INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

JURISDICTIONAL IMMUNITIES OF THE STATE

(GERMANY V. ITALY)

GREEK INTERVENTION

ANNEXES

TO
GERMANY'S COMMENTS

ON THE GREEK DECLARATION
OF 3 AUGUST 2011

26 AUGUST 2011

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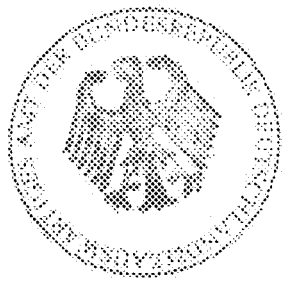
Certification

The Government of the Federal Republic of Germany hereby certifies that the documents contained in the annexes are true copies of the original documents and that the translations into any official language of the Court provided by the Government of Federal Republic of Germany are accurate.

Berlin, 26 August 2011



Annex 1

Deuxième Conférence Internationale de la Paix, La Haye 15 Juin-18 Octobre 1907, Actes et Documents, Tome III, La Haye 1907, 247

Annexe 13.

PROPOSITION DE LA DÉLÉGATION D'ALLEMAGNE

De l'indemnisation pour violation du Règlement de 1899 concernant les lois et coutumes de la guerre sur terre (Annexe I).

Article 1.

La Partie belligérante qui violera les dispositions de ce Règlement, au préjudice de personnes neutres, sera tenue de dédommager ces personnes du tort qui leur a été causé. Elle sera responsable de tous actes commis par les personnes faisant partie de sa force armée.

La fixation du dommage causé et de l'indemnité à payer, à moins qu'une indemnisation immédiate en espèces n'ait été prévue, pourra être remise à plus tard, si la Partie belligérante estime que cette fixation est incompatible, pour le moment, avec les opérations militaires.

Article 2.

En cas de violation au préjudice de personnes de la Partie adverse, la question de l'indemnisation sera réglée par le traité de conclusion de la paix.

Annexe 14.

PROPOSITION DE LA DÉLÉGATION DE BELGIQUE.

Amendement au Règlement de 1899 concernant les lois et coutumes de la guerre sur terre (Annexe I).

Articles 44 et 44a.

Remplacer l'article 44 (quelle que soit la place qu'on lui assigne) et l'article 44a proposé par la Délégation des Pays-Bas par le texte suivant :

Il est interdit de forcer les habitants d'un territoire occupé à prendre directement ou indirectement, collectivement ou individuellement, une part quelconque aux opérations militaires contre leur pays et d'exiger d'eux des renseignements en vue de ces opérations.

Annex 2

The Proceedings of the Hague Peace Conferences, The Conference of 1907, Acts and Documents, Volume III, New York 1921, 139

here with neutral subjects but with neutral States upon whom obligations
[144] are imposed concerning belligerents interned in their territory. For this reason this question would appear to be entirely in place in the Regulations of 1899.

The President remarks that it is not a question of a law of war but of obligations of neutral States. Moreover, the question seems to come within the province of the committee of examination.

This is also the view of his Excellency Mr. van den Heuvel, who thinks that the same applies to the following articles, and that if a new place is assigned to Article 57 the same should be done in the case of Articles 58, 59 and 60.

The President declares that the committee of examination will take this into consideration.

The President announces that since the formation of the committee of examination a new amendment has been deposited by the German delegation relative to indemnification for violation of the Regulations respecting the laws and customs of war on land.[1] This amendment is worded as follows:

ARTICLE 1

A belligerent party which shall violate the provisions of these Regulations to the prejudice of neutral persons shall be liable to indemnify those persons for the wrong done them. It shall be responsible for all acts committed by persons forming part of its armed forces.

The estimation of the damage caused and the indemnity to be paid, unless immediate indemnification in cash has been provided, may be postponed, if the belligerent party considers that such estimate is incompatible, for the time being, with military operations.

ARTICLE 2

In case of violation to the prejudice of persons of the hostile party, the question of indemnity will be settled at the conclusion of peace.

This proposition, which is very interesting inasmuch as it tends to give sanction to requirements which at present have none, is composed of two parts:

The first concerns neutral persons and declares that they must be indemnified for wrong done them by persons forming part of the armed forces of a belligerent State. There is right and obligation, but no right is stipulated for the wrong done "persons of the hostile party"; it is said only that the *questions* which concern them must be settled at the conclusion of peace. Perhaps it would be preferable to omit the words "the questions" or better to make only one article instead of two. I permit myself to suggest further that the wording might be slightly improved: "*persons of the hostile party*" is perhaps not very correct and the words "*may be postponed*" are very vague.

Major General von Gündell takes the floor and explains the German proposition as follows:

I shall take the liberty of stating in a few words the reasons for the German proposition, which aims to complete the Regulations respecting the laws and customs of war on land by the addition of provisions dealing with the case of infraction of the Regulations.

One might perhaps question the necessity of providing for such a case on

[1] Annex 13.

Annex 3

Federal Court Rio de Janeiro, Judgement of 9 July 2008,
Ordinary Proceedings Number 2006.5101016944-1,
Barreto v. Federal Republic of Germany

Translation

The Judicial Branch
The Federal Courts
Rio de Janeiro Judicial District

No. 21 Court District
Ordinary Proceedings No. 2006.5101016944-1
Plaintiff: Araci Barreto
Defendant: Federal Republic of Germany

Judgment
(Type C)

The case concerns an action brought by Araci Barreto against the Federal Republic of Germany in which, in brief, she was seeking compensation for loss and damage caused by the defendant.

The plaintiff states that she was the daughter-in-law and sister-in-law of two members of the crew of the fishing vessel CHANGRI-LÁ which was torpedoed in July 1943 by a German submarine whilst in Brazilian territorial waters.

The initial petition was made in the documents contained in Folios 66/168.

Amendment contained in Folios 173/174.

Having examined the case file, I now decide as follows.

In matters such as the above, the [Superior Court of Justice] *Superior Tribunal de Justiça* has ruled – in my opinion correctly – as follows:

Ordinary appeal No. 66 – RJ (2008/0042275-3)
Rapporteur: Ministro Fernando Gonçalves
Appellant: Antônio Apúlio Aguiar Continho and others
Counsel: Luiz Roberto Leven Siano and another/others
Respondent: Federal Republic of Germany

The Judicial Branch
The Federal Courts
Rio de Janeiro Judicial District

Summary

International law. Action for compensation. Victim of act of war. Foreign state. Absolute immunity.

1. Immunity from jurisdiction relating to public acts [*acta jure imperii*] is absolute and does not allow of exceptions. Precedents in the case-law of the Superior Court of Justice and the [Federal Supreme Court] *Supremo Tribunal Federal*.

2. Unfortunately, there are no means of bringing the Federal Republic of Germany before the national courts in order to respond to an action seeking compensation for material and immaterial loss or damage, as a result of a public act by that country, consisting of the sinking of a fishing vessel off the coast of Cabo Frio – Rio de Janeiro by a Nazi submarine in 1943 during the Second World War.

3. Ordinary appeal examined and not admitted.

Consequently, the action for which damages are being sought is a public act and it therefore has to be accepted that the defendant enjoys immunity from jurisdiction.

Of course, the defendant could in theory choose to allow prosecution of the case to proceed by waiving its prerogatives as a sovereign State. However, we have no knowledge that this has ever occurred, from which we must conclude that the Federal Republic of Germany has NEVER permitted the Brazilian courts to hear any claim for reparations for acts of war.

For example, in addition to the case referred to in the above Summary, we would also cite Cases No. 2006.51.01.000.310-1 and No. 2006.51.01.000350-2, in which, in the same way, the defendant chose not to submit to the jurisdiction of the Brazilian courts when a claim for compensation was filed in connection with the sinking of the CHANGRI-LÁ.

