INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

JURISDICTIONAL IMMUNITIES OF THE STATE

(GERMANY V. ITALY)

ANNEXES

TO THE

MEMORIAL

OF THE

FEDERAL REPUBLIC OF GERMANY

VOLUME 2

ANNEXES 16 - 43

12 JUNE 2009

Volume 2

Table of Contents

Annex 31	United States Court of Appeals for the District of the Columbia Circuit, *Hwang Geum Joo v. Japan, Minister Yohei Kono, Minister of Finance*, 28 June 2005.
Annex 32	Foreign State Immunity Law, 2008, Israel.
Annex 33	Corte di Cassazione, decision No. 530/2000, *FILT-CGIL Trento and Others v. United States of America*, 3 August 2000; English translation: 128 ILR 644.
Annex 34	Rechtbank s'-Gravenhage (Regional Court The Hague), judgment of 10 July 2008.
Annex 35	U.S. Department of State, Amicus Curiae brief in *Sampson v. Federal Republic of Germany*.
Annex 36	Thilo Rensmann, 'Impact on the Immunity of States and their Officials', in: The Impact of Human Rights Law on General International Law (Oxford 2009), pp. 151-170.
Annex 37	[French] Ministère public, submissions in *Bucheron* before Cour de cassation, of 26 April 2002/25 June 2002.
Annex 38	Cour d'appel de Paris, judgment of 9 September 2002, *Bucheron*.
Annex 39	Constitutional Court of Slovenia, judgment of 8 March 2001, English translation.
Annex 40	Rechtbank (Regional Court) of Gent (Belgium), judgment of 18 February 2000.
Annex 41	Tribunal of first instance Leskovac (Serbia), judgment of 1 November 2001.
Annex 42	Legal opinion of the Yugoslav Federal Ministry of Justice of 24 April 2002.
Annex 43	Court of Appeal of Gdansk (Poland), judgment of 13 May 2008.

Certification

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

Berlin, 13 June 2009

Annex 16

Corte di Cassazione

Case of *Max Josef Milde*

Judgment of 21 October 2008

REPUBBLICA ITALIANA
IN NOME DEL POPOLO ITALIANO
LA CORTE SUPREMA DI CASSAZIONE
PRIMA SEZIONE PENALE

01072/09

UDIENZA PUBBLICA

DEL 21/10/2008

SENTENZA

N. 1263/08

Composta dagli Ill.mi Sigg.:

Dott. FAZZIOLI EDOARDO PRESIDENTE

1.Dott.SILVESTRI GIOVANNI CONSIGLIERE REGISTRO GENERALE

2.Dott.GIORDANO UMBERTO " N. 017567/2008

3.Dott.SIOTTO MARIA CRISTINA "

4.Dott.ROMBOLA' MARCELLO "

ha pronunciato la seguente

SENTENZA ~~ORDINANZA~~

sul ricorso proposto da :

1) REPUBBLICA FEDERALE DI GERMANIA N. IL 00/00/0000

2) MILDE MAX JOSEF N. IL 30/11/1922

avverso SENTENZA del 18/12/2007

CORTE MILITARE APPELLO di ROMA

visti gli atti, la sentenza ed il ricorso

udita in PUBBLICA UDIENZA la relazione fatta dal Consigliere

SILVESTRI GIOVANNI

Udito il Procuratore Generale in persona del dott. Robutti Rosia

che ha concluso per il rigetto del ricorso;

udito, per la parte civile, l'Avv. M. Bianconi e R. De Fraja;

udito il difensore dell'imputato civile avv. Dossena;

Kacs. - Ilaj MILDE

SVOLGIMENTO DEL PROCESSO

Con sentenza del 10.10.2006, il Tribunale Militare della Spezia condannava alla pena dell'ergastolo Milde Max Josef ritenuto responsabile di concorso nel delitto previsto dall'art. 185 c.p.m.g. di violenza con omicidio contro privati nemici, pluriaggravata e continuata, perché, durante lo stato di guerra tra l'Italia e la Germania, a seguito dell'uccisione di quattro militari tedeschi, quale sergente della divisione paracadutisti corazzata "Hermann Göring", contribuendo alla materiale realizzazione del crimine e comunque reciprocamente rafforzandosi nel proposito criminoso, nella giornata del 29.6.1944, nei territori dei comuni di Civitella, di Cornia e di S. Pancrazio, senza necessità e senza giustificato motivo, per cause non estranee alla guerra ed anzi nell'ambito e con finalità di un'ampia operazione di rastrellamento contro i partigiani e la popolazione civile, che a quelli si mostrava solidale, cagionava la morte di duecentotre persone (tra le quali anziani, donne e bambini) estranee alle operazioni militari, agendo con crudeltà e premeditazione, usando violenza sessuale a molte donne e compiendo lo scempio di numerosi cadaveri. Con la medesima sentenza, il tribunale militare dichiarava non doversi procedere nei confronti di Bottcher Siegfred per estinzione del reato a seguito di morte del reo ed accoglieva le domande proposte dalle parti civili nei confronti della Repubblica Federale di Germania, citata in giudizio in qualità di responsabile civile.

In data 18.12.2007 la Corte Militare di Appello rigettava le impugnazioni proposte dal difensore dell'imputato Milde e dal responsabile civile. La Corte rilevava che doveva essere condivisa la ricostruzione dei fatti riguardante la partecipazione del Milde e il suo contributo causalmente rilevante apportato alla strage realizzata ai danni della popolazione civile mediante l'uccisione indiscriminata di uomini, di donne e di bambini, precisando che nei fatti erano ravvisabili gli estremi oggettivi e soggettivi della fattispecie del delitto di cui all'art. 185 c.p.m.g. e che non erano configurabili le scriminanti dell'adempimento di un dovere e dello stato di necessità né ricorrevano le condizioni per l'applicazione delle circostanze attenuanti generiche.

