INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING JURISDICTIONAL IMMUNITIES OF THE STATE (GERMANY *v.* ITALY): GREECE INTERVENING

WRITTEN STATEMENT OF THE HELLENIC REPUBLIC

3 August 2011

[Translation by the Registry]

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I. INTRODUCTION

1. This Written Statement of the Hellenic Republic (Greece) is submitted to the ICJ pursuant to the Order of 4 July 2011 issued by the International Court of Justice (the Court) on the Application for permission to intervene submitted by the Hellenic Republic in the case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy)*. In that Order the Court granted the Hellenic Republic permission to intervene in the current proceedings, as a non-party, in accordance with Article 62 of the Statute of the Court, and fixed the time-limit for the filing of said Statement, as provided for in Article 85, paragraph 1, of the Rules of Court.

2. Greece wishes to state at the outset and most emphatically that its intervention in the case between Germany and Italy concerning Jurisdictional Immunities of the State is not intended, and was never intended, to affect in any way the excellent relations it maintains with those two countries, the Parties to the dispute.

3. The purpose of Greece's intervention was set out in its Application for permission to intervene of 14 January 2011, and in its Written Observations of 4 May 2011. It was described clearly in the Court's Order of 4 July 2011. Through this intervention the Hellenic Republic seeks, within the limits set by the Court in its Order, to contribute to ascertaining the current legal position in respect of an evolving issue, and to the progressive development of international law, in an area of such importance to the international legal order and to the position of the individual therein.

4. Greece's Written Statement briefly sets out the legal considerations which the intervening State wishes to submit to the Court, in order to clarify its position on aspects regarding the procedure and substantive scope of the present dispute as defined by the Court[1]. That is to say, firstly to clarify the judgments of the Greek courts in the landmark *Distomo Massacre* case, by elaborating on the legal principles deriving from both national and international law which underpin those judgments. This approach will involve discussing the factual and functional background to the issues underlying the *Distomo Massacre* case, which arose out of serious violations of international humanitarian law, as well as the legal position adopted by the Greek courts, in light of issues relating to State immunity and international liability and of the civil claims instituted in respect of the enforcement of the *Distomo* judgment on Italian territory. We will also refer to the judgment of the Special Supreme Court in the *Margellos and Others* case[2].

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5. Greece will then consider the legal consequences that the ICJ Judgment will have on this question, which is of the utmost importance for the Greek domestic legal order. Not only is this question undoubtedly of general interest to any State, but the Court's judgment will also have practical consequences on pending and future cases similar to those which have already been brought before the Greek courts mentioned above.

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[1] ICJ, Order of 4 July 2011, para. 25.

[2] Although this judgment is not cited as being within the area of Greek intervention as defined by the Court's Order, but because it is mentioned in the Order and in the Separate Opinion of Judge Cançado Trindade, as well as in Germany's Memorial (12 June 2009), para. 65.

II. GREECE'S APPLICATION TO INTERVENE

A. The factual and functional background to the present case

6. On 23 December 2008, the Federal Republic of Germany filed an Application instituting proceedings against Italy in respect of a dispute originating in "violations of obligations under international law" allegedly committed by Italy as a result of its judicial practice, "in that it has failed to respect the jurisdictional immunity which . . . Germany enjoys under international law".

7. More specifically, in its Application Germany requests the Court to adjudge and declare that the Italian Republic:

> "— 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;
>
> — 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;
>
> — 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".

8. It is thus a dispute between Germany and Italy over the adoption and enforcement, within the Italian legal order, of various judgments rendered by Italian courts — in violation, according to Germany, of the jurisdictional immunity which that State enjoys under international law — awarding reparations to individual victims of serious violations of international humanitarian law committed by the Third Reich and the German armed forces during the Second World War. One of
5 Germany's complaints — the third — focuses on the enforcement in Italy of a Greek judgment in the *Distomo Massacre* case. It is the judgment rendered by the *Protodikeio*/Livadia Court of First Instance, upheld by the *Areios Pagos*/Court of Cassation, which held the German State liable to compensate Greek nationals who had been the victims of the massacre perpetrated at Distomo in Greece by German armed forces in 1944.

9. The Distomo massacre dates back to 10 June 1944, when Greece was under German occupation. On 25 September 1997, the Livadia Court of First Instance *(Protodikeio)* found Germany liable for serious violations of humanitarian law committed during the massacre and awarded damages to relatives of the victims of the massacre. Germany lodged an appeal before the Greek Court of Cassation, which, in 2000, upheld the Livadia judgment by an overwhelming majority. However, the Livadia decision, which had become final, could not be enforced in Greece, as the authorization required under Article 923 of the Greek Code of Civil Procedure for enforcing a decision against a third State was not granted by the Minister for Justice.

Faced with the refusal to enforce the Livadia judgment, in July and August 2000 the plaintiffs instituted enforcement proceedings. Germany lodged an objection and a request for the proceedings to be stayed. On 19 December 2000, by its decision 8206/2000, the Athens Court of First Instance upheld that request and, by its decision 3667/2001 of 10 July 2001, dismissed Germany's objection, holding that Article 923 of the Code of Civil Procedure was incompatible

with the right to proper justice guaranteed by Article 6, paragraph 1, of the European Convention on Human Rights (ECHR).

Germany lodged an appeal on 12 July 2001. The Athens Court of Appeal, in its decision 6848/2001 of 14 September 2001, held that the limitation laid down in Article 923 was not in breach of the ECHR provision.

The case brought before the Court of Cassation in October 2001 was examined by the full court, after it had been referred by its Seventh Division. By its judgment 36/2002, the Court of Cassation upheld the position of the Athens Court of Appeal, namely that the limitation imposed on an award of reparations against Germany was not incompatible with Article 6, paragraph 1, of the ECHR[3].