A civil process is eminently purposive in nature. Consequently, everything points to the fact that an application which clearly does not have the slightest possibility of success, as in the case under examination here, should not be admitted.

After considering these points – and to repeat the obvious – I consider that it is unreasonable to submit the plaintiff to the emotional and financial costs of proceedings which will simply result in a disappointing decision, which was already foreseeable from the start [*ab ovo*].

On the basis of the above, I hereby terminate the case pursuant to Article 267 (IV) of the [Code of Civil Procedure] *Código de Processo Civil*, without costs or fees.

As the time limit for the submission of pleas has elapsed without any pleas being submitted [*in albis*], I now close the case and remit the proceedings.

And order this Decision to be published, placed on the record and notified.

Rio de Janeiro, 9 July 2008

[signature]

Hudson Targino Gurgel
Deputy Federal Judge
in my capacity
as Head of No. 21 Judicial District

Annex 4

District Court Tel Aviv-Yafo, Decision of 31 December 2009,
Case 2143-07, *Orith Zemach et al. v. Federal Republic of Germany*

Translation

District Court in Tel Aviv-Yafo

Probate Case 2143-07 Orith Zemach et al. **31 December 2009**
v. Federal Republic of Germany

Application No. 1

The Claimant **Orith Zemach & Others**

v.

The Respondent **Federal Republic of Germany**

Present:
For the claimant, Advocate Erez Itzhaki
For the State Attorney-General, Advocate Carmit Ben-Eliezer and Advocate Tamar Kaplan from the Ministry of Foreign Affairs

DECISION

In view of the fact that the Federal Republic of Germany enjoys foreign sovereignty immunity, it will not be possible to consider the claim on its merits – either as an ordinary or as a representative action.

Therefore, the plaintiffs shall take the necessary measures to drop the claim and the application to confirm the action as a representative action and the fee shall be refunded to them in accordance with the regulations.

The case, at this stage, has been set for internal reminder on 15.2.10. By that time, the plaintiffs shall submit the appropriate applications.

Issued and announced this day, 14 Tevet 5770, 31/12/2009 in the presence of those attending.

Hagai Brenner 54678313

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Hagai Brenner, Judge
Tel Aviv-Yafo District Court Recorder

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Annex 5

Polish Supreme Court, Decision of 29 October 2010,
File ref. IV CSK 465/09,
Natoniewski v. Federal Republic of Germany

Translation

File ref. IV CSK 465/09

DECISION

29 October 2010

The Supreme Court composed of:

The President of the Supreme Court Tadeusz Ereciński (Chair)
Supreme Court Justice Mirosława Wysocka
Supreme Court Justice Kazimierz Zawada (Rapporteur)

Recorder: Izabela Czapowska

in the claim for compensation brought by Winícjusz Natoniewski
against the Federal Republic of Germany/Office of the Federal Chancellor (Berlin),
after hearing the plaintiff's appeal for cassation
of the Gdańsk Appeal Court's decision of 13 May 2008,
file ref. no I ACz 595/08,
in the Civil Chamber on 29 October 2010,

dismisses the appeal for cassation.

Grounds

In his legal action of 29 October 2007 against the Federal Republic of Germany/Office of the Federal Chancellor, Winicjusz Natoniewski sought payment by the defendant of the sum of 1,000,000 zloty as compensation for injury suffered in the course of the pacification of Szczecyn, a village in the province of Lublin, by the German armed forces during the Second World War. In the course of the said pacification, which took place on 2 February 1944, people were deported, executions were carried out, buildings were burned and property looted. Several hundred of the village's inhabitants lost their lives. According to the terms of his legal action, the plaintiff, then a six-year-old child, suffered numerous extensive burns to the head, chest and arms as a result of acts perpetrated by the armed forces, with painful consequences from which he suffers to this day.

By decision of 8 November 2007, the Regional Court dismissed the action without serving it on the defendant on the grounds that the matter did not come within national jurisdiction. Recognizing Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 2001, p. 1 – hereinafter "Regulation No 44/01") as the basis for judging national jurisdiction in the matter raised by the plaintiff and accepting, with reference to the judgment of the Court of Justice of the European Union of 15 February 2007 in *Lechouritou et al. v Federal Republic of Germany* (European Court Reports 2007, p. I-01519 – hereinafter "judgment in *Lechouritou et al.*") delivered pursuant to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on 27 September 1968 (consolidated version: OJ C 27, 1998, p. 1 – hereinafter "the Brussels Convention") but consistent with current legislation as embodied in Regulation No 44/01, that the matter in hand, like the matter on which the aforementioned Court judgment was delivered, was not a civil matter within the meaning of Article 1.1 of Regulation No 44/01, the Regional Court invoked the absence of any legal provision giving a Polish court competence to deal with the matter.

The Regional Court attempted to serve the decision of 8 November 2007 and the plaintiff's appeal against that decision on the defendant in the manner prescribed by Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ L 160, 2000, p. 37 – hereinafter "Regulation No 1348/00"). However, after noting that its attempted service had

been ineffective, the Court abandoned any further action aimed at serving the relevant documents on the defendant.

The plaintiff's appeal against the Regional Court's decision of 8 November 2007 was dismissed by the Appeal Court by decision of 13 May 2008. The Appeal Court shared the view underlying the contested decision. In its opinion, that view was supported by the interpretation contained in the judgment in *Lechouritou et al.*

The Appeal Court attempted to serve the decision of 13 May 2008 and the plaintiff's appeal for cassation of that decision in the manner prescribed by the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters signed at The Hague on 15 November 1965 (Journal of Laws No 87/2000, item 968). However, when this attempt failed because the authorities of the defendant state claimed that the matter lay outside the scope *ratione materiae* of the said Convention as defined in Article 1.1 thereof, the Appeal Court attempted to serve the documents in question on the defendant state through the diplomatic channel, i.e. it transmitted them to the Ministry of Foreign Affairs of the Federal Republic of Germany through the intermediary of the Embassy of the Republic of Poland in Berlin. The Ministry, however, returned the correspondence with a verbal note that, notwithstanding the correctness of the Appeal Court's decision, such service breached the jurisdictional immunity of the Federal Republic of Germany since the matter fell within the sphere of *acta iure imperii*, i.e. acts of state sovereignty.

In his appeal for cassation of the Appeal Court's decision of 13 May 2008, the plaintiff put forward the following grounds: breach of Article 1 in conjunction with Article 5.3 of Regulation No 44/01 by the ruling that matters invoked in a legal action brought by a natural person against a foreign state for compensation for damage resulting from acts perpetrated by the armed forces of that state are not civil matters within the meaning of the said Regulation; breach of Article 1096 of the Polish Code of Civil Procedure (hereinafter "CCP") by the ruling that the provisions of the CCP did not apply to the case in hand; and breach of Article 385 in conjunction with Article 1103 pt 3 CCP by the incorrect interpretation that national jurisdiction did not exist in the matter and the consequent unjustified dismissal of the plaintiff's appeal against the Regional Court's decision of 8 November 2007. In the plaintiff's opinion, the existence of national jurisdiction in the matter is shown specifically by the Supreme Court's decision of 7 November 2007, I CO 29/07 (unpublished). That decision designated the court competent to hear an analogous case against the Federal Republic of Germany pursuant to Article 45 CCP, and a condition for the application of Article 45 CCP is the existence of national jurisdiction.

Delivering an opinion on the case pursuant to Article 398^8 § 1 CCP, the Attorney General expressed the view that the appeal for cassation should be dismissed.

Responding to the Supreme Court's decision of 22 December 2009 in a written communication of 26 February 2010, the Ministry of Justice provided information, pursuant to Article 1116 CCP, concerning international legal acts, the practice of states and the case law of international courts with a view to determining the norms of customary international law applying to state immunity.