La Corte militare riteneva altresì immune da vizi il capo di sentenza relativo alla condanna della Repubblica Federale di Germania al risarcimento dei danni:

considerava, anzitutto, priva di fondamento l'eccezione di inammissibilità e di improponibilità dell'azione civile sulla base degli obblighi internazionali assunti dall'Italia in relazione all'art. 77 del Trattato di pace del 10.2.1947, ratificato e reso esecutivo con d.lgs. 28.11.1947, n. 1430, e all'Accordo per il regolamento di alcune questioni di carattere patrimoniale, economico e finanziario sottoscritto a Bonn il 2.6.1961 tra la Repubblica Federale di Germania e la Repubblica Italiana, reso esecutivo con d.P.R. 14.4.1962, n. 1263.

La Corte militare, inoltre, disattendeva le argomentazioni e i richiami a decisioni di organi giurisdizionali di vari ordinamenti stranieri fatti dalla difesa del responsabile civile per sostenere l'operatività nel caso di specie del principio di immunità degli Stati dalla giurisdizione e l'assoluta inderogabilità di esso anche in caso di gravi violazioni dei diritti umani. Conformemente a quanto stabilito dalle Sezioni Unite Civili della Corte di Cassazione, i giudici militari ritenevano che il rispetto dei diritti inviolabili della persona umana abbia assunto il valore di principio primario dell'ordinamento internazionale, con l'effetto di ridurre la portata e l'ambito di altri principi ai quali quello stesso ordinamento e' tradizionalmente ispirato, quale quello sulla "sovrana uguaglianza" degli Stati, cui si collega il riconoscimento della immunita' statale dalla giurisdizione civile straniera. Di talchè - come è stato precisato dalle stesse Sezioni Unite - la norma consuetudinaria di diritto internazionale generalmente riconosciuta che impone agli Stati l'obbligo di astenersi dall'esercitare il potere giurisdizionale nei confronti degli Stati stranieri non ha carattere assoluto, nel senso che essa non accorda allo Stato straniero un'immunita' totale dalla giurisdizione civile dello Stato territoriale, tale immunita' non potendo essere invocata in presenza di comportamenti dello Stato straniero di tale gravita' da configurare, in forza di norme consuetudinarie, crimini internazionali, in quanto lesivi, appunto, di quei valori universali di rispetto della dignita' umana che trascendono gli interessi delle singole comunita' statali (Cass., Sez. Un., 11 marzo 2004, n. 5044).

Dopo avere confutato le numerose obiezioni addotte dalla difesa della Repubblica Federale di Germania nei riguardi della correttezza di tale indirizzo giurisprudenziale, la Corte militare passava in esame varie fonti normative, interne e internazionali (già vigenti nel 1944 o comunque ricognitive di un preesistente principio di diritto

internazionale generale), che riconoscono il carattere di *ius cogens* alle norme che puniscono i crimini di guerra e impongono l'obbligo di risarcire il danno patrimoniale e non patrimoniale cagionato alle vittime.

Contro la sentenza proponeva ricorso per cassazione il difensore della Repubblica Federale di Germania nella sua qualità di responsabile civile denunciando, con i primi due motivi di ricorso, l'inosservanza e l'erronea applicazione di norme penali, sostanziali e processuali, ai sensi dell'art. 606, comma 1, lett. b) e c) c.p.p. per difetto di giurisdizione e per improcedibilità, inammissibilità e improponibilità dell'azione civile in relazione alla violazione degli obblighi internazionali assunti dall'Italia con l'art. 77 del Trattato di pace del 1947, con gli accordi italo-tedeschi di Bonn del 1961 e con le relative leggi interne di recepimento, nonché per violazione della disposizione di cui al primo comma dell'art. 10 della Costituzione. La difesa del responsabile civile deduceva, in particolare, che le ragioni della decisione risultavano forvianti ed erano inficiate da evidenti errori di diritto in quanto erano state disapplicate norme di legge costituzionale, ordinaria e consuetudinaria, che sanciscono la preclusione all'esercizio dell'azione civile contro lo Stato tedesco per fatti legati al secondo conflitto bellico in forza della rinuncia compiuta dallo Stato italiano, anche a nome dei propri cittadini, a fare valere rivendicazioni di carattere economico. Ne segue, ad avviso del ricorrente, che, poichè nel diritto internazionale il diritto al risarcimento dei danni civili non può essere qualificato come diritto inviolabile della persona previsto da una norma inderogabile di *ius cogens* ai sensi dell'art. 53 della Convenzione sul diritto dei trattati sottoscritta a Vienna nel 1969, è innegabile che uno Stato è titolare del potere di validamente transigere gli aspetti civilistici inerenti a crimini di guerra a mezzo di accordi internazionali.

Con il terzo motivo di ricorso la difesa del responsabile civile ha prospettato vizi logici e giuridici della motivazione, ai sensi dell'art. 606, 1° comma, lett. b) ed e) c.p.p., per violazione della legge penale e per carenza e manifesta illogicità, sull'assunto che la Corte militare non aveva tenuto conto della più recente evoluzione del diritto internazionale in tema di immunità degli Stati dalla giurisdizione civile, interpretando erroneamente le norme di riferimento internazionalpubblicistiche concernenti detta

immunità. In particolare, il ricorrente deduceva che la deroga al principio dell'immunità giurisdizionale - affermata dai giudici militari sulla scia della sentenza n. 5044 del 2004 delle Sezioni Unite Civili della Corte di Cassazione - non corrisponde allo stato attuale del diritto internazionale essendo stata considerata insussistente dalle supreme Corti di vari Stati dell'Unione Europea (Grecia, Germania e Francia), oltre che dalla Corte costituzionale tedesca con pronuncia del 15.2.2006 e dalla *House of Lords* inglese con decisione del 14.6.2006. E, poiché le norme di diritto internazionale poggiano prevalentemente sulla prassi dei singoli Stati, il ricorrente assumeva che deve reputarsi priva di fondamento l'isolata tesi accolta nella citata sentenza della Corte di Cassazione italiana e recepita dalla Corte militare: quest'ultima, peraltro, aveva seguito una "terza via" con il ritenere che il limite della immunità dalla giurisdizione sia operante quando le gravi violazioni dei diritti fondamentali dell'uomo derivino da fatti commessi nello Stato del foro. Il ricorrente rilevava, inoltre, che la Corte europea dei diritti dell'uomo aveva ribadito la regola dell'immunità, pur in presenza di violazioni di norme di *ius cogens*, in ben tre decisioni contrarie all'opinione seguita dalle Sezioni Unite Civili con la sentenza del 2004, a sostegno della quale non era neppure producente il richiamo alle decisioni delle Corti degli Stati Uniti d'America che avevano ammesso l'esistenza di una deroga al principio di immunità nei riguardi di quegli Stati che favoriscono il terrorismo, dato che tali decisioni poggiavano sulla disciplina legislativa interna introdotta con l'emendamento del 1996 al *Foreing Sovereign Immunities Act*, tanto più che nessuna deroga è prevista neanche nella Convenzione sull'immunità degli Stati in seno alle Nazioni Unite approvata nel 2004.