Faced with the Justice Minister's refusal to agree to the adoption of interim measures aimed at enforcing the Livadia judgment, the claimants then brought the matter before the Council of State, which, in its judgment 3669/2006, confirmed that the Minister's act, being a governmental act and not subject to review by the courts, lay entirely within the sovereign discretion of the State.

10. The claimants then made an application to the European Court of Human Rights
6 (*Kalogeropoulos and Others* case) against Greece and Germany. They claimed that Article 6, paragraph 1, of the Convention on Human Rights had been violated, as well as Article 1 of Additional Protocol No. 1 to that Convention, as a result of the refusal to comply with the 1997 judgment of the Livadia Court. On 12 December 2002, the Strasbourg Court declared the application inadmissible.

11. The applicants also instituted proceedings before the German courts (the Bonn Regional Court/*Landgericht* in 1997, and the Cologne Supreme Regional Court/*Oberlandesgericht* in 1998) with a view to enforcing the Livadia judgment in Germany. The Distomo victims' action was unsuccessful. The Greek applicants then lodged an appeal before the German Federal Constitutional Court, the *Bundesgerichtshof* (BGH). On 26 June 2003, the *Bundesgerichtshof* rejected the Greek plaintiffs' appeal[4].

12. By contrast, the Distomo victims did succeed in securing enforcement through a decision of the Florence Court of Appeal of 2 May 2005, which declared that the Livadia judgment was enforceable in Italian territory. The decision to enforce the judgment rendered by the Livadia court became enforceable after the Italian Supreme Court *(Corte Suprema di Cassazione)* upheld the decision of the Florence Court of Appeal. That position regarding enforcement of the judgment was recently reconfirmed (in May 2011).

On 7 June 2007, the Greek applicants registered with the Como provincial office of the Italian Land Registry a legal charge *(ipoteca giudiziale)* over Villa Vigoni, a property of the German State.

13. In the general context of the case, the decision in *Margellos and Others* v. *Germany* is also cited. In that case, which is procedurally distinct from the judgments handed down in the

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[3]Nomiko Vima 2002, 856-858 (in Greek).

[4]BGH, decision of 26 June 2003, III ZR 245/98, published in *NJW* 2003, 3488 *et seq*. For the German judgments, see M. Rau, "State Liability for Violations of International Humanitarian Law — The Distomo Case Before the German Federal Constitutional Court", 7 *German LJ* 2005, 701-720; S. Pittrof, "Compensation Claims for Human Rights Breaches Committed by German Armed Forces Abroad During the Second World War: the Federal Court of Justice Hands Down Decision in the Distomo Case", 5 *German LJ*, 2004, 15-21.

Distomo Massacre case, Greek claimants sought compensation for acts perpetrated by German armed forces in the Greek village of Lidoriki in 1944. Notwithstanding the 2000 judgment of the full Court of Cassation, the First Chamber of the Greek Court of Cassation referred the case to the Special Supreme Court *(Anotato Eidiko Dikastirio)*, requesting it to decide whether the rules on State immunity covered the acts referred to in the *Margellos* case. On 17 September 2002 the Special Supreme Court, by a majority of six votes to five, adopted a position contrary to that of the Court of Cassation in 2000.

14. Finally, it should be underlined that the *Distomo Massacre* and *Margellos and Others* were not isolated cases in relevant Greek case law. Indeed, a whole series of claims for reparation
7 were brought before the Greek courts during that period by individuals who had been victims of the conduct of German occupying forces. These gave rise to a series of first-instance and appeal judgments, which outline the trend in respect of the principle of State immunity (e.g., Judgments 59/1998 of the Tripoli Court of First Instance, 1122/99 of the Athens Court of Appeal and 894/2001 of the Piraeus Court of Appeal)[5].

15. All the above-mentioned decisions address the issue of the conflict between the principle of State immunity and the individual right to reparation.

B. The purpose of Greece's request for leave to intervene and the Court's Order

16. On 13 January 2011, the Hellenic Republic filed a request for leave to intervene under Article 62 of the Statute of the Court in the current proceedings between Germany and Italy. In its request, having first explained and established its legal interest in the outcome of the case, Greece asked the Court to grant it permission to intervene and participate in the proceedings, in accordance with the provisions of Article 85 of the Rules of Court. Greece stressed the fact that its request was in keeping with its wish to contribute, as a non-party, to the sound administration of justice in this case. It proposed to make submissions with a view to clarifying extremely sensitive legal questions regarding the relationship between international responsibility, reparations and immunity, an evolving area of law in which Greek nationals and Greek courts have to a certain extent been leading the way at national and international level.

17. In their written observations the two Parties to the present dispute did not formally object to Greece's request, even though Germany raised certain considerations which indicated that the Greek request did not meet the intervention criteria set out in the Statute.

18. On 4 July 2011, the ICJ granted the Application for permission to intervene. In its Order, the Court finds that "Greece has sufficiently established that it has an interest of a legal nature which may be affected by the judgment that the Court will hand down in the main proceedings"[6].

19. Thus the Court stated that it

> "might find it necessary to consider the decisions of Greek courts in the *Distomo* case, in light of the principle of State immunity, for the purposes of making findings with regard to the third request in Germany's submissions, concerning the question whether

[5]For an overview of the case law of the Greek courts, see ICRC Customary Humanitarian Law Study, Greece (National case law on reparations) at: http://www.icrc.org/customary-ihl/eng/docs/v2_cou_gr_rule150.

[6]Order of 4 July 2011, para. 26.

> Italy committed a further breach of Germany's jurisdictional immunity by declaring Greek judgments based on occurrences similar to those defined in the first request as enforceable in Italy"

and that

8 > "this is sufficient to indicate that Greece has an interest of a legal nature which may be affected by the judgment in the main proceedings"[7].

