[Translation by the Registry]

I.) Question put to Germany by Judge Bennouna at the end of the public sitting of 16 September 2011

If no other remedy is available for individual victims of serious violations of human rights or humanitarian law committed on their territory by a foreign State, would it be admissible for the latter to raise a plea of immunity from jurisdiction jure imperii *before the courts of the forum State?*

State immunity from jurisdiction in respect of acts *jure imperii* is a firmly established principle in international law. It derives from the fundamental principle of the sovereign equality of States. As regards the cases which form the subject of the present dispute, international law provides for no exception to the principle of State immunity from jurisdiction. State practice leaves no room for doubt on the matter. In support of this assertion, Germany has submitted the relevant legal decisions to the Court.

Scholarly opinion also confirms the foregoing. The resolution of the Institute of International Law on "The Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes", adopted at its Naples Session in 2009, offers no evidence to the contrary.

Article IV of that resolution reads as follows:

> "The above provisions are without prejudice to the issue whether and when a State enjoys immunity from jurisdiction before the national courts of another State in civil proceedings relating to an international crime committed by an agent of the former State."[1]

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[1] *Yearbook* of the Institute of International Law, Vol. 73 (Naples Session, 2009), p. 228.

[Original: English]

II.) Questions put to both Parties by Judge Cançado Trindade at the end of the public sitting of 16 September 2011

1. In relation to your arguments in these public sittings before the Court and bearing in mind the Settlement Agreements of 1961 between Germany and Italy, what is the precise scope of the waiver clauses contained therein, and of the waiver clause of Article 77 (4) of the Peace Treaty of 1947? Can the issue of reparation be considered as entirely closed today? Or has any of its aspects remained open to date?

The Court's Order of 6 July 2010 determines the relevance of the Peace Treaty of 1947 and the two 1961 Agreements between Germany and Italy for the current proceedings. Reference is made, in particular, to paragraphs 27 and 28 of the Order. Germany has always held the position that the question of whether reparations related to World War II are still due or not is not the subject matter of the proceedings before the Court.

2. Is the delicts* exceptio *(territorial torts) limited to acts* jure gestionis*? Can it be ? Are acts* jure imperii *understood to contain also a delicts* exceptio*? How can war crimes be considered as acts* jure *– I repeat,* jure-imperii*?

The cases which are the subject of the proceedings before the Court concern acts of armed forces during an armed conflict. The delicts *exceptio* (territorial torts) does not apply to such military activities.

The qualification of a State act as an act *jure imperii* is based on the nature of that act as an exercise of the State's sovereign powers and is independent of the legality of that act. Such sovereign acts may also involve serious breaches of international law. International law provides for substantive rules on State responsibility and international criminal responsibility which do not repeal or derogate from State immunity.

3. Have the specific Italian victims to whom the Respondent refers effectively received reparation? If not, are they entitled to it and how can they effectively receive it, if not through national proceedings? Can the regime of reparations for grave breaches of human rights and of humanitarian law still be regarded as exhausting itself at inter-State level ? Is

the right to reparation related to the right of access to justice **lato sensu*****? And what is the relationship of such rights of access to justice with*** **jus cogens*****?***

In accordance with the Court's Order of 6 July 2010, Germany has always held the position that the question of whether reparations related to World War II are still due or not is not the subject matter of the proceedings before the Court.

The reparations scheme which was set up for World War II was a classic inter-State reparation scheme and was comprehensive.

Victims who believe they have a claim against Germany can institute proceedings before the German courts. The European Court of Human Rights (ECHR) has confirmed that the application of national and international law by the German courts in this regard is not arbitrary and does not does violate Article 6, paragraph 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees the right of access to justice. References to the relevant jurisprudence are provided in the submissions of Germany.

III. Question put to both Parties by Judge ad hoc Gaja at the end of the public sitting of 16 September 2011

Does a waiver made by State A, also on behalf of its nationals, with regard to a category of claims against State B, imply that State B is entitled to enjoy jurisdictional immunity should a national of State A bring to the courts of State A a claim within that category ?

The question of a waiver and the question of jurisdictional immunity are not dependent on each other. They concern different aspects. A waiver addresses the issue of whether a specific right exists or not and is, therefore, an issue for the merits of a suit. Jurisdictional immunity concerns the question of whether a State is subject to the jurisdiction of another State irrespective of the existence of a specific right. Most procedural systems will deal with it as a matter of the existence or non-existence of jurisdiction which has to be decided before proceeding to any other enquiry. In the example it is not the waiver by State A which gives State B jurisdictional immunity but rather the nature of the act of State B, irrespectively of any waiver by State A.