In data 30.9.2008 la difesa del responsabile civile depositava memoria difensiva nella quale è stato trascritto il parere redatto dal prof. Andrea Gattini, ordinario di diritto internazionale presso l'Università degli Studi di Padova, che l'Ambasciatore della Repubblica Federale di Germania aveva trasmesso al Ministero degli Affari Esteri italiano. In tale parere risultavano diffusamente illustrate le critiche alla sentenza n. 5044 del 2004 delle Sezioni Unite Civili della Corte di Cassazione, qualificata come un arresto episodico e un "*unicum*" nella giurisprudenza sia interna che degli altri Stati. Il ricorrente richiamava e faceva proprie tutte le osservazioni esposte nel citato parere e, dopo avere

commentato il contenuto di una serie di decisioni pronunciate all'udienza del 9.5.2008 dalle stesse Sezioni Unite, concludeva chiedendo l'annullamento senza rinvio dell'impugnata sentenza relativamente ai capi civili concernenti la condanna solidale del responsabile civile al risarcimento dei danni nei confronti delle parti civili.

Con memoria depositata il 16.10.2008, i difensori di alcune parti civili ribadivano l'eccezione di inammissibilità dell'appello già formulata nel corso del giudizio di secondo grado, deducendo che si era formato il giudicato sul capo di sentenza relativo alla responsabilità civile della Repubblica Federale di Germania in dipendenza del crimine di guerra commesso dall'imputato Milde Max Josef, dato che i difensori della predetta Repubblica Federale non erano muniti di procura speciale e non erano, quindi, legittimati ad interporre appello contro la sentenza di primo grado.

MOTIVI DELLA DECISIONE

1. - E' manifestamente infondata l'eccezione avanzata dai difensori delle parti civili al fine di fare dichiarare l'inammissibilità delle impugnazioni proposte, in appello e in cassazione, dal difensore della Repubblica Federale di Germania in relazione alla prospettata mancanza di procura speciale.

E' da premettere che l'eccezione si collega ad un principio che traspare chiaramente da varie disposizioni del codice di rito e che è pacificamente recepito nella giurisprudenza, essendo questa unanimemente orientata nel senso che le norme relative alle impugnazioni delle parti private, diverse dall'imputato, prevedono e conferiscono il potere d'impugnativa alle stesse parti personalmente considerate, e non ai loro difensori: di talchè questi ultimi - a differenza di quanto stabilito per il difensore dell'imputato dal terzo comma dell'art. 571 c.p.p. - non possono ritenersi legittimati alla interposizione dell'atto di gravame, a meno di non essere muniti di procura speciale (Cass., Sez. IV, 14 maggio 1997, Ferrera, rv. 208223). E proprio in applicazione di tale regola e in riferimento alla posizione del responsabile civile è stato affermato che il difensore non è autonomamente legittimato a proporre impugnazione e che il compimento di tale atto gli è consentito soltanto nell'esercizio del potere derivante da procura speciale (Cass., Sez. IV, 27 settembre 1989, Ronchetti, rv. 182526; Sez. IV, 19 aprile 1990, Cirulli, rv. 184878; Sez. IV, 26 gennaio 1993, Tartaglia, rv. 195854).

Nel caso di specie la Corte militare ha esattamente escluso che l'appello potesse considerarsi inammissibile per la ragione indicata delle parti civili, rilevando, con l'ordinanza pronunciata all'udienza dibattimentale del 18.12.2007, che il mandato difensivo era contenuto in un atto allegato all'appello nel quale era specificato che la procura veniva rilasciata per il "giudizio di appello da promuoversi avverso la sentenza", onde nessun plausibile dubbio poteva sollevarsi sull'esistenza della procura speciale, dal momento che la funzione dell'atto era proprio quella di investire il difensore del potere di impugnare la sentenza del tribunale militare e di instaurare il processo di secondo grado per fare riformare le statuizioni relative alla responsabilità civile.

Parimenti esplicito e del tutto inequivoco risulta il tenore letterale del mandato difensivo rilasciato in calce al ricorso per cassazione dall'ambasciatore della Repubblica Federale di Germania accreditato presso lo Stato italiano, dato che nell'atto anzidetto è precisato che all'avv. Augusto Dossena del foro di Firenze è stato conferito il potere di proporre ricorso contro la sentenza emessa il 18.12.2007 dalla Corte Militare di Appello con cui è stata confermata la condanna di Milde Max Josef e del responsabile civile (ossia della stessa Repubblica Federale), sicchè, in presenza di tutti i requisiti formali e sostanziali prescritti dall'art. 122 c.p.p., è indubbia l'esattezza della qualificazione dell'atto come procura speciale a proporre l'impugnazione in nome e per conto del responsabile civile.

2. - Il ricorso contro la sentenza pronunciata dalla Corte Militare di Appello investe unicamente il capo concernente le statuizioni civili relative alla condanna al risarcimento dei danni della Repubblica Federale di Germania nella qualità di responsabile civile per il fatto di reato posto in essere dal Milde. Ne segue che, poiché quest'ultimo e il suo difensore non hanno impugnato la decisione di conferma della condanna all'ergastolo per il delitto di violenza con strage previsto dall'art. 185 c.p.m.g., la sentenza è divenuta irrevocabile per tale capo e la ricostruzione dei fatti è ormai oggetto di accertamento non più controvertibile.

