GERMANY V. ITALY:

THE RIGHT TO DENY STATE IMMUNITY WHEN VICTIMS HAVE NO OTHER RECOURSE

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1. INTRODUCTION

1. *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* presents the International Court of Justice with an historic opportunity to make necessary clarifications in an important area of international law. Despite national courts' routine application of national laws of sovereign immunity, there is sparse international level authority governing the immunities of states. Consequently, the Court's judgment in this case will be of great importance to national courts and legislatures on the doctrine of sovereign immunity in a particularly important context: where victims seek remedies for serious violations of international humanitarian law.

2. Amnesty International seeks to ensure that all relevant considerations are fully examined as the Court deliberates on a matter that will have far-reaching ramifications. Accordingly, this paper focuses on two points that are not fully addressed in any of the parties' submissions in this proceeding. *First*, it offers a framework through which decisions of the Italian courts at issue in the case should be analyzed and demonstrates that these decisions are consistent with the existing doctrine of sovereign immunity. *Second*, it provides an analysis and rebuttal of the negative consequences Germany alleges will ensue were the Court to reject its claim.

2. THE CONDUCT OF THE ITALIAN COURTS IS CONSISTENT WITH THE DOCTRINE OF SOVEREIGN IMMUNITY UNDER INTERNATIONAL LAW

2. 1. SOVEREIGN IMMUNITY IS A CONTINUOUSLY EVOLVING DOCTRINE

3. As the European Court of Human Rights recently recognized, "the application of absolute State immunity has, for many years, clearly been eroded."[1] Leading publicists agree that the contours of the international law of sovereign immunity are not fixed and rigid. Professor Brownlie observed that "[i]t is one thing to say that the principle of absolute immunity . . . no longer represents the law; it is quite another to demarcate the new boundaries of immunity."[2] Lady Fox notes that there is a "diversity of State practice."[3] And Professor Crawford has stated, "[i]n the present state of international practice and opinion, it is clear that neither an absolute or general immunity nor any particular distinction between immune and non-immune transactions can claim to represent general international law."[4]

4. As early as 1951, the disparate nature of state practice on sovereign immunity led Sir Hersch Lauterpacht to declare "the time has come to inquire afresh whether there is in fact in existence a clear and categorical principle of international law which forbids the courts of a state to assume jurisdiction over another state."[5] He cast doubt over whether there was, in fact, a "rule of international law which obliges states to grant jurisdictional immunity to other states."[6] Lauterpacht urged the abolition of any rule of general immunity of foreign states, subject to certain safeguards and exceptions. He described these safeguards and exceptions as "based on a restricted interpretation of acts *jure imperii*" – none of which would cover the war crimes at issue in this case.[7] Lauterpacht concluded that

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[1] *Cudak v. Lithuania* (no.15869/02), Eur. Ct. H.R., para. 64 (2010).

[2] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 330 (7th ed. 2008).

[3] HAZEL FOX, THE LAW OF STATE IMMUNITY 236 (2d ed. 2008).

[4] James Crawford, *International Law and Foreign Sovereigns: Distinguishing Immune Transactions*, 54 BRIT. Y.B. INT'L L. 75, 114 (1983).

[5] Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 227 (1951).

[6] *Id.* at 228.

[7] *Id.* at 237-240.

if a state assumed jurisdiction pursuant to the scheme he advocated, and "a foreign State were to bring a complaint before the International Court of Justice, it is unlikely that the Court would find that a rule of international law has been violated and that international responsibility had been incurred."[8]

2. 2. THE DEVELOPMENT OF THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY IS MARKED BY STATES' NARROWLY TAILORED AND PRINCIPLED RESTRICTIONS ON THE IMMUNITY AFFORDED TO FOREIGN STATES

5. Since the late nineteenth century, states have been continuously restricting the scope of jurisdictional immunity granted to other states before their national courts in a broad range of areas.[9] Italian and Belgian courts recognized restrictions on state immunity in decisions in the late nineteenth century and early twentieth century.[10] Austrian courts,[11] French courts[12] and Egyptian mixed courts[13] followed suit. The United States issued the

[8] 3 HERSCH LAUTERPACHT, *State Territory and Territorial Jurisdiction*, *in* INTERNATIONAL LAW 336 (E. Lauterpacht ed., 2009).

[9] In addition to commercial activities, terrorism and torts in the forum, discussed below, the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 contains restrictions on state immunity in the areas of counterclaims; certain contracts of employment; ownership, possession and use of certain real property; intellectual and industrial property; participation in companies or other collective bodies; ships (other than warships) owned or operated by a state; and arbitration agreements (Annexe, U.N. Doc. A/RES/59/38).

[10] FOX, *supra* note 3, at 224 n.89 and accompanying text (citing *Guttieres v. Elmilik* (1886) Foro. It. 1886-I, 913 (Corte di Cassazione di Firenze); *id.* at 224-25 n.90 and accompanying text (citing *Storelli v. Governo della Repubblica Francese* (1924) Rivista 17 (1925) 236 at 240, 2 I.L.R. 129); *id.* at 225 n.94 and accompanying text (citing *SA des Chemins de Fer Liégeois-Luxembourgeois v. Etat Néerlandais*, Pasicrisie belge 1903, I 294).

[11] Lauterpacht, *supra* note 5, at 257 (citing *Österreichisch-ungarische Bank v. Ungarische Regierung* (Austrian-Hungarian Bank v. The Government of Hungary) (1919) (assumption of jurisdiction by Austrian Supreme Court over Hungary, stating "[i]t can be assumed that local jurisdiction may be invoked against a foreign State for the determination—and also for the enforcement—of such claims to be performed within the country concerning which the foreign State appears in consequence of a relationship of a purely private-law nature.")); *id.* n.3 and accompanying text (discussing a 1928 Austrian Supreme Court case wherein the Court rejected what it termed the "more extreme view," that a State "can never be subjected to the jurisdiction of the foreign court, regardless of the fact whether the dispute arises out of the exercise of its sovereign rights or of its activity as the subject of private law, or whether it subjects itself expressly to the jurisdiction of the foreign court. . . .") (citing *Foreign States (Legation Buildings) Immunities* case, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES, Vol. 4 (1927-28), Case No. 113 and "*Decisions of the Austrian Supreme Court in Civil and Administrative Matters,*" vol. x (1928), No. 177, PP. 427-9).

[12] *Id.* at 260 (citing *État Roumain v. Pascalet et Cie* (Paris Ct. of Appeal, 1924)).

[13] *Id.* at 255 (citing *Egyptian Delta Rice Mills Co. v. Comisaría General de Madrid* (Mixed Court of Egypt, 1943) ("[a]s regards the execution of the judgments, although a foreign State can claim immunity from execution, this immunity applies only where the execution takes place on the territory of that State or when the assets which it is proposed to attach are held by the State in virtue of its character as a public authority. On the other hand, where, as in the present

Tate letter in 1952, in which the State Department announced its new policy to "follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity."[14] In the second half of the twentieth century, the courts of many countries, including France,[15] the United Kingdom,[16] Kenya,[17] Japan,[18] Argentina,[19] New Zealand,[20] Romania[21] and Nigeria[22] adopted a restrictive approach to sovereign immunity, and numerous states enacted legislation codifying such an approach.[23]

6. The specific restrictions to sovereign immunity adopted by states reflect principled responses to changes in international relations and international law. For example, states restricted the scope of jurisdictional immunity granted in the area of commercial activities in response to the appearance of states as "commercial entrepreneurs" in the nineteenth century.[24]

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case, the assets which are the object of the execution are on Egyptian territory and are in fact funds which belong to the Comisaría General not as a public authority but as the directing power over a group of undertakings, all of a commercial character, the execution must be authorized.")).