The Supreme Court deliberated as follows:

In examining the appeal for cassation, the Supreme Court raised of its own motion the question of the invalidity of the proceedings (Article 398^{13} § 1 CCP). One reason for the invalidity of proceedings is that a party has been deprived of the possibility of defending its rights (Article 379 (5) CCP). Such deprivation may result, inter alia, from negligence in regard to the service of judicial or procedural documents.

Having regard to the obligation imposed by Article 398^{13} § 1 CCP to raise of its own motion the question of the invalidity of the proceedings, the first issue which the Court had to consider in this case was whether the defendant had been deprived of the possibility of defending its rights as a result of the lack of proper service of judicial or procedural documents. The question that needed to be answered, above all, was whether service on the defendant of the Appeal Court's decision dismissing the appeal, and of the plaintiff's appeal for cassation of that decision, through the diplomatic channel constituted effective service. The obligation to serve the decision dismissing the appeal derives from Article 387 CCP, whereas the obligation to serve the appeal for cassation derives from Article 398^{7} CCP.

Poland is not a party to the European Convention on State Immunity signed at Basel on 16 May 1972 (Annex 1b to the Ministry of Justice's communication of 26 February 2010 – hereinafter "Basel Convention"), which provides for the service of specified documents in proceedings against a foreign state through the diplomatic channel with the result that service of such documents is deemed to have been effected by their receipt by the ministry of foreign affairs of the defendant state (Article 16.2 and 16.3), while the United Nations Convention of 2 December 2004 on Jurisdictional Immunities of States and Their Property (Annex 3b to the Ministry of Justice's communication of 26 February 2010 – hereinafter "UN Convention"), which contains a similar provision (Article 22.1.i and 22.2), has not yet entered into force. The CCP, on the other hand, contains no provision whatever concerning the manner of service of judicial and procedural documents on a foreign state. At the present time, § 28.1 of the Ministry of Justice's regulation of 28 January 2002 on court action in international civil and criminal proceedings in international relations, in the version in force since 23 December 2009 (Journal of Laws No 17, item 164, as amended) could constitute the legal basis for service of such a document by a Polish court through the diplomatic channel, but neither that

provision nor any other provision of the said regulation specifies the consequences of refusal by the ministry of foreign affairs of a defendant state to accept the served document.

The service on the defendant of the Appeal Court's decision dismissing the appeal and the plaintiff's appeal for cassation of that decision through the diplomatic channel must nevertheless be deemed to have been effective upon receipt of the transmitted documents by the Ministry of Foreign Affairs of the Federal Republic of Germany. To take the opposite view would make continuation of the judicial proceedings dependent on a decision of the defendant state, and that is unacceptable because at the present time states are accorded the protection of immunity from the jurisdiction of foreign courts – as discussed in detail below – not in all cases but only in a specified category of cases. The transmission of a letter to the defendant state in the manner discussed fully fulfils the aims of the institution of the service of documents in civil proceedings. Under international public law, a state's minister of foreign affairs has full powers to represent that state in its external relations (see Article 7.2(a) of the Vienna Convention on the Law of Treaties signed on 23 May 1969 (Journal of Laws 1990, No 74, item 439). The transmission of a letter to the ministry of foreign affairs therefore ensures that the defendant state receives knowledge of proceedings under way and is able to take action to defend its rights. It must be emphasised that the service of judicial and procedural documents on a defendant state through the diplomatic channel is widely accepted in international practice, as confirmed not only by the international agreements on state immunity referred to above (Basel Convention and UN Convention) but also by national legislation (e.g. Section 12.1 of Britain's State Immunity Act 1978 – Annex 12 to the Ministry of Justice's communication of 26 February 2010, Section 24 of Australia's Foreign States Immunities Act 1985 – Annex 15 to the Ministry of Justice's communication of 26 February 2010, and Section 13.1 of South Africa's Foreign States Immunities Act 1981 – point II of the Ministry of Justice's communication of 26 February 2010).

The next issue to be settled in connection with the court's obligation to raise of its own motion the question of the invalidity of the proceedings in examining the appeal for cassation are the consequences of failure to serve on the defendant the legal action, the decision of 8 November 2007 dismissing the action, and the plaintiff's appeal against that decision.

The view expressed in the literature that a state's entitlement to jurisdictional immunity does not preclude service of a copy of the legal action on that state should be accepted (precisely in the light of international public law on the matter, as follows from the argument set out below). Moreover, adoption of the opposite view – as happened in the present case – that a legal action brought under Article 1099 CCP can be dismissed without being served on the defendant did not release the Regional Court from its obligation under Article 357 § 2 CCP to serve a copy of the decision dismissing the action on both parties (see

Supreme Court judgment of 28 March 1955, I CO 18/55, OSNCiK 1955, No 4, item 66). The obligation to serve the plaintiff's appeal against the decision on the defendant derives from Article 395 § 1 CCP.

The attempt to serve the decision of 8 November 2007 dismissing the action and the plaintiff's appeal against that decision on the defendant pursuant to Regulation No 1348/00 was incorrect. The said regulation applied only in civil and commercial matters (Article 1.1), whereas, in accordance with the interpretation given in the judgment in *Lechouritou et al.*, a legal action brought by natural persons in an EU Member State against another EU Member State for compensation in respect of loss or damage suffered as a result of acts perpetrated by armed forces in the course of warfare in the territory of the first State does not come into that category.

Thus the Regional Court failed effectively to serve on the defendant not only the legal action itself but also the decision dismissing the action and the plaintiff's appeal against that decision, and the Appeal Court accepted this. There are nevertheless no grounds for maintaining that the defendant was deprived of the possibility of defending its rights within the meaning of Article 379 (5) CCP. A judgment as to whether a party has been deprived of the possibility of defending its rights must be based on the specific circumstances. There can be no question of the invalidity of proceedings on that ground unless there has been a breach of procedural law such as to substantially affect the possibility of action of a party to the proceedings in the specific circumstances of the case. This rules out invalidity of the proceedings on the ground referred to where the party concerned fails to make use of an available possibility of defending its rights (see, for example, Supreme Court judgments of 23 June 2004, V CK 607/03, LEX No 194103, and 8 March 2002, III CKN 461/99, unpublished). In view of the defendant's behaviour in the instant case, it cannot be maintained that the shortcomings concerning the service of documents which have been discussed were the real cause of the defendant's failure to act in the proceedings. It follows unequivocally from the abovementioned verbal note of the Ministry of Foreign Affairs of the Federal Republic of Germany that in such cases as the present the mere service of judicial and procedural documents on the defendant state is considered by the Federal Republic of Germany as a breach of state jurisdictional immunity. The content of the said note permits the assumption, with a probability bordering on certainty, that even if the Regional Court had effected service through the diplomatic channel, the documents transmitted would have been returned and the defendant would not have taken part in the proceedings.

Since there was no basis for declaring the proceedings invalid on the ground that the defendant had been deprived of the possibility of defending its rights, the Supreme Court went on to examine the grounds for cassation put forward by the plaintiff.