III. THE POSITION OF THE GREEK COURTS ON STATE IMMUNITY IN RESPECT OF REPARATION FOR GRAVE VIOLATIONS OF HUMANITARIAN LAW, IN THE CONTEXT OF THE DEVELOPMENT OF INTERNATIONAL LAW

A. The judgments in the *Distomo Massacre* case

(a) *The judgment of the Court of First Instance of Livadia*

20. In the *Prefecture of Voiotia* (and others) v. *Germany* case, known as the *Distomo Massacre* case, the Prefecture of the central Greece region and 257 individuals submitted, on 27 November 1995, a claim for compensation to the Court of First Instance of Livadia, capital and administrative centre of the Prefecture. The claimants were seeking compensation for damages suffered during the atrocities committed by the German occupying forces in Distomo on 10 June 1944. In that horrific episode, 218 of the village's inhabitants, including infants aged six months, — for the most part relatives of the applicants — were massacred, their property was destroyed and the village was burned to the ground.

21. The Hellenic Republic does not find it necessary to dwell on the facts which form the basis of the case brought before the Court of First Instance of Livadia. They are well known to the Court, to the Parties to the present dispute and indeed beyond. An excellent statement of those facts can be found in the separate opinion of Judge Cançado Trindade[8]. It is undeniable that, besides engaging the international responsibility of the State, those atrocities constitute crimes against humanity or war crimes, similar in nature to those which impelled the Nuremberg Tribunal to pass heavy sentences on various individuals, sentences that were mirrored elsewhere in other trials that took place after the Second World War.

22. Germany refused to be represented in the proceedings, invoking the jurisdictional immunity of the German State. It should be noted in this respect that in Greece there is no specific legislation on State immunity. The question is governed in a general way by Article 3, paragraph 1, of the Greek Code of Civil Procedure, which stipulates — simply — that foreigners enjoy immunity before the Greek courts, the latter interpreting that term to include States as well.

9 23. The Court of Livadia considered the case and in its judgment No. 137/1997, rendered on 25 September 1997 and published on 30 October 1997, ruled that a sum of approximately €27,362,323 should be paid to the claimants by Germany[9].

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[7] Order of 4 July 2011, para. 25.

[8] Separate opinion appended to the Order, para. 29.

[9] *Nomiko Vima*, 1999, pp. 972-975; *International Law Reports* (ILR), Vol. 129, p. 726, para. 22.

24. Before arriving at this conclusion, the Livadia judges had first examined whether they had jurisdiction, taking account of the distinction between acts *jure imperii* and acts *jure gestionis*. They concluded that Germany was not covered by jurisdictional immunity, because the acts perpetrated by the members of its armed forces were in breach of international rules of *jus cogens*. The court based this determination on the obligation incumbent upon the occupying power, under the Regulations annexed to the Fourth Hague Convention of 1907 (Art. 46), to respect the right to life, the right to property, etc. The court considered that this obligation was part of *jus cogens*. Therefore, it concluded, *inter alia*, that when a State violates the peremptory norms of international law, it tacitly waives its right to jurisdictional immunity.

25. The Livadia court also emphasized the principle "ex injuria jus non oritur", concluding that acts in breach of international law cannot give rise to a right to immunity for the State responsible.

26. Further, the Livadia court found that the applicants had *locus standi* to bring a claim for compensation. It concluded that such a step was not precluded by the London Agreement of 1953 on German External Debts, to which Greece had become a party in 1956. Under the terms of that Agreement, the consideration of claims relating to Germany's activities during the Second World War was suspended until the question of reparation was finally settled by means of a peace treaty. The Livadia court asserted that this suspension was lifted in 1990 by the Moscow Treaty (relating to the German question), the so-called "2 plus 4" instrument signed by the Federal Republic of Germany, the German Democratic Republic, France, the United States of America, the USSR and the United Kingdom.

(b) *The judgment of the Court of Cassation* (Areios Pagos)

27. Judgment No. 137/1997 of the Court of First Instance of Livadia was challenged by Germany before the Greek Court of Cassation *(Areios Pagos)* on 24 July 1998. Germany's appeal in cassation was examined by the Court's First Chamber, which, by its decision 1357/99, referred the case to the full Court. In its judgment No. 11/2000[10], rendered on 13 April and published on
10 4 May 2000, the full Greek Court of Cassation[11] upheld the Livadia judgment. The Court confirmed the distinction between acts *jure imperii* and acts *jure gestionis* and made it clear that the principle of State immunity was applicable only in the case of the former, the distinction being made on the basis of the law of the forum State, having regard, as fundamental criterion, to the nature of the act in question. The Court of Cassation affirmed that those rules, codified by the European Convention on State Immunity, had achieved the status of customary international law as confirmed by State practice.

28. The Court of Cassation went on to cite Article 11 of the said Convention, which provides that a State which has caused injury or damage cannot claim immunity in compensation proceedings instituted by the victim of the injury or damage, irrespective of whether the responsible State was acting *jure imperii* or *jure gestionis*. The only condition laid down by the European Convention is that the act or omission is linked to the territory of the forum State and that the authors of the acts or omissions were present on that territory at the time when they occurred.

29. The Court then provided evidence of the customary nature of the exception from State immunity, as provided for in a variety of national legislation, such as the 1976 Sovereign

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[10] *Nomiko Vima*, 2000, pp. 212-219; *ILR*, Vol. 129, p. 513, 4 May 2000.

[11] Comprising 20 judges and the Court's Prosecutor.

Immunities Act of the United States of America, the 1978 Sovereign Immunities Act of the United Kingdom and similar legislation adopted by Canada (1982), Australia (1985), South Africa (1981), Singapore (1979) and others. The Court of Cassation also cited the International Law Commission's draft articles on Jurisdictional Immunities of the State and their Property, and the resolution on the matter of the *Institut de droit international*. In addition, it cited the jurisprudence of the United States courts in support of its argument that there is an exception from State immunity, even when the wrongful acts were committed *jure imperii*.

30. Finally, the Court of Cassation, referring to the Regulations annexed to the Fourth Hague Convention of 1907, concluded that the criminal acts committed were "in contravention of the peremptory norms of international law", and hence in violation of the rules of *jus cogens*.