[14] *See* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting U.S. Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't State Bull. 984-985 (1952).

[15] FOX, *supra* note 3, at 226 n.98 and accompanying text (citing *Administration des Chemins de Fer du Gouvernement Iranien v. Société Levant Express Transport* (Cour de Cassation, Feb. 25, 1969)).

[16] FOX, *supra* note 3, at 214 n.249 and accompanying text (citing *Trendex Trading Corporation v. Central Bank of Nigeria* [1977] 1 QB 529).

[17] FOX, *supra* note 3, at 221 n.79 and accompanying text (citing *Ministry of Defence of the Government of the UK v. Ndegna* (Kenya Ct. of Appeal, March 17, 1983)).

[18] FOX, *supra* note 3, at 234-35 n.135 and accompanying text (citing 1416 Saibansho Jiho 6 (Japanese Supreme Court, July 21, 2006)).

[19] Lauterpacht, *supra* note 5, at 266 (citing *Gobierno de Italia en Suc. v. Conseo Nacional de Educacíon* (Camara Civil de la Capital, 1940) ("The fiscal law is to be applied to all entities which are persons, including the Italian State in its character as a juridical person.")).

[20] FOX, *supra* note 3, at 221 n.79 and accompanying text (citing *Governor of Pitcairn and Associated Islands v. Sutton* [1995] 1 NZLR 426, 104 I.L.R. 508).

[21] Lauterpacht, *supra* note 5, at 223, 256 (citing *Banque roumaine de commerce et de crédit de Prague v. État Polonais, Revue de droit international privé*, 19 (1924), p. 581 (assuming jurisdiction over Polish Tobacco Monopolies administered by the Polish Ministry of Finance)).

[22] FOX, *supra* note 3, at 221-22 n.79 and accompanying text (citing *Kramer v. Government of Kingdom of Belgium and Embassy of Belgium*, [1989] 1 CLRQ 126, 103 I.L.R. 299).

[23] United States, Foreign Sovereign Immunities Act [hereinafter FSIA], 28 U.S.C. §§ 1602 *et. seq.*; United Kingdom, State Immunity Act [hereinafter UKSIA], 1978, c. 33; Australia, Foreign States Immunities Act 1985, *reprinted in* 25 I.L.M. 715 (1986) [hereinafter ASIA]; Canada, State Immunity Act [hereinafter CSIA], R.S.C. 1985, c. S-18; South Africa, Foreign States Immunities Act of 1981; Singapore, State Immunity Act (1979) [hereinafter Singapore SIA].

[24] BROWNLIE, *supra* note 2, at 327-28.

7. Moreover, a restrictive approach to sovereign immunity is *not always* based on a distinction between "acts of government" or "public acts" (*acta jure imperii*), which are afforded immunity, and "acts of a commercial nature" or "private acts" (*acta jure gestionis*).[25] For example, Joseph Dellapenna has noted that the tort restriction to sovereign immunity "is fundamentally different from the withdrawal of immunity for commercial acts" because the former "does not depend on whether the tortious act was 'commercial' or 'private' rather than 'governmental,' 'public,' or 'sovereign.'"[26] Many countries have enacted a tort restriction over the half century since an Austrian court first recognized this restriction,[27] including the United States,[28] Great Britain,[29] Canada,[30] South Africa,[31] Argentina,[32] Australia,[33] and Singapore.[34] This restriction is generally justified by the state's right to adjudicate matters occurring directly within its territory.[35] Another example of the divergence from the "public/private act approach" is found in the United States' adoption of a restriction to sovereign immunity for expropriation, an act which is uniquely "public."[36]

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[25] *Id.* at 328.

[26] JOSEPH DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS 424 (2003).

[27] *Collision with a Foreign Government-Owned Motor Car* (Austrian Supreme Court, Feb. 10, 1961, 40 Int'l L. Rep. 73 (1970)).

[28] FSIA § 1605(a)(5).

[29] UKSIA § 5 ("Personal injuries and damage to property. A State is not immune as respects proceedings in respect of — (a) death or personal injury; or (b) damage to or loss of tangible property, caused by an act or omission in the United Kingdom.").

[30] CSIA art. 6 ("A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to (a) any death or personal or bodily injury, or (b) any damage to or loss of property that occurs in Canada.").

[31] South African Foreign States Immunities Act para. 6 (1981) (stating that South African courts have jurisdiction over proceedings concerning "(a) the death or injury of any person; or (b) damage to or loss of tangible property, caused by an act or omission in the Republic.").

[32] La Ley 24.488, May 31, 1995, [A.D.L.A., 1995-A-220] B.O., June 28, 1995.

[33] ASIA section 13 ("A foreign State is not immune in a proceeding in so far as the proceeding concerns: (a) the death of, or personal injury to, a person; or (b) loss of or damage to tangible property; caused by an act or omission done or omitted to be done in Australia.").

[34] Singapore SIA art. 7 ("A State is not immune as respects proceedings in respect of — (a) death or personal injury; or (b) damage to or loss of tangible property, caused by an act or omission in Singapore."). Such provisions are also contained in the European Convention on State Immunity and the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004. *See* European Convention on State Immunity art. 4, May 16, 1972, ETS No. 74, 11 I.L.M. 470 (1972); United Nations Convention on Jurisdictional Immunities of States and Their Property, art. 12, Dec. 2, 2004, Annexe, U.N. Doc. A/RES/59/38.

[35] Fox notes that while the justification for the non-commercial exception "seems to be based on an assertion of local control or jurisdiction over acts occurring within the territory of the forum State," the justification "is not carried to its logical conclusion; the exception is confined to acts causing personal injury or tangible loss. . . ." FOX, *supra* note 3, at 569.

[36] The United States FSIA restricts immunity for an act of expropriation for any case: (1) "in which rights in property taken in violation of international law are in issue;" (2) "that property or any property exchanged for such property is

8. This process of evolution in sovereign immunity can also be seen in the restriction the United States introduced into its immunities legislation in 1996. The United States Congress determined that "under current law a U.S. citizen who is tortured or killed abroad cannot sue the foreign sovereign in U.S. courts, even when the foreign country wrongly refuses to hear the citizen's case. Therefore, in some instances a U.S. citizen who was tortured (or the family of one who was murdered) will be without a remedy."[37] The legislature's solution to this problem was a restriction on sovereign immunity when: (1) the defendant is a government-designated "state sponsor of terrorism;" (2) the victim or claimant is a U.S. citizen; and (3) the defendant sovereign engaged in conduct that falls within the ambit of the statute (torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act).[38] The European Court of Human Rights, in *Al-Adsani v. United Kingdom*, described this restriction as "circumscribed in its scope" and noted that it was "further limited" by restrictions on execution.[39]

9. History reveals a clear pattern of state practice, whereby states have restricted the sphere in which immunity is granted in response to changes in the global legal order. As noted above, to reflect the entry of states into the commercial realm internationally, national courts created the "commercial" restriction to sovereign immunity.[40] States likewise developed other restrictions in a manner that accommodated changes in the international order or vindicated fundamental principles of international law: in the case of the non-commercial tort exception, the right to territorial sovereignty, and in the case of the terrorism restriction, the right to reparation for victims of the phenomenon of international terrorism.[41]

2. 3. THE RESTRICTION ARTICULATED BY THE ITALIAN COURTS IS CONSISTENT WITH STATE PRACTICE AND IS BASED ON FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW

10. The restriction recognized by Italy is applicable only where (a) the claim relates to serious violations of international humanitarian law or crimes against humanity, and (b) no other alternative avenues of redress are available. In the cases at issue, the victims who brought claims in Italian courts against Germany or sought to enforce foreign judgments had

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owned or operated by an agency or instrumentality of the foreign state;" and (3) "that agency or instrumentality is engaged in commercial activity in the United States." 28 U.S.C. § 1605(a)(3).

