INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

JURISDICTIONAL IMMUNITIES OF THE STATE

(GERMANY V. ITALY)

OBSERVATIONS OF ITALY ON THE PRELIMINARY OBJECTIONS OF THE FEDERAL REPUBLIC OF GERMANY REGARDING ITALY'S COUNTER-CLAIM

18 MAY 2010

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I. Preliminary Considerations

1. In its Counter-Memorial of 22 December 2009 Italy not only requested that the Court adjudge and declare that all the claims presented by Germany regarding the merits of the case be rejected. Italy also filed a Counter-Claim in accordance with Article 80 of the Rules of the Court, respectfully asking the Court to adjudge and declare that, considering the existence of an obligation under international law of reparation owed to the victims of war crimes and crimes against humanity perpetrated by the Third 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.

2. As shown in that Counter-Memorial, Italy based its Counter-Claim on the consideration that Germany's Claim could not possibly be examined by the Court without, necessarily, ruling on the merits of the issues raised by the Counter-Claim, as the Court is asked specifically to decide whether jurisdictional immunity must be granted by the Italian courts to the German State even if it has seriously and persistently breached its international obligation of reparation for victims of war crimes and crimes against humanity for which it is internationally responsible.

3. In its Preliminary Objections regarding Italy's Counter-Claim, filed on 10 March 2010, Germany requests the Court to adjudge and declare that the Italian Counter-Claim does not come within the scope of the Court's jurisdiction, whether *ratione temporis* or *ratione materiae*. According to Article 80(1) of the Rules of the Court, a Counter-Claim must meet two main requirements: it must fall within the jurisdiction of the Court and must be directly connected with the subject-matter of the Claim. Germany maintains that the first requirement is absent in this case and devotes its full Preliminary Objections to an illustration of this thesis. It refrains, however, from taking a stance on the inter-relatedness of its Claim and Italy's Counter-Claim, considering that the issue may remain open "at this stage of the proceedings".[1]

[1] Preliminary Objections of the Federal Republic of Germany regarding Italy's Counter-Claim (hereinafter PO), para. 3, p. 4.

4. Consequently, this response from the Italian side will focus on the arguments that enable a refutation of the German objections, which are geared essentially to showing the absence *ratione temporis*[2] of the Court's jurisdiction to examine Italy's Counter-Claim. Italy does not dispute Germany's right to leave open for now the question of the direct connection between the Italian Counter-Claim and the German Claim, thereby explicitly reserving the right to raise it at a later stage of the proceedings "if need be."[3] It notes, however, what Germany is implying at this point: if, at the end of the present incidental phase, the Court recognizes that the Italian Counter-Claim falls within its jurisdiction, it is possible that Germany will only then decide to assert a further objection – still preliminary in nature – alleging the lack of a direct connection between Claim and Counter-Claim.

5. Italy, while recognizing that no explicit rule precludes the taking of such a course of action, wishes nonetheless – with all due respect – to express its perplexities as to a procedural strategy that does not seem consistent with the need for promptitude invoked by Germany (to which the Court has hearkened by establishing a very strict timetable for filing the written pleadings). It is, in fact, a strategy aimed at needlessly overburdening the current proceedings, since it prevents the Court from resolving completely and definitively *at the outset* all the issues concerning the admissibility of the Counter-Claim. It also means that, once the Court has – as is expected by the Italian side – declared the admissibility of the Counter-Claim in terms of jurisdiction, the Parties will be obliged to confront each other on the entirety of the substantive issues relating to both Claim and Counter-Claim with a sort of "sword of Damocles" hanging over the proceedings. It is obvious, in fact, that all the written and oral debate on the merits of the Counter-Claim would *a posteriori* prove completely redundant – a very considerable and unnecessary waste of time and energy for both the Parties and the Court – were Germany in its Reply to finally decide to raise the issue of the connection and were the Court then, in its final decision, purely hypothetically, to accept it.

6. The procedural strategy chosen by the Applicant in short involves, as just noted, highly manifest drawbacks. These are so obvious as to strengthen a conviction: the very fact that Germany centres its Preliminary Objections exclusively on the alleged lack of jurisdiction of the Court in relation to the Italian Counter-Claim, refraining instead from discussing in depth the question of the connection between its Claim and the Italian Counter-Claim (already amply demonstrated, be it noted, in the Italian Counter-Memorial),[4] is open to being read as an implicit admission that this connection cannot be seriously questioned. The connection is,

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[2] Indeed, all the objections put forward by Germany appear to Italy to be in fact aimed at showing the alleged absence of the Court's competence *ratione temporis* (and not *ratione materiae*).
[3] PO, para. 2, p. 3.
[4] Counter-Memorial of Italy (hereinafter CM), paras. 7.6-7.8, p. 130 ff.

in fact, absolutely clear from the very fact that the subject-matter of the disputes in respect of which the Italian courts have denied immunity of the German State from jurisdiction is precisely the question of reparation for victims of crimes committed by the Nazi authorities.

II. Issues Where There Is No Dispute Between the Parties

7. In its Preliminary Objections Germany devotes several pages to showing that neither its Declaration of 30 April 2008, accepting the jurisdiction of the Court under Article 36(2) of the Statute, nor the Joint Declaration issued on the occasion of the German-Italian Governmental Consultations held on 18 November 2008 in Trieste, provide a suitable foundation for the jurisdiction of the Court in the present case. It should be emphasized that there is full agreement on these points between the parties, Italy never having claimed the contrary: it would therefore be superfluous to dwell now in detail on the arguments set out by the Applicant in this regard.

8. Nor is there any dispute between the Parties concerning the fact that the European Convention for the Peaceful Settlement of Disputes of 1957 is the only possible basis for jurisdiction with respect to both the German Claim and the Italian Counter-Claim. They also agree unanimously that, under Article 27(a) of the Convention, the "critical date", corresponding to the entry into force of the Convention in their mutual relations, is 18 April 1961: in other words, only disputes relating to facts or situations subsequent to 18 April 1961 come within the jurisdiction of the Court. Now, precisely, in the present case both the Claim and the Counter-Claim relate to facts and situations subsequent to the critical date: as Italy has already amply demonstrated in its Counter-Memorial and as will be repeated in the next few pages, there is no dispute between the Parties relating to facts or situations occurred during World War Two, but only relating to facts or situations subsequent to the entry into force of the 1957 European Convention.

