INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

JURISDICTIONAL IMMUNITIES OF THE STATE

(GERMANY V. ITALY)

PRELIMINARY OBJECTIONS

OF

THE FEDERAL REPUBLIC OF GERMANY

REGARDING ITALY'S COUNTER-CLAIM

10 MARCH 2010

Outline of Argument

I. Subject-Matter of the Counter-Claim

1. In its Counter-Memorial (CM) of 22 December 2009, Italy has not only requested the Court to reject Germany's claims regarding the merits of the case (violation of Germany's jurisdictional immunity), but has also filed a Counter-Claim. Italy prays the Court to adjudge and declare that,

"considering the existence under international law of an obligation of reparation owed to the victims of war crimes and crimes against humanity perpetrated by the IIIrd Reich:

1. Germany has violated this obligation with regard to Italian victims of such crimes by denying them effective reparation.

2. Germany's international responsibility is engaged for this conduct.

3. Germany must cease its wrongful conduct and offer appropriate and effective reparation to these victims, by means of its own choosing, as well as through the conclusion of agreements with Italy."

Germany is of the view that these requests do not come within the scope of the Court's jurisdiction. The occurrences from which Italy purports to derive a right to reparation lie more than 60 years back. However, World War II with all of its deplorable violations of human rights and international humanitarian law (IHL) is not encompassed by the jurisdiction of the Court in the relationship between the two parties, neither *ratione temporis* nor *ratione materiae*. The following submissions will be confined to demonstrating that Italy, by introducing its Counter-Claim, has misjudged the authority of the Court to look into facts that belong to the historical past. They will not focus on the defences invoked by Italy to justify its disregard for Germany's jurisdictional immunity as a sovereign State, and they will touch upon those defences only marginally to the extent necessary for the explanation of the present preliminary objections. Germany will deal with the substance of the case as soon as this incidental proceeding has come to its close.

II. Legal Basis of Preliminary Objections

2. Germany bases its preliminary objections on Article 80 (3) of the Rules of Court. This provision permits objections to be raised against a counter-claim filed by the respondent party. Pursuant to Article 80 (1) of the Rules of Court, a counter-claim must meet two requirements. In the first place, it must come within the jurisdiction of the Court. Second, it must be directly connected with the subject-matter of the application. It stands to reason that these two requirements do not constitute an exhaustive list of all factors conditioning the admissibility of a counter-claim. In addition to the two requirements explicitly mentioned by Article 80 (1) of the Rules of Court, other legal obstacles may be present rendering an application inadmissible. Germany reserves the right to raise such additional preliminary objections, if need be, at a later stage.

3. Germany deliberately refrains from taking a stance on the inter-relatedness of the claim brought by it against the Respondent and the Counter-Claim. It is of the view that the issue may remain open for the time being although many good grounds militate for considering that the Application and the Counter-Claim are located widely apart from one another. Indeed, a significant disparity can be observed. As far as substance is concerned, Italy wishes the Court to pronounce on violations of international law that were committed by the armed forces and the occupation authorities of Nazi Germany when they held sway over Italy and Italian nationals. By contrast, Germany objects to the practice of the Italian courts, in particular the Corte di Cassazione, to deny it the sovereign right of jurisdictional immunity. Moreover, time-wise the distance between the two claims is enormous. The factual basis of the Italian claims is located in the years from September 1943 to May 1945, after Italy had joined the Allied Powers that eventually defeated the Nazi regime in Germany. By contrast, Germany complains about the case law of the Italian tribunals, initiated by the *Ferrini* judgment of the

Corte di Cassazione of 11 March 2004.[1] Notwithstanding the huge gap between the two claims, Germany does not deem it useful at this stage of the proceedings to engage in a legal battle about the links between them. In fact, the lack of jurisdiction *ratione temporis* as well as *ratione materiae* is evident. On this ground alone, the Counter-Claim must fail.

III. Bases of Jurisdiction

4. None of the instruments governing the relationship between Italy and Germany provides a suitable foundation for the jurisdiction of the Court. Italy cannot validly contend that the Court may entertain the Counter-Claim.

1) Germany's Declaration of 30 April 2008

5. On 30 April 2008, Germany accepted the jurisdiction of the Court under Article 36 (2) of the Statute. The relevant parts of this declaration are worded as follows:

"1. The Government of the Federal Republic of Germany declares that it recognizes as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to the Secretary-General of the United Nations withdrawing the declaration and with effect as from the moment of such notification, over all disputes arising after the present declaration, with regard to situations or facts subsequent to this date other than:
(i) ...
(ii) any dispute which
(a) relates to, arises from or is connected with the deployment of armed forces abroad, involvement in such deployments or decisions thereon."

