INTERNATIONAL COURT OF JUSTICE

JURISDICTIONAL IMMUNITIES OF THE STATE
(GERMANY V. ITALY; GREECE INTERVENING)

COUR INTERNATIONALE DE JUSTICE

IMMUNITES JURIDICTIONNELLES DE L'ETAT
(ALLEMAGNE C. ITALIE ; GRECE (INTERVENANT))

ANSWERS TO QUESTIONS PUT TO ITALY BY JUDGES SIMMA, CANÇADO TRINDADE AND GAJA AT THE END OF THE PUBLIC SITTING OF 16 SEPTEMBER 2011

23 September 2011

Question put to Italy by Judge Simma

"Italy takes the view that the waiver clause stipulated in Article 77 (4) of the 1947 Peace Treaty with Italy does not, indeed cannot, cover severe breaches of international humanitarian law committed against Italians by Germany. According to the Respondent, Italy was already, in 1947 and is up to the present, under an international legal obligation not to waive claims to German responsibility for such grave breaches. In view of the great weight thus given to these claims by Italy, let me ask the following question, a factual question:

Please describe in detail the attempts undertaken by the Italian Government at the diplomatic level to induce Germany to make reparation to Italian victims of German war crimes that is precisely the category of Italian victims allegedly excluded from German reparation measures during the period following the 1947 Peace Treaty up until the Ferrini case."

1. The question asked by Judge Simma: Preliminary remarks.

1. Judge Simma recalled that "Italy takes the view that the waiver clause stipulated in Article 77 (4) of the 1947 Peace Treaty [...] does not, indeed cannot, cover severe breaches of international humanitarian law committed against Italians by Germany. According to the Respondent, Italy was already, in 1947 and is up to the present, under an international legal obligation not to waive claims to German responsibility for such grave breaches" and, "[in] view of the great weight thus given to these claims by Italy", the Judge formulated what he defined as "a factual question"; in particular, Italy has been asked to "*describe in detail the attempts* undertaken by the Italian Government at the diplomatic level to induce Germany to make reparation to Italian victims of German war crimes that is precisely the category of Italian victims allegedly excluded from German reparation measures during the period following the 1947 Peace Treaty up until the Ferrini case"[1].

This question gives Italy the opportunity to express a few further considerations concerning the issue of the lack of reparations to Italian war crime victims.

2. At the outset, prior to answering this very specific question about the attempts undertaken at the diplomatic level, it seems necessary to address, albeit briefly, the wording of the preambular part of the question formulated by Judge Simma.

3. As far as the first sentence is concerned ("Italy takes the view that the waiver clause stipulated in Article 77 (4) of the 1947 Peace Treaty [...] does not, indeed cannot, cover severe breaches of international humanitarian law committed against Italians by Germany"), Italy has no objection, since it appropriately summarizes Italy's views.

4. It is respectfully submitted, however, that the second preambular sentence summarizes the position of Italy in a way which does not correspond to the presentation of Italy's arguments before the Court. The sentence "[a]ccording to the Respondent, Italy was already, in 1947 and is up to the present, under an international legal obligation not to waive claims to German

[1] *Emphasis added.*

responsibility for such grave breaches" presents Italy's arguments inappropriately, and it does so in a way which, without certain indispensable clarifications, might be prejudicial to Italy's position.

5. For Italy, the obligation to provide reparation for egregious breaches of IHL in favour of Italian victims rests on Germany because of *non-derogable* principles of international law. In this regard, Italy has never expressed any renunciation aiming at absolving Germany of its liability, nor could Italy have done so. As a consequence, even if one were to suppose that Italy has not engaged in pressing diplomatic attempts to induce Germany to make reparation to Italian victims of war crimes committed by the Third Reich, this would not have the effect of rendering moot or invalid Germany's obligations, nor could it deprive Italy of the right to request, on behalf of its nationals, that Germany comply with the law. In particular, this is true since, on the basis of the intransgressible principles of international humanitarian law, no State is allowed to absolve itself or any other State from liability for grave breaches of IHL. Therefore, Italy would not have been in a position to absolve Germany either through an express agreement (which was never made), or through an implicit waiver due to its alleged silence. Nor could Germany be relieved of its obligations in any other way. The only way to discharge that obligation is to conclude appropriate agreements with Italy for the benefit of Italian victims or to make direct reparations to the victims. None of these measures has been taken by Germany.