B. The approach of the Greek courts in the context of evolving international law

(a) ***The legal context of the case and the development of international law***

30.*(sic)* The reasoning behind the legal analysis of the two Greek courts and their judgments reflects the state of the debate, at both national and international level and among legal
11 commentators, relating to the development of international law in respect of State jurisdictional immunity and other closely related questions of international law, which together form a corpus, even though each component of this corpus remains and embodies a distinct issue.

31. For some time now, international law has been undergoing a significant evolution, with particular consequences, notably in respect of international responsibility, reparation for victims of human rights violations and breaches of humanitarian law and the related rights, and State immunity. It could even be said that the international law governing those matters is undergoing a transformation, not just in people's minds, but in fact and in law[12].

32. This transformation is marked in particular by the position and new role of individuals in the international legal order: individuals, holders of rights, impel States and other international actors to adopt a different approach in their practice relating to the implementation of individual rights, thus contributing to the emergence of new international norms[13]. Those same individuals, through their claims — by means of direct action before national courts or international judicial bodies — have produced a jurisprudence which frequently goes beyond the basic premises of the law as it was created or established in the past, but which no longer corresponds to the stated

[12]See A.A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* — General Course on Public International Law", Part (I), *Collected Courses of The Hague Academy (RCADI)*, Vol. 316 (2005), Chaps. IX-X, pp. 252-317 and Part (II), *RCADI*, Vol. 317 (2005), Chap. XXV, pp. 217-245.

[13]The trend concerning the new position of the individual in the international order was explained by the PCIJ in its 1928 Advisory Opinion on the Jurisdiction of the Courts of Danzig (Series B — No. 15, *Jurisdiction of the Courts of Danzig*, 1928, PCIJ), in which it found that "it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by the national courts". For his part, Hersch Lauterpacht took the view that "the position of the individual in international law cannot be unaffected by certain developments that empower individuals to protect their rights before international tribunals and impose on them duties directly under international law". See L. Oppenheim, *International Law*, p. 636 (H. Lauterpacht (ed.), 8th edition, 1955). The trend becomes the situation: see E. Roucounas, "Facteurs privés et droit international public", *RCADI*, Vol. 299 (2002) and by the same author, "The Users of International Law", in Arsanjani. Cogan, Sloane & Wiessner: *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, Martinus Nijhoff, 2011, Chap. 13; C. Bassiouni, "International recognition of victims' rights", *Human Rights Law Review*, 2006, pp. 203-279 and A. Orakhelashvili, "The position of the individual in international law", *California Western International Law Journal*, Vol. 31, 2001 pp. 241 and 245. See also D. Shelton, *Remedies in International Human Rights Laws*, OUP, Oxford, 2000.

priorities of the international community of the twenty-first century. Even the views of the Security Council demonstrate the considerable progression of the position of the individual, in particular as regards protection against violations of human rights and humanitarian law[14].

33. Without doubt, it is in the field of international human rights law, international
12 humanitarian law and international criminal law that the greatest advance can be seen. In reality, this is more than just the humanization of international law; it is a true reform of the global legal structure[15]. Evidence of this can be seen in international criminal law and in the new international criminal courts and tribunals. Reference should be made in this context to the possibility potentially deriving from Article 75 of the Statute of the International Criminal Court for individual victims to seek reparation for a violation of international humanitarian law. More importantly still, human rights treaties require States to make provision for a remedy in the event of violations[16]. At a regional level, both the Inter-American Court of Human Rights and the European Court of Human Rights have awarded reparation to victims of human rights violations, which were also violations of international humanitarian law. They have done so in respect of both international and non-international armed conflicts. Some individuals have also received reparation directly, through various procedures, in particular mechanisms established by the Security Council, inter-State agreements and unilateral acts such as national laws or the settlement of claims submitted directly by individuals to national courts[17]. The matter is also raised in the reports of the fact-finding missions dispatched by the Security Council and the Human Rights Council to areas where violations of human rights and humanitarian law are taking place, such as Darfur for example[18].

(b) *The individual right to reparation and the question of violations of international humanitarian law (IHL)*

(i) The position of the Greek courts

34. The fundamental argument in the position of the Greek courts is based on the recognition that there is an individual right to reparation in the event of grave violations of humanitarian law.

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[14]See the Security Council position: speech by Gérard Araud, President of the Security Council (10 May 2011); resolutions 1265 (1999) and 1296 (2000), which clearly confirm the Security Council's role of intervener in situations of armed conflict in which civilians are threatened or humanitarian assistance is deliberately hampered. Also see resolutions 1325 (2000), 1612 (2005), 1674 (2006), 1738 (2006), 1820 (2008), 1882 (2009), 1888 (2009) and 1894 (2009). This latter marks an important step by providing directions for the effective protection of civilians on the ground. Also see the principle of the "Responsibility to Protect" in the 2005 *World Summit Outcome Document* (60/1), paras. 138-140.

[15]See T. Meron, *The Humanization of International Law*, Nijhoff, 2006, and by the same author, "International law in the age of human rights", *RCADI*, Vol. 301, 2004, pp. 9-490.

[16]International Covenant on Civil and Political Rights, Art. 2 (3); European Convention on Human Rights, Art. 13; American Convention on Human Rights, Arts. 10 and 25; African Charter on Human and Peoples' Rights, Art. 7 (1) *(a)* (implicit).

In this connection see, *inter alia*, Karine Bonneau, "Le droit à réparation des victimes des droits de l'homme : le rôle pionnier de la Cour interaméricaine des droits de l'homme" in *Droit fondamentaux* No. 6, January 2006-December 2007, available at: http://www.droits-fondamentaux.org/ (last accessed on 1 June 2009); P. Leach, *Taking a Case to the European Court of Human Rights*, 2nd edition, OUP, Oxford, 2005, pp. 397-454.