6. At first glance already, the reader can see that Germany's Declaration does not provide a legal basis for Italy's claim. The jurisdiction is accepted only *pro futuro* ("all disputes arising after the present declaration, with regard to situations or facts subsequent to this

[1] Memorial of Germany (MG), p. 1 fn. 1.

date"); the declaration has no retroactive effect. World War II is hence excluded from the temporal scope of the declaration. Additionally, Germany has explicitly excluded from the scope of the Declaration any disputes that are related to the activity of its armed forces abroad. Furthermore, to date Italy has not submitted to the jurisdiction of the Court pursuant to Article 36 (2) of the Statute. The condition of reciprocity is not met. Accordingly, no argument is conceivable that might be capable of bringing the Counter-Claim within the scope of the Declaration of 30 April 2008. It should also be noted that Italy has not even attempted to advocate such an erroneous reading of the Declaration.

2) The German-Italian Joint Declaration of 18 November 2008

7. The text of the Counter-Memorial suggests in two places that the Joint Declaration, issued on the occasion of the German-Italian Governmental Consultations held on 18 November 2008 in Trieste,[2] may be interpreted as an implicit acceptance of the jurisdiction of the Court (CM, p. 7 para. 1.5, p. 131 para. 7.8). A careful reading of this document does not yield any clues corroborating such a construction of the Joint Declaration. In order to set the record straight, the text of the Declaration should be reproduced in full in this submission:

"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 cooperation they also jointly address the painful experiences of World War II; 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,[3] and keeps alive the memory of these terrible events.

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[2] MG, ANNEX 2.

[3] Italian military internees, in abbreviation IMIs, were Italian soldiers taken prisoners by the German armed forces after Italy had left the alliance with Germany in September 1943. Although their legal status could not be altered by Germany, large numbers of them were deported to Germany to perform forced labour in particular in the armaments industry. Many times, they were badly treated in violation of the

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 of its actions. Italy is thus of the view that the ICJ's ruling on state immunity will help to clarify this complex issue."

8. Primarily, Germany observes that the Joint Declaration is nothing else than a political document, intended to manifest to the world at large that the introduction of the dispute would not adversely affect the bonds of friendship and cooperation existing between the two countries. The two governments, in full agreement, wished to avert the impression that bringing their dispute to the Court might indicate a state of tension existing between them. The German Government, as the representative organ of a democratic State having embraced the rule of law, manifested once again its deep regrets over the harm and suffering inflicted on the victims of ruthless violence during World War II, and the Italian Government, also in the spirit of partnership found by the two nations after that War, accepted that the legal controversy surrounding Germany's legal status in proceedings before Italian courts should be settled by amicable peaceful means, in accordance with the Charter of the United Nations (Articles 2 (3), 33). In sum, the Joint Declaration was conceived by both parties as a political commentary to the legal action envisaged and held to have become indispensable for resolving an intricate legal difficulty, namely proceedings before the Court.

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guarantees of the 1929 Red Cross Convention relative to the Treatment of Prisoners of War, to which both countries were parties.

9. In its *Aegean Sea* judgment,[4] the Court engaged in a long discussion on whether a joint communiqué of 31 May 1975, adopted by the Prime Ministers of Greece and Turkey, amounted to an acceptance of the jurisdiction of the Court concerning the delimitation of the continental shelf in the Aegean Sea. After a long and tortuous examination of the history of diplomatic relations between the two countries on that issue, the Court eventually arrived at the conclusion that a commitment by Turkey to take the dispute to The Hague could not be perceived. The Court did not dismiss the Greek action *a limine*, refraining from arguing that a communiqué reflecting the result of a ministerial meeting could in no case be taken as a formal legal commitment. However, in that case the eventuality of having the dispute judicially settled was explicitly mentioned. The relevant text referred to a possible resolution of the delimitation problem by the Court. In the present case, by contrast, not a single word can be found in the Joint Declaration to the effect that the issue of responsibility of Germany for violations of human rights and IHL during World War II should be unearthed and submitted to the Court together with the controversy about German immunity. The only subject-matter mentioned in connection with the (then awaited) proceeding before the Court is State immunity.

