

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

JURISDICTIONAL IMMUNITIES
OF THE STATE

(GERMANY *v.* ITALY)

COUNTER-CLAIM

ORDER OF 6 JULY 2010

2010

COUR INTERNATIONALE DE JUSTICE

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IMMUNITÉS JURIDICTIONNELLES
DE L'ÉTAT

(ALLEMAGNE *c.* ITALIE)

DEMANDE RECONVENTIONNELLE

ORDONNANCE DU 6 JUILLET 2010

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YEAR 2010

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OF THE STATE

(GERMANY v. ITALY)

COUNTER-CLAIM

ORDER

Present: President OWADA; Vice-President TOMKA; Judges KOROMA, AL-KHASAWNEH, BUERGENTHAL, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, GREENWOOD; Judge ad hoc GAJA; Registrar COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Article 48 of the Statute of the Court and to Articles 31, 44, 45 and 80 of the Rules of Court,

Makes the following Order:

1. Whereas, on 23 December 2008, the Government of the Federal Republic of Germany (hereinafter “Germany”) filed in the Registry of the Court an Application instituting proceedings against the Government of the Italian Republic (hereinafter “Italy”) alleging that “[t]hrough its judicial practice . . . Italy has infringed and continues to infringe its obligations towards Germany under international law”; whereas, in its Application, Germany based the jurisdiction of the Court on Article 1 of the

European Convention for the Peaceful Settlement of Disputes of 29 April 1957 (hereinafter the “European Convention”); and whereas at the end of its Application, it set out its claims as follows:

“Germany prays the Court to adjudge and declare that the Italian Republic:

- (1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945, to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;
- (2) by taking measures of constraint against ‘Villa Vigoni’, German State property used for government non-commercial purposes, also committed violations of Germany’s jurisdictional immunity;
- (3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany’s jurisdictional immunity.

Accordingly, the Federal Republic of Germany prays the Court to adjudge and declare that:

- (4) the Italian Republic’s international responsibility is engaged;
- (5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany’s sovereign immunity become unenforceable;
- (6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above”;

2. Whereas, on 23 June 2009, within the time-limits fixed by the Court in its Order of 29 April 2009, Germany filed its Memorial, at the end of which it presented its submissions in the same form as the claims set out in the Application;

3. Whereas, on 23 December 2009, within the time-limits fixed by the Court in its Order of 29 April 2009, Italy filed its Counter-Memorial; whereas, in Chapter VII of the Counter-Memorial, Italy, making reference to Article 80 of the Rules of Court, submitted 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”; whereas it based the Court’s jurisdiction over the counter-claim on Article 1 of the European Convention, taken together with Article 36, paragraph 1, of the Statute of the Court; whereas it asserted that there exists a “direct connection between the facts and law upon which Italy relies in rebutting Germany’s claim and the facts and law upon which Italy relies to support its counter-claim”; and whereas at the end of the Counter-Memorial, it presented its submissions as follows:

“On the basis of the facts and arguments set out above, and reserving its right to supplement or amend these Submissions, Italy respectfully requests that the Court adjudge and declare that all the claims of Germany are rejected.

With respect to its counter-claim, and in accordance with Article 80 of the Rules of the Court, Italy asks respectfully the Court to adjudge and declare that, considering the existence under international law of an obligation of reparation owed to the victims of war crimes and crimes against humanity perpetrated by the III^o 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”;

4. Whereas, on 27 January 2010, at a meeting held by the President of the Court with the Agents of the Parties, the Agent of Germany indicated that his Government did not consider the counter-claim submitted by Italy to be in accordance with Article 80, paragraph 1, of the Rules of Court and that it intended to raise objections to the Italian counter-claim; whereas the Court decided that the German Government should specify in writing, by 26 March 2010 at the latest, the legal grounds on which it relied in maintaining that the Respondent’s counter-claim did not fall within the provisions of Article 80, paragraph 1, of the Rules of Court, and that the Government of Italy would in turn be invited to present its views in writing on the question by 26 May 2010 at the latest; and whereas by letters dated 5 February 2010, the Registrar informed the Parties accordingly;

5. Whereas, on 24 March 2010, Germany submitted its written observations entitled “Preliminary objections of the Federal Republic of Germany regarding Italy’s counter-claim”, in which it set out the legal grounds on which it argues that the counter-claim does not meet the requirements of Article 80, paragraph 1, of the Rules of Court; and

whereas a copy of those observations was transmitted to the other Party on the same day;