6. The second general remark is that, although it is true – as mentioned in Italy's first round of pleadings[2] – that no continuous pressing requests have been made to Germany on account of the friendly relationship existing between the two Countries, this was due to the *specific legal context* in which the issue of reparations developed. Moreover, as far as war crimes against the civilian population of several Italian villages is concerned, due consideration must also be given to the fact that in many cases clear evidence was only gathered in the 1990s, and criminal prosecution in these cases has taken place in Italian criminal courts only in very recent years.

2. The position of Italy vis-à-vis Germany in this sad story of protracted denial of justice

7. Coming now to the more factual aspect of the question by Judge Simma, Italy will first present some historical data that illustrate the diplomatic steps undertaken. Secondly, Italy will outline the legal context in which formal diplomatic *démarches* were taken. In particular, in this regard, Italy would like to emphasize that only recently did it become clear that Germany had no intention to comply with its obligations. Thirdly, Italy will explain why the fact that reparation was not frequently requested in a formal way does not suffice to annihilate or extinguish the rights accruing to victims under international law.

(a) 1947-1961

8. First of all, there is **no need to demonstrate that steps were undertaken between 1947 and 1961**, since the two 1961 Agreements are a demonstration that Italy did not accept the idea according to which the 1947 waiver clause covered any claim of any nature, including war crimes reparation claims. In this regard, the fact that differences of opinion arose between Italy and Germany as regards the scope of the waiver clause is conclusively shown by the German Government itself in the Memorandum of 30 May 1962 presented to the legislative

[2] CR 2011/18, p. 37, para. 39 (Zappalà).

bodies,[3] cited by Italy in its Counter-Memorial.[4] Therefore, for the period 1947-1961 there is intrinsic, direct evidence that the waiver clause as interpreted by Germany did not satisfy Italian requests.

(b) 1961-1990

9. Subsequently, concerning the decades from 1961 to 1990, Italy has already explained that, as part of the overall agreement in 1961, Italy ratified the 1953 London Agreement on German External Debts and, as is well known, Article 5 of this Agreement **expressly postponed the issue of pending reparations** until a final settlement was reached. Such a final settlement has not yet occurred. Therefore, with this agreed postponement in mind there was no point in insisting with Germany about the need to make reparations for war crime victims.

(c) 1990-2000

10. After the 1990 "4+2" Treaty, in which nothing was said on the issue of reparations, a new round of *ex gratia* reparations was undertaken by Germany. Italy placed great expectations on this new round of reparations. This new round was the result of a complex process which had led to the adoption in 2000 of the Law on the Foundation Remembrance, Responsibility and Future. In passing, one should recall that this process was due to the claims filed before national courts, particularly in the US by numerous war crime victims (see e.g. the *Princz case*).[5] This shows that, although Germany has often reiterated the *ex gratia* nature of many of the reparations made under various schemes, those initiatives have not been altogether spontaneous.

(d) The diplomatic steps undertaken by Italy since 2000

11. However, when it became evident that Germany had no intention to make reparation to Italian victims of war crimes; and when the real intentions of Germany started to emerge, the attitude of the Italian Government changed and it became more proactive. This is admitted by Germany when, in its Reply, it states that "after the adoption of the 2000 German law on the 'Remembrance, Responsibility and Future' Foundation [...] Italy made representations to Germany on account of the exclusion of the Italian military internees ("IMIs") from the scope *ratione personae* of that law".[6]

12. In particular, we must clarify that, on 29 November 2000, a mixed delegation of officials of the Ministry of Foreign Affairs together with officials from the Ministry of Defence met in Berlin with officials in the Ministry of Foreign Affairs and with the Director of the Berlin branch of International Organization for Migration (i.e. the Organization entrusted with the task of handling the requests for compensation).