9. Some clarification is required, however, about the meaning and the effects of the Joint Declaration of 18 November 2008, which it is no coincidence both sides have cited countless times in their respective written pleadings. It is certainly to be repeated once again that Italy has in no way claimed that the Court's jurisdiction in relation to the Counter-Claim was based on it. However, Italy is firmly convinced that the Joint Declaration is far from having solely political value, as Germany instead claims.[5]

10. First, from the very fact of having solemnly declared that it respected Germany's decision to apply to the Court and having stated its conviction that the Court's decision "will help clarify

[5] PO, para. 10, p. 8.

this complex issue," Italy committed itself not to challenge the Court's jurisdiction on the issue of immunity. If it had, it would have been acting unlawfully, in clear violation of the principle of good faith. In keeping with the spirit of the Declaration, the Italian Government has recently adopted a decree-law which "provides for the suspension of the effects of enforcement orders against States or international organizations whenever a case is pending before an international judicial body concerning the establishment of jurisdictional immunities of such States or organizations from Italian jurisdiction".[6]

11. Italy is also convinced that the Joint Declaration has legal implications for Germany too. The latter cannot in fact deny having recognized, by agreeing to it, an evident truth: that the question of jurisdictional immunity arises with specific reference to, and is closely connected with, the disputes over compensation for the victims of atrocities committed by the Nazi authorities that are explicitly mentioned and condemned in the Declaration itself. In other words, the Joint Declaration would be sufficient by itself to prove that Germany's Claim and Italy's Counter-Claim are directly connected.

12. This clear recognition probably explains why Germany felt it preferable to refrain for now from making objections as to the connection; but it also explains why Germany's decision to raise the objection of the Court's lack of jurisdiction concerning the dispute over the reparations appears to be questionable. In so doing, Germany seeks to avoid the Court's addressing "this complex issue" in its entirety, something Italy instead considers highly desirable and fully consistent with the spirit of the Joint Declaration. It seems, in fact, rather incoherent on the one hand to show willingness to refer an important part of this "complex issue" to the Court while on the other hand opposing the Court's joint consideration of the other part, equally important and inextricably linked to the first.

III. Germany's Attempt to Identify the Occurrences of World War Two as the "Real Cause" of the Dispute Submitted by Italy

a) Introduction

13. In its Counter-Memorial of 22 December 2009, Italy submitted that the Court's jurisdiction over the Counter-Claim is based on Article 1 of the European Convention for the Peaceful

[6] Decree-law (subject to parliamentary approval) of 28 April 2010, n. 63: "prevedere la sospensione dell'efficacia dei titoli esecutivi nei confronti di Stati od organizzazioni internazionali allorché sia pendente un giudizio dinanzi ad un organo giudiziario internazionale diretto all'accertamento della propria immunità dalla giurisdizione italiana".

Settlement of Disputes of 29 April 1957, taken together with Article 36(1) of the Statute of the Court. Italy also clarified that the applicability of the European Convention to its Counter-Claim is not excluded by Article 27(a) of the Convention. In Italy's view, the dispute submitted in the Counter-Claim has its source or real cause in the reparation regime established by the two 1961 Agreements between Italy and Germany[7] as well as in the events following the establishment in 2000 of the "Remembrance, Responsibility and Future" Foundation. Since both facts arose after 18 April 1961, the limitation *ratione temporis* provided for by Article 27(a) of the European Convention does not apply to the dispute submitted by Italy.

14. In its Preliminary Objections of 10 March 2010, Germany objects that Italy's Counter-Claim falls outside the Court's jurisdiction *ratione temporis*, arguing that the dispute submitted by Italy relates to facts or situations prior to the critical date for the purposes of Article 27(a) of the European Convention. In invoking this exception to the Court's jurisdiction, Germany relies on two main arguments, both of which – it must be made clear from the outset – appear to be untenable: Germany simply ignores the distinction, affirmed many times in the Court's jurisprudence, between the source of the rights alleged to have been breached and the source of the dispute, a distinction which is fundamental for the purposes of determining the source or real cause of the present dispute.

15. In the first place, Germany submits that the dispute brought by Italy has its source or real cause in the events that took place during World War Two. In Germany's view, these events constitute the focal point of the arguments developed by Italy to support its claims. In its Preliminary Objections, Germany argues as follows:

> "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".[8]

16. Having presented the case submitted by Italy as one entirely revolving around the crimes committed by the German Reich during World War Two and the legal consequences ensuing from these crimes, Germany then asserts that Italy attempts to overcome the limitation *ratione*

[7] Treaty on the Settlement of Certain Property-Related, Economic and Financial Questions and Treaty Concerning Compensation for Italian Nationals Subjected to National-Socialist Measures of Persecution, both signed on 2 June 1961 and entered into force, respectively, on 16 September 1963 and on 31 July 1963 (CM, Annex 3 and 4).
[8] PO, para. 19, p. 12.

temporis set out in Article 27(a) of the European Convention by characterizing the violation of the duty of reparation as a continuing violation. In other words, according to Germany, Italy is attempting to bring the dispute on reparation within the temporal field covered by the European Convention by relying on the argument that, since the violation of the duty of reparation which arose during World War Two gave rise to a situation that has continued after the critical date, the dispute submitted through the Counter-Claim falls within the jurisdiction of the Court.

17. Germany's second argument contests the relevance, for the purposes of applying the limitation clause provided under Article 27(a) of the European Convention, of the two Settlement Agreements of 1961 and of the events following the establishment of the "Remembrance, Responsibility and Future" Foundation. Germany argues that the 1961 Agreements cannot constitute the real cause of the dispute on reparation because they do not provide a source of any rights that Italy might invoke against Germany with regard to the issue of reparation. According to Germany, the 1961 Agreements are irrelevant for the purposes of the Court's jurisdiction *ratione temporis* because they "are not *the source* of any injustice or illegality".[9] The same argument is used by Germany to justify its conclusion that the events following the establishment of the "Remembrance, Responsibility and Future" Foundation do not constitute the real case of the dispute submitted by Italy.[10]

18. As already observed, Germany's arguments are unconvincing. With regard to the first argument, Italy observes that Germany substantially reformulates the case submitted by Italy through its Counter-Claim and trivializes the arguments developed by Italy in its counter-memorial. As regards the second argument, Germany's assessment of the two 1961 Agreements and of the events that took place since 2000 is clearly vitiated by the fact that, when determining what constitutes the source or real cause of the present dispute, Germany fails to appraise the fundamental distinction between the source of the rights alleged to have been breached and the source of the dispute. In the following paragraphs of this section, Italy will explain why it finds that Germany has attempted to reformulate the case submitted through Italy's Counter-Claim. In the next section, it will rebut to Germany's arguments concerning the 1961 Agreements and the subsequent events.

[9] PO, para. 33, p. 21 (emphasis added).
[10] PO, para. 37, p. 23.

b) The Occurrences During World War Two Do Not Constitute the Real Cause of the Dispute on Reparation

19. In its judgment in the *Phosphates in Morocco* case, the Permanent Court of International Justice observed:

> "The question whether a given situation or fact is prior or subsequent to a particular date is one to be decided in regard to each specific case, just as the question of the situations or facts with regard to which the dispute arose must be decided in regard to each specific case".[11]

Thus, in order to determine the situations or facts with regard to which the dispute brought by Italy arose, account must be taken of the specific subject-matter of this dispute.