Da tale premessa deve inferirsi che la definizione della regiudicanda risultante dal ricorso della Repubblica Federale di Germania deve avere quali imprescindibili coordinate di riferimento i seguenti punti:

a) durante lo stato di guerra tra l'Italia e la Germania, l'imputato Milde Max Josef, sergente della divisione paracadutisti corazzata "Hermann Göring", in data 29.6.1944, nei territori dei comuni di Civitella, di Cornia e di S. Pancrazio, ha partecipato alla rappresaglia disposta dai comandi nazisti a seguito dell'uccisione di quattro militari tedeschi ad opera dei partigiani ed attuata mediante il rastrellamento della popolazione civile di quei centri abitati, il massacro di duecentotre persone (tra le quali vecchi, donne e bambini) estranee alle operazioni militari, agendo con crudeltà e premeditazione, usando violenza sessuale a molte donne e compiendo lo scempio di numerosi cadaveri;

b) il delitto previsto dall'art. 185 c.p.m.g. corrisponde ad una fattispecie compresa fra i reati contro le leggi e gli usi della guerra, la cui principale connotazione è identificabile nell'operatività di regole dettate dagli Stati per disciplinare la violenza nei conflitti armati (*ius in bello*) in vista della salvaguardia degli interessi protetti dalla normativa internazionale e della tutela della persona umana come bene assoluto: si tratta, dunque, di norma incriminatrice strettamente collegata al diritto umanitario bellico regolato da convenzioni e da consuetudini internazionali, onde la relativa fattispecie, cagionando la grave lesione di valori riconosciuti in ogni società civile, rientra nel novero dei crimini internazionali di guerra (cfr. Cass., Sez. I, 8 novembre 2007, Sommer ed altri, riguardante il massacro di S. Anna di Stazzema compiuto dalle truppe tedesche con analoghe modalità contro la popolazione civile).

I due punti anzidetti, esaurientemente accertati dalla Corte militare nella sentenza impugnata, non hanno formato oggetto dell'impugnativa della Repubblica Federale di Germania, in quanto nei motivi di ricorso è stata contestata esclusivamente la giuridica possibilità di condannare al risarcimento dei danni detto Stato per attività che, secondo le norme consuetudinarie internazionali, risultano coperte dall'immunità giurisdizionale e non possono, perciò, costituire fonte di responsabilità civile, mentre nessuna contestazione è stata neppure sollevata sul fatto che la Repubblica Federale possa essere chiamata a rispondere delle condotte illecite poste in essere, durante la seconda guerra mondiale, dalle truppe naziste del Terzo Reich.

3. - In relazione al perimetro segnato dalle censure formulate dal ricorrente il tema di indagine e di decisione devoluto alla cognizione di questa Corte si risolve nello

stabilire se la norma consuetudinaria di diritto internazionale che riconosce l'immunità giurisdizionale degli Stati per gli atti compiuti nell'esercizio della sovranità debba essere o non applicata anche nell'ipotesi di condotte consistenti in crimini internazionali.

Sul punto le posizioni tradizionali della giurisprudenza di legittimità erano unanimi nel riconoscere l'operatività, assoluta e inderogabile, del principio di diritto consuetudinario internazionale della «immunità ristretta o relativa» in virtù del quale l'esenzione degli Stati stranieri dalla giurisdizione civile attiene agli atti *iure imperii*, attraverso i quali si esplica l'esercizio della sovranità statale, e non si estende, invece, agli atti *iure gestionis* o *iure privatorum* posti in essere dallo Stato, indipendentemente dal suo potere sovrano, alla stregua di un privato cittadino (cfr., *ex plurimis*, Cass., Sez. Un. Civ., 12 giugno 1999, n. 328; 3 febbraio 1996, n. 919; 24 settembre 1993, n. 9675; 30 maggio 1990, n. 5091).

Tale orientamento ha avuto una svolta netta, e consapevolmente argomentata in senso difforme, con la sentenza 11 marzo 2004, n. 5044, con la quale le Sezioni Unite Civili della Corte di cassazione, pur tenendo fermo il principio della immunità ristretta, ha ritenuto che esso incontri un limite qualora le condotte riferibili allo Stato, anche se riconducibili nella sfera di esercizio di poteri sovrani (quali quelli posti in essere nello svolgimento di operazioni belliche), costituiscano grave violazione della libertà e della dignità della persona umana, tanto da poter essere qualificate come crimini internazionali. Gli innovativi principi espressi con la predetta decisione risultano compiutamente compendiati nella seguente massima ufficiale: "Il rispetto dei diritti inviolabili della persona umana ha assunto il valore di principio fondamentale dell'ordinamento internazionale, riducendo la portata e l'ambito di altri principi ai quali tale ordinamento si è tradizionalmente ispirato, quale quello sulla «sovrana uguaglianza» degli Stati, cui si collega il riconoscimento della immunità statale dalla giurisdizione civile straniera; ne consegue che la norma consuetudinaria di diritto internazionale generalmente riconosciuta che impone agli Stati l'obbligo di astenersi dall'esercitare il potere giurisdizionale nei confronti degli Stati stranieri, non ha carattere assoluto, nel senso che essa non accorda allo Stato straniero un'immunità totale dalla giurisdizione civile dello Stato territoriale, tale immunità non potendo essere invocata in presenza di

comportamenti dello Stato straniero di tale gravità da configurare, in forza di norme consuetudinarie di diritto internazionale, crimini internazionali, in quanto lesivi, appunto, di quei valori universali di rispetto della dignità umana che trascendono gli interessi delle singole comunità statali; sussiste pertanto la giurisdizione italiana in relazione alla domanda risarcitoria promossa, nei confronti della Repubblica Federale di Germania, dal cittadino italiano che lamenti di essere stato catturato a seguito dell'occupazione nazista in Italia durante la seconda guerra mondiale e deportato in Germania per essere utilizzato quale mano d'opera non volontaria al servizio di imprese tedesche, atteso che sia la deportazione che l'assoggettamento ai lavori forzati devono essere annoverati tra i crimini di guerra e, quindi, tra i crimini di diritto internazionale, essendosi formata al riguardo una norma di diritto consuetudinario di portata generale per tutti i componenti della comunità internazionale" (Cass. civ., Sez. Un., 11 marzo 2004, n. 5044, Ferrini c. Repubblica Federale di Germania).

