

## JOINT DECLARATION OF JUDGES KEITH AND GREENWOOD

1. This case has its origins in atrocities and other inhumane acts committed by German armed forces and other parts of the Nazi Government against Italian nationals, both civilian and military, between 3 September 1943, when Italy concluded an armistice with the Allied Powers, and the unconditional surrender of Germany on 8 May 1945. The illegality of those acts is beyond doubt and is not contested in these proceedings. The only issue before the Court in the present phase of the proceedings is whether the counter-claim which Italy seeks to bring is within the jurisdiction of the Court, as required by Article 80, paragraph 1, of the Rules of Court. The only jurisdictional basis on which Italy might found its case is the European Convention for the Peaceful Settlement of Disputes, 1957, (“the European Convention”). Article 27 (a) of the European Convention, however, excludes from the acceptance of the jurisdiction of the Court (contained in Article 1) “disputes relating to facts and situations” prior to the entry into force of the Convention. In its Judgment in *Certain Property (Liechtenstein v. Germany)* the Court held that the test is whether the source, or real cause, of the dispute, lies in facts or situations prior to the entry into force of the Convention (*Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 24, para. 44).

2. Since the European Convention entered into force between Germany and Italy on 18 April 1961, the question is whether Italy has shown that the counter-claim concerns a dispute whose source, or real cause, is to be found in facts and situations arising after that date. The Court has held that it has not. We agree with that conclusion and, in general, with the reasons given by the Court. In this Declaration we address two matters which we consider strengthen that reasoning.

3. The first relates to the existence and definition of the dispute which Italy wishes to submit in its counter-claim. According to Italy:

“[T]he source or real cause of the disputes submitted to the Court in the present case is to be found in the reparation regime established by the two 1961 Agreements between Germany and Italy. An additional source is constituted by events following the establishment in 2000 of the ‘Remembrance, Responsibility and Future’ Foundation.” (Counter-Memorial, para. 7.4.)

Italy had earlier said this:

“To use the Court’s words in the *Certain Property* case, the conclusion of the 1961 Agreements created a ‘new situation’ between Italy and Germany with regard to the issue of reparation. It is the 1961 Agreements — and more particularly the questions concerning their scope, as well as the scope of the waiver clause therein contained — which form the central point of the differences between Italy and Germany on the issue of reparation. The 1961 Agreements, and not the Peace Treaty, must therefore be regarded as constituting the source or real cause of the disputes submitted to the Court.” (Counter-Memorial, para. 3.18.)

4. Beyond those broad assertions, Italy does not identify what those disputes are in terms of the jurisdiction of the Court under the European Convention (see also para. 3.19). What are the disagreements between Italy and Germany relating to “the interpretation” and application of the 1961 Agreements or relating to the 2000 Foundation and amounting to “international legal disputes”? As we read the Counter-Memorial, no such legal disagreement or dispute is anywhere defined or demonstrated. In Chapter II, entitled “The Facts”, Italy says that the 1961 Agreements:

“are first and foremost a confirmation that Germany recognizes it is under an obligation to offer compensation to Italian victims of serious violations of IHL. However, Italy considers that these Agreements by their very provisions did not exhaust the range of reparatory measures, but should have simply represented a first step in a broader process of providing appropriate reparations to all Italian victims of serious IHL violations.” (Para. 2.15.)

5. In the next section of “The Facts”, Italy contends that the 1953 and 2000 German legislation did not provide a mechanism for effective reparation for a very large number of Italian victims (paras. 2.20-2.34). That the Italian concern is with what it sees as the failure of the measures, so far agreed with Germany and enacted by the German legislature, and of the decisions of German Courts and authorities to provide compensation for those Italian victims recurs at various points in the Counter-Memorial (e.g., paras. 2.45, 5.58-5.65). Almost at the end of the Chapter on Reparation it says this:

“The 1961 Agreements represent a ‘new situation’ whereby Germany has (a) recognized the obligation towards Italian victims of serious violations of IHL; (b) they contain some limited measures of reparation (covering pending economic claims as well as claims by victims of persecution on various specific grounds); but, at the same time, (c) they left several other situations uncovered. In this respect, after a long period of uncertainty and several unfulfilled promises, Italian victims were eventually excluded from the application of the 2000 Law, on rather unconvincing arguments.” (Para. 5.66.)

That passage immediately precedes this statement:

“The situation described above created the legal background that prevented Italian judges from turning down reparation claims which had been unfulfilled for too long and forced them to reject the plea of immunity advanced by Germany.” (Para. 5.67.)

6. The failure of the Counter-Memorial to identify the international legal disputes relating to the 1961 Agreements and subsequent German actions is reflected by the absence from the Counter-Memorial of any diplomatic correspondence from Italy to Germany identifying any such disputes.

7. One further consideration remains to be mentioned in this regard. Italy, in its Written Observations on the Preliminary Objections of Germany regarding Italy’s counter-claim, contends 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’.” (Para. 65.)

What Germany said in full was this:

“Germany does not deny that there exists in fact a certain divergence of opinions regarding the legal connotation of the two 1961 Agreements. While Germany is of the view that these two instruments are to be seen as a voluntary complement to the regime ushered in by the 1947 Peace Treaty, Italy contends that the

two Agreements opened up again the issue of reparations. But the core of the Counter-Claim is epitomized by the contention that Germany has a continuing obligation to provide reparation for the violations of the IHL committed by the authorities of the Nazi regime during the time of the military occupation of Italy. Hence the real cause of the dispute is the occurrences of 1943 to 1945. The two Settlement Treaties as such are not in issue. Both sides agree that the conclusion of these Treaties was a positive step forward for the improvement of the mutual relationship between the two countries. As far as Italy's claims are concerned, the 1961 Agreements provide no basis, neither factually nor legally. There is simply no dispute about the relevance of the Treaties with regard to the Counter-Claim." (Preliminary Objections of Germany regarding Italy's counter-claim, para. 35.)

