



INTERNATIONAL COURT OF JUSTICE

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Press Release

Unofficial

No. 2010/22

20 July 2010

Jurisdictional Immunities of the State **(Germany v. Italy)**

The Court finds Italy's counter-claim inadmissible as such and fixes time-limits for the filing of additional written pleadings

THE HAGUE, 20 July 2010. The International Court of Justice (ICJ) made an Order on 6 July 2010 on a counter-claim submitted by Italy in its Counter-Memorial in the case concerning Jurisdictional Immunities of the State (Germany v. Italy). By that Order, the Court, by thirteen votes to one, “[f]inds that the counter-claim presented by Italy . . . is inadmissible as such and does not form part of the current proceedings” and, unanimously, authorizes Germany to submit a Reply and Italy to submit a Rejoinder and fixes 14 October 2010 and 14 January 2011, respectively, as the time-limits for the filing of those pleadings. The subsequent procedure has been reserved for further decision.

In its Application instituting proceedings dated 23 December 2008 and in its Memorial of 23 June 2009:

“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".

At the end of its Counter-Memorial filed on 23 December 2009, Italy presented the following submissions, including, in the second paragraph, a counter-claim:

"On the basis of the facts and arguments set out . . . , 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^oReich:

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."

Reasoning of the Court

In its Order, the Court seeks to ascertain whether Italy's counter-claim meets the requirements laid down by Article 80 of the Rules of Court. Under paragraph 1 of that Article, "[t]he 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".

The Court recalls that Germany, while reserving its position on the question whether the requirement of direct connection is met in this case, denies expressly that the counter-claim meets the requirement of jurisdiction.

It notes that Italy bases the Court's jurisdiction over its counter-claim on Article 1 of the European Convention for the Peaceful Settlement of Disputes (hereinafter the "European Convention"), and that Germany contends that, under Article 27 (a) of that same Convention, the Court does not have jurisdiction ratione temporis over the counter-claim, because the provisions of the Convention "shall not apply to . . . disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute", which, according to Germany, is the case in this instance.

The Court observes that its task is therefore to determine, in the light of the provisions of Article 27 (a) of the European Convention, whether the dispute that Italy intends to bring before the Court by way of its counter-claim relates to facts or situations prior to 18 April 1961, when the Convention came into force as between Germany and Italy.

It notes that, in accordance with its 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”.

The Court first observes 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, rather than to the violations themselves. According to the Court, 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. Consequently, those violations are not the “facts or situations to which the dispute in question relates”.

The Court then turns to the Peace Treaty which the Allied Powers concluded on 10 February 1947 with Italy, and to the two agreements concluded between the Parties on 2 June 1961 relating to compensation to be paid by Germany to the Italian Government. In respect of the 1947 Treaty, it notes in particular that this formed part of a legal régime designed to settle various property and other claims arising out of the events of the Second World War and that it included a provision (Art. 77, para. 4) whereby Italy 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”. With regard to the 1961 Agreements, the Court observes that they provided to Italy, for certain of its nationals, forms of compensation extending beyond the régime established in the aftermath of the Second World War, but that they did not affect or change the legal situation of the Italian nationals at issue in the present case.

The Court adds that the legislation which Germany enacted, between 1953 and 2000, concerning reparation for certain categories of victims of serious violations of humanitarian law committed by the Third Reich, and the fact that under this legislation certain Italian victims did not receive compensation, do not constitute “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.

The Court proceeds to find 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, namely, the legal régime established in the aftermath of the Second World War. That dispute accordingly falls outside the temporal scope of the Convention; the counter-claim therefore does not come within the Court’s jurisdiction as required by Article 80, paragraph 1, of the Rules of Court. Having found thus, the Court observes that it need not address the question whether the counter-claim is directly connected with the subject-matter of the claims presented by Germany.

Further, having noted that the proceedings relating to the claims brought by Germany continue, the Court refers to the views expressed by the Parties at a meeting held on 27 January 2010 with the President of the Court, regarding the submission of a Reply by the Applicant and a Rejoinder by the Respondent, and the time-limits to be fixed for the filing of those pleadings.

