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Mercredi 14 septembre 2011 à 10 heures

Wednesday 14 September 2011 at 10 a.m.

10 Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte.

La Cour se réunit ce matin pour entendre les observations de la Grèce sur l'objet de son intervention en l'espèce.

Permettez-moi de vous rappeler que demain, jeudi 15, et vendredi 16, l'Allemagne et l'Italie présenteront à leur tour des observations sur l'objet de l'intervention de la Grèce au cours de leur second tour de plaidoiries.

J'appelle maintenant M. Stelios Perrakis, l'agent de la Grèce, à la barre.

Mr. PERRAKIS: Mr. President, distinguished Members of the Court, this is the first time that I have appeared before your Court and I would like to begin by saying how deeply I admire both the Court and the work it has been doing for the last 66 years, and how much I am devoted to international justice and international law. It is a great honour and a privilege to be able to appear before you on behalf of my country, the Hellenic Republic.

I. INTRODUCTORY REMARKS

1. The case before you is no ordinary case. It is a defining case, whose substance goes beyond a simple bilateral dispute between States, because the real issue, the core of the matter, — behind the established notions, whether accepted or evolving —, is the duel between State sovereignty and the individual, between the jurisdictional immunity of the State and individuals whose rights are infringed and who are subject to grave violations of humanitarian law.

2. An examination of State immunity, a sensitive issue in terms of its implementation, must address the substantive rules deriving from the international responsibility of the State, its obligation to make good any damage caused and the individual right of the victim to reparation.

3. The *Germany* v. *Italy* case is unfolding before the Court at a time when the international community is actively committed to promoting an international constitutional order in which democracy, the rule of law and human rights prevail and in which justice reigns. As the great Greek tragedian Aeschylus said in his work *Eumenides*: "[there], where Justice, triumphing over the Erinyes, the goddesses of retribution, and the barbaric aspects of humanity, promises Athens

11 that its seat, the seat of justice, will be a fortress, a rampart of safety, as large as the territory of Athens, as strong as the City-State . . .” *[translation by the Registry]*.

4. I find it difficult to believe that the fundamental question in the present dispute, of State immunity versus the rights of the individual, risks shaking the foundations of international law, or that development in that respect could pose a threat to international law, as is claimed. I would point out that the international community, whose institutional and legal structure was established by the 1945 United Nations Charter, not only affirms the sovereign equality of States but sanctions the establishment of human rights within the League of Nations.

5. The Hellenic Republic is here before you further to the Court’s Order of 4 July 2011 on the Hellenic Republic’s Application for permission to intervene in the case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy)*. In that Order, the Court granted the Hellenic Republic permission to intervene in the current proceedings as a non-party, in accordance with Article 62 of the Statute of the Court.

6. On 3 August, pursuant to Article 85, paragraph 1, of the Rules of Court, Greece filed its written statement; comments on that written statement were received from Germany on 26 August.

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

8. The purpose of Greece’s intervention was set out in its Application for permission to intervene of 13 January 2011, and in its written observations of 4 May 2011. It was described clearly in the Court’s Order of 4 July 2011. What the Hellenic Republic seeks to do, within the limits set by the Court in its Order and on the basis of the decisions rendered by the Greek courts in the *Distomo* case, is to help to determine the current legal position in respect of an evolving issue and to contribute to the progressive development of international law, in an area of such importance to the international legal order and to the position of the individual therein.

9. We will begin today by presenting the factual background to the present case and to our

12 intervention. We will then clarify the judgments of the Greek courts in the landmark *Distomo Massacre* case, by elaborating on the legal principles deriving from both national and international

law which underpin those judgments. This approach will involve discussing the factual background to the issues underlying the *Distomo Massacre* case as well as the legal position adopted by the Greek courts concerned, in the light of issues relating to State immunity, of international liability and of the civil claims instituted in respect of the enforcement of the *Distomo* judgment in Italian territory. We will also refer to the *Margellos and Others* judgment of the Special Supreme Court.

10. We will then consider the judgments in the light of international law and its recent development, so as to analyse the various components involved. Finally, we will conclude by addressing the legal consequences that the Court's Judgment will have on this question. While this issue is undoubtedly of general interest to any State, we will look at the practical consequences that the Court's judgment will have in Greece on pending and future cases similar to those which have already been brought before the Greek courts.

II. THE FACTUAL AND FUNCTIONAL BACKGROUND TO THE PRESENT CASE AND TO GREECE'S INTERVENTION

Mr. President, distinguished Members of the Court, I would now like to describe the factual and functional background to the present case and to Greece's intervention.

11. In the dispute between Germany and Italy over the adoption and enforcement, within the Italian legal order, of various judgments rendered by Italian courts — in violation, according to Germany, of the jurisdictional immunity which it enjoys under international law — awarding reparations to individual victims of serious violations of international humanitarian law committed by the Third Reich and the German armed forces during the Second World War, one of Germany's complaints — the third — focuses on the enforcement in Italy of a Greek judgment in the *Distomo Massacre* case. This was the judgment rendered by the Livadia Court of First Instance *(Protodikeio)*, upheld by the Court of Cassation *(Areios Pagos)*, which held the German State liable to compensate Greek nationals who had been the victims of the massacre perpetrated at Distomo by German armed forces on 10 June 1944, when Greece was under German occupation.

13 12. On 25 September 1997, the Livadia Court of First Instance found Germany liable for serious violations of humanitarian law committed during the massacre and awarded damages to relatives of the victims of the massacre. Germany lodged an appeal before the Greek Court of

Cassation, which, in 2000, upheld the Livadia judgment by an overwhelming majority. However, the Livadia decision, which had become final, could not be enforced in Greece, as the authorization required under Article 923 of the Greek Code of Civil Procedure for enforcing a decision against a third State was not granted by the Minister for Justice.

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

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

15. The claimants also instituted proceedings before the German courts (the Bonn Regional Court in 1997 and the Cologne Supreme Regional Court the following year) with a view to enforcing the Livadia judgment in Germany. The Distomo victims' action was unsuccessful. The Greek applicants then lodged an appeal before the German Federal Constitutional Court, which was rejected on 26 June 2003. The explanation for the dismissal of the individual Greek actions is to be found in the status of German legislation on the possibility for victims of IHL violations to lodge claims and in the attitude of the German courts towards the right of individual victims to justice and reparation.

16. By contrast, the Distomo victims did succeed in securing enforcement through a decision of the Florence Court of Appeal of 2 May 2005, which declared that the Livadia judgment was enforceable in Italian territory. The decision to enforce the judgment rendered by the Livadia court became enforceable after the Italian Supreme Court *(Corte Suprema di Cassazione)* upheld the
14 decision of the Florence Court of Appeal. On 7 June 2007, the Greek applicants registered with the Como provincial office of the Italian Land Registry a legal charge over Villa Vigoni, a property of the German State.

17. In this context, reference is also made to the decision in *Margellos and Others* v. *Germany*. On 17 September 2002 the Special Supreme Court, by a majority of six votes to five, adopted a position contrary to that of the Court of Cassation in 2000.