[37] This statement was made by the House Judiciary Committee in describing the rationale for a version of the terrorism restriction amendment that was proposed in 1994. *See* H. Rept. 103-702, 103 Cong., 2d Sess. (Aug. 16, 1994), at 4.

[38] 28 U.S.C.A. § 1605A.

[39] *Al-Adsani v. United Kingdom* (35763/97) Eur. Ct. H.R. 761 at 20 (2001).

[40] *See supra* note 24 and accompanying text.

[41] *See supra* Section II(B).

already attempted to secure reparation pursuant to mechanisms created under domestic German law and had unsuccessfully brought suit in German courts.[42]

11. In recognizing a restriction to sovereign immunity when a victim of violations of international humanitarian law or crimes against humanity has been unable to bring a claim for reparation in other fora, Italy acted in a manner consistent with established state practice. That is because the restriction Italy advocates is narrowly defined, manageable, and rooted in established principles of international law. Moreover, the restriction does not interfere with the core purpose of sovereign immunity: to ensure the effective orderly conduct of international relations.

12. *First*, the restriction reflects fundamental precepts of contemporary international law: the right of victims of the most heinous of state-committed crimes to reparation, and the continued fight against impunity for such crimes.[43] The International Court of Justice recognized the right to reparation of victims of serious violations of international law in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* when it held that Israel's breach of international law, including international humanitarian law, obliged it to compensate "all natural or legal persons having suffered any form of material damage as a result of the wall's construction."[44] The obligation to provide reparation for war crimes is also enshrined in Article 3 of the Hague Convention Respecting the Laws and Customs of War on Land, a right that the drafters intended be afforded to individuals.[45] The individual right to reparation for gross violations of international human

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[42] *See* Counter-Memorial of Italy, paras. 2.20-2.21.

[43] The Italian courts limited the scope of their decisions to conduct that was not merely outside the authority of a state under the international legal system, but involved crimes under international law, which undermine the entire international legal fabric and violate *jus cogens* prohibitions. As judges recognized in the *Pinochet* judgment, immunity should not apply to conduct that was a crime under international law – torture – since torture could not be a state function. *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others; Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division)*, Judgment, House of Lords, March 24, 1999 (*Pinochet No. 3*), 38 I.L.M. 581, 593 (1999) (Lord Browne-Wilkinson) ("the implementation of torture . . . cannot be a state function"); *id.* at 638 (Lord Hutton) ("The alleged acts of torture by Senator Pinochet were carried out under colour of his position as head of state, but they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime."); *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others* Ex Parte *Pinochet* (*On Appeal From a Divisional Court of the Queen's Bench* Division), Judgment, House of Lords, Nov. 25, 1998 (Pinochet No. 1), 37 I.L.M. 1302, 1333 (1998) (Lord Nicholls) ("And it hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state."); *id.* at 1338 (Lord Steyn) ("[T]he charges brought by Spain against General Pinochet are properly to be classified as conduct falling beyond the scope of his functions as Head of State.").

[44] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, 2004 I.C.J. Reports 136, para. 153.

[45] That article reads: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." Hague Convention IV Respecting the Laws and Customs of War on Land and Annexed Regulations, art. 3, Oct. 18, 1907, 36 Stat. 2277, T.S. 539 [hereinafter Hague Convention IV]. There are various statements from

rights law and serious violations of international humanitarian law has been recognized by the United Nations General Assembly in an instrument articulating "existing legal obligations under international human rights law and international humanitarian law."[46] It is also reflected in a number of international instruments and in customary international law.[47]

German, French, Swiss, and British delegates and the President of the Commission in the *travaux préparatoires* to the effect that victims of violations of the laws and customs of war must be indemnified by states. *See* Proposition of the German Delegation, *in* 3 THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1907 139-42 (James Brown Scott ed., 1921). Not a single state objected to the requirement that states provide reparation to the victims. *See also* Eric David, *The Direct Effect of Article 3 of the Fourth Hague Convention of 18th October 1907 Respecting the Laws and Customs of War on Land*, *in* WAR AND THE RIGHTS OF INDIVIDUALS 49, 51 (Hisakazu Fujita et al. eds., 1999) ("With regard to the direct effect of Article 3, the preparatory works again show clearly that the States' intention was to recognise an individual's right to obtain compensation for violations of the Regulations imputable to a belligerent Party."); Christopher Greenwood, Expert Opinion, *Rights to Compensation of Former Prisoners of War and Civilian Internees under Article 3 of Hague Convention No. IV, 1907*, *reprinted in* WAR AND THE RIGHTS OF INDIVIDUALS, at 59, 67 ("As Professor Kalshoven has explained . . . although Article 3 does not exclude the possibility of a claim for compensation being made by a State on behalf of the individual victims of violations, the intention of those who draft that provision was that individuals should be able to bring their claims directly against the State of the wrongdoer.").

[46] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, 60th Sess., U.N. Doc. A/RES/60/147 (Dec. 16, 2005) (recognizing the right of victims to effective remedies, including reparation).

[47] *See, e.g.*, Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflict, art. 91, June 8, 1977, 1125 U.N.T.S. 3; Rome Statute of the International Criminal Court, art. 75, July 17, 1998, 2187 U.N.T.S. 90; JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Rule 150 (2005) ("A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused."); UN Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, Sept. 25, 2009, para. 1868 ("international law requires the State responsible for the internationally wrongful act to provide reparation and compensation to the victim."). *See also*, International Covenant on Civil and Political Rights (ICCPR), art. 2 (3), Dec. 16, 1966, 999 U.N.T.S. 171; Human Rights Committee, General Comment No. 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant), UN Doc. CCPR/C/21/Rev.1/Add.13, May 26, 2004; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85; UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Principles 5 and 8, UN Doc. A/RES/40/34, Nov. 29, 1985; Updated set of principles for the protection and promotion of human rights through action to combat impunity (Joinet-Orentlicher Principles), UN Doc. E/CN.4/2005/102/Add.1, Feb. 8, 2005; International Convention for the Protection of All Persons from Enforced Disappearance, U.N. Doc. A/RES/61/177, Dec. 20, 2006. This right has also been recognized in regional instruments, European Convention on Human Rights (1950), art. 41, Europ.T.S. No. 5; 213 U.N.T.S. 221; American Convention on Human Rights, art. 63 (1), Nov. 21, 1969, O.A.S. T.S. No. 36; 1144 U.N.T.S. 143; Inter-American Convention to Prevent and Punish Torture, art. 9, Feb. 28, 1987, O.A.S. T.S. No. 67; African Charter on Human and Peoples' Rights, art. 27, June 27, 1981, 1520 U.N.T.S. 217; and regional jurisprudence, *Velasques Rodrígues v. Honduras*, Compensatory Damages, Inter-Am.Ct. H. R., Ser. C, No. 7, para. 25 (1989); *The Mayagna (Sumo) Awas Tingni Community*, Series C, No. 79, Inter-Am. Ct. H. R., Ser. C, No. 79, para. 163 (2001). Moreover, the right to an effective remedy for human rights violations even during a state of emergency has been recognized as non-derogable. Human Rights Committee, General Comment No.29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, para. 14 (2001)*; see also Judicial guarantees in states of emergency*, Advisory Opinion OC-9/87, Inter-American Court of Human

