State immunity — Jurisdiction — Doctrine of restrictive immunity — Exception to immunity for civil claims in tort — Tort committed in forum State by agents of defendant State — European Convention on State Immunity, 1972 — Article 11 — Whether now reflecting rule of customary international law — Immunity from civil proceedings in respect of acts of armed forces — Article 31 of Convention — Whether such immunity absolute — Whether any exception for war crimes or crimes against humanity violating jus cogens and not direcdy connected with furtherance of armed conflict — Whether commission of such acts constituting tacit waiver of immunity

State immunity — Jurisdiction — Human rights — Whether State immunity compatible with right of access to courts — European Convention on Human Rights, 1950, Article 6(1) — Exception to immunity for tort claims in civil proceedings

Human rights — Access to courts — European Convention on Human Rights, Article 6(1) — State immunity — Relationship between State immunity and human rights — Nature of prohibition of crimes against humanity — Whether constituting a rule of jus cogens — Whether taking precedence over principle of State immunity

Relationship of international law and municipal law — Crimes against international law — Crimes against humanity and war crimes — Claim for compensation in civil proceedings in tort before municipal courts — Whether commission of such crimes by its armed forces precluding foreign State from relying on State immunity — Whether such exception to immunity now recognized as rule of customary international law

War and armed conflict — Enforcement of the laws of war — Compensation and reparations — Crimes against humanity and war crimes — Claim for compensation brought by relatives of victims before municipal courts — Atrocities committed by German forces during Second World War — The law of Greece

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PREFECTURE OF VOIOTIA
v.
FEDERAL REPUBLIC OF GERMANY
(DISTOMO MASSACRE CASE)[1]

(Case No 11/2000)

Greece, Court of Cassation (Areios Pagos)

4 *May* 2000

SUMMARY: *The facts:*— In June 1944, German occupation forces in Greece massacred more than 300 inhabitants of the village of Distomo and burnt the village to the ground. In 1995, proceedings against Germany were instituted before the Greek courts, by over 250 relatives of the victims of the massacre, claiming compensation for loss of life and property. The Court of Livadia held Germany liable and ordered it to pay compensation to the claimants. Germany appealed to the Court of Cassation, on the ground that it was immune from the jurisdiction of the Greek courts.

Held (by seven votes to four): — The appeal was dismissed. The Greek courts were competent to exercise jurisdiction over the case.

(1) State immunity was a rule of customary international law and consequently a generally accepted rule of international law which, pursuant to Article 28(1) of the Greek Constitution, formed part of the Greek legal order and had superior force. The institution of State immunity was a consequence of the sovereign equality of States and was aimed at avoiding disturbance of international relations (pp. 515–16).

(2) It was now accepted by European countries that State immunity was not absolute but relative, applying only to sovereign acts performed *jure imperii* and not acts *jure gestionis*, performed by the State in the same manner as private individuals. Restrictive immunity was enshrined in the European Convention on State Immunity adopted in Basle in 1972 ("the Basle Convention"). While only eight European States (including Germany) had ratified the Convention, all other European States accepted the doctrine of restrictive immunity. The Basle Convention had also influenced developments in many other non-European States (pp. 516–17).

(3) Article 11 of the Basle Convention provided that a State did not possess jurisdictional immunity in proceedings relating to tort claims if the facts at issue had occurred on the territory of the forum State. There was now a generally accepted rule of customary international law that States were competent to exercise jurisdiction over claims for damages against a foreign State, in relation to torts committed by its organs against persons or property on the territory of the forum State, even if the acts in question had been performed *jure imperii* (pp. 517–18).

[1] For related proceedings, see pp. 525, 537 and 556 below.

(4) State immunity could not be dispensed with in proceedings relating to military conflicts between States where harm to civilians was a necessary consequence. The resultant claims were normally dealt with by inter-State agreements. But an exception to the immunity rule should apply where the acts for which compensation was sought (especially crimes against humanity) had not targeted civilians generally but rather specific individuals in a given place who were neither directly nor indirectly connected with the military operations. Furthermore, the right to immunity was tacitly waived wherever it could be established that the acts in question had been performed in violation of the rules of *jus cogens* (pp. 519–21).