18. On 13 January 2011, the Hellenic Republic filed an Application for permission to intervene under Article 62 of the Statute in the current proceedings between Germany and Italy. Greece stressed the fact that its Application was in keeping with its wish to contribute, as a non-party, to the sound administration of justice in this case.

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

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

Mr. President, Members of the Court, we are now going to address the question of the position of the Greek courts on State immunity in respect of reparation for violations of humanitarian law, in the context of the development of international law, and I ask, Mr. President, if you would give the floor to my colleague, Counsel and Advocate, Professor Antonis Bredimas.

Le PRESIDENT : Je remercie M. Stelios Perrakis, l'agent de la Grèce, pour son intervention. J'invite à présent M. Bredimas à prendre la parole.

Mr. BREDIMAS: Mr. President, Members of the Court, this is the first time I have addressed the Court, and it is a very great honour and privilege to be able to do so on behalf of my country. My statement will consider the judgments in the *Distomo Massacre* case, that is to say, the judgment of the Court of First Instance of Livadia and, subsequently, the judgment of the *Areios Pagos*, the Greek Court of Cassation.

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

A. The judgments in the *Distomo Massacre* case

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

21. Beginning with the Court of First Instance of Livadia, in the *Prefecture of Voiotia* (and others) v. *Germany* case, known as the *Distomo Massacre* case, the Prefecture of the central Greece region and 257 individuals submitted, on 27 November 1995, a claim for compensation to the Court of First Instance of Livadia, capital and administrative centre of the Prefecture. The claimants asked the court to declare admissible their claims for compensation for pecuniary and non-pecuniary losses suffered during the atrocities committed by the German occupying forces in Distomo on 10 June 1944. In that horrific episode, 218 of the village's inhabitants, including seven babies under six months, 15 children aged between 2 and 5, and 25 children aged between 6 and 12 (a total of 47 children), 91 women, 25 elderly men and 20 couples, not to mention numerous rapes and murdered pregnant women — victims who were, for the most part, relatives of the applicants — were massacred, their property was destroyed and the village was burned to the ground.

22. The Hellenic Republic does not find it necessary to dwell on the facts which form the basis of the case brought before the Livadia court. They are well known to the Court, to the Parties to the present dispute and indeed beyond. An excellent statement of those facts can be found in the separate opinion of Judge Cançado Trindade. It is undeniable that, besides engaging the international responsibility of the German State, of course, those atrocities constitute crimes against humanity or war crimes, similar in nature to those which impelled the Nuremberg Tribunal to pass heavy sentences on various individuals, sentences that were mirrored elsewhere in other trials that took place after the Second World War. Germany, in its comments of 26 August, does not dispute either these facts or these legal implications, and we welcome the fact that it is not denying the obvious.

23. Distomo, like Kalavrita and 88 other massacre sites in Greece, is an example of a
16 widespread and systematic policy of reprisals by the occupying power, which resulted in the destruction of Distomo and many other Greek villages and the extermination of an innocent civilian population in a manner that has been described as "barbaric".

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

25. The Court of First Instance of Livadia began by automatically examining whether it had jurisdiction under Article 4 of the Code of Civil Procedure, that is to say, where the respondent does not appear at the initial hearing, as was the case with Germany. The court also considered whether it had jurisdiction in the light of a further provision referred to by that same article of the Code of Civil Procedure, whereby "Foreign citizens shall not be subject to the jurisdiction of Greek courts where they enjoy immunity." That prerogative of immunity is enjoyed not just by individuals, but also by foreign States as subjects of public international law. The court, considering this last question, adopted the general approach accepted in public international law, which is to distinguish between acts of a State which fall under private international law (acts *jure gestionis*) and those by which a State exercises its authority (acts *jure imperii*). The Livadia court followed extensive Greek jurisprudence in recognizing that State acts *jure imperii* are covered by the principle of immunity. It then went on to consider whether the acts committed by the German occupying forces at Distomo were acts *jure gestionis* or *jure imperii*.

26. The court — as would any Greek court — considered this question according to the domestic law of the forum State, but following the principles established by international law, including Article 46 of the Regulations annexed to the Hague Convention of 1907, under which "Family honour [and] rights, the lives of persons, and private property . . . must be respected." This provision constitutes a specific obligation for occupying forces, which are required to comply with it. On that basis, the Livadia court agreed that Article 46 was a provision of *jus cogens*, as
17 accepted by public international law. The consequence of the existence of *jus cogens* is that a State

cannot invoke the principle of immunity if it is prosecuted for breaching provisions of that nature. The Livadia court based its finding on the judgment of the Nuremberg Tribunal that the right to immunity is lost where the acts or offences in question are condemned under international law, a reference to what was subsequently accepted as *jus cogens*. The court therefore reached the following conclusions: *(a)* that a State which has breached a rule of *jus cogens* is deemed to have implicitly waived the right to immunity, *(b)* that acts of a State in breach of *jus cogens* cannot be classified as sovereign acts, *(c)* that territorial sovereignty prevails over the principle of immunity, which cannot be relied on by a State for acts committed during an illegal military occupation, and finally *(d)* that claiming immunity for acts committed in breach of *jus cogens* would be tantamount to an abuse of law. On all those grounds the Livadia court, reiterating that the acts committed by the Germany occupying forces did not constitute acts of sovereign authority, held that Germany did not enjoy immunity and that the actions brought before it by the plaintiffs were admissible.

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

28. Addressing the question of compensation for the applicants, the court deemed their claims to be in accordance with international law, referring to Article 3 of the Hague Convention of 1907, which provides that

> "A belligerent party which violates the provisions of the said Regulations [Respecting the Laws and Customs of War on Land, in other words Article 46] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

The Livadia court discussed two points relating to this. First, although Greece has not ratified the Regulations, the two States (Greece and Germany) are nevertheless bound by their content since they form part of customary international law; and second, the expression "if the case demands" used in Article 3 of the Hague Convention does not, according to legal
18 commentators, introduce a flexibility clause into that article, but instead emphasizes that it is necessary for damage to have occurred.

29. The Court of First Instance went on to consider two questions arising from certain national or international instruments that might be relevant for the issue of reparations. First, it analysed Greek Law No. 2023, under the terms of which "The state of war between Greece and

Germany shall be lifted as of 10 June 1951", but observed that that applied "subject to the settlement of the issues and disputes that have arisen from the war, in a subsequent peace treaty". Second, it considered the London Agreement of 27 February 1953 on German External Debts, which Greece ratified in 1956, Article 5 (2) of which provides as follows:

> "Consideration of claims arising out of the Second World War by countries which were at war with or were occupied by Germany during that war, and by nationals of such countries, against the Reich and agencies of the Reich, including costs of German occupation, credits acquired during occupation on clearing accounts and claims against the Reichskreditkassen, shall be deferred until the final settlement of the problem of reparation."

30. For the Livadia judges, although Germany had not concluded a formal peace treaty with Greece, the Moscow Treaty of 1990, known as the "Two-plus-Four Treaty" — the two German States (the Federal Republic of Germany and the German Democratic Republic) plus the four victorious powers (USSR, UK, USA and France) — constituted a peace treaty, since it settled issues arising from the armed conflict of the Second World War. The court observed that the rules contained in the Moscow Treaty satisfied the condition laid down in the London Agreement (that the problem of reparation should be finally settled in a treaty).