13. *Second*, when a victim of serious violations of international humanitarian law or crimes against humanity has been unable to bring a claim for reparation within the courts of the responsible state, before a regional court, pursuant to any other compensation mechanism, and recognizing that diplomatic protection is not an effective alternative,[48] the victim is entitled to bring suit in foreign courts as an option of last resort. Such a restriction to sovereign immunity is consistent with the decision of the International Court of Justice in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, where it stated that immunity from jurisdiction is not equivalent to impunity.[49] In that case, the Court upheld the immunity of an incumbent Minister of Foreign Affairs from criminal prosecution by a foreign state, but only after noting that other avenues for criminal prosecution existed.[50]

Rights, Oct. 6, 1987. In addition, the Security Council and states have established claims commissions permitting victims to obtain reparation for war crimes from the states themselves. *See*, for example, the United Nations Compensation Commission, U.N. S.C. Res. 687, para. 16 (1991) (reaffirming "that Iraq . . . is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to . . . nationals . . ., as a result of Iraq's unlawful invasion and occupation of Kuwait"); Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, art. 5 (1), Algiers, Dec. 12, 2000 (mandate of the Commission includes "all claims for loss, damage or injury . . . by nationals of one party (including both natural and juridical persons) against the Government of the other party . . . that are (a) related to the conflict . . . and (b) result from violations of international humanitarian law").

[48] Under current international law, there are at least five reasons why diplomatic protection does not constitute an effective alternative way for victims of war crimes to obtain reparation. First, although a state has the right to exercise diplomatic protection on behalf of its nationals, "[i]t is under no duty or obligation to do so." International Law Commission, Draft Articles on State Responsibility, with commentaries, commentary on art. 2, para. 2. Second, in practice, states often purport to waive the right to reparation of their nationals or they accept derisory sums, particularly in peace treaties. Third, victims do not have the right under international law to require their state to make reparation claims on their behalf. *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment*, ICJ Reports 1970, para. 78 ("Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law."). Fourth, victims often have no right under national law to require the state to advance their claims to reparation. For example, a citizen of the United Kingdom cannot compel the executive to espouse his or her claim. *See R (on the Application of Abbasi and another) v. Secretary of State for Foreign and Commonwealth Affairs and another,* [2002] EWCA Civ. 1598. These are serious problems when the victims are members of a disfavoured or persecuted group in the state, victims of crimes of sexual violence, stateless persons or refugees. Although there is now recognition that states can exercise diplomatic protection over stateless persons and refugees, they can only do so when such persons have been continuous lawful residents, but cannot do so against the refugee's state of nationality, the state most likely to have persecuted the refugee. *See*, Draft Articles on Diplomatic Protection, art. 8 (2006). Fifth, even if the state does choose to take up the victim's claim of reparation for war crimes, the claim is that of the state and not the individual. *Case concerning Ahmadou Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), Judgment, Int'l Ct. Justice, Nov. 30, 2010, paras. 160-161; *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, I.C.J. Reports, Series A, No. 2, 1924, at 12. Therefore, the state may, but is not obliged to, pass on any damages it obtains to the individual victim. *Barcelona Traction*, para. 78. Given the reluctance of states to exercise diplomatic protection, a leading authority on state immunity has stated, "it is here that a plea to disregard immunity may strongly be made to enable the individual claimant to bring proceedings in a third State against the defaulting State." Fox, *supra* note 3, at 145.

[49] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 2002 I.C.J. Reports 3, para. 60.

[50] *Id.* paras. 60-61. Similarly, the Amsterdam Court of Appeal when upholding a claim of immunity by the United

Lady Fox has affirmed that state immunity "merely diverts any breach . . . to a different method of settlement."[51] If no such alternative method is available for resolution of the claims of victims of violations of international humanitarian law, a narrow restriction to sovereign immunity fits within a principled application of the doctrine.[52]

14. *Finally*, the restriction recognized by Italy does not interfere with the core purpose of sovereign immunity: to ensure the effective orderly conduct of international relations. In the *Arrest Warrant* case, the Court held that incumbent foreign ministers were entitled to immunity before other states' courts in order to enable them to fulfill their functions effectively, without being hindered in the performance of their duties.[53] The purpose of state immunity under customary international law is to enable states to "carry out their public functions effectively" and to ensure that international relations are conducted in an orderly manner.[54] Consequently, restrictions on sovereign immunity that do not impede the doctrine's purpose are permissible under international law.[55] As Dame Rosalyn Higgins has observed:

> It is sovereign immunity which is the exception to jurisdiction and not jurisdiction which is the exception to a basic rule of immunity. An exception to the normal rules

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Nations with respect to claims by families of victims in Srebenica based on the failure of Dutch peacekeepers to protect the victims held that there was no denial of justice because the families could still pursue the same claims for reparation against the Netherlands.[50] *Association of Citizens Mothers of Srebenica v. The Netherlands*, Judgment, Case no. 200.022.151/01, Appeal Court, Commerce section, first civil law section, The Hague, March 30, 2010, para. 5.12 ("[T]o the Association et al. the course of bringing the State, which they reproach for the same things as the UN, before a Netherlands court of law is open. . . The State cannot invoke immunity from prosecution before a Netherlands court of law, so that a Netherlands court will have to give a substantive assessment of the claim against the State anyway.") *available at* http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals_Judgment_Mothers_Srebrenica_EN.pdf.

[51] Fox, *supra* note 3, at 151.

[52] The approach of the Italian courts was consistent with that of the judges in the Pinochet case who concluded that immunity should not apply when it was coextensive with the right asserted. *Pinochet No. 3*, *supra* note 43, at 651 (Lord Millet) ("No rational system of criminal justice can allow an immunity which is co-extensive with the offence."); *id.* at 594-95 (Lord Browne-Wilkinson) (declaring that "the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive" if the contention that torture was official business sufficient to grant immunity *rationae materiae* were accepted).

[53] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *supra* note 49, paras. 52-54.

[54] Fox, *supra* note 3, at 224-25. This approach was reflected in the 2010 decision of the European Court of Human Rights, which examined whether Lithuania's grant of immunity in a case involving the Polish Embassy was consistent with Lithuania's obligations under article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms relating to the right of access to court: "The Court observes in particular that the applicant was a switchboard operator at the Polish Embassy whose main duties were: recording international conversations, typing, sending and receiving faxes, photocopying documents, providing information and assisting with the organisation of certain events. Neither the Lithuanian Supreme Court nor the respondent Government have shown how these duties could objectively have been related to the sovereign interests of the Polish Government." *Cudak v. Lithuania*, *supra* note 1, para. 70.