Dissenting Opinion: Four judges, including the President of the Court, concluded that Germany should be entitled to jurisdictional immunity. The exceptions to immunity for claims in tort contained in the Basle Convention and the United Nations Draft Articles on Jurisdictional Immunities of States did not include claims arising from situations of armed conflict. This term was to be broadly understood and extended not only to conflicts between States but also to armed resistance against occupying forces and the response to such resistance, however disproportionate. Furthermore, an exception to immunity could not be based on the violation of a rule of *jus cogens* since there was no rule of customary international law that such an infringement constituted a tacit waiver of immunity (pp. 521–4).

The following is the text of the relevant part of the judgment of the Court:

This appeal, based on Article 559 of the Code of Civil Procedure, has been brought by the Federal Republic of Germany against Decision No 137/1997 of the Three-Member Court of First Instance of Livadia.

Pursuant to Article 38(1) of the Statute of the International Court of Justice in The Hague (1946), one of the sources of international law is international custom, as evidence of a general practice accepted as law. Accordingly, in order for an international custom to exist, two elements are necessary: (a) "a pragmatic external one, which is constant and uniform practice" and (b) "a psychological element, the conviction that this practice is consistent with a concrete legal obligation or right (*opinio juris sive necessitatis*)".

Accordingly, when States in their relations follow a certain practice, positive or negative, in the conviction that this constitutes a legal obligation under international law, then they create a custom. In the formation of international custom, by the nature of affairs, a bigger influence is exercised by those countries which are more closely connected to its subject. In determining the value of the State practice, the

element of time must also be taken into consideration, since duration shows both consistency in application and confirmation of the value of the customary rule, without however excluding situations where, for the formation of a customary rule, a long period of practice is not necessary. It is of fundamental importance first to establish the existence of an international custom which, as a generally accepted rule of international law, will then constitute an integral part of Greek law and prevail over all contrary provisions of law, pursuant to Article 28(1) of the Constitution. As to the evidence to establish a custom, in 1951 the International Law Commission of the United Nations drew up an indicative list which includes decisions of international and national courts, diplomatic correspondence, opinions of legal advisers of States, international conventions, internal (national) legislation, as well as the practice of international organizations. Attention is drawn to codifying conventions, through which a customary rule already in force becomes crystallized or by which such a rule is created, as well as judicial decisions of both international and national courts which contribute to the determination of the existence and the content of rules of international law. Finally, jurisprudence and especially the teachings of prominent international lawyers of various nations (Article 38(l)(d) of the Statute of the International Court of Justice) constitute subsidiary means for determining rules of law.

The extraterritoriality or sovereign immunity of foreign States, meaning their non-submission to the international jurisdiction of the courts of the forum State, is a rule of customary international law and consequently a generally accepted rule of public international law which, according to Article 28(1) of the Constitution, constitutes an integral part of Greek law and takes precedence over any contrary provision.

In its contemporary version, the institution of sovereign immunity constitutes a consequence of the sovereignty, independence and equality of nations, whilst its aim is to avoid the disturbance of international relations. It is now accepted by the international legal community that the immunity of foreign States does not cover all their actions (absolute immunity) but merely those actions which constitute an exercise of sovereign power in relation to third parties (*acta jure imperii*). It is not upheld for those acts which the foreign State carries out as a *fiscus* within the framework of its relations under private law (*acta jure gestionis*) (relative or restrictive immunity). The distinction between actions performed *jure imperii* and *jure gestionis* is made on the basis of the law of the forum State and the criterion for making this distinction is the nature of the act of the foreign State, meaning whether the act itself involves the exercise of sovereign power. In addition, the international

tendency to limit further the immunity of foreign States has led, within the framework of the Council of Europe, to the signing (in Basle on 16 May 1972) of the European Convention on State Immunity. This Convention includes a codification of the previously in force customary international law of continental Europe and has been ratified by eight Member States of the Council of Europe: the United Kingdom, the Federal Republic of Germany, Austria, Belgium, Cyprus, Luxembourg, the Netherlands and Sweden.