Pursuant to Article 91.3 of the Constitution, Regulation No 44/01 invoked in the appeal for cassation takes precedence over national laws. Naturally, the precedence of Regulation No 44/01 over national laws comes into consideration only when the matter in hand falls within the scope of the said Regulation. Its scope ratione materiae is defined positively by the first sentence of Article 1.1, which provides that the Regulation shall apply in civil and commercial matters. This provision reiterates the first sentence of Article 1.1 of the Brussels Convention and is thus, like most of the provisions of Regulation No 44/01, an expression of continuity with the provisions of the said Convention (see recitals 5 and 19 of the preamble and Article 68 of the Regulation). For that reason the case law of the Court of Justice of the European Union concerning Article 1.1 of the Brussels Convention remains fully applicable. Advocating an autonomous definition of the phrase "civil and commercial matters" independent of the meanings attributed to it in individual Member States, the Court of Justice of the European Union holds that the question whether a matter is civil or commercial is decided by the nature of the legal relationship which has given rise to the dispute: see judgment of 21 April 1993 in *Volker Sonntag v Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann*, European Court Reports 1993, p. I-01963 and the rulings invoked by P. Grzegorczyk, P. Rylski and K. Weitz in "Przegląd orzecznictwa Europejskiego Trybunału Sprawiedliwości z zakresu europejskiego prawa procesowego cywilnego (2003-2008)" ("Review of the case law of the European Court of Justice in the field of European civil procedural law"), *Kwartalnik Prawa Prywatnego* (Private Law Quarterly) 2009, No 3, p. 755. Starting from that premise, in the judgment in *Lechouritou et al.* to which reference has already been made, it replied in the negative to a question referred by the Greek appellate court relating to a German wartime massacre in the village of Kalavrita, as to whether actions for compensation which are brought by natural persons against a defendant state as being liable under civil law for acts or omissions of its armed forces fall within the scope ratione materiae of the Brussels Convention where those acts or omissions occurred during a military occupation of the plaintiffs' state of domicile following a war of aggression on the part of the defendant, are manifestly contrary to the law of war and may also be considered to be crimes against humanity. Thus the European Court of Justice did not consider such actions for compensation to be civil matters within the meaning of Article 1.1 of the Brussels Convention, nor, by the same token, within the meaning of Article 1.1. of Resolution 44/01, i.e. as matters falling previously within the scope ratione materiae of the Brussels Convention and now within that of Regulation 44/01. In the view of the Court of Justice, military operations conducted by Germany during the Second World War were emanations of state sovereignty inasmuch as they were decided upon in a unilateral and binding manner by the competent public authorities and were linked to the state's foreign policy; given the wording

of the provision in question, the lawfulness or unlawfulness of state action has no bearing on this interpretation. The Court of Justice further grounded its judgment on other legal acts in the field of European civil procedural law, namely Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004 L 143, p. 1) and Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ 2006 L 399, p. 1), both of which (in the second sentence of Article 1.1 and the second sentence of Article 2.1 respectively) explicitly exclude liability of the state for acts and omissions in the exercise of state authority (*acta iure imperii*), irrespective of whether such acts or omissions are lawful.

The Appeal Court was thus right to follow in the footsteps of the Regional Court and hold that the interpretation given in the judgment in *Lechouritou et al.* remained applicable – also on the basis of Article 1.1 of Regulation No 44/01 – in the circumstances of the instant case. The courts of the Member States should apply European Union law in conformity with the interpretation of the Court of Justice of the European Union rendered in response to questions referred to it. The plea raised in the appeal for cassation that the contested decision breached Article 1 in conjunction with Article 5.3 of Regulation No 44/01 by ruling that the matter invoked by the plaintiff was not a civil matter within the meaning of that Regulation is therefore unfounded. In this respect, the appeal for cassation contains no arguments whatever that might incline the Supreme Court to request the Court of Justice pursuant to Article 267 of the Treaty on the Functioning of the European Union (hereinafter "the TFEU") to give a ruling on a further question on the interpretation of the term "civil and commercial matters" used in the first sentence of Article 1.1. of Regulation No 44/01.

From its correct ruling that Regulation No 44/01 was inapplicable to the matter in hand, the Appeal Court, like the Regional Court, drew the wrong conclusion, to wit that the said ruling in itself precluded any jurisdiction of Polish courts in the matter. Since Regulation No 44/01 was inapplicable to this matter, the support of national jurisdiction for the international agreement was also irrelevant, and what remained to be considered was whether national jurisdiction exists in the matter by virtue of national legislation. The basis for a ruling on this point must necessarily be the Code of Civil Procedure in the version preceding the Law of 5 December 2008 on Revision of the Code of Civil Procedure and Other Legislation (Journal of Laws No 234, item 1571), which entered into force on 1 July 2009. Pursuant to Article 8.1 of that Law, its provisions apply to proceedings instituted after the date of its entry into force, whereas the proceedings in the instant case were instituted before 1 July 2009.

According to the Code of Civil Procedure in the aforementioned version, national jurisdiction was composite in nature, which is not the case in the present version. Its existence

then depended firstly on establishing a connection with the Polish legal area via a connecting factor with national jurisdiction (positive condition) and secondly on the absence of jurisdictional immunity (negative condition). The provisions of Articles 1115-1116 CCP dealt with immunity, as indicated by the title of the section comprising them: "exemption from national jurisdiction". Apart from diplomatic immunity (Article 1111) and consular immunity (Article 1112), Poland also accepts the jurisdictional immunity of foreign states, translated by the fact that they cannot be sued in national courts. The view that has finally prevailed in Polish jurisprudence under the influence of the literature is that, in accordance with Article 9 of the Constitution, the source of such immunity is generally accepted international practice (Supreme Court decision of 13 March 2008, III CSK 293/07, OSNC-ZD 2009, No B, item 33). This view is concurrent with the rulings of the courts of many states (e.g. Britain, Italy, Switzerland, Greece and Germany) and of the European Court of Human Rights (see, for example, the judgment of 21 November 2001 in *Al-Adsani v. the* United Kingdom – Annex 63 to the Ministry of Justice's communication of 26 February 2010). The basis of the jurisdictional immunity of foreign states is the principle of the equality of states (*par in parem non habet imperium*). The purpose of this principle, which is an expression of respect for state sovereignty, is to maintain friendly relations between states.

In examining whether Polish courts have jurisdiction in the matter by reason of national legislation, it was therefore necessary, strictly speaking, to consider not only the provisions of the CCP concerning connecting factors with national legislation, but also the rules of customary public international law concerning state immunity as a condition for exemption from national jurisdiction.

In the light of Article 1103 pt 3 CCP invoked in the appeal for cassation, there can be no doubt as to the existence of the positive condition for national jurisdiction in this case. The plaintiff is seeking enforcement of an obligation arising from an unlawful act committed in Poland. There accordingly exists the connecting factor with national legislation stipulated in that provision, in the form of a claimed obligation in Poland.

The only issue of major practical significance, therefore, is whether the defendant, as a state, enjoys jurisdictional immunity, i.e. what needs to be resolved is the incomparably more difficult question – completely passed over by the lower courts involved in the case – of the fulfilment or non-fulfilment of the negative condition for national jurisdiction in the form of the absence of jurisdictional immunity (exemption from national jurisdiction, not as mentioned in Articles 1111 and 1112 CCP but as arising from generally accepted international practice).

The content of the customary rule of public international law concerning the jurisdictional immunity of states must be determined according to the criteria which, pursuant

to Article 38.1.b of the Statute of the International Court of Justice (Journal of Laws 1947, No 23, item 90, as amended), are decisive for the existence of customary law as a source of public international law. Those criteria are: general practice and a felt legal obligation to act in the specified manner. The detailed material for determining such content consists of the provisions of the Basel Convention and the UN Convention, the case-law of international courts, the decisions of national courts, the texts of foreign legal acts and relevant statements in the literature.

In view of the earlier emphasis on the connection between the instant case and the judgment in *Lechouritou et al.*, it must be stressed that reference to that judgment cannot replace analysis based on the abovementioned material. The judgment in *Lechouritou et al.* contains an interpretation relevant to the substantive scope of application of Regulation No 44/01 but does not touch upon state jurisdictional immunity. The Court of Justice of the European Union deliberately left the question of such immunity outside the scope of its deliberations. Under Article 267 TFEU (ex Article 234 of the Treaty establishing the European Community), the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the European Union. It is therefore not competent to interpret rules of general international customary law (see point 78 of the opinion of the Advocate General in *Lechouritou et al.* in http://curia.europa.eu). For that reason, the ruling that the action brought against a state in this case is not a civil matter within the meaning of the first sentence of Article 1.1 of Regulation 44/01 does not permit the conclusion that the matter is covered by state jurisdictional immunity.