31. Lastly, the Livadia court considered which claims for compensation should be accepted and which dismissed on the ground that they were vague or sought pecuniary satisfaction for mental suffering.

32. In its Decision No. 137/1997, the Livadia court ordered Germany to pay the applicants some €27,362,323, but above all adopted a decision which both the plaintiffs and public opinion regarded as justice being done.

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

33. Germany appealed in cassation against the 1997 judgment of the Court of First Instance of Livadia in 1998. In its judgment of 1999, the First Civil Chamber of the *Areios Pagos* referred the case to the full court, which rendered its judgment on 25 May 2000 upholding the judgment of the Livadia court and dismissing Germany's appeal in cassation.

The Court of Cassation looked at the fundamental issue in the dispute, examining the two elements necessary for an international custom to exist, namely, general practice and *opinio juris*.

It found that the principle of the sovereign immunity of foreign States is a rule of customary international law which, according to Article 28 of the Constitution, constitutes an integral part of Greek law and is designed to avoid "the disturbance of international relations". The court reiterated the judgment of the Livadia court concerning the distinction between acts *jure imperii* and acts *jure gestionis* and the fact that that distinction is made on the basis of the law of the forum State. It subsequently referred to conventional international law and in particular the 1972 European Convention on State Immunity, on which it made the following observations. First, the Convention had been ratified by only eight States, one of which was Germany, but the fact that it had not been ratified by the majority of European States did not mean that they disagreed with the fundamental principles it contained. The Court of Cassation also considered that the Convention codified customary international law on the subject. In any event, the court highlighted Article 11 of the Convention, which provides that a contracting State cannot claim immunity from another contracting State in proceedings relating to redress for injury or damage caused by crimes committed against a person or property, regardless of whether the crime was committed by the State *jure imperii* or *jure gestionis*. The judgment goes on to consider the cumulative conditions laid down in the Convention, which are that there must be a connection with the forum State, that the act must have occurred in the territory of the forum State, and that the author of the injury or damage must have been present in the territory of the State where the crime was committed.

34. The *Areios Pagos* devotes particular attention to the fact that the 1972 Convention pioneered and influenced legislation on exceptions to the principle of immunity in a number of States, particularly outside Europe (USA, Canada, Australia, South Africa, Singapore, etc.), while a

20 whole section of the judgment is devoted to the "Articles on Jurisdictional Immunities" drafted by the International Law Commission in 2001, which, according to the Court of Cassation's judgment, reflect the opinions of the international community on questions of immunity. The court expressly refers to Article 82 of the International Law Commission's Articles and compares it with the corresponding text in the European Convention and the note by the Rapporteur interpreting that Article, which states that it is based on the principle of territoriality and governs crimes committed by State organs in the forum territory, whether they are acts *jure imperii* or *jure gestionis*. The Court of Cassation also invokes similar rules produced in 1991 by the Institut de droit international

as well as the jurisprudence of certain States, in particular the USA, where it expressly cites the cases of *Letelier* v. *Republic of Chile* of 1980 and *Liu* v. *Republic of China* of 1986, in which the American courts affirmed their jurisdiction to hear these cases even though they concerned government acts committed *jure imperii*.

35. Finally, the Court of Cassation, referring to the Regulations annexed to the Fourth Hague Convention of 1907, concluded that the criminal acts committed were "in contravention of the peremptory norms of international law".

36. On the basis of all these factors, as well as the opinion of many prominent writers on public international law, the court held that this was a general practice on the part of States which was accepted as law and, consequently, that it was an international custom which provides that national courts may have jurisdiction, by way of exception from the principle of immunity, over claims for damages in relation to wrongful acts committed in the circumstances described earlier. The court accepted that the exception from the principle of immunity did not usually cover claims for pecuniary reparation relating to armed conflict, since such reparation is usually covered by agreements between States (peace treaties). However, State jurisdictional immunity did not apply where the acts committed constituted crimes — usually crimes against humanity — which were not objectively necessary to maintain a belligerent occupation.

37. Applying those conclusions in the present case, the Court of Cassation upheld the
21 judgment of the Livadia court, agreeing that the acts committed against the inhabitants of the village of Distomo by the German occupying forces constituted armed reprisals which were not in any way necessary to maintain the military occupation or to suppress resistance. The court thus upheld the decision of the Livadia court that the German State could not invoke the principle of immunity and that it had indirectly waived that right in so far as the acts in question did not have the character of acts of sovereign power.

Mr. President, Members of the Court, that concludes my statement, and I would now ask you to invite our Agent, Professor Stelios Perrakis, to continue with our arguments.

Le PRESIDENT : Je remercie M. Bredimas pour son exposé. Je redonne la parole à M. Stelios Perrakis, l'agent de la Grèce, qui va présenter ses observations.

Mr. PERRAKIS: Mr. President, Members of the Court, I will continue our statement on the position of the Greek courts on State immunity in respect of reparation for grave violations of humanitarian law.

B. The judgments of other Greek courts

38. Greece was one of the worst affected countries in the Second World War, with an unusually high loss of life in relation to the size of the population, but also because of the civilian massacres frequently perpetrated. It should be underlined that the *Distomo* case was not an isolated case in the relevant Greek case law. Massacres similar to those in Distomo were committed by the occupying troops in 89 locations, one of the worst being in Kalavrita in the northern Peloponnese.

39. A whole series of claims for reparation were brought before the Greek courts during the late 1990s by individuals who had been victims of the conduct of German occupying forces. Individual actions for damages were brought before a number of Greek courts on the basis of various acts committed throughout the country, most of them terrible crimes perpetrated by the army of occupation during massacres mainly carried out as reprisals.

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40. These gave rise to a series of different first-instance and appeal judgments, which outlined the trend in respect of the principle of State immunity. Some did not uphold the victims' claims, invoking the jurisdictional immunity of the German State. Others accepted that the individual complaints were well founded, as was the case with Distomo. The latter courts, having affirmed their jurisdiction to hear the complaints brought by individuals, upheld those complaints and rendered satisfaction, ordering the German Government to pay financial compensation for pecuniary and non-pecuniary damage. The first group of judgments includes those by the Courts of First Instance of Thebes (17/13 of 13/1/97), Chania (No. 77/1997), Piraeus (692/97), Larissa (93/98), Patras (953 of 25/9/1998), Arta (1/26/1/99), etc. The second group, the "positive" judgments, include the Courts of First Instance of Tripolis (59/1998), Aigio (92/3/6/98 and 91/25/6/1998), the Athens Court of Appeal (1122/1999), the Crete Court of Appeal (438/20/7/2000) and the Piraeus Court of Appeal (894/2001).

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

41. The *Margellos and Others* case before the Special Supreme Court is not mentioned in the Court's Order within the particular field of Greece's intervention. It is simply referred to in the Court's factual considerations. However, it was emphasized by Germany in its written pleadings in the principal proceedings, its comments of 26 August on our written statement, and in its arguments on Monday.