10. Similar observations can be made regarding the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*.[5] In this case, the relevant document, Minutes of a high-level meeting that took place in December 1990, mentioned explicitly that the controversy might eventually be brought to the cognizance of the Court. The only question that had to be solved was whether the Minutes had been intended as a formally binding legal undertaking or were instead to be considered as a simple step in an extended negotiating process. At the end of its examination of the document and its context, the Court reached the conclusion that indeed

[4] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports* 1978, 1, at 39-44.
[5] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, ICJ Reports* 1994, p. 112.

an international agreement had been concluded. Here, such an interpretation is excluded a priori since the issue of German reparations for damage caused during World War II is not mentioned in the Joint Declaration of 18 November 2008. The suggestion that the dispute about Germany's immunity is part of a "complex question" is interesting as a reference to the historical context. But it lacks any substantiation. In sum, it boils down to a cautious comment underlining that politically the dispute has a wider dimension. Legally, however, it is devoid of any relevance.

11. In any event, the text of the declaration shows that, even if construed as an agreement having a legal nature, it could under no circumstances serve as the foundation of the jurisdiction of the Court in the instant case. The only paragraph relevant for the issue presently discussed is paragraph 4. Only this last paragraph gives a voice to Italy's position. The first sentence reflects Italy's preparedness to conduct before the Court a judicial proceeding concerning the issue of Germany's State immunity. The third sentence reaffirms the gist of the first one. It again refers to a pronouncement of the Court on State immunity, commenting additionally that such a pronouncement will be useful for the elucidation of a "complex issue". No other subject-matter is explicitly mentioned. Politically, it may have been important for Italy to emphasize that the issue was "complex". But this unsubstantiated hint cannot possibly be interpreted as meaning that the entire background and context of the current dispute has been submitted to the jurisdiction of the Court. Paragraph 4 of the Declaration reflects nothing else than Italy's perception of the case. However, in order to establish the jurisdiction of the Court in a case against Germany with regard to any claims allegedly flowing from factual occurrences of the past, Germany's consent would be essential. Although unnecessary before the Court, it may be re-stated that consent of both parties is the basis of international dispute settlement. Such consent on the part of Germany cannot be perceived in the Joint Declaration.

12. A simple perusal of the Joint Declaration also reveals that the European Convention is explicitly mentioned in paragraph 4. In other words, the parties were in agreement that the European Convention was the only legal foundation of the forthcoming proceedings before the Court. There was no need for them to look for, or to establish, any other basis enabling them to bring the dispute about Germany's immunity, the only subject-matter referred to in paragraph 4, before the Court.

3) The European Convention for the Peaceful Settlement of Disputes

13. Essentially, Italy seeks to base the Counter-Claim on the European Convention for the Peaceful Settlement of Disputes of 29 April 1957 (hereinafter: European Convention).[6] Both States are parties to this Convention. However, the instant dispute is not covered by its provisions. Article 27 sets forth that it has no retroactive effect. Its applicability does not encompass

"disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute."

Italy ratified the Convention on 29 January 1960, Germany did so on 18 April 1961. Accordingly, the Convention came into force for legal relationships between both parties on 18 April 1961. All "facts or situations" that happened before this date are not encompassed by the jurisdiction of the Court *ratione temporis*. Clearly, the occurrences relied upon by Italy to support its counter-claim lie before the relevant time-limit.

14. It should be clarified from the very outset that the date when the dispute arose is not acknowledged as a relevant criterion under the European Convention. It only matters when the facts or situations that entailed the dispute occurred. Obviously, however, there must be a

[6] Council of Europe Treaty Series (CETS) No. 23.

connection between the relevant facts or situations and the dispute. Accordingly, an assessment must establish what the determinative factual circumstances are from which the dispute emerged. It is obviously the occupation of Italy from September 1943 to May 1945 with all the ensuing consequences also for Italian prisoners of war which caused the injury Italy is complaining of.

15. This conclusion is made clear by Italy's own submissions. On p. 134 of its Counter-Memorial, in order to explain its requests, Italy explicitly refers to the "obligation of reparation owed to the victims of war crimes and crimes against humanity *perpetrated by the IIIrd Reich*".[7] In many places of the Counter-Memorial, this conclusion is explained and reiterated. Thus, on p. 37 para. 3.15, one can read:

> "There is no dispute between the parties that these claims [for reparation] arose out of the grave violations of international humanitarian law committed by Nazi Germany during the Second World War. It is the issue of reparation ... which forms the central point of the dispute brought by Italy."

In other words, Italy states openly that it derives all of its claims from the unlawful acts and activities committed 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.