On that occasion, it was emphasized that IMIs should be included among the beneficiaries of the compensation scheme of the Foundation, and it was recalled that they had been excluded from the scope of the 1961 agreements (and Germany never objected to this). Moreover, the special nature of IMIs was highlighted, clarifying that they could not be likened

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[3] *Drucksache des Deutschen Bundestages IV/438*, p. 9.
[4] Italy's CM, para. 5.56, p. 109.
[5] Italy's CM para. 4.75, pp. 68-9.
[6] See GR at para. 13.

to other categories of prisoners or deportees. The officials of the Auswaertiges-Amt replied that 'prisoners of war' had been excluded for fear that this would open a 'Pandora's box'. However, since Italian Military Internees had been deprived by the Third Reich of that status, Italy had great expectations that these Italian victims of war crimes would be included among the beneficiaries of reparations.

13. In November 2000 and subsequently on various occasions during the spring of 2001, the Embassy of Italy in Berlin raised the issue of IMIs with German authorities and emphasized that an exclusion of IMIs from the beneficiaries of the compensation awarded by the Foundation would have been utterly unjust. Against this background, on 7 March 2001, the Italian Ambassador in Berlin, H.E. Silvio Fagiolo, met with the President of the Kuratorium of the Foundation Jansen to support the case for making reparations to IMIs.

14. As also reported by the German press of the time (see e.g. the article by Juergen Jeske in Frankfurter Allgemeine Zeitung of 12 November 2001), the exclusion of the former Italian Military Internees (IMI) and other Italian victims of Nazism from the number of beneficiaries of the Foundation Remembrance, Responsibility, Future was mainly due to a financial problem, rather than to a legal impediment, which was actually fabricated at a later stage. On 14 May 2001, in a meeting with the then-Italian Ambassador in Berlin, Silvio Fagiolo, who was again advocating the inclusion of the IMIs, the competent senior official of the Federal Chancellery, Graf Lambsdorff,[7] admitted that the problem was, to a large extent, a financial one.

15. The support offered by the Italian Government to the mission of Italian Military Internees in Berlin on 27 June 2001, when an Italian delegation met with Professor Tomuschat, who was acting at that time in his private capacity as an expert requested by the Ministry of Finance to clarify the status of IMIs for the purpose of the applicability of the Foundation's reparation scheme, is further evidence of the keen interest of Italy, as a sovereign State, to insist on the implementation of Germany's obligations of reparation.

16. The effects of the intervention of the Italian Government can also be inferred from the decision to postpone the deadline for the filing of requests of compensation to the Foundation until 31 December 2001.

17. Finally, on 2 August 2001 the Director of Legal Affairs in the Ministry of Foreign Affairs (Auswaertiges-Amt), Mr. Westdickenberg, invited the Ambassador of Italy in Berlin to a meeting and officially informed him of the conclusions reached in the expert opinion of Professor Tomuschat. In that opinion, IMIs were equated to prisoners of war for the purpose of denying them any right to obtain compensation under the Foundation's reparation scheme. Mr. Wesdickenberg further informed the Ambassador of the German Government's decision to follow Professor Tomuschat's opinion. Immediately, on that specific occasion, Ambassador Fagiolo with great clarity criticized the reasoning behind the expert opinion and the decision of the German authorities to follow it as the source of blatant injustice. Obviously, the German authorities would not have immediately informed the Ambassador of Italy if this had merely been an issue involving individual Italian nationals with no bearing whatsoever in the relationships between the two Countries.

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[7] In 1999 Lambsdorff was appointed by Chancellor Schröder as the federal envoy to the negotiations for the compensation of the victims of forced labor in Germany during World War II, which led to the establishment of the Foundation "Remembrance, Responsibility and Future".

18. The relationship was, at all times, one of a clear, traditional, diplomatic relationship at the inter-State level. A level at which Germany had again failed to comply with its obligations, because it had been consistently operating on the basis of the erroneous assumption that the waiver clause had exempted it from all responsibilities.