20. In this respect, it must be reiterated that, contrary to what Germany appears to suggest, the object of the dispute brought by Italy through its Counter-Claim is not whether Germany committed war crimes or crimes against humanity against Italian victims during World War Two. Nor is it whether these crimes gave rise to a duty on Germany to provide reparation. These issues are not in dispute between the parties, as Germany has always, as it does again in its Memorial submitted in the present case, acknowledged its international responsibility deriving from the conduct of the German Reich. Thus, the present dispute did not arise because of the unlawful conduct of German authorities during World War Two. Insofar as this conduct gave rise to Germany's international responsibility, it can be regarded as the source of the right of reparation claimed by Italy. However, it does not constitute the source or real cause of the present dispute.

21. The dispute submitted by Italy has substantially a twofold object. First, there is the disputed question of the existence, at the time when, in the 2000s, the present dispute was triggered, of a right of reparation in favour of Italy. In this respect, what the Court has to decide is essentially whether or not Italy, by concluding the two 1961 Settlement Agreements, waived all its claims for reparation, including the claims relating to the grave violations of international humanitarian law committed by the German Reich during World War Two. Secondly, and strictly linked to the first issue, there is the question of whether Germany, by refusing to address the claims for reparation submitted to it after the establishment in 2000 of the "Remembrance, Responsibility and Future" Foundation, failed to comply with its obligations concerning reparation for the Italian victims of the crimes committed by the

[11] Series A/B, No. 74, p. 24. See also *Right of Passage over Indian Territory (Merits)*, ICJ Reports 1960, p. 33: "In order to form a judgment as to the Court's jurisdiction it is necessary to consider what is the subject of the dispute".

German Reich, and if so, what the legal consequences arising from such wrongful conduct are. Taking into account the subject-matter of the present dispute as here defined, it is clear that the facts or situations to which regard must be had for the purposes of applying the temporal limitation clause set forth in Article 27(a) are not the occurrences of World War Two. The dispute submitted by Italy is one with regard to a certain situation – the reparation regime established by the two 1961 Settlement Agreements – and with regard to certain facts – the events following the establishment of the "Remembrance, Responsibility and Future" Foundation. These facts and situation, and not the occurrences during World War Two, constitute the source or real cause of the dispute on reparation.

22. While it is clear that the present dispute relates to facts and situations subsequent to the critical date for the purposes of Article 27(a) of the European Convention, Italy is aware and does not deny that the facts which gave rise to Germany's responsibility and which constitute the source of the rights claimed in the present case date back to a period before the exclusion date. However, this by itself certainly does not imply that the Court lacks jurisdiction over the dispute. In its judgment in the *Electricity Company of Sofia and Bulgaria* case, the Permanent Court observed:

> "It is true that a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to that situation or fact. A situation or fact in regard to which a dispute is said to have arisen must be the real cause of the dispute. In the present case it is the subsequent acts with which the Belgian Government reproaches the Bulgarian authorities with regard to a particular application of the formula – which in itself has never been disputed – which form the centre point of the argument and must be regarded as constituting the facts with regard to which the dispute arose".[12]

23. In its judgment in the *Right of passage* case the present Court expressed itself in similar terms, as it observed that the dispute brought by Portugal fell within the temporal jurisdiction of the Court "whatever may have been the earlier origin of one of its parts".[13] Along much the same line, it must be acknowledged that, independently of whether the present dispute may presuppose the existence of prior situations or facts, the Court has jurisdiction over it since the specific facts and situations with regard to which the dispute arose are facts and situations subsequent to the critical date.

[12] Series A/B, No. 77, p. 82.
[13] ICJ Reports 1960, p. 35.

c) Italy's Alleged Attempt to Base the Jurisdiction of the Court on the Existence of a Continuing Violation

24. As has been shown, Germany argues that Italy, in order to avoid the operation of the temporal limitation clause of Article 27(a), relies on the fact that the violation of the duty of reparation committed by Germany constitutes a continuing wrongful act, which occurred before the critical date but has continued after that date. In this respect, Germany finds that there is a parallelism between the dispute brought by Italy against France in the *Phosphates in Morocco* case and the dispute brought by Italy in the present case. According to Germany, just as in the *Phosphates in Morocco* case Italy asked the Permanent Court to determine the wrongfulness of an act that occurred before the critical date and then attempted to overcome the temporal limitation by relying on the existence of a continuing violation, similarly in the present case Italy is attempting "to relocate the origin of the responsibility incurred by Nazi Germany rather arbitrarily, presenting it as a continuing violation".[14] Unsurprisingly, Germany concludes by observing that the Court must reject Italy's argument in much the same way as the Permanent Court did in 1938.

25. There is not much to say about this alleged attempt of Italy to overcome the time-limits indicated in Article 27(a) by relying on the existence of a continuing wrongful act. Italy has no difficulty in admitting that the notion of a continuing wrongful act has no relevance for the purposes of determining the jurisdiction *ratione temporis* of the Court under Article 27(a). In fact, Italy has never intended to rely on this argument. As already indicated, Italy argues that the Court has jurisdiction over the dispute on reparation because the source or real cause of this dispute is to be found in facts and situations – such as the 1961 Agreements and the events following the establishment of the Foundation – which are subsequent to the critical date.

26. It may be here appropriate, however, in order to further clarify Italy's position about the subject-matter of the present dispute and the jurisdiction of the Court, to make some few remarks on the alleged parallelism between the dispute submitted to the Permanent Court in the *Phosphates in Morocco* case and the present dispute. It is submitted that Germany's attempt to draw analogies between these two cases is incorrect and misleading. In the *Phosphates in Morocco* case, the subject-matter of the dispute was the monopoly régime that had been established by France through legislation adopted before the critical date. Italy asked the Court to determine whether this monopoly régime was consistent with earlier French treaty obligations. Under such circumstances, the Permanent Court had no difficulty in

[14] PO, para. 21, p. 13.

finding that the acts undertaken by France before the critical date constituted "the fact with regard to which the dispute arose"[15] and that therefore it had no jurisdiction to adjudicate upon the dispute submitted by Italy.

27. Unlike the situation in the *Phosphates in Morocco* case, the subject-matter of the present dispute is not whether during World War Two German authorities committed grave violations of international humanitarian law giving rise to Germany's international responsibility *vis-à-vis* Italy. These facts do not constitute the subject-matter of the present dispute simply because they are not in dispute between the parties. Although the present dispute concerns the issue of the reparation owed by Germany as a consequence of the crimes committed by German authorities in the period between 1943 and 1945, the focal point of the dispute – *le fait générateur*[16] – is to be found in facts and situations subsequent to the critical date. Thus, Germany's attempt to suggest that the present dispute presents the same situation as in the *Phosphates in Morocco* case is simply unconvincing.