Le linee interpretative segnate dalla sentenza Ferrini sono state riprese e ribadite in tutta la giurisprudenza successiva di questa Corte. Nel definire un regolamento di giurisdizione riguardante la controversia instaurata contro la Repubblica Argentina relativamente alla vendita di *bonds* e alla moratoria nel loro rimborso, le Sezioni Unite Civili hanno bensì dichiarato il difetto di giurisdizione in applicazione del principio della immunità ristretta, riaffermando, tuttavia, che questo è soggetto al limite derivante dal principio fondamentale dell'ordinamento internazionale relativo all'obbligo degli Stati di rispettare i diritti inviolabili della persona umana, onde è da escludere che gli atti di esercizio della sovranità possano essere coperti dalla immunità quando si risolvano in comportamenti dello Stato estero gravemente lesivi di quei valori universali di rispetto della dignità umana che trascendono gli interessi delle singole comunità statuali: con l'ulteriore conseguenza che non è configurabile immunità giurisdizionale in caso di domanda risarcitoria di danni connessi a crimini di guerra imputabili allo Stato estero convenuto in giudizio da cittadino italiano innanzi al giudice nazionale (Cass., Sez. Un. Civ., 27 maggio 2005, n. 11225).

L'orientamento interpretativo è stato recentemente confermato da due decisioni pronunciate dalle Sezioni Unite Civili in controversie in cui era parte la Repubblica

Federale di Germania. Nella prima sentenza è stato stabilito - in tema di riconoscimento di sentenze straniere - che non può essere ritenuta contraria all'ordine pubblico interno la sentenza della Corte di cassazione della Grecia di condanna della Repubblica Federale di Germania al pagamento delle spese processuali, relative ad una domanda, accolta, di indennizzo proposta dagli eredi delle vittime di un eccidio di civili compiuto dalle forze armate tedesche nel territorio greco durante la seconda guerra mondiale, dovendosi ritenere che la norma consuetudinaria di diritto internazionale, che impone agli Stati l'obbligo di astenersi dall'esercitare il potere giurisdizionale per gli atti *iure imperii*, non abbia carattere incondizionato ma incontri un limite nel riconoscimento del primato assoluto dei valori fondamentali di libertà e dignità della persona umana e, conseguentemente, non possa essere invocata in presenza di comportamenti dello Stato straniero di tale gravità da configurarsi quali crimini contro l'umanità in quanto lesivi di quei valori universali di rispetto della dignità umana che trascendono gli interessi delle singole comunità statali (Cass., Sez. Un. Civ., 29 maggio 2008, n. 14199). Di analogo tenore risulta la coeva ordinanza emessa in sede di regolamento di giurisdizione, con cui è stato precisato, ancora una volta, che "il rispetto dei diritti inviolabili della persona umana ha assunto, anche nell'ordinamento internazionale, il valore di principio fondamentale, riducendo la portata e l'ambito di altri principi ai quali tale ordinamento si è tradizionalmente ispirato, quale quello del rispetto delle reciproche sovranità, cui si collega il riconoscimento dell'immunità statale dalla giurisdizione civile straniera; ne consegue che la norma consuetudinaria di diritto internazionale generalmente riconosciuta - che impone agli Stati l'obbligo di astenersi dall'esercitare il potere giurisdizionale nei confronti degli Stati stranieri per gli atti *iure imperii* - non ha carattere incondizionato, ma, quando venga in contrapposizione con il parallelo principio, formatosi nell'ordinamento internazionale, del primato assoluto dei valori fondamentali della libertà e dignità della persona umana, ne rimane conformata, con la conseguenza che allo Stato straniero non è accordata un'immunità totale dalla giurisdizione civile dello Stato territoriale, in presenza di comportamenti di tale gravità da configurarsi quali crimini contro l'umanità che, in quanto lesivi di quei valori universali di rispetto della dignità umana che trascendono gli interessi delle singole comunità statali, segnano il

punto di rottura dell'esercizio tollerabile della sovranità (Cass., Sez. Un. Civ., 29 maggio 2008, n. 14201).

Il nuovo indirizzo sull'immunità giurisdizionale condizionata degli Stati è stato recepito anche in una recente sentenza penale di questa stessa Sezione che, nell'esaminare il tema dell'immunità funzionale o *ratione materiae* dalla giurisdizione penale dell'individuo-organo dello Stato straniero per gli atti eseguiti *iure imperii* nell'esercizio dei compiti e delle funzioni a lui attribuiti, ha chiarito come tale immunità trovi un preciso limite nelle gravi violazioni del diritto internazionale umanitario, ossia in quei crimini lesivi dei diritti inviolabili di libertà e dignità della persona umana (Cass., Sez. I, 19 giugno 2008, P.G. in proc. Lozano, rv. 240556). E' significativo il fatto che, per giustificare la *ratio decidendi* di tale pronuncia, sia stato esplicitamente richiamato l'arresto delle Sezioni Unite Civili costituito dalla citata sentenza Ferrini dell'11.3.2004, che ha riconosciuto nei crimini internazionali un limite all'immunità giurisdizionale degli Stati. E il richiamo deve considerarsi puntuale e affatto pertinente quando si considera che il collegamento tra l'immunità funzionale dell'individuo-organo e l'immunità dello Stato è stato oggetto di specifica trattazione nella parte finale della motivazione della sentenza Ferrini laddove si argomenta che "l'immunità funzionale, secondo l'opinione prevalente, costituisce specificazione di quella che compete agli Stati, poiché risponde all'esigenza di impedire che il divieto di convenire in giudizio lo Stato straniero possa essere vanificato agendo nei confronti della persona mediante la quale la sua attività si è esternata. Ma se il rilievo è esatto, come sembra a questa Corte, deve allora convenirsi con quanti affermano che se l'immunità funzionale non può trovare applicazione, perché l'atto compiuto si configura quale crimine internazionale, non vi è alcuna valida ragione per tener ferma l'immunità dello Stato e per negare, conseguentemente, che la sua responsabilità possa essere fatta valere davanti all'autorità giudiziaria di uno Stato straniero".