4. Concluding remarks

19. While it is true that evidence of diplomatic steps in the form of official documents might be scarce, not only are there various legal reasons that explain it, but in the most relevant time frame (2000/2001) there were numerous meetings between Italian and German diplomatic authorities.

20. Furthermore, in the past Germany had systematically declared that the agreements were without prejudice to any measure of reparation that might be granted to individuals under German law; Italy could not imagine that this would lead German authorities to disregard the legitimate claims of Italian victims of war crimes. Italy would have hoped, precisely in consideration of the relationships between the two Countries and the common commitment to European integration, that such avenues would be open and effective for Italian nationals.

21. Simply put, Italy has not waived any claims for war crimes, and has in no way acquiesced to Germany's failure to respect the obligation to make reparation. In any case, even silence or the simple lapse of time cannot extinguish such claims. War crimes are not subject to any statute of limitations, either within national legal order or at the international level. This is true not only with regard to the punishment of individuals but also for compensation claims and the liability of States.

22. In conclusion, it cannot be denied that Italy has made significant steps to request Germany to pay compensation to numerous war crimes victims. It must be stressed, however, that in any case, even if Italy had not taken any such steps (which, as seen above, is not the case), there is no rule which justifies setting aside obligations ensuing from intransgressible principles of international humanitarian law. Germany cannot invoke the formulation of its own internal laws to justify, at the international level, a lack of reparation for entire categories of victims of war crimes. If these laws are flawed, or if their interpretation is mistaken, it is up to the German authorities to find appropriate remedies. Italy was and still is ready to address the issue of reparation to Italian war crime victims through an appropriate inter-State settlement.

Questions put to both Parties by Judge Cançado Trindade

"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?

2. Is the delicts exception (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?

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 international 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 right of access to justice with jus cogens?"

1. A) What is the precise scope of the waiver clauses contained the Settlement Agreements of 1961 between Germany and Italy, and of the waiver clause of Article 77 (4) of the Peace Treaty of 1947?

Italy recalls that the two agreements concluded in 1961 were the result of a process which in itself showed that there were differences of opinion between Italy and Germany as to the scope of the waiver clause contained in the 1947 Peace Treaty, and that Germany had to take some measures to address them. The agreements were thus a measure of reparation for, on the one hand, some pending economic questions (the 'Settlement' agreement) and, on the other, as indemnification of victims of persecution (the 'Indemnity' agreement). While the former primarily concerned the economic relationships between Italy and Germany (as well as Italian and German nationals) and represents conclusive evidence that Italy had never accepted Germany's interpretation of the waiver clause, the latter focused on a specific category of victims which was targeted on the basis of specific discriminatory grounds. These two agreements, however, only cover a given, particular subject matter: pending economic questions and reparations to victims of persecution. Moreover, these agreements do contain waiver clauses, and in particular the 'Settlement' agreement (which refers to pending economic questions) contained an obligation for Italy to ensure for the future that no claim would be brought against Germany. However, even these clauses merely referred to the subject matter of the agreement and were not (and could not have been) so expansive as to cover, in addition, war crimes reparation claims. Therefore, it is warranted to state that the agreements and the waiver clauses therein are specifically limited to the claims within the scope of the relevant agreements: pending economic questions, on the one hand, and claims by victims of persecution, on the other.

With regard to the waiver clause of Article 77(4) of the Peace Treaty of 1947, Italy recalls that, in its written and oral pleadings, it has widely demonstrated that this clause does not cover claims of compensation arising out of grave breaches of international humanitarian law.

B) Can the issue of reparation be considered as entirely closed today? Or has any of its aspects remained open to date?

As far as the second aspect of Judge Cançado Trindade's question is concerned, Italy observes that the issue of reparations is *not* closed. There are several categories of victims that have never been taken into account for the purpose of awarding reparations, including Italian victims belonging to the categories referred to in the cases underlying the present dispute.