The non-ratification until today of this Convention by other European countries does not necessarily mean disagreement concerning its basic principles, since European countries in their entirety accept and customarily apply the doctrine of restrictive immunity and indeed some of those countries have been amongst the first to apply that doctrine, for example as in the case of Italy, France and Greece.

According to Article 11 of this codifying Convention, a Contracting Party cannot claim immunity from the jurisdiction of a court of another Contracting Party in relation to its civil liability to provide restitution for damage caused by torts against the person or property (including bodily harm, whether caused intentionally or by negligence, manslaughter, destruction of property, arson, etc.) irrespective of whether the tort was committed by the contracting party acting *jure imperii* or *jure gestionis*.

An additional prerequisite for the establishment of the tortious liability of the foreign State is the existence of a link with the State of the forum. In particular, it must be established cumulatively that (a) the act or omission occurred on the territory of the State of the forum and (b) the author of the act or omission was present on that territory at the time when the facts occurred.

In addition, the European Convention of 1972 has inspired and influenced a significant number of foreign States which have introduced legislation on foreign State immunity, excluding immunity for claims against foreign States relating to tortious liability, provided that the same conditions are satisfied, which constitute an expression of the principle of territoriality (commission of the tort on the territory of the forum State with the author being present on that territory at the time of its commission). Such an exception from immunity is provided for by the legislation of the United States (Foreign Sovereign Immunities Act (FSIA) of 1976, Article 1605(a)(5)), the United Kingdom (Sovereign Immunity Act (SIA) of 1978, Article 5), Canada (SIA of 1982, Article 6), Australia (FSIA of 1985, Article 13), South Africa (FSIA of 1981, Article 6) and Singapore (SIA of 1979, Article 7). In addition, in 1991 the International Law Commission of the United Nations (ILC), composed of the representatives of thirty-four Member States, including the

United States, Canada, Brazil, Egypt, the United Kingdom, Germany, France, Italy, Greece, the former Soviet Union, China, India and Japan, submitted for adoption to the General Assembly the final "Draft Articles on Jurisdictional Immunities of States and their Property", which it had started to work on in 1978. This important text, which reflects the opinion of the international community on matters of sovereign immunity and is also inspired by the principles contained in the European Convention on State Immunity, provides, in Article 12, with wider and more thorough expression, for an exception from immunity in relation to the tortious liability of a foreign State under exactly the same conditions as those mentioned above, that "the act or omission was committed wholly or partially on the territory of the other (forum) State and that the author of the act or omission was present on that territory at the time of the act or omission".

In the interpretative comments of the special rapporteur attached to Article 12 it is clarified that this provision is based on the principle of territoriality and concerns torts committed by intention or negligence (even political assassination) against persons on the territory of the forum State by organs or agents of the foreign State, irrespective of whether those acts were performed *jure imperii or jure gestionis*. Identical to the above draft of the International Law Commission is the resolution (also of 1991) prepared by the Institute of International Law which also recognizes (in Article 2(2) (e)) that the organs of the forum State are competent in respect of proceedings concerning the torts of causing death or personal injury or loss or damage to property, which are attributable to activities of a foreign State and its agents within the territorial jurisdiction of the forum State.

In addition, the national courts of a number of countries, and in particular those of the United States, have handed down decisions asserting jurisdiction over claims brought by private persons against foreign States for damages for tortious acts performed *jure imperii* on the territory of the forum State by authors who were present on the territory of that State at the time of their commission. For example, the following cases are referred to: *Letelier v. Republic of Chile* (488 F Supp 665 (1980)), in which the United States courts asserted jurisdiction over a case concerning the assassination of the former Ambassador of Chile, Orlando Letelier, in a bomb attack in the United States which had been ordered by the Government of Chile at the time and carried out by its organs, in other words an act performed *jure imperii* in contravention of human rights and contrary to the principles of international law. Similarly, United States courts asserted jurisdiction in *Liu v. Republic of China* (642 F Supp 297 (1986)), which concerned the execution (by shooting)

on United States territory of the Taiwanese anti-government activist Henry Liu by agents of China acting in the exercise of State sovereignty *(jure imperii)*.