28. What has just been said with regard to the dispute in the *Phosphates in Morocco* case equally applies to the several decisions of the European Court of Human Rights referred to in Germany's Preliminary Objections. Germany devotes four pages of its Preliminary Objections to an analysis of the jurisprudence of the European Court, in order to illustrate the principles which the Strasbourg Court applies when assessing its jurisdiction *ratione temporis*.[17] The attempt is to demonstrate that the Court's jurisdiction *ratione temporis* is to be determined in relation to the facts constitutive of the alleged wrongful act and that subsequent failure of the remedies aimed at redressing that wrongful act cannot bring it within the Court's jurisdiction.

29. The German argument on this point does not deserve a lengthy answer. In fact, the jurisprudence referred to by Germany is clearly not pertinent to the point at issue in the present case. The jurisdiction *ratione temporis* of the European Court of Human Rights is not governed by a temporal limitation clause such as that provided by Article 27(a) of the European Convention. Moreover, and most importantly, all the decisions of the Strasbourg Court reported by Germany refer to cases which differ in at least one fundamental respect from the present case. While all these cases also raised the issue of reparation, in fact they focused essentially on the question of whether a State's conduct that happened before the entry into force of the European Convention on Human Rights in respect to that State had to be regarded as constituting an infringement of an individual right covered by the European

[15] Series A/B, No. 74, p. 29.
[16] Ibid., p. 23.
[17] PO, paras. 23-29, pp. 15-19

Convention. Thus, it was the State's conduct prior to the critical date, and not subsequent events pertaining to the issue of reparation, which constituted the centre point of these cases. In the present case, on the contrary, the focus is not on the occurrences during World War Two and on the wrongful acts committed at that time by German authorities. Those occurrences constitute the background situation and the source of the rights and obligations of the parties. Admittedly, these facts occurred prior to the critical date. But this is irrelevant for the purposes of Court's jurisdiction *ratione temporis*. Significantly, the Strasbourg Court too has repeatedly acknowledged that it is competent to examine facts prior to ratification by the State concerned to the extent that they "could be considered to have created a situation extending beyond that date or may be relevant for the understanding of facts occurring after that date".[18]

IV. The Real Cause of the Present Dispute Is to Be Found in the 1961 Settlement Agreements and in the Events Following the Establishment of the "Remembrance, Responsibility and Future" Foundation

a) Applying the Distinction Between Facts Constituting the Source of the Rights and Facts Constituting the Source of the Dispute, the Present Case is within the Court's Jurisdiction

30. As already indicated, Germany denies that the 1961 Settlement Agreements can be regarded as constituting the source or real cause of the present dispute, arguing that these agreements are not "the cause of action on which Italy continues to rely in presenting its claims" but merely "an element in the large process of settling the consequences of World War II".[19] Germany relies on a similar argument to challenge the relevance for the purposes of the Court's jurisdiction of the events following the enactment of the Law establishing the "Remembrance, Responsibility and Future" Foundation. Italy submits that, by focusing exclusively on the occurrences of World War Two and trying to ignore the 1961 Agreements and the later events in the 2000s, Germany is failing to apply to the facts of the present case the legal tests to which recourse must be had, according to established jurisprudence of this

[18] European Court of Human Rights, *Broniowski v. Poland* [GC], no. 31443/96, Decision, 19 December 2002, para. 74 (*adde*, namely, *Khachatryan v. Armenia*, no. 31761/04, Judgment, 1 December 2009, para. 47; *Grigoryev and Kakaurova v. Russia*, no. 13820/04, Judgment, 12 April 2007, para. 25; see also, *Šilih v. Slovenia* [GC], Application no. 71463/01, Judgment of 9 April 2009; *Harutyunyan v. Armenia*, no. 36549/03, Judgment, 28 June 2007, paras. 49-50). See also the following remark of the Strasbourg Court in its decision of 23 May 1995 in the case *Yagci and Sargin v. Turquie* : "[The Court] therefore cannot accept the Government's argument that even facts subsequent to 22 January 1990 are excluded from its jurisdiction where they are merely extensions of an already existing situation. From the critical date onwards all the State's acts and omissions not only must conform to the Convention but are also undoubtedly subject to review by the Convention institutions" (para. 40).

[19] PO, para. 33, p. 21.

Court, in order to determine whether a dispute falls within the jurisdiction *ratione temporis* of the Court.

31. The fundamental test, which the Court clearly enunciated in its judgment in the *Right of passage* case, is based on the "distinction 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".[20] Applying this test to the dispute submitted by Portugal, the Court found that, while the right of passage claimed by Portugal might have had its source in situations or facts which had occurred well before the critical date, the facts or situation constituting the real cause of the dispute took place only in 1954 – after the critical date – when a new situation was brought about as a consequence of India's opposition to the exercise of Portugal's right of passage. In that case, the Court specified that "[a] finding that the Court has jurisdiction in this case will not involve giving any retroactive effect to India's acceptance of the compulsory jurisdiction", since "[t]he Court indeed will only have to pass upon the existence of the right claimed by Portugal as at July 1954, upon the alleged failure of India to comply with its obligations at that time and upon any redress in respect of such a failure".[21]

32. Relying on the test applied by the Court in the *Right of passage* case, Italy submits that, contrary to the view held by Germany, the occurrences during World War Two constitute the source of Italy's right of reparation and are therefore irrelevant for the purposes of determining the Court's jurisdiction *ratione temporis*. On the other hand, it is a fact that the 1961 Settlement Agreements brought about a new legal situation between Italy and Germany in relation to the issue of reparation. It is also a fact that it was only in the context of the developments of the 2000s that Germany clearly expressed its refusal to compensate Italian victims of the grave violations of international humanitarian law committed by Nazi Germany. These facts being the real cause of the present dispute, the Court has jurisdiction to pass upon the existence nowadays of the right claimed by Italy, upon the failure of Germany to comply with its obligation of reparation and upon any redress in respect of such a failure.

33. The following paragraphs will be devoted showing that the 1961 Agreements and the developments of the 2000s brought about a new situation in the relation between Italy and Germany and that it is in relation to these facts and situations that the present dispute arose. Before turning to this, a remark of a general character is called for. Germany strongly complains that Italy's interpretation of Article 27(a) of the European Convention would gravely affect the object and purpose of this clause. Germany argues as follows:

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[20] ICJ Reports 1960, p. 35.
[21] Ibid., pp. 35-36.