2. A) Is the delicts exceptio (territorial torts) limited to acts jure gestionis?

The "tort exception" to immunity applies to both acts *jure gestionis* and acts *jure imperii* committed by a foreign State on the territory of the forum State. This view is confirmed by the International Law Commission's Commentary on the Draft Articles on Jurisdictional Immunities of States and Their Property, in Article 11 of the European Convention of on Jurisdictional Immunity as well as in the practice of States (see, among the instances of practice referred to during the oral pleadings, the laws of the United Kingdom, Singapore, Canada, Israel, the United States, Argentina, South Africa, Australia and Japan (ibid., p. 44), the judgments of the Canadian Supreme Court of Quebec in *Kazemi (Estate of) and Hashemi v. Iran, Ayatollah Ali Khamenei and ors* (ibid., p. 40), of the Supreme Court of Canada in *Schreiber* v. *Attorney-General of Canada and Germany* (CR 2011/21, p. 33), of the US Supreme Court in *Argentine Republic* v. *Amerada Hess* (ibid., p. 32), and of the Polish Supreme Court in the *Natoniewski* case (ibid. p. 34; see also Annex 5 to Germany's Comments on the Greek Declaration of 3 August 2011, p. 12)). The relevant legal literature also supports this view (see Italian Counter-Memorial, p. 52, note 96).

B) Can it be?

As the International Law Commission's Commentary on the Draft Articles on Jurisdictional Immunities of States and Their Property acknowledges (see CR 2011/18, p. 42), the distinction between *acta jure imperii* and *acta jure gestionis* has been maintained in the case law of certain States with respect to torts committed by a foreign State in the territory of the forum State. This may be taken as implying that States are not under a prohibition to grant immunity for *acta jure imperii* in such situations. However, in line with the view expressed on this issue by the International Law Commission, Italy submits that this practice does not affect the conclusion as to the non-existence of an *obligation* to accord immunity for *acta iure imperii* in those cases in which the tort exception applies.

C) Are acts jure imperii understood to contain also a delicts exceptio?

There is nothing inherent in the notion of acts *jure imperii* which dictates the conclusion that the tort exception does not cover this category of acts. The justification of this exception to immunity is based on the assertion of local control or jurisdiction over torts committed within the territory of the forum State. As stated by Professor Crawford (for references, see CR 2011/21, p. 59, para. 32), the basis for an assertion of jurisdiction over 'governmental torts' is "plainly not a distinction between 'governmental' and 'non-governmental' acts, but an assertion of local control over (i.e. jurisdiction over) obvious forms of harm or damage". Moreover, as observed by the International Law Commission (for references, see CR 2011/18, p. 46, note 43), "[s]ince the damaging act or omission has occurred in the territory of

the State of the forum, the applicable law is clearly the *lex loci delicti commissi* and the most convenient court is that of the State where the delict was committed". Taking into account the justification on which the tort exception is based, it becomes clear that it applies to all acts of a foreign State which occurred on the territory of the forum State, whether performed *jure imperii* or *jure gestionis*.

D) How can war crimes be considered as acts jure – I repeat, jure imperii?

Italy is aware of the view according to which war crimes and crimes against humanity could not be considered to be sovereign acts for which the State is entitled to invoke the defense of sovereign immunity (see Italian Counter-Memorial, pp. 65-66, where reference is made to the view expressed by Judge Sporkin in *Princz* v. *Federal Republic of Germany* as well as, in legal literature, by Professor Kokott and Professors Belsky, Roth-Arriaza and Merva). While Italy acknowledges that in this area the law of State immunity is undergoing a process of change, it also recognizes that it is not clear at this stage whether this process will result in a new general exception to immunity – namely a rule denying immunity with respect to every claim for compensation arising out international crimes. For this reason, Italy, taking into account the specific and, to a certain extent, unique circumstances characterizing the cases submitted to Italian courts, relies on other arguments – namely the tort exception and the existence in the present case of an irreconcilable conflict between immunity and the effective enforcement of peremptory rules – to support its view that it had no obligation to accord jurisdictional immunity to Germany.

3. A) Have the specific Italian victims to whom the Respondent refers effectively received reparation?

None of the categories of victims referred to in the cases underlying the present dispute has received reparation. Some of them never had any chance to request compensation since no mechanism has ever been put in place: e.g. for the relatives of the victims of the massacres perpetrated by agents of the Third Reich against civilian population; while the Italian Military Internees have been trying to obtain compensation for nearly a decade without any success. Moreover there does not seem to be any sign of willingness on the part of German authorities to conclude an agreement with Italy for the purpose of making reparation to these categories of victims.