16. The Court has a rich jurisprudence dealing with the temporal applicability of treaties or unilateral declarations under Article 36 (1) and (2) of the Statute accepting its jurisdiction. It has followed a constant line in subsuming the facts of a given case under the relevant clauses, notwithstanding the fact that the formulation of these clauses appears in two different configurations, either focusing solely on the date of the relevant occurrences or taking into account additionally the date of the origin of the dispute. Under both formulations, however, the main task is to determine when the facts giving rise to the dispute happened.

[7] Emphasis added.

17. Basing itself on the jurisprudence of the Permanent Court of International Justice (hereinafter: Permanent Court), in particular in the case concerning the *Electricity Company of Sofia and Bulgaria*,[8] the Court confirmed in the *Right of Passage* case[9] that the "real cause" of the dispute had to be clarified and that accordingly a distinction had to be drawn between

> "the situations or facts which constitute the source of the rights claimed by one of the Parties and the situations or facts which are the source of the dispute. Only the latter are to be taken into account for the purpose of applying the Declaration accepting the jurisdiction of the Court."[10]

18. In the case concerning *Certain Property*,[11] in which Germany was the respondent party, these findings were again re-affirmed. The Court held that, in order to determine the "real cause" of the dispute, the date of the facts or situations in relation to which the dispute arose had to be focused upon. Thus, it is not the source of the rights claimed by the party submitting a request to the Court that is decisive in this regard but the factual configuration giving rise to the dispute. Rightly, the Court found that at the heart of the dispute lay the confiscation measures taken by Czechoslovakia after World War II. All the judicial proceedings that took place in Germany at a later date could not change this basic given. It was the allegedly unlawful measure that had to be taken as the point of departure in assessing the time criterion.

19. In the instant case, the legal position is unequivocally clear. A duty of reparation can have arisen for Germany only as a consequence of unlawful activities of its armed forces or other occupation authorities in Italy from September 1943 to May 1945. As already pointed out, this

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[8] P.C.I.J., *Electricity Company of Sofia and Bulgaria (Preliminary Objections)*, A/B 77, 4 April 1939.
[9] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports* 1960, p. 12.
[10] *Ibid.*, at 35.
[11] *Case concerning Certain Property (Liechtenstein v. Germany), Preliminary Objections, I.C.J. Reports* 2005, 6, at 22-25 paras. 39-46.

is in fact the reason given by Italy to buttress the requests contained in its Counter-Claim. As to the legal foundation, Italy bases its claims on general international law inasmuch as such general rules, as today codified in the ILC's Articles on Responsibility of States for internationally wrongful acts,[12] provide for reparation of any injury by an internationally wrongful act. No later events are mentioned as giving rise to the alleged rights to reparation. Throughout its submissions in the Counter-Claim, Italy emphasizes that Germany has failed to comply with the duties of reparation that arose for it during World War II. Invariably, the focus of its demonstration is on the events of that time. Accordingly, the facts from which the dispute arose occurred before the entry into force of the European Convention. Hence, *ratione temporis* the Court lacks jurisdiction.

IV. Italy's Attempts to Push the Origin of the Dispute Beyond the Time-Limit of 18 April 1961

1) A Continuing Violation?

20. Attempting to overcome the temporal hurdles standing in the way of its Counter-Claim, Italy purports to construct a continuing violation which Germany has allegedly committed (and is still committing) by denying to Italian victims the reparations to which they were entitled. In its Counter-Memorial, Italy argues as follows (p. 32 para. 3.4):

"Italy submits that the dispute on immunity has its 'real cause' in Germany's refusal to compensate the Italian victims of the grave violations of international humanitarian law committed by Nazi authorities during the Second World War. It follows that the dispute on immunity brought by Germany and the dispute on reparation brought by Italy through its counterclaim arose out of the same 'facts and circumstances'".

[12] Taken note of by General Assembly Resolution 56/83, 12 December 2001.

This line of reasoning is reiterated many times in the Counter-Memorial. Again and again, Italy contends that the dispute about Germany's immunity and the dispute on reparation as introduced by the Counter-Memorial have one common source, namely Germany's refusal to compensate Italian victims.[13] Thus, Italy endeavours to shift the origin of Italy's alleged entitlement to reparation from the time of World War II to some undetermined date after the entry into force of the European Convention.

21. The attempt to relocate the origin of the responsibility incurred by Nazi Germany rather arbitrarily, presenting it as a continuing violation, must fail. In none of the cases dealt with by them have the Permanent Court or the present Court taken any other date than the date of the controversial interference as the critical date. The interference with the rights of the other party is one thing – the consequences entailed thereby are quite another thing. In a historical perspective, claims arising from injustices of the past can be made after decades after the occurrence of such injustices. Europe was torn by fratricidal wars for centuries, and the history of European colonialism has many inglorious pages. However, by arguing that compensation should be paid, one cannot bring the origins of such controversies into the present-day legal world. In any event, law generally looks for clarity and certainty and distinguishes itself from history and philosophy. It is for this reason, too, that statutes of limitation are a natural component of every legal system.

