INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

JURISDICTIONAL IMMUNITIES OF THE STATE

(GERMANY V. ITALY)

GREEK INTERVENTION

GERMANY'S COMMENTS

ON THE GREEK DECLARATION OF 3 AUGUST 2011

26 AUGUST 2011

Outline of Argument

I. General Observations

1. Germany has taken note of the Written Declaration which Greece submitted to the Court on 3 August 2011, having been authorized to do so by the order of the Court of 4 July 2011 admitting it as intervenor. In Germany's view, Greece has not been able to add any new substantive elements to the dispute between Germany and Italy which the Court is called upon to adjudicate. Neither has any new light been shed on the issue of immunity nor has Greece produced evidence susceptible of showing that an individual right of reparation arises for individual victims under customary international law on account of violations of international humanitarian law (IHL). It is to be welcomed, on the other hand, that all of the data relating to the *Distomo* case are now plainly before the Court (Greek Declaration, paras. 8-13, 20-30). Germany does not object to the facts as presented by Greece.

II. Immunity

2. Regarding the central issue of immunity, Greece has very little to say. Rightly, it acknowledges that no rule has emerged as yet that would have restricted the scope of jurisdictional immunity of States in respect of instances of grave violations of international human rights law (IHRL) or IHL. Instead, it refers to an ongoing process of change ("mutation") (para. 31) and to a "renovation of the global legal architecture" (para. 33), without however producing any evidence to the effect that this alleged transformation has already come to a close. In its submissions, international practice is conspicuously lacking. It is true that many of the international treaties for the protection of human rights, which have all come into existence many years after the occurrences which form the subject-matter of the present dispute, provide for remedies to the benefit of victims. Invariably, such remedies may be filed with international review bodies. However, no trace can be found in the recent practice of a right for

individuals to sue foreign States before their own courts if the conduct in issue consists of *acta jure imperii*, sovereign acts of a foreign State.

3. No support can be obtained for the Greek viewpoint from Art. 40 of the ILC's Articles on responsibility of States for internationally wrongful acts.[1] Greece is of the view that Art. 40 may serve as an indication that sovereign immunity must yield in instances of violations of *jus cogens* norms (para. 52). However, this inference has no basis in the text of that provision. Deliberately, the ILC has shown great caution in outlining the consequences of a *jus cogens* rule. As a perusal shows at first glance, the ILC avoided attaching any procedural consequences to a breach of a peremptory norm of general international law. Even when an allegation to that effect is made, the normal procedural conditions obtain. Without having to endure any forfeiture of its sovereign rights, a State charged with gross misconduct rests on a par with its fellow nations regarding any procedure that may be open for a review of the controversial conduct.

4. When referring to the *Tadic* judgment of the International Criminal Tribunal for the Former Yugoslavia[2] (para. 46), Greece commits the same error as the Italian Corte di Cassazione in *Ferrini:* it fails to see that individual immunity and State immunity must be carefully distinguished. Today, the international community is in broad agreement to accept, and even to require, the criminal prosecution of persons having perpetrated grave crimes under international law. Germany belongs to those States that have actively promoted the elaboration and conclusion of the Rome Statute of the International Criminal Court. It is an imperative of justice that everyone charged with such crimes must stand trial. Yet it is a different matter altogether after an armed conflict to devise appropriate ways and means suited to provide reparation for injuries suffered. There is

[1] Taken note of by General Assembly Resolution 56/83 of 12 December 2001.
[2] Of 2 October 1995, ILM 35 (1996), p. 32.

no need to dwell on that aspect of the dispute at any great length since ample observations were already submitted to the Court on this issue.

Accordingly, the uncontested fact that perpetrators of grave international crimes may be prosecuted before international courts and, within certain limits, also before national judicial bodies pursuant to the principle of universal jurisdiction,[3] does not permit the inference that private individuals may bring reparation claims before their own judicial system against wrong-doing States.