The Court was composed as follows: 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.

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.

The full texts of the Order and the appended declarations and opinion will be available shortly on the Court's website (www.icj-cij.org). Summaries of the declarations and opinion appended to the Order are annexed to this Press Release.

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Joint Declaration of Judges Keith and Greenwood

In their joint declaration, supporting the Order made by the Court, Judges Keith and Greenwood address two matters which they consider strengthen the Court's reasoning. Both relate to the requirement, in terms of Article 27 (a) of the European Convention for the Peaceful Settlement of Disputes, that the source or real cause of the dispute which Italy wishes to present by way of its counter-claim lay in facts or situations arising after 18 April 1961, the date when the Convention came into force between Italy and Germany. In that respect, Italy refers to the 1961 Agreement which came into force in 1963 and to a German Law of 2000 along with later German actions.

The first matter the two Judges address is the failure of Italy in its Counter-Memorial to establish the existence of any international legal dispute relating to the Agreements, the 2000 Law on later German actions. That failure is reflected by the absence from the Counter-Memorial of any diplomatic correspondence from Italy to Germany identifying any such dispute.

Second, the Judges conclude that even if such a dispute did exist, its source or real cause lay in facts before 18 April 1961. Any dispute about the scope and effect of the 1961 Agreements and German action was inextricably bound up with the provisions of the 1947 Peace Treaty between the Allied Powers and Italy.

For Judges Keith and Greenwood, Italy itself provided clear confirmation that the dispute submitted in the counter-claim did not fall within the Court's jurisdiction because its source or real cause is to be found in facts or situations arising long before 18 April 1961. In the first and second substantive sentences of the chapter of the Counter-Memorial 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.

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.”

Dissenting opinion of Judge Cançado Trindade

1 Judge Cançado Trindade, in his dissenting opinion, composed of 14 parts, begins by recalling the emergence and rationale of counter-claims in international legal procedure, with attention turned to international legal doctrine as to its prerequisites, characteristics and effects (Parts I-III). He further recalls that, in the case-law of the PCIJ and ICJ, a counter-claim has a duality of character in relation to the original claim: it is, at a time, both independent from the original claim, as an autonomous legal act, while at the same time being directly linked to it. 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 original claim. It is thus “distinguishable from a defence on the merits” (Part IV).

2. While in the four preceding cases concerning counter-claims the Court's jurisdiction had either not been contested by the applicant States, or else the Court had had the opportunity to establish its own jurisdiction in an incidental phase, previous to the filing of the counter-claims, in the present case of Jurisdictional Immunities of the State Germany has challenged the jurisdiction of the Court over Italy's counter-claim. Such procedural history shows that the Court's practice in relation to counter-claims is still in the making.

3. Be that as it may, the Court should have at least instructed properly the dossier of the case, by holding, prior to the decision it has taken, public hearings to obtain further clarifications from the contending parties. In the view of Judge Cançado Trindade (Part V), the same treatment is to be rigorously dispensed to the original claim and the counter-claim as a requirement of the sound administration of justice (la bonne administration de la justice). They are, both, autonomous, and should be treated on the same footing, with a strict observance of the principe du contradictoire. Only in this way the procedural equality of the parties (applicant and respondent, rendered respondent and applicant by the counter-claim) is secured.

4. After examining the factual complex of the present case (including the 2008 Joint Declaration of Italy and Germany), Judge Cançado Trindade reviews the arguments of the contending parties on the counter-claim, focusing on the scope of the dispute, the substance of the dispute and the notion of "continuing situation" (Part VI). Next, he examines the origins of the notion of a "continuing situation" in international legal doctrine (Part VII), and its configuration in international litigation and case-law, in Public International Law as well as in the International Law of Human Rights (Part VIII). He then moves his analysis onto the configuration of a "continuing situation" in international legal conceptualization at normative level (Part IX).