In definitiva, la precedente disamina autorizza a concludere che negli ultimi anni si è affermato un indirizzo sufficientemente univoco, onde deve riconoscersi che la posizione interpretativa che esclude l'immunità degli Stati dalla giurisdizione civile

nell'ipotesi di crimini internazionali rappresenta ormai un punto fermo nella giurisprudenza di legittimità.

4. - Il Collegio intende esprimere piena e convinta adesione a tale orientamento ermeneutico la cui esattezza trova completa conferma nel concorso di precisi ed affidabili argomenti di ordine logico e sistematico che inequivocamente convergono nel dimostrare che il principio consuetudinario dell'immunità giurisdizionale degli Stati non ha una portata assoluta e indiscriminata, ma è destinato a rimanere inoperante nelle fattispecie nelle quali con esso concorra il principio di diritto internazionale consuetudinario che legittima l'esercizio dei mezzi di tutela apprestati per la reintegrazione dei danni provocati da crimini internazionali originati da gravi lesioni dei diritti inviolabili della persona umana.

Le critiche del ricorrente mirano principalmente a contestare il principio di diritto enunciato dalla sentenza n. 5044/2004, ribadito dalle decisioni successive sopra citate, attraverso la rassegna delle varie pronunce emesse dalle Corti supreme di numerosi ordinamenti nelle quali è stato attribuito al principio dell'immunità degli Stati dalla giurisdizione civile un valore assoluto che non ammette limitazioni neppure in presenza di condotte consistenti in crimini internazionali: di talchè, a giudizio del ricorrente, l'orientamento della Corte di cassazione costituirebbe nella prassi internazionale una posizione del tutto isolata e sarebbe nient'affatto rispondente alla normativa effettivamente vigente nell'ambito dei rapporti tra Stati.

La tesi del ricorrente non ha pregio.

In primo luogo, deve rilevarsi che le Sezioni Unite Civili della Corte di cassazione, con la predetta sentenza n. 5044 del 2004, hanno compiuto un'attenta ed esauriente analisi dei contenuti delle decisioni pronunciate dalle Corti straniere indicate dal ricorrente, ponendo in risalto, per alcune di esse, la difformità delle fattispecie rispetto a quella che formava oggetto del processo ed osservando che, comunque, esistono altre pronunce di autorità giurisdizionali straniere con le quali è stato negato che il principio dell'immunità giurisdizionale dello Stato possa paralizzare l'esercizio delle azioni giudiziarie dirette a fare valere diritti individuali il cui titolo è identificabile in crimini

internazionali derivanti dalla violazioni delle norme poste a tutela dei diritti fondamentali dell'uomo.

La stessa indagine è stata compiutamente eseguita nell'impugnata sentenza della Corte Militare d'Appello sulla scia delle considerazioni puntuali e ampiamente motivate della sentenza Ferrini: e, in assenza di diverse e più convincenti prospettazioni critiche, i risultati della disamina effettuata dalla Corte di cassazione vengono integralmente condivisi e fatti propri dal Collegio, onde è sufficiente farne richiamo adesivo senza che sia necessario procedere ad una rinnovata esposizione delle ragioni favorevoli o contrarie alla tesi dell'assolutezza dell'immunità degli Stati desumibili dalle diverse decisioni delle Corti di giustizia straniere.

Peraltro, il punto che soprattutto preme di sottolineare è intimamente collegato alla convinzione che la soluzione della questione dibattuta non possa corrispondere ad un esito di tipo meramente quantitativo e non possa dipendere, perciò, soltanto dal numero, maggiore o minore, delle decisioni che aderiscono all'una o all'altra posizione. In proposito deve osservarsi che se è vero che l'esame della prassi dei tribunali dei vari Stati costituisce uno strumento importante per l'accertamento del vigore delle norme consuetudinarie di diritto internazionale, è non di meno certo che il compito dell'interprete non può ridursi ad un computo aritmetico dei dati desunti dalla prassi, dovendo tenersi conto, oltre che delle difficoltà di verifica della reale esistenza delle consuetudini, anche della consistenza qualitativa di esse, delle interrelazioni riscontrabili tra le stesse, dell'operatività dei nessi di interdipendenza e di collocazione gerarchica operanti in diretta funzione del rango attribuito a ciascuna di quelle norme rispetto alla scala dei valori generalmente accolta dall'ordinamento internazionale.

Così impostato, il tema di indagine e di decisione si risolve nello stabilire se il principio dell'immunità giurisdizionale degli Stati costituisca una regola non soggetta a condizioni o a limitazioni oppure se debbano prevalere quelle altre norme consuetudinarie che tutelano i valori supremi inerenti alla persona umana come tale, le cui violazioni postulano, sempre e comunque, l'applicazione di sanzioni reintegratorie anche se le relative condotte siano riferibili ad uno Stato.

5. - La complessità del quesito cui occorre dare risposta dipende, dunque, dalla coesistenza di diverse norme consuetudinarie internazionali, delle quali devono essere coordinati i differenti ambiti applicativi accertando se essi siano tra loro compatibili ovvero se l'operatività dell'uno debba prevalere sull'altro.

E' indubbio che il principio dell'immunità giurisdizionale degli Stati forma oggetto di una norma consuetudinaria generalmente riconosciuta nella comunità internazionale in relazione alle attività che costituiscono estrinsecazione diretta di poteri sovrani.

Non è parimenti contestabile che nell'ordinamento internazionale sono presenti da tempo norme consuetudinarie formatesi per tutelare la libertà e la dignità dell'uomo, considerate come valori fondamentali e come diritti inalienabili. Alcuni di questi, pur avendo matrice in norme consuetudinarie, hanno trovato solenne proclamazione in convenzioni internazionali, nelle quali sono stati esplicitamente enunciati taluni principi fondamentali precedentemente consolidati nei rapporti tra gli Stati in base al generale riconoscimento dell'intera comunità internazionale: è quanto è avvenuto, ad esempio, con il Patto internazionale relativo ai diritti civili e politici, adottato a New York il 16.12.1966 dall'Assemblea delle Nazioni Unite, con la Convenzione dell'Aja del 1907 sul rispetto delle leggi e degli usi di guerra e con le quattro Convenzioni di Ginevra del 1949 e i due protocolli addizionali, che compongono il c.d. diritto umanitario.