III. Individual Reparation Claims under IHL?

5. Notwithstanding its endeavours to argue that any private victim of gross violations of IHRL and IHL is the holder of an individual entitlement to reparation (para. 34), Greece does not succeed in providing persuasive evidentiary elements to sustain that contention. In fact, in para. 35 it sets out – apparently against its intention – the true legal position: such an entitlement does not exist.

6. Germany acknowledges that some authors have believed to derive from the travaux préparatoires of Hague Convention IV of 1907 the conclusion that Art. 3 of that Convention was meant to establish an individual right to reparation (see fn. 24).[4] Art. 3 does not specify to whom reparation is due. It reads:

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be

[3] See ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment*, ICJ Reports 2002, p. 3, at 24.
[4] See, in particular, Frits Kalshoven, "State Responsibility for Warlike Acts of the Armed Forces", *ICLQ* 40 (1991), p. 827, at 830-2; reconfirmed: "Some Comments on the International Responsibility of States", in: Wolff Heintschel von Heinegg & Volker Epping (eds.), *International Humanitarian Law Facing New Challenges* (Berlin *et al*.: Springer, 2007) 207, at 212.

responsible for all acts committed by persons forming part of its armed forces.

The assertion that the States parties present in The Hague intended to provide for individual entitlements has never had a solid background.

Before World War I, international law was generally conceived of as a system of rights and duties operating exclusively between States. To bestow individual rights on victims of IHL would have been an oddity within that intellectual framework. And the subsequent practice has never endorsed such a revolutionary vision of the international legal order. After World War I, the settlement brought about by the Treaty of Versailles was an arrangement between States, the victorious powers, on the one hand, and Germany, on the other. The Treaty did not provide for individual rights of reparation on account of violations of IHL – which of course would have had to be allocated to victims on both sides.

7. Additionally, the analysis of the proceedings of the 1907 Peace Conference undertaken by Kalshoven is far from persuasive – and even flatly wrong. The following observations will shed a clear light on the issue.

8. At the Conference the German Government introduced some amendments in one of the Commissions of the Peace Conference.[5] In one of these amendments, reference was made to compensation for "persons". This proposed rule, however, was confined to "neutral persons", i.e. citizens of neutral countries, an exception in the course of warfare. The other proposed rule said in a very unspecific manner that in case of prejudice to the adverse party "the *question* of indemnity will be settled at the conclusion of peace." In other words, no suggestion was made that generally individual war victims should be compensated, just the contrary: the German proposal

[5] *Deuxième Conférence Internationale de la Paix, La Haye 15 Juin-18 Octobre 1907, Actes et Documents*, Tome III, La Haye 1907, 247, ANNEX 1. For the English version see *The Proceedings of the Hague Peace Conferences. The Conference of 1907. Acts and Dcouments* (Vol. III, New York: Oxford University Press, 1921) 139, ANNEX 2.

proceeded from the assumption that the traditional pattern of making reparation for war damages to the "adverse party" by way of inter-State treaties should be maintained. In the ensuing debate, a controversy arose concerning the possibility of distinguishing between neutral persons and nationals of the opponent party. It is true that the speakers referred mostly to *persons* having sustained injury. But the British delegate, Lord Reay, also said that indemnification of members of the hostile party:

"depends upon the conditions which will be inserted in the treaty of peace and which will be the result of negotiations between the belligerents".[6]

Eventually, the texts were merged and got their final shape – where the beneficiary of the proposed reparation claim is not mentioned. A sober assessment of the materials referred to yields no real clue that eventually, at the end of their deliberations, the drafters intended to set forth individual entitlements. Instead, the conclusion seems to be warranted that they renounced setting forth a special rule in favour of nationals of neutral countries.[7]

9. The codification of the customary rules of IHL produced by the ICRC does indeed state under Rule 150, as rightly pointed out in the Greek Declaration (para. 38), that there "is an increasing trend in favour of enabling individual victims of violations of international humanitarian law to seek reparation directly from the responsible State".[8] First of all, it is highly significant how cautious the authors producing the study were in framing the relevant sentence. A "trend" is not a rule. Additionally, it stands to reason that the materials assembled by the ICRC stem from recent developments and lack any pertinence in respect of events that took place more than 60 years ago.