6. Whereas, by a communication from its Agent dated 25 May 2010 and received in the Registry on the same day, Italy submitted to the Court its written observations entitled “Observations of Italy on the preliminary objections of the Federal Republic of Germany regarding Italy’s counter-claim”; and whereas, by a letter dated 25 May 2010, the Registrar communicated a copy of those observations to the German Government;

7. Whereas, having received full and detailed written observations from each of the Parties, the Court is sufficiently well informed of the positions they hold as to whether the Court may entertain the claim presented as a counter-claim by Italy in its Counter-Memorial; and whereas, accordingly, the Court does not consider it necessary to hear the Parties further on the subject;

* * *

8. Whereas the Court finds it useful at the outset briefly to describe the factual background of the case which is not contested between the Parties; whereas between 1943 and 1945 war crimes and crimes against humanity were committed by the Third Reich against Italian citizens; whereas on 10 February 1947, the Allied Powers concluded a Peace Treaty with Italy, regulating, in particular, the legal and economic consequences of the war with Italy; whereas paragraphs 1 to 4 of Article 77 of the Peace Treaty read as follows:

“1. From the coming into force of the present Treaty property in Germany of Italy and of Italian nationals shall no longer be treated as enemy property and all restrictions based on such treatment shall be removed.

2. Identifiable property of Italy and of Italian nationals removed by force or duress from Italian territory to Germany by German forces or authorities after September 3, 1943 shall be eligible for restitution.

3. The restoration and restitution of Italian property in Germany shall be effected in accordance with measures which will be determined by the Powers in occupation of Germany.

4. Without prejudice to these and to any other dispositions in favour of Italy and Italian nationals by the Powers occupying Germany, Italy waives on its own behalf and on behalf of Italian nationals 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. This waiver shall be deemed to include debts, all inter-governmental

claims in respect of arrangements entered into in the course of the war, and all claims for loss or damage arising during the war”;

9. Whereas on 2 June 1961, two Agreements were concluded between the Parties; whereas the first Agreement concerned the “Settlement of certain property-related, economic and financial questions” (entered into force on 16 September 1963); whereas by virtue of this Agreement, Germany paid compensation to Italy for “outstanding questions of an economic nature” (Art. 1); whereas the Italian Government, under Article 2 of that Agreement, declared

“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”;

whereas by the second Agreement, concerning “Compensation for Italian nationals subjected to National-Socialist measures of persecution” (entered into force on 31 July 1963), Germany undertook to pay compensation to Italian nationals affected by those measures; whereas Article 3 of that Agreement 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”;

10. Whereas, after the Second World War, Germany, from 1953 to 2000, enacted legislation on the compensation of victims of the Nazi régime; whereas, under this legislation, including the most recent German federal law of 2 August 2000 for the establishment of a “Remembrance, Responsibility and Future” Foundation, not all Italian victims were entitled to obtain compensation; whereas from that date on, a number of judicial decisions in Germany found that certain categories of victims, including certain Italian nationals, were not entitled to compensation under the legislation in force;

11. Whereas on 11 March 2004 the Italian *Corte di Cassazione* held that Italian courts had jurisdiction over the claims for compensation brought against Germany by Mr. Luigi Ferrini, an Italian national who had been arrested in August 1944 and deported to Germany, where he was detained and compelled to work in a munitions factory until the end of the war; whereas the *Corte di Cassazione*, by two Orders of 29 May 2008 issued, respectively, in the case concerning *Giovanni Man-*

telli and Others and in the case concerning *Liberato Maietta*, confirmed that the Italian courts had jurisdiction over claims of the same nature brought against Germany; and whereas a number of similar claims are currently pending before the Italian courts;

* *

12. Whereas the Court now turns to the question whether the claim presented as a counter-claim by Italy in its Counter-Memorial complies with the requirements of Article 80 of the Rules of Court; and whereas that Article reads as follows:

“1. The Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party.

2. A counter-claim shall be made in the Counter-Memorial and shall appear as part of the submissions contained therein. The right of the other party to present its views in writing on the counter-claim, in an additional pleading, shall be preserved, irrespective of any decision of the Court, in accordance with Article 45, paragraph 2, of these Rules, concerning the filing of further written pleadings.