E' opinione del tutto pacifica che le violazioni dei diritti inalienabili della persona umana, protetti da norme consuetudinarie, integrano crimini internazionali, i quali devono essere perseguiti e puniti da ogni Stato in quanto costituiscono lesione di interessi primari dalla quale derivano gravi lacerazioni dell'ordine internazionale. All'interno della categoria dei crimini internazionali una particolare collocazione deve essere attribuita ai crimini contro l'umanità, vale a dire - secondo l'insegnamento della migliore dottrina - a quegli atti illeciti qualificati dalle seguenti connotazioni: a) si tratta di crimini particolarmente odiosi in quanto comportano una seria lesione della dignità umana ovvero una grave umiliazione di uno o più esseri umani; b) non corrispondono ad eventi sporadici o isolati, ma costituiscono una prassi estesa o sistematica di atrocità; c) devono essere perseguiti e puniti tanto se commessi durante un conflitto bellico

quanto se commessi in tempo di pace; d) le vittime sono costituite da civili o, se commessi in tempo di guerra, da persone che non prendono parte alle ostilità armate.

Le norme a tutela dei diritti fondamentali dell'uomo, la cui lesione dà origine all'elemento oggettivo che contraddistingue i crimini contro l'umanità, esprimono nell'ordinamento internazionale il primato generalmente riconosciuto al rispetto della dignità umana assumendo "il ruolo di principio fondamentale per il suo contenuto assiologico di metavalore", sicchè la loro violazione "segna anche il punto di rottura tollerabile della sovranità" (Cass., Sez. Un., ord. 29 maggio 2008, n. 14201, cit.). Di talchè il principio del rispetto della "sovrana uguaglianza" degli Stati deve restare privo di effetti nell'ipotesi di crimini contro l'umanità, ossia di gravi azioni criminose la cui vera sostanza consiste in un abuso della sovranità statuale.

6. - La compresenza nella medesima fattispecie di norme consuetudinarie internazionali concernenti, da un lato, l'immunità degli Stati dalla giurisdizione e, dall'altro, la necessaria reintegrazione delle gravi violazioni dei diritti fondamentali dell'uomo costituenti crimini internazionali impone il loro coordinamento in modo da accertare a quali norme debba essere attribuita prevalenza e come debba essere composto il conflitto tra dati normativi in rapporto di alternatività e di inconciliabilità.

Il coordinamento non può che essere realizzato sulla base di giudizi di valore che risultino in perfetta sintonia con le opzioni accolte nell'ordinamento internazionale. In proposito meritano di essere pienamente condivise, per la loro chiarezza e per la loro incisività argomentativa, le perspicue considerazioni esposte nella già citata sentenza di questa Sezione, nella quale è stata individuata la chiave risolutiva del conflitto di norme rilevando che "dalla parallela e antinomica coesistenza nell'ordinamento internazionale dei due principi, entrambi di portata generale, consegue, come logico corollario, che l'eventuale conflitto, laddove essi vengano contemporaneamente in rilievo, debba risolversi sul piano sistematico del coordinamento e sulla base del criterio del bilanciamento degli interessi, dandosi prevalenza al principio di rango più elevato e di *ius cogens*, quindi alla garanzia che non resteranno impuniti i più gravi crimini dei diritti inviolabili di libertà e dignità della persona umana" (Cass. Sez. I, 19 giugno 2008, Lozano, rv. 240556, cit.).

La differente consistenza qualitativa delle norme consuetudinarie è confermata dal diverso valore e dalla diversa forza di resistenza ad esse attribuiti dall'ordinamento internazionale, dato che in dottrina e in giurisprudenza è pacifica l'opinione secondo cui il principio consuetudinario dell'immunità giurisdizionale degli Stati è derogabile mediante apposite convenzioni, mentre le norme consuetudinarie formatesi a tutela dei diritti inviolabili dell'uomo non sono derogabili e appartengono al sistema di norme imperative del diritto internazionale generale o di *ius cogens*. La preminenza di tale categoria di norme risulta inequivocamente dal contenuto dell'art. 53 della Convenzione sul diritto dei trattati, adottata a Vienna il 23.5.1969, ratificata e resa esecutiva con l. 12.2.1974, n. 112, ove è stabilito che "è nullo qualsiasi trattato che, al momento della sua conclusione, sia in contrasto con una norma imperativa di diritto internazionale generale" ed è precisato che "ai fini della presente convenzione, per norma imperativa di diritto internazionale generale si intende una norma che sia stata accettata e riconosciuta dalla comunità internazionale degli Stati nel suo insieme in quanto norma alla quale non è permessa alcuna deroga e che non può essere modificata che da una nuova norma di diritto internazionale generale avente lo stesso carattere".

L'appartenenza allo *ius cogens* delle norme consuetudinarie poste a tutela dei diritti umani fondamentali è stata più volte affermata dalla giurisprudenza sopra citata proprio per giustificare la prevalenza di dette norme su quella riguardante l'immunità giurisdizionale degli Stati sul rilievo che quelle norme sono poste al vertice dell'ordinamento internazionale e che la grave e sistematica violazione delle stesse integra crimini internazionali che minacciano l'umanità intera e minano le fondamenta stesse della coesistenza internazionale (Cass., Sez. Un. Civ., n. 5044/2004 cit.).

Del resto, il valore particolare di tali norme è stato recentemente riconosciuto dal Tribunale di primo grado delle Comunità europee, che ha escluso l'illegittimità delle misure patrimoniali adottate per contrastare il terrorismo internazionale in applicazione delle disposizioni emesse dal Consiglio di sicurezza dell'O.N.U., ritenendo che la normativa "non vìola i diritti fondamentali degli interessati, alla luce dello standard di tutela universale dei diritti fondamentali della persona umana appartenenti allo *ius cogens*"

(sent. 21 settembre 2005, n. 315/01 e n. 306/01; sent. 12 luglio 2006, n. 253/02 e n. 49/04).