This exception to immunity is also adopted by a large number of prominent writers on international law. In view of these facts, a general practice of the States of the international community accepted as law is thus verified, amounting to the formation of an international custom which, in accordance with Article 28(1) of the Constitution, constitutes an integral part of national law with superior rank. This rule requires, by way of exception from the principle of immunity, that national courts may exercise international jurisdiction over claims for damages in relation to torts committed against persons and property on the territory of the forum State by organs of a foreign State present on that territory at the time of the commission of these torts even if they resulted from acts of sovereign power *(acta jure imperii)*.

[The majority of the Court considers] that State immunity cannot be dispensed with in relation to claims for damages arising [from military action] in situations of armed conflict, which generally involve conflict between States where harm to civilians necessarily results and where resultant claims are normally dealt with through inter-State agreements after the war has ended. But the exception to the immunity rule should apply where the offences for which compensation is sought (especially crimes against humanity) did not target civilians generally, but specific individuals in a given place who were neither directly nor indirectly connected with the military operations. In particular, in the case of military occupation arising in the course of an armed conflict, Article 43 of the Regulations on the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907 confirms that [in law] there is neither transfer of sovereignty nor, in normal circumstances, any abolition of the laws in force in the occupied State, which the occupying forces are required to respect.

Furthermore, extraterritoriality (State immunity) does not cover the criminal acts of the organs of such an occupying force, where they are committed as an abuse of sovereign power, in retaliation for acts of sabotage by resistance groups, against a specific and relatively limited number of completely uninvolved and innocent civilians, something which is anyway contrary to the principle, generally accepted by civilized nations, that no one should be punished for the acts of someone else (see also Article 50 of the above-mentioned Regulations, which provides that no general penalty, pecuniary or otherwise, shall be inflicted on the inhabitants of the occupied country on account of the acts of individuals for which they cannot be regarded as responsible).

In these proceedings, in the absence of the defendant State, this Court regards the following facts as accepted: The Germans, realizing that the successes of the Allied Forces on the war fronts would result in the steady increase of the resistance of the Greek Liberation Forces, began systematic terrorism with group "clean-up" operations and executions of innocent people, in order to bring down the morale of these fighting forces and to decrease the intensity of their efforts. Therefore, on 10 June 1944, the Germans serving in the Gestapo and the Livadia SS dressed up twenty of their soldiers in Greek dress and headed towards Arachova in two cars with other German cars following. On the way there they were shooting and killing every Greek they met. They arrived at Distomo towards noon and started the destruction. Then they headed to Stiri village. On the way there, however, the disguised Germans were ambushed by Greek resistance men, who killed eighteen of them and one of their Greek drivers.

Subsequently, in order to take revenge, the Germans went back to Distomo where they ordered a curfew. They then encircled the village, put guards on the exits and started a collective massacre, equal to which in atrocity and cruelty humanity has hardly known throughout the centuries. Senior officers, junior officers and soldiers, having executed the twelve hostages that were with them, were then divided into groups and went from house to house attacking the poor inhabitants of Distomo like wild beasts, raping, butchering and killing. Old, young, women, boys, girls and even infants were the victims of their blood mania. From the total number of the victims of this vindictive mania of the organs of the Third Reich, whose successor is the defendant State, 201 are particularly identified as members of the families (parents, children, brothers, grandfathers, grandmothers, brothers-in-law, sisters-in-law) of the plaintiffs, who are claiming, amongst other things, sums for moral injury, suffered in the above-mentioned circumstances as a result of the loss of their relatives.

[The majority of this Court considers that] these crimes (of murder which, at the same time, constituted crimes against humanity) were committed against specific persons of relatively limited number, living in a specific place, who had absolutely no connection to the resistance group which, within the framework of its resistance action, was responsible for the killing of the disguised German soldiers participating in the operation to terrify the local population. These cruel murders were objectively in any case not necessary for the conservation of the military occupation or to reduce the resistance action and were carried out on the territory of the State of the forum, by organs of the Third Reich, in excess of their sovereign powers. Because organs of the defendant State were involved in the commission of these crimes, the relevant claims

for damages and pecuniary compensation fall within the international jurisdiction of the trial court, as exceptions to the prerogative of immunity in accordance with the norm of customary international law which, as concluded above, has acquired the force of law.