3. Where an objection is raised concerning the application of paragraph 1 or whenever the Court deems necessary, the Court shall take its decision thereon after hearing the parties”;

13. Whereas Germany does not dispute that the Italian claim is not presented as a defence on the merits, but as a “counter-claim” within the meaning of Article 80 of the Rules of Court, that is to say, a counter-claim constituting “an autonomous legal act the object of which is to submit a new claim to the Court” and, at the same time, “linked to the principal claim, in so far as, formulated as a ‘counter’ claim, it reacts to it” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997, p. 256, para. 27*); nor is it disputed that the claim has been “made in the Counter-Memorial and [appears] as part of the submissions contained therein”, in accordance with Article 80, paragraph 2, of the Rules of Court;

14. Whereas under Article 80, paragraph 1, of the Rules of Court two requirements must be met for the Court to be able to entertain a counter-claim at the same time as the principal claim; whereas in earlier pronouncements the Court has characterized these requirements as requirements on the “admissibility of a counter-claim as such” (*Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998, p. 203, para. 33; Armed Activities on the Territory of the Congo (Democratic Republic of the*

Congo v. Uganda), *Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001*, p. 678, para. 35); whereas “admissibility” in this context must be understood broadly to encompass both the jurisdictional requirement and the direct-connection requirement; and whereas the Court will employ the term in that sense herein as well;

15. Whereas the Court has already had occasion to state the reasons why the admissibility of a counter-claim as such is contingent on those two requirements in the following terms:

“Whereas the Respondent cannot use a counter-claim as a means of referring to an international court claims which exceed the limits of its jurisdiction as recognized by the parties; and whereas the Respondent cannot use that means either to impose on the Applicant any claim it chooses, at the risk of infringing the Applicant’s rights and of compromising the proper administration of justice; and whereas it is for that reason that paragraph 1 of Article 80 of the Rules of Court requires that the counter-claim ‘comes within the jurisdiction of the Court’ and ‘that it is directly connected with the subject-matter of the claim of the other party’” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, *Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, pp. 257-258, para. 31);

16. Whereas Germany reserved its position on the question whether the requirement of direct connection is met in this case; whereas, however, Germany denies expressly that the counter-claim meets the requirement of jurisdiction contained in Article 80, paragraph 1, of the Rules of Court; and whereas it is to that issue that the Court will now turn;

* *

17. Whereas Article 1 of the European Convention, on which Italy bases the Court’s jurisdiction on its counter-claim in the present proceedings, provides that:

“The High Contracting Parties shall submit to the judgment of the International Court of Justice all international legal disputes which may arise between them including, in particular, those concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation”;

whereas Article 27 (a) of the European Convention reads as follows:

“The provisions of this Convention shall not apply to:

- (a) disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute”;

and whereas the European Convention came into force as between the Parties on 18 April 1961;

18. Whereas in its Judgment of 10 February 2005 in the case concerning *Certain Property (Liechtenstein v. Germany)*, in relation to the temporal limitation contained in the same Article 27 (a) of the European Convention, the Court stated that “the critical issue is not the date when the dispute arose, but the date of the facts or situations in relation to which the dispute arose” (*Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 25, para. 48);

*

19. Whereas the Court must first identify the subject-matter of the dispute that Italy intends to bring before the Court by way of its counter-claim in order to determine whether the facts or situations to which the dispute relates fall within the temporal scope of the European Convention;

20. Whereas Germany contends that the dispute that Italy intends to submit by way of its counter-claim relates to “violations of international law that were committed by the armed forces and the occupation authorities of Nazi Germany when they held sway over Italy and Italian nationals” between September 1943 and May 1945 and an alleged failure by Germany to comply with its duties of reparation arising from those violations;

21. Whereas, for its part, Italy contends that the subject-matter of the dispute that it intends to bring before the Court is “twofold”; whereas, on the one hand, the dispute concerns the question of the existence, at the present time, “of a right of reparation in favour of Italy”; and whereas, on the other hand, the Parties also disagree as to whether Germany, following the establishment in 2000 of the “Remembrance, Responsibility and Future” Foundation, failed to comply with its obligations concerning reparation for the Italian victims of crimes committed by the German Reich;

22. Whereas the Parties do not dispute the fact that Italian nationals were victims of serious violations of international humanitarian law committed by Nazi Germany between 1943 and 1945; whereas the Parties however hold opposing views as to whether and to what extent Germany is under an obligation to make reparation to those victims; and whereas the existence and scope of this obligation to make reparation is the subject-

matter of the dispute that Italy intends to bring before the Court by way of its counter-claim;

