INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

JURISDICTIONAL IMMUNITIES

(FEDERAL REPUBLIC OF GERMANY V. ITALIAN REPUBLIC)

APPLICATION

OF

THE FEDERAL REPUBLIC OF GERMANY

DECEMBER 2008

Subject of the dispute

The Federal Republic of Germany (hereinafter: Germany) hereby institutes proceedings against the Italian Republic (hereinafter: Italy) before the International Court of Justice. In recent years, Italian judicial bodies have repeatedly disregarded the jurisdictional immunity of Germany as a sovereign State. The critical stage of that development was reached by the judgment of the Corte di Cassazione of 11 March 2004 in the *Ferrini* case,[1] where the Corte di Cassazione declared that Italy held jurisdiction with regard to a claim (proceedings initiated in 1998) brought by a person who during World War II had been deported to Germany to perform forced labour in the armaments industry. After this judgment had been rendered, numerous other proceedings were instituted against Germany before Italian courts by persons who had also suffered injury as a consequence of the armed conflict. All of these claims should be dismissed since Italy lacks jurisdiction in respect of acts *jure imperii* performed by the authorities of the Third Reich for which present-day Germany has to assume international responsibility. However, the Corte di Cassazione has recently confirmed its earlier findings in a series of decisions delivered on 29 May 2008 and in a further judgment of 21 October 2008. Germany is concerned that hundreds of additional cases may be brought against it.

Repeated representations with the Italian Government have been of no avail. Recourse to the International Court of Justice (hereinafter: the Court) is accordingly the only remedy available to Germany in its quest to put a halt to the unlawful practice of the Italian courts, which infringes its sovereign rights. The Italian Government has publicly stated that it "respects" the German decision to submit the dispute for final determination to the World Court. Also on its part, it is of the view that a decision by the Court on State immunity will be helpful for clarifying this complex issue.[2]

[1] Judgment No. 5044/2044, 11 March 2004, Rivista di diritto internazionale 87 (2004), 539; English translation: 128 ILR 659.

[2] See Joint Declaration, adopted on the occasion of German-Italian Governmental Consultations, held on 18 November 2008 in Trieste, ANNEX. "L'Italia rispetta la decisione tedesca di rivolgersi alla Corte Internazionale di Giustizia per una pronuncia sul principio dell'immunità dello Stato. L'Italia, anche come parte contraente, come la

Representation of Germany before the International Court of Justice

Germany has appointed as its agents:

1) Ministerialdirektor Dr. Georg Witschel, Auswärtiges Amt, Werderscher Markt 1, 10117 Berlin,

2) Professor Dr. Dr. h.c. Christian Tomuschat, Odilostr. 25a, 13467 Berlin.

The address for service to which all communications concerning the case should be sent is the Embassy of the Federal Republic of Germany in The Netherlands, Groot Hertoginnelaan 18-20, 2517 EG Den Haag.

Germania, della Convenzione Europea sulla composizione pacifica delle controversie del 1957, e come Paese che fa del rispetto del diritto internazionale un cardine della propria condotta, considera che la pronuncia della Corte Internazionale sull'immunità dello Stato sia utile al chiarimento di una complessa questione."

Outline of Argument

I. Jurisdiction (sections 1-3)

II. Issues of Admissibility (sections 4-6)

1) No need for exhaustion of local remedies (section 4)

2) No need for prior exhaustion of diplomatic negotiations (section 5)

3) No jurisdiction of Court of Justice of European Communities (section 6)

III. The Facts (sections 7-12)

Judicial Proceedings against Germany

IV. The Claims of the Federal Republic of Germany (section 13)

V. Requests (sections 14-15)

Annex

I. Jurisdiction

1. The application is brought under the terms of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957 (hereinafter: European Convention).[3] Italy ratified that Convention on 29 January 1960, Germany did so on 18 April 1961. None of the two parties has denounced it.

2. Article 1 of the European Convention provides:

"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."

In the instant case, the dispute concerns in particular the existence, under customary international law, of the rule that protects sovereign States from being sued before the civil courts of another State. Accordingly, the claim falls *ratione materiae* within the scope of application of the European Convention.

3. The applicability of the European Convention is not excluded by the provisions of Article 27, which enunciates certain time limits. In fact, as stipulated there:

"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;
b disputes concerning questions which by international law are solely within the domestic jurisdiction of States."

As already indicated when specifying the subject of the dispute, all the claims which have been introduced against Germany before Italian courts relate to occurrences of World War II, where German troops committed

[3] CETS No. 23.

grave violations of international humanitarian law. However, the proceedings instituted against Italy do not deal with the substance of those claims. Germany's only objective is to obtain a finding from the Court that to declare claims based on those occurrences as falling within the domestic jurisdiction of Italian courts, constitutes a breach of international law. The time when that objectionable judicial practice began can be accurately specified. It is the judgment of the Corte di Cassazione in the *Ferrini* case of 11 March 2004 which opened the gates for claims seeking reparation for injury sustained as a consequence of events situated within the framework of World War II. The date of 11 March 2004 and the years subsequent thereto are clearly within the scope *ratione temporis* of the European Convention.