Consequently, the trial court was entitled to rule that it had international jurisdiction over the relevant claims for damages and pecuniary satisfaction brought by the plaintiffs, albeit on the different ground that the defendant State could not invoke its right of immunity, which it had tacitly waived since the acts for which it was being sued were carried out by its organs in contravention of the rules of *jus cogens* (Article 46 of the Regulations on the Laws and Customs of War Annexed to the Fourth Hague Convention of 1907) and did not have the character of acts of sovereign power. The trial court therefore correctly concluded, as to the result in relation to the question of the existence of its international jurisdiction, that the plea of lack of international jurisdiction was inadmissible.

Accordingly [the majority of this Court concludes that] the grounds of appeal must be dismissed in so far as they refer to infringements of procedural provisions (Articles 3 and 4 of the Code of Civil Procedure) in relation to the international jurisdiction of the Greek courts. In particular, the argument constituting the first ground of appeal, that the trial court was wrong to recognize an exception to the immunity of foreign States based on customary international law, cannot be upheld and the appeal is dismissed…

DISSENTING OPINIONS

[A minority of five members of the Court (President Matthias and Judges Kromydas, Rigos, Bakas and Vardavakis) dissented on the following points:]

The European Convention on State Immunity, 1972 does not constitute in all its provisions a codification of previously formulated customary international law. The exception to extraterritoriality (State immunity) for torts committed on the territory of the forum State by an author present on that territory, where those torts are the result of acts of sovereignty *(jure imperii)*, does not correspond to a generally accepted rule of customary international law. Furthermore, only eight States have so far ratified this Convention, and there is no other international convention text which provides for such an exception. The fact that the above-mentioned Anglo-Saxon States have enacted such an exception in national legislation, which limits the immunity of other States before their courts, is of no significance for the deduction of international custom, because these texts do not form part of the international

legal order but are merely domestic law enacted unilaterally with regard to the jurisdiction of national courts and not bilaterally. Consequently, the two decisions of the United States courts invoked by the majority do not document the existence of an international custom since they apply domestic legislation of the United States and not a norm of international law.

Furthermore, the Draft which the International Law Commission of the United Nations started to prepare in 1978 and submitted to the General Assembly in 1991 (Draft Articles on Jurisdictional Immunities of States and their Property) still today remains simply a draft, as do the Draft Articles of the International Law Association. These documents testify to the lack of a customary norm recognizing an exception to State immunity for torts committed on the territory of the forum State *jure imperii*. The failure to reach agreement on these draft documents, and to render them binding texts, confirms that the regulations which they contain, in relation to the exception to immunity at issue here, do not constitute a generally accepted rule of customary international law. Furthermore, in the Draft Articles on Sovereign Immunity for American States produced by the Inter-American Legal Committee in 1983, the exception for torts committed on the territory of the forum State is restricted to torts committed within the framework of commercial activities and does not extend to torts committed *jure imperii* (Article 6(e) in conjunction with Article 5(1)). Of significance also is the jurisprudence of the English courts, in which the immunity of foreign States is recognized in relation to torts committed *jure imperii* (*Congreso del Partido*, 1983; *Kuwait Airways Corporation v. Iraqi Airways* , 1995. For more general discussion see *Académie de Droit International, Recueil des Cours*, 1980 II, volume 167, Sir Ian Sinclair, pp. 141 *et seq*.).

[A minority of four members of the Court (President Matthias and Judges Rigos, Bakas and Vardavakis) dissented on the following points:]

The exception to the rule of State immunity for torts, contained in the European Convention on State Immunity, does not include torts arising from armed conflicts. According to a clarification, included in the United Nations Draft Articles on the Jurisdictional Immunities of States and their Property of 1991, in relation to Article 12, the tort exception does not cover any claim founded on "situations involving armed conflicts". This expression is very wide. It does not refer merely to action or incidents in war but to all kinds of armed conflicts under all circumstances. There is no distinction between attacker or victim of the attack, nor in relation to the kind of conflict and its results, nor depending on whether it was limited to fighting between military formations or also extended to civilians. This wide expression is justifiable