[17]See the United Nations Compensation Commission, created by Security Council resolutions 687 (1991) and 692 (1991), which processes compensation claims for losses and damage suffered as a direct result "of Iraq's unlawful invasion and occupation of Kuwait". See F. Wooldridge and Olufemi Elias, "Humanitarian considerations in the work of the United Nations Compensation Commission", *International Review of the Red Cross* (IRRC), Vol. 85, September 2003, pp. 555-581.

[18]See the *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 25 January 2005, para. 148 (http://www.un.org/News/dh/sudan/com_inq_darfur_pdf).

13 In this regard, there are powerful arguments, as well as State practice, to support the view that IHL confers rights on individuals, including the right to be compensated for grave violations of IHL[19].

35. Thus under customary international law, States have an obligation to remedy the effects of any violations of IHL committed by them[20]. However, this gives rise to the question as to who is the beneficiary of that right to reparation.

In this respect, it cannot be argued with any seriousness that IHL — law *par excellence* aimed at protecting the individual and his rights — does not confer direct rights on individuals which are opposable to States. That notion is implicitly accepted in a series of IHL provisions[21] and explicitly accepted in the philosophy and very raison d'être of IHL[22].

36. Thus, the obligation on the State to compensate individuals for violations of the rules of humanitarian law derives directly from Article 3 of the Fourth Hague Convention of 1907, even though it is not expressly stated in that Article[23]. In this connection, account should be taken of the *travaux préparatoires* for that Convention, which confirm that the Article in question concerns

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[19]IHL aims to go "beyond the interstate levels and [to reach] for the level of the real (or ultimate) beneficiaries of humanitarian protection, i.e., individuals and groups of individuals", G. Abi-Saab, "The Specificities of Humanitarian Law", in C. Swinarski (ed.), *Studies and Essays of International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC, Geneva/The Hague, 1984, p. 269.

[20]See P. d'Argent, *Les reparations de guerre en droit international public: La responsabilité internationale des États à l'épreuve de la guerre*, Brussels, Bruylant, 2002; A. Randelzhofer and C. Tomuschat (eds.), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights*, The Hague. M. Nijhoff, 1999; P. Klein, "Responsibility for serious breaches of obligations deriving from peremptory norms of international law and UN law", *European Journal of International Law* (EJIL), Vol. 13, 2002, pp. 1241-1255.

[21]In particular: Art. 7 of the First Geneva Convention; Arts. 6 and 7 of the Second Geneva Convention; Arts. 7, 14, 84, 105 and 130 of the Third Geneva Convention; Arts. 5, 7, 8, 27, 38, 80 and 146 of the Fourth Geneva Convention; Arts. 44 (5), 45 (3), 75 and 85 (4) of the First Additional Protocol of 1977; and Art. 6 (2) of the Second Additional Protocol.

[22]In 1949, the Diplomatic Conference preparing for the adoption of the four humanitarian conventions in Geneva recognized that "it is not enough to grant rights to protected persons and to lay responsibility on the States: protected persons must also be furnished with the support they require to obtain their rights; they would otherwise be helpless from a legal point of view in relation to the Power in Whose hands they are", *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II A, p. 822. This declaration was made during a discussion on Art. 30 of the Fourth Geneva Convention.

[23]Moreover, every treaty text should be interpreted, according to Article 31 of the 1969 Vienna Convention on the Law of Treaties, as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

cases of individual claims against States for unlawful acts committed during armed conflict or belligerent occupation[24].

14 37. The right to reparation reappears in Article 91 of the 1977 Additional Protocol, the substance of which reflects customary international law[25]. Reference can also be found in Article 38 of the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1999.

38. Finally, a right to reparation for grave violations of IHL is also provided for in Rule 150 of the ICRC's codification of customary international humanitarian law[26] and confirmed in the texts of "soft law"[27].

39. The obligation on the State to compensate individuals for violations of the rules of international law is also affirmed in the International Law Commission's articles on Responsibility

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[24]Second Hague Conference, *Actes et Documents*, Vol. 3, p. 142. It is interesting to note that the proposal initially put forward to the Conference by the German delegate von Gundell, aimed at introducing two articles on the subject of compensation for victims and distinguishing the treatment of nationals of neutral States from those of enemy States, was not agreed, although the recognition of individual compensation was uncontested. See G. Aldrich, Individuals as Subjects of International Humanitarian Law, in J. Makarcyk (ed.), *Theory of International Law at the Threshold of the 21st century: Essays in Honour of Krzystof Skubiszweski*, 1996, pp. 851-859; L. Zegveld, "Remedies for victims of violations of international humanitarian law", 2003, *IRRC*, Vol. 85, p. 497 (506); C. Greenwood, International Humanitarian Law (Law of War), in F. Kalshoven, *The Centennial of the First International Peace Conference 2000*, 2000, p. 161 (250).

On the *travaux préparatoires*, see F. Kalshoven, "State responsibility for warlike acts of the armed forces", *International and Comparative Law Quarterly* (ICLQ), Vol. 40, 1991, p. 827, and also his article, "Article 3 of the Convention (IV), respecting the laws and customs of war on land", in H. Fujita, I. Suzuki and K. Nagano (eds.), *War and Rights of Individuals*, Nippon Hyoron-sha Co. Ltd. Publishers, Tokyo, 1999, p. 37. See also the opinions of E. David and C. Greenwood on the same body of work, and the analysis of P. d'Argent, "Des règlements collectifs aux règlements individuals (collectivisés) : la question des reparations en cas de violation massive des droits de l'homme", *International Law Forum du droit international*, Vol. 5, 2003, p. 10; J. de Preux, "Article 91", in ICRC (ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff, Geneva, 1986, p. 1082, No. 3656, which states that "[t]hose entitled to compensation will normally be Parties to the conflict or their nationals" (emphasis added) *[sic]*; E. David, *Principes de Droit des Conflits Armés*, 2nd edition, Brussels, Bruylant, 1999, p. 570, No. 4.27. According to T. van Boven (E/CN.4/Sub.2/1993/8 and E/CN.4/1996/17, revised on 16 January 1997 by E/CN.4/1997/104) and C. Bassiouni, the right to obtain reparation is directly conferred by international law to the victims of grave human rights violations, and those victims also hold a genuine right of access to justice, as well as a right of access to factual information on the violations; see C. Bassiouni, *Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms*, 8 February 1999, E/CN.4/1999/65; *The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, final report of 18 January 2000*, E/CN.4/2000/62. For the final version of this draft, as adopted by the UN General Assembly, see *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (UN Doc.A/RES/60/147), 21 March 2006.

[25]Y. Sandoz, C. Swinarski and B. Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987 (hereinafter the "Commentary on the Additional Protocols"), pp. 1056-1057, paras. 3656-3657.

[26]"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."

[27]See also *The Chicago Principles on Post-Conflict Justice*, 2007, by the International Human Rights Law Institute, the Chicago Council on Global Affairs, the Istituto Superiore Internazionale di Scienze Criminali and the Association Internationale de Droit Pénal; Sixty-first session of the Commission on Human Rights. In 2003, the International Law Association drafted a report on the question of "Compensation for victims of war". Having analysed the humanitarian law and the human rights law concerning the right of victims to compensation, it adopted a Declaration in 2010, Art. 6 of which provides that "[v]ictims of armed conflict have a right to reparation from the responsible parties". See also *The Hague Agenda for Peace and Justice for the 21st century*, 15 May 1999, Recommendation I, para. 17, which refers to strengthening the protection of and providing reparation for the victims of armed conflict, annexed to A/54/98, Fifty-fourth session of the General Assembly, 20 May 1999.

of States for Internationally Wrongful Acts, Article 33 (2) of which — a "savings clause" — states that it 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"[28].

(ii) International/national jurisprudence and practice in the area

40. In the case concerning the *Factory at Chorzów*, the Permanent Court of International Justice stated that a secondary right to reparation was the indispensable complement of a violation of international law[29].

This was reaffirmed by the Court in the case concerning *Reparation for Injuries Suffered in*
15 *the Service of the United Nations*[30]. The Court also addressed the rights of individuals in its Advisory Opinion on the "Wall"[31].

41. In 2004, the German Federal Constitutional Court recognized that individuals are beneficiaries of rights under IHL, but it did not accept that Article 3 entails an individual right[32].

It is interesting, however, to note that a German administrative court of appeal concluded in 1952 that Article 3 of the Fourth Hague Convention provided for an individual right to reparation[33].

42. The possibility of exercising a right deriving from IHL has been recognized by a number of national courts. In addition to the judgments of the Greek courts in the *Distomo Massacre* case, see, for example, the decisions of the *Gerechtshof Amsterdam* (Amsterdam Court of Appeal)[34], the

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[28]See J. Crawford, *The International Law Commission's Articles on State Responsibility*, CUP, Cambridge, 2002, p. 210 and the International Law Commission's articles on *Responsibility of States for Internationally Wrongful Acts*, annexed to General Assembly resolution 56/83, UN doc.A/56/49, Vol. I (Corr. 4) (ILC Articles on State Responsibility).

[29]See the judgment of the Permanent Court of International Justice (PCIJ). According to the PCIJ, any breach of an engagement (under international law) involves an obligation to make reparation: *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 29. See also the International Court of Justice (ICJ): *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, paras. 152 and 153; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, para. 259.

[30]The Court recognized that "a State seeking redress for damage inflicted upon one of its nationals, the United Nations as an international organization may claim reparation for damages not only caused to itself but also in respect of damages suffered by its agents", *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 179, para. 84 *[sic]*.

[31]In the case concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court further notes that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. It recalls the well-established jurisprudence, according to which "[t]he essential principle contained in the actual notion of an illegal act . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed". The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural and legal persons having suffered any form of material damage as a result of the wall's construction; paras. 149-154.

[32](BVerfG) 2 BvR 1379/01 of 28 June 2004, available at: http://www.bverfg.de/entscheidungen/rk20040628_2bvr137901.html.

[33]It is interesting, however, to note that a German administrative court of appeal concluded in 1952 that Art. 3 of the Fourth Hague Convention provided for an individual right to reparation, Germany, Administrative Court of Appeal of Munster, *ILR*, Vol. 19 (1952), pp. 632-634.

[34]*Gerechtshof Amsterdam*, Vierde meervoudige burgerlijke kamer, *Dedovic* v. *Kok* et al., judgment of 6 July 2000.

Hague Court of Appeal on Srebrenica[35] and the Italian *Corte Suprema di Cassazione* (Italian Supreme Court of Cassation) in the *Ferrini* case in 2004[36].

(b)(sic) ***Jurisdictional immunity of the State and its relative nature***

43. The progression from absolute jurisdictional immunity to relative immunity, and the development of the distinction between acts *jure imperii* and acts *jure gestionis*, are the result of significant developments within the inter-State international community and the establishment of international laws which addressed the needs raised by national and/or international trade. Thus it began with commercial transactions, national courts being induced to protect the rights of the individuals who were parties in those transactions. The maxim "par in parem no habet imperium" and its consequences underwent an initial restriction in practice in relation to State immunity.

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44. This evolution began with various national courts[37], followed by international instruments, such as the European Convention on State Immunity and the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004), and even national legislation[38].

45. In a second phase — the transformation of the international community from an inter-State community to a community of several international actors (States, international organizations, groups of individuals, NGOs, etc.) — the individual has become a conduit for the functioning of that community and for the implementation of international law, in particular as a legal vehicle for human rights. The human person — as an individual or a group of individuals which are the subjects of international rules, beneficiaries and user(s)[39] of international norms — now holds a much stronger position in the face of interventions by States.

46. A universal demand for a system of justice could never be furthered or satisfied by opposing State sovereignty to human rights. And it was strongly emphasized by the International Criminal Tribunal for the former Yugoslavia in the *Tadic* case that State sovereignty cannot be invoked in the case of war crimes and crimes against humanity[40].

47. A direct result of this situation is a growing pressure on States to provide the means to remove obstacles and enable victims to obtain reparation. A new perspective is emerging for individuals, as a result of the obligation on States to promote the right of reparation for victims of violations of international law that are so widespread throughout the world[41].

48. This evolution in the law on State immunity has been accepted by a number of national courts, which have reached their decisions on the basis of the current state of international law and

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[35]The Hague Court of Appeal, 5 July 2011, at: http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR0132&u_ljn=BR0132.

[36]242 *Corte Suprema di Cassazione*, *Ferrini* v. *Federal Republic of Germany* (Cass.Sez.Un.5044/04), 11 March 2004, reproduced in *Rivista di diritto internationale*, Vol. 87 (2004), p. 540.

[37]See, for example, the Counter-Memorial of Italy, p. 45 *et seq*.

[38]See the references in the Memorial of Germany and the Counter-Memorial of Italy.

[39]See E. Roucounas, *Facteurs privés . . ., op. cit*.

[40]Tadic appeal decision on jurisdiction, para. 58.

[41]See the preamble to General Assembly resolution 60/147, UN doc. A/RES/60/147 (16 Dec. 2005).

its development. It is against this background that the *Distomo Massacre* case (see below) has to be viewed, where two Greek courts, the Court of First Instance of Livadia and the Court of Cassation, rendered judgments precisely in light of what they considered to be the law, at this stage in the development of international law, in particular as regards the application of the principle of State immunity.

49. For its part, the European Court of Human Rights explained its position on the subject of developments in the area in its judgments in *Al-Adsani* v. *United Kingdom* (21 Nov. 2001),
17 *Kalogeropoulos* v. *Greece and Germany* (12 Dec. 2002) and *Grosz* v. *France* (16 June 2009), of which the latter two concerned the commission of grave violations of international humanitarian law during the Second World War. The *Kalogeropoulos* case was a continuation of the *Distomo Massacre* case. The Strasbourg court found that, even though its conclusions were true, "at least as regards the current rule of public international law," they did not preclude a development in customary or conventional international law in the future *(Grosz)*.

(d) *The Question of* Jus Cogens

50. The most fundamental question regarding the application of the principle of State immunity, and one that is closely linked with that of individual reparation, concerns the rules of *jus cogens*.

51. In effect, as the Greek courts held in the *Distomo Massacre* case, if peremptory international rules have been violated, the jurisdictional immunity of the State responsible for such violations cannot be invoked. Thus victims of serious violations of human rights and humanitarian law wishing to seek reparation before a national court should not be faced with the obstacle of State immunity.

52. The International Law Commission's articles on the international responsibility of States provide an authoritative reference. Article 40 provides for more serious consequences for breaches of *jus cogens* rules, which include serious violations of international humanitarian law.

53. The approach whereby the rule of State immunity does not take precedence over a *jus cogens* rule would appear to suggest an *opinio juris* crystallizing as a new customary norm in this area[42]. The declarations made by three States ratifying the Convention on Jurisdictional Immunity[43], in which they state that the latter instrument is without prejudice to any future international development in the protection of human rights, reflect this view.

54. Independently of the interpretations and arguments as to the relationship between *jus cogens* rules and State immunity rules — in respect of their hierarchy or priority, or whether such acts (international crimes) fall outside the area of State sovereignty or constitute an implied waiver of sovereignty — the fact of the matter remains that a rule of *jus cogens*, by its nature and content, prevails over any other international rule. The attempt to draw a distinction between a *jus cogens* rule (substantive rule) and a State immunity rule (procedural rule) has no logical or, still less, legal
18 relevance, if all the relevant matters addressed above — and all the discussions within the

[42]In this respect, see the Dissenting Opinion of Judge Rozakis et al., paras. 1-2, in the case of *Al-Adsani* v. *the United Kingdom* (21 November 2001).

[43]See the declarations by Norway, Sweden and Switzerland at: http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en.

international community — are taken into account[44]. In this context, the *jus cogens* rule is part of a "custom-generation process"[45]. If, on the other hand, the procedural rule (jurisdictional immunity) were to take precedence over the substantive rule *(jus cogens)*, it would produce an untenable legal situation, inconsistent with the purpose and *ratio* of the primary substantive *jus cogens* rule, which would be violated without achieving its goal.

55. In the *Ferrini* case, the Italian Supreme Court relied on *jus cogens* not as a rule of *jus in bello*, but rather as a means of underlining the seriousness of the acts committed by a third State which might justify the denial of immunity. We would thus stress the fact that the crimes in question are so serious — crimes against humanity, both at the time and today — that they justify the refusal to grant immunity[46].

56. Such an interpretation reflects a widely held view, as well as the emergence of a new situation in this sensitive area, involving the international responsibility of the State, the individual's right to reparation for violations of international humanitarian law and State immunity. A refusal to apply *jus cogens* in the face of the rule of jurisdictional immunity of the State would in practice result in impunity for States which have committed atrocities[47]. Such a conclusion does not merit the support of any actor on the international scene today and would jeopardize all of the progress made within the international community.

C. The judgment of the Special Supreme Court (SSC) in the *Margellos and Others* case

57. The *Margellos and Others* case is not mentioned in the Court's Order, but it is cited or emphasized by Germany[48] in its written pleadings in the principal proceedings. The *Margellos and Others* case is based on events similar to those in the *Distomo* case, which took place in Lidoriki in
19 the Fokis region of Central Greece[49]. Pursuant to the request of the First Chamber of the Court of Cassation and in accordance with Article 100 of the Greek Constitution, the Special Supreme Court was asked to determine whether there was a norm in customary international law whereby, in the case of wrongful acts which violated peremptory international rules, there is an exception to the jurisdictional immunity of a State. Having examined the case law of various national courts, as well as that of the European Court of Human Rights in the *McElhinney* v. *Ireland* and *Al-Adsani* v. *the United Kingdom* cases, and the 1972 European Convention, the Court concluded that, notwithstanding the fact that a trend was emerging, it was not in a position to confirm the existence of an emerging international norm which would allow an exception to the jurisdictional immunity of the State in the event of crimes perpetrated by the armed forces of a State in violation of *jus cogens* international obligations. Judgment 6/2001 was rendered by the barest majority of six votes

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[44]See *Ferrini*, decision No. 5044/2004, at 669, para. 9.1.

[45]See C. Focarelli, "Promotional *Jus Cogens*: A Critical Appraisal of *Jus Cogens'* Legal Effects", 77 *Nordic J. of Int'l L.* 429, 457 (2008).

[46]"For the Court, the characterization of *jus cogens* appears to be one element which supports 'the priority status, which . . . now attaches to the protection of fundamental human rights over and above the protection of States interests through the recognition of immunity from foreign jurisdiction'." See *State Immunity and the Promise of* Jus Cogens.

[47]See Judge Rozakis, dissenting opinion in the *Al-Adsani* case of 21 November 2001; see also ICJ *Arrest Warrant* case, *supra* note 13, *I.C.J. Reports 2002*, p. 25, para. 60: "The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* with respect of any crimes they might have committed, irrespective of their gravity."

[48]Germany's Memorial, 12 June 2009, para. 65 and Germany's Reply, 5 October 2010, para. 7.

[49]Greece was one of the worst affected countries in the Second World War, with an unusually high loss of life in relation to the size of the population, but also because of the civilian massacres frequently perpetrated by the German occupying army. Massacres similar to those in Distomo and Lidoriki were committed in 88 locations by German troops, one of the worst being in Kalavrita in the northern Peloponnese.

to five. The minority, in its dissenting opinion, endorsed the arguments of the Court of Cassation *(Areios Pagos)* discussed above and insisted that the existence of an emerging customary norm of international law barred the application of State immunity in that case.

58. Under Article 100 of the Greek Constitution of 1975, the Special Supreme Court has a dual role. Firstly, if there is a difference of opinion between two of the country's highest courts regarding the validity of a rule of law, the Special Supreme Court carries out a constitutional review in order to rule on and clarify the situation from a constitutional standpoint. It can also declare that a generally accepted rule of international law (customary law under Article 28 (1) of the Constitution) is applicable in a particular case. This second aspect of the Special Supreme Court's jurisdiction rarely comes into play. Nevertheless, the Special Supreme Court "is a special court rather than hierarchically supreme"[50], which does not necessarily share the same characteristics as courts of law in other countries, whose acts or decisions take clear precedence within the national legal order. It is only partially a constitutional court, which, moreover, does not have jurisdiction to receive individual applications challenging the constitutionality of a legal rule in force.

59. In the light of this legal situation, and particularly as regards the "identification" of an international customary rule in a particular case, it should be emphasized that the judgment rendered in *Margellos and Others* in 2002, by a bare six-to-five majority, and its impact on the Greek legal order, certainly raises questions. This is especially so given that the Special Supreme Court concluded in its judgment that

> "in the present state of development of international law, there is no generally accepted rule which, as an exception to the rule of sovereign immunity, would allow proceedings to be brought against a foreign State before the courts of another State, relating to a claim for compensation for wrongful acts committed in the forum State in which the armed forces of the defendant State were involved — in whatever manner and whether in time of war or of peace"[51].

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However, the argument — namely the finding that international law is still developing — is there, even in the reasoning of the majority (six members) of the Special Supreme Court, whereby the current state of development of the law — as at the time of the judgment — was not such as to enable the Court to hold that a new norm had been established in that area. This goes without saying for the minority (five members) of the Special Supreme Court.

Such a nuanced approach, allowing for the development of international law in this area — given the contrary position taken by the Court of Cassation in the *Distomo* case, as well as the changes emerging in international law and at the national level (Italian courts) — in fact leaves the question open.

IV. BY WAY OF CONCLUSION

60. Under these circumstances, it is for the Court to give an authoritative answer on the questions which are raised in these proceedings and which are at the heart of the problems faced by the Greek courts in the *Distomo* case.

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[50] See J. Iliopoulos-Strangas, *Les Décisions de la Cour Spécial Suprême Grecque et Leur Mise en Oeuvre*, available at: http://www.tribunalconstitucional.ad/docs/coloqui_justicia/10-JULIA%20ILIOPOULOS.pdf.

[51] Paras. 14-15.

61. The Greek Government considers that the effect of the judgment that the ICJ will hand down in this case concerning the jurisdictional immunity of the State will be of major importance to the Italian legal order and certainly to the Greek legal order. Thus Article 28 of the Greek Constitution states:

> "1. The generally recognized rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law."

Through this provision in the Greek Constitution, customary international law can be applied directly by the Greek courts. It is also clear from this provision in the Constitution that, as customary law evolves, its state of development must be identified and applied by the Greek courts in each particular case.

62. Further, an ICJ decision on the effects of the principle of jurisdictional immunity of States when faced with a *jus cogens* rule of international law — such as the prohibition on violation of fundamental rules of humanitarian law — will guide the Greek courts in this regard. It will thus have a significant effect on pending and potential lawsuits brought by individuals before those courts.

63. Moreover, the Greek Government considers that the legal analysis in the *Distomo Massacre* case, and the interpretation given to the development of international law, reflect a
21 widely held view, and the emergence of a new situation in this sensitive area involving the international responsibility of the State, the individual's right to reparation for violations of international humanitarian law and State immunity. A refusal to apply *jus cogens* in the face of the rule of jurisdictional immunity of the State would in practice result in impunity for States which have committed atrocities. Such a conclusion at the present time would moreover risk jeopardizing all of the progress that has been made within the international community.