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23. Whereas the Court will now examine whether it has jurisdiction *ratione temporis* under the European Convention; whereas in accordance with the Court's earlier case law, the facts and situations it must take into consideration are those with regard to which the dispute has arisen or, in other words, only those which must be considered as being the source of the dispute, those which are its "real cause" rather than those which are the source of the claimed rights (*Right of Passage over Indian Territory (Portugal v. India), Merits, Judgment, I.C.J. Reports 1960*, p. 35); whereas, in the present case, the Court thus has to determine whether the dispute that Italy intends to submit by way of its counter-claim, as defined in paragraph 22 above, relates to facts or situations occurring prior to the entry into force of the European Convention as between the Parties on 18 April 1961, namely, events which took place from 1943 to 1945 and the Peace Treaty of 1947 between the Allied Powers and Italy, or whether it relates to "new situations" resulting from the 1961 Agreements (which entered into force in 1963; see paragraph 9 above) and from decisions taken by German authorities after the entry into force of the European Convention as between the Parties; and whereas, in other words, the Court has, in the case at hand, to establish which of those facts and situations are the source or real cause of the dispute concerning the obligation of Germany to make reparation to certain Italian victims of serious violations of humanitarian law committed by Nazi Germany between 1943 and 1945;

*

24. Whereas Germany argues that the facts and situations to which the dispute that Italy intends to submit by way of its counter-claim relates are the occupation of Italian territory from September 1943 to May 1945 and the ensuing consequences for Italian civilians and captured members of the Italian armed forces; whereas Germany states that the German Government, when concluding the 1961 Agreements, was of the view that by virtue of the waiver clause contained in Article 77, paragraph 4, of the Peace Treaty of 1947 no further claims for reparation could be made and therefore considered those Agreements as "a gesture of goodwill designed to put an end to legal fights about compensation due in individual cases"; whereas Germany asserts that the real cause of the dispute that Italy intends to submit by way of its counter-claim lies only in the serious violations of international humanitarian law committed during the Second World War by the German Reich; whereas Germany denies that the two Agreements concluded between the Parties in 1961

are the real cause of the dispute; whereas Germany points out that Italy does not identify any dispute between the Parties relating to the 1961 Agreements and stresses that these Agreements have no relevance with regard to the counter-claim, in particular because they did not bring about a new situation with a new critical date; whereas Germany also denies that the German law of 2 August 2000 could be deemed the real cause of the dispute; whereas, according to Germany, Italy does not contend that, by not including the captured members of the Italian armed forces in the scope of the law *ratione materiae*, Germany committed a violation of its duties towards Italy; whereas Germany asserts that the facts and situations to which the dispute that Italy intends to bring before the Court by way of its counter-claim relates, fall within the temporal limitation contained in Article 27 (a) of the European Convention; and whereas Germany thus concludes the Court has no jurisdiction over that dispute under Article 1 of the European Convention;

25. Whereas Italy submits that the dispute that it intends to bring before the Court by way of its counter-claim originates from the reparation régime set in place by the 1961 Agreements as well as the events following the establishment of the “Remembrance, Responsibility and Future” Foundation (see paragraph 10 above) — which together constitute the source or real cause of the dispute; whereas Italy considers that the two Agreements concluded between the Parties on 2 June 1961 providing, *inter alia*, for compensation to be paid by the German Government, created a “new situation” between Italy and Germany on the issue of reparation because Germany, by concluding these Agreements, renounced its right to invoke the 1947 Peace Treaty waiver clause and acknowledged the existence of an ongoing obligation to provide reparation to Italy and Italian nationals; whereas, additionally, Italy states that the decisions by the German authorities from 2000 onwards, rejecting the claims for reparation put forward by Italian nationals, also constitute a “new situation”; whereas Italy contends that the dispute that it intends to submit by way of its counter-claim originates from these two “new situations”, which do not fall within the temporal limitation of Article 27 (a) of the European Convention; and whereas Italy thus concludes that the Court has jurisdiction over that dispute under Article 1 of the European Convention;