While the existence as such of foreign states' immunity in proceedings before national courts is beyond doubt, the problem is the present scope of that immunity. This problem, which is a subject of great interest in the literature, is closely interlocked with the issue of access to the courts and the defence of other basic human rights.

Until around the 1950s state immunity was generally recognized as absolute. It existed in all cases, irrespective of their nature, unless the state in question waived it. In Poland the concept of absolute state immunity found expression as late as 26 September 1990 in a Resolution of the Seven Judges of the Supreme Court (III PZP 9/90 ,OSNC 1991 No 2-3, item 17). At the present time, as a result of gradual departure from that concept, in Poland, as in other states, it is considered a generally accepted principle that a foreign state enjoys jurisdictional immunity only in matters relating to the exercise of state authority, i.e. *acta iure imperii*, but not in matters relating to participation in ordinary civil and commercial affairs, i.e. *acta iure gestionis* (see Supreme Court judgment of 13 March 2008, III CSK 293/07).

On the assumption, therefore, that the plaintiff's action relates, in accordance with the view expressed in the judgment in *Lechouritou et al*, to activities of the defendant falling with the sphere of *acta iure imperii*, the defendant would undoubtedly enjoy jurisdictional immunity. For some time, however, there have been strong tendencies towards further restriction of the jurisdictional immunity of states. In examining the present case, therefore, these tendencies must also be considered.

The main point at issue is the exclusion of state immunity in proceedings relating to redress for injury or damage suffered as a result of unlawful acts committed – as in the present case – in the forum state, i.e. the state of the court giving judgment (tort exception). There are deep teleological grounds for denying state immunity in this area. The strong connection of the matter with the legal order of the forum state is an argument in favour of such denial. The organs of a state in the territory of which such acts are committed must, by virtue of its jurisdiction over the geographical area in question, have the possibility of judging the legality of those acts.

With one exception (Pakistan's State Immunity Ordinance 1981), in all states which have passed laws governing the immunity of foreign states, those laws exclude immunity of a defendant foreign state in cases relating to crimes committed in the territory of the forum state (§ 1605(a)(1) of the United States Foreign Sovereign Immunities Act of 1976 – Annex 11 to the Ministry of Justice's communication of 26 February 2010, Section 5 of the British Act of 1978, Section 7 of the Singapore State Immunity Act of 1979 r. – Annex 13 to the Ministry of Justice's communication of 26 February 2010, Paragraph 5 of the Canadian State Immunity Act of 1982 – Annex 14 to the Ministry of Justice's communication of 26 February 2010, Section 13 of the Australian Act of 1985, Section 6 of the South African Act of 1981, Article 2(e) of the Law of 1995 on the Jurisdictional Immunity of Foreign States before Argentinian Courts – Annex 16 to the Ministry of Justice's communication of 26 February 2010, Article 62/E para 1(c) of the Hungarian Law-Decree of 1979 on Private International Law – website of the International Commission on Civil Status: http://ciec1.org/, and Article 10 of the Act on the Civil Jurisdiction of Japan over Foreign States – according to information available on the internet, this law entered into force on 1 April 2010).

Similarly, Article 11 of the Basel Convention precludes a defendant state from claiming jurisdictional immunity in proceedings relating to redress for injury or damage if the acts which occasioned the injury or damage occurred in the territory of the state of the forum, and if the author of the injury or damage was present in that territory at the time when those acts occurred. Article 12 of the UN Convention makes an analogous provision, as does Article 3F of the Draft Convention on the Jurisdictional Immunities of States and Their Property adopted by the International Law Association at Montreal in 1982 (International

Legal Materials 1983, vol. XXII, pp. 287 et seq.), while in the resolution adopted by the Institut de Droit International (Institute of International Law) at its conference in Basel in 1991 (*Institute of International Law* 1992, vol. 64-II, pp. 267 et seq.) injury or damage resulting from a crime committed in the forum state is mentioned among the criteria indicating that the courts of that state have jurisdictional competence.

The view that a defendant state does not enjoy immunity in proceedings relating to redress for injury or damage suffered as a result of unlawful acts committed in the forum state is also supported by judicial practice. That view was taken, for example, by the US Court of Appeals in its decision of 29 December 1989 in *Helen Liu v. Republic of China* (Annex 51 to the Ministry of Justice's communication of 26 February 2010), by the Greek Supreme Court in its decision of 4 May 2000 in *Prefecture of Voiotia v. Federal Republic of Germany*, known as the Distomo case (Annex 19 to the Ministry of Justice's communication of 26 February 2010), and by the Italian Court of Cassation in its decision of 11 March 2004 in *Ferrini v. Federal Republic of Germany* (Annex 31b to the Ministry of Justice's communication of 26 February 2010).

That view is also shared by many authors.

The material on international legal acts and state practice adduced above, as well as the opinions of scholars, gives grounds to assert that at the present time there does not exist an obligation under international law to grant a foreign state immunity in proceedings relating to redress for injury or damage resulting from unlawful acts, if the acts which occasioned the injury or damage occurred in the territory of the state of the forum and the author of the injury or damage was present in that territory at the time when those acts occurred.

That assertion, however, does not conclude the matter. In considering the circumstances of the matter raised by the plaintiff, the first question that remains to be settled is whether the norm of customary public international law in force at the present time that jurisdictional immunity is excluded in proceedings against a state relating to redress for injury or damage suffered as a result of an unlawful act committed in the forum state is applicable where the unlawful act occurred scores of years ago -- when that norm was not yet in force. The accepted principle of public international law that the legal significance and assessment of events depends on the rules in force at the time of their occurrence could give reason to answer that question in the negative. That principle, however, has a substantive aspect: it concerns the effects of events in the sphere of public international law, whereas state immunity, although an institution of public international law, is of a clearly procedural nature: it affects the possibility of passing judgment on the substance of the case. In the field of procedural law, however, the intertemporal principle is different: proceedings instituted under a new law are conducted according to that law (principle of the immediate application of new

law). Exceptions to the principle of the immediate application of new law are admissible only where a new law enters into force when proceedings are already under way (see, for example, the grounds for the Supreme Court's decision of 24 June 1999, I CKN 269/99, OSNC 2000, No 2, item 29, and for the Resolution of the Seven Judges of the Supreme Court of 17 January 2001 on a Legal Principle, III CZP 49/00, OSNC 2001, No 4, item 53), whereas no such circumstance obtains in the present case. Entitlement to state immunity must therefore be examined in the light of the norm of international law in force at the time when the court decided on the admissibility of the proceedings, and not the norm in force at the time when the unlawful act that is the subject of the plaintiff's action was committed. A similar problem arising in regard to the application of the US Foreign Sovereign Immunities Act was settled in that manner by the US Supreme Court's judgment of 7 June 2004 in *Altmann v. Republic of Austria* (see pt II.9h of the Ministry of Justice's communication of 26 February 2010 and Annex 57 thereto). In the opinion of that Court, there is no impediment to application of the exemption from immunity provided for in the Act in proceedings that relate to occurrences which took place before its entry into force, including events that occurred during the Second World War. A further argument in support of the position adopted is provided by the UN Convention. While Article 4 stipulates that the Convention shall not apply in proceedings instituted prior to its entry into force, no provision corresponding to Article 35.3 of the Basel Convention was included, so there is nothing to prevent its application in proceedings that are instituted after its entry into force but relate to prior events.