42. The *Margellos and Others* case is based on events similar to those in the *Distomo* case, which took place in Lidoriki in the Fokis region of central Greece. Pursuant to the request of the First Chamber of the Court of Cassation, the Special Supreme Court was asked to determine whether there was a norm in customary international law whereby, in the case of wrongful acts which violated peremptory international rules, there is an exception to the jurisdictional immunity of a State. Having examined the case law of various national courts, as well as that of the European Court of Human Rights in the *McElhinney* v. *Ireland* and *Al-Adsani* v. *United Kingdom* cases, and the 1972 European Convention on Immunity, the court concluded that, notwithstanding the fact that a trend was developing, it was not in a position to confirm the existence of an

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emerging international norm which would allow an exception to the jurisdictional immunity of the State in the event of crimes perpetrated by the armed forces of a State in violation of *jus cogens* international obligations. Judgment 6/2001 of the Special Supreme Court was rendered by the barest majority of six votes to five. I repeat, six to five. Just like *Al-Adsani*, where it was nine to eight. The minority, in its dissenting opinion, endorsed the arguments of the Court of Cassation, which my colleague discussed earlier, and insisted that the existence of an emerging customary norm of international law barred the application of State immunity in that case.

43. With regard to the *Margellos and Others* case, Germany's assessment of the judgment is legally flawed, in our opinion, as a result of its obvious confusion concerning the status of the Special Supreme Court. Notwithstanding its "information obtained", the situation is not as Germany would have us believe, which is that the judgment of the Special Supreme Court more or less "rejected" — the term used by the Agent for Germany, Professor Tomuschat — or even "overturned" the findings of the Court of Cassation.

44. First of all, Mr. President, Members of the Court, the Special Supreme Court is not "the highest judicial body" in Greece, as the German Government states. According to authoritative legal writers in Greece, the majority of publicists classify this court as a special court which is neither independent, permanent nor hierarchically supreme, and which does not necessarily share the same characteristics as courts of law in other countries, whose acts take clear precedence within the national legal order. As for its judgments concerning the existence of rules of international law, it is difficult to claim that these have an *erga omnes* effect, including in respect of any government institutions.

45. The confusion lies in the jurisdiction exercised by the Special Supreme Court. Its judgments must be seen in the context of its legal status as a *sui generis* organ in the Greek legal system and therefore in the national legal order. Under Article 100 of the Greek Constitution, the Special Supreme Court has a dual role. Firstly, if there is a difference of opinion between two of the country's highest courts regarding the validity of a rule of law, the Special Supreme Court carries out a constitutional review in order to rule on and clarify the situation from a constitutional
24 standpoint. It can also declare that a generally accepted rule of international law (customary law under Article 28 (1) of the Constitution) is applicable in a particular case. It is therefore only partially a constitutional court, in its first role.

46. In the light of this legal situation, and particularly as regards the "identification" of an international customary rule in a particular case, it should be emphasized that the judgment rendered in *Margellos and Others* in 2002 and its impact on the Greek legal order raise certain questions. This is especially so given that the Special Supreme Court concluded in its judgment that "in the present state of development of international law, there is no generally accepted rule which would allow an exception to the rule of sovereign immunity" (paras. 14-15). However, the argument — namely the finding that international law is still developing — is there, even in the reasoning of the six-member majority (it goes without saying for the five-member minority, of course), whereby the current state of development of the law — as at the time of the judgment — was not such as to enable the court to hold that a new norm on immunity had been established.

47. On the other hand, the Special Court's role in providing a "uniform interpretation" of rules of international law does not mean that its interpretation cannot ever change. That is the view of the Special Court itself, which states even in the judgment in *Margellos and Others* that its approach is limited in time, given the continuing development of international law. In practice this means that the ordinary, "natural" judge must subsequently consider, at each stage in the development of international law, whether a rule may be regarded as "generally accepted" or not. It is the approach taken by the Special Court in its interpretations which becomes binding on other courts, not the interpretations themselves in individual cases.

48. This approach of allowing for the development of international law in this field — given the contrary position taken by the Court of Cassation in the *Distomo* case, as well as the changes emerging in international law and at the national level (Greek and Italian courts) — essentially leaves the question open.

49. All this provides evidence of the important role which the national courts play, in our opinion, in undertaking the application and interpretation of international law. The experience of
25 recent decades says much about their role. Major questions of international law and legal developments have originated with the national courts, such as the effects of the *Pinochet* case in terms of individual criminal responsibility, or more generally.

IV. THE APPROACH OF THE GREEK COURTS IN THE CONTEXT OF EVOLVING INTERNATIONAL LAW

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

50. Mr. President, Members of the Court, the question arises whether the reasoning behind the legal analysis of the Greek courts and their judgments in the *Distomo* and other similar cases, or in relation to other violations of humanitarian law, reflects the state of the debate at both national and international level and among legal commentators, relating to the development of international law in respect of jurisdictional immunity and other closely related questions of international law, which together form a corpus, even though each component of this corpus remains and embodies a distinct issue.

51. What is the position of this Greek interpretation of the principle of jurisdictional immunity in relation to the questions of reparation and individual actions before national/international courts in the light of developments in international law? In addressing the priority given to State immunity from the standpoint of other rules of international law governing the international status of the individual, are we on the right track in the effective implementation of rights? Is the approach adopted by the Greek courts to the *Distomo* case and the "minority" of the Special Supreme Court in line with developments in international law, State practice, the judgments of national or international courts, the position of international political institutions and others and the new legal rules?

52. Mr. President, it would appear that the Greek courts are mindful of these trends, which are moreover accompanied by considerable changes within the international community in the post-bipolar era. Indeed, international law has for some time been undergoing a considerable evolution, notably in respect of international responsibility, reparation for victims of human rights
26 violations and breaches of humanitarian law and related rights, and State immunity. It could even be said that the international law governing these matters is undergoing a transformation, not only in people's minds, but in fact and in law. Several internationalist authors, including international judges, share this view.

53. This transformation is marked in particular by the position and new role of individuals in the international legal order. Individuals, as holders of rights and international actors with rights and responsibilities, impel States and other international actors to adopt a different approach in their practice regarding the implementation of their rights. They thus contribute to the emergence of new international norms. Those same individuals, through their claims — by means of direct action before national courts or international judicial bodies — have produced a jurisprudence which frequently goes beyond the basic premises of the law as it was created or established in the past, but which no longer corresponds to the stated priorities of the international community in this century.

54. This aspect of the individual's position in the international order is only a new stage in an evolutionary process initiated, in its time, by the PCIJ (Advisory Opinion on the Jurisdiction of the Courts of Danzig) which considered «l'objet même d'un accord international, dans l'intention des

Parties contractantes, [est] l'adoption, par les Parties, de règles déterminées, créant des droits et obligations pour des individus, et susceptibles d'être appliquées par les tribunaux nationaux». Later, Hersch Lauterpacht considered that: «la position des individus en droit international ne peut pas ne pas être modifiée par certaines évolutions qui leur donnent le pouvoir de protéger leurs droits devant des juridictions internationales et leur imposent des obligations relevant directement du droit international» *[traduction du Greffe]*. These views have been taken up by legal commentators and are reflected in the commentary on the ILC Draft Articles on State Responsibility: «[aujourd'hui], les individus … [peuvent] être considérés comme les bénéficiaires ultimes [de certaines normes internationales] et, en ce sens, comme les titulaires de droits…».