[6] *Loc. cit.* (note 5) 142.
[7] See also the careful assessment of the drafting history by the Tokyo district court in the judgment of 7 December 1963, Tokyo District Court, 7 December 1963, 32 *ILR* 627.
[8] ICRC (ed.), Customary International Humanitarian Law, Vol. I, Cambridge 2005, p. 541.

10. Similar criticism may be directed against the reference made to Art. 33 (2) of the ILC's Articles on Reponsibility of States for internationally wrongful acts. What the ILC did was to complete its draft by a saving clause. It did not take a stand on whether, and to what extent, subjective rights may accrue to individuals in case of the violation, by a State, of its obligations under international law. The basic fact is, again, that within the framework of "classic" international law, as it obtained during World War II, individual reparation claims under general international law were unknown in practice. Following this line, the ILC confined its codification of the law of State responsibility to relationships between States as the traditional subjects of international law.

11. In para. 41, Greece mentions a decision of the German Federal Constitutional Court (FCC) of 28 June 2004. It admits openly that that decision does not support the notion of individual rights arising from violations of IHL. It may nevertheless be useful to quote the relevant passage textually:

"Art. 3 of the Hague Convention of 1907 does not establish, in principle, an individual right to reparation, but codifies only the general principle of international law of responsibility between the contracting parties. This secondary reparation claim, however, exists only in the relationship under international law between the States concerned. The reparation claim differs in that regard from the primary right of the persons concerned to respect of the prohibitions of international humanitarian law which exists between the State occupying a territory and the population living in that area."[9]

[9] „Art. 3 des Haager Abkommens von 1907 begründet grundsätzlich keinen individuellen Entschädigungsanspruch, sondern positiviert nur den allgemeinen völkerrechtlichen Grundsatz (…) einer Haftungsverpflichtung zwischen den Vertragsparteien. Dieser sekundärrechtliche Schadensersatzanspruch besteht jedoch nur in dem Völkerrechtsverhältnis zwischen den betroffenen Staaten. Der Schadensersatzanspruch unterscheidet sich insoweit von dem primärrechtlichen Anspruch der betroffenen Personen auf Einhaltung der Verbote des humanitären Völkerrechts, der in dem Völkerrechtsverhältnis zwischen dem ein Territorium besetzenden Staat und der in diesem Gebiet lebenden Bevölkerung besteht.", Europäische Grundrechte Zeitschrift 31 (2004), p. 439, at 441.

The FCC thus carefully distinguishes between primary and secondary rules. Even if individuals are holders of rights under primary rules, this does not mean that they acquire automatically rights under the relevant secondary rules that govern the consequences of a breach of those primary rules.

12. Greece has also adduced (footnote 35) a recent judgment of the Court of Appeal of The Hague of 5 July 2011 (without providing the text and even less so a translation into one of the official languages of the Court). Nonetheless, Germany has studied the judgment in its Dutch version. The perusal has made clear that the judgment does not say what the Greek Declaration wishes it to say. Obviously, in a proceeding concerning alleged misconduct of the "Dutchbat" (Dutch military contingent) deployed in Srebrenica in 1995 the Court of Appeal of The Hague did not have to deal with issues of immunity. However, the question of the legal foundations of a reparation claim had to be addressed. In paras. 6.3 and 6.20, the Court specifies that it derives a reparation claim from the Bosnian law of obligations – and not from IHL.

13. Germany also draws attention to the recent decision of the European Court of Human Rights in *Sfountouris and Others*.[10] The main applicant counts among the victims of the Distomo massacre, having been deprived of his parents when he was a child. The Strasbourg Court notes, without raising any objection, the view of the German courts seized with the issue denying « l'existence d'un droit individuel des requérants à être indemnisé fondé directement sur le droit international public, en particulier sur l'article 3 de la Convention de La Haye et de l'article 23 lit. g) du règlement annexe ». Accordingly, it held that the applicants « ne sont pas fondés de prétendre qu'ils avaient une espérance légitime de pouvoir bénéficier d'une indemnisation pour le préjudice subi ». On that basis, the application was declared inadmissible.