22. By a decision in principle, the Permanent Court clearly rejected attempts by a party to overcome the time-limits indicated in a declaration accepting its jurisdiction by relying on the procedural consequences of the specific act of interference complained of. In the *Phosphates in Morocco* case[14] it was precisely Italy that wished to circumvent the temporal limitation of France's acceptance of the jurisdiction of the Permanent Court pursuant to Article 36 (2) of the

[13] Counter-Memorial (CM), p. 11 para. 1.17
[14] P.C.I.J., *Phosphates in Morocco (Preliminary Objections)*, A/B 74, 14 June 1938.

Statute, which had become operative on 7 September 1931. It argued that the Moroccan administration had, in 1925, taken measures that inflicted long-lasting damage to an Italian entrepreneur. Therefore, the fact that these measures had been put into operation long before France had submitted to the Court's jurisdiction was irrelevant. It maintained

"that the dispute arises from factors subsequent to France's acceptance of the compulsory jurisdiction, first because certain acts, which considered separately are in themselves unlawful international acts, were actually accomplished after the crucial date; secondly, because these acts, taken in conjunction with earlier acts to which they are closely linked, constitute as a whole a single, continuing and progressive illegal act which was not fully accomplished until after the crucial date; and lastly, because certain acts which were carried out prior to the crucial date, nevertheless gave rise to a permanent situation inconsistent with international law which has continued to exist after the said date."[15]

The Court, however, did not accept this line of reasoning. It observed with regard to the allegation that the Moroccan Department of Mines had acted in violation of the vested rights placed under the protection of the relevant international conventions:

"That being so, it is in this decision that we should look for the violation of international law – a definitive act which would, by itself, directly involve international responsibility. This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States. In these circumstances the alleged denial of justice, resulting either from a lacuna in the judicial organization or from the refusal of administrative or extraordinary methods of redress designed to supplement its deficiencies, merely results in allowing the unlawful to subsist. It exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it.
As regards the argument that the dispossession of M. Tassara and his successors constituted a permanent illegal situation which, although brought about by the decision of the Department of Mines, was maintained in existence at a period subsequent to the crucial date by the denial of justice to the claimants, the Court need only recall the principle which it has set forth above: the complaint of a denial of justice cannot be separated from the criticism which the Italian Government directs against the decision of the Department of Mines of January 8th, 1925."[16]

[15] *Ibid.*, p. 23.
[16] *Ibid.*, p. 28.

The gist of this passage is very simple. When considering whether a certain occurrence falls within the jurisdiction of the Court *ratione temporis*, account has to be taken of the interference complained of as such. The settlement of the damage done may extend over a lengthy period of time. But the complaints raised against the way and method of settlement do not count with regard to determining the applicability of the relevant time clause.

23. The jurisprudence of the Permanent Court stands in full harmony with the jurisprudence of the European Court of Human Rights. On many occasions, the Strasbourg Court was faced with cases predating the entry into force of the European Convention on Human Rights for the respondent country concerned. More often than not, such cases dated back to the period of the communist dictatorships in Eastern Europe. In order to sort out the difficulties raised in such instances, the Strasbourg Court has established very clear principles by which it will be guided when ruling on the admissibility of an application *ratione temporis*.

24. A first group of cases relates to acts of deprivation of property. It stands to reason that the victims of such confiscatory acts will always mourn the bad fate which hit them, being unable to forget their prior more felicitous situation. But the Strasbourg Court does not consider such measures as producing a continuing effect. In *Malhous v. Czech Republic*,[17] it held that:

"deprivation of ownership or of another right *in rem* is in principle an instantaneous act and does not produce a continuing situation of 'deprivation of a right'".

This finding has been confirmed in a series of later judgments. It may suffice to refer to a judgment of the Grand Chamber of the Court in *Blečić v. Croatia* (§ 77) where it was said that:

[17] European Court of Human Rights (ECtHR), 13 December 2000, Application 33071/96.