II. Issues of Admissibility

1) No need for exhaustion of local remedies

4. Germany does not act in the exercise of its right of diplomatic protection in favour of German nationals. It acts on its own behalf. Its sovereign rights have been – and continue to be – directly infringed by the jurisprudence of the highest Italian courts that denies Germany its right of sovereign immunity. The claims that have been adjudicated by Italian courts and are still pending before them are directed against the German State as a legal entity, not against German nationals. Accordingly, there is no legal requirement for Germany to exhaust local remedies. On the other hand, if such a requirement existed, it would have been fully complied with since it is the Corte di Cassazione, the highest court in civil matters, that has developed the contested doctrine of non-invokability of sovereign immunity in cases of grave violations of human rights and humanitarian law.

2) No need for prior exhaustion of diplomatic negotiations

5. Article 33 of the UN Charter does not require States to find solutions to an actual dispute by all the methods listed therein before turning

to the Court. In the *Oil Platforms* case, this proposition was recently confirmed.[4] Nor does the European Convention establish any requirement to that effect. In any event, however, since the delivery of the *Ferrini* judgment by the Corte di Cassazione, Germany has been in constant contact with the Italian authorities, urging them to see to it that the erroneous course followed by the Italian judiciary be halted. Germany is aware of the efforts undertaken by the Italian Government with a view to informing its judicial branch about Italy's obligations under the rules of general international law which, in principle, are of direct applicability within the Italian legal order according to Article 10 (1) of the Italian Constitution. Of course, as in all the countries parties to the European Convention on Human Rights, Italian judges are independent and are not subject to any instructions imparted to them by their Government. Nonetheless, Italy as a whole must shoulder responsibility for the acts of all its State organs, whatever their nature. Article 4 (1) of the Articles on Responsibility of States for Internationally Wrongful Acts, elaborated by the International Law Commission and taken note of by General Assembly Resolution 56/83 of 12 December 2001, states unequivocally that conduct capable of entailing responsibility may emanate from any organ that

"exercises legislative, executive, judicial or any other functions."

This proposition reflects a rule of customary law. No voices can be found that would argue that the judiciary does not belong to the institutional elements for whose actions a State can be made accountable. The commentary of the ILC on Article 4 (1)[5] refers to a rich array of relevant precedents. It is left to every State to organize its entire machinery in such a way that violations of international law to the detriment of other States do not occur.

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[4] ICJ Reports 2003, p. 161, 210, para. 107. For further references see Christian Tomuschat, comments on Article 36, in: Zimmermann/Tomuschat/Oellers-Frahm, *The Statute of the International Court of Justice. A Commentary*, 2006, p. 649, margin note 115; Anne Peters, International Dispute Settlement: A Network of Cooperational Duties, 14 (2003) EJIL 1, at 14.

[5] See James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge 2002), p. 95, para. 6.

3) No jurisdiction of the Court of Justice of the European Communities

6. The present dispute is not covered by any of the jurisdictional clauses of the Treaty of Nice (Article 227 EC). Although disturbances of the proper functioning of the internal market under the Treaty of Nice – and later of the Treaty of Lisbon – may result from the contested practice of the Italian courts, it has no direct link with the operation of the European market regime. The general relationship between the European nations continues to be governed by general international law. Every Member State of the European Community/European Union is obligated to respect the general rules of international law vis-à-vis the other members unless specific derogations from that regime have been stipulated. In respect of the dispute in the instant case, however, no such derogation has been agreed upon. Jurisdictional immunity belongs to the core elements of the relationship between sovereign States. Outside the specific framework established by the treaties on European integration, the 27 European nations concerned continue to live with one another under the regime of general international law. It should be added, in this connection, that the special framework of judicial cooperation that enables individuals to obtain the execution of judgments rendered in one member State of the European Union in other member States of the Union does not comprise legal actions claiming compensation for loss or damage suffered as a consequence of acts of warfare.[6]

III. The Facts

Judicial Proceedings against Germany

7. As already hinted in the introduction, Germany is currently faced with a growing number of disputes before Italian courts where claimants who suffered injury during World War II, when Italy was under German occupation after it had terminated its alliance with Germany on 8/9

[6] See Court of Justice of the European Communities, *Lechouritou*, case C-292/05, 15 February 2007, para. 46.

September 1943 and joined the Allied Powers, have instituted proceedings seeking financial compensation for that harm. *Three* main groups of claimants may be distinguished. *On the one hand*, there are claimants, mostly young men at the time, who were arrested on Italian soil and sent to Germany to perform forced labour. The *second* group is constituted by members of the Italian armed forces who, after the events of September 1943, were taken prisoner by the German armed forces and were soon thereafter factually deprived by the Nazi authorities of their status as prisoners of war,[7] with a view to using them as forced labourers as well. The *third* group comprises victims of massacres perpetrated by German forces during the last months of World War II. Using barbarous strategies in order to deter resistance fighters, those units on some occasions assassinated hundreds of civilians, including women and children, after attacks had been launched by such fighters against members of the occupation forces. In many of those cases, there was a gross quantitative disproportionality between the numbers of the German and the Italian victims.