Given a positive answer to the question of the applicability of the rule of customary public international law in force at the present time, the next question that needs to be answered in connection with exemption from state jurisdictional immunity in proceedings relating to redress for injury or damage suffered as a result of unlawful acts committed in the forum state is whether such exemption also applies in proceedings concerning events that occur in times of armed conflict, and specifically such dramatic events as the pacification of Szczecyn.

Article 31 of the Basel Convention, in stipulating that nothing in the Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State, rules out application of the exemption from state jurisdictional immunity provided for in Article 11 in proceedings relating to redress for injury or damage suffered as a result of unlawful acts committed in the forum state in situations arising out of armed conflict (see in this connection point 116 of the explanatory report on the Convention – Annex 2 to the Ministry of Justice's communication of 26 February 2010). The International Law Commission's comments on Article 12 of the UN Convention, which corresponds to

Article 11 of the Basel Convention (pp. 44-46 – Annex 4 to the Ministry of Justice's communication of 26 February 2010), likewise express the view that this provision does not apply in situations arising out of armed conflict, and it was that view which prevailed in the negotiations on the UN Convention. A similar position is also held by the authors (Hazel Fox and David P. Steward) whose statements are quoted in Annexes 6 and 7 to the Ministry of Justice's communication of 26 February 2010.

At the same time, it is hard to find an example of a ruling by a national court recognizing, solely on the basis of the tort exception, the admissibility of actions for redress against a foreign state in relation to events encompassed by warfare conducted in the territory of the forum state.

In view of the specific nature of military conflicts, state entitlement to jurisdictional immunity appears most justified precisely in relation to matters encompassed by warfare. Armed conflict, and the large-scale casualties, enormous destruction and suffering involved, cannot be reduced to relations between a state (the author of the injury or damage) and an injured individual: warfare takes place primarily between states. For that reason, material claims relating to armed conflict are traditionally regulated by peace treaties aimed at resolving the consequences of the conflict in their entirety at both the international and the individual level. State jurisdictional immunity in such matters is a means of ensuring that material claims resulting from warfare are dealt with by an international law procedure. The purpose of excluding judicial settlement of disputes about such claims is to prevent a situation in which the normalisation of mutual relations between states at the end of a war is hampered by numerous court cases dealing with material claims resulting from that war. Such cases could constitute a factor sustaining political conflicts and thus not necessarily lead to adequate settlement of the claims in question. The aforementioned international law procedure for settling claims resulting from warfare, combined with foreign states' entitlement to jurisdictional immunity, is of a universal nature. This method of dealing with claims relating to events encompassed by warfare cannot therefore be considered solely from the perspective of relations between Poland and Germany, i.e. from the perspective of states that ended war between them more than sixty years ago.

In general, cases involving the activity of the armed forces of one state in the territory of another state touch up the essence of state sovereignty and involve sensitive issues with implications for diplomatic relations and national security (see judgment of the European Court of Human Rights of 21 November 2001 in *McElhinney v. Ireland*, LEX No 75882, concerning an incident in which a British soldier opened fire on Irish territory).

Nevertheless, although – as already mentioned – it is hard to find an example of a ruling by a national court recognizing, solely on the basis of the tort exception, the

admissibility of actions for redress against a foreign state in relation to events encompassed by warfare conducted in the territory of the forum state, there do exist court decisions and statements in the literature that admit such claims on other, more general, grounds. The need to examine these other grounds is exceptionally important in the circumstances of the instant case because a state of affairs in which individual injury tort remains outside the limits of state immunity can raise fundamental doubts of an axiological nature, and mass injuries caused by the armed actions of an aggressor state would come into that category.

In its judgment in the *Distomo* case, the Greek Supreme Court expressed the view that, although damage resulting from armed conflict should in principle be settled by way of international agreements concluded after the end of the war, a state cannot be protected by immunity in cases where a specific act was not committed against the civilian population as a whole but was directed at a specific individual not directly or indirectly involved in armed activities. That view was expressed, in particular, in regard to acts constituting crimes against humanity and abuse of power, contrary to generally accepted rules of international law. In the aforementioned judgment, earlier rulings of US courts were invoked. In those rulings based on the United States Foreign Sovereign Immunities Act of 1976 – inter alia in the judgment of 15 October 1985 in *Von Dardel v. Union of Soviet Socialist Republics* (Annex 11 to the Ministry of Justice's communication of 26 February 2010) and the judgment in *Helen Liu v. Republic of China* – the court held that a defendant foreign state does not enjoy immunity in matters relating to obvious breaches of generally accepted rules of international law. In the *Distomo* case the Greek Supreme Court also expressed the view that a state which permits itself a breach of a peremptory (*ius cogens*) norm of public international law thereby tacitly waives its immunity.

This tendency is also manifest in the judgment of the Italian Court of Cassation in *Ferrini v. Federal Republic of Germany*, in which it was held that the obligation to respect the immunity of a defendant state does not exist where the causative act that is the basis for the claim belongs – like deportation to forced labour in the case in question – to the category of crimes under international law. Serious breaches of peremptory principles governing the protection of human rights are crimes under international law. Those principles belong to the essence of the international legal order and take precedence over all other principles of public international treaty and customary law, including those concerning state immunity. Every state is obliged to punish breaches of those principles. In passing judgment, the Court of Cassation also referred to the fact that it has not been possible for a long time to invoke the functional immunity of state officials in order to prevent the authors of international crimes from being brought to justice. Since the immunity to which state officials are entitled is essentially a sub-category of state immunity (its purpose being to prevent parties from

circumventing a state's immunity by bringing actions against its office holders), there should also be no grounds for maintaining state immunity in proceedings relating to redress for injury or damage suffered as the result of an international crime. The position taken in the judgment in *Ferrini v. Federal Republic of Germany* was supported by later judgments of the Court of Cassation, *inter alia* the judgment of 21 October 2008 in criminal proceedings in which the successors of the victims of the pacification of the town of Civitella sought compensation from the Federal Republic of Germany (Annex 36 to the Ministry of Justice's communication of 26 February 2010).

As well as the abovementioned rulings, there are dissenting opinions of judges in cases similar to those discussed above who took a different position and recognized state immunity in the matter. Specifically, in *Margellos v. Federal Republic of Germany*, in which the Greek Special Supreme Court, passing judgment on 17 September 2002 (Annex 19 to the Ministry of Justice's communication of 26 February 2010), departed, with prospective effect, from the position taken in the judgment of the Greek Supreme Court in the *Distomo* case, while the judges in the minority expressed the conviction that Article 31 of the Basel Convention does not cover war crimes, the prohibition of which has the status of a *ius cogens* norm and is therefore hierarchically superior to any other norm of international law. In their opinion, war crimes cannot be considered an element in an armed conflict justifying an exception to the principle of customary law expressed in Article 11 of the Basel Convention. Similarly, in the judgment of the European Court of Human Rights in *Al-Adsani v. United Kingdom*, the reasoning of the minority judges concerning non-recognition of the immunity of a state (Kuwait) in proceedings instituted in Britain relating to an act (torture) committed in Kuwait (and thus on this occasion in a state that was not the state of the forum) centres on the importance and peremptory status of the prohibition on torture in international law. They stress that, in view of its status, the prohibition on torture takes precedence over any other norm. In *McElhinney v. Ireland*, the minority judges of the European Court of Human Rights maintained that, by accepting that the British Secretary of State for Northern Ireland had immunity in relation to the incident in which a British solider opened fire in Irish territory (Annexes 37 and 38 to the Ministry of Justice's communication of 26 February 2010), the Irish courts imposed a disproportionate restriction on the right of judicial access in the light of Article 6.1. of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws 1993, No 61, item 284, as amended – hereinafter "European Convention").