55. Of course, the new situation is substantially reflected in the role of individuals before international courts: European and inter-American courts, as well as before other international organs: the Human Rights Committee, other human rights treaty bodies within the United Nations system and other institutions of regional or universal scope.

27 56. Recognition of individual criminal responsibility is a further element of change in the international status of the individual.

57. Even the views of the Security Council demonstrate the considerable progression of the position of the individual, in particular as regards protection against violations of human rights and humanitarian law. Evidence of this trend is to be found in several resolutions adopted after the 1990s, dealing in particular with the protection of civilians in situations of armed conflict or in relation to the question of humanitarian assistance. In this connection, see the recent statement by Mr. Gérard Araud, acting President of the Security Council, on 10 May 2011. In some cases where the civilian population was at risk, the Security Council has even authorized the use of armed force. What is the situation regarding State sovereignty in the case of Somalia, dating back more than 20 years (in 1992) or today in Libya (2011)?

58. Moreover, the advent in the international legal order of the principle of responsibility to protect, as set out in the 2005 World Summit outcome document (A/RES/60/1, paras. 138-140), strengthens the certainty of the need to protect civilian populations under threat or victims of grave violations of international humanitarian law.

59. Without doubt, in this legal framework, it is in the field of international human rights law, international humanitarian law and international criminal law that the greatest advances can be seen.

60. In reality, this is more than just the humanization of international law, according to Theodor Meron; it is a true reform of the global legal architecture. Evidence of this can be seen in international criminal law and in the new international criminal courts and tribunals. Reference should be made in this context to the State's obligation to facilitate the possibility for individual victims to claim reparation for a violation of international humanitarian law from an individual perpetrator. The State's responsibility to facilitate is an obligation derived from Article 75 of the Statute of the International Criminal Court. While it is true that, in that case, the question of reparation does not arise at State level, it is conversely a demonstration of a novel development, illustrating a turning point in international legal theory on individual reparation. Under this
28 approach, the individual as victim makes a direct claim for reparation against the perpetrator of the crimes. Thus, the issue becomes one of the relationship between the victim and the perpetrator, the victim and the international community.

61. This possibility for the individual to appear and plead before a court and to institute different types of proceedings, including in the area of reparation, has developed in several directions. The central role in this gradual process belongs to the doctrine of human rights and the proclamation of human rights by the international community at the universal, regional or national level.

62. In particular, the human rights treaties require States to provide for effective remedies in the event of the violation of rights, and most of them include a specific obligation on States parties to make provision for a right to seek reparation in domestic law. This is a firmly established individual right in international law: International Covenant on Civil and Political Rights (Article 2.3); Convention on Racial Discrimination (Article 6); Convention against Torture (Article 14); European Convention on Human Rights (Article 13); American Convention on Human Rights (Articles 10 and 25); African Charter on Human and Peoples' Rights (Article 7.1 *(a)*), to name only a few. These systems for the protection of human rights entail an obligation on States parties to establish domestic remedies available to individual victims of human

rights violations. According to General Comment No. 31, dated 26 May 2004, of the Committee on Human Rights under the International Covenant on Civil and Political Rights, Article 2, paragraph 3, of the Covenant requires States parties to make reparation to individuals whose Covenant rights have been violated. Without reparation, according to the General Comment, the obligation to provide an effective remedy, which is central to the efficacy of Article 2, paragraph 3, is not discharged.

63. Thus, as was confirmed by the European Court of Human Rights in the *Aksoy* v. *Turkey* case, "the notion of an effective remedy entails . . . the payment of compensation" by the respondent State (para. 98). The Inter-American Court of Human Rights took a similar position in the *Velasquez Rodriguez* case (paras. 174-176).

64. The same point is reaffirmed by the Commission on Human Rights in its resolution 1999/33 entitled "The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms" (26 April 1999).

65. In 2005, the Commission on Human Rights, followed by ECOSOC and finally the United Nations General Assembly:

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> "Affirm[] the importance of addressing the question of remedies and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law in a systematic and thorough way at the national and international levels . . . Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms international law in the field."

66. Mr. President, this is a United Nations instrument which, contrary to the assertions of Germany, is very clear about victims' rights to reparation, and which expresses the universal consensus concerning the State's obligation of reparation and its obligation to provide for an appropriate and adequate remedy at national level.

67. Article 21 of the principles adopted refers to the obligation on States to develop appropriate rights and remedies in favour of individuals whose rights have been violated. Professor van Boven had explained convincingly that the principle adopted by the General Assembly was the outcome of difficult negotiations and a number of diplomatic compromises. Accordingly:

— remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following, as provided for under international law: effective access to justice; adequate, effective and prompt reparation for harm suffered;

— in accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law;

— to that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgments.

68. In another context, it should be noted that the International Commission of Inquiry on Darfur observes in its Report that:

> «L'émergence des droits de l'homme en droit international a modifié la notion classique de responsabilité de l'Etat, qui plaçait celui-ci au centre du mécanisme d'indemnisation. L'incorporation des droits de l'homme dans le droit de la responsabilité des Etats a supprimé la restriction procédurale selon laquelle les victimes de guerre ne pouvaient demander réparations que par le biais de leurs gouvernements et a étendu le droit à l'indemnisation aux nationaux comme aux étrangers. La tendance majoritaire veut que l'indemnisation, au titre de la responsabilité des Etats, soit versée non seulement aux Etats mais aussi aux particuliers.» (Para. 593; footnote on p. 217.)

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69. In addition, in a letter addressed to the Secretary-General of the United Nations in October 2000, Judge C. Jorda, President of the International Criminal Tribunal for the former Yugoslavia, stated :

> «[l]a reconnaissance et l'acceptation universelle du droit à un recours utile ont forcément une incidence sur l'interprétation des règles du droit international relatives à la responsabilité des Etats pour les crimes de guerre et autres crimes de droit international.
>
> . . . . . .
>
> Ainsi, le droit international reconnaît maintenant le droit des victimes de violations graves des droits de l'homme, en particulier les crimes de guerre, les crimes contre l'humanité et les actes de génocide à la réparation (y compris sous forme d'indemnisation) du préjudice qu'elles ont subi du fait de ces violations.» *[Traduction du Greffe.]*

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

70. Mr. President, Members of the Court, the fundamental argument in the position of the Greek courts is based on the recognition that there is an individual right to reparation in the event of grave violations of humanitarian law. We wish to draw the Court's attention to three questions addressed by the Greek courts: first, whether individuals, in the light of the current legal situation, possess primary rights in human rights law and humanitarian law; second, whether they have the right to seek reparation in the event of the violation of these rights; and third, whether they have rights that can be enforced in domestic courts.

