

INTERNATIONAL COURT OF JUSTICE

**CASE CONCERNING
JURISDICTIONAL IMMUNITIES OF THE STATE
(GERMANY V. ITALY)**

**COUNTER-MEMORIAL
OF ITALY**

22 DECEMBER 2009

CHAPTER VII

COUNTER-CLAIM

Section I. Introduction

7.1 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. Article 80 of the Rules of the Court provides 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.”

7.2 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. Section I of this Chapter will address the question of the Court's jurisdiction over the counter-claim as well as the question of its admissibility. Section II will indicate the remedies

sought by Italy for the breaches by Germany of its obligation of reparation owed to Italian victims.

7.3 Most of the factual and legal issues at stake in this counter-claim have been addressed in establishing Italy's defence to Germany's claim. Indeed, the previous chapters of this Counter-Memorial have already demonstrated that Germany has violated its obligation of reparation owed to Italian victims. Since a detailed assessment of the facts and law upon which Italy relies in presenting its counter-claim has already been made in previous chapters, examination of such issues in the context of the present Chapter will be kept to an essential minimum. Italy reserves the right to introduce and present to the Court in due course additional facts and legal considerations in respect to the present counter-claim.

Section II. Jurisdiction and Admissibility of the Counter-Claim

7.4 The Court's jurisdiction over this counter-claim is based on Article 1 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, taken together with Article 36(1) of the Statute of the Court. As demonstrated in Chapter III, the applicability of the European Convention to Italy's counter-claim is not excluded by Article 27(a) of the Convention. Italy has already shown that the dispute on immunity brought by Germany and the dispute on reparation brought by Italy originate out of the same facts. In particular, the 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. Since both disputes relate to facts that arose after 18 April 1961, i.e., the date when the European Convention entered into force between Germany and Italy, the limitation *ratione temporis* provided for by Article 27(a) of the European Convention does not apply to the dispute brought by Italy through its counter-claim.

7.5 Italy's counter-claim is also directly connected with the subject-matter of Germany's claim. In its Order of 29 November 2001 in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, this Court observed:

“Whereas the Rules of Court do not however define what is meant by ‘directly connected’; whereas it is for the Court to assess whether the counter-claim is sufficiently connected to the principal claim, taking account of the particular aspects of each case; and whereas, as a general rule, whether there is the necessary direct connection between the claims must be assessed both in fact and in law”²³⁸.

7.6 Manifestly, there is 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. While Germany has claimed that Italy violated Germany’s jurisdictional immunity, Italy submits that no violation has been committed since, under international law, a State responsible for violations of fundamental rules is not entitled to immunity in cases in which, if granted, immunity would be tantamount to exonerating the State from bearing the legal consequences of its unlawful conduct. Thus, in assessing the well-foundedness of Germany’s claim, the Court will have to address many of the same factual and legal issues as lie at the heart of Italy’s counter-claim. Under such circumstances, it seems inevitable to conclude that Germany’s principal claim and Italy’s counter-claim “form part of the same factual complex” and that, by submitting their respective claims, both parties “are pursuing the same legal aims”²³⁹.

7.7 Obviously, Italy’s counter-claim does not simply aim to “counter” Germany’s principal claim. However, the fact that this counter-claim has also the effect of widening the subject-matter of the dispute to be decided by the Court does not affect its admissibility. As this Court stated in its Order of 17 December 1997 in the *Application of the Genocide Convention* case,

“the thrust of a counter-claim is thus to widen the original subject-matter of the dispute by pursuing objectives other than the mere dismissal of the claim of the Applicant in the main proceedings”²⁴⁰.

7.8 Significantly, even before submitting its Application to the Court, Germany was well aware of the strict link existing in the present case between immunity and reparation. The

²³⁸ *I.C.J. Reports 2001*, p. 678, para. 36.

²³⁹ *Ibid.*, p. 679, para. 38.

²⁴⁰ *I.C.J. Reports 1997*, p. 256, para. 27.

existence of a complex issue linking together questions of immunity with questions of reparation emerges unequivocally from the Joint Declaration adopted on the occasion of the German-Italian governmental consultation held on 18 November 2008 in Trieste. In the Joint Declaration, while Germany, together with Italy, fully acknowledged “the untold suffering inflicted on Italian men and women in particular during massacres and on former Italian military internees” (i.e., the groups of individuals who have instituted proceedings before Italian courts in order to obtain financial compensation for the harm suffered as a result of the activities of German armed forces)²⁴¹, Italy declared that it respected “Germany’s decision to apply to the International Court of Justice for a ruling on the principle of State immunity”, finding that “the ICJ’s ruling on State immunity will help to clarify this complex issue”²⁴². Now that Germany has brought proceedings on the question of immunity, Italy finds it important to seize this opportunity and to entrust the Court with the task of rendering a decision with regard to the entire “complex issue” dividing the parties.