[55] *See* Lee Caplan, *State Immunity and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 Am. J. Int'l L. 741, 777 (2003).

> of jurisdiction should only be granted when international law requires – that is to say, when it is *consonant with justice and with the equitable protection of the parties*. It is not to be granted "as of right".[56]

15. The International Court of Justice has noted in the *Wall Opinion* that obligations *erga omnes* are by their very nature "[the] concern of all States" and, "[i]n the view of the importance of the rights involved, all States can be held to have a legal interest in their protection."[57] It follows that the commission of serious violations of international law and crimes against humanity can never contribute to enhancing international relations, and there is therefore no entitlement to immunity from suit based on such conduct.

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[56] Rosalyn Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 NETH. INT'L L. REV. 265, 271 (1982) (emphasis added).

[57] *Supra* note 44, para. 155 (citing *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment, I.C.J. Reports 1970, para. 33).

3. GERMANY'S CONCERNS ABOUT THE CONSEQUENCES OF THE COURT DISMISSING ITS CLAIM ARE UNWARRANTED

16. Germany alleges a series of negative consequences that would follow were the International Court of Justice to dismiss Germany's claim and find that Italian courts acted consistently with international law. Germany's predictions are reminiscent of those made at the time of the House of Lords' *Pinochet* decision, when some commentators asserted that chaos would ensue if former heads of state were no longer granted immunity.[58] Those predictions have proven wrong. Far from "conflict" and "devastation," the *Pinochet* decision has resulted in increased domestic accountability for serious human rights violations.[59] Similar claims have been made that permitting prosecutions of persons suspected of crimes under international law would prevent the settlement of conflicts. However, agreements to end conflict continue to be reached even though justice has been taken off the table as a bargaining chip by the exercise of universal jurisdiction and the establishment of international criminal courts. The list of "horribles" set forth by Germany is as flawed as those recited by critics of the *Pinochet* decision and critics of prosecution of crimes under international law.

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[58] Jeremy Rabkin, *First They Came for Pinochet*, 4 Wkly. Standard 11, Nov. 23, 1998 (stating that the implication of the arrest and potential prosecution of Pinochet was "an invitation to international conflict"); BBC News, *UK Campaigners push for Pinochet trial*, Oct. 20, 1998 (noting that a Chilean political representative predicted Britain's involvement would have a potentially "devastating effect" on Britain's relations with Chile); *Pinochet Arrest Forces Chile to Revisit Past*, LATimes, Oct. 25, 1998, *available at* http://articles.latimes.com/1998/oct/25/news/mn-36094 (quoting Retired General Ernesto Vidala as comparing the arrest of Pinochet to "a giant bomb [being] dropped on the [Chilean democratic] transition").

[59] *See* NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS 197-98 (2005) (noting that the Pinochet cases "strengthened the idea that proper accountability for [international] crimes is the business of justice everywhere, and that domestic laws enshrining unfair trials or shielding perpetrators are subject to outside scrutiny" and that the cases likewise "yielded landmark jurisprudence in the highest national courts of a handful of countries. . . .").

3. 1. THE LEGAL IMPACT OF A RESTRICTION IS MANAGEABLE AND LIMITED

3. 1. 1. A RESTRICTION WILL NOT DESTROY CERTAINTY IN INTERNATIONAL LAW

17. Germany argues that dismissing its case would "seriously disturb[]" the certainty of the law.[60] This assertion ignores the reality of how sovereign immunity has continued to develop over time, which Germany acknowledges in noting the shift from absolute to restrictive immunity.[61] Through national courts and national legislation, states have incrementally developed principled restrictions to sovereign immunity, many of which vary from state to state. The development and existence of these restrictions, which states have generally considered to be workable and effective, confirms that courts can and do carefully apply restrictions on sovereign immunity, and the international legal system and international relations continue to function effectively.

18. The lack of immunity for commercial activities recognized in many states[62] has not resulted in destabilized international relations. Instead, states have elaborated rules and limitations to ensure that the restriction is applied prudently and in conformity with the principles of sovereign equality and comity. For example, a number of states have limited the commercial activity restriction by requiring a territorial nexus between the commercial activity engaged in by the foreign state and the forum state. This type of territorial nexus requirement can be found in both the Sovereign Immunities Act of the United Kingdom (the "SIA"),[63] and the European Convention on State Immunity.[64]

19. The United States also includes a nexus requirement in the statutory law governing the application of sovereign immunity, the Foreign Sovereign Immunities Act ("FSIA") (28 U.S.C. §§ 1602 *et. seq.*). The nexus requirement substantially limits the breadth of the FSIA, permitting a United States court to acquire jurisdiction only where the commercial activity performed by a foreign state has one of three specified connections to the United States:

> the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States

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[60] Oral Submission of Professor Dr. Christian Tomuschat on Behalf of Germany, *Germany v. Italy*, Sept. 12, 2011, at 34.

[61] Memorial of Germany, at 49-54.

[62] *See supra* Section II(B).

[63] UK SIA §§ 4(1) *et. seq.*; Richard Garnett, *Should Foreign State Immunity be Abolished?*, 20 Aust. YBIL 175, 177 (1999).

[64] European Convention on State Immunity art. 4, May 16, 1972, ETS No. 74, 11 I.L.M. 470 (1972) ("[A] Contracting State cannot claim immunity from the jurisdiction of the courts of another Contracting State if the proceedings relate to an obligation of the State, which, by virtue of a contract, falls to be discharged in the territory of the State of the forum."); *id.* art. 7 ("A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment.").

> in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United states. § 1605(a)(2).

20. United States courts have not strayed from this territorial requirement, and have consistently afforded sovereign immunity to state conduct that does not have a sufficient link or effect in the United States.[65]

21. The variation in states' approaches to sovereign immunity can be seen in the divergent approaches states have taken to determine when the activity in question is classified as commercial. In the United States, immunity is limited to activity of a sovereign nature, because the commerciality of an act turns on the nature, rather than the purpose of the act.[66] On the other hand, the Canadian Supreme Court in *Re Canada Labour Code* held that the commercial activity restriction requires considering "not only the nature of the act, but its purpose," suggesting a greater potential scope of sovereign immunity.[67] French courts historically followed the "purpose" test as well, but in recent years, some French courts have adopted the "nature" of the act test,[68] which is also the test applied by German courts.[69] Far from leading to confusion or chaos, these different approaches demonstrate the workability and practicality of allowing states to define the parameters of sovereign immunity to be afforded in their respective courts.

22. The terrorism restriction recognized in the United States and the non-commercial tort restriction have also been narrowly tailored by the courts.[70] The cases brought under the

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[65] *See, e.g.*, *Carey v. National Oil Corp.*, 592 F.2d 673 (2d Cir. 1979) (injury to a United States corporation resulting from an alleged breach of an obligation owed to its Bahamian subsidiary had an indirect effect in the United States, and was insufficient to support jurisdiction of United States courts); *Doe I v. Unocal Corp.*, 395 F.3d 932, 958 (9th Cir. 2002) (Myanmar military and state-owned oil company were entitled to immunity under the FSIA, as their alleged human rights violations during their development of a gas pipeline were not considered to have been performed in connection with a commercial activity having a direct effect in the United States); *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 80 (2d Cir. 2010) (Although the breach of an agreement to pay money in New York has the requisite direct effect in the United States to support jurisdiction under the FSIA commercial activities exception, transfer of funds out of a New York bank account is not itself sufficient to place the effect of a defendant's conduct in the United States within the meaning of the exception).