7. - I risultati dell'interpretazione sistematica risultano in rapporto di piena consonanza con quelli offerti dall'interpretazione logica. Infatti, se è vero che le norme sorte a tutela della libertà e della dignità umana trovano base giustificativa in principi universali ed inderogabili, percepiti come tali dall'intera comunità internazionale, la coerenza interna del sistema esige che alla violazione di quei valori fondamentali segua immancabilmente la reazione repressiva dei componenti di detta comunità e delle stesse vittime che hanno subito la lesione, dato che, se così non fosse, non avrebbe senso proclamare il primato dei diritti fondamentali della persona e, poi, contraddittoriamente escludere la possibilità di accesso al giudice negando, in tal modo, agli individui la possibilità di usare i mezzi indispensabili ad assicurare l'effettività e la preminenza di quei diritti fondamentali conculcati dall'azione criminosa di uno Stato.

Infine, mette conto segnalare l'importanza del metodo di indagine consistente nel controllare l'affidabilità dei risultati raggiunti nella prospettiva dei valori e dei principi dei quali è permeato il sistema costituzionale italiano, nel quale è inserita una disposizione, quella del primo comma dell'art. 10, per effetto della quale "l'ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute". Dai lavori dell'Assemblea costituente emerge l'inequivoca volontà di introdurre, per mezzo della predetta disposizione, una norma sulla produzione giuridica con funzione di rinvio mobile o formale, la cui operatività produce l'effetto di realizzare l'adattamento automatico e costante dell'ordinamento interno alle norme di diritto internazionale generale, vale a dire alle regole consuetudinarie e ai principi generali riconosciuti vincolanti dall'intera comunità internazionale. Anche a non volere tenere conto delle diverse posizioni emerse in dottrina a proposito del rango delle norme di adattamento di cui al primo comma dell'art. 10 Cost., deve sottolinearsi che anche gli autori favorevoli a ricondurle, almeno in parte, nel novero delle norme costituzionali ammettono che l'adattamento "deve essere bensì costante e completo, ma a condizione di non portare ad infrangere i cardini essenziali del nostro ordinamento, e cioè quei principi che il costituente ha voluto considerare coessenziali all'attuale assetto

costituzionale, assolutamente imprescindibili e quindi immodificabili". Ed è estremamente significativo che tra questi principi costituzionali ritenuti non derogabili ad opera delle norme internazionali generalmente riconosciute vengano compresi i diritti fondamentali della persona umana.

Dai precedenti rilievi deve, dunque, evincersi che nel caso di specie la sentenza impugnata ha correttamente escluso l'immunità dalla giurisdizione civile della Repubblica Federale di Germania per la ragione che il diritto fatto valere dalle parti civili è scaturito da un crimine contro l'umanità. A quest'ultimo riguardo deve rilevarsi che una simile qualificazione trae indubbio motivo di conferma dalle sentenze di questa Corte che hanno pronunciato su altri disumani misfatti posti in essere dalle truppe tedesche in Italia durante l'ultima guerra mondiale in base ad una predeterminata linea di sistematica ferocia attuata, per disposizioni provenienti dai capi supremi dello Stato nazista, anche contro la popolazione civile in violazione dei beni supremi della vita e della dignità delle persone (cfr. Cass., Sez. I, 16 novembre 1998, n. 1230, Priebke e Hass, riguardante l'eccidio delle Fosse Ardeatine; Sez. I, 8 novembre 2007, n. 4060/08, Sommer e altri, concernente il massacro di S. Anna di Stazzema). D'altro canto, deve porsi in evidenza che neppure la difesa della ricorrente Repubblica Federale di Germania ha potuto muovere alcuna contestazione contro la qualificazione come crimine contro l'umanità del feroce massacro di duecentotre persone estranee alle operazioni militari, tra le quali vecchi, anziani e bambini.

In conclusione, devono considerarsi giuridicamente infondate le censure mosse contro la sentenza della Corte Militare di Appello che ha correttamente negato l'immunità giurisdizionale rispetto alla cognizione della domanda di risarcimento dei danni proposta contro il responsabile civile.

8. - Non attengono al tema dell'immunità dalla giurisdizione le eccezioni formulate dalla ricorrente per obiettare che il riconoscimento del diritto fatto valere dalle parti civili trova preclusione nell'art. 77, comma 4, del Trattato di pace del 10.2.1947, approvato con decreto legislativo del Capo provvisorio dello Stato del 28.11.1947 n. 1430, con cui - a detta del ricorrente - l'Italia avrebbe rinunciato a suo nome e a nome dei cittadini italiani, a qualsiasi domanda di risarcimento nei confronti

della Germania e dei cittadini germanici pendente alla data dell'8 maggio 1945, con la sola eccezione di quelle relative a diritti acquisiti prima del 1 settembre 1939. Al riguardo devono essere integralmente condivise le argomentazioni a mezzo delle quali la Corte militare ha disatteso l'eccezione rilevando che la regolamentazione posta dal Trattato di pace del 1947 è inapplicabile nella presente controversia in quanto la Repubblica Federale di Germania non è parte di detto Trattato, la cui disciplina, peraltro, riguarda diritti di natura reale relativi a danni materiali e non anche i danni morali che devono essere risarciti ai familiari delle vittime di crimini di guerra, come è stato esattamente accertato nella sentenza impugnata con considerazioni di ineccepibile correttezza logica e giuridica.

Parimenti è priva di fondamento la censura diretta a denunciare la violazione da parte della Corte militare dell'Accordo stipulato a Bonn il 2.6.1961 "per il regolamento d'alcune questioni di carattere patrimoniale, economico e finanziario", reso esecutivo con il D.P.R. n. 1263 del 14 aprile 1962, con il quale il Governo italiano ha dichiarato "che sono definite tutte le rivendicazioni ... di persone fisiche e giuridiche italiane ... derivanti da diritti o ragioni sorti nel periodo tra il 1 settembre e l'8 maggio 1945", assumendo l'impegno a tenere "indenne la Repubblica Federale di Germania da ogni eventuale azione o altra pretesa legale". Orbene, considerato che, a seguito di detto Accordo, con il D.P.R. 6.10.1963, n. 2043, sono state dettate le regole per la ripartizione della somma versata dal Governo della Repubblica Federale di Germania, merita pieno consenso l