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))

# ITALY'S OBSERVATIONS ON REPLIES PROVIDED BY GERMANY

30 September 2011

Italy would call the Court's attention to the following comments relating to the answers given by Germany to the questions posed by Judge Cançado Trindade.

A. – In answer to Judge Cançado Trindade's first question, Germany stated:

**"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"**

Germany then observed, in response to Judge Cançado Trindade's third question:

**"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"**

Italy would offer the following comment regarding the foregoing passages.

The paragraphs of the Order of 6 July 2010, cited by Germany, refer to the reasons underlying the Court's conclusion that Italy's counter-claim fell outside the scope *ratione temporis* of the Court's jurisdiction. However, this conclusion was strictly limited to the issue of the admissibility

of Italy's counter-claim. As it emerges clearly from paragraph 13 of the said Order, it does not affect the solution of the question raised by Germany's main claim (see also Italy's Rejoinder, paragraphs 1.1-1.3). It therefore remains for the Court to consider and evaluate Italy's arguments on the merits of Germany's main claim. These include, in particular, the argument according to which the violation of the obligation to make reparation for war crimes has, in the circumstances of the instant case, specific implications with regard to the application of the principle of jurisdictional immunity of the State.

B.- In the Reply provided by Germany to question n. 3 by Judge Cançado Trindade it is stated that:

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

This statement does not withstand closer examination. Germany has admitted, both in the written submissions[1] as well as in the oral pleadings,[2] that reparations made with regard to Italian victims of war crimes were only 'partial'. The 1961 indemnity agreement (the only agreement on war crimes reparations made between Germany and Italy) provided for reparation only for victims of persecution. Hence, the statement contained in Germany's Reply to the third question by Judge Cançado Trindade, where it is affirmed that the reparation scheme was "comprehensive", can hardly be accepted as accurate, in particular as far as Italian victims of war crimes are concerned.

Moreover, the very arguments used by Germany to explain its position make it clear that no reparation has been made for numerous Italian victims of war crimes. Germany's refusal to make such reparations was grounded on the argument (challenged by Italy in these proceedings) that it had been relieved of responsibility by the waiver clause of Article 77 of the 1947 Peace Treaty.[3] Italy has shown that such a waiver clause did not and could not cover war crimes reparation claims.[4]

Finally, in this regard the main argument advanced by Germany to justify why Italian victims of war crimes did not receive compensation is that, until 8 September 1943, Italy had been an ally of Germany.[5] However, as Italy clarified in the course of the oral proceedings, this argument is flawed because it confuses the regime of responsibility for violations of *jus ad bellum* with the

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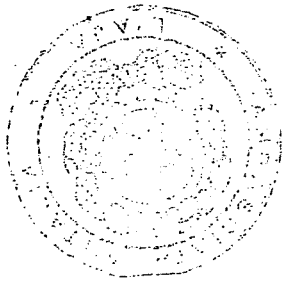
[1] See GR, para. 33, at p. 19.
[2] See CR 2011/20, paras. 9-10, at p. 12-13 (Wasum-Reiner)
[3] See GR, para. 33, at p. 19, and CR 2011/20, para. 23-, at p. 26 (Tomuschat).
[4] See CM paras. 5.47-5.56, at pp. 105-109, Rejoinder paras. 3.7-3.16, at pp.14-21 and CR 2011/18, paras. 4-25, at pp. 25-33 (Zappalà).
[5] Ult. Loc. cit.





consequences of violations of the provisions of *jus in bello*, and in particular it ignores the special regime of responsibility for serious breaches of international humanitarian law.

C.- Germany's response to Judge Cançado Trindade's third question reads as follows:

**"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 [*sic*] 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."**

In this regard, Italy would submit the following observation.

The fact that Italian victims had access to German courts does not mean that they were given an effective legal avenue to obtain reparation. As has been shown in the Italian Counter-memorial (pp. 19-25), German laws – and in particular the Federal Compensation Law of 1953 – imposed a number of unduly restrictive requirements for Italian victims to receive compensation. Because of these restrictions, lawsuits of victims having foreign nationality were generally dismissed by German courts. In this respect, the reference made by Germany to the jurisprudence of the European Court of Human Rights (ECHR) is inapposite, as this jurisprudence is based on the assumption that "the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to their ratification of the Convention" (*Associazione Nazionale Reduci dalla Prigionia dall'Internamento e dalla Guerra di Liberazione and 275 Others v. Germany*, No. 45563/04, decision of 4 September 2007, para.1). Moreover, the cases brought against Germany by victims of the Third Reich were mainly grounded on the right to property as provided by Article 1 of Protocol No. 1, and the ECHR considered those cases inadmissible because the facts at issue did not fall within the ambit of that rule (see *Associazione Nazionale Reduci dalla Prigionia*, cit.; *Sfountouris and Others v. Germany*, No. 24120/06, decision of 31 May 2011; *Ernewein and Others v. Germany*, No. 14849/08, decision of 12 May 2009).

The Hague, 30 September 2011

The Italian Co-Agent