[66] *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (holding that the purpose of the activity is irrelevant, no matter how "uniquely sovereign").

[67] [1992] 2 S.C.R. 50, 70, cited in *Kuwait Airways Corp. v. Iraq*, 2010 SCC 40, [2010] 2 S.C.R. 571.

[68] DELLAPENNA, *supra* note 26 (citing Judgment of Dec. 8, 1964 (*Enterprise Pérignon c. United States*) (Cass. Civ. 1re), 45 I.L.R. 82 (1972); Judgment of Jan. 17, 1973 (*Spain v. S.A. de l'Hotel George V*) (Cass. Civ. 1er) 65 I.L.R. 61 (1984)).

[69] *Empire of Iran*, German Federal Constitutional Court (Apr. 30, 1963), 45 I.L.R. 57.

[70] *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 89 (2d Cir. 2008) (holding that the terrorism exception of the FSIA was inapplicable to Saudi Arabia, because it had never been designated by the State Department as a "state sponsor of terrorism"); *Acosta v. Islamic Republic of Iran*, 574 F. Supp. 2d 15, 26 (D.D.C. 2008) (dismissing claims under the terrorism exception to the FSIA by the estate of an Israeli citizen who had renounced his U.S. Citizenship at

terrorism restriction to the FSIA and its predecessor restriction (28 U.S.C. § 1605(a)(7)) have been for extreme acts of violence, as required by the statute, including assassinations,[71] suicide bombing,[72] and torture.[73] The restriction has also been applied in a manner that permits states to accommodate foreign policy considerations. For example, the statute's restriction on immunity is waived with respect to Iraq to allow the country to utilize all of its available funds for the state recovery effort.[74] Similarly, states have limited the application of the non-commercial tort restriction by requiring a territorial nexus between the forum and the tort[75] and narrowly interpreting the covered injuries,[76] although in some instances these limitations may unduly restrict the rights of victims. Nonetheless, they demonstrate that national courts do not carve out extremely broad restrictions on immunity. The restriction articulated by the Italian courts is similarly narrow.

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the time of his death); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 85 (D.C. Cir. 2002) (dismissing plaintiffs' claims for torture and hostage taking because the allegations in the complaint "do not come close to satisfying the definition of 'hostage taking'" and "the allegations supporting plaintiffs' torture claim are not adequate to bring the case within the statutory exceptions to foreign sovereign immunity").

[71] *Calderon-Cardona v. Democratic People's Republic of Korea*, 723 F. Supp. 2d 441 (D.P.R. 2010) (Plaintiffs filed suit against North Korea for death and personal injury resulting from machine gun attack at Israeli airport in 1972).

[72] *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128 (D.D.C. 2001) (Plaintiff's son was killed in car bombing of U.S. embassy in Beirut in 1984).

[73] *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107 (D.D.C. 2000) (Plaintiff was kidnapped and tortured in Beirut for nearly seven years in the 1980s).

[74] Memorandum of Justification for Waiver of Section 1083 of the National Defense Authorization Act for Fiscal Year 2008 with Respect to Iraq, Jan. 28, 2008, *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2008/01/20080128-12.html (stating that "[s]uch burdens would undermine the national security and foreign policy interests of the United States, including by weakening the ability of the democratically-elected government of Iraq to use Iraqi funds to promote political and economic progress and further develop its security forces").

[75] *See Amorrortu v. Republic of Peru*, 570 F. Supp. 2d 916, 925 (S.D. Tex. 2008) ("The [non-commercial tort exception to sovereign immunity under the FSIA] applies only to cases in which the damage or loss of property occurs in the United States"); *Bouzari v. Islamic Republic of Iran*, [2002] OJ No. 1624 ("Section 6 only permits a Canadian court to take jurisdiction if the injury occurs in Canada.").

[76] *Shreiber v. Canada*, [2002] 3 S.C.R. 269, 2002 SCC 62 (Supreme Court of Canada) (holding that although Section 6(a) of the State Immunity Act provides an exception to immunity in any proceeding related to personal injury, plaintiffs claim should be dismissed because he was only deprived of his freedom through lawful imprisonment and not physically harmed as required by the statute); *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 802 (S.D.N.Y. 2005) (holding that a tort must involve a "non-discretionary act," meaning that the actions do not involve an element of choice or judgment based on considerations of public policy, as they did in this case).

3. 1. 2. A RESTRICTION WILL NOT LEAD TO UNLIMITED TRIALS AND "FORUM-SHOPPING"

23. Germany argues that if its claim is not upheld, "we would quickly see a fairly uncoordinated and unhealthy 'race' to go to court, with every man for himself and everyone out to get as much as possible."[77] Germany asserts that this would "all lead to an endless increase in international anarchy and potentially unhealthy competition entirely coloured by ulterior motives, which are all too common in the rather discordant world of international relations."[78] This contention ignores the applicable legal frameworks under national legislation and jurisprudence and the practical reality of the types of claims at issue.

24. *First*, any plaintiff bringing a civil claim against a foreign state would still be subject to the jurisdictional requirements of the plaintiff's chosen forum. Indeed, one of the many challenges that victims of crimes under international law face in seeking reparation are national jurisdictional rules requiring that a plaintiff prove a nexus between the forum and the cause of action. For example, in Canada, the courts employ a "real and substantial connection" test,[79] while in the United States, "minimum contacts" between the defendant and the forum state are required.[80] Switzerland also requires a substantial connection between the act performed by the foreign state and Swiss territory,[81] as does the European Convention on State Immunity and the UK SIA.[82]

25. *Second*, courts have a number of discretionary tools that allow them to decline to hear cases that are more appropriately dealt with in another forum. For example, most common law systems recognize some form of *forum non conveniens*, a doctrine which permits a court, "for the convenience of the parties and the ends of justice,"[83] to stay proceedings if the

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[77] Oral Submission of Robert Kolb on Behalf of Germany, *Germany v. Italy*, Sept. 12, 2011, at 52 [hereinafter Kolb Submission].

[78] *Id.*

[79] *E.g., Bouzari v. Islamic Republic of Iran*, [2004] OJ No. 2800, para. 23 (citing *Muscutt v. Courcelles* (2002), 60 OR (3d) 20, 213 DLR (4th) 577 (CA)).

[80] To satisfy the constitutional requirements of personal jurisdiction in the United States the defendant must have (1) minimum contacts with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice," *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotations omitted); and (2) the exercise of jurisdiction, taking into account "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief," must be reasonable. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987). In order to meet the constitutional requirements of minimum contacts for a case based on jurisdiction that does not arise out of claims related to the forum state, the contacts must meet a higher level of connection, the *continuous* and *systematic* test. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 n.9 (1984). *See also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619-20 (1992) (minimum contacts existed where "direct effects" prong of commercial activity exception was met).

[81] *Hellensiche Republik v Waldero*, Judgment of March 28, 1930, Tribunal Fédéral, Receuil des Arrêts du Tribunal Federal (ATF) 56 I 237, *as cited in* 2 Int'l Fin. L. Rev. 20 (1983).

