

# AMNESTY INTERNATIONAL

## PUBLIC STATEMENT

12 September 2011  
AI Index: IOR 40/014/2011

### **The International Court of Justice should reaffirm the century-old right of victims of war crimes to reparation by denying immunity claim**

On 23 December 2008, Germany initiated proceedings against Italy before the International Court of Justice seeking to permit civil claims by victims of war crimes committed in Italy by members of the German armed forces during the Second World War to proceed against Germany in Italian courts. In the 2004 case of *Ferrini v. Italy*, the Italian *Corte di Cassazione* (Court of Cassation) had concluded that Italian courts have jurisdiction to consider reparation claims against Germany, leading a number of victims of the Second World War to institute civil proceedings against Germany in Italian courts. Germany, for its part, denied its obligation to pay reparation based on its claim of state immunity, leading to the seizure of German assets in Italy to enforce reparation judgments.

On 4 July 2011, the Court granted an application by Greece to intervene in this case. A Greek court had issued a judgment in 1997 holding Germany responsible for the massacre by members of its armed forces of civilians in the Greek village of Distomo on 10 June 1944. Once again Germany refused to provide reparation to the victims, claiming it was immune. After the Greek Minister of Justice refused to enforce the award, upholding Germany's claim to state immunity, the victims sought unsuccessfully to challenge this official's decision in the European Court of Human Rights and then obtained a judgment from an Italian court permitting enforcement of the Greek court judgment in Italy. The International Court of Justice directed that one week of oral proceedings take place beginning on Monday, 12 September 2011.

**Right to reparation for war crimes.** All victims of war crimes have been entitled since 1907 to obtain reparation from states for war crimes. Article 3 of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, which was proposed by Germany, expressly provides:

“A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”

When proposing the inclusion of this obligation, the German delegate explained:

“if . . . individuals injured by breach of the Regulations, could not ask for compensation from the Government, and instead they had to turn against the officer or soldier responsible, they would, in the majority of cases be denied their right to obtain compensation”

This obligation in Hague Convention IV (ratified by Germany), which contains no exceptions on the ground of state immunity, was included without significant change in 1977 in Article 91 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

This obligation to provide reparation is not simply a treaty obligation, but it is now part of customary international humanitarian law. Rule 150 of the International Committee of the Red Cross Rules of Customary International Humanitarian Law provides: “A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.” This obligation was reinforced by two UN instruments adopted in 2005, the UN Basic Principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and international humanitarian law and the UN Updated set of principles for the protection and promotion of human rights through action to combat impunity, both of which confirm the right of victims of war crimes to reparation.

**Responsibility of states to individuals.** Under international law, states incur a responsibility for crimes under international law committed by their armed forces not only to other states, but also, in some instances, to individuals. Article 33 (2) of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted in 2001, provides that “[Part II of the Draft Articles (Content of the international responsibility of a State)] is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State”. The Commentary by the Commission to this provision explains:

“When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State’s benefit. For instance, a State’s responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights.”

In the *Advisory Opinion about Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion, I. C. J. Reports 2004, para. 152) the International Court of Justice concluded that there is “an obligation [for a state] to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage”.

**Any claim that a state is immune to a civil claim to reparation for war crimes should be rejected.** The absolute obligation of states to provide reparation to victims of war crimes should not be completely negated by a claim to state immunity, rendering it a nullity. Upholding a claim of state immunity in such circumstances would be a devastating denial of justice to victims of war crime. There are simply no meaningful alternatives for victims to seeking reparation in a civil case against the state responsible. States have repeatedly asserted when seeking reparation from other states for their nationals on the basis of exercising diplomatic protection that they are asserting their own right, not the right of their nationals, and have frequently declined to pass on to the victims any reparation provided by the responsible state. Even when they have passed on money to their nationals, the amounts agreed with the responsible state have often been derisory, as in the cases of women victims of war crimes and crimes against humanity involving sexual violence committed by Japanese soldiers during the Second World War. When the victims are stateless or their governments are unwilling to seek reparation from the other state, the victims may have no recourse whatsoever.

A claim to immunity from providing reparation to victims of war crimes which is coextensive with the obligation of states under international law to provide such reparation cannot be accepted any more than the similar claim rejected by the House of Lord in 1999 in the *Pinochet* case to an immunity in foreign courts.

The submissions of Germany, Italy and Greece on the merits, until today, have not been made public. When the oral hearings this week have been concluded, Amnesty International intends to address the arguments of the parties on this important issue.

End/