71. Of course, under customary international law, States have an obligation to remedy the effects of any violations of international humanitarian law committed by them. However, this gives rise to the question as to who is the beneficiary of the right to reparation. In this connection, there are both arguments and State practice in support of the view that humanitarian law confers rights on individuals, including the right to compensation for serious violations of international humanitarian law. International humanitarian law — law *par excellence* aimed at protecting the individual — confers rights on individual beneficiaries. That notion is implicitly accepted in a series of international humanitarian law provisions, which are included in the 1949 Geneva Conventions and the additional Protocols of 1977, and explicitly accepted in the philosophy and the very raison d'être of international humanitarian law. As was noted by Georges Abi-Saab, the aim
31 of international humanitarian law is to go «au-delà du niveau interétatique et [d'atteindre] celui des bénéficiaires réels (ou ultimes) de la protection humanitaire, à savoir, les individus et les groupes d'individus» *[traduction du Greffe]*.

72. The diplomatic conference preparing for the adoption of the four humanitarian conventions in Geneva also recognized as far back as 1949 that: «[i]l ne suffit pas d'accorder des droits aux personnes et d'imposer aux Etats une responsabilité ; il faut encore fournir aux personnes protégées les appuis qui leur sont nécessaires pour faire valoir leurs droits ;».

73. Thus, the obligation on the State to compensate individuals for violations of the rules of humanitarian law seems to derive from Article 3 of the Fourth Hague Convention of 1907, even though it is not expressly stated in that Article and even though individuals needed State mediation through inter-State treaties. On the other hand, nor does this situation reveal the intention not to

grant an individual right to victims of the law of the Hague Convention. That is made clear by the fact that individuals are not excluded from the text of Article 3. This line of argument also emerges from the *travaux préparatoires* of the Second Hague Conference. It should be recalled that, according to the initial proposal of Germany, «la partie belligérante qui violerait ces dispositions au détriment de personnes neutres sera tenue d'indemniser ces personnes au titre du préjudice subi» *[traduction du Greffe]*. In its commentary of 26 August, Germany claims that Professor Kalshoven, a former judge of your Court, interprets the *travaux préparatoires* on Article 3 d'une manière qui est «loin d'être convaincante», but at the same time, it can be seen that the German proposal, in its interpretation of Article 3, refers to the compensation of "persons" and that «[i]l est vrai que [les intervenants] faisaient pour l'essentiel référence aux *personnes* lésées». It is therefore hard to see why Kalshoven's interpretation that Article 3 «visait dès le départ à conférer aux individus le droit de demander réparation pour les préjudices qu'ils subissent, même s'il existait un désaccord sur la question de savoir si les ressortissants d'Etats neutres bénéficieraient des mêmes droits» *[traduction du greffe]* est «loin d'être convaincante».

74. Both Judge C. Greenwood and Professor Eric David take a similar approach: Article 3 «confère des droits aux personnes individuelles, notamment le droit à indemnisation, en cas de violation, que l'individu concerné peut revendiquer contre l'Etat auteur du préjudice».

32 75. The *travaux préparatoires* indicate that this provision concerns cases of individual claims against States for unlawful acts committed during armed conflict or belligerent occupation, even though Article 3 deals only with the procedural requirements for claiming reparation.

76. It should be emphasized that, at that time and for many years, practice in this field was based on the signature of peace treaties following the cessation of hostilities, which governed the question of reparation. However, it was often the case that such treaties were not concluded and, consequently, the question of compensation remained open, as for example in the case of Germany in 1990, or the case of Iraq recently, among others.

77. The right to reparation appears in Article 91 of the 1977 additional Protocol, the substance of which reflects customary international law. According to the ICRC commentary, «les ayants droit à l'indemnité seront normalement des Parties au conflit, *ou leurs ressortissants*» (les italiques sont de nous), even if there are procedural problems. Similarly, in 1986, when the ICRC

commentaries where being drafted, it was recognized that there was already «[une] tendance … [croissante] à autoriser les personnes victimes de violations du droit international humanitaire à demander directement réparation à l'Etat responsable».

78. Since 1986, the ICRC has carefully completed its study on customary international humanitarian law, in which it provides (Rule 150) for a right to reparation for serious violations of international humanitarian law. In order to arrive at that finding and prove the customary nature of this obligation and the binding force of the rule, the ICRC undertook a thorough assessment of the sources and the evidence.

79. International practice in this field is abundant and multi-faceted. In the case concerning the *Factory at Chorzów*, the Permanent Court of International Justice stated that a secondary right to reparation was the indispensable complement of a violation of international law. Your Court also addressed the right of individuals to reparation in its advisory opinion on the "Wall", where it found that Israel had the obligation to make reparation for the damage caused to all the natural or legal persons concerned. The Court recalled the firmly established case law to the effect that "[t]he essential principle contained in the actual notion of an illegal act . . . is that reparation must, as far

33 as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".

Le PRESIDENT : Monsieur Perrakis, excusez-moi de vous interrompre. Les dernières pages que vous venez de lire ne semblent pas avoir été traduites en anglais. Nous vous serions reconnaissants de bien vouloir parler un peu plus lentement pour permettre aux interprètes de vous suivre.

Mr. PERRAKIS: Certainly, Mr. President.

I was saying therefore, that, in the opinion of the Court, your Court, in the case concerning the "Wall", Israel also had an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction (paras. 149-154).

80. This position was reaffirmed in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 257, para. 259:

> "The Court [your Court] observes that it is well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by . . . (violations of international human rights law and of international humanitarian law, looting, plunder and exploitation of the DRC's natural resources), [and] the Court considers that those acts resulted in injury to the DRC and to persons on its territory. Having satisfied itself that this injury was caused to the DRC by Uganda, the Court finds that Uganda has an obligation to make reparation accordingly."

81. The International Criminal Tribunal for the former Yugoslavia, for its part, in the *Furundžija* case, referring to the specific category of peremptory rules of international law *(jus cogens)*, held that the individual victims of a violation of such norms are automatically entitled to seek reparation before any court of law.

82. The possibility of exercising an individual right derived from international humanitarian law has been addressed by a number of national courts. There are extremely wide differences in the approach adopted by these courts. Some of them have even taken the position of refusing all rights to individuals from the standpoint of international law, as for example in the famous
34 *Shimoda* case in 1963, or have held that individuals are only beneficiaries of rights and enjoy only the indirect protection of international law. For example, the German Federal Constitutional Court had recognized in 2004 that individuals are beneficiaries of rights under international humanitarian law, but it did not accept that Article 3 entailed an individual right.

83. The same approach in recent German case law stands in contrast to the position taken by the German courts in the 1950s. Thus, a German administrative court of appeal concluded in 1952 that Article 3 of the Fourth Hague Convention provided for an individual right to compensation.

84. The possibility of exercising an individual right in order to claim damages has been recognized by some national courts, such as the Amsterdam Court of First Instance in the *Dedovic* v. *Kok* case of 2000.

85. The State's obligations to compensate individuals for violations of the rules of international law is also affirmed in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, Article 33 (2) of which — a "savings clause" — states

that it is without prejudice to "any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State" (commentary, Crawford, p. 210).