"the Court's temporal jurisdiction is to be determined in relation to the facts constitutive of the alleged interference. The subsequent failure of remedies aimed at redressing that interference cannot bring it within the Court's temporal jurisdiction."[18]

Accordingly, the Court sees confiscation as an instantaneous act; later claims for reparation do not re-open the window of jurisdiction. An instantaneous act consummates the violation. For the victims, the proceedings instituted to seek reparation are of course of the greatest importance. But legally they do not form an integrated whole together with the interference proper. Even if greatly protracted, they do not help the applicant overcome the time hurdle.

25. This line of reasoning was also the basis of the rejection of an application brought by a group of persons who had owned land in the eastern territories of Germany which now belong to Poland. The applicants argued that their assets had been taken without any compensation and that therefore a violation of the guarantee of "possessions" under Article 1 of the [First] Protocol to the European Convention on Human Rights had to be found. In this case, too, the Court stuck with its earlier jurisprudence, stating:

"[A]s the Court has consistently held, in particular in the context of expropriation measures effected in connection with the post-War regulation of ownership relations, the deprivation of ownership or another right *in rem* is in principle an instantaneous act and does not produce a continuing situation".[19]

Like the Italian victims considered in the instant case, the persons deprived of their properties, among them also persons of Jewish origin,[20] felt that compensation was owed to them. For many years, they had endeavoured to obtain redress from Poland for the losses they had suffered as a consequence of World War II. But the Strasbourg Court felt prevented *ratione temporis* from entertaining their claims.

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[18] ECtHR, Application 59532/00, 8 March 2006.
[19] ECtHR, *Preussische Treuhand v. Poland*, Application 47550/06, 7 October 2008, § 57.
[20] Applicant No. 1, Irene Ziebolt.

Accordingly, it refrained from conducting an inquiry into the lawfulness of the confiscatory measures taken by Poland against them. The application was dismissed *a limine*.

26. The same grounds are relied upon by the Strasbourg Court when it has to adjudicate cases of allegedly arbitrary killings. As a rule, after a dubious killing has taken place, proceedings must be initiated to establish the causes and to determine any responsibilities of third persons. Such proceedings may drag on for long periods of time. Nonetheless, these subsequent procedural steps are not taken into account when the applicability *ratione temporis* of the European Convention on Human Rights with regard to the death of a human person is assessed, provided they do not as such involve a new violation of guarantees of due process. In *Kholodov and Kholodova v. Russia*[21] the Court observed that the victim:

"was killed in 1994, that is before the Convention entered into force in respect of the Russian Federation on 5 May 1998. In accordance with the generally recognised rules of international law, the Convention only applies in respect of each Contracting Party to facts subsequent to its coming into force for that Party. It follows that the Court may not take cognisance *ratione temporis* of the facts surrounding Mr Dmitriy Kholodov's death in 1994.
Admittedly, the investigation into Mr Dmitriy Khodolov's death and the trial of putative perpetrators continued long after the ratification of the Convention by the Russian Federation. However, the Court's temporal jurisdiction is to be determined in relation to the facts constitutive of the alleged interference. The subsequent failure of remedies aimed at redressing that interference cannot bring it within its temporal jurisdiction"

27. The same reasoning was employed by the Court in a complex case of missing persons in Cyprus. The relatives of Greek victims of the Turkish invasion of Cyprus in 1974 sought to obtain a judgment of the Court to the effect that a violation of the right to life had been committed. The Court did not grant the remedy pursued by the applicants. It drew attention to its constant jurisprudence by stating that

[21] ECtHR, Application 30651/05, 14 September 2006.

"where there are proceedings instituted by an applicant to obtain redress for an act, omission or decision alleged to violate the Convention and which occur or continue after the entry into force of the Convention, these procedures cannot be regarded as part of the facts constitutive of the alleged violation and do not bring the case within the Court's temporal jurisdiction".[22]

28. It is true that the European Court of Human Rights holds jurisdiction only in a specialized field of international law. *Ratione materiae*, its jurisdiction differs widely from that of the Court. However, the problem of how to calculate the time-limits governing the jurisdiction of an international judicial body is a general problem of international law. If the length of the proceedings following a tort committed in violation of obligations under international law was taken into account in determining when certain facts or situations took place, the legal position would become totally incalculable. No State could with good conscience accept the jurisdiction of the Court without having to fear unforeseen and undesired consequences. According to the logic underlying the submissions of the respondent party even the German declaration of 8 April 2008 could then be interpreted as a foundation of the Counter-Claim, notwithstanding the explicit reservation that it is designed to apply solely to "all disputes arising after the present declaration, with regard to situations or facts subsequent to this date". Italy's line of reasoning is very simple and straightforward: it does not recognize any of the cut-off dates established either by treaty or in a unilateral declaration. Any new request of an injured party after the critical date would suffice to bring the dispute concerned within the jurisdiction of the Court. Such requests could be repeated *ad libitum*. Thus, the basic premise of consent, the foundation stone of the international system of judicial settlement, would be rendered nugatory at an enormous price for the idea of judicial settlement of international disputes.