"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".[22]

34. In fact, Italy's interpretation of this type of clause is entirely consistent with the Court's interpretation, focusing, as the Court does, on the facts and situations which lie at the heart of the dispute. In its judgment in the *Phosphates in Morocco* case, the Permanent Court observed that this type of clause is inserted in order "to preclude the possibility of the submission to the Court by means of an application of situations or facts dating from a period when the State whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise".[23] Considering that in the very weeks when, in 1961, Germany decided to ratify the 1957 European Convention, Germany was also negotiating with Italy the two Settlement Agreements, it seems difficult to argue that Germany could not foresee legal proceedings, such as the present ones, which to a large extent revolve around the interpretation of these two Agreements.

b) The Facts which Are Relevant to Determining the Court's Jurisdiction over Italy's Counter-Claim

35. Italy bases its Counter-Claim on a new fact, or, *rectius*, a set of new facts, which all took place after the critical date – 18 April 1961 – and which are at the origin of a dispute between the parties on the issue of the implementation of the obligations of reparation owed to Italian victims of serious violations of international law perpetrated by the German Reich.

36. These new facts are:

- first, the stipulation of the two 1961 Agreements between Germany and Italy on the issue of "indemnity in favour of Italian nationals affected by National Socialist measures of persecution" (the Indemnity Treaty) and on the "Settlement of Pending Claims of an Economic Nature", and by the implicit and explicit consequences of these Agreements (i.e. the fact that Germany implicitly, and to a certain extent explicitly, acknowledged both that it could not invoke the waiver clause contained in Article 77(4) of the 1947 Peace Treaty, and

[22] PO, para. 28, p. 18.
[23] Series A/B, No. 74, p. 24.

the fact that the 1961 Treaty explicitly recognizes the right of Italian victims to present claims under German law);

- secondly, the subsequent practice (including the adoption of further measures of compensation and reparation to victims of serious IHL violation and the persistent denial of reparation under German law to a very large number of Italian victims on discriminatory grounds even very recently, specifically under the 2000 Law on the "Remembrance, Responsibility and Future" Foundation).

37. It is this whole set of new facts which constitutes the "real cause" of the dispute introduced by Italy with its Counter-Claim. It is not, as Germany inappropriately considers, the unchallenged and uncontroversial obligation to provide for reparation to victims of serious international humanitarian law violations which arose from the events of World War Two. On this latter issue, as emphasized above, there is no dispute between the parties (see *supra* Section II, para. 8 and Section III para. 20). And the persistent denial of reparation represents the violation of an ongoing obligation incumbent on Germany; an obligation which has, though indirectly and implicitly (but nonetheless clearly), been affirmed through the 1961 Agreements, and is at the core of Italy's Counter-Claim. The 1961 Agreements represented the turning point and should be seen as the first step in a process of reparation to Italian victims which was never fully implemented.

38. Most of the issues that should be dealt with in this matter will have to be fully discussed together with the merits of the case. Nevertheless, it is necessary, at this stage already, to briefly dwell on this set of new facts. In particular, it is important to bring out how the 1961 Agreements, in their meaning and implications, go well beyond their merely contractual terms (i.e. the legal obligations which are expressly affirmed).

c) The 1961 Agreements and Their Threefold Implications

39. In the years following World War Two the issue of reparations by Germany for all kinds of war damages was very sensitive indeed and, without going into the details of that process at this stage, it is well known that the Allied Powers needed to strike a balance between the will to impose a heavy toll on Germany and the attempt not to undermine their chances to resort to German's economic potential, as well as of stability and growth in postwar Europe.

40. As a consequence, the issue of reparations was dealt with piecemeal: some reparations were directly enforced by the Allied Powers; some were paid by Germany immediately after the war; some were postponed for a few years; some were frozen for several decades; some others

were waived; some were addressed through international treaties; some others were left to internal measures by Germany. Finally, some claims could not even be discussed and settled, since the events relating to them had not been fully established in all details. In this category, one would clearly comprise reparations for events which had not yet been ascertained by the end of the war, or were fully clarified only years (sometimes even decades) after the war (e.g. the massacres which occurred in the Italian Apennines, such as Civitella or Marzabotto, which have been fully established only fairly recently).

41. In the fifties, several States which had pending questions with Germany started to engage in a political process which eventually led to the settlement of a variety of pending claims through several treaties. These countries included France, the United Kingdom, Belgium, the Netherlands, Luxembourg, Denmark, Norway and Greece, which in 1956 presented requests for the compensation of victims of Nazi persecutions. Italy was not originally among these States, but it subsequently joined the group and started negotiations with Germany that led to the conclusion of the two 1961 Agreements.

42. On 2 June 1961, the Federal Republic of Germany and Italy concluded two treaties: (i) an "Agreement about the settlement of certain questions of a proprietary, economic and financial character" (the "Settlement Treaty"), and (ii) a "Treaty about indemnity in favour of Italian nationals affected by National Socialist measures of persecution" (the "Indemnity Treaty").

43. As mentioned above, these Agreements are relevant for at least three different reasons.

- First, through the stipulation of the Agreements Germany waived what it considered to be its right to avail itself of the Italian waiver of all claims (assuming that this waiver could cover serious violations of IHL, which Italy believes it does not).

- Second, through these Agreements, for the first time after World War Two, Germany agreed to meet Italian claims, thus recognizing that an obligation of reparation towards Italy existed and opening the way for a process of reparations.

- Third, through the Agreements and in the Agreements themselves, Germany made it clear that these did not exhaust the range of reparations which could be provided to Italian victims, by explicitly recognizing that other avenues remained available (or would become available) under German legislation. Moreover, the Agreements themselves did not cover all claims, but only limited categories.

44. In particular, the second treaty, the Indemnity Treaty, provided that Germany would pay Italy an amount of 40 million Deutsche Mark for the benefit of Italian nationals affected by

measures of National Socialist persecution for reasons of race, faith or ideology. This treaty was only limited to a certain category of victims of serious violations of international law and it admittedly did not aim at covering all possible cases. This is attested both by the text of the treaty (there was an explicit "without prejudice" clause covering any rights Italian victims of persecution might have under German law) and by the fact that other cases were not within the scope of the Agreement. Nonetheless, it would hardly be logical to interpret this treaty as meaning that all other victims of serious IHL violations were denied all reparation. Nothing in the treaty supports this interpretation; nor does the intention of the Parties. The treaty left many questions opened and brought about a new situation in which victims could finally obtain reparation.

45. This interpretation is confirmed by a variety of elements. First of all, Article 3 of the treaty clarified that the payment of the mentioned amount "shall finally settle between the Federal Republic and Italy *all questions* which are *within the subject-matter of the treaty*, without prejudice to possible claims of Italian nationals on the basis of the German laws on compensation of victims of National Socialist persecution (Wiedergutmachungsgesetze)".[24] This clearly entails that questions which were not specifically within the subject-matter of the treaty were left outside the scope of the treaty itself (and thus, clearly, also outside the scope of Article 3); however, it in no way means that they had been ignored, or had to be ignored. It is logical to conclude, and certainly this is Italy's perception, that for other categories of victims other avenues were going to be opened, including the filing of claims under German laws.