[10] Application 24120/06, 31 May 2011.

14. In para. 56, Greece submits that the application of the immunity rule as well as the denial of individual reparation entitlements would, in the final analysis, lead to “l’irresponsabilité des Etats ayant commis des atrocités”. This statement comes as a surprise since it fails to take into account the fact that the entire edifice of international law rests on a clear distinction between substantive law, rules of conduct, on the one hand, and procedures for the enforcement of those rules, on the other. Unlike under domestic law, judges are not generally available in international law. But many other procedures exist, in particular diplomatic procedures, that may be as effective as judicial procedures. It is therefore erroneous to assume that the lack of a judicial remedy undermines the significance of substantive rules of international law to a point where a total loss of responsibility would occur. It should not go unnoticed that, in particular, the ILC’s Articles lack a procedural part. It was found sufficient to regulate the substance of the relevant secondary rules on State responsibility without attempting, at the same time, to supplement them by provisions on mechanisms and procedures of enforcement.

15. Germany notes that Greece is fairly hesitant in acknowledging that in *Margellos* the Highest Court under Art. 100 of the Greek Constitution departed from the *Distomo* judgment of the Areios Pagos, holding that the traditional rule of immunity was still in existence (paras. 57-59). However, Greece could not possibly deny that its highest judicial body, which is specifically entrusted with “the settlement of controversies related to the designation of rules of international law as generally acknowledged” (Art. 100(1) f)) has opted for maintaining the traditional rule, whose raison d’être stands still in splendid vitality. According to the information obtained by Germany, judgments of the Highest Court in

respect of the existence and the scope of general rules of international law would appear to have an *erga omnes* effect, to be respected by all governmental institutions.[11]

16. Since Greece seems to suggest that international law is continually developing and that since the *Margellos* judgment of its Special Court under Art. 100 of the Constitution the legal position may have changed, Germany will present three judgments from a recent past, coming from different regions of the world, which all confirm the traditional rule of immunity without any hesitation. In all of these cases, Germany was the Respondent, and the historical background was similarly World War II. These three judgments are the following:

a) a judgment of the Federal Court in Rio de Janeiro of 9 July 2008,[12]
b) a summary decision of the Israeli District Court in Tel Aviv-Jaffa of 31 December 2008,[13]
c) a judgment of the Polish Supreme Court of 29 October 2010.[14]

The three judgments show that there can be no question of a "trend" pointing to a reduction in scope of the jurisdictional immunity of States in cases of grave breaches of IHRL and IHL.

At this juncture, Germany refrains from going into the details of these decisions. They will be fully commented upon during the forthcoming hearings before the Court.

[11] Art. 54(1) of Law 345 (1976).
[12] ANNEX 3.
[13] ANNEX 4.
[14] ANNEX 5.

IV. Concluding Observations

17. Germany welcomes the fact that Greece will be given an opportunity to express itself on some of the legal issues raised by the present dispute. Germany trusts that at the hearing Greece will remain within the confines traced by the Court's order of 4 July 2011.

Berlin, 26 August 2011

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List of Annexes

Annex 1	Deuxième Conférence Internationale de la Paix, La Haye 15 Juin-18 Octobre 1907, Actes et Documents, Tome III, La Haye 1907, 247
Annex 2	The Proceedings of the Hague Peace Conferences. The Conference of 1907. Acts and Documents, Volume III, New York 1921, 139
Annex 3	Federal Court Rio de Janeiro, Judgement of 9 July 2008, Ordinary Proceedings Number 2006.5101016944-1, *Barreto v. Federal Republic of Germany*
Annex 4	District Court Tel Aviv-Yafo, Decision of 31 December 2009, Case 2143-07, *Orith Zemach et al. v. Federal Republic of Germany*
Annex 5	Polish Supreme Court, Decision of 29 October 2010, File ref. IV CSK 465/09, *Natoniewski v. Federal Republic of Germany*