

### Observations of Germany concerning Italy's response to the question asked by Judge Simma

Germany makes the following observations with regard to Italy's response to the question asked by Judge Simma:

Italy's response confirms that only in 2000, after the establishment by Germany of an *ex gratia* compensation scheme for former civilian forced labourers, did Italy request that Italian military internees be included in this *ex gratia* scheme. The Italian demarches from the year 2000 and thereafter were limited to this group of former Italian military internees. The issue of reparations was not affected. No reference was made to victims of massacres.

For the period 1947 to 1961 Italy refers in general terms to the two 1961 Agreements and to a Memorandum of the German Government to the German Parliament. The two Agreements regulated in a final manner specific property-related, economic and financial questions on the one hand, and compensation for Italian nationals subjected to National Socialist measures of persecution on the other, and provided for *ex gratia* lump sum payments to Italy. The two Agreements were without prejudice to the general waiver clause of Article 77 of the Peace Treaty. At the time, Italy held the view that the reparations chapter was closed. This is confirmed by Italy's subsequent ratification of the London Agreement on German External Debts. Article 5, paragraph 4 of that Agreement stipulates that claims against Germany by former Allies of the German *Reich* shall be dealt with in accordance with the provisions made in the relevant treaties. For Italy this was an endorsement of the waiver clause in Article 77 of the Peace Treaty. Italy has accordingly not made any representations concerning allegedly outstanding reparations.

The explanatory Memorandum of the German Government referred to by Italy and quoted in paragraph 5.56 of Italy's Counter-Memorial (at p. 109) only clarifies that the waiver clause of the Peace Treaty does not constitute a prohibition for Germany to make *ex gratia* payments on the basis of the relevant German domestic legislation, i.e. the Federal Compensation Act (*Bundesentschädigungsgesetz*) and the Federal Restitution Act (*Bundesrückerstattungsgesetz*). It cannot be interpreted as undermining the Peace Treaty's waiver clause by entering into a new international obligation towards Italy.

In her concluding remarks Italy argues that diplomatic inaction and the lapse of time were irrelevant since "war crimes are not subject to any statute of limitations, either within national legal order or at the international level" (paragraph 21). It is interesting to note that this assertion is not supported by the decisions of the Italian courts. On the contrary, Italian courts have, in a number of judgements that disregarded Germany's state immunity, dismissed actions brought by Italian former military internees precisely because the limitation period under Italian law had already expired.

## Observations of Germany concerning Greece's response to the question asked by Judge Cançado Trindade

Germany makes the following observations with regard to Greece's response to the question asked by Judge Cançado Trindade:

Article 100 paragraph 1 of the Greek Constitution stipulates:

**"A Special Supreme Court shall be established, the jurisdiction of which shall comprise:**

**...**

**f) The settlement of controversies related to the designation of rules of International Law as generally accepted..."**

Article 54 paragraph 1 of Greek Law No. 345/1976 regarding the Special Supreme Court, promulgated on 9 June 1976, reads as follows:

**"The judgment of the Special Supreme Court will apply to all."**

With regard to this provision the Special Supreme Court has stated in its ruling of 8 October 2003 (case 13/2003):

**"...Furthermore, according to Article 54 paragraph 1 of the Law regarding the Special Supreme Court, the judgment of the Court settling disputes on characterising rules of International Law as generally accepted "will apply to all". According to the meaning of this provision, the judgment of the Special Supreme Court, which settles disputes on characterising concrete rules of International Law as generally accepted and the relevant finding, is binding upon not only the court which referred the case to the Special Supreme Court or the parties, which filed the respective motion, but also upon any court or organ which has to deal with the same legal question, that is the dispute, whether, at the same stage of evolution of International Law, the same rules can be characterised as generally accepted (see Special Supreme Court 46/1991). ... "**

Since the Special Supreme Court's decision of 17 September 2002 in the case 6/2002 ("Margellos") no Greek court has issued a judgment disregarding Germany's state immunity for acts *jure imperii* during World War II and no measures of execution in the Distomo case have been taken. In its judgments 1857/2007 of 1 October 2007 and 853/2009 of 6 April 2009 the Areios Pagos followed the jurisprudence of the Special Supreme Court according to which the rule of jurisdictional immunity stands unaffected even in cases the subject matter of which are allegations of serious violations of international humanitarian law.