[82] Article 5(1) of the European Convention on State Immunity excludes immunity in employment proceedings, subject to the counter-exceptions in the second paragraph which require a territorial nexus, just as the UK SIA does in art. (3)(1).

[83] *Koster v. (American) Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 527 (1947).

defendant is able to demonstrate that there is a more appropriate, alternative forum.[84] In the United States, for example, courts routinely dismiss cases on *forum non conveniens* grounds when the court has judged that a particular case would be more appropriately resolved either in another forum, or by another branch of government.[85] Consequently, when properly formulated, *forum non conveniens* acts as a check against cases being heard in inappropriate courts.

26. *Third*, although there is no evidence that meritless claims by victims of serious crimes under international law are a serious problem, national courts are trusted to separate viable claims from meritless claims in any number of contexts, and to wield their discretionary power to curb abuse of process when necessary. For example, national courts are often empowered to award costs against the offending party for initiation of vexatious or baseless claims.[86] There is no reason to think that national courts would be unable to identify meritless claims in cases wrongfully invoking the limited restriction to sovereign immunity proposed by Italy, thereby ensuring that the exception is utilized by the appropriate plaintiffs.

27. *Finally*, the numbers of potential claimants would be manageable if victims are required to demonstrate that they have made other efforts to obtain redress and that their resort to national courts of the forum state is their only remaining option for relief. As noted above, the victims who brought claims in Italian courts against Germany brought suit in Italian courts only as a last resort.[87] In addition, the practical reality is that few victims have the resources to file civil claims in inappropriate jurisdictions. Civil litigation is costly, and the resources required to initiate and carry out legal proceedings in a foreign country are substantial.

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[84] *See generally* Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 TEX. INT'L L.J. 467 (2002) (discussing the doctrine of *forum non conveniens* in England, Scotland, the United States, Canada, Australia, and related doctrines in Germany and Japan).

[85] *See, e.g. Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.22 (1981) (dismissing wrongful death action in the state of California, where plaintiffs were from Ohio and Pennsylvania and airplane crash was in Scotland but also requiring that at the "outset of any *forum non conveniens* inquiry, the court must determine whether there exists an [adequate] alternative forum").

[86] *See* Lauterpacht, *supra* note 5, at 240 ("courts may be trusted to discourage, by appropriate award of costs, any abuse of their process.").

[87] *Supra* note 41.

3. 2. INTERNATIONAL RELATIONS AND THE GLOBAL LEGAL ORDER WILL CONTINUE TO FUNCTION UNAFFECTED BY A RESTRICTION

3. 2. 1. NATIONAL COURTS WILL PREVENT POLITICAL MANIPULATION AND UNILATERALISM

28. Germany asks rhetorically "[w]ho will prevent scores from being settled? How many countries have a truly independent judicial system?"[88] if Italy prevails before the Court. Germany argues that "[o]nce immunity has been weakened or even mortally wounded, once it has been reduced to dust, the way will be open to use the courts to antagonize foreign States" and "[e]ach State . . . would act according to its own agendas."[89]

29. There is little or no evidence that national courts permit litigants to manipulate them politically with regard to foreign claims. Even if national courts were do so, the reality of the modern international legal system and international relations contradicts Germany's assertion that political manipulation and unilateralism will result from a restriction on sovereign immunity. The supposed danger of political manipulation and unilateralism would be no greater than that which currently exists in relation to the vast numbers of cases against foreign states where immunities do not apply and in relation to cases against former government officials. It is also important to recognize that, as a practical matter, international relations remain subject to concerns of comity, reciprocity, and economic relations, among others, which also operate as a check on manipulation and unilateralism.

3. 2. 2. PEACE AGREEMENTS WILL NOT BE DESTABILIZED

30. Germany claims "[i]n setting aside immunity retroactively, the Court would be making it possible for all these settlements to be reopened. . . . No peace settlement would be final."[90] It also argues that "the entire history of the settlement of the tortious damages caused by World War II would have to be rewritten."[91] This contention exaggerates the effect dismissing Germany's claim would have on peace agreements. It fails to take into account that rejection of Germany's application would strengthen peace agreements in the future by ensuring that denial of reparation to victims does not become a festering sore prevent a stable peace.

31. As an initial matter, reparations are rarely the centerpiece of any peace agreement. Rather, existing peace agreements cover a vast array of issues, not just matters relating to reparation. The Dayton Peace Accords, for example, addressed ceasefire, boundary demarcation, election guarantees, and a number of other matters.[92]

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[88] Kolb Submission, at 52.

[89] *Id.* at 52-53.

[90] Kolb Submission, at 51.

[91] Memorial of Germany, at 70.

[92] General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Accords), 50th Sess., Agenda

32. Moreover, states already have an existing obligation under international law to provide reparation in cases of war crimes.[93] Consequently, far from undermining peace settlements, the possibility of litigation should victims not receive reparation will only serve as an incentive for states to create meaningful and effective methods to ensure victims obtain reparation through judicial or other methods, such as claims commissions. This would be a positive, not negative, development that would increase the chances of a lasting, stable peace, without continuing interstate tensions.

3. 2. 3. THERE WILL NOT BE "VIRTUALLY ENDLESS" PROLIFERATION IN CONFLICTING RELATIONS BETWEEN STATES

33. Germany argues that "[i]ndividuals would be in a position to cause serious problems in relations between governments. Modern international law is based on co-operation and growing trust between states. Without that, nothing permanent can be constructed."[94] This reflects an outdated notion of international relations as an activity influenced and conducted solely by diplomats and statesmen. We live in an age of complexity where any number of factors outside an executive's control, including domestic lawsuits, impact daily on the relations between governments. Modern international relations is sophisticated enough to cope with the limited restriction to sovereign immunity applied by Italian courts.

34. *First*, states are routinely subject to lawsuits in foreign courts in areas not subject to sovereign immunity, including in the area of commercial activities. Malcolm Shaw observes that "[t]he enumeration of non-immunity situations is so long, that the true situation of a rapidly diminishing exception to jurisdiction should be appreciated. In many instances, it has only been with practice that it has become apparent how much more extensive the submission to jurisdiction has become under domestic legislation."[95]
35. *Second*, in the investment arbitration realm, hundreds of cases have been brought by nationals of one state against another state.[96] The investor's national government has no control over the investor's claims once the government has provided jurisdiction for such claims, for example, under a bilateral investment treaty. States are currently able to manage any impact these cases have on their international relations, and there is no reason why this would change if Germany's claim were dismissed. One only need look at the repeated refrains of Italy and Germany during the submissions of this case about the amicable relationships between their respective countries as evidence of this point.[97]

Item 28, U.N. Doc. S/1995/999 (Dec. 14, 1995).

[93] *See* Hague Convention IV, art. 3.

[94] Kolb Submission, at 53.

[95] MALCOLM NATHAN SHAW, INTERNATIONAL LAW 667 (5th ed. 2003).

[96] As of June 30, 2011, 351 cases were brought against States under the International Centre for Settlement of Investment Disputes ("ICSID") Convention and the Additional Facility Rules alone. The ICSID Caseload – Statistics, at 7, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistic.