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26. Whereas the Court notes that the dispute that Italy intends to submit to the Court by way of its counter-claim relates to the existence and the scope of the obligation of Germany to make reparation to certain Italian victims of serious violations of humanitarian law committed by Nazi Germany between 1943 and 1945 (see paragraph 22 above), rather than to the violations themselves; whereas, the Court observes that while

those violations are the source of the alleged rights of Italy or its citizens, they are not the source or “real cause” of the dispute; whereas those violations are not therefore the facts or situations to which the dispute in question relates;

27. Whereas, in 1947, the Allied Powers concluded a Peace Treaty with Italy which formed part of a legal régime designed to settle various property and other claims arising out of the events of the Second World War; whereas that Treaty determined the status of Italian property in Germany and dealt with the restoration and restitution of property of Italy and its nationals (Art. 77, paras. 1 to 3) (see paragraph 8 above); whereas, by the same Peace Treaty, Italy, “without prejudice to [paragraphs 1 to 3 of Article 77] and to any other dispositions in favour of Italy and Italian nationals by the Powers occupying Germany”, agreed, with certain exceptions, to waive “on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945” (Art. 77, para. 4) (see paragraph 8 above);

28. Whereas, under the 1961 Agreements on compensation to be paid by Germany to the Italian Government (see paragraph 9 above), Germany made certain specific and limited commitments with regard to Italy; whereas, while the 1961 Agreements provided to Italy, for certain of its nationals, forms of compensation extending beyond the régime established in the aftermath of the Second World War, they did not affect or change the legal situation of the Italian nationals at issue in the present case; and whereas, moreover, the legal situation of those Italian nationals 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 as to the ability of Germany to rely upon that provision;

29. Whereas, between 1953 and 2000, Germany enacted legislation concerning reparation for certain categories of victims of serious violations of humanitarian law committed by the Third Reich; whereas the Court cannot consider either the legislation itself, including the 2000 law on the “Remembrance, Responsibility and Future” Foundation, or the fact that under this legislation certain Italian victims did not receive compensation, as constituting “new situations” with regard to any obligation of Germany under international law to pay compensation to the Italian nationals at issue in the present case and did not give rise to any new dispute in that regard;

30. Whereas, in view of the foregoing, the Court finds that the dispute that Italy intends to bring before the Court by way of its counter-claim relates to facts and situations existing prior to the entry into force of the

European Convention as between the Parties; and whereas the said dispute accordingly falls outside the temporal scope of this Convention;

31. Whereas the Court accordingly concludes that the counter-claim presented by Italy does not come within its jurisdiction as required by Article 80, paragraph 1, of the Rules of Court;

* *

32. Whereas, the Court, having concluded that the counter-claim submitted by Italy does not fall within its jurisdiction, need not address the question whether that counter-claim is directly connected with the subject-matter of the claims presented by Germany;

* *

33. Whereas, in the light of all the foregoing, the Court finds that the counter-claim presented by Italy is inadmissible under Article 80, paragraph 1, of the Rules of Court;

* *

34. Whereas the proceedings relating to the claims brought by Germany continue; whereas, at a meeting held on 27 January 2010 by the President of the Court with the Agents of the Parties, the Agent of Germany proposed that the Court authorize a second round of written pleadings on the merits, and considered that time-limits of three months for the preparation of a Reply and a Rejoinder, respectively, would be sufficient; and whereas the Agent of Italy did not object to this proposal;

* * *

35. For these reasons,

THE COURT,

(A) By thirteen votes to one,

Finds that the counter-claim presented by Italy in its Counter-Memorial is inadmissible as such and does not form part of the current proceedings;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Al-Khasawneh, Buergenthal, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Greenwood; *Judge ad hoc* Gaja;

AGAINST: *Judge* Cançado Trindade;

(B) Unanimously,

Authorizes Germany to submit a Reply and Italy to submit a Rejoinder and *fixes* the following dates as time-limits for the filing of these pleadings:

For the Reply of Germany, 14 October 2010;
For the Rejoinder of Italy, 14 January 2011; and
Reserves the subsequent procedure for further decision.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this sixth day of July, two thousand and ten, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Germany and the Government of the Italian Republic, respectively.

(Signed) Hisashi OWADA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges KEITH and GREENWOOD append a joint declaration to the Order of the Court; Judge CANÇADO TRINDADE appends a dissenting opinion to the Order of the Court; Judge *ad hoc* GAJA appends a declaration to the Order of the Court.

(Initialed) H.O.
(Initialed) Ph.C.