86. Some persons have also obtained reparation directly through a variety of procedures, including mechanisms put in place by the Security Council, inter-State agreements and unilateral acts, such as national laws or responses to claims filed directly by individuals with national courts.

87. One of the most interesting mechanisms is that of the 2000 Agreement between Eritrea and Ethiopia, establishing an Eritrea-Ethiopia Claims Commission (EECC). In this case, even if individuals submit claims to the Commission through their States, the Commission has confirmed nevertheless in its jurisprudence that «la demande demeure la propriété de l'individu et … les dommages-intérêts sont, le cas échéant, accordés à l'individu». Consequently, individuals are perceived as the holders of secondary rights under international humanitarian law.

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88. The question also arises in the context of reports submitted by fact-finding missions of the Security Council or the Human Rights Council on situations of violations of human rights and humanitarian law, as exemplified by the commissions of inquiry on Darfur, Lebanon and others.

89. A series of other international instruments, in the form of "soft law", strengthen the position of the victim and his or her right to reparation, such as General Assembly resolution 48/153 and others on the former Yugoslavia, and resolution 1998/70 of the Commission on Human Rights, on Afghanistan. More recently, the International Law Association adopted a declaration on "reparation for victims of war" in 2010, Article 6 of which provides that "victims of armed conflict have a right to reparation from the responsible parties".

90. Thus, reparation is directly provided for individuals through various procedures, in particular via mechanisms established by inter-State agreements, via unilateral acts of States, national legislation, and, where appropriate, reparation claimed directly by individuals from national courts.

With your permission, Mr. President, I shall now address the question of jurisdictional immunity and its relative nature in relation to the question of *jus cogens*.

(c) ***Jurisdictional immunity of the State and its relative nature and the question of*** **jus cogens**

91. The progression from absolute jurisdictional immunity to relative immunity, and the development of the distinction between acts *jure imperii* and acts *jure gestionis*, are the result of significant developments within the inter-State international community and the establishment of international laws which addressed national and/or international changes. Thus, beginning with commercial transactions, national judges were induced to protect the rights of the individuals who were parties in those transactions. The maxim "par in parem non habet imperium" and its consequences underwent an initial restriction in practice in relation to State immunity.

92. This evolution began with various national courts, as a consequence of claims filed by
36 individuals, followed by international instruments, such as the European Convention on State Immunity and the United Nations Convention on Jurisdictional Immunities of States and their Property (2004), and even national legislation.

93. In a second phase — the transformation of the international community from an inter-State community to a community of several international actors (States, international organizations, groups of individuals, NGOs, etc.) — the individual has become a conduit for the functioning of that community and for the implementation of international law, in particular as a legal vehicle for human rights.

94. In these circumstances, a universal demand for a system of justice could never be furthered or satisfied by opposing State sovereignty to human rights. And it was strongly emphasized by the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case that State sovereignty cannot be invoked in the case of war crimes and crimes against humanity.

95. A direct result of this situation is a growing pressure on States to provide the means to remove obstacles and enable victims to obtain reparation. A new perspective is emerging for individuals, as a result of the obligation on States to promote the right of reparation.

96. This evolution in the law of State immunity has been accepted by a number of national courts, which have reached their decisions on the basis of the current state of international law and its development. It is against this background that the *Distomo Massacre* case has to be viewed.

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

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

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

100. The approach whereby the rule of State immunity does not take precedence over a *jus cogens* rule would appear to suggest an *opinio juris* crystallizing as a new customary norm in this area (see the dissenting opinion of a minority of the European Court of Human Rights in the *Al-Adsani* v. *United Kingdom* case). The declarations made by three States (Norway, Sweden and Switzerland) ratifying the Convention on Jurisdictional Immunities, in which they state that the latter instrument is without prejudice to any future international development in the protection of human rights, reflect this view.

101. Even the Polish Supreme Court, Mr. President, in its recent judgment in 2010, addresses the question of *jus cogens* in relation to State jurisdictional immunity, and recognizes that there is a tendency to deny State immunity with respect to war crimes, describing this denial as an emerging norm.

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

international community — are taken into account. In this context, the *jus cogens* rule is part of a "custom-generation process". If, on the other hand, the procedural rule (jurisdictional immunity) were to take precedence over the substantive rule *(jus cogens)*, it would produce an untenable legal situation, inconsistent with the purpose and *ratio* of the primary substantive *jus cogens* rule, which would be violated without achieving its goal (for example, with regard to torture, to provide satisfaction or reparation for the victim, and to punish the perpetrator of the violation).

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

104. The *ratio* of the operation of *jus cogens* rules lies in the fact that the international community/society of today is better organized, under the rule of law, and considers certain rights as fundamental values. The international community appears not in any sense to authorize rules opposed to a higher value (for example, the prohibition of torture), so the trend is towards their elimination.

105. If we wish to ensure the effective implementation of *jus cogens* rules, it is not enough merely to set aside the opposing norms; rather, we must fully satisfy its inherent purpose.

106. Indeed, how can a State that is in violation of its international obligations fully and entirely assume its responsibility, particularly as regards reparation for the victims, if the individuals that have suffered violations — even when they are defined as *jus cogens* violations — are not able to initiate reparation procedures before the competent courts.

V. GENERAL ASSESSMENT AND FINAL REMARKS

107. Mr. President, distinguished Members of the Court, the dispute before you concerns, on the one hand, the rule of immunity deriving from State sovereignty and, on the other, the basic rules relating to human rights, humanitarian law and international crimes. The former protect the

interests of States that are independent and sovereign equals. The latter refer to the emergence and establishment of fundamental values and rights, whose importance and protection are the subject of an awareness which is shared and promoted by the entire international community.

108. An examination of the application of State immunity must address the substantive rules deriving from the international responsibility of the State, the obligation to make good any damage caused and the individual right of victims to reparation. If an individual victim is unable to exercise his or her right, this has an immediate and direct negative effect on the obligation to provide reparation, which therefore indirectly casts doubt on whether the responsibility of the State is engaged.

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109. Especially when the State responsible for the violations of international humanitarian law, being aware of the facts and of its international responsibility for the unlawful acts committed by its organs, neither considers nor adopts appropriate national legislation to enable or clear the way for individual victims under international humanitarian law to seise the competent courts in order to submit compensation claims for injury caused by the responsible State.

110. Permit me, Mr. President, to recall the *Ko Otsu Hei Incidents* case of 1998 in which the Japanese court, which awarded compensation to three Korean women subjected to enforced prostitution during the Second World War, declared: "the Government was aware of the situation [violations of international humanitarian law] and of the fact that it was internationally responsible under international law, and yet it failed to adopt legislation of the kind required in order to allow the victims the legal possibility of compensation" *[translation by the Registry]*. Unfortunately, Mr. President, that judgment was later quashed, but it is a most insightful and innovative prototype.

111. International humanitarian law grants rights to individuals. What is the sense of affording an individual right for the protection of persons, which falls within the scope of international humanitarian law, if that right cannot by enforced by the courts? What is the extent of that right if, in the context of practical implementation, access to the courts is barred at the procedural level? This legal situation gives rise to the conclusion that the content of the rights in question, of the individual victims, cannot in fact be given prominence or even practical shape.