5. He ponders that the present Order of the Court makes abstraction of the configuration of the notion of "continuing situation" in those distinct aspects, and its emphasis falls solely on waiver of claims (of war reparations), again oblivious of the incidence of jus cogens, rendering certain waivers of claims devoid of any juridical effects; he regrets that this is the case, in the light of the scope of the present dispute before the Court (Parts X-XI). Judge Cançado Trindade then turns, in Part XII of his dissenting opinion, to the true bearers (titulaires) of the originally violated rights, the individuals, and warns against the dangers of the Court's paying lip service to State voluntarism.

6. In his conception, the individuals' rights (including herein their vindication of reparations for war crimes) are not the same as their State's rights, and any purported waiver by a State of the rights inherent to the human person would be against the international ordre public, and would be deprived of any juridical effects. To substantiate his thesis, he examines developments in conventional international law (international humanitarian law, international labour conventions, and international law of human rights) as well as general international law, and stresses the relevance of the legacy of the Martens clause. To him, the "dictates of the public conscience" invoked therein is to the benefit of humankind as a whole.

7. In Part XIII of his Dissenting Opinion, Judge Cançado Trindade sustains that the gradual awakening of human conscience led to the evolution from the conceptualization of the delicta juris gentium to that of the violations of international humanitarian law (in the form of war crimes and crimes against humanity) — the Nuremberg legacy — and from these latter to that of the grave

violations of international humanitarian law (with the four Geneva Conventions on International Humanitarian Law of 1949, and their I Additional Protocol of 1977). States cannot waive claims of reparations of violations of the fundamental human rights and of serious or grave breaches of International Humanitarian Law that amount to war crimes (such as deportation to forced labour).

8. After assessing the incidence of jus cogens, in the light of the submissions of the contending parties, Judge Cançado Trindade concludes (Part XIV) that neither the tragic occurrences of the II World War, nor the purported waiver of claims of Article 77 (4) of the 1947 Peace Treaties between the Allied Powers and Italy, are controverted by the contending parties to the point of constituting the real cause of the present dispute (on State immunity in direct connection with war reparation claims). On the other hand, the two 1961 bilateral Agreements between Germany and Italy constitute the real cause of the present dispute, and form the triggering point of a continuing situation persisting to date. The Court is thus endowed with jurisdiction ratione temporis on the basis of Article 27 (a) of the 1957 European Convention for the Peaceful Settlement of Disputes, and the Court should thus have declared the counter-claim admissible, as it is furthermore “directly connected” with the original claim, in conformity with Article 80 (1) of the Rules of Court.

9. In Judge Cançado Trindade’s view, the present case does not concern State immunities in abstracto, or in isolation: it pertains to State immunity in direct connection with reparations for war crimes. It is thus necessary to go well beyond the strict inter-State outlook, so as to reach the ultimate bearers (titulaires) of rights, the human beings, confronted with waiver of their claims of reparation of serious breaches of their rights by States supposed to protect, rather than to oppress, them. Any such waiver is in breach of jus cogens.

10. In Judge Cançado Trindade’s perception, one cannot build (and try to maintain) an international legal order over the suffering of human beings. At the time of mass deportation of civilians, sent to forced labour (along the two World Wars of the XXth century, not only the II World War), everyone already knew that that was a wrongful act, a serious violation of human rights and of international humanitarian law, which came to be reckoned as amounting also to a war crime and a crime against humanity. In his final observation, the voluntarist-positivist outlook does not stand, as above the will stands conscience, moving the Law ahead as its ultimate material source, and removing manifest injustice.

Declaration of Judge ad hoc Gaja

In his declaration, Judge ad hoc Gaja states that in deciding on the admissibility of Italy’s counter-claim the Court applies for the first time Article 80 of the Rules of Court as amended with effect from 1 February 2001. Unlike the previous provision, the new text requires the Court to take a decision “after hearing the parties” also on an objection raised by the claimant State with regard to the Court’s jurisdiction on the counter-claim.

He declares that, in the case in hand, an oral hearing would probably have helped the Court to identify more precisely the date when the dispute arose and the facts and situations to which the dispute related.