In the literature, some authors also argue that state immunity should be denied in cases involving serious breaches of human rights. As in the court rulings, various grounds are invoked. The argument of tacit waiver of immunity by the state is found, as is the concept –

closely related to the construct of abuse of power – of the "forfeiture" (*Verwirkung*) of state immunity as a result of action by the state that is manifestly contrary to international law. Analogies are drawn with the prosecution of state officials for breaches of human rights committed in the course of their duties, usually accompanied by the claim that an act contrary to peremptory norms does not have the status of a sovereign act. However, advocates of the exclusion of state immunity in cases involving serious breaches of human rights appear to attach most weight to the concept of the hierarchical superiority of *ius cogens* norms in the legal system. In this respect, some advocates of the exclusion of state immunity in cases involving serious breaches of human rights attach particular importance to the norm guaranteeing access to the courts (Article 6.1 of the European Convention).

Nevertheless, many court rulings do not endorse the abovementioned arguments for the exclusion of state immunity in cases concerning claims resulting from serious breaches of human rights, including those arising in the course of armed conflict. Those arguments are also rejected in a significant portion of the literature.

While there is no doubt that a state can waive the jurisdictional immunity to which it is entitled, the arguments to the effect that it can do so tacitly in the cases considered have been rightly called into question. Such tacit waiver, it is argued, arises either from the state's acting in a manner contrary to peremptory norms or from its adherence to an international agreement on the protection of human rights. The first concept rests on a totally arbitrary premise – it fails to take account of the fact that a state's waiver of immunity must, like every expression of will, be effected in a sufficiently clear manner – while the second is hard to reconcile with the requirements of treaty law concerning adherence to an international agreement. It should be noted that even in the judgment in *Ferrini v Federal Republic of Germany* the court distanced itself from the argument that the defendant state had tacitly waived its immunity. A similar position was taken by the US Court of Appeals in its decision of 1 July 1994 in *Hugo Princz v. Federal Republic of Germany*, a case arising out of the Holocaust (Annex 53a to the Ministry of Justice's communication of 26 February 2010). That position was supported by US court decisions of 8 April 1997 in *Hirsch v. State of Israel and State of Germany* (Annex 56 to the Ministry of Justice's communication of 26 February 2010) and of 26 November 1996 and 10 February 1997 in *Smith v. Libya*, a case concerning the Lockerbie air disaster (Annex 54 to the Ministry of Justice's communication of 26 February 2010).

Considerable doubts are also raised by the concept – closely related to the construct of abuse of power – of the "forfeiture" of state immunity as a result of action by the state that is manifestly contrary to international law. These doubts primarily concern whether that concept can be justified by reference to the general principles of law referred to in Article 38.1.c of the Statute of the International Court of Justice. State immunity is regulated by customary

international law, and general principles of law can be invoked as a source of international law only in the case of a gap in the norms of international treaty or international customary law. Furthermore, application of the concept in question would lead to the exclusion of state immunity on grounds of fairness, as a result of which the corresponding court decision would resemble the imposition of reprisals, and it is highly doubtful whether, given the political dimension of reprisals, their imposition can be a matter for the courts. Even if that were accepted, it is hard to imagine, having regard to the circumstances of the instant case and considering the matter rationally, that a Polish court would impose reprisals on the Federal Republic of Germany for events that occurred over sixty years ago. In this connection, it should be borne in mind that Poland too invokes state immunity in proceedings brought against it in foreign courts in connection with its post-war nationalisation and expropriation legislation. An example of this is the case brought before a New York court in which Theo Garb and other plaintiffs sought compensation from Poland for illegal deprivation of property in the course of a "planned antisemitic riot" (see pt II.9i of the Ministry of Justice's communication of 26 February 2010).

In *Margellos v. Federal Republic of Germany*, the Greek Special Supreme Court, departing with prospective effect from the position taken by the Greek Supreme Court in its judgment in the *Distomo* case, reasoned that armed activities in the context of a war take various forms, including disproportionate and cruel acts of retaliation by the armed forces of the aggressor. That being so, the Greek Supreme Court's distinction between the operation carried out in Distomo and the concept of armed conflict was artificial and did not correspond to reality. Despite the disproportionality and cruelty of that operation, it was nevertheless an element in an armed conflict. Although Article 3 of the Convention respecting the Laws and Customs of War on Land signed at The Hague on 18 October 1907 (Journal of Laws 1927, No 21, item 161) provides that a belligerent which violates the provisions of the Convention shall be liable to pay compensation, it does not restrict the pursuit of claims for such compensation through the courts. That issue is covered by public international law, under which the jurisdiction of courts in the matter is restricted by the principle of state immunity. In the opinion of the Greek Special Supreme Court, at the present stage in the development of public international law there exists no generally accepted principle allowing, as an exception to state immunity, the pursuit in the courts of claims relating to unlawful acts committed – whether in peacetime or in time of war – by a foreign state in the territory of the forum state with the participation of the armed forces of the defendant state, and international practice contains no clear evidence of the existence of such an exception.

In its decision of 14 June 2006 in *Jones et al. v. Saudi Arabia*, concerning redress for torture committed by state officials in the territory of Saudi Arabia (Annex 43 to the

Ministry of Justice's communication of 26 February 2010), the House of Lords recognized the defendant's immunity and, invoking the Canadian Court of Appeal's decision of 30 June 2004 in *Bouzari v. Islamic Republic of Iran* (Annex 45 to the Ministry of Justice's communication of 26 February 2010), held that although the prohibition on torture is undoubtedly a peremptory norm of public international law, state immunity in cases relating to redress for torture does not affect the prohibition itself but only restricts the jurisdiction of national courts in such matters. State immunity would be in contradiction with the prohibition on torture only if it comprised a complementary procedural rule obliging national courts to admit its application in such cases by way of exception to the principle of the immunity of foreign states. That, however, is not the case. It is not therefore for a national court to "develop" international law by unilaterally attributing to it a content which, while corresponding to the values enshrined in peremptory norms of international law and desirable, is not accepted by other states. Although such activism in the field of national law is within the limits of the judicial function, it is unacceptable in the field of international law, which is based on the common agreement of states. Accordingly, in a situation in which there is no evidence that states accept, as an exception to the principle of immunity, the jurisdiction of national courts in actions brought against foreign states for breach of *ius cogens* norms of international law, the principle of foreign states' entitlement to immunity should apply.

The ruling of the International Court of Justice of 14 February 2002 in *Congo v. Belgium* may also be read as an expression of the view that breach of *ius cogens* norms does not give rise to automatic sanction in the form of the lifting of immunity as an impediment to hearing a case concerning a breach of those norms. In that ruling the International Court of Justice confirmed, on the basis of customary law, the immunity of persons holding high state office and did not consider the present stage of development of the law regarding exception from the said immunity (Annex 58 of the Ministry of Justice's communication of 26 February 2010.)

Thus part of the legal doctrine, which is divided on the point at issue, stresses that there can be no question of a contradiction between principles of state immunity and *ius cogens* norms since they are of two different kinds: the former procedural and the latter substantive. It follows that an imperative to lift state immunity in cases concerning redress for torture cannot be deduced from norms prohibiting torture, just as norms permitting the use of torture cannot reasonably be derived from principles of immunity. The fact that a substantive norm of public international law contains no guarantee that it can be sanctioned in a foreign national court means that it cannot collide with a norm concerning state immunity which makes such sanction impossible. The distinction between substantive guarantees in the field of human rights, on the one hand, and the procedural obligation to accord protection in

relation to those rights, on the other, is grounded in premises of public international law respecting the sovereignty of individual states. Although it rests upon the prevention of examination of the legality of a state's action by foreign courts, state immunity does not rule out resolution of a conflict, with the participation of the state concerned, by appropriate public international law methods.