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[22] ECtHR, *Varnava and Others v. Turkey*, Application 16046/90, 18 September 2009, § 130.

29. A similar jurisprudence has been evolved by the Human Rights Committee under the International Covenant on Civil and Political Rights. In *Koutny v. Czech Republic*, it held that an act of confiscation that occurred in Czechoslovakia in 1951 was outside the competence of the Committee, Czechoslovakia – the predecessor State - having ratified the Optional Protocol to the Covenant only in 1991.[23] No word was lost by the Committee on the fact that the applicant felt still as a victim of political persecution by the regime holding power at that time.

2) The Two Settlement Agreements of 1961 as the Real Cause of the Dispute?

30. The second attempt undertaken by Italy to bring the dispute within the temporal field covered by the European Convention relies on the contention that the two Settlement Agreements of 1961 brought about a "new situation". Italy even goes so far as to state that the

"1961 Agreements, and not the Peace Treaty, must ... be regarded as constituting the source or real cause of the disputes submitted to the Court."[24]

It is hard to follow the Respondent in this assessment. It completely distorts the object and purpose of the two Agreements.

31. In its Memorial (p. 10 para. 10), Germany pointed out that in the fifties of the last century differences arose between the two Governments about the scope of the waiver clause contained in the Peace Treaty. The German Government was of the view that the clause had brought to extinction any claims covered by it. On the other hand, the Italian Government held that there was ample room for additional payments on the part of Germany with a view to improving the good relations between the two countries. In order to consolidate the situation

[23] Communication 807/1998, views of 20 March 2000, UN doc. CCPR/C/68/D/807/1998, para. 6.2.
[24] CM, p. 39 para. 3.18; see also p. 112 para. 5.66.

of peace and good understanding as it had evolved after the foundation of the new democratic Germany in 1949, and acting in a spirit of understanding and compromise, the German Government decided that it would be a wise course of action to make some concessions to Italy instead of insisting on full respect for the waiver clause of the Peace Treaty. Just one sentence of the governmental memorandum[25] submitted to the legislative bodies with regard to the two Agreements of 1961 should be quoted once again:

"The only viable solution to overcome all differences seemed to make a single lump sum payment the amount of which could be determined without any detailed examination of the factual and legal foundations of each controversial claim by way of compromise." [26]

Thus, Germany saw the conclusion of the two Settlement Agreements as a gesture of good will designed to put an end to legal fights about compensation due in individual cases.

32. Accordingly, Germany rejects the contention advanced in the Counter-Memorial (p. 39 para. 3.18; p. 108 paras. 5.55, 5.56) that by concluding the two Settlement Agreements of 1961

"Germany renounced its availing itself of any claim based on an interpretation of the 1947 Peace Treaty to the effect that Italy had waived its rights of reparation for war damages, including reparation owed to Italian victims of Nazi crimes. At the same time, in 1961 Germany acknowledged its obligation of reparation towards Italy and Italian nationals."

This contention provides an arbitrary reading of the two Settlement Agreements, not supported by their text nor by the circumstances surrounding their conclusion. Germany did not acknowledge a legal obligation to make reparation for the damage suffered by Italian citizens during the critical months from September 1943 to May 1945. No word of such an acknowledgement can be found in the Agreements. In spite of its stance that a legal obligation under international law did not exist

[25] MG, p. 10 para. 10.
[26] *Ibid.*

for it, Germany agreed to make the payments requested by Italy with a view to stabilizing the good relations between the two countries.

33. It is hard to see why such a gesture of good will should have brought about a "new" situation constituting the core of the dispute pending before the Court. The two Agreements were steps in a process of inner-European normalization, intended to consolidate even further the good partnership between Germany and Italy. The cause of action on which Italy continues to rely in presenting its claims is nothing else than the rule of general international law that any breach of a rule of international law leads to a duty of reparation. Inevitably, this reasoning leads back to the German occupation of Italy from 1943 to 1945 and the state of war existing between the two countries during that time. On the other hand, the 1961 Agreements are precisely an element in the large process of settling the consequences of World War II. They are not the source of any injustice or illegality. Italy does not challenge the Agreements. They were validly concluded and they do not negatively affect Italian rights. Italians victims of breaches of the law by German authorities should have benefited from the payments made by Germany.[27] Apparently, Italy feels today that the sums agreed upon in 1961 were too low and did not suffice to cover all the damage sustained by it. But such a feeling of remorse cannot be the foundation of an entitlement to reparation. No claim is derived from the two 1961 Settlements Agreements against Germany, and accordingly Germany does not have to shield itself against any such claim. Although the two Agreements are seen in a different light by both countries, they are not even portrayed by the Respondent as the source of any tort action or other action against Germany. Moreover, Germany has fully complied with its contractual obligations stipulated therein.