because the States signing international conventions on sovereign immunity or considering the drafts of such conventions obviously want to enjoy immunity not only in relation to claims for damages arising from organized military conflicts but also in relation to all claims arising from armed conflicts…Such conflicts constitute expressions of dynamic confrontation in various forms, including armed resistance by the occupied country as well as efforts by the occupying country to suppress such resistance by force. Attempts to break down armed conflicts into different phases, some considered as falling within and some as falling outside the notion of armed conflict, are artificial and do not correspond to reality.Consequently, according to the dissenting minority, it should be accepted that States enjoy immunity from all claims arising from a situation of general conflict between countries. This interpretation is supported by the fact that, despite the many recent wars and many atrocities carried out during them, there do not appear to have been any successful judicial claims for damages anywhere in the world and, in particular, relying on an exception to the rule of immunity.

[A minority of the same four above-mentioned members of the Court adopted the following dissenting opinion:]

In all the circumstances described above, the group killing of the civilians at Distomo, as horrible and cruel as it is, was directly connected to the armed conflict between the Greek resistance and the military forces of the enemy. Indeed, it is clearly acknowledged that:

(a) The terrorist acts and "clean-up" operations and executions of innocent civilians were carried out by the German forces of occupation "in order to bring down the morale of the resistance and to reduce the intensity of their fighting" because "the successes of the allied forces on the war fronts would result in the intensification of the resistance by the Greek Liberation Forces";
(b) The Germans shot and killed each Greek they met in order to fulfil the above aim…and this activity formed part of military conflict;
(c) On the way to Stiri village the German forces were ambushed by members of the Greek resistance who killed eighteen Germans clearly within the framework of the same military conflict;
(d) Subsequently the Germans, in order to take revenge, went back to Distomo where (…) they encircled the village (…) and started the collective killings.

Consequently, these collective murders are also incorporated into the same armed conflict. They are connected in time and cause with the killing of the eighteen German soldiers which preceded them, since they

constitute a reply to that immediately preceding act of resistance. Whilst that reply was, of course, disproportionate and cruel, it nevertheless clearly came within the armed conflict since it took place within the framework of group retaliation against opponents [of the occupation]. Furthermore, an exception to the immunity of the German State cannot be founded on the infringing of international norms which constitute *jus cogens*, given that there is no customary rule establishing that such an infringement constitutes a tacit waiver of State immunity. Consequently, according to the dissenting opinion, the claims at issue were not subject to the jurisdiction of the Greek courts because the German State, in relation to those claims, enjoyed extraterritoriality (State immunity). Consequently the appeal should have been allowed…, the judgment of the trial court should have been quashed and the claim should have been dismissed…

[Report: Judgment of the Court of Cassation (Areios Pagos) in Case No 11/2000 (English translation prepared for the International Law Reports from the unpublished Greek text)]

NOTE. — Following the dismissal of Germany's appeal, the judgment of the Court of First Instance of Livadia awarding compensation became final. The German authorities did not comply with the decision so the plaintiffs sought to enforce it against German property in Greece. Such enforcement against a foreign State required the consent of the Minister of Justice under Article 923 of the Code of Civil Procedure, which was not granted. In a judgment of 14 September 2001, the Court of Appeal of Athens upheld an objection to enforcement lodged by Germany on the ground that Article 923 pursued an aim in the public interest, namely to avoid disturbances in international relations, and was proportionate to that aim. Neither did Article 923 constitute a denial of the right to efFective judicial protection, contrary to Article 6 of the European Convention on Human Rights, since it was not an absolute prohibition on enforcement but merely a requirement for prior government approval. An appeal to the Court of Cassation was dismissed on 28 June 2002.

The plaintiffs then lodged a complaint, under Article 6(1) of the European Convention on Human Rights, before the European Court of Human Rights, against the refusal of the Greek and German authorities to comply with the decision of the Court of First Instance of Livadia (see *Kalogeropoulou v. Greece and Germany* , p. 537 below) and proceedings in the German courts (p. 556 below).

A critical comment on the above judgment of the Court of Cassation by Maria Gavouneli appears in 95 AJIL (2001) 198. The effect of the majority judgment in *Margellos v. Germany* (p. 525 below) is to reverse the decision in the above case.

129 ILR 513