Section III. Remedies Sought by Italy

7.9 In Chapter V Italy has demonstrated that Germany has obligations of reparation arising out of the serious violations of international humanitarian law committed by the Third Reich against Italian victims. However, as clearly emerges from the facts described in Chapter II, the measures adopted so far by Germany (both under the relevant agreements as well as in unilateral acts) have proved insufficient, in particular because such measures did not cover several categories of victims such as the Italian military internees and the victims of massacres perpetrated by German forces during the last months of Second World War. In its Memorial Germany argues that the conclusion of the two 1961 Agreements between Italy and Germany extinguished all reparation claims, since Italy agreed to waive for itself and for all of its nationals all claims against Germany resulting from the period of Second World War.²⁴³ This argument has been disproved in Chapter V.

²⁴¹ GM, para. 13.

²⁴² ANNEX 1.

²⁴³ GM, para. 11.

7.10 For all these reasons, Italy asks the Court to adjudge that Germany is still under an ongoing obligation to make reparations for the large number of the unlawful acts committed by the Third Reich and that Germany's international responsibility is engaged by its failure to provide effective reparation more than 60 years after the relevant facts.

7.11 The remedy to make good this violation should consist in an obligation on Germany to establish an appropriate and effective mechanism for addressing the reparation claims of Italian victims. The establishment of such a mechanism would not only provide the necessary remedy for the breaches by Germany of its international obligations. It would also provide Italian victims with a legal avenue other than resort to national judges. As already indicated in the previous chapters, it is because of the absence of any alternative mechanism for reparation that Italian victims of Nazi crimes brought their claims before Italian judges; and it is because of Germany's failure to offer effective reparation that Italian judges have lifted State immunity.

7.12 While Italy is entitled to an order from the Court that Germany must cease its wrongful conduct and provide reparation to Italian victims of Nazi crimes, admittedly the choice of means as to how reparation should be provided is to be left primarily to Germany. However, this freedom in the choice of means is not without qualification: any mechanism to which Germany may entrust the assessment of the reparation claims must ensure that Italian victims are offered appropriate and effective reparation.

7.13 Among the available options, due consideration must be given to the possibility that the Parties find an agreed solution through negotiations. In its Memorial, Germany repeatedly asserts that the traditional and preferred method of settling war claims consists of concluding agreements at inter-State level²⁴⁴. While Germany argues that in the relationship between Italy and Germany there was (and there is) no need for a new agreement covering the reparation claims of the victims of grave violations of humanitarian law committed by Nazi Germany, its view is based solely on the claim that Italy, by concluding the 1947 Peace Treaty and the 1961 Agreements, has renounced all claims against Germany and German nationals resulting from the period of Second World War²⁴⁵. Now, as shown above Italy did not waive all the claims, since the 1947 clause had a very specific and limited scope, and the 1961 Agreements only partially

²⁴⁴ GM, paras. 32, 55 and 59.

²⁴⁵ GM, para. 59.

addressed the issue of reparations. In any case, the question whether Italy has validly renounced all reparation claims against Germany is now before the Court. Once the Court has clarified that Germany's position concerning Italy's renunciation to all claims is completely unfounded, the negotiation of an agreement at inter-State level may be regarded as a viable solution for sorting out the complex situation arising as a result of the denial of effective reparation suffered by Italian victims of Nazi crimes. Italy would certainly welcome any initiative on the part of Germany leading to the establishment, on the basis of specific conventional understandings, of mechanisms for addressing reparation claims. Thus, in Italy's view, a declaration by the Court ordering Germany to provide effective reparation, including through negotiation of an agreement with Italy, may, under the circumstances of the present case, constitute an appropriate remedy.

Section IV. Conclusions

7.14 Italy's counter-claim is based on Germany's denial of effective reparation to Italian victims of the grave violations of international humanitarian law committed by Nazi Germany during the Second World War. This counter-claim is within the jurisdiction of the Court and is directly connected with the subject-matter of Germany's claim. Italy asks the Court to find that Germany has violated its ongoing obligation to provide effective reparation to Italian victims of Nazi crimes and that Germany must cease its wrongful conduct and bear international responsibility for such conduct. Italy finds that under the circumstances of the present case an appropriate remedy consists in an order of the Court that Germany must offer effective reparation to Italian victims of Nazi crimes by means of its own choosing as well as through the conclusion of an agreement with Italy.

SUBMISSIONS

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.

Rome, 22 December 2009

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