34. There is no mention in the Counter-Memorial as to any alleged defect, inconsistency or other failure of the two 1961 Agreements with regard to Germany's obligations under international

[27] Apparently, the procedures of distribution of the monies paid by Germany were defective, as admitted by Italy, CM, p. 111 para. 5.64.

law. Italy does not challenge these treaties as far as Germany's participation is concerned. It does not charge Germany with any breach of general international law. On the contrary, Italy received the payments promised by Germany, thereby expressing its satisfaction with those instruments and their performance. At no point in time since their conclusion has Italy made any representations to Germany as to their validity. Italy's requests (CM, p. 134) do not mention the two Agreements as a source of obligations incumbent upon Germany over and beyond the obligations specifically stipulated therein.

35. Germany does not deny that there exists in fact a certain divergence of opinions regarding the legal connotation of the two 1961 Agreements. While Germany is of the view that these two instruments are to be seen as a voluntary complement to the regime ushered in by the 1947 Peace Treaty, Italy contends that the two Agreements opened up again the issue of reparations. But the core of the Counter-Claim is epitomized by the contention that Germany has a continuing obligation to provide reparation for the violations of IHL committed by the authorities of the Nazi regime during the time of the military occupation of Italy. Hence the real cause of the dispute is the occurrences of 1943 to 1945. The two Settlement Treaties as such are not in issue. Both sides agree that the conclusion of these Treaties was a positive step forward for the improvement of the mutual relationship between the two countries. As far as Italy's claims are concerned, the 1961 Agreements provide no basis, neither factually nor legally. There is simply no dispute about the relevance of the Treaties with regard to the Counter-Claim. Reference may be made in this connection to the famous definition of a dispute given by the Permanent Court in *Mavrommatis Palestine Concessions*:

"A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[28]

[28] P.C.I.J., *The Mavrommatis Palestine Concessions*, A/2, 30 August 1924, p. 11.

The Court has added that for the purposes of verifying the existence of a legal dispute it falls to it to determine whether

"the claim of one party is positively opposed by the other".[29]

In 1961, Germany agreed to a gesture of cooperative partnership vis-à-vis Italy. But the real cause of the dispute is and remains the hostilities and the occupation policies conducted by Germany. No tort claim or other claim against Germany flows from the 1961 Agreements. Italy does not invoke the Agreements as the basis of its Counter-Claim. Accordingly, there was no need for Germany to oppose such a claim.

36. In sum, the contention that the dispute finds its "real source" in the 1961 Agreements goes widely astray.

3) The Enactment of the German Law of 2 August 2000 Establishing the Foundation "Remembrance, Responsibility and Future"[30]

37. Great emphasis is placed by Italy on the fact that the Italian Military internees were not taken into account by the German Law of 2 August 2000 establishing the Foundation "Remembrance, Responsibility and Future".[31] However, no legal claim is derived by Italy from this omission. Rightly, it admits that the enactment of the Law was not dictated by an existing obligation under international law as between the two countries. In other words, Italy does not contend that by abstaining from including the Italian Military internees in the scope *ratione materiae* of the Law Germany committed a violation of its duties vis-à-vis Italy.

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[29] *South West Africa, Preliminary Objections, Judgment, ICJ Reports* 1962, p. 316, at 328.
[30] CM, ANNEX 7.
[31] CM, p. 110 paras. 5.61, 5.62.

4) Conclusion

38. After this review of the factual occurrences that may be deemed to constitute the "real cause" of the dispute, Germany comes to the conclusion that no other source can be found than the horrendous activities performed during World War II in violation of IHL. No continuing violation can be perceived, and neither the conclusion of the two 1961 Settlement Agreements nor the enactment of the Law on the Establishment of the Foundation "Remembrance, Responsibility and Future" can reasonably be deemed to be the facts that gave rise to the dispute.

V. Requests

39. Germany prays the Court to

dismiss Italy's Counter-Claim as not falling within the jurisdiction of the Court.

Berlin, 10 March 2010

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