B) If not, are they entitled to it and how can they effectively receive it, if not through national proceedings?

At the moment there is no other alternative than national proceedings. Germany's internal mechanisms did not function in favour of the categories of victims referred to in the cases underlying the present dispute and no agreement with Italy for the purpose of making reparation to these victims has ever been concluded. Actually, had domestic judges not removed immunity no other avenue would have remained open for war crime victims to obtain reparation. The strong reluctance of German authorities to enter into any specific agreement providing for reparation for the Italian Military Internees, for example, has been represented by the Italian Ambassador in Berlin during the discussions concerning the possibility of compensation by the Foundation.

C) Can the regime of reparations for grave breaches of human rights and of international humanitarian law still be regarded as exhausting itself at inter-State level?

The regime of reparations for grave breaches of human rights and international humanitarian law does not exhaust itself at the inter-State level. Individual victims of grave breaches of human rights or international humanitarian law can certainly address their claims of reparations to domestic courts. In some cases, domestic laws provide for specific legal avenues to ensure that the victims can obtain redress; in other cases, victims can rely on international rules as incorporated in the domestic legal order of the forum State. When resort to domestic courts represents, for the victims of international crimes, the only and last means available to obtain some form of redress, Italy submits that the removal of immunity is justified.

D) Is the right to reparation related to the right of access to justice lato sensu?

Since recourse to domestic judges constitutes a mechanism by which individual victims of grave breaches of human rights or of international humanitarian law can obtain redress for such breaches, there is certainly a relationship between the right to reparation and the right of access to justice. Under certain circumstances, the denial of access to justice because of the immunity granted to a foreign State may imply a denial of effective reparation.

E) And what is the relationship of such right of access to justice with jus cogens?

As the question suggests, there is clearly a relationship between the right of access to justice and *jus cogens*. The concept of *jus cogens* does not confine itself solely to the realm of primary rules but also relates to the *remedies* available in cases of grave breaches of obligations prescribed by norms having such character. In this respect, a conflict may indeed arise between rules which prevent individuals from having access to justice – such as the rule of State immunity – and the effective enforcement of *jus cogens* rules. It is submitted that, when this conflict arises, if there is no other avenue open to obtain the effective enforcement of *jus cogens,* priority must be given to *jus cogens* by removing immunity, thereby allowing access to justice to individual victims.

Question put to both Parties by Judge *ad hoc* Gaja.

"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?"

According to Italy, a waiver of the kind described by Judge *ad hoc* Gaja does not, and cannot, imply *per se* that State B is entitled to jurisdictional immunity. Immunity and the effects of a waiver clause operate at two distinct levels. Immunity is a bar to jurisdiction which is based on the status of the defendant as a sovereign State: the question of immunity is, in other words, a procedural issue which must be addressed at the earliest stage of the proceeding. By contrast, the waiver of claims or of rights has the effect of rendering a claim inoperative or of depriving an individual of his/her substantive right. In principle, the question of immunity precedes the question of the effects to be attached to a waiver clause. In its judgment of October 2008 in the *Josef Milde* case, the Italian Court of Cassation carefully distinguished the question of the immunity enjoyed by Germany under the law of State immunity from the question of the effects to be attached to the waiver clause contained in Article 77, paragraph 4 of the 1947 Peace Treaty (see German Memorial, Annex 16, p. 17). Furthermore, it must be reiterated that, even if it were admitted, for the sake of argument, that the waiver clause of the Peace Treaty has, in and of itself, the effect of depriving Italian courts of jurisdiction over claims against Germany arising from World War Two, this could in no way affect the question of jurisdiction with respect to grave breaches of international humanitarian law committed by Germany since (as Italy has demonstrated in its written and oral pleadings) the waiver clause does not (and could not) cover claims arising in relation to such breaches.

The Co-Agent of Italy
H.E. Franco Giordano, Ambassador