46. In this respect, and for the purpose of emphasizing that Germany was fully aware that this Agreement created, in 1961, a radically new situation, it is significant to note that the treaty was accompanied by an "exchange of letters" (Briefwechsel) between the Secretary of State of the German Foreign Office and the Italian Ambassador in Bonn of the same day, clarifying

[24] " "Artikel 3 Mit der in Artikel 1 bezeichneten Zahlung sind zwischen der Bundesrepublik Deutschland und der Italienischen Republik, unbeschadet etwaiger Ansprüche italienischer Staatsangehöriger auf Grund der deutschen Wiedergutmachungsgesetze, alle Fragen, die Gegenstand dieses Vertrages sind, abschließend geregelt". See Report of the Foreign Relations Committee on the draft of the "Indemnity Treaty" of 28 November 1962, sec. A: „... mit dem Ziel, eine Entschädigung auch derjenigen Verfolgten zu ermöglichen, die Ansprüche nach dem Bundesentschädigungsgesetz vom 29. Juni 1956 nicht haben". See also Kurt Schwerin, German Compensation for Victims of Nazi Persecution, 67 *Northwestern University Law Review* (1972), pp. 479-527 (with a description of the Bundesentschädigungsgesetz pp. 495-511), at 510: "Many victims of Nazi persecution do not suit the requirements of BEG [Bundesentschädigungsgesetz] paragraph 4, or of any of the paragraphs just discussed. Among these victims are Belgian, Danish, Dutch or French nationals who were persecuted and damaged in their own countries. To meet their claims, a number of nations have concluded with the Federal Republic of Germany 'global agreements' under which they receive funds for payment to individual claimants. The individuals have no direct claim against Germany, but rather must file their claims in their own nations".

the implicit effects of the treaty.[25] In his letter, the Secretary of State informed the Italian Government that "the German Government will see to it that applications of Italian nationals under the Bundesentschädigungsgesetz (Federal Compensation Law) and the Bundesrückerstattungsgesetz (Federal Restitution Law) will be dealt with without raising objections based on Art. 77(4) of the Peace Treaty with Italy of 1947 ("ohne daß hierbei die Einwendungen aus Artikel 77 Abs. 4 des genannten Friedensvertrages erhoben werden sollen" / "senza che sia sollevata l'obiezione di cui all'art. 77 par. 4 del detto Trattato di Pace")", which up to that point had been successfully raised and had led to the discarding of requests by Italian victims. The Secretary further promised that all applications which had been previously rejected because of that provision of the Peace Treaty would be reconsidered. On behalf of the Italian Government, the Italian Ambassador welcomed the German assurances and declared his agreement.

47. Accordingly, German governmental authorities indicated that they would inform the relevant authorities that claims by Italian victims under German legislation which had been discarded in the fifties on the basis of the waiver clause contained in the 1947 treaties should be reexamined in the light of the new situation. What else could this mean if not that Germany recognized that the 1961 Agreements entailed a fundamental change in the situation? This was confirmed by the Memorandum (Denkschrift) submitted to the legislative bodies on 30 May 1962, in which the Federal Government recalled Art. 77(4) of the Peace Treaty as generally excluding Italian claims against Germany and German nationals arising out of World War II, but added: "However, the special character of the claims to compensation for measures of National Socialist persecution (Ansprüche auf Wiedergutmachung nationalsozialistischer Verfolgungsmaßnahmen) justifies not raising objections based on Art. 77(4) to applications pursuant to the Bundesentschädigungsgesetz. (…) Regarding the Bundesrückerstattungsgesetz of 19 July 1957, the Federal Government […] instructed the German authorities in charge not to raise objections based on Art. 77(4) of the Peace Treaty with Italy of 10 February 1947 in the case of claims to restitution."[26]

48. Now, in Italy's view, this is clear evidence that both parties considered and agreed that the 1961 Indemnity Treaty created a new situation, which led to the waiver of the right by Germany to avail itself of the clause of Article 77(4) of the 1947 Peace Treaty. This is also evidence that the 1961 Agreements created a new situation which determined new expectations for Italian victims, based on a profound reorganization of the relationships

[25] "*Briefwechsel*" of 2 June 1961 Annex 4 to CM or see in Bundesgesetzblatt 1963 II, p. 795 et seq.
[26] Drucksache des Deutschen Bundestages IV/438, p. 9.

between Italy and Italian victims, on the one side, and Germany and its judicial and administrative bodies on the other, concerning the issue of reparations.

49. Moreover, even assuming that Germany did not explicitly – as it did, as confirmed by the above-mentioned exchange of letters – admit that the 1961 Agreements created a new situation, the Agreements (like any international treaty) clearly bear some relevance not only for what they expressly stipulate (their contractual dimension), but also for what they broadly mean and for the consequences they entail as a manifestation of the opinion of States and of their recognition of given situations.

50. Furthermore, the Agreements are also relevant for the expectations they did create for individual Italian victims against the background of the clear change in circumstances which they brought about. As lucidly stated by a German historian familiar with these issues, the 1961 Agreements were the beginning (and not the end) of a process of reparation which was unfortunately never totally accomplished.[27] It is precisely these expectations, which have never been satisfied by Germany, that have determined the filing of all those claims which are now pending before Italian Courts and the case law Germany challenges with its Claim.

51. In light of the above, it can be safely concluded that the 1961 Agreements must be considered "new facts" which occurred after the critical date (18 April 1961) and which justify the exercise of jurisdiction by the Court. There is little doubt that these Agreements represent by no means the final word on the issue of reparations, as Germany seems to argue, and there is also little doubt that both Parties are aware that it is precisely the fact that these Agreements came into existence that brings Italy to present its Counter-Claim to the Court today.

52. As far as the argument that the 1961 Agreements did not reopen, but closed, the issue of reparations is concerned, it should be emphasized that this is a matter that concerns the interpretation of these Agreements, and it is thus already *per se* evidence that a dispute between the parties on their meaning exists.