8. Since the relevant events go back more than 60 years, in many instances the claimants are the heirs of the victims proper, either the children or the widows.

9. The democratic Germany, which emerged after the end of the Nazi dictatorship, has consistently expressed its deepest regrets over the egregious violations of international humanitarian law perpetrated by German forces during the period from 8/9 September 1943 until the liberation of Italy. On many occasions, Germany has already made additional symbolic gestures to commemorate those Italian citizens who became victims of barbarous strategies in an aggressive war, and is prepared to do so in the future. On behalf of the German Government, Foreign Minister Frank-Walter Steinmeier just recently confirmed that Germany fully acknowledges the untold suffering inflicted on Italian men and women in particular during massacres, and on former Italian military internees,

[7] It stands to reason that in an armed conflict none of the two belligerent parties may deprive combatants made prisoners of war unilaterally of that status. The status of prisoner of war is regulated by rules of international law over which no party can dispose at its own free will.

when he visited, together with his Italian colleague Franco Frattini, the memorial site "La Risiera di San Sabba" close to Trieste which during the German occupation had served as a concentration camp. A joint conference of German and Italian historians will be held in 2009 at the centre for cultural encounters Villa Vigoni to look into the common history of both countries during the period when they were both governed by totalitarian regimes, giving special attention to those who suffered from war crimes, including those Italian soldiers whom the authorities of the Third Reich abusively used as forced labourers ("military internees").

10. A *fourth* group of disputes must be mentioned separately, namely the disputes arising from the attempts by Greek nationals to enforce in Italy a judgment obtained in Greece on account of a similar massacre committed by German military units during their withdrawal in 1944 (*Distomo* case).

11. In one case, measures of constraint were already taken against German assets in Italy. A judicial mortgage ("ipoteca giudiziale") was inscribed in the land register covering Villa Vigoni, the German-Italian centre of cultural encounters mentioned above (section 9). Accordingly, Germany must expect that other such measures may be taken against real estate that serves public purposes of Germany in Italy.

12. At the present stage of the proceedings, Germany does not deem it necessary to describe in detail all the cases that are currently pending before Italian judges. Since 2004, the numbers have continually increased. Currently, roughly 250 claimants have introduced civil actions against Germany, which are pending before 24 regional courts ("Tribunali") and two courts of appeal. It stands to reason that Germany is thus involved in a continual confrontation which requires a huge amount of financial and intellectual expenditure. A special task force of lawyers had to be set up to follow the developments with their manifold ramifications. Having to observe the judicial practice of the Italian judges in the relevant cases, and to respond to it in an appropriate manner, has grown into a serious

stumbling block adversely affecting the bilateral relationships between the two nations.

IV. The Claims of the Federal Republic of Germany

13. Through its judicial practice, as summarily described above, Italy has infringed and continues to infringe its obligations towards Germany under international law. Italy is bound to abide by the principle of sovereign immunity which debars private parties from bringing suits against another State before the courts of the forum State. Italy cannot rely on any justification for disregarding the jurisdictional immunity which Germany enjoys under that principle. In particular, in the *Ferrini* case and in subsequent cases, the Corte di Cassazione has openly acknowledged that it did not apply international law as currently in force, but that it wished to develop the law, basing itself on a rule "in formation", a rule which does not exist as a norm of positive international law. Through its own formulations, it has thus admitted that by its restrictive interpretation of jurisdictional immunity, i.e. by expanding Italy's jurisdiction, it is violating the rights which Germany derives from the basic principle of sovereign equality.

V. Requests

14. On the basis of the preceding submissions, 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;

15. Germany reserves the right to request the Court to indicate *provisional measures* in accordance with Article 41 of the Statute should measures of constraint be taken by Italian authorities against German State assets, in particular diplomatic and other premises that enjoy protection against such measures pursuant to general rules of international law.

The Hague, 22 December 2008

Ambassador of the Federal Republic of Germany

ANNEX

Joint Declaration, adopted on the occasion of German-Italian Governmental Consultations, Trieste, 18 November 2008

(Translation from the German/Italian original)

Joint Declaration

Italy and Germany share the ideals of reconciliation, solidarity and integration, which form the basis of the European construction that both countries have contributed to with conviction, will continue to contribute to and drive forward.

In this spirit of cooperation they also jointly address the painful experiences of World War II; together with Italy, Germany fully acknowledges the untold suffering inflicted on Italian men and women in particular during massacres and on former Italian military internees, and keeps alive the memory of these terrible events.

With this in mind, Deputy Chancellor and Federal Minister for Foreign Affairs Frank-Walter Steinmeier, accompanied by Foreign Minister Franco Frattini, visited the Risiera di San Sabba in what can be considered a gesture of great moral and humanitarian value to pay tribute to the Italian military internees who were kept in this transit camp before being deported to Germany, as well as to all the victims for whom this place stands.

Italy respects Germany's decision to apply to the International Court of Justice for a ruling on the principle of state immunity. Italy, like Germany, is a state party to the European Convention of 1957 for the Peaceful Settlement of Disputes and considers international law to be a guiding principle of its actions. Italy is thus of the view that the ICJ's ruling on state immunity will help to clarify this complex issue.