8. We do not see Germany's statement as recognition that a dispute — in the well-established legal sense of the term — existed regarding the 1961 Agreements. In any event, we consider these pleadings as irrelevant to the Court's power to "entertain a counter-claim" under Article 80 of the Rules of the Court. They are subsequent to it; further, Germany has not had the opportunity to respond to this latest Italian argument, since it was set out only in the Italian response to Germany's objections to the counter-claim and there have been neither further written proceedings nor oral hearings subsequent to the filing of that response

9. We consider, therefore, that Italy has failed to establish the existence of a dispute between itself and Germany arising after 18 April 1961.

10. The second matter to which we wish to draw attention is that, even if (contrary to what we have just stated) Italy had satisfied us that there was a dispute between the Parties relating to the 1961 Agreements or the German reparations legislation, we are convinced that the source or real cause of that dispute lay in facts prior to 18 April 1961, with the result that the jurisdiction of the Court would be excluded by the limitation in Article 27 (a) of the European Convention.

11. As the Order records, the issue of claims by Italy and Italian nationals arising out of the events of the Second World War was one of the many subjects addressed by the Peace Treaty concluded in 1947 between the Allied Powers and Italy. Of particular relevance is Article 77, paragraph 4, by which Italy agreed, on its own behalf and on behalf of all Italian nationals, to waive "all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939". The precise scope and effect of this clause, and, in particular, whether it covered claims for violations of humanitarian law has been the subject of different views and is a matter on which we do not express an opinion. We note, however, that the issue of whether Germany should pay reparations in respect of violations of international humanitarian law committed in Italy and elsewhere during the Second World War was the subject of discussion long before 1961. It was, for example, considered in the context of the conclusion of the London Agreement on German External Debts, 1953.

12. The two 1961 Agreements have to be seen in that context. In those Agreements, Germany undertook to make certain payments to Italy in respect of events which occurred during the Second World War. Article 2, paragraph 1, of the first 1961 Agreement, namely, the Treaty between the Federal Republic of Germany and the Italian Republic on the Settlement of Certain Property-related, Economic and Financial Questions, provided that

“The Italian Government declares all outstanding claims on the part of the Italian Republic or Italian natural or legal persons against the Federal Republic of Germany or German natural or legal persons to be settled to the extent that they are based on rights and circumstances which arose during the period from 1 September 1939 to 8 May 1945.”

Article 3 of the second 1961 Agreement, namely, the Treaty between the Federal Republic of Germany and the Italian Republic concerning Compensation for Italian Nationals subjected to National-Socialist Measures of Persecution, provided that “[w]ithout prejudice to any rights of Italian nationals based on German compensation legislation, the payment provided for in Article 1 shall constitute final settlement between the Federal Republic of Germany and the Italian Republic of all questions governed by the present Treaty”.

13. Again, there is room for more than one view about the precise scope and effect of these provisions. For present purposes, however, the important point is that neither of the 1961 Agreements, in and of itself, is capable of being interpreted as creating any obligation for Germany to pay compensation to Italy or Italian nationals for violations of international humanitarian law committed during the Second World War over and above the sums expressly provided for in the two Agreements. Italy has not suggested that Germany has not paid these sums. Instead, Italy relies upon the two Agreements as constituting recognition on the part of Germany that it could no longer rely upon the waiver in Article 77, paragraph 4, of the Peace Treaty. To the extent that there may be said to be a dispute between the Parties regarding that question, however, it is inseparable from the régime established by the 1947 Peace Treaty and the dealings between the two Governments which followed the adoption of that Treaty. In particular, it is inextricably linked to an appreciation of the scope and effect of the waiver contained in Article 77, paragraph 4, of the 1947 Peace Treaty and the different views of the Parties thereon.

14. Nor does the adoption by Germany of legislation concerning reparation for certain categories of victims of violations of humanitarian law committed during the second World War or the fact that, under this legislation, certain Italian victims were denied compensation, constitute facts which can be separated from the régime created by the 1947 Peace Treaty. The German national legislation and its application by the German courts and authorities does not in itself give rise to an obligation under international law to compensate any categories of claimants excluded from the scope of the legislation. Once again, its relevance is said to lie in its effect upon the ability of Germany to rely upon the provisions of the 1947 Peace Treaty and it is, therefore, inextricably bound up with that Treaty.

15. We are therefore driven to the conclusion that the source or real cause of any dispute which Italy seeks to bring before the Court by way of a counter-claim is to be found in facts and situations which came into existence long before 18 April 1961. Italy’s formulation of the counter-claim in its Counter-Memorial effectively admits as much. In the first and second substantive sentences of the chapter setting out the counter-claim, Italy states:

“As permitted by Article 80 of the Court’s Rules, Italy hereby submits a counter-claim with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich.” (Para. 7.1.)

“The present Chapter sets forth Italy’s counter-claim in this case. Italy asks the Court to find that Germany has violated its obligation of reparation owed to Italian victims of the crimes committed by Nazi Germany during the Second World War and that, accordingly, Germany must cease its wrongful conduct and offer effective and appropriate reparation to these victims.” (Para. 7.2.)

The matter could not be stated with greater clarity.

*(Signed)* Kenneth KEITH.

*(Signed)* Christopher GREENWOOD.

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