53. Italy, however, must observe that the waiver clauses contained in the 1961 Agreements, as well as many identical clauses contained in similar agreements with many other countries, are by no means a clear indication that the issue of reparation was definitely closed, as Germany has argued. Quite the contrary. As has been rightly pointed out by Pierre d'Argent, these clauses containing waivers of any future claim were differently interpreted by the signatories

[27] Interview with Lutz Klinkhammer, 'Il peso del passato. Germania, Italia e i risarcimenti alle vittime del nazismo' by Michela Ponzani, *Giornale di Storia* (Rivista elettronica registrata / ISSN 2036-4938) 01.06.2009 at http://www.giornaledistoria.net/index.php?&nomeCat=Mestiere%20di%20storico&title=Il%20peso%20del%20passato.%20Germania,%20Italia%20e%20i%20risarcimenti%20alle%20vittime%20del%20nazismo&sezione=1&content=14&cat=12&view=2&id=11

to treaties of this kind.[28] In exchanges of letters accompanying most of these treaties (but not the Agreements with Italy), the German government specified that what was meant by these clauses was that the State beneficiary would no longer be entitled to turn to Germany to seek for compensation. *This interpretation*, however, was merely Germany's appreciation of the clauses, and it was *uniformly and systematically rejected by all counterparts*, which normally reserved themselves the right to claim further compensation for all matters not specifically covered by the treaty. Now, it is pretty clear that this was justified by the fact it had been decided, through the London Agreement on Germany's External Debt (to which Germany was a party), that the negotiations for a global settlement of war reparations by Germany would continue until a final agreement could be reached. Meanwhile, most issues of reparations were postponed. Clearly, against this background, no State was ready to accept any limitation on its rights to claim compensation in the form of blanket waiver clauses. In other words, these interstate settlements are final only insofar as their rather limited object is concerned, and it is only with reference to that specific object that the final word on reparations is pronounced by the agreements themselves.[29]

54. Against this background, Italy does not claim that Germany did not fulfill its contractual obligations under the 1961 Agreements; however, it certainly claims that Germany did not recognize all the consequences following from those Agreements, including the obligation to provide appropriate reparation to all victims not covered by the Agreements. These obligations directly flow from the *recognition*, which occurred through the 1961 Agreements, that there were reasonable grounds and ample legal justifications to *reopen the issue of reparations* for war crimes and other serious violations of IHL. These obligations should have been (and should still be) fulfilled by Germany either under German legislation or by other unilateral means, or by taking all other necessary and appropriate steps to do so, including through further agreements with Italy.

55. But more must be added: Germany challenges the Italian position, which attributes great relevance to the 1961 Agreements, by arguing that these Agreements, as well as the rest of German legislation on reparations, including the 2 August 2000 Law on the Foundation, merely represent gestures of goodwill by Germany corresponding to no obligation under international law. This is inaccurate and unpersuasive. Neither the 1961 Agreements nor the Law of 2000 can be considered as merely unilateral acts performed *ex gratia*. First of all, it seems quite clear that no treaty can be really seen simply as a gesture of good will and cannot be considered a unilateral act. Secondly, as is well known, both the 1961 Agreements and the

[28] See Pierre D'Argent, *Les réparations de guerre en droit international public: La responsabilité internationale des États à l'épreuve de la guerre*, Bruxelles/Paris 2002, p. 205 et seq.
[29] Ibid..

Law of 2000 were the result of international pressure and intergovernmental negotiations. In particular, the Law of 2000 (which is formally a unilateral act) was adopted as a result of intense negotiations with several States and chiefly the United States of America; additionally a Joint Declaration of all parties involved in the negotiations was adopted. This is explicitly recognized in the Preamble of the Law,[30] and has been reaffirmed by the Constitutional Court of Germany,[31] as well as by leading scholars.[32] It is also interesting to note that pursuant to Section 5 of the Law the Board of Trustees of the Foundation is made up of 27 members, including several representatives named by foreign Governments.[33].

56. Italy does not intend, at this stage in the proceedings, to develop all the arguments which demonstrate that Germany's contention is incorrect, since these are matters concerning the merits of the case, and they should not need to be discussed in this phase. However, Italy must note that the 1961 Agreements responded to a logic flowing from the clear obligation to compensate serious violations of IHL. The circumstance often alleged by Germany that the payments were made as a gesture of goodwill and *ex gratia* has no foundation and is clearly contradicted by the fact that the 1961 treaties were part of a much larger process of settlement of claims which was mandatory (see Italy's Counter-Memorial, Chapter 5). In particular, the "Indemnity Treaty" belongs to a number of bilateral treaties concluded between the Federal Republic of Germany and other Western European states between 1959 and 1964 which were strongly linked to obligations of a non-derogable nature, as explained in more detail in Italy's Counter-Memorial (paras. 5.15 ff.) and as will be further demonstrated in the course of the proceedings.

57. In any case, the mere fact that Italy and Germany have opposing views on these and other issues directly linked to the meaning and scope, as well as the effects, of the 1961 Agreements (and subsequent German practice) proves that there is "...a disagreement on a point of law or

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[30] The Preamble of the Law explicitly provides that "this Law and the German-U.S. intergovernmental agreement provide adequate legal security for German enterprises in the United States of America, that the German Bundestag acknowledges political and moral responsibility for the victims of National Socialism. The Bundestag intends to keep alive the memory of the injustice inflicted on the victims for coming generations as well. (see Annex 7 to CM)

[31] 2 BvR1379/01 (Annex 9 to CM) at para. 5, where the Court clarifies that "negotiations took place between the Federal Government of Germany and governments of other States involved in the Second World War concerning compensation for forced labourers used in German companies and in the public sector".

[32] See Legal Opinion Drawn up by Professor Dr. Christian Tomuschat, 31 July 2001, on "Entitlement of Italian Military Internees to Benefit under the Law Creating a Foundation 'Remembrance, Responsibility and Future'?", Annex 8 to CM), p. 9 (point 2) of the English translation, where it is clarified that "on 17 July 2000 an agreement was reached between the government of the United States of American and the government of the Federal Republic of Germany on the "Remembrance, Responsibility, and Future" Foundation. On the same day the principles of the compensation arrangement were also approved in a Joint Statement by the governments of the Republic of Belarus, the Czech Republic, Israel, Poland, the Russian Federation, Ukraine, the Federal Republic of Germany and the US. On 2 August 2000 there followed the implementation of these international legal actions through the Law setting up a 'Remembrance, Responsibility and Future' Foundation".

[33] Section 5: The Board of Trustees.

fact, a conflict of views...." between the parties,[34] and places the 1961 Agreements and their consequences at the heart of the dispute.

58. The fact that Germany was fully aware that with the 1961 treaties a new era was going to start is further attested by the fact that after the conclusion of the 1961 treaties, the Federal Republic of Germany and Italy proceeded to settle other still pending claims arising from the time of World War Two. This clearly contradicts the argument that all issues relating to claims originating in World War Two events were closed by the 1961 Agreements. For example, in the treaty concluded on 19 October 1967, "on the settlement of issues of a proprietary, economic and financial character connected with the Second World War",[35] Italy and Germany agreed that Italian nationals who had suffered war damage to property in Germany would have the same rights for compensation as enjoyed by German nationals under the relevant German legislation (Article 2(1)). This is clear confirmation that the issue of reparations was definitely reopened with the 1961 Agreements and is still in search of a final settlement.

d) German Practice after 1961 and in Particular the 2000 Law on the "Remembrance, Responsibility and Future" Foundation, and its Implementing Measures

59. Finally, apart from merely pointing to the 1961 Agreements as new facts, Italy also considers that from 1961 onwards Germany has failed to respect the principle that reparation would be granted to Italian victims (a principle which Germany had established in 1961 and not before).