[97] Memorial of Germany, at 1 (stating that the two countries "are linked to one another by deep bonds of friendship and understanding"); Counter-Memorial of Italy, para. 1.3 (stating that "Italy fully shares the conviction that the solid bonds of friendship between the two countries absolutely do not risk being disturbed by the present proceedings"); Reply of

36. *Third*, the assumption by national courts of jurisdiction in cases against foreign states in certain circumstances may enhance relations between states. As Lauterpacht noted, "[f]rom the point of view of securing a friendly atmosphere in international relations judicial remedies against foreign states may be preferable to diplomatic action necessitated by the refusal of those states to submit to jurisdiction."[98]

3. 3. THE FISCAL AND FOREIGN ASSET IMPLICATIONS OF THE RESTRICTION WILL BE NEGLIGIBLE AT MOST

37. Germany asserts that "if immunity is set aside, States would be well advised not to own any property outside their own borders. . . . Once immunity from enforcement has disappeared along with jurisdictional immunity, crushed under the weight of so-called *jus cogens*, how could any other item of property be protected from being seized and sold? Bank accounts, industrial holdings, cultural exchange centres, government foundations, the property of heads of State, warships, perhaps even embassy buildings."[99]

38. Contrary to these assertions, a ruling in favour of Italy will not make it more difficult for states to own assets abroad. States will not be faced with unreasonable or disproportionate reparations judgments necessitating execution against vast amounts of state property, as Germany implies. State assets are already subject to enforcement actions under the various restrictions to sovereign immunity discussed earlier in this submission. Consequently, dismissing Germany's case would change very little in relation to the legal status of state-owned assets located abroad and the difficulties victims have in enforcing judgments against states.

39. Under current national law, the scope of immunity for state-owned property from attachment and execution is often even broader than the law that governs immunity of the state itself from suit. In the United Kingdom, Canada and Australia, a foreign state's property must be in commercial use to be eligible for satisfaction of judgments, even when the state does not retain immunity from jurisdiction.[100] French and Italian case law contain similar approaches,[101] and this same principle is also codified in the UN Convention on Jurisdictional Immunities of States and Their Property.[102]

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the Federal Republic of Germany, para. 9 (referring to the good neighbourly friendship currently existing between Germany and Italy).

[98] Lauterpacht, *supra* note 5, at 240.

[99] Kolb Submission, at 54.

[100] UKSIA § 13(4); CSIA art. 12(1)(b); ASIA section 32(3)(a).

[101] *Eurodif Corporation v. Islamic Republic of Iran*, Court of Cassation (France), March 14, 1984, 23 I.L.M. 1062 (1984) (stating that the principal of immunity from execution over foreign state assets "may be disregarded . . . when the property attached was intended to be used for the economic or commercial activity of a private law nature upon which the claim is based"); *Condor and Filvem v. Ministry of Justice*, Constitutional Court, Rome, July 15, 1992, 33 I.L.M. 596 (1994) (stating that "it is not enough that the transaction in question be subject to the jurisdiction of this or another State. It is also necessary that the property to which the request for attachment or the process of execution

40. An even more expansive approach is found in French and United States jurisprudence. The French *Cour de Cassation* has held that the general principle of immunity from execution over foreign state assets "may be disregarded . . . when the property attached was intended to be used for the economic or commercial activity of a private law nature upon which the claim is based." [103] Similarly, under the FSIA, a plaintiff must establish a nexus between the property against which a judgment can be executed and the underlying claim of the lawsuit.[104] Additionally, plaintiffs who file suit and win under the terrorism restriction in the FSIA cannot collect on foreign assets if the President waives the right due to national security concerns.[105]

41. Besides the expansive immunity provisions for state-owned property established by domestic and international immunity statutes, there is a long-standing rule of international law that the physical property of a foreign state's embassy, mission or consular residence is protected from attachment and execution.[106] This principle extends to the accounts used to run the state's embassy or mission.[107]

42. Finally, a number of international law instruments provide limitations on different forms of reparations to states, which must not be overly burdensome or disproportionate to the injury caused by a state's violation of international law. For example, the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts provide that a state is not obligated to pay restitution that is "materially impossible" or that involves "a burden out of all proportion to the benefit deriving from restitution instead of compensation."[108] Similarly, the Basic Principles and Guidelines on the Right to a Remedy

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refers is not destined to accomplish public functions (jure imperii) of the foreign State").

[102] UN Convention on Jurisdictional Immunities of States and Their Property, art. 19(c), G.A. Res. 59/38, U.N. Doc. A/RES/59/38/Annex (Dec. 2, 2004).

[103] *Eurodif Corporation v. Islamic Republic of Iran*, Court of Cassation (France), March 14, 1984, 23 I.L.M. 1062 (1984); *see also Sonotarch v. Migeon*, Court of Cassation (France), Oct. 1, 1985, 26 I.L.M. 998, 1003 (1987) ("the assets of a foreign state, which are in principle not subject to garnishment, with exceptions, especially when they are intended for economic or commercial activities of a private nature from which the claim of the creditor arises.")

[104] FSIA § 1610(a)(2) (stating that property will not be immune from attachment and execution where the "property is or was used for the commercial activity *upon which the claim is based*") (emphasis added); *see also Letelier v. Republic of Chile*, 748 F.2d 790, 795-98 (2d Cir. 1984) (finding that a plane owned by the state airline was not subject to attachment in a case for murder by a car bomb because it was "not commercial activity that falls within the § 1610(a)(2) exception and its assets therefore are not stripped of immunity").

[105] FSIA § 1610(f)(3).

[106] Vienna Convention on Diplomatic Relations, art. 22(3), Apr. 18, 1961, 500 U.N.T.S. 85; FSIA § 1610(a)(4)(B); UKSIA art. 16(1); ASIA section 32(3)(a).

[107] *Philippine Embassy Case*, 46 BVerfG 342; 65 I.L.R. 146 (Dec. 13, 1977); *Alcom Ltd. v. Republic of Colombia,* House of Lords, 23 I.L.M. 719 (1984).

[108] Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-third Session, Article 35, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001); *see also* Third report on State responsibility by Mr. James Crawford, Special Rapporteur, March 15, 2000, A/CN.4/507, para. 41 (noting that in "extreme circumstances one might envisage the plea of necessity or *force*

and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly on December 16, 2005, state that "[c]ompensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case. . . ."[109] These fundamental principles ensure that, far from depleting state resources abroad as Germany suggests, the reparation awarded by the courts to individual victims of serious violations of international humanitarian law and crimes against humanity would be limited.

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majeure as a basis for delaying payments" that a state is unable to pay) (internal citations omitted).

[109] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principle 20, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

4. CONCLUSION

43. To uphold Germany's claim, the International Court of Justice must satisfy itself that the existing doctrine of sovereign immunity *prevents* courts from developing carefully constrained and principled restrictions such as that applied by the Italian courts at issue in this case. Such a finding would be inconsistent with state practice. Widespread state practice demonstrates that since the nineteenth century, states have been developing narrowly tailored and principled restrictions on state immunity that do not interfere with the core purpose of sovereign immunity: to ensure the effective orderly conduct of international relations. A restriction to sovereign immunity when a victim of serious violations of international humanitarian law or crimes against humanity has been unable to bring a claim for reparation in other fora fits squarely within this pattern of state practice. This restriction is carefully construed and based in fundamental precepts of contemporary international law: the right of victims of the most heinous of state-committed crimes to reparations, and the continued fight against impunity for such crimes.

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