Their implementation is dependent on the affirmation of the primary rule benefiting the individual and the primary rule penalizing the State responsible for the acts classed as crimes, or may even be devoid of all substance.

40 112. It should be noted that international practice seems limited because a number of national courts are still hesitant. And this affords shelter to the State responsible for atrocities. But the process of change is already under way. The national court is becoming the final remedy.

113. Mr. President, Members of the Court, it is utter hypocrisy to claim today that the question of reparation should be entered into at inter-State level. How can use be made of a diplomatic procedure if States are unwilling to jeopardize their good relations? Or, in the specific case of Germany, if the latter does not formally respond to the Note Verbale it received from the Greek Government in 1995? In fact, how many peace treaties have been signed after recent conflicts (Iraq, Lebanon, Georgia — to name but a few)? What peace treaties are involved when modern conflicts, for the most part, are neither declared nor formally ended? Why did the signatories of the Moscow Treaty not address the question of reparation in that instrument? Why, in the past, have there been "selective" and "partial" responses to victims' claims? What is meant by how long is it necessary to wait for the question to be resolved? Certainly until such time as the responsible States fully assume their responsibility. Who has to honour the commitment which has been made for over a century: "he who infringes international law must make reparation"? And if the States which have undertaken that commitment fail to act at national or international level, how should we react? What should be done? How, then, should the present situation be defined at international level while attempting to provide credible responses to victims like those of Distomo? How can the legal effect, under Article 3, of a right to reparation for grave violations of international humanitarian law be denied? How much longer can this restrictive legal logic endure when the international community is now sending Heads of State like Bashir of Sudan and Gaddafi of Libya before the International Criminal Court for crimes against humanity, and taking measures in favour of human rights, vulnerable populations and victims of war?

114. The current international legal order cannot accept the absolute jurisdictional immunity of a State responsible for acts defined as war crimes or crimes against humanity, committed by its organs. Such a stance would appear outdated and incompatible with the requirements of justice

41 and the rule of law and with human rights, which form the legal-political backdrop to a certain culture developing within the international community as a whole. If the jurisdictional immunity of the State were to remain inviolable, this would be in direct contradiction to other developments in international law, in particular those relating to the international responsibility of the individual, the lifting of the immunity of Heads of State, the rights of individuals to have recourse to national and international courts, etc. This observation should be considered in the light of the fact that the rules of international responsibility and, hence, those of State immunity, were shaped at a time when the individual held a different status under international law. Today, however, we have human rights, individual criminal responsibility, universal jurisdiction and international criminal courts.

115. Moreover, as was recognized by the majority of the House of Lords in the *Pinochet* judgment, it is incongruous to both oblige States to try or extradite war criminals and recognize their jurisdictional immunity for such crimes. The legitimate invocation of a national interest by a State, in order to secure immunity from the jurisdiction of a national court, is deprived of its force in view of the evolution of contemporary international law.

116. As cited by Fleck:

> «Il serait paradoxal que dans les conflits armés d'aujourd'hui, alors que la responsabilité des individus pour crimes internationaux fait partie intégrante du droit international, les droits des victimes individuelles en droit international humanitaire restent «imparfaits», en ce sens que les Etats responsables ne sont liés par aucune obligation corrélative applicable.» *[Traduction du Greffe.]*

117. Nowadays, the international community and its members have a responsibility to ensure redress for violations of international humanitarian law and access to reparation for victims, even beyond the existence of a "peace treaty".

118. Is it not surprising that this notion is prevailing at a time when the international community recognizes the principle of the responsibility to protect, in the case of war crimes, crimes against humanity, genocide or ethnic cleansing committed in a State unable or unwilling to redress the situation, thus providing authority, following a decision by the Security Council, for even a right of armed intervention for the protection of populations under threat or attack (see Libya).

42 119. Trends, orientations, emerging situations — such movement on a national and international scale demonstrates that changes regarding immunity are already taking place.

120. Mr. President, the breakthrough — at both national and international level — in granting victims the right to reparation for violations is already significant and it will not stop there. It is a challenge for the years ahead — a new approach adopted by the community of nations as a general notion, but which is in keeping with the very sense of the law and moral philosophy.

121. Under these circumstances, it is for the Court, in its authority and wisdom, to give an authoritative answer to the questions which are raised in these proceedings and which are at the heart of the problems faced by the Greek courts in the *Distomo* case, but also in others.

122. Mr. President, Members of the Court, it is necessary to question Germany's argument regarding the threat posed to the international legal order by the flood of individual claims that would be brought before the national courts if there were any change in State jurisdictional immunity. On the other hand, Mr. President, we believe that the international order is threatened by the conduct of States which fail to comply with the rules of international law, which defy human rights, which do not commit themselves to promoting the values of justice and the rule of law. International law is at risk of being undermined by those sorts of attitudes and not by the ascendancy of human rights.

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

124. The *Margellos and Others* judgment of the Special Supreme Court, like the decision of the *Corte di Cassazione* in 2000 and the dozens of judgments rendered by various courts of first instance and courts of appeal, show that the Greek courts still appear to be divided on the question of immunity, and this can be said without overlooking or underestimating the dynamic trend exemplified by *Areios Pagos* and the Livadia court, which is being shaped by developments in international law in that area, as expressed in particular by the courts in the *Distomo* case.

43 125. We have confidence in the wisdom of the Court to resolve the complex and delicate question of State jurisdictional immunity. In the past, for example in the *Arrest Warrant* case, the Court has established the boundaries between individual immunity and universal jurisdiction. In our case, it may also systematically and usefully define the conditions under which jurisdictional immunities may be exercised, thereby avoiding a doomsday scenario.

126. The Greek Government considers that the effect of the judgment that your Court will hand down in this case concerning jurisdictional immunity will be of major importance, primarily to the Italian legal order and certainly to the Greek legal order. In fact, Article 28 of our Constitution stipulates that "[t]he generally recognized rules of international law . . . shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law".

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

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

129. On the other hand, a decision to the contrary by the Court, which would observe and establish that the jurisdictional immunity of the State cannot be applied in the case of heinous international crimes, would be "a first step in a process of reconciliation with the past" for the
44 victims of massacres like that of Distomo. The victims and their relatives — some of whom are present here — are merely claiming justice via human rights. The decision of the International Court of Justice should reflect the intentions of the international community stated in the

2005 United Nations World Summit Outcome Document regarding an international order for peace, justice, the rule of law, human rights, democracy and development. That would be the catharsis, so to speak, the final act of a Greek tragedy.

Mr. President, thank you for you attention.

Le PRESIDENT : Je remercie M. Stelios Perrakis, l'agent de la Grèce, pour son exposé, son évaluation générale et ses observations finales concernant la position de la Grèce en qualité d'Etat intervenant. Ainsi s'achève l'audience de ce matin. La Cour se réunira de nouveau demain de 10 heures à 12 h 30 pour entendre l'Allemagne, qui présentera ses observations sur l'objet de l'intervention de la Grèce au cours de son second tour de plaidoiries.

L'audience est levée.

L'audience est levée à 11 h 40.

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