60. As mentioned above, the 1961 Agreements specified that Italian victims could resort to German legislation. However, the implementation of this right was denied. The feeling Italian victims had is that they were discriminated because Fascist Italy had been an Ally of the Third Reich for the first half of the war and Germany considered it inappropriate that Italians should benefit from reparations.

61. While it should be recalled that in the immediate aftermath of World War Two the whole issue of reparation was governed by financial concerns more than strict adherence to legal principles, it successively became clear that many pending matters needed to be addressed. However, it was decided that various aspects relating to the issue of reparation could still wait. After Germany's reunification, in the early 1990s it became clear that there was no

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[34] *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.

[35] Abkommen zwischen der Bundesrepublik Deutschland und der Italienischen Republik über die Regelung vermögensrechtlicher, wirtschaftlicher und finanzieller, mit dem Zweiten Weltkrieg zusammenhängender Angelegenheiten – Accordo fra la Repubblica Federale di Germania e la Repubblica Italiana per il regolamento di questioni patrimoniali, economiche e finanziarie connesse alla Seconda Guerra Mondiale; Bundesgesetzblatt 1969 II, 356

longer any reason to keep postponing, and a process started (which in the second half of the 1990s was rather pushed by various pending cases around the world, including some in US Courts) to persuade Germany that further gestures towards victims of atrocities during World War Two were indeed necessary.[36] This process lead to the 2000 Law on the "Remembrance, Responsibility and Future" Foundation.[37] The adoption of this law and the procedures triggered by it created a new expectation in many Italian victims, who massively applied to claim reparation for the serious violations of IHL suffered during the war, which were eventually denied.[38]

62. As explained in Italy's Counter-Memorial, the 2000 Law and its implementation have brought gross injustice against Italian victims, on the basis of ambiguous and unconvincing arguments.[39] It is precisely the persistent denial of justice that determined most of the resulting case law against Germany in Italian courts. In essence, since 1961, despite the admission that reparation obligations existed, and the expectations created by stating that steps had been taken without prejudice to any rights victims might have under German legislation, no (or very few) reparations have actually been made.

63. At this stage of the proceedings, Italy considers that it is not necessary to dwell further on these matters. Italy is confident that there will be ample opportunity for deeper exchanges of views when the Court comes to deal with the merits of the Counter-Claim, considering that all the events at the origins of the dispute between Italy and Germany took place after the critical date and as such they allow the Court to exercise its jurisdiction.

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[36] For an overview, see the reports of the Federal Government of 6 May 2005 (Drucksache des Deutschen Bundestages 15/5505), 19 April 2006 (Drucksache des Deutschen Bundestages 16/1275), 4 April 2007 (Drucksache des Deutschen Bundestages 16/5001), 28 April 2008 (Drucksache des Deutschen Bundestages 16/9047) and 16 April 2009 (Drucksache des Deutschen Bundestages 16/12657).

[37] Bundesgesetzblatt 2000 I, 1263. For analysis, see Hugo J. Hahn, Individualansprüche auf Wiedergutmachung von Zwangsarbeit im Zweiten Weltkrieg – Das Entschädigungsgesetz vom 2.8. 2000, *Neue Juristische Wochenschrift* 2000, 3521. For a critical assessment of the law (as "enabl[ing] the culprits to evade accepting any real responsibility for the enslavement of millions, while cloaking this evasion in reverence for the slaves"), see Libby Adler and Peer Zumbansen, The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich, in Peer Zumbansen (ed.), *Zwangsarbeit im Dritten Reich: Erinnerung und Verantwortung – NS Forced Labor: Remembrance and Responsibility*, Baden-Baden: Nomos, 2002, pp. 333-392.

[38] Decision of 18 June 2003, case no. 6 S 35.03. See also the decision of the Verwaltungsgericht Berlin of 8 September 2004 (case no. VG 9 A 336.02) (dismissal of the lawsuit because of lack of standing to sue). For further similar lawsuits filed in the Administrative Court of Berlin, see the report of the Federal Government, at 19 et seq. And see also Case no. 6 M 20.03, available in the JURIS database.

[39] On 28 June 2004, a Chamber of the German Constitutional Court (Bundesverfassungsgericht) decided to not adjudicate constitutional complaints brought before the Court by an association of former Italian military detainees and 942 such former detainees individually. Cf. Case no. 2 BvR 1379/01; *Neue Juristische Wochenschrift* 2004, p. 3257. For a critical review of the decision, see Bardo Fassbender, "Compensation for Forced Labour in World War II: The German Compensation Law of 2 August 2000", 3 *Journal of International Criminal Justice* (2005), pp. 243-252. See also the decision of the Bundesverfassungsgericht of 7 December 2004 (case no. 1 BvR 1804/03) (non-acceptance of a constitutional complaint for lack of prospect of success; no violation of the complainant's constitutional right to property), *Neue Juristische Wochenschrift* 2005, p. 879.

e) Conclusions

64. In sum the main point of Italy's Counter-Claim (the fact that Italian victims have not yet obtained reparation) is precisely linked to the new facts which occurred in 1961 and the whole set of subsequent facts (acts and omissions by which Germany has denied reparation to individual victims), which are all posterior to the critical date. These new facts are essentially the 1961 Agreements, but also the subsequent practice, the measures adopted by Germany under German legislation to make reparations available to victims of serious violations of international law attributable to the Third Reich, and the persistent discrimination towards Italian victims. The very heart of Italy's Counter-Claim is precisely connected to the relevance of the 1961 Agreements and Germany's subsequent practice concerning reparations, including the decisions based on the 2000 Law which objectively discriminate the large majority of Italian victims.

65. Against this background it is evident that the Court has jurisdiction over the Counter-Claim and will be in a position to interpret and analyse the 1961 Agreements in the light of their provisions as well as of their implications. It must be underlined that Germany has indeed explicitly recognized the existence of a dispute between the Parties revolving around the meaning and the impact of the 1961 Agreements. Germany "does not deny" and on the contrary explicitly affirms "that there exists in fact a certain divergence of opinions regarding the legal connotations of the two 1961 Agreements".[40] Moreover, the Court also has jurisdiction to determine whether or not the subsequent German practice, and above all the 2000 Law and its implementation, constituted an infringement of the rights to reparation of Italian victims.

[40] PO, para. 35, p. 22.

V. Requests

66. For the reasons set out above, Italy respectfully requests the Court to adjudge and declare:

a) that the Court has jurisdiction over Italy's Counter-Claim;

and, correspondingly,

b) that Germany's preliminary objections are rejected.

Rome, 18 May 2010

Ambassador Paolo Pucci di Benisichi

Agent of the Government of Italy

Dr. Giacomo Aiello

Agent of the Government of Italy