In *Al-Adsani v. United Kingdom*, the European Court of Human Rights declined to rule that British courts had violated Article 6.1 of the European Convention by refusing, on the ground of Kuwait's entitlement to immunity, to award compensation from that state for the torture of Al-Adsani committed in its territory by its state officials. In the opinion of the Court of Human Rights, the right of access to judicial protection is not absolute. State immunity, as an institution of public international law, serves a rightful purpose, namely the maintenance of friendly relations between sovereign states. Measures consistent with general principles of public international law, based on the institution of immunity, cannot in principle be judged a disproportionate restriction on the right of judicial access. In the opinion of the Court of Human Rights, there are no rules of international law, judicial decisions or other materials that could incline it to the view that a state does not enjoy jurisdictional immunity in civil proceedings relating to redress for acts of torture. In *McElhinney v. Ireland*, too, the European Court of Human Rights held state immunity to be an admissible restriction on the right of judicial access. Similarly, in *Kalogeropoulou et al. v. Greece and Germany* (Annex 69 to the Ministry of Justice's communication of 26 February 2010), reiterating the conclusions reached in its decision in *Al-Adsani v. United Kingdom*, it ruled that the Greek administrative authorities' refusal to authorise the seizure of German property in Greece to enforce payment of the damages awarded against Germany by decision of the Greek Supreme Court in the *Distomo* case could not be considered an unjustified restriction of the right of judicial access. In reply to the argument that the prohibition of crimes against humanity is a *ius cogens* norm which supersedes norms governing state immunity, it held that the view that a state cannot claim state immunity before the courts of another state in civil proceedings relating to redress for crimes against humanity does not enjoy sufficient acceptance among states at the present time.

In its decisions in *Al-Adsani v. United Kingdom* and *Kalogeropoulou et. al v. Greece and Germany*, the European Court of Human Rights also rejected the analogy with the prosecution of state officials for breaches of human rights committed in the course of their duties – an argument usually accompanied by the claim that an act contrary to peremptory norms does not have the status of a sovereign act. That position accords with the view expressed in the decision of the House of Lords in *Jones et al. v. Saudi Arabia* and with the ruling of the Court of Justice of the European Union in its judgment in *Lechouritou et al. v*

Federal Republic of Germany. As the Attorney General argued in point 65 of his opinion in the latter case, the view that the acts of the German armed forces did not constitute *acta iure imperii* would lead to difficulties in identifying who is liable because it would be possible to attribute liability only to the persons who actually caused the damage rather than to the state to which they belong.

It must also be borne in mind that the absolute rejection of state immunity in committal proceedings in cases concerning redress for damage occasioned by breaches of human rights should logically be connected with denial of the executive immunity of the state in such cases, whereas at the present time the international community decidedly does not accept derogation from executive immunity. A telling example of this, in addition to the abovementioned refusal of the Greek administrative authorities to authorise the seizure of German property in the *Distomo* case, is the suspension by the President of the United States of a provision permitting seizure of the property of diplomatic missions and consular posts of states which support terrorism. It was considered that application of that provision would breach the United States' treaty obligations and deprive its foreign posts of protection.

Comprehensive consideration of the material discussed above, assembled for the purpose of reconstructing the contents of the norm of customary public international law in force at the present time in the field of state jurisdictional immunity, tends to support the conclusion that there are insufficient grounds for recognizing an exception to state immunity in cases concerning redress for breaches of human rights occasioned by unlawful acts committed in the territory of the forum state which come within the category of armed activities. It is true that a certain portion of that material – specifically the decision of the Greek Supreme Court in the Distomo case, the decision of the Court of Cassation in *Ferrini v. Federal Republic of Germany* and statements in the literature supporting the position taken in those decisions – may indicate the beginnings of the emergence of a norm which excludes state immunity in all cases concerning serious human rights violations, but having regard to another important portion of the material – especially the decision of the Greek Special Supreme Court in *Margellos v. Federal Republic of Germany*, the decision of the House of Lords in *Jones et al. v. Saudi Arabia*, the decision of the European Court of Human Rights in *Al-Adsani v. United Kingdom* and the statements in the literature supporting the position taken in those decisions – it cannot be accepted that such a norm has already emerged. Thus although such a norm may be desirable on an axiological view of human rights, it cannot be maintained that it is already in force. Any doubts in the matter will be resolved by the International Court of Justice, before which the Federal Republic of Germany has instituted proceedings against the Italian Republic, in connection with the decisions in *Ferrini v. Federal Republic of Germany* and similar cases, for alleged breach of an international

obligation through disregard of Germany's entitlement to jurisdictional immunity (Annex 61 to the Ministry of Justice's communication of 26 February 2010).

Furthermore, while not denying the great importance of the present concept of human rights, the significance of state immunity must also be borne in mind. Based on the principle of the equality of states and the non-subjection of sovereign states to each other's jurisdiction, it serves to maintain friendly relations among them. In eliminating the influence of national courts on the legal situation of foreign states, it prevents the occurrence of tension between states by ensuring respect for sovereignty. In so doing, however, state immunity does not rule out the resolution of conflicts by appropriate public international law methods. As is known, material claims resulting from events of war are traditionally settled in international treaties aimed at comprehensive settlement of the consequences of military conflict. This manner of settling such claims is even the most appropriate having regard to the specific nature of such conflict.

Thus although the pacification of Szczecyn by German armed forces was a flagrant violation of the law of war and of humanitarian law and – from a present-day perspective – clearly breached absolutely binding norms on the protection of human rights, proceedings instituted against the Federal Republic of Germany relating to claims arising out of that event cannot, in the light of the customary norm of public international law in force at the present time, be considered exempt from the principle of state jurisdictional immunity. In accordance with the decision of the European Court of Human Rights, this position does not breach Article 6.1 of the European Convention guaranteeing the right to protection by the courts, and that decision must also be considered pertinent on the basis of Article 45.1 of the Constitution, since the two provisions are essentially concurrent.

In any event, state jurisdictional immunity cannot be considered an inadmissible restriction of the right of judicial access where plaintiffs have reasonable alternative means available to protect their rights effectively (see judgment of the European Court of Human Rights of 18 February 1999 in *Waite and Kennedy v. Germany*, LEX No 77226). The essential means of doing so is to file a claim in the courts of the state in which the breach of basic human rights occurred.

Recognition of the defendant state's immunity denotes non-fulfilment in this case of the negative condition laid down in the Code of Civil Procedure in the version preceding the Law of 5 December 2008 on Revision of the Code of Civil Procedure and Other Legislation, namely the absence of jurisdictional immunity. Thus despite fulfilment of the position condition, i.e. the existence of a connecting factor with national jurisdiction, Article 1103 pt 3 CCP cannot apply in the instant case.

The plaintiff's argument that the existence of national jurisdiction in the instant case is shown by the Supreme Court's decision of 7 November 2007, I CO 29/07, designating the court competent to hear an analogous case pursuant to Article 45 CCP, cannot be accepted. The view that the designation of a locally competent court by the Supreme Court pursuant to Article 45 CCP should be preceded by examination of the question of national jurisdiction, though found in the literature and accepted in the earliest court rulings (see, in particular, Supreme Court decisions of 30 August 1965, IV CO 20/65, LEX No 5859 and 14 February 1985, II CO 13/85, OSNC 1985, No 12, item 196), is incorrect and is not upheld in principle in present jurisprudence. The basis of the organisation of the judicial system is the division of labour between courts, and therefore – as correctly explained in the latest literature on the subject – the existence of national jurisdiction in a given case should not be the subject of a decision by a random court but should be decided by the court competent in the given case. Furthermore, even if the Supreme Court were obliged to examine the question of national jurisdiction before designating the competent court, the result of that examination could not be binding on the court designated as competent, since the latter has a duty to examine all absolute procedural conditions independently.

It follows from the present examination in cassation that, despite an incorrect statement of reasons, the contested decision corresponds to the law and that the plaintiff's appeal in cassation should be dismissed pursuant to Article 398^{14} CCP.