aims", being thus admissible (*ibid.*, pp. 678-681, paras. 38-45)[15]. The Court pondered, in support of its decision of admissibility, that, in view of the circumstances of the case, "the sound administration of justice and the interests of procedural economy call for the simultane-

[15] Which was not the case with Uganda's third counter-claim.

ous consideration of those counter-claims and the principal claims" (*I.C.J. Reports 2001*, p. 680, para. 44).

27. Thus, in those four precedents of the Court's present Order in the pending case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy)*, the Court found in favour of the admissibility of the counter-claims, as above reported, and without prejudice to the subsequent decisions on the merits of the respective cases. While in the present case, Germany has challenged the jurisdiction of the ICJ over Italy's counter-claim, in the four preceding cases concerning counter-claims, the Court's jurisdiction had either not been contested by the Applicant States, or else the Court had had the opportunity to establish its own jurisdiction in an incidental phase, previous to the filing of the counter-claims[16]. In any case, their significance as precedents cannot be separated from their procedural history.

V. The Question of the Admissibility of the Counter-Claim in the Present Case

28. Such history shows that the Court's practice in relation to counter-claims is still in the making. The decision that the Court has just taken in the present case in no way contributes to the evolution of its own case law on the subject. It is, quite on the contrary, an *involution*, a step back-

[16] May it be recalled, first, that the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* was lodged with the ICJ in 1993, jurisdiction having been based on a compromissory clause (Article IX of the Convention against Genocide). There were two requests for provisional measures. The first set of provisional measures proceedings which took place in 1993 culminated in an Order (of 8 April 1993) whereby the Court indicated three sets of measures, later confirmed by another Order (of 13 September 1993). In its Judgment of 1996 in the preliminary objections phase, the ICJ confirmed its previous finding on jurisdiction and rejected Yugoslavia's objections (the Court decided that it had jurisdiction to adjudicate upon the dispute on the basis of Article IX of the Genocide Convention).

Yugoslavia included counter-claims in its Counter-Memorial, and Bosnia and Herzegovina did not challenge the Court's jurisdiction over the counter-claims; it only challenged the connection with the subject-matter of the initial proceedings. Bosnia and Herzegovina argued that the counter-claim at issue should not be joined to the principal claim; it suggested that Yugoslavia could always submit to the ICJ an Application instituting proceedings through the normal channels. By an Order of 17 December 1997, the ICJ found that Yugoslavia's counter-claims were "directly connected" with the subject-matter of the Applicant's claims and were thus admissible (para. 37). But later on Yugoslavia, in 2001, withdrew the counter-claims submitted in its Counter-Memorial, and informed the Court that it intended to submit an Application for revision of the Judgment of 11 July 1996. It did so later on, on 24 April 2001, when it requested the Court to revise the Judgment on Preliminary Objections delivered on 11 July 1996. By an Order of

wards, as it surrounds the handling of counter-claims with greater uncertainties. In my understanding, the Court should have decided for the *admissibility* of Italy's counter-claim in the present Order, and should have left for its subsequent decision on merits the determination as to whether the counter-claim was well-founded or not, as it did in a couple of precedents[17] of the present Order.

29. This feature of the previous practice of the Court in the handling of counter-claims had been favourably acknowledged in expert-writing, for having thereby treated the counter-claims together with the main claims, duly enlarging the object of the dispute and enabling the ICJ to have a better knowledge of the dispute it had been called upon to adjudicate[18]. Without Italy's counter-claim of reparations for damages arising from war crimes, the Court will now have a much narrower horizon

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10 September 2001, the Court's President placed on record the withdrawal by Yugoslavia of the counter-claims submitted in its Counter-Memorial.

Secondly, in the *Oil Platforms* case *(Iran* v. *United States of America)*, the United States raised a preliminary objection to the jurisdiction of the Court pursuant to Article 79 (1) of the Rules of Court. In a Judgment of 12 December 1996, the ICJ dismissed the preliminary objection and found that it had jurisdiction to entertain the main claim interposed by Iran. The United States filed its Counter-Memorial, which included a counter-claim, challenged by Iran for allegedly failing to meet the requirements (of jurisdiction and of direct connection) set out by Article 80 of the Rules of Court. By an Order of 10 March 1998, the ICJ found that it had jurisdiction to entertain the counter-claim; the procedural difference with the present case was that, in the *Oil Platforms* case, the ICJ had already stated its jurisdiction with regard to the subject which became later an issue of a counter-claim. Yet, in the present and pending case of *Jurisdictional Immunities of the State (Germany* v. *Italy)*, the Court's jurisdiction had not been formally established.

The Court had established its jurisdiction in a Judgment rendered on 12 December 1996 (para. 55 (2)), and the parties raised certain questions as to the precise significance or scope of that Judgment. In its Judgment on the merits of 6 November 2003, the ICJ was faced with new objections by Iran to its jurisdiction to entertain the counter-claim (or to its admissibility) at the merits phase of the case; such objections were different from those addressed by the Court's Order of 10 March 1998. The Court pointed out that, in its previous Order of 10 March 1998, it did "not address any other question relating to jurisdiction and admissibility, not directly linked to Article 80 of the Rules" (para. 105 of the Judgment). At last, the Court found, at that stage, that the counter-claims of the United States could not be upheld.

And thirdly, in the case of the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* (2001), Congo did not deny that Uganda's claims fulfilled the "jurisdictional" requirement of Article 80 (1) of the Rules of Court, and the ICJ referred mainly to the "direct connection" between the original claims and the counter-claims (cf. *supra*).

[17] E.g., those concerning the case of the *Oil Platforms* (1998) and the case of the *Land and Maritime Boundary between Cameroon and Nigeria* (1999), *supra*.

[18] S. Torres Bernárdez, "La modification des articles du Règlement de la Cour Internationale de Justice relatifs aux exceptions préliminaires et aux demandes reconventionnelles", 49 *Annuaire français de droit international* (2003), pp. 229, 233-234, 241 and 247.

to pronounce on Germany's (original) claim of State immunity. The present decision of the Court made *tabula rasa* of its own previous reasonings, and of 70 years of the more enlightened legal doctrine on the matter, to the effect that counter-claims do assist in achieving the sound administration of justice *(la bonne administration de la justice)* and in securing the needed equilibrium between the procedural rights of the contending parties.

30. In any case, as the Court's majority decided summarily to discard the counter-claim as "inadmissible as such" — with my firm dissent — it should at least have instructed itself properly by holding, first, public hearings to obtain further clarifications from the contending Parties. It should not have taken the present decision without first having heard the contending Parties in a public sitting, for five reasons, namely: *(a)* first, as a basic requirement ensuing from the principle of international procedural law, of the sound administration of justice *(la bonne administration de la justice)*; *(b)* secondly, because counter-claims are ontologically endowed with *autonomy*, and ought to be treated on the same footing as the original claims, that they intend to neutralize *(supra)*; *(c)* thirdly, claims and counter-claims, "directly connected" as they ought to be, require a strict observance of the *principe du contradictoire* in their handling altogether[19]; *(d)* fourthly, only with the faithful observance of the *principe du contradictoire* can the *procedural equality* of the parties (Applicant and Respondent, rendered Respondent and Applicant by the counter-claim) be secured; and fifthly, and *(e)* last but not least, the issues raised by the original claim and the counter-claim before the Court are far too important — for the settlement of the case as well as for the present and the future of international law — to have been dealt with by the Court in the way it did, summarily rejecting the counter-claim.

VI. THE *FACTUAL COMPLEX* OF THE PRESENT CASE AND THE ARGUMENTS OF THE CONTENDING PARTIES

31. Turning now to the consideration of the *factual complex* of the present case concerning *Jurisdictional Immunities of the State*, opposing Italy to Germany in so far as the counter-claim submitted to the Court is concerned, I shall at first consider and assess the 2008 Joint Declaration of Italy and Germany. Secondly, I shall review the arguments of the contending Parties on the counter-claim, focusing on: *(a)* the scope of the

[19] Cf. F. Salerno, "La demande reconventionnelle dans la procédure de la Cour Internationale de Justice", 103 *Revue générale de droit international public* (1999), pp. 371-374.

dispute; *(b)* the substance of the dispute; and *(c)* the debate of the contending Parties on the notion of "continuing situation".

1. The 2008 Joint Declaration of Italy and Germany

32. On 18 November 2008, Italy and Germany adopted a significant Joint Declaration at the memorial site *"La Risiera di San Sabba"* close to Trieste, included in the documentary Annexes of both contending Parties filed with this Court[20]. In that

> "Italy and Germany share the ideals of reconciliation, solidarity and integration, which form the basis of the European construction that both countries have contributed to with conviction, will continue to contribute to and drive forward.
>
> In this spirit of co-operation they also jointly address the painful experiences of the Second World War; together with Italy, Germany fully acknowledges the untold suffering inflicted on Italian men and women in particular during massacres and on former Italian military internees, and keeps alive the memory of these terrible events.
>
> With this in mind, Deputy Chancellor and Federal Minister for Foreign Affairs Frank-Walter Steinmeier, accompanied by Foreign Minister Franco Frattini, visited the Risiera di San Sabba in what can be considered a gesture of great moral and humanitarian value to pay tribute to the Italian military internees who were kept in this transit camp before being deported to Germany, as well as to all the victims for whom this place stands.
>
> Italy respects Germany's decision to apply to the International Court of Justice for a ruling on the principle of State immunity. Italy, like Germany, is a State Party to the European Convention of 1957 for the Peaceful Settlement of Disputes and considers international law to be a guiding principle for its actions. Italy is thus of the view that the ICJ's ruling on State immunity will help to clarify this complex issue".

33. Italy and Germany have seen it fit, very significantly, to issue this Joint Declaration of 18 November 2008, near Trieste, to which I attach much importance. It is highly commendable of Germany and Italy to have honoured the memory of some of the victims, subjected to deportation and forced labour, in the Second World War. The past lies within us in the present, and we can hardly face the future if we overlook it. It is

[20] Annexes to the Memorial of the Federal Republic of Germany, Vol. I, of 12 June 2009, Annex 2; and Annexes to the Counter-Memorial of Italy, of 22 December 2009, Annex I.

hardly surprising that, in the history of human thinking, to live within the *passing of time* has, for centuries, proven to be one of the greatest enigmas of human existence (as acknowledged in the writings, e.g., of Plato, Aristotle, Augustine, Seneca, B. Pascal, I. Kant, H. Bergson, P. Ricoeur, among others).

34. The triggering point of the present case opposing the two contending Parties lies in the two 1961 Agreements between Germany and Italy (respectively, the Agreement on the Settlement of Certain Property-Related, Economic and Financial Questions, and the Agreement on Indemnity in Favour of Italian Nationals Affected by National-Socialist Measures of Persecution). This point should not be taken as a blindfold, so as to prevent or avoid the Court looking into the past, into one of the darkest periods in contemporary history. Not at all. The past is ineluctably within each one of us. By their Joint Declaration of 18 November 2008, Italy and Germany have clearly demonstrated that they both remain prepared to look into the past, and to honour the memory of those victimized by human cruelty, by the horrors of the Third Reich. From much less than a Joint Declaration of the kind, legal consequences have been extracted, that States have felt themselves bound to bear[21]. Facing the past renders the present understandable and bearable, and the future viable, if not promising.

35. The weight of grave injustice does not dissipate nor lighten with the passing of time; instead, it becomes heavier and more unbearable. To live well within time, one has to reckon, and abide by, the imperatives of justice. Great injustices, atrocities, grave violations of human rights and international humanitarian law, do not fade away. They can hardly be forgotten. Even if one meets with forgiveness, this latter is not a synonym of forgetfulness[22]. However overlooked it has been by historians to date, forced labour in the Second World War[23] is alive not only in the memory of the surviving victims in our days, but also in collective or inter-

[21] Such is the case of certain unilateral acts of States in international law; cf., e.g., Erik Suy, *Les actes juridiques unilatéraux en droit international public*, Paris, LGDJ, 1962, p. 44, and cf. pp. 1-290; G. Venturini, "La portée et les effets juridiques des attitudes et des actes unilatéraux des Etats", 112 *Recueil des cours de l'Académie de droit international de La Haye* (1964), pp. 387-388, 391 and 400-401; A. Miaja de la Muela, "Los Actos Unilaterales en las Relaciones Internationales", 20 *Revista Española de Derecho Internacional* (1967), pp. 456-459.

[22] On this specific point, cf. A. A. Cançado Trindade, "Responsabilidad, Perdón y Justicia como Manifestaciones de la Conciencia Jurídica Universal", 8 *Revista de Estudios Socio-Jurídicos*, Universidad del Rosario de Bogotá (2006), pp. 15-36.

[23] Cf., generally, as to the Second World War, e.g., W. Gruner, *Jewish Forced Labour under the Nazis*, Cambridge University Press, 2008, pp. 3-295; C. R. Browning, *Politique nazie, travailleurs juifs, bourreaux allemands*, Paris, Ed. Tallandier, 2009, pp. 11-267. And cf. generally, as to the First World War, e.g., F. Passelecq, *Déportation et travail forcé des ouvriers et de la population civile de la Belgique occupée (1916-1918)*, Paris/New Haven, P.U.F./Yale University Press, 1928, pp. 1-404; [Various Authors], *Captivity, Forced*

generational human memory, in human conscience, and the present case before this World Court bears witness of that.

2. *The Parties' Arguments on the Counter-Claim*

(a) *The scope of the dispute*

36. It is beyond the purposes of the present dissenting opinion to examine all the arguments of the contending Parties on the *cas d'espèce,* as developed by them in the Memorial and Counter-Memorial. Instead, at the present stage of consideration of the present case, I shall concentrate the examination that follows on the Parties' arguments specifically devoted to the counter-claim, which forms the object of the present Order of the Court. Yet, a brief preliminary remark is called for, concerning the distinct understanding of the contending Parties as to the "real scope" of their dispute.

37. In fact, Germany attributes to it a narrower, and Italy a broader, scope. Germany describes the dispute, in its Memorial, as one relating to a judgment rendered (on 11 March 2004) by Italy's *Corte di Cassazione* in the case *Ferrini* v. *Federal Republic of Germany*, whereby that Italian Court allegedly breached violating its rights by denying it immunity in proceedings instituted by Italian citizens who had been subjected to forced labour in the armaments industries on German territory from 1943 to 1945. While Germany recognizes that the Third Reich's action towards the so-called "military internees"[24] was unlawful and criminal, it is of the opinion that such past atrocities do not justify the breach of the immunity that States enjoy under general international law.

38. To that, Germany adds that war reparations are to be agreed upon on the international level, and, more precisely, on an "inter-State level"[25], as they have in fact been, through three international agreements, namely: *(a)* the Peace Agreement that Italy celebrated with the Allied Powers in 1947; *(b)* the 1961 Treaty on the Settlement of Certain Property-Related, Economic and Financial Questions between Germany and Italy; and *(c)* the 1961 Treaty on Indemnity in Favour of Italian Nationals Subjected

Labour and Forced Migration in Europe during the First World War (M. Stibbe, ed.), London/N.Y., Routledge, 2009, pp. 1-81.

[24] As Germany points out, there are actually three categories of claimants, namely: *(a)* civilians abducted in Italy and taken to Germany to perform forced labour; *(b)* prisoners of war of Italian nationality who were factually deprived of their status under the Hague Conventions and then subjected to forced labour (the "military internees", whom the Parties frequently refer to); and *(c)* victims of massacres perpetrated by German officials. Cf. Memorial of the Federal Republic of Germany, of 12 June 2009, pp. 12-13, para. 13.

[25] Cf. *ibid*., pp. 9-12, paras. 10-12.

to National-Socialist Measures of Prosecution, also between Germany and Italy. Accordingly, in Germany's view, the scope of the present dispute is limited to the aforementioned denial of its immunity.

39. On its part, Italy invites the ICJ to identify the "real cause of the dispute" not in the judgment of its *Corte di Cassazione* in the *Ferrini* case (2004), but rather in "the issue of reparation owed by Germany to the Italian victims of the crimes committed by Nazi authorities"[26]. Italy contends that Germany has failed to provide Italian "military internees" with the appropriate compensation, by *inter alia* excluding them from reparation schemes established under German law[27] (cf. *infra*). Accordingly, Italy submits that for the purposes of determining the "real cause of the dispute", its courts' decisions with regard to the issue of the immunity of the German State "have to be regarded as being a consequence of the legal and factual situation created by Germany's refusal to compensate Italian victims"[28]. It is on the basis of this broader view of the scope of the present dispute that Italy introduced a counter-claim.

40. As to the "direct connection" requirement for the interposition of counter-claims (cf. *supra*), Italy advances the view that there is a manifest connection between the facts and the law that it referred to, to the effect of responding to Germany's claim, and the facts and the law that substantiate the present counter-claim. Italy argues that "a State responsible for violations of fundamental rules is not entitled to immunity" if this would exonerate it from "bearing the consequences of its unlawful conduct"; in order to analyse this defence to Germany's original claim, it submits that the Court will have to deal with "many of the same factual and legal issues" that serve as a basis for the counter-claim[29].

41. On this point, Italy concludes with two remarks. First, it points out that the fact that the counter-claim widens the object of the dispute in no way affects its admissibility, as confirmed by the Court in its Order in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case (1997, *supra*)[30]. And secondly, Italy asserts that, Germany having been "well aware of the strict link existing in the present case between immunity and reparation", it is undeniable that the reparation issue is part of the "complex issue" to which the Joint Declaration adopted by the Parties in 2008 alludes[31].

[26] Counter-Memorial of Italy (22 December 2009), p. 35, para. 3.11.
[27] Cf. *ibid*., pp. 16-18, paras. 2.9-2.19.
[28] *Ibid*., p. 36, para. 3.11.
[29] *Ibid*., p. 130, para. 7.6.
[30] *Ibid*., p. 130, para. 7.7.
[31] *Ibid.*, pp. 130-131, para. 7.8.

42. On its turn, Germany "deliberately refrains" from taking a stance on "the inter-relatedness of the claim brought by it against the Respondent and the counter-claim", although it does indicate that there is, in its view, "a significant disparity" between both claims[32]. First, as to the lack it sustains of direct connection in law, whereas its own claim refers to the judicial practice of Italian courts in denying immunity of jurisdiction, Italy's counter-claim relates to violations of international law committed by German troops during the Second World War. And second, in so far as the alleged lack of direct connection in facts is concerned, the events Germany wishes the Court to rule upon have taken place from 2004 onwards, while those Italy wants the Court to examine took place in 1943-1945. Germany takes the position, however, that the direct connection issue is not relevant for the Court's decision on admissibility of the counter-claim, since "the lack of jurisdiction *ratione temporis* as well as *ratione materiae* is evident"[33].

(b) *The substance of the dispute*

43. In the last chapter of its Counter-Memorial[34], Italy introduces a counter-claim whereby it asks the ICJ to adjudge and declare that

> "Germany has violated its obligation of reparation owed to Italian victims of the crimes committed by Nazi Germany during the Second World War and that, accordingly, Germany must cease its wrongful conduct and offer effective and appropriate reparation to these victims"[35].

Italy then concentrates on the prerequisites of admissibility of counter-claims, under Article 80 of the Rules of Court (cf. *supra*). It begins by arguing that "the dispute on immunity brought by Germany and the dispute on reparation brought by Italy originate out of the same facts"[36].

44. Its counter-claim, in its view, thus shares with the original claim the same jurisdictional ground. In particular, Italy sustains that the Court has jurisdiction *ratione temporis* in the present case, because the events that constitute the "real cause of the dispute" — i.e., "the reparation regime established by the two 1961 Agreements between Germany and Italy" and the exclusion of Italian victims from the reparation

[32] Preliminary Objections of Germany regarding Italy's Counter-Claim (10 March 2010), p. 4, para. 3.
[33] *Ibid.*, p. 4, para. 3.
[34] Counter-Memorial of Italy (22 December 2009), pp. 128-133, paras. 7.1-7.14.
[35] *Ibid.*, p. 128, para. 7.2.
[36] *Ibid.*, p. 129, para. 7.4.

scheme instituted by the Foundation "Remembrance, Responsibility and Future" set up in 2000 — took place after the entry into force of the 1957 European Convention for the Peaceful Settlement of Disputes[37] (which provides the jurisdictional basis for the adjudication of the present case).

45. Italy considers the "more recent decisions of German authorities regarding the claims of reparation put forward" by Italian victims (especially under the auspices of the "Remembrance, Responsibility and Future" Foundation in 2000[38]) to be additional "new situations" to the end of establishing jurisdiction *ratione temporis* over the present counter-claim. Since such decisions were taken upon the view that "individuals who are victims of grave violations of international humanitarian law would not be entitled to an individual right of reparation because the issue of reparation in such cases has to be dealt with exclusively at the inter-State level", they would constitute an autonomous source of the Parties' dispute in relation to the issue of reparations[39].

46. Furthermore, Italy states that it "disagrees with Germany about the scope of the waiver clauses" contained in the two Agreements of 1961[40]. Accordingly, Italy denies that the "real cause of the dispute" would lie in the atrocities committed by Nazi Germany during the Second World War (between 1943 and 1945), as the contending Parties are already "in clear agreement concerning the occurrence and the legal qualification of facts which gave rise to the claims of reparation", namely, the "grave violations of international humanitarian law committed by Nazi Germany"[41].

47. The reason why the dispute does not originate in the 1947 Peace Treaty either (although Article 77, paragraph 4, of which, containing the waiver clause, calls for interpretation), is that, by celebrating the two 1961 Treaties *(cit. supra)*, Germany allegedly renounced to invoke the waiver clause of Article 77, paragraph 4, of the former Peace Treaty, thus giving rise to a "new situation" between the Parties with regard to "the issue of reparation"[42]. For these reasons, Italy concludes that the dispute can only arise from the interpretation of the two 1961 Treaties. In its own words,

> "(. . .) [T]he Court has jurisdiction to deal with the dispute on immunity brought by Germany as well as with the dispute on reparation brought by Italy. There is no relevant temporal limitation on the Court's jurisdiction since both disputes relate to facts and situa-

[37] Cf. Counter-Memorial of Italy (22 December 2009), p. 129, para. 7.4, and cf. also pp. 33-37, paras. 3.6-3.13.
[38] *Ibid*., pp. 38 and 40, paras. 3.16 and 3.19.
[39] *Ibid*., p. 40, para. 3.19.
[40] *Ibid*., p. 39, para. 3.17.
[41] *Ibid*., pp. 37-38, para. 3.15.
[42] *Ibid*., p. 39, para. 3.18.

tions — the conclusion of the 1961 Compensation Agreements between Italy and Germany and Germany's refusal to address the claims for reparation by IMIs — which took place after the entry into force of the European Convention as between the parties to the disputes." [43]

48. On its part, in its "preliminary objections" to Italy's counter-claim, Germany argues that the Court has neither jurisdiction *ratione materiae*, nor jurisdiction *ratione temporis*, to entertain it. In its view, neither its declaration of 30 April 2008 (accepting the compulsory jurisdiction of the ICJ) [44], nor the German-Italian Joint Declaration of 18 November 2008 (reproduced *supra*) could have had the effect of expressing its consent on the exercise of jurisdiction by the Court over the Italian counter-claim [45]. Germany expresses the view that the temporal criterion established by Article 27 of the European Convention for the Peaceful Settlement of Disputes [46] pertains not to the date the dispute arises, but instead to the date of "the facts or situations that entailed the dispute" [47]. These facts and situations — Germany adds — are "the unlawful acts and activities committed by Germany by the German forces and other authorities during the 20 months when Italy was placed under occupation and Italian armed forces were treated as enemy forces" [48].

49. As to Italy's contention that the dispute arises from the interpretation of the waiver clauses of the two 1961 Agreements, Germany sees the two 1961 Agreements as a "gesture of good will", as "steps in a process of inner-European normalization, intended to consolidate even further the good partnership between Germany and Italy" [49]; Germany denies to have been required by international law to celebrate the 1961 Agreements, which, it adjoins, "were validly concluded" and "do not negatively

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[43] Counter-Memorial of Italy (22 December 2009), pp. 40-41, para. 3.20.

[44] Preliminary Objections of Germany . . ., *op. cit. supra* note 32, pp. 4-5, paras. 5-6. Germany points out that the declaration accepting the compulsory jurisdiction of the ICJ applies only to disputes arising after the date of its issuing, and, in any case, excludes disputes relating to the activity of armed forces abroad.

[45] As to the 2008 Joint Declaration, Germany points out that it consists of a "political document" issued for the purpose of reassuring the international community that the institution of proceedings against Italy did not adversely affect the good relations between the Parties. Moreover, the declaration mentions the European Convention of 1957 is seen by Germany as proof that the Parties agreed that the Convention "was the only legal foundation of the forthcoming proceedings before the Court"; cf. *ibid.*, p. 9, para. 12.

[46] Article 27: "The provisions of this Convention shall not apply to: (. . .) 1. disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute. (. . .)".

[47] Preliminary Objections of Germany (. . .), *op. cit. supra* note 32, pp. 9-10, para. 14.

[48] *Ibid.*, p. 10, para. 15.

[49] *Ibid.*, pp. 20-21, paras. 32-33.

affect Italian rights"[50]. Moreover — Germany adds — Italy has never mentioned "alleged defect, inconsistency or other failure of the two 1961 Agreements", so that there is "simply no dispute about the relevance of the Treaties with regard to the counter-claim"[51].

50. Lastly, Germany briefly dismisses Italy's argument that the exclusion of Italian victims from the reparation scheme of the Foundation "Remembrance, Responsibility and Future" (2000) constitutes a new source of dispute. It points out that Italy admitted, in its Counter-Memorial, that "the enactment of the law was not dictated by an existing obligation under international law between two countries"[52]; accordingly, it submits that the events related to the enactment and execution of the statute are not relevant to the present case.

51. In turn, in its "Observations on the Preliminary Objections" of Germany, Italy reiterates that Germany has failed to distinguish between the "source of the rights alleged to have been breached" and the "[real] source of the dispute" that the Court is being called to adjudicate upon. Although the source of the rights to receive reparation lies on grave violations of international humanitarian law committed during the Second World War, it submits that the dispute in reality concerns the interpretation of the two 1961 Agreements, thus falling within the jurisdiction *ratione temporis* of the Court. According to Italy, what the Court is asked to decide is: *(a)* "whether or not Italy, by concluding the two 1961 Settlement Agreements, waived all its claims for reparation, including the claims relating to the grave violations of international humanitarian law committed by the German Reich during the Second World War"; and *(b)* "whether Germany, by refusing to address the claims for reparation submitted to it after the establishment in 2000 of the 'Remembrance, Responsibility and Future' Foundation, failed to comply with its obligations concerning reparation for the Italian victims of the crimes committed by the German Reich, and if so, what the legal consequences arising from such wrongful conduct are"[53].

[50] Preliminary Objections of Germany . . ., *op. cit. supra* note 32, p. 21, para. 33.

[51] *Ibid.*, pp. 21-22, paras. 34-35.

[52] *Ibid.*, p. 23, para. 37.

[53] Observations of Italy on the Preliminary Objections of the Federal Republic of Germany regarding Italy's Counter-Claim, 18 May 2010, pp. 7 and 9-10, paras. 14 and 21. In its own words:

> "The dispute submitted by Italy has substantially a twofold object. First, there is the disputed question of the existence, at the time when, in the 2000s, the present dispute was triggered, of a right of reparation in favour of Italy. In this respect, what the Court has to decide is essentially whether or not Italy, by concluding the two 1961 Settlement Agreements, waived all its claims for reparation, including the claims relating to the grave violations of international humanitarian law committed by the

52. Seeking to demonstrate that there is indeed a dispute between the Parties as to how the two 1961 Agreements are to be interpreted, Italy refers to some of the questions the Court will have to address if it decides to entertain the counter-claim. It notes that the two 1961 Agreements have threefold implications, in the sense that Germany is said to have: *(a)* "waived what it considered to be its right to avail itself of the Italian waiver of all claims" under the 1947 Peace Treaty; *(b)* recognized that "an obligation of reparation towards Italy existed (. . .) opening the way for a process of reparations"; and *(c)* "made it clear that [the two 1961 Agreements] did not exhaust the range of reparations which could be provided to Italian victims, by explicitly recognizing that other avenues remained available (or would become available) under German legislation" [54].

53. In order to substantiate the argument that the two 1961 Agreements created a "radically new situation" so that Germany became precluded from resorting to the waiver clause of the 1947 Peace Treaty, Italy refers to the text of Article 3 of the Indemnity Treaty [the second 1961 Agreement] (which suggests that the agreements are without prejudice to claims not falling within their specific subject-matter) and to an "exchange of letters" that took place at the time of the Agreements' celebration [55]. Italy maintains that the 1961 Agreements could not have solved the reparations issue as suggested by Germany, pointing to the practice of several States that denied that, waiver clauses similar to those of the two 1961 Agreements, could have the effect of closing the debate on reparations [56].

54. Italy further objects to Germany's position that the two 1961

German Reich during World War II. Secondly, and strictly linked to the first issue, there is the question of whether Germany, by refusing to address the claims for reparation submitted to it after the establishment in 2000 of the 'Remembrance, Responsibility and Future' Foundation, failed to comply with its obligations concerning reparation for the Italian victims of the crimes committed by the German Reich, and if so, what the legal consequences arising from such wrongful conduct are. Taking into account the subject-matter of the present dispute as here defined, it is clear that the facts or situations to which regard must be had for the purposes of applying the temporal limitation clause set forth in Article 27 *(a)* [of the 1957 European Convention] are not the occurrences of World War II. The dispute submitted by Italy is one with regard to a certain situation — the reparation regime established by the two 1961 Settlement Agreements — and with regard to certain facts, the events following the establishment of the 'Remembrance, Responsibility and Future' Foundation. These facts and situation, and not the occurrences during World War II, constitute the source or real cause of the dispute on reparation." (Para. 21.)

[54] Observations of Italy . . ., *op. cit. supra* note 53, p. 17, para. 43.
[55] *Ibid.*, pp. 18-19, paras. 45-47.
[56] *Ibid.*, pp. 20-21, para. 53.

Agreements, as well as the German legislation on reparations, consisted of *ex gratia* measures; in Italy's view, "no treaty can be really seen simply as a gesture of good will and cannot be considered a unilateral act", and both the treaties and the relevant German legislation "were the result of international pressure and intergovernmental negotiations"[57]. Italy sums up that

> "the mere fact that Italy and Germany have opposing views on these and other issues directly linked to the meaning and scope, as well as the effects, of the 1961 Agreements (and subsequent German practice) proves that there is '. . . a disagreement on a point of law or fact, a conflict of views. . .' between the Parties, and places the 1961 Agreements and their consequence at the heart of the dispute"[58].

(c) *The debate on the notion of "continuing situation"*

55. Another bone of contention between Germany and Italy concerns the incidence in the *cas d'espèce* of the notion of "continuing situation". Germany stresses that "the core of the counter-claim [of Italy] is epitomized by the contention that Germany has a continuing obligation to provide reparation for the violations of international humanitarian law committed by the authorities of the Nazi regime during the time of the military occupation of Italy"[59]. In Germany's view, since "[n]o tort claim or other claims against Germany flows from the 1961 Agreements"[60], the Court should abstain from entertaining the counter-claim for lack of jurisdiction *ratione temporis*.

56. Italy, on its part, affirms in its Counter-Memorial that the "obligation of reparation" on which its counter-claim is based, "has been and continues today to be breached by the German side in relation to a great number of victims"[61]. That being so, it argues that, while "the crimes from which the obligation of reparation takes its origins have to be assessed as *'faits instantanés'*", "the internationally wrongful act consisting in breach of the obligation of reparation is by no means instantaneous", falling within the definition of breaches having a continuing character envisaged by Article 14, paragraph 2, of the ILC Articles on State Responsibility[62].

[57] Observations of Italy . . ., *op cit. supra* note 53, pp. 21-22, para. 55.
[58] *Ibid.*, pp. 22-23, para. 57.
[59] Preliminary Objections of Germany . . ., *op. cit. supra* note 32, pp. 22-23, para. 35.
[60] *Ibid.*, pp. 22-23, para. 35.
[61] Counter-Memorial of Italy (22 December 2009), p. 11, para. 1.17.
[62] *Ibid.*, p. 12, para. 1.17.

57. Although Italy makes this point when it discusses the applicability of contemporary rules on State immunity and international humanitarian law to the Applicant's alleged obligation to provide reparation (cf. *supra*), Germany argues that this line of reasoning consists in an attempt to "overcome the temporal hurdles standing in the way of [Italy's] counter-claim"[63]. Germany then invites the Court to make a distinction between "the interference with the rights of the other party", which, in the present case, took place in 1943-1945 — i.e., in a period falling outside the jurisdiction *ratione temporis* of the Court — and "the consequences entailed thereby" — i.e., the alleged obligation to provide reparation[64].

58. Germany recalls, in this context, the decision of the PCIJ in the *Phosphates in Morocco* case (Italy *v.* France, 1938)[65], and further contends that, in the line of what has been decided by the PCIJ, "the complaints raised against the way and method of settlement do not count with regard to determining the applicability of the relevant time clause" in the present case[66]. In this connection, Germany refers to examples taken from the case law of the European Court of Human Rights (ECHR)[67], singling out cases such as those of *Malhous* v. *Czech Republic* case (2000, concerning deprivation of ownership or any other right *in rem*), and the *Kholodov and Kholodova* v. *Russia* case (2006, concerning Mr. D. Kholodov's death)[68]; yet, as these cases pertained admittedly to "instantaneous acts" rather than *continuing situations*, they do not bear relevance to the present case before the ICJ, which is of a distinct nature.

59. Italy, in turn, points out that it has "no difficulty in admitting that the notion of a continuing wrongful act has no relevance for the purposes of determining the jurisdiction *ratione temporis* of the Court", and affirms

[63] Preliminary Objections of Germany . . ., *op. cit. supra* note 32, pp. 12-13, para. 20.

[64] *Ibid*., p. 13, para. 21.

[65] In that case, Italy submitted that the Court had jurisdiction *ratione temporis* to entertain claims related to an executive decision taken by the Moroccan administration six years before France accepted the compulsory jurisdiction of the Court because: *(a)* the denial of justice on the part of France constituted in itself an internationally wrongful act; and *(b)* the executive decision and the denial of justice constituted "a single, progressive illegal act which [had not been] fully accomplished until after the crucial date" (p. 23). The PCIJ rejected these arguments, pondering that: *(a)* a complaint of a denial of justice [could not] be separated from the criticism which the Italian Government [directed] against the decision of the Department of Mines of 8 January 1925"; *(b)* the alleged denial of justice merely allowed "the unlawful to subsist", exercising "no influence either on the accomplishment of the act or on the responsibility ensuing from it" (p. 28).

[66] Preliminary Objections of Germany . . ., *op. cit. supra* note 32, pp. 13-15, para. 22.

[67] Cf. *ibid*., pp. 15-18, paras. 23-28 (references to the cases *Malhous* v. *Czech Republic* [2000], *Blečić* v. *Croatia* [2006], *Preussische Treuhand* v. *Poland* [2008], *Kholodov and Kholodova* v. *Russia* [2006], and *Varnava and Others* v. *Turkey* [2009]).

[68] Cf. *ibid*., pp. 15-17, paras. 24 and 26.

that it "has never intended to rely on this argument"[69]. Yet, Italy criticizes Germany's invocation, to its purpose, of the *Phosphates in Morocco* case and of the examples taken from the case law of the European Court of Human Rights[70]. In Italy's view,

> "Unlike the situation in the *Phosphates in Morocco* case, the subject-matter of the present dispute is not whether during the Second World War German authorities committed grave violations of international humanitarian law giving rise to Germany's international responsibility *vis-à-vis* Italy. These facts do not constitute the subject-matter of the present dispute simply because they are not in dispute between the Parties. Although the present dispute concerns the issue of the reparation owed by Germany as a consequence of the crimes committed by German authorities in the period between 1943 and 1945, the focal point of the dispute — *le fait générateur* — is to be found in facts and situations subsequent to the critical date. Thus, Germany's attempt to suggest that the present dispute presents the same situation as in the *Phosphates in Morocco* case is simply unconvincing". [71]

VII. The Origins of a "Continuing Situation" in International Legal Doctrine

60. The origins of the notion of a "continuing situation" have passed virtually unnoticed in expert writing of our times. It was necessary to wait for its configuration, first, in international litigation, and then, in international legal conceptualization (cf. *infra*), for the notion to begin to attract some, but not much, attention on the part of expert writing. Coincidentally, it was precisely in the rich tradition of German as well as Italian international legal thinking that the origin and early development of that notion lie. It is not my intention, within the confines of the present dissenting opinion, to proceed to an in-depth study of this specific point; I shall only refer to the earliest elaboration of this notion in international legal doctrine.

61. Already in the year of the First Hague Peace Conference, in his book *Völkerrecht und Landesrecht* (1899), Heinrich Triepel identified the point at issue:

> "Völkerrechtlich geboten nennen wir einmal alles Landesrecht, dessen Schöpfung sich als Erfüllung völkerrechtlicher Pflicht darstellt, ferner aber das, das der Staat zwar ohne solche Verpflich-

[69] Observations of Italy . . ., *op. cit. supra* note 53, p. 11, para. 25.
[70] *Ibid.*, pp. 11-13, paras. 26-29.
[71] *Ibid.*, p. 12, para. 27.

tung geschaffen hat, aber nachmals aufrechtzuerhalten verpflichtet wird. Dort besteht die Staatspflicht in Erlass und Aufrechterhaltung des Rechts, hier allein in dieser. Umgekehrt — wenn die Staaten zu bestimmtem Zeitpunkte völkerrechtlich verpflichtet werden, ein Recht bestimmten Inhalts zu haben, so verletzt der Staat, der das entsprechende Recht besitzt, seine Pflicht durch dessen Abschaffung und die fortgesetzte Unterlassung der Wiedereinführung, der von vornherein des gebotenen Rechts ermangelnde nur durch die Nichteinführung; beide aber begehen ein, wenn ich so sagen darf, völkerrechtliches 'Dauerdelikt'." [72]

62. Although H. Triepel did not go deeper into the argument, he displayed his intuition as to situate it not only in the relationship between international law and domestic law, but also in its temporal dimension. Fourteen years later, shortly before the outbreak of the First World War, his book came out in an Italian edition, where the same paragraph appeared:

> "Imposto dal diritto internazionale è per noi anzitutto il diritto interno la cui creazione rappresenta l'adempimento di un obbligo internazionale, ed in secondo luogo il diritto interno che fu creato dallo Stato senza esservi internazionalmente obbligato, ma che posteriormente lo Stato si è obbligato a conservare in vigore. Nel primo caso il dovere dello Stato consiste nell'emanazione e nel mantenimiento in vigore di determinate norme di diritto, nel secondo caso soltanto nell'ultimo obbligo. Reciprocamente, si a un determinato momento gli Stati sono internazionalmente obbligatti ad avere norme di diritto di un dato contenuto, lo Stato ce già le possiede viola il suo dovere se le abolisce e trascura di introdurle nuovamente, mentre lo Stato che non le possiede ancora lo viola soltanto col non introdurle; ambedue peraltro commettono, se mi è lecito usare questa espressione, un 'reato continuato' internazionale."[73]

[72] H. Triepel, *Völkerrecht und Landesrecht*, Leipzig, Verlag von C. L. Hirschfeld, 1899, p. 289:

> "We call 'required by international law' *(völkerrechtlich geboten)* all domestic law, the creation of which represents the fulfillment of an international obligation, but also that which the State has created absent such an obligation, but subsequently becomes obligated to uphold. In one case the obligation of the State comprises the enactment and the duty not to repeal the law, in the other only the latter. Conversely, if at a given time States are internationally obliged to have rules of law with a given content, the State which already has such laws is breaching its obligation if it repeals them and fails to re-enact them, whereas the State which does not yet have such laws breaches its obligation merely by not introducing them: both States thus commit, if I may say so, a continuous violation of international law *(völkerrechtliches Dauerdelikt)*." [Free translation.]

[73] H. Triepel, *Diritto Internazionale e Diritto Interno* (trad. G. C. Buzzati), Turin, Unione Tipografico-Editrice Torinese, 1913, p. 286. One decade later, lecturing in the

63. It was during the inter-war period that the notion of "continuing situation" was in fact elaborated in the early writings of Roberto Ago. In his Hague Academy lectures of 1939, with the outbreak of the Second World War, R. Ago argued that, in international law, there are situations which are conformed by a sole wrongful act or omission *(délit international simple)*, and others which are conformed by a series of them, and the *effect* of such wrongful human conduct in time (*délit international complexe* or *continu*). In the case of these latter, there is a prolongation in time of the *tempus commissi delicti*[74].

64. The essential element in the distinction between them lies in whether the action or omission is "transient or permanent". An example of a breach prolonged in time is afforded by the promulgation of a (domestic) law in breach of the law of nations, thereby generating a *délit continu*[75]. And R. Ago added, as to the obligation of reparation, that this latter "in no way manifests itself as a subsidiary obligation", but rather as "a primary obligation, established by a customary rule"[76] *[translation by the Registry]*.

By that time, the notion of a "continuing situation" in breach of international law was already being pleaded in international litigation (cf. *infra*).

VIII. The Configuration of a "Continuing Situation" in International Litigation and Case Law

65. As the Court, in its present Order, appears not to have deemed it necessary to pronounce on the notion of a "continuing situation", I feel

opening courses of the Hague Academy of International Law (1923), Triepel reiterated his view:

> "Nous nommons *internationalement ordonné*, d'abord tout le droit interne dont la creation se présente comme l'accomplissement d'un devoir international, et en outre le droit que l'Etat a créé sans y être tenu, mais qu'il est obligé maintenant de conserver. Dans la première hypothèse, le devoir de l'Etat consiste à créer et à conserver le droit, dans la seconde, il ne consiste qu'à le conserver. Inversement, quand les Etats sont internationalement astreints à avoir, à une certaine époque, un droit d'un contenu déterminé, l'Etat, qui possède le droit dont il s'agit, viole son devoir s'il abroge ce droit et s'il s'abstient ensuite de le réintroduire; tandis que celui qui ne possède point dès le début le droit internationalement ordonné, ne viole son devoir que s'il ne l'introduit pas. Mais tous les deux commettent, pour ainsi dire, un 'délit permanent international' (*Dauerdelikt*, comme on dit en allemand)"; H. Triepel, "Les rapports entre le droit interne et le droit international", 1 *Recueil des cours de l'Académie de droit international de La Haye* (1923), p. 109.

[74] R. Ago, "Le délit international", 68 *Recueil des cours de l'Académie de droit international de La Haye* (1939), pp. 512, 514, 517-519 and 523.

[75] *Ibid.*, pp. 519-520.

[76] *Ibid.*, p. 529.

obliged to do so, as I regard the matter of importance for the present and future of international law. It has been the object of contentions on the part of both Italy and Germany, and has not seldom been raised before contemporary international tribunals (such as the ICJ, and the European and Inter-American Courts of Human Rights). Although, in the present case before the ICJ, at the end of their recent debates (in the written phase which preceded the present Order of the Court), it was clarified that the notion at issue did not provide the main basis for the positions of the contending Parties, yet not only was it invoked by both before the Court, but it remains, in my view, important for a proper understanding of the time dimension of cases of the kind. I shall thus dwell upon it, in the domain of public international law, as well as in that of the international law of human rights proper.

1. In Public International Law

66. May I first refer to the era of the PCIJ. On one occasion, in his oral arguments before the PCIJ in the public sitting of 12 May 1938, in the case of *Phosphates in Morocco* (Italy *v.* France), counsel for Italy, Roberto Ago, argued that the facts of that dispute before the PCIJ went back to a legislative act of 1920 (establishing the "monopole des phosphates"), extended to a decision taken in 1925 (pertaining to the "cartel phosphatier"), and to a *déni de justice* which occurred in 1931-1933[77]. In this succession of facts, there were thus — he added — elements which were prior to the date of acceptance of the compulsory jurisdiction of the PCIJ[78].

67. In his view, the facts, in particular, which extended from 1925 to 1933, gave origin to a "clear violation of international law"[79]. In the oral argument of Roberto Ago,

> "In their entirety, those facts, which are intimately linked by a necessary connection (. . .) with a common aim, represent logically and teleologically — in terms of their practical and legal effects — a single continuing and progressive internationally wrongful act.
>
> Therein are contained (. . .) all the constituent elements of a continuing offence: the plurality of actions, the unity of the law violated, the unity of aim and purpose of the agent.
>
> (. . .) The continuing wrongful act, (. . .) which is simultaneously composed of a series of individual wrongful acts, must be regarded

[77] *Phosphates in Morocco, P.C.I.J., Series C, Nos. 84-85*, pp. 1218, 1220, 1230-1231. According to Ago, the breach of international law incurred into, "prolonge son existence dans le temps et se renouvelle à chaque instant"; *ibid.*, pp. 1240-1241, and cf. p. 1237.

[78] *Ibid.*, p. 1233, and cf. p. 1231.

[79] *Ibid.*, p. 1233, and cf. p. 1229.

as a single offence . . . . The progressive wrongful act must be treated in law as a single wrongful act."[80] *[Translation by the Registry.]*

68. This latter is represented by its being continuously maintained, in breach of an international obligation; in this way,

"The violation of international law does not end at its first occurrence; it continues until the violation has ceased. What continues are not the effects of the initial, completed and concluded violation, but rather the violation itself, which is continuously renewed, and which thus continues to be perpetrated for as long as the will and actions of the agent remain unchanged.

It is precisely for this reason that, in domestic law, in the face of a continuing criminal act, the prescription period only begins to run when the criminal act has ended."[81] *[Translation by the Registry.]*

69. In its Judgment of 14 June 1938 (Preliminary Objections) in the *Phosphates in Morocco* case, the PCIJ was, however, of the view that, as to the alleged continuing situation or acts, presumably constituting a single whole (*P.C.I.J., Series A/B. No. 74*, pp. 22-23), what was ultimately a determining factor was "the will of the State which only accepted the compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction disputes having actually arisen from situations or facts subsequent to its acceptance" (*ibid.*, p. 24).

70. In the *cas d'espèce*, the cited acts and situations were not, in the view of the PCIJ, the culmination of earlier events, nor did they alter the situation (as to the "monopolization" of Moroccan phosphates) which had already been established. The Court thus dismissed the argument of Italy of a "continuing and progressive violation" constituted by successive acts of the Respondent State (*ibid.*, pp. 25-27). Conceptually, thus, the PCIJ subscribed to the traditional voluntarist conception of its own jurisdiction, and espoused a static and atomized view of the whole matter brought into its cognizance.

71. It is not my intention here to take this decision into discussion, more than seven decades later, but rather to refer to it, for the purposes of the present dissenting opinion. As to the ICJ era, may it be recalled that, in its Advisory Opinion of 1971 on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the ICJ pronounced on South Africa's international responsibility arising from a continuing violation (its "continued presence in Namibia", which was

[80] *Phosphates in Morocco, P.C.I.J., Series C, Nos. 84-85*, pp. 1234-1235, and cf. p. 1238.
[81] *Ibid.*, p. 1239.

being "maintained in violation of international law")[82]. The ICJ found that "[b]y maintaining the present illegal situation, and occupying the territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation"[83]. It then asserted the obligation of the UN member States "to recognize the illegality and invalidity of South Africa's continued presence in Namibia"[84].

72. The point I wish to make here is that, although the notion of *continuing situation* has roots in the international legal thinking of as early as the first half of the twentieth century, it has passed almost unnoticed, and remains virtually unexplored, in doctrinal writings to date, in public international law. Yet, the notion has received some attention in the particular domain of the international law of human rights[85], on the part of both the European and the Inter-American Courts of Human Rights. It has further been acknowledged at not only the jurisprudential level but also at the normative level in recent years, and can no longer be overlooked.

2. *In the International Law of Human Rights*

73. At jurisprudential level, the notion of *"situation continue"* was early to become the object of attention on the part of the European Court of Human Rights (ECHR) — as well as of the former European Commission of Human Rights — in relation to the application of the rule of exhaustion of local remedies in cases of detention [while] on remand[86]. Attention was then turned by the ECHR to the *length* or *actual duration* of the detentions at issue, as "continuing situations"[87]. Over the years, the ECHR has at times been faced with continuing situations in distinct circumstances.

74. It is not surprising to find that the notion of *continuing situation* has been developed particularly in the domain of the international law of human rights, given the special character of human rights treaties, which

[82] *I.C.J. Reports 1971*, p. 56, para. 126.

[83] *Ibid*., p. 54, para. 118; and cf. *ibid*., p. 47, para. 95, for the Court's reference to a "persistent violation of obligations".

[84] *Ibid*., p. 54, para. 119.

[85] Among the very few articles devoted to the issue to date, cf., in particular: J. Pauwelyn, "The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems", 66 *British Year Book of International Law* (1995), pp. 415-450; A. Buyse, "A Lifeline in Time — Non-Retroactivity and Continuing Violations under the ECHR", 75 *Nordic Journal of International Law* (2006), pp. 63-88; A. Van Pachtenbeke and Y. Haeck, "From *De Becker* to *Varnava*: The State of Continuing Situations in the Strasbourg Case Law", 1 *European Human Rights Law Review* (2010), pp. 47-58.

[86] A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge University Press, 1983, pp. 221-228.

[87] Cf. *ibid*., pp. 223 and 225.

create, within the conceptual universe of international law, mechanisms of protection of the rights inherent to human beings, and *positive* obligations (of protection) on the part of the State, whose responsibility may be engaged by successive wrongful acts as well as omissions. There may well exist a causal connection between the original *facts* (a term which is not a synonym of *acts*) and subsequent acts or omissions of the State at issue, conforming a *continuing situation*.

75. In a recent case, that of *Varnava and Others* v. *Turkey* (2009), the ECHR was seized of a case concerning the forced disappearance of nine men in 1974. The Court was competent to examine complaints against Turkey pertaining to facts having occurred after 28 January 1987. In its judgment of 18 September 2009, the Grand Chamber of the ECHR pointed out that the mortal remains of one of the fatal victims were discovered in a mass grave in 2007, but there were no sighting or news of the other eight missing men since late 1974 until the present (para. 112).

76. The ECHR's Grand Chamber cross-referred to the case law on jurisdiction *ratione temporis* of its homologue, the Inter-American Court of Human Rights (IACtHR), in particular the leading case of this latter, the case *Blake* v. *Guatemala* (1998) (paras. 93-96, 138 and 147). The ECHR decided that there had been a *continuing violation* of Article 2 (right to life) and of Article 5 (right to liberty and security of the person) of the European Convention of Human Rights, on the account of the failure of the authorities of the Respondent State to conduct an effective investigation of the fate of the nine men who had disappeared in life-threatening circumstances (*dispositif*, paras. 4 and 6).

77. The Court, furthermore, found a *continuing violation* of Article 3 (freedom from torture and other inhuman or degrading treatment or punishment) of the European Convention, in respect of the Applicants (Operative Clause, para. 5)[88]. In addressing the continuing suffering of the relatives of the disappeared persons, the ECHR pondered:

> "A disappearance is (. . .) characterized by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred (. . .). This situation is very often drawn out over time, prolonging the torment of the victim's relatives. It cannot therefore be said that a disappearance is, simply, an 'instantaneous' act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation." (Para. 148.)

[88] And cf. paras. 194 and 208 of the judgment.

78. In the same judgment, the ECHR further observed, in relation to the continuing violation of Article 3 of the Convention, that

> "The length of time over which the ordeal of the relatives has been dragged out and the attitude of official indifference in face of their acute anxiety to know the fate of their close family members discloses a situation attaining the requisite level of severity, There has, accordingly, been a breach of Article 3 in respect of the applicants." (Para. 202.)

The ECHR insisted on its warning, in the context of the case at issue, as to the impact of the *passing* of time in legal relations (para. 161), and asserted the obligation "to take due measures to protect the lives of the wounded, prisoners of war, or civilians in zones of international conflict", a duty which extends to "providing an effective investigation for those who disappeared in such circumstances" (which had not been provided in the *cas d'espèce* — para. 174).

79. Earlier on, on the other side of the Atlantic, the Inter-American Court of Human Rights (IACtHR), in its leading case on competence *ratione temporis*, that of *Blake* v. *Guatemala* (1996-1999), referred to by its European homologue, the ECHR *(supra)*, was faced with the case of a forced disappearance of a person (Mr. N. C. Blake), which began in March 1985 and extended to June 1992, when his mortal remains were found. In the meantime, the Respondent State recognized the compulsory jurisdiction of the Court on 9 March 1987, with regard to facts subsequent to this date. The Respondent State raised a preliminary objection of the Court's lack of competence *ratione temporis*.

80. The IACtHR, in its judgment on preliminary objections (of 2 July 1996), considered that the forced disappearance implied violations of several human rights, some of which "may be prolonged continuously or permanently until such time as the victim's fate or whereabouts are established" (para. 39). The IACtHR found itself competent *ratione temporis* to examine, not the violations of the rights to life and personal liberty of the disappeared person, but their subsequent effects on their close relatives. Thus, in its judgment on the merits of the case (of 24 January 1998), the IACtHR considered the forced disappearance of Mr. N. C. Blake as marking the beginning of a "continuing situation" in breach of his close relatives' right to judicial protection (access to justice) and to a fair trial; the Court established the Respondent State's responsibility for those breaches — for lack of effective investigation, prosecution and sanction, of those responsible for Mr. N. C. Blake's disappearance and death.

81. In my separate opinion in the IACtHR's judgments on preliminary objections (para. 14) as well as on reparations (para. 24), I deemed it fit to draw attention to the impact of the legal conceptualization of a "continuing situation" upon traditional postulates of the law of treaties, and called for the *humanization* of international law, to start and advance

precisely in that chapter, so much impregnated with State voluntarism and with undue weight attributed to the forms and manifestations of consent as the law of treaties has been. In any case, I added, in my separate opinion in the IACtHR's judgment on reparations (of 22 January 1999), that that process of humanization was already in course, with the insertion, into the first Vienna Convention on the Law of Treaties (1969, and also into the second, 1986), of the provisions on *jus cogens* (Articles 53 and 64), as well as the humanitarian provision of Article 60, paragraph 5, a true safeguard clause in defence of the human being (paras. 30-32).

82. Moreover, in my separate opinion in the IACtHR's judgment on the merits (para. 38) of the same *Blake* case, I further turned attention to the enlargement of the notion of *victim* of violations of the protected rights (due to the continuing suffering of the close relatives of the forcefully disappeared person, para. 38). At last, in my separate opinion in the following judgment on reparations, I turned attention also to the element of *intemporality* proper to the international protection of rights inherent to the human person, a protection which is thus intended to apply in all circumstances and at all times, without temporal limitations (paras. 4 and 45).

83. In sum, the notion of continuing situation has been upheld in the case law of both the ECHR and the IACtHR, on the basis of a careful examination of the circumstances of each *cas d'espèce*. The two international human rights tribunals have been careful to avoid generalizations and to set up general criteria for the identification of *continuing situations*. Notwithstanding, they have both at times established the existence of continuing situations, without prejudice of juridical security. They have thereby contributed to the fulfillment of the object and purpose of the European and the American Conventions on Human Rights. Given the nature of certain cases — such as the present case concerning *Jurisdictional Immunities of the State* (opposing Germany to Italy) — nowadays lodged with the ICJ, which concern not only the rights of States, but have a direct incidence also on the fundamental rights of the human person, it is, in my view, high time for the Hague Court, also known as the World Court, to become more attentive to the notion of *continuing situation* as it has been developing in public international law and the international law of human rights over the last decades.

IX. The Configuration of a "Continuing Situation" in International Legal Conceptualization at Normative Level

84. The notion of a "continuing situation" has marked its presence not only at jurisprudential level, but also at normative level. Two elements

marked their presence in its configuration in law-making exercises, namely, first, the acknowledgment of the time factor, the inter-temporal dimension, stretching from the *fait générateur* to the whole period of persistence of the continuing situation; and, secondly, the *effects* that such a situation may have on the victims, which, in case of grave breaches of human rights, constitute an *aggravating* circumstance. It is, however, beyond the purpose of the present dissenting opinion to embark on an examination of this second element. Examples of the conceptualization of a "continuing situation" at normative level exist in regional as well as universal (United Nations) levels.

85. At regional level, the 1994 Inter-American Convention on Forced Disappearance of Persons conceptualizes the forced disappearance of persons as, *inter alia*, an offence which "shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined" (Article III). Taking this provision of the 1994 Inter-American Convention into account, in my aforementioned separate opinion in the IACtHR's Judgment on the merits of the *Blake* case (of 24 January 1998), I pondered that

> "forced disappearance of person is, first of all, a *complex* form of violation of human rights; secondly, a particularly *grave* violation; and thirdly, a *continuing or permanent violation* (until the fate or whereabouts of the victim is established). In fact, the continuing situation (. . .) is manifest in the crime of forced disappearance of persons. As pointed out in this respect, in the *travaux préparatoires* of the Inter-American Convention on Forced Disappearance of Persons,
>
> > 'This crime is permanent in so far as it is committed not in an instantaneous way but permanently, and is prolonged as long as the person remains disappeared'[89].
>
> Such consideration was duly reflected in Article III of the Convention *(supra).*" (Para. 9).

86. At universal level, likewise, the 2006 UN International Convention for the Protection of All Persons from Enforced Disappearance, on its part, expressly refers to the "continuous nature" of the offence of enforced disappearance of persons (Article 8, paragraph 1 *(b)*). The same conception was adopted, fourteen years earlier, in the 1992 UN Declaration on the Protection of All Persons against Forced Disappearances of 1992, which, after pointing out the gravity of the crime of forced disappearance of person (Article 1 (1)), likewise warned that this latter ought to be

[89] OEA/CP-CAJP, *Informe del Presidente del Grupo de Trabajo Encargado de Analizar el Proyecto de Convención Interamericana sobre Desaparición Forzada de Personas*, doc. OEA/Ser.G/CP/CAJP-925/93 rev.1, of 25 January 1994, p. 10.

"considered a permanent crime while its authors continue concealing the fate or whereabouts of the disappeared person and while the facts have not been clarified" (Article 17 (1)).

87. May it further be recalled that, two decades earlier, still at the UN level, ECOSOC resolution 1503 (XLVIII), of 27 May 1970, established a (confidential) procedure to investigate situations revealing a "*consistent pattern* of violations of human rights". These latter were essentially *continuing situations* (e.g., those brought about State policies of racial discrimination). This is yet another example of the international legal conceptualization, at normative level, of the configuration of a "continuing situation" in breach of human rights.

88. Yet, in so far as the notion of "continuing situation" is concerned, in the international law of human rights, in particular, *international case law preceded law-making*. Once again, in my same separate opinion in the *Blake* case (merits), I further pointed out that

> "Long before the typification of the forced disappearance of person in the international law of human rights, the notion of *'continuing situation'* found support in the international case law in the domain of human rights. Thus, already in the *De Becker* v. *Belgium* case (1960), the European Commission of Human Rights, for example, recognized the existence of a 'continuing situation' *(situation continue/situación continuada)*[90]. Ever since, the notion of 'continuing situation' has marked presence in the case law of the European Commission, on numerous occasions[91]. The *continuity* of each situation appears — as the European Commission has expressly warned in the *Cyprus* v. *Turkey* case (1983) — as an *aggravating* circumstance of the violation of human rights proven in the *cas d'espèce*."[92] (Para. 11.)

89. A "continuing situation" may well occur with certain breaches of

[90] Cf., Cour européenne des droits de l'homme, *Affaire De Becker* (série B : *Mémoires, Plaidoiries et Documents*), Strasbourg, C.E., 1962, pp. 48-49 (*Rapport de la Commission*, 8 January 1960).

[91] Cf., e.g., the decisions of the former European Commission of Human Rights concerning the petitions Nos. 7202/75, 7379/76, 8007/77, 7742/76, 6852/74, 8560/79, 8613/79, 8701/79, 8317/78, 8206/78, 9348/81, 9360/81, 9816/82, 10448/83, 9991/82, 9833/82, 9310/81, 10537/83, 10454/83, 11381/85, 9303/81, 11192/84, 11844/85, 12015/86, and 11600/85, among others.

[92] In its Report of 4 October 1983 in the *Cyprus* v. *Turkey* case (petition No. 8007/77) the European Commission concluded that the *continuing separation of families* (as a result of the refusal of Turkey to allow the return of Greek Cypriots in order to reunite themselves with their next of kin in the North) constituted an "aggravating factor" of a *continuing situation* in violation of Article 8 of the European Convention of Human Rights. European Commission of Human Rights, *Decisions and Reports*, Vol. 72, pp. 6 and 41-42.

human rights, but not all of them. Many of such breaches are "instantaneous acts", such as, e.g., summary and extra-legal executions. But there are some breaches which are continuous, and forced disappearance of persons is not the only one. There may also occur a continuing denial of justice: rather often, there are unreasonable and prolonged delays that end up constituting a continuing denial of justice. As the time of human beings is not the time of human justice[93], rather often the justiciable ones have to wait a great many years — not seldom a whole lifetime — for justice to be done, if at all. Lawyers, nationally and internationally, know this far too well.

90. In sum, no tribunal — national or international — can today overlook the notion of a "continuing situation", not even the World Court. This notion has in recent years found international legal conceptualization not only in international human rights protection, but also in domains of public international law. To recall but one example, Article 14 (on "Extension in time of the breach of an international obligation") of the *Articles on State Responsibility* (2001) of the UN International Law Commission (ILC) provides that

> "1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
>
> 2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
>
> 3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."

91. The work of the ILC on its adopted *Articles on State Responsibility*, in this particular respect, took due note of the contribution of the IACtHR's decision in the *Blake* case *(supra)*[94] on the matter at issue. The ILC, furthermore, acknowledged the temporal element (the extension in time) when it addressed the consequences of a serious breach of

[93] On this specific point (and in relation to universal jurisdiction), cf. my dissenting opinion in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Order of 28 May 2009, I.C.J. Reports 2009*, pp. 179-180 and 182-188, paras. 39 and 46-64.

[94] Cf. J. Crawford, *The International Law Commission's Articles on State Responsibility — Introduction, Text and Commentaries*, Cambridge University Press, 2005 [reprint], p. 136, and cf., pp. 251-252.

an obligation under international law (Article 41 (3)), with a direct bearing on the State's duty to cease such consequences and to provide reparation.

X. The "Continuing Situation" in the Present Case

92. In the present case before the ICJ (original claim and counter-claim), there is no dispute between Germany and Italy concerning the *facts* of the Second World War and the *facts* extending up to the celebration of the two 1961 Agreements celebrated between them. Therefore, the waiver of Article 77 (4) of the 1947 Peace Treaty between the Allied Powers and Italy cannot possibly be invoked as a ground for establishing the lack of jurisdiction *ratione temporis* of the ICJ to entertain Italy's counter-claim. This latter, according to Italy[95], pertains to the dispute as to the facts ranging from the celebration of the two 1961 Agreements onwards until the present time.

93. This being the triggering point of the alleged "continuing situation" in the *cas d'espèce*, nor can the provision of Article 27 *(a)*[96] of the 1957 European Convention for the Peaceful Settlement of Disputes be possibly invoked as a ground for determining the lack of jurisdiction *ratione temporis* of the ICJ to entertain Italy's counter-claim. The notion of "continuing situation" was not at all invoked to bring the triggering point back to the occurrences of 1943-1945 in the Second World War; quite on the contrary, it pertained to the right to reparation for war crimes, being an element to be taken into account by the Court as from the new continuing situation generated by the celebration of the two Agreements of 1961 onwards, as it ensues from the contentions of the Parties in the original claim and the counter-claim and all arguments relating thereto.

94. The finding of the Court's majority of lack of jurisdiction *ratione temporis* leading to the admissibility of the counter-claim thus requires demonstration. The submissions contained in Italy's counter-claim, and the arguments as to the law submitted by the contending Parties to this Court, in my understanding fall entirely within the Court's jurisdiction *ratione temporis*, and the Court should, thereby, in my view, have declared the counter-claim admissible. To make my own position quite clear, I shall next examine the scope of the present dispute before the ICJ, and turn then attention to those I regard as the true bearers *(titulaires)* of the originally violated rights, against the background of what I devise as the pitfalls of State voluntarism.

[95] Observations of Italy . . ., *op. cit. supra* note 53, pp. 7, 9-10, 15 and 25, paras. 13, 21, 35 and 64; Counter-Memorial of Italy (22 December 2009), p. 129, para. 7.4.

[96] Cf., text *cit.* in note 46, *supra*.

XI. The Scope of the Present Dispute before the Court

95. Already in the dawn of its era, the PCIJ spelled out its characterization of a "dispute", in the well-known *obiter dictum* in its Judgment of 20 August 1924 in the case of the *Mavrommatis Palestine Concessions* case (Greece *v.* United Kingdom), in the following terms: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[97] The present case (original claim and counter-claim), opposing Germany to Italy, fits well into this characterization. There is here a dispute between Italy and Germany concerning the law (not the facts). The facts are not in dispute. There is here a conflict of their legal views on a claim of State immunity in face of claims of war reparations. This is the bone of contention between Germany and Italy.

96. A *contentieux* on reparations does not have a "subsidiary" nature in relation to the *faits générateurs* of the international responsibility of States. It has a dynamic of its own. Thus, besides the initial engagement of State responsibility by its *faits générateurs* (the events of 1943-1945, not controverted here), responsibility may *ex hypothesi* be again engaged in case of lack of due reparation, as a separate and additional breach of international law. It will depend whether there is State immunity or not, a point which is beyond the scope of the present Order. Yet, we are here, within the scope of the present Order, before a *contentieux* opposing a vindication of State immunities to vindications of war reparations. The original claim and the counter-claim are ineluctably intertwined.

97. The duty of reparation emanates from a fundamental principle of international law, acknowledged by the PCIJ in its early years in the *Factory at Chorzów* case (Germany *v.* Poland). In its Judgment on jurisdiction of 26 July 1927, it asserted that "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form"[98]. And in its Judgment on the merits (in the same case) of 13 September 1928, it reiterated that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation"[99].

98. Likewise, early in its era, the ICJ itself had the occasion to reassert this "principle of international law" (involving a duty to provide reparation). In its historical Advisory Opinion on *Reparation for Injuries Suf-*

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[97] *Judgment No. 2, 1924, P.C.I.J. Series A, No. 2*, p. 11.
[98] *Jurisdiction, Judgment No. 8, 1927, P.C.I.J. Series A, No. 9*, p. 21.
[99] *Merits, Judgment No. 13, 1928, P.C.I.J. Series A, No. 17*, p. 29.

fered in the Service of the United Nations (of 11 April 1949); it added therein that in "claiming reparation based on the injury suffered by its agent, the Organization does not represent the agent, but is asserting its own right, the right to secure respect for undertakings entered into towards the Organization" (*I.C.J. Reports 1949*, p. 184). The Organization vindicates its own right to reparation, not that of its agent. Its own right is distinct from those of its agents. Likewise, a State's right is distinct from the rights of individuals subject to its jurisdiction.

99. Other contemporary international jurisdictions have also had the occasion to acknowledge that a *contentieux* of reparations has its own dynamics, distinct from that of the *contentieux* as to the merits of the cases at issue, however complementary they may be. In recent years, the Inter-American Court of Human Rights has faced successive cases of (total or partial) recognition of international responsibility by the Respondent States, which, in cases of total or integral recognition, has allowed the Court to move on straight to the *contentieux* of reparations[100]. This latter followed its own dynamics, clearly separate from the original *faits générateurs* of the international responsibility of the State concerned, in relation to which controversy had ceased to exist. Controversy existed only in relation to the claims as to the reparations due.

100. The present case concerning *Jurisdictional Immunities of the State* before the ICJ is an inter-State *contentieux* between Germany and Italy, concerning their opposing claim and counter-claim, of State immunity and war reparations, respectively. Such interrelated claims are two faces of the same coin. By dismissing one of the claims by means of the present Order, the Court's majority deprived the Court of the examination and settlement of the dispute in its entirety. The *cas d'espèce* originated not in the events of the Second World War (1943-1945), but in the initiative of aggrieved individuals, in recent years, to seek justice before domestic tribunals.

XII. THE TRUE BEARERS *(TITULAIRES)* OF THE ORIGINALLY VIOLATED RIGHTS AND THE PITFALLS OF STATE VOLUNTARISM

101. Individuals' rights are not the same as their State's right. How those individuals are to vindicate their rights is another matter, beyond

[100] Cf., e.g., Inter-American Court of Human Rights (IACtHR), *Aloeboetoe and Others* v. *Suriname* case (Reparations, Judgment of 10 September 1993), Series C, No. 15; IACtHR, *Trujillo Oroza* v. *Bolivia* case (Reparations, Judgment of 27 February 2002), Series C, No. 92; IACtHR, *Goiburú and Others* v. *Paraguay* case ([Merits and] Reparations, Judgment of 22 September 2006), Series C, No. 153.

the scope of the present decision of the ICJ on the Italian counter-claim. And it is a question which, as a result of the unfortunate dismissal by the Court's majority of the counter-claim as "inadmissible as such", will now fall beyond the scope of the present dispute to be adjudicated by the Court at the merits stage. The Court will now address only the German claim of State immunity, in isolation. This is, in my view, much to be regretted, for the unique occasion which the Court has just failed to take up to settle the case while at the same time contributing to the progressive development of international law in this domain still surrounded by uncertainties, despite its utmost relevance for the *jus gentium* of our times.

1. The "Real Cause" of the Present Dispute

102. In the present Order, the Court's majority relies on the general waiver of Article 77 (4) the 1947 Peace Treaty between the Allied Powers and Italy. That was a general Peace Treaty, to which, by the way, Germany was not a party. The 1947 Treaty was general and wide in scope, a product of its time, of the aftermath of the Second World War. The waiver clause of its Article 7 (4), clearly turned to claims of a patrimonial character, is in general, *ma non troppo*: as general as it may be, it is not absolute.

103. The waiver clause in the 1947 Peace Treaty was directed, as its drafting terms disclose[101], to claims of a patrimonial nature, rather than to all kinds of claims. By the time that waiver (Article 77 (4)) was enshrined by the Allied Powers and Italy into the Peace Treaty in 1947, they could not have anticipated that that waiver, however general it intended to be, could not extend over all the complexities of victimization in the Third Reich, such as the deportations and forced labour to which Italian nationals (individuals and not their State) had been subjected to by Nazi Germany between 1943 and 1945.

104. This *mens rea* is confirmed by the other paragraphs of Article 77

[101] Article 77 (4) of the 1947 Peace Treaty states:

"Without prejudice to these and to any other dispositions in favour of Italy and Italian nationals by the Powers occupying Germany, Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939. This waiver shall be deemed to include debts, all inter-governmental claims in respect of arrangements entered into in the course of the war, and all claims for loss or damage arising during the war."

of the 1947 Peace Treaty, referring to: Italian *property* in Germany not being enemy property (Article 77 (1)); Italian *property* removed to Germany to be restituted to Italy (Article 77 (2)); new reference to Italian *property* in Germany (Article 77 (3)); transfer of German *assets* in Italy to Germany. This is the context into which the purported waiver of Article 77 (4) was inserted, in a provision endowed with an essentially patrimonial character. There is nothing whatsoever in Article 77 of the 1947 Peace Treaty, or in this latter as a whole (to which Germany was not a party), that can provide a basis for the Court's majority view that there is a "continuity" between the 1947 purported waiver and the waiver clauses in the two 1961 Agreements, or, worse still, that these latter would be an indemonstrable "improvement" of the former.

105. The subsequent adoption of the two 1961 Agreements, this time between Germany itself and Italy, bears witness of that. The PCIJ had already had the occasion to clarify that a dispute may well presuppose "the existence of some prior situation or fact", not controverted by the parties. A situation or fact in respect of which a dispute is considered to have arisen is to be seen as "the real cause of the dispute"[102]. The celebration of the two 1961 Agreements constitutes, in my view, the triggering point of a *new continuing situation*, containing the "real cause of the dispute", and projecting itself from then onwards into our days. Such dispute between Germany and Italy thus clearly falls within the jurisdiction of the Court *ratione temporis*, on the basis of Article 27 *(a)* of the 1957 European Convention for the Peaceful Settlement of Disputes.

2. *Inconsistencies of State Practice*

106. Claims of Italian nationals on the basis of German legislation on compensation for Nazi persecution victims were not encompassed by the waiver of Article 77 (4) of the 1947 Peace Treaty, because of the provision "without prejudice to these and to any other dispositions in favour of Italy and Italian nationals by the Powers occupying Germany". This provision, as just pointed out, was intended to apply to claims of a patrimonial nature (cf. *supra*). State responsibility for war crimes subsisted.

107. In fact, in this regard, the German *Bundesgerichtshof* (Supreme Court) itself, in a decision of 14 December 1955, interpreted the limited scope of the 1947 waiver clause, by reckoning that this latter had not brought about a final settlement of the matter given the wording of the clause, "without prejudice to (. . .) any (. . .) dispositions in favour of Italy and Italian nationals by the Powers occupying Germany" [*Decisions*

[102] *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J. Series A/B, No. 77*, p. 82.

of the Bundesgerichtshof in Civil Matters, Vol. 19, pp. 258 *et seq.*]; accordingly, the *Bundesgerichtshof* admitted that the Italian claims and the corresponding German obligations still existed[103]. In 1947, in a Peace Treaty to which Germany was not a party, the Allied Powers demanded the waiver from Italy "exclusively in their own interest", and that waiver did not cover claims of war crimes reparations[104]. I cannot see why the Court's majority gave so much importance to that waiver, to the point of trying to base its whole and succinct reasoning on it.

108. The celebration of the two 1961 Agreements, this time by Germany itself with Italy, disclosed Germany's recognition that reparation obligations existed in 1961. This marks, in my view, the triggering point of a new *continuing situation*, from then onwards, up to the present, which forms the object of the dispute before the Court (claim of State immunity and counter-claim of pending war reparations). The two Agreements, celebrated on 2 June 1961 between Germany and Italy, were: *(a)* the Agreement on the Settlement of Certain Property-Related, Economic and Financial Questions (the so-called "Settlement Agreement"); and *(b)* the Agreement on Indemnity in Favour of Italian Nationals Affected by National-Socialist Measures of Persecution (the so-called "Indemnity Agreement").

109. The *exchange of letters* between Germany and Italy attached to the 1961 Indemnity Agreement[105] stated that "claims brought by Italian nationals which had been rejected with final and binding effect on the basis of Article 77 (4) of the Italian Peace Treaty [of 1947] were to be re-examined". Thus, new applications under the 1953 Federal Restitution Law (*Bundesentschädigungsgesetz*-BEG) were seemingly to be treated without objections on the basis of Article 77 (4) of the 1947 Peace Treaty. Furthermore, in a memorandum *(Denkschrift)* submitted to the Legislative on 30 May 1962[106], the German Federal Government recalled Article 77 (4) of the 1947 Peace Treaty, and instructed the German authorities in charge *not to raise objections* on the basis of that provision, in case of claims to restitution. In the words of the memorandum *(Denkschrift)*:

> "[. . .] [T]he special character of the claims to compensation for measures of National Socialist persecution *(Ansprüche auf Wieder-*

[103] Counter-Memorial of Italy (22 December 2009), p. 108, para. 5.53, note 223.
[104] Cf. *ibid.*, p. 108, para. 5.53, and note 223.
[105] Cf. *ibid.*, Annex 4.
[106] Cf. *ibid.*, para. 5.56 (photocopy of whole memorandum in German, as obtained from the library of the *Bundestag* in Berlin, *Drucksache des Deutschen Bundestages* IV/438, p. 9).

gutmachung nationalsocialistischer Verfolgungsmaßnahmen) justifies not raising objections based on Article 77 (4) to applications pursuant to the *Bundesentschädigungsgesetz*. [. . .] Regarding the *Bundesrückerstattungsgesetz* of 19 July 1957, the Federal Government [. . .] instructed the German authorities in charge not to raise objections based on Article 77 (4) of the Peace Treaty with Italy of 10 February 1947 in the case of claims to restitution." [107]

110. All this shows that Germany reckoned, in its practice, that the waiver clause contained in Article 77 (4) of the 1947 Peace Treaty did not cover war crimes reparations. It further shows that the purported waiver of Article 77 (4) of the 1947 Peace Treaty was not as general — and certainly not absolute at all — as the Court's majority in the present Order would make one believe, not even on the basis of German State practice! The reasoning of the Court's majority in the present Order, in my perception, tries in vain to find a basis in law, and finds none, not even on State practice!

111. And this is not all. More recently, the 2000 Law on the "Remembrance, Responsibility and Future" Foundation in Germany, provided compensation to some victims of the war crimes of the Third Reich, excluding, however, prisoners of war from its field of application (on the basis of Section 11.3); the right to reparation of at least some victims was thus reckoned to subsist. All this shows that the pending dispute between Germany and Italy (claim and counter-claim together) remains indeed surrounded by uncertainties, and that State practice alone — with its usual inconsistencies — cannot provide secure guidance to the work of international adjudication.

3. No Lip Service to State Voluntarism

112. Unlike the Court's majority, I am of the view that there is no room at all for paying an instinctive lip service to State voluntarism in the present case. The Court, in my understanding, cannot — and should not — try to develop a sound reasoning on the basis of *waivers* of claims of breaches of fundamental human rights. The facts before the Court in a way show that conscience has stood above the will: Germany and Italy have presented to the Court their distinct views of the case or *continuing situation* at issue, in their respective original claim and counter-claim. These two are inextricably interconnected,

[107] *Drucksache des Deutschen Bundestages* IV/438, p. 9, in: Observations of Italy . . ., *op. cit. supra* note 53, p. 19, para. 47.

and fall quite clearly under the jurisdiction of the Court *ratione temporis*.

113. The Court has been invited to proceed to the consideration of the *cas d'espèce* at the height of its responsibilities, and in my view the only way to do this properly is by taking cognizance of the original claim and the counter-claim altogether. In the present case, without the counter-claim on war reparations, the examination of the basic issue raised in the original claim becomes irremediably mitigated and incomplete. By depriving the Court of the consideration of the original claim and the counter-claim altogether, by means of the present Order it has just adopted, the Court's majority ended up, in my view, depriving the Court of the possibility of the proper and full exercise of its functions in the realization of its mission. In my understanding, the pursuit of the realization of justice at international level has, in the present Order of the Court, succumbed to an instinctive search for manifestations of the will (or consent) of States[108], in attributing an undue weight to waivers of claims of violated rights which are not theirs.

114. My own personal understanding is that a State can waive claims on its own behalf, if it so decides, but not on behalf of human beings (whether its nationals or not) who have been victims of atrocities which shock the conscience of humankind. The individual victims, and not their State, are the bearers *(titulaires)* of the rights which had been violated shortly before the 1947 Peace Treaty (between 1943 and 1945), starting with the right to respect for their own dignity as human beings. Rights inherent to the human person are endowed with an element of timelessness. Their vindication cannot be waived at will, by any State whatsoever.

115. The present dispute between Italy and Germany shows, already at this stage, that the rights of Italian victims of serious violations of international humanitarian law (war crimes and crimes against humanity) have subsisted. Their vindication, by so-called "Italian Military Internees" (IMIs, i.e., soldiers who were detained, denied the status of prisoners of war, transferred to detention camps and sent to forced labour), as well as civilians likewise detained and transferred to detention camps and sent to forced labour, and other victims of the civilian populations in the context of massacres, "as part of a strategy of terror"[109], has resisted the erosion of time. Fundamental human rights are simply not amenable to waivers of their claims by States, by means of peace

[108] This is nothing new; for earlier unfortunate examples, cf., e.g., *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, pp. 90-106; case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 6-53.

[109] Cf. Counter-Memorial of Italy (22 December 2009), p. 15, para. 2.8.

treaties, of other kinds of treaties, or by any other means. This can be further appreciated in a wider horizon.

116. In the days of the historical Second Peace Conference, held here in The Hague, the participating States decided to set forth a general obligation, incumbent on *all* parties to an armed conflict, to make reparations (not only on the part of the defeated States in favour of the victorious powers, as was the case in previous State practice). This was done *on the basis of a German proposal*, which resulted in Article 3 of the Fourth Hague Convention[110] and is the first provision dealing specifically with a *reparation* regime for violations of international humanitarian law[111]. Thanks to the reassuring German proposal, Article 3 of the Fourth Hague Convention of 1907 clarified that it was intended *to confer rights directly upon individuals*[112], *human beings*, rather than States.

117. This legacy of the Second Hague Peace Conference of 1907 projects itself to our days[113]. The time projection of the suffering of those subjected to deportation and sent to forced labour in the Second World War (period 1943-1945) has been pointed out in expert writing, also in relation to the prolonged endeavours of the victims to obtain reparation.

[110] Article 3 states:

> "A belligerent Party which violates the provisions of the said Regulations [Regulations respecting the laws and customs of war on land, annexed to the Fourth Hague Convention] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

[111] This Article of the Fourth Hague Convention of 1907 came to be regarded as being also customary international law, and it was reiterated in Article 91 of the I Additional Protocol (of 1977) to the 1949 Geneva Conventions on international humanitarian law. Article 91 (Responsibility) of the I Protocol states: "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

[112] Cf., to this effect, Eric David, "The Direct Effect of Article 3 of the Fourth Hague Convention of 18 October 1907 Respecting the Laws and Customs of War on Land", in *War and the Rights of Individuals — Renaissance of Individual Compensation* (H. Fujita, I. Suzuki and K. Nagano, eds.), Tokyo, Nippon Hyoron-sha Co. Publs., 1999, pp. 50-53; and cf. also, e.g., F. Kalshoven, "State Responsibility for Warlike Acts of the Armed Forces", 40 *International and Comparative Law Quarterly* (1991), pp. 831-833; D. Shelton, *Remedies in International Human Rights Law*, 2nd ed., Oxford University Press, 2006, p. 400.

[113] For a general reassessment of that 1907 Conference, on the occasion of its centennial commemoration in 2007, cf. [Various Authors], *Actualité de la Conférence de La Haye de 1907, Deuxième Conférence de la paix/Topicality of the 1907 Hague Conference, the Second Peace Conference* (Yves Daudet, ed.), Leiden, Nijhoff/The Hague Academy of International Law, 2008, pp. 3-302.

In the early 1970s it was pointed out, for example, that

> "it is both surprising and alarming that twenty-five years after the [Second World] War many restitution and compensation cases are still pending. It is especially disturbing that some of these cases have been pending for more than twenty years."[114]

118. More recently, after the enactment of the German Compensation Law of 2 August 2000, it was again recalled that the subjection of prisoners of war to forced labour was characterized by "inhuman conditions" of detention, "insufficient nutrition" and "lack of medical care". And,

> "According to historical research, these appalling conditions were predominant for Italian military internees [IMIs] in Germany. (. . .) The Italians were not prisoners of war who happened also to be subjected to forced labour. Instead, the exploitation of their labour force was the principal reason for their continued detention in Germany. (. . .)
>
> Lastly, one can only deeply regret the tardiness of the legislation passed only in the year 2000, 55 long years after the end of the Second World War. This tardiness was properly recognized by the German Parliament itself when, in the *Stiftungsgesetz* Statute's preamble, it emphasized that 'the law comes too late for those who lost their life as victims of the National Socialist regime, or died in the meantime'."[115]

Not only had those victims to endure inhuman and degrading treatment, but later crossed the final limit of their ungrateful lives living with impunity, without reparation and amidst manifest injustice. The time of human justice is definitively not the time of human beings.

119. Looking at the serious breaches of the law during the Second World War in a wider dimension, the pitfalls of State voluntarism — proper of the positivist legal thinking — were eloquently denounced by the learned professor at the University of Heidelberg, Gustav Radbruch, in the aftermath of the Second World War, and shortly before his death in 1949. In announcing his own personal conversion to the thinking of natural law, he pondered that positivism left the German judiciary immobilized and defenceless in face of all the atrocities perpetrated in the Third Reich, seen by the power-holders as in conformity with their *jus positum* (or rather, their imposed laws). That tragically showed, after "a century of legal positivism", added Rad-

[114] K. Schwerin, "German Compensation for Victims of Nazi Persecution", 67 *Northwestern University Law Review* (1972), p. 518, and cf. pp. 519-523.

[115] B. Fassbender, "Compensation for Forced Labour in World War II", 3 *Journal of International Criminal Justice* (2005), pp. 251-252.

bruch, that all laws ought to be in conformity with the law superior to them, that is, natural law[116].

120. Stressing the cleavage between the *Sein* and the *Sollen*, he argued that, where statutory law manifestly negates — to an extreme and intolerable degree — the equality at the core of all justice, it must be disregarded by judges in favour of the fundamental principles of justice. The international legal profession nowadays, marked by a preponderant and thoughtless adherence to legal positivism, should not forget the warnings of that German professor, tormented as he became by the horrors, perpetrated with impunity, of the Third Reich. The main lesson which Radbruch drew was that the positivist conviction that "a law is a law" (*dura lex sed lex*, or else *Gesetz ist Gesetz*) rendered German jurists of the time defenceless against arbitrary or "criminal" *(verbrecherische)* laws.

121. He added that positivism is incapable of establishing the validity of laws on its own, and it had assumed that such validity follows from the fact that such laws had the power to come into being. Notwithstanding, it is justice which constitutes the highest value, and an unjust law, in principle to be observed, when it comes to be in tension with justice, becomes an "incorrect law" *(unrichtiges Recht)*, which is displaced by justice. When that law does not even aspire to serve justice, oblivious of equality which is at its centre, it is not only "incorrect law", it never achieves the quality of law at all, the ultimate purpose of which is to serve justice[117].

122. In an essay published posthumously, G. Radbruch, again regretting the sad legacy of positivism, insisted on his view that there exists a law higher than the laws, a natural law, a law of reason *(ratio)*, which is above the laws *(ein übergesetzliches Recht)*. And he expressed the hope — keeping in mind the then recent horrors of the Third Reich — that one day the world will see a whole array of international organizations wherein groups of people are no longer attached to their respective nation States, but rather dedicated solely to the cause of humanity as a whole. These human beings "beyond nationality" *(übernationale Menschen)*, in his forecast, would be capable to create properly a true international law, and to adjudicate international disputes[118].

[116] G. Radbruch, *Introducción a la Filosofía del Derecho* [3rd Spanish edition of *Vorschule der Rechtsphilosophie*], Mexico/Buenos Aires, Fondo de Cultura Económica, 1965, pp. 178 and 180.

[117] G. Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht" (1946), in G. Radbruch, *Rechtsphilosophie* (E. Wolf, ed.), Stuttgart, K. F. Koehler Verlag, 1950, pp. 352-353, and cf. pp. 347-357.

[118] G. Radbruch, "Die Erneuerung des Rechts", in *Naturrecht oder Rechtspositivismus?* (W. Maihofer, ed.), Bad Homburg vor der Höhe, H. Gentner Verlag, 1962, pp. 2 and 6-7, and cf. pp. 1-10.

123. I find of perennial value the main lesson extracted by G. Radbruch from the grave violations of human rights and international humanitarian law perpetrated during the *long dark night*[119] of the years of the Third Reich. Among those brutalities stands that of forced labour in war industry, which has received much less attention from historians than other aspects of those somber times. For those of us who have the privilege to serve the cause of justice, it is imperative not to lose sight, in regard to that abominable practice, that the ultimate bearers *(titulaires)* of the originally violated rights were not States, but human beings, of flesh and bones and soul. The vindication of their rights stand in the background of the vindicated State right to immunity. In the present case before the Court, counter-claim and original claim form an indivisible whole.

XIII. The Incidence of *Jus Cogens*: Purported Waiver of Vindication of Rights Inherent to the Human Person Being Devoid of Juridical Effects

124. In any case, any purported waiver by a State of the rights inherent to the human person would, in my understanding, be against the international *ordre public*, and would be deprived of any juridical effects. To hold that this was not yet recognized at the time of the Second World War and the 1947 Peace Treaty — a view remindful of the old positivist posture, with its ineluctable subservience to the established power — would be, in my view, without foundation. It would amount to conceding that States could perpetrate crimes against humanity with total impunity, that they could systematically perpetrate manslaughter, humiliate and enslave people, deport them and subject them to forced labour, and then hide themselves behind the shield of a waiver clause negotiated with other State(s), and try to settle all claims by means of peace treaties with their counterpart State(s).

125. Already in the times of the Third Reich, and before them, this impossibility was deeply-engraved in human conscience, in the *universal juridical conscience*, which is, in my understanding, the ultimate *material* source of all law. To hold that enforced labour was not prohibited at the time of the German Third Reich would not stand (cf. *infra*), not even on the basis of the old positivist dogmas. It does not stand at all, neither in times of armed conflict, nor in times of peace. The gradual restrictions leading to its prohibition, so as to avoid and condemn abuses of the past against the human person, became manifest not only in the domain of international humanitarian law, but also in that of the regulation of labour relations (proper of the international Conventions of the Interna-

[119] To paraphrase some medieval thinkers.

tional Labour Organization — ILO). In my own perception, even before all those instruments *(infra)*, enslavement and forced labour were proscribed by human conscience, as the gross abuses of the past weighed too heavily on this latter.

1. Conventional International Law

(a) *International humanitarian law*

126. As to international humanitarian law, may it be recalled that, well before the sinister epoch of the Third Reich, the Regulations Respecting the Laws and Customs of War on Land, Annex to the (IV) Hague Convention Respecting the Laws and Customs of War on Land, adopted at the Second Hague Peace Conference of 1907, with the aim "to serve, even in this extreme case, the interests of humanity" (preamble, para. 2), imposed clear restrictions on the labour of prisoners of war (Article 6), and prohibited the confinement of these latter (Article 5). The Fourth Hague Convention of 1907 contained, in its preamble, the *célèbre Martens clause* (cf. *infra*), whereby in cases not included in the adopted Regulations annexed to it,

> "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the principles of humanity, and the dictates of the public conscience" (para. 8).

127. Two decades later, by means of the 1926 Geneva Anti-Slavery Convention, the States parties recognized that it was "necessary to prevent forced labour from developing into conditions analogous to slavery" (preamble, para. 5). They further warned that "recourse to compulsory or forced labour may have grave consequences", and thereby they undertook,

> "each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to take all measures to prevent compulsory or forced labour from developing into conditions analogous to slavery" (Article 5).

128. Three years later, and still one decade before the outbreak of the Second World War, the 1929 Geneva Convention Relative to the Treatment of Prisoners of War, again imposed restrictions on the labour of prisoners of war (Articles 28-30 and 32-34), and categorically prohibited "to employ prisoners in the manufacture or transport of arms or munitions of any kind, or on the transport of material destined for combatant units" (Article 31). And, promptly at the end of the Second World War,

the 1945 Charter of the International Military Tribunal of Nuremberg listed among "war crimes" the "deportation to slave labour or for any other purpose of civilian population of or in occupied territory" (Article 6 *(b)*), and among "crimes against humanity" the "enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war" (Article 6 *(c)*).

129. In any case, well beyond the provisions of the aforementioned treaties, celebrated years before, and shortly after, the Second World War, forced labour — analogous to slavery — in the war industry was prohibited by the *universal juridical conscience*, the ultimate *material* source of international law. In this respect, we do not need to indulge into the superficial positivist exercise of spotting express prohibitions in the text of treaties (the *jus positum*). Slave work, forced labour in armaments industry, was prohibited by general international law well before the nightmare and the horrors of the Third Reich.

(b) *International labour Conventions*

130. As to the international instruments of the International Labour Organization (ILO), may it be recalled that the Forced Labour Convention (No. 29) of the ILO was adopted in 1930, almost one decade before the outbreak of the Second World War. And even well before then, forced labour was proscribed by human conscience. The International Labour Office itself has drawn attention to the fact that the 1930 Forced Labour Convention (No. 29), followed by the 1957 Abolition of Forced Labour Convention (No. 105), have practically found universal acceptance[120] (being "the most widely ratified of all international labour conventions"[121]), and the principles embodied therein have been incorporated in several international instruments at both universal and regional levels. The International Labour Office has, accordingly, propounded the view that "[T]he prohibition of the use of forced or compulsory labour in all its forms is considered now as a peremptory norm of modern international law of human rights"[122].

131. It has gone even beyond the domain of the international law of

[120] Counting nowadays on 170 and 164 ratifications, respectively; cf. *op. cit.* note 122, *infra*, p. 12.

[121] Cf. *op. cit.* note 122, *infra*, pp. 1 and 34. Yet, despite this universal condemnation of forced labour, the problem remains in our days, as "millions of people around the world are still subjected to it", in a true "affront to human dignity" (*ibid.*, p. 1), as illustrated by the persistence of slavery-like practices, trafficking in persons for the purpose of exploitation, and illegal forms of compulsion to work (cf. *ibid.*, pp. 35-47).

[122] International Labour Office, *Eradication of Forced Labour*, Geneva, ILO, 2007, p. XI.

human rights, in reiterating, in its recent study on the matter (published almost eight decades after the 1930 Forced Labour Convention [No. 29]), the view that

> "Freedom from forced or compulsory labour was among the first basic human rights subjects within the Organization's mandate to be dealt with in international labour standards. The principles embodied in the ILO Conventions in this field have since been incorporated in various international instruments, both universal and regional, and have therefore become a peremptory norm of international law." [123]

132. This is not the only assertion to this effect; in yet another study published seven years ago by the ILO, the view is restated that, as from the letter and the spirit of the 1930 Forced Labour Convention (No. 29), followed by the 1957 Abolition of Forced Labour Convention (No. 105), the evolution of this particular matter has attained "the status of the abolition of forced or compulsory labour in general international law as a peremptory norm from which no derogation is permitted" [124].

133. It should not be forgotten that this was achieved only after much human suffering of succeeding generations. As observed at the time of the celebration of the 1957 Abolition of Forced Labour Convention (No. 105), there is "humiliating historical evidence" that "the formal abolition of slavery was only reluctantly achieved, little by little, during the nineteenth century"; as "hidden or even overt forms of serfdom" still persisted in some countries, in the mid-twentieth century it was thus necessary to conclude the 1957 ILO Convention on Abolition of Forced Labour (No. 105). At that same time, moreover, the 1958 UN Conference on the Law of the Sea "found itself faced with the infamous slave trade to deal with as a still existing evil surviving from the past" [125].

(c) *International law of human rights*

134. Keeping in mind all the aforementioned developments — the evolution of the new *jus gentium* of our times — it is clear that, a long time ago, the prohibition of forced labour in all circumstances became estab-

[123] *Eradication of Forced Labour, op. cit. supra* note 122, p. 111. For a study of the historical background of the 1930 Forced Labour Convention (No. 29), and the early engagement in the matter on the part of the ILO and the League of Nations, cf. Jean Bastet, *Le travail forcé et l'organisation internationale (SDN et BIT)*, Paris, LGDJ, 1932, pp. 1-181.

[124] M. Kern and C. Sottas, "The Abolition of Forced or Compulsory Labour", in *Fundamental Rights at Work and International Labour Standards*, Geneva, ILO, 2003, p. 44, and cf. p. 33.

[125] J. H. W. Verzijl, *Human Rights in Historical Perspective*, Haarlem, Haarlem Press, 1958, p. 6.

lished in the law of nations, in times of armed conflict as well as of peace (cf. *supra*). As proclaimed, in the aftermath of the Second World War, by the 1948 Universal Declaration of Human Rights, "[a]ll human beings are born free and equal in dignity and rights" (Article 1). This prohibition derives from the fundamental principle of equality and non-discrimination. This fundamental principle, according to Advisory Opinion No. 18 of the Inter-American Court of Human Rights (IACtHR) on the *Juridical Condition and Rights of Undocumented Migrants* (of 17 September 2003), belongs to the domain of *jus cogens*.

135. In that transcendental Advisory Opinion of 2003, the IACtHR, in line with the humanist teachings of the "founding fathers" of the *droit des gens (jus gentium)*, pointed out that, under that fundamental principle, the element of equality can hardly be separated from non-discrimination, and equality is to be guaranteed without discrimination of any kind. This is closely linked to the essential dignity of the human person, ensuing from the unity of human kind. The basic principle of equality before the law and non-discrimination permeates the whole operation of the State power, having nowadays entered the domain of *jus cogens*[126]. In a concurring opinion, it was stressed that the fundamental principle of equality and non-discrimination permeates the whole *corpus juris* of the international law of human rights, has an impact in public international law, and projects itself onto general or customary international law itself, and integrates nowadays the expanding material content of *jus cogens*[127].

2. *General International Law*

136. I have already referred to the *Martens clause* (para. 126, *supra*) inserted into the preamble of the Fourth Hague Convention of 1907 (cf. *supra*), and, even before that, also in the preamble of the Second Hague Convention of 1899 (para. 9), adopted at the First Hague Peace Conference of 1899[128], both pertaining to the laws and customs of land warfare. Its purpose was to extend juridically needed protection to civilians and combatants in all situations, even though not contemplated by the con-

[126] IACtHR, Advisory Opinion No. 18 (of 17 September 2003), on the *Juridical Condition and Rights of Undocumented Migrants*, Series A, No. 18, paras. 83, 97-99 and 100-101.

[127] *Ibid*., concurring opinion of Judge A. A. Cançado Trindade, paras. 59-64 and 65-73. In recent years, the IACtHR, together with the *ad hoc* International Criminal Tribunal for the former Yugoslavia, have been the contemporary international tribunals which have most contributed, in their case law, to the conceptual evolution of *jus cogens* (well beyond the law of treaties), and to the gradual expansion of its material content; cf. A. A. Cançado Trindade, "*Jus Cogens*: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case Law", in *XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano — OAS* (2008) pp. 3-29.

[128] It was originally presented by the Delegate of Russia (Friedrich von Martens) to the First Hague Peace Conference (1899).

ventional norms; to that end, the Martens clause invoked the "principles of the law of nations" derived from "established" custom, as well as the "principles of humanity" and the "dictates of the public conscience". Subsequently, the Martens clause was again to appear in the common provision, concerning denunciation, of the four Geneva Conventions of international humanitarian law of 1949 (Articles 62, 63, 142 and 158), as well as in the Additional Protocol I (of 1977) to those Conventions (Article 1, paragraph 2), to quote some of the main Conventions of international humanitarian law.

137. The Martens clause has thus been endowed, for more than a century, with continuing validity, in its invocation of public conscience [129], and it keeps on warning against the assumption that whatever is not expressly prohibited by the Conventions on international humanitarian law would be allowed; quite on the contrary, the Martens clause sustains the continued applicability of the principles of the law of nations, the principles of humanity, and the dictates of the public conscience, independently of the emergence of new situations [130]. The Martens clause impedes, thus, the *non liquet*, and exerts an important role in the hermeneutics and the application of humanitarian norms.

138. The fact that the draftsmen of the Conventions of 1899, 1907 and 1949 and of Protocol I of 1977 have repeatedly asserted the elements of the Martens clause in those international instruments reckons that clause as an emanation of the material source of international humanitarian law [131] and of international law in general. In this way, it exerts a continuous influence in the spontaneous formation of the contents of new rules of international humanitarian law.

139. By intertwining the principles of humanity and the dictates of public conscience, the Martens clause establishes an "organic interdependence" of the legality of protection with its legitimacy, to the benefit of all human beings [132]. The legacy of Martens is also related to the primacy of law in the settlement of disputes and the search for peace [133]. Contemporary juridical doctrine has also characterized the Martens clause

[129] As, however advanced may the codification of humanitarian norms be, it will hardly be considered as being truly complete.

[130] B. Zimmermann, "Protocol I — Article 1", in *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Y. Sandoz, Ch. Swinarski and B. Zimmermann, eds.), Geneva, ICRC/Nijhoff, 1987, p. 39.

[131] H. Meyrowitz, "Réflexions sur le fondement du droit de la guerre", in *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet* (Ch. Swinarski, ed.), Geneva/The Hague, CICR/Nijhoff, 1984, pp. 423-424; and cf., H. Strebel, "Martens' Clause", in *Encyclopedia of Public International Law* (R. Bernhardt, ed.), Vol. 3, Amsterdam, North-Holland Publ. Co., 1982, pp. 252-253.

[132] Ch. Swinarski, "Préface", in V. V. Pustogarov, *op. cit. infra* note 133, p. XI.

[133] V. V. Pustogarov, *Fedor Fedorovich Martens — Jurist i Diplomat*, Moscow, Ed. Mejdunarodnie Otnosheniya, 1999, pp. 1-287.

as source of general international law itself[134]; and no one would dare today deny that the "principles of humanity" and the "dictates of the public conscience" invoked by the Martens clause belong to the domain of *jus cogens*[135]. The aforementioned clause, as a whole, has been conceived and reiteratedly affirmed, ultimately, to the benefit of humankind as a whole, thus maintaining its topicality. The clause may be considered as an expression of the *raison d'humanité* imposing limits on the *raison d'Etat.*

3. The Incidence of Jus Cogens*, in the Light of the Submissions of the Contending Parties*

140. The previous considerations bring me to a remaining line of brief reflections on the incidence of *jus cogens*, in the light of the submissions of Italy and Germany in the present case concerning *Jurisdictional Immunities of the State*. Their submissions, on this specific issue, and in the context of the *cas d'espèce*, are not so diverging as one might perhaps expect them to be. It is certain that, in its Memorial, Germany begins by criticizing the arguments of Italy's *Corte di Cassazione* in its 2004 Judgment in the *Ferrini* case, as, in Germany's view,

> "(. . .) As a legal concept, *jus cogens* did not exist at the time when the violations occurred from which the plaintiffs attempt to derive their claims. Thus, to apply the standard of *jus cogens* to the tragic events of the Second World War does not correspond to the general rules of temporal applicability of international law. Any conduct must be appraised by the standards in force at the time it was practice."[136]

It then added that, "since international law is essentially based on the consent of States", it is in their "general practice" that answers must be sought as to the consequences "entailed by a breach of a *jus cogens* rule"[137].

141. Such assertions do not resist closer examination. State consent and *jus cogens* are as antithetical as they could possibly be. The practice of States alone, permeated with incongruencies as it usually is, cannot at all provide sole guidance for extracting the consequences of a breach of a peremptory norm of general international law *(jus cogens)*, in the sense of Articles 53 and 64 of the two Vienna Conventions on the Law of Trea-

[134] F. Münch, "Le rôle du droit spontané", in *Pensamiento Jurídico y Sociedad Internacional — Libro-Homenaje al Prof. D. A. Truyol y Serra*, Vol. II, Madrid, Univ. Complutense, 1986, p. 836.

[135] S. Miyazaki, "The Martens Clause and International Humanitarian Law", in *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet, op. cit. supra* note 131, pp. 438 and 440.

[136] Memorial of Germany (12 June 2009), pp. 52-53, para. 85.

[137] *Ibid.*, p. 54, para. 87.

ties (1969 and 1986). When the first of those Vienna Conventions was adopted, it marked the emergence of *jus cogens* only in the domain of the *law of treaties*. In the course of the official debates of the Vienna Conference of 1986, which adopted the second Vienna Convention, I deemed it fit to warn of the manifest *incompatibility* between *jus cogens* and the static positivist-voluntarist conception of international law (with emphasis on the will or consent of States)[138].

142. The truth is that *jus cogens* goes well beyond the law of treaties, and this is not new. Still in its Memorial, Germany asserts that, "undoubtedly", *jus cogens* "prohibits genocide"; and it promptly concedes, in this connection, that: "This ban has its legal foundation both in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and in (earlier) general rules of international law."[139]

Thus, Germany itself rightly — and commendably — recognizes the incidence of *jus cogens* going well back into the past, and well before the relevant provisions (Articles 53 and 64) of the 1969 Vienna Convention on the Law of Treaties. It ends up by recognizing that *jus cogens* (in general international law) prohibited genocide already at the times of the crimes of the Third Reich, which shocked the conscience of humankind. Even before the end of the nineteenth century (on the occasion of the First Hague Peace Conference of 1899), the prohibition of genocide was deeply-rooted in the universal juridical conscience, or in "the dictates of the public conscience", to paraphrase the Martens clause *(supra)*.

143. The 1948 Convention against Genocide went on to put that on paper, after the horrors of the Third Reich. But well before that Convention, everyone with a sane mind knew perfectly well that the perpetration of genocide is a *wrongful* act, is a crime, it goes against the law. As to the treatment of detained persons, in its Counter-Memorial in the present case, Italy, on its turn, in relation to *jus cogens*, considers that

> "It seems to be universally accepted that, even before the Second World War, provisions concerning the treatment of prisoners had a non-derogable character. (. . .) The Charter annexed to the Agreement of 8 August 1945 establishing the Nuremberg International Military Tribunal qualified as war crimes the violations of the laws or customs of war. The Tribunal found that, by 1939, the humanitarian rules included in the Regulations annexed to the Hague Con-

[138] Cf. *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organization* (Vienna, 18 February-21 March 1986), Vol. I, N.Y., 1995, pp. 187-188 [intervention by Mr. Cançado Trindade (Brazil)].

[139] Memorial of Germany (12 June 2009), p. 53, para. 86.

vention IV of 1907 'were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war'.

In 1946, General Assembly resolution 95 (I) confirmed the Nuremberg Principles as regards international crimes. Even if the context was that of individual criminal responsibility and not of State responsibility and *jus cogens* definition, it cannot be denied that the criminalization of violations of humanitarian law committed during the Second World War is indicative of the idea that such violations were considered, already at that time, as affecting the most fundamental values of the international community." [140]

144. In fact, we can go back — even before the Second Hague Peace Conference (1907) — to the time of the First Hague Peace Conference (1899), in the line of the viewpoints submitted to the Court by both Germany and Italy, not necessarily diverging herein. By the end of the nineteenth century, in the days of the First Hague Peace Conference, there was a sense that States could incur delictual responsibility for mistreatment of persons (e.g., for transfer of civilians for forced labour); this heralded the subsequent age of criminal responsibility of individual State officials, with the typification of war crimes and crimes against humanity.

145. The gradual awakening of human conscience led to the evolution from the conceptualization of the *delicta juris gentium* to that of the violations of international humanitarian law (in the form of war crimes and crimes against humanity) — the Nuremberg legacy — and from these latter to that of the *grave* violations of international humanitarian law (with the four Geneva Conventions on international humanitarian law of 1949, and their I Additional Protocol of 1977) [141]. With that gradual awakening of human conscience, likewise, human beings ceased to be *objects* of protection and became reckoned as *subjects* of rights, starting with the fundamental right to life, encompassing the *right of living* in dignified conditions.

146. Human beings were recognized as *subjects* of rights in all circum-

[140] Counter-Memorial of Italy (22 December 2009), pp. 62-63, paras. 4.62-4.63.

[141] I Geneva Convention, Articles 49-50; II Geneva Convention, Articles 50-51; III Geneva Convention, Articles 129-130; IV Geneva Convention, Articles 146-147; I Additional Protocol, Articles 85-88. The I Additional Protocol of 1977 (Article 85) preferred to stick to the terminology of the four Geneva Conventions of 1949 in this particular respect, and maintained the expression of "grave breaches" on international humanitarian law, in view of the "purely humanitarian objectives" of those humanitarian treaties; yet, it saw it fit to state that "grave breaches" of those treaties (the four Geneva Conventions and the I Additional Protocol) "shall be regarded as war crimes" (Article 85 (5)). Cf. Y. Sandoz, Ch. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, ICRC/Nijhoff, 1987, pp. 990 and 1003.

stances, in times of peace as well as of armed conflict. As to the former, may it here be briefly recalled that, well before the 1948 Universal Declaration of Human Rights, in the inter-war period, the pioneering experiments of the minorities system and the mandates system under the League of Nations granted direct access to the individuals concerned to international instances (the Minorities Committees and the Permanent Mandates Commission, respectively), in order to vindicate the rights emanated *directly* from the law of nations (the evolving *jus gentium*). As to the latter, likewise, as from the Second Hague Peace Conference of 1907 onwards, human beings were recognized as being entitled to war reparations claims.

147. A detailed factual account of the cruelty and the untold human suffering of deportation and forced labour of workers and of the civilian population (of occupied Belgium)[142], already in the First World War (period 1916-1918), published in 1928, observed that

> "The system of deportation set up in the autumn of 1916 essentially consisted in the widespread requisitioning or mass conscription of working-class males, in order to meet the labour requirements of the German war machine (. . .)
> Such requisitioning is clearly in breach of international law, both traditional and as codified by the Hague Conventions."[143] *[Translation by the Registry.]*

Two decades later, the IV Geneva Convention (1949) expressly prohibited forcible transfers[144], in addition to the earlier restrictions set forth in the 1907 Hague Regulations (IV Hague Convention). Those international instruments came to be regarded as declaratory of the evolving customary law on the matter[145].

148. The 1907 Hague Regulations (IV Hague Convention) contained restrictions, rather than a peremptory prohibition, because at the beginning of the twentieth century the practice of deporting persons came to be regarded as "having fallen into abeyance". But the worst was still to come, with the imposed formation of a "forced labour service", over two World Wars, with its appalling features, insufficiently examined by his-

[142] Cf. F. Passelecq, *Déportation et travail forcé des ouvriers et de la population civile . . ., op. cit. supra* note 23, pp. 318-320, 329-330, 334-335, 374-376 and 394. The author ends his book (on the considerable suffering of those subjected to deportation and forced labour from 1916-1918) with these words: "We will not draw any conclusions. For a number of reasons, it is preferable that the reader be left directly confronted with the facts, to hear their silent message without human intervention" *[translation by the Registry]*; *ibid.*, p. 404. He let the facts speak for themselves.

[143] *Ibid.*, p. 374.

[144] Article 49 (1), in addition to Article 147 on unlawful deportations or transfers.

[145] Cf., e.g., J.-M. Henckaerts, "Deportation and Transfer of Civilians in Time of War", 26 *Vanderbilt Journal of Transnational Law* (1993), pp. 469-519.

torians to date: "millions of human beings were torn from their homes, separated from their families and deported from their country, usually under inhumane conditions"[146].

They were in this way sent to forced labour in the war industry. Such events disclosed the necessity of "more detailed provisions" on the matter, giving expression to a prohibition which was already present in human conscience. Accordingly, in the IV Geneva Convention of 1949, "'unlawful deportation or transfer' was introduced among the grave breaches, defined in Article 147 of the Convention as calling for the most severe penal sanctions"[147].

149. Thus, by the mid-twentieth century any doubt was dispelled that prohibitions of the kind had come to be regarded as "having been embodied in international law"[148]. As to the idea of *jus cogens*, it had found expression even earlier, in relation to distinct situations, keeping in mind general international law and the very foundations of the international legal order. The expression *"jus cogens"* was utilized by Judge Schücking, of the PCIJ, in his separate opinion in the *Oscar Chinn* case[149]. One year later, in his course at the Hague Academy of International Law, A. Verdross also evoked the expression *"jus cogens"*, and referred himself to the aforementioned separate opinion of Judge Schücking[150].

150. In the same year of 1935, another scholar, J. H. W. Verzijl, endorsing the views of Judge Schücking in his invocation of *jus cogens* in the *Oscar Chinn* case (in his own words, "M. Schücking, le juge allemand, me paraît avoir parfaitement raison"), also referred to *jus cogens*, and was quite critical of the decision of the PCIJ in the *Oscar Chinn* case for having pursued an essentially voluntarist-positivist approach (unfortunately still *en vogue* in our days). In the words of J. H. W. Verzijl,

> "(. . .) To a fundamental question of public international law, the Judgment gave a highly regrettable response. At issue was what the Court should do when a treaty is claimed by some of its parties to be totally null and void because it violates certain pre-existing *jus cogens* norms (. . .)
>
> The position is quite simple: if the Court accepts that the later text infringes pre-existing norms of a *jus cogens* character, it cannot

[146] Jean S. Pictet *et al.* (eds.), *Commentary on the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva, ICRC, 1958, p. 278.

[147] *Ibid.*, p. 280.

[148] *Ibid.*, p. 279.

[149] *Oscar Chinn (United Kingdom* v. *Belgium), Judgment, 1934, P.C.I.J., Series A/B, No. 63*, pp. 148-150, esp. p. 149.

[150] Cf., A. Verdross, "Les principes généraux du droit dans la jurisprudence internationale", 52 *Recueil des cours de l'Académie de droit international de La Haye* (1935), pp. 206 and 243.

apply the treaty, and must consider it null and void in its totality, even if that nullity is not invoked by any of the parties to the dispute. In such a situation, nullity is automatic and the Court must make a finding to that effect *proprio motu.*

The Permanent Court, however, failed to do this (. . .) I have no hesitation in describing this Judgment as a *pessimi exempli*. Because, by submitting to the will of the parties to the dispute, the Court, by this unfortunate Judgment, has opened the door to all manner of evasions of peremptory norms of international law. Through this Judgment, it has prepared the ground for States to escape — with impunity, and indeed with its tacit approval — the application of rules of law previously recognized as necessarily representing for the future an unshakeable basis for international relations."[151] *[Translation by the Registry.]*

151. My own view, as I have already pointed out, is that States cannot waive claims of violations of the fundamental rights inherent to the human person, and any purported waiver to that effect would be deprived of any juridical effects. This applies even more forcefully if those violations (under the international law of human rights) are also serious or grave breaches of international humanitarian law and amount to war crimes. This was already recognized in the mid-twentieth century, in respect of deportation to slave labour. Thus, the 1945 [London] Charter of the International Military Tribunal (of Nuremberg) included "deportation to slave labour" among "*war crimes*, namely, violations of the *laws or customs* of war" (Article 6 *(b)*). The 1945 Charter of the Nuremberg Tribunal further included "enslavement" and "deportation" among "*crimes against humanity*" (Article 6 *(c)*).

152. Shortly after the adoption of the Charter of the Nuremberg Tribunal, the UN International Law Commission (ILC) was directed by the UN General Assembly resolution 177 (II), paragraph *(a)*, to "formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal". In pursuance of the General Assembly resolution, the ILC started considering the subject at its very first session. The ILC espoused the view that

"since the Nuremberg principles had been affirmed by the General Assembly, the task entrusted to the Commission by paragraph *(a)* of resolution 177 (II) was not to express any appreciation of these principles as principles of international law but merely to formulate them"[152].

[151] J. H. W. Verzijl, "La validité et la nullité des actes juridiques internationaux", 15 *Revue de droit international* (1935), pp. 321-322.

[152] UN, *Yearbook of the International Law Commission* (1950), Vol. II, p. 374.

This view was approved by the General Assembly in 1949, and, after the consideration of the report on the matter (*rapporteur*, Jean Spiropoulos), the ILC adopted, in its session of 1950, a formulation of the principles of international law formulated in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal[153].

153. Principle VI of the ILC's formulation of the Nuremberg Principles included, among "*war crimes*", the "deportation to slave labour or for any purpose of civilian population of or in occupied territories"; and it likewise included, among "*crimes against humanity*", "enslavement" and "deportation" of "any civilian population"[154]. In sum, the ILC only formulated the principles at issue, which had already been recognized by the international community, and duly asserted by the UN General Assembly. The "dictates of the public conscience" — to paraphrase the Martens clause — had already echoed in the UN General Assembly. The international community already recognized *jus cogens*. Could claims of war crimes reparations be waived in 1947? Not at all. Could claims of reparations of crimes against humanity be waived in 1947? Not at all. Could claims of reparations of serious breaches (two years later codified as "grave breaches") of international humanitarian law be waived in 1947? Not at all; not in my perception, not in my conception.

XIV. Conclusions

154. May I now, at last, proceed to a summary of the foundations I have cared to lay, in the present dissenting opinion, of my own position, contrary to the decision taken by the Court's majority in the present Order. In summarily discarding the Italian counter-claim as "inadmissible as such", the Court should have at least instructed properly the *dossier* of the *cas d'espèce*, by holding, prior to the decision it has just taken, public hearings to obtain further clarifications from the contending Parties. The same treatment is to be rigorously dispensed to the original claim and the counter-claim as a requirement of the sound administration of justice *(la bonne administration de la justice)*. They are, both, autonomous, and should be treated on the same footing, with a strict observance of the *principe du contradictoire*. Only in this way the *procedural equality* of the parties (Applicant and Respondent, rendered Respondent and Applicant by the counter-claim) is secured.

[153] *Yearbook of the International Law Commission* (1950), Vol. II, p. 374.
[154] *Ibid.*, p. 377.

155. Counter-claims, as a juridical institute transposed from domestic procedural law into international procedural law, already have their history, but the ICJ's jurisprudential construction on the matter is still in the making. Article 80 (1) of the Rules of Court entitles the ICJ to entertain a counter-claim if "it comes within the jurisdiction of the Court" and "is directly connected with the subject-matter of the claim of the other party". The present Order of the Court is not in line with the procedural history of the Court's handling of counter-claims (cf. *supra*). The Court, furthermore, felt it sufficient to examine only one of the requisites of Article 80 (1), on the basis, *data venia*, of erroneous assumptions as to the facts and as to the law, and failing thus to comply *in toto* with that provision of its own Rules.

156. The Order that the Court has just adopted has made abstraction of the configuration of the notion of "continuing situation" in international legal thinking, in both international litigation and case law, and in international legal conceptualization at normative level. Furthermore, it has not addressed the position of the true bearers *(titulaires)* of the originally violated rights, oblivious of the pitfalls of State voluntarism. Its emphasis fell solely on waiver of claims, again oblivious of the incidence of *jus cogens*, rendering certain waivers of claims devoid of any juridical effects *(supra)*.

157. The Court has discarded the Italian counter-claim on the basis of succinct considerations in the two brief paragraphs 28 and 29, of the present Order. Paragraph 29 is a *petitio principii*, simply begging the question. The *ratio decidendi* lies in paragraph 28 of the Order: it argues that the two 1961 Agreements provided Italy with forms of compensation for certain of its nationals going beyond the "regime" established shortly after the Second World War, and that they did not affect or change the legal situation of the Italian nationals at issue in the present case. It adds that the legal situation of those Italian nationals is "inextricably linked" to an "appreciation" of the scope and effect of the waiver contained in Article 77 (4) of the 1947 Peace Treaty and "the different views of the Parties as to the ability of Germany to rely upon that provision".

158. This is, in fact, another *petitio principii*, trying to make one believe that there is continuity between the 1947 Peace Treaty between the Allied Powers[155] and Italy, and the 1961 Agreements. This *petitio*

[155] Namely: Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, China, France, Australia, Belgium, Byelorussian Soviet Socialist Republic, Brazil, Canada, Czechoslovakia, Ethiopia, Greece, India, the Netherlands, New Zealand, Poland, the Ukrainian Soviet Socialist Republic, Union of South Africa, and the People's Federal Republic of Yugoslavia.

principii ultimately leads the Court to declare that the counter-claim relates to facts and situations which already existed prior to the entry into force of the 1957 European Convention for the Peaceful Settlement of Disputes, thus falling outside its jurisdiction *ratione temporis*, and enabling it to declare the counter-claim "inadmissible as such". The matter summarily disposed of, in the present Order, is not so clear and self-evident as the Court's majority seems to believe. On the basis of the considerations and reflections developed in the present dissenting opinion, I am led to conclude that the Court's majority position does not stand, and finds no basis, neither as to the facts nor as to the law, to rely upon. It is nothing but a *petitio principii*.

159. Germany expressly acknowledges that "there exists in fact a certain divergence of opinions regarding the legal connotation of the two 1961 Agreements" [156], whether they set up or not a "reparation regime" [157]. Germany and Italy further disagreed as to whether the celebration of the two 1961 Agreements represented a gesture of good will on the part of Germany, or else a mandatory process of settlement of reparations claims [158]. Germany's obligation of effective reparation in respect of Italian victims' claims of serious international humanitarian law violations, though finding a *historical* causal nexus in the crimes committed by the Third Reich, actually derives *juridically* from decisions of post-war Germany, formalized through the two 1961 Agreements [159].

160. In this connection, both Parties have excluded occurrences of the period preceding the entry into force of the 1957 European Convention for the Peaceful Settlement of Disputes from the subject-matter of the present dispute, in so far as consideration of the counter-claim is concerned [160]. Italy makes it quite clear that "it is the issue of reparation, and not the factual and legal assessment of events of the Second World War, which forms the central point of the dispute" [161]. The tragic occurrences of the Second World War do not constitute the real cause of the present dispute on reparation claims; the 1961 Agreements do, and form the triggering point of a *continuing situation* persisting to date.

[156] Preliminary Objections of Germany..., *op. cit. supra* note 32, p. 22, para. 35.

[157] Cf. Observations of Italy . . ., *op. cit. supra* note 53, pp. 20 and 25, paras. 52 and 65.
[158] *Ibid.*, pp. 22-23, paras. 56-57.
[159] Cf. Counter-Memorial of Italy (22 December 2009), p. 111, para. 5.63.
[160] Memorial of Germany (12 June 2009), pp. 8-9, para. 7; Counter-Memorial of Italy (22 December 2009), pp. 37-38, paras. 3.14-3.15.
[161] Counter-Memorial of Italy (22 December 2009), pp. 37-38, para. 3.15.

161. As already pointed out, there is evidence to the effect that, from 1961 onwards, Germany decided no longer to avail itself of the waiver clause of Article 77 (4) of the 1947 Peace Treaty, even retroactively; from then onwards, applications of Italian nationals would no longer be discarded (unlike what used to happen before 1961, on the basis of Article 77 (4) of the Peace Treaty). Reference has already been made, first, to the *exchange of letters* (between the Secretary of State of the German Foreign Office and the Italian Ambassador in Bonn) of 2 June 1961 (on the same day as the two Agreements were signed[162], taking into account that exchange of letters), indicating that a *new obligation* had emerged, and, secondly, to the memorandum submitted to the legislative bodies by the German Federal Government on 30 May 1962, indicating its preparedness to consider claims of reparations (arising out of war crimes in the Second World War) of Italian victims[163]. These Agreements embodied an obligation under international law, representing not only a simple gesture of good will[164].

162. Be that as it may, even if that would not be the case, the Court is not in principle bound by the submissions of the parties. In the determination of its own jurisdiction, so as *to say what the law is (juris dictio)*, it is perfectly entitled to go beyond the submissions of the contending parties. The Court is the master of its own jurisdiction. In the present case, it does not need to embark on an exercise of the kind, *motu proprio*, as the submissions of the contending Parties leave no room for doubt that the Court's jurisdiction *ratione temporis* is well-established, and the way was thus paved for it to declare the admissibility of the counter-claim.

163. The present Order seems to be at pains to concede that the two 1961 bilateral Agreements provided forms of compensation *extending beyond (allant au-delà)* the "regime" established in the aftermath of the Second World War. The truth is that the two "regimes" (of 1947 and 1961) are independent from each other, and are to be considered separately. May I recall that the celebration of the 1961 Indemnity Agreement was accompanied by an *exchange of letters* between Germany and Italy (cf. *supra*) — which cannot pass unnoticed here — wherein Germany itself held that all applications which had previously been rejected in the 1950s because of Article 77 (4) of the 1947 Peace Treaty would be reconsidered, and new applications of Italian nationals under the Federal

[162] Observations of Italy . . ., *op. cit. supra* note 53, pp. 18-19, para. 46; and cf. Counter-Memorial of Italy (22 December 2009), Annex 4.

[163] There was a clear instruction of the German Government to its legislative authorities not to object to claims to restitution on the basis of the waiver of Article 77 (4) of the 1947 Peace Treaty; cf. also Counter-Memorial of Italy (22 December 2009), pp. 108-109, para. 5.56.

[164] Observations of Italy . . ., *op. cit. supra* note 53, pp. 21-22, para. 55.

Compensation Law of 1953[165] and Federal Restitution Law would be dealt *without raising objections* based on Article 77 (4) of the 1947 Peace Treaty.

164. The new legal reparation regime, started with the two 1961 Agreements — as explained by Germany itself in that *exchange of letters — does not match* the previous one established in 1947 by the Peace Treaty and that rendered Article 77 (4) of the 1947 Peace Treaty obsolete. A *new situation* emerged in 1961, *without continuity* with that of the 1947 Peace Treaty. This is owed to several factors. To start with, Germany was not a party to the 1947 Peace Treaty between the Allied Powers and Italy. The *mens rea* of that extensive 1947 Treaty (a piece of contemporary world history) was to strike a balance between the will of the Allied Powers to impose a heavy toll on Germany and the concomitant attempt by the Allied Powers not to undermine their chances to resort in due course to Germany's economic potential and solvency. The issue of reparation was dealt with in a piecemeal approach, tangentially, and was postponed for proper regulation at a later time.

165. The *mens rea* of the two 1961 Agreements was quite different, as their titles indicate themselves, and their contents clearly confirm it (cf. *supra*), and the celebration of the two 1961 Agreements constitutes the triggering point of a new situation, a *continuing situation* in respect of claims of war reparations which extends up to the present time. This *continuing situation* started in 1961, relating to facts subsequent to the entry into force of the 1957 European Convention for the Peaceful Settlement of Disputes, thus falling entirely within the Court's jurisdiction *ratione temporis*, what enabled it to declare the counter-claim "admissible as such". That is what the Court should have done.

166. The present Order itself identified the Italian nationals at issue in the present case as "certain Italian victims of serious violations of humanitarian law committed by Nazi Germany between 1943 and 1945" (para. 26), that is, human beings of flesh and bones, and soul. During the 1950s, several States started to engage in political processes with Germany through the celebration of Treaties such as the two 1961 Agreements. Italy started negotiations with Germany which led to the conclusion of their two bilateral 1961 Agreements.

167. This was the first bilateral step which eventually led to the settlement of certain pending bilateral claims of reparation for war crimes.

[165] This law has been amended many times; the Federal Compensation Law of 1965 (BEG Final Law) is still in force. Cf. Counter-Memorial of Italy (22 December 2009), Annexes 5 and 6.

Shortly afterwards, in the aforementioned *exchange of letters* following the celebration of the 1961 Indemnity Agreement, Germany interpreted the waiver clause and explicitly held that it was not applicable (cf. *supra*). The 1961 Agreements are the ones to which both Germany and Italy are parties, and the Court cannot thus "link" (even less so "inextricably"!) the situation of war reparation claims of the Italian victims at issue here, with the one established between Italy and the Allied Powers (not Germany). But this is not all.

168. May I further recall that Germany's conception of the waiver clause contained in Article 77 (4) of the 1947 Peace Treaty was again, for a second time, clarified in 1962. The Federal Government instructed the German authorities in charge, on 30 May 1962, *not to raise objections* based on Article 77 (4) of the 1947 Peace Treaty in case of claims of restitution, due to the special character of the claims to compensation for measures of Nazi persecution (cf. *supra*). Unlike what the Court's majority assumes, the "regime" of the 1947 Peace Treaty was not "continued" or perfected by the 1961 Agreements: it was simply replaced. Article 77 (4) of the 1947 Peace Treaty had become obsolete, and thus no longer applicable.

169. The relationship between the Peace Treaty of 1947 and the two Agreements of 1961 cannot at all be described as one of continuity. There is merely a historical causal *nexus*, which does not entail the exclusion of the Court's jurisdiction *ratione temporis* over the Italian counter-claim. As I previously observed, the international *contentieux* of reparations is endowed with a dynamics of its own, and there are nowadays many examples in international litigation to that effect (cf. *supra*). Under these circumstances, the Court does not need to "appreciate" (as the Order says), the scope and effect of the waiver contained in Article 77 (4) of the 1947 Peace Treaty in order to decide whether the counter-claim falls within its jurisdiction.

170. This "appreciation" was, in any case, undertaken by Germany itself, already in 1961 and 1962, and deprived that waiver clause of its *raison d'être*. The Court's Order seeks to establish an "inextricable link" (only in its imagination) between the 1947 waiver, fallen into *desuetudo*, and the legal situation of the victimized Italian nationals concerned, in order to conclude that the present dispute relates to facts or situations existing prior to 1961, so as to find itself deprived of jurisdiction *ratione temporis*. However, Germany's position as to that waiver clause had only been established in 1961, and not earlier, in the sense of rendering the waiver clause at issue inapplicable.

171. Germany recognized that the waiver of Article 77 (4) of the 1947 Peace Treaty had no longer any effect. Applications (for compensation) which had been previously rejected in the 1950s on the ground of Article 77 (4) would be reconsidered, and new applications (of Italian nationals)

under the Federal Compensation Law of 1953 and Federal Restitution Law would be dealt without raising objections based on Article 77 (4) of the 1949 Peace Treaty. Germany's position disclosed a juridical conviction that the 1947 purported waiver of claims against it was no longer to have legal effects, on ground of obsolescence. Germany expressed its belief not to be obliged by the waiver clause of 1947. Its subsequent practice — the aforementioned *exchange of letters*, and the memorandum *(Denkschrift)* of 30 May 1962 — affected directly the waiver clause of the 1947 Peace Treaty.

172. A new *continuing situation* thus emerged in 1961 as to war reparation claims, extending to the establishment in 2000 of the "Remembrance, Responsibility and Future" Foundation, and from then to date. This is what Italy actually expressed before the Court[166], adding that

> "as Germany has always (. . .) acknowledged its international responsibility deriving from the conduct of the German Reich, (. . .) the present dispute did not arise because of the unlawful conduct of German authorities during the Second World War. (. . .) It does not constitute the source or real cause of the present dispute"[167].

This was triggered much later, with the celebration of the two 1961 German-Italian Agreements.

173. In addition, and much to my regret, the Court's decision in the present Order seems more open and receptive to the sensitivity of States than to that of the victimized human beings, subjected to deportation and sent to forced labour. Unfortunately for its posture, not seldom States appear to be even more sensitive than human beings, so they are unlikely to be pleased, anyway. The Court's tenacious search to identify, above all, the will of States, is also, in my view, much to be regretted. Its decision in the present Order, in my view, does not stand, however, even from its voluntarist outlook. Germany itself cared to show, in its new posture (as from 1961 onwards) in relation to the 1947 waiver, that to try to build a legal reasoning on a waiver of the kind is like trying to build a castle in the sand.

174. After all, above the will stands human conscience. Moved by this latter, the contending Parties, Germany and Italy, agreed to submit their present dispute (original claim and counter-claim) to this Court. By means of their respective original claim and counter-claim, Italy and Ger-

[166] Observations of Italy..., *op. cit. supra* note 53, pp. 9-10, para. 21.
[167] *Ibid.*, p. 9, para. 20.

many commendably provided the Court with a unique opportunity to pronounce on a matter — that of State immunity in relation to claims of war crimes reparation — of the utmost importance for the present state and the future of the law of nations (the *jus gentium*); the Court regrettably dropped this unique occasion for reasons which escape my comprehension.

175. The present case concerning *Jurisdictional Immunities of the State* does not concern State immunities *in abstracto*, or in isolation: it pertains to State immunity in *direct connection* with reparations for war crimes. The arguments of the contending Parties, in the written phase which preceded the present Order of the ICJ, in my perception leave no doubt that there is a *direct connection* between Germany's original claim and Italy's counter-claim, in conformity with Article 80 (1) of the Rules of Court. Such direct connection is inescapable.

176. As to the jurisdictional requirement, the vindications of the contending Parties, both that of Germany as to State immunities, and that of Italy as to war reparation claims, as from the two 1961 Agreements, in my perception fall clearly within the Court's jurisdiction ratione *temporis*, on the basis of Article 27 *(a)* of the 1957 European Convention for the Peaceful Settlement of Disputes. Any assertion to the contrary would require demonstration, which I have not at all found in the present Order of the Court.

177. The fact that the Court found itself, in the present Order, without jurisdiction *ratione temporis* and declared the counter-claim "inadmissible as such", does not mean that it *really* does not have jurisdiction to entertain it: the Court's majority has found it so, but there are, *data venia*, cogent reasons to the contrary. All it means is that the conception of international law espoused by the Court's majority in the present Order led it to its finding. It is *not* my own conception, which goes well beyond the strict inter-State outlook, so as to reach the ultimate bearers *(titulaires)* of rights, the human beings, confronted with waiver of their claims of reparation of serious breaches of their rights by States supposed to protect, rather than to oppress, them.

178. States may, if they so wish, waive claims as to *their own* rights. But they cannot waive claims for reparation of serious breaches of rights that *are not* theirs, rights that are inherent to the human person. Any purported waiver to this effect runs against the international *ordre public*; is in breach of *jus cogens*. This broader outlook, in a higher scale of *values*, is in line with the vision of the so-called "founding fathers" of the law of nations (the *droit des gens*, the *jus gentium*), and with what I regard as the most lucid trend of contemporary international legal thinking.

179. One cannot build (and try to maintain) an international legal order over the suffering of human beings, over the silence of the innocent destined to oblivion. At the time of mass deportation of civilians, sent to forced labour during the *two* World Wars (in 1916-1918 and in 1943-1945) of the twentieth century (and not only the Second World War), everyone already knew that that was a *wrongful* act, an atrocity, a serious violation of human rights and of international humanitarian law, which came to be reckoned as amounting also to a war crime and a crime against humanity. Above the will stands conscience, which is, after all, what moves the law ahead, as its ultimate *material* source, removing manifest injustice.

(Signed) Antônio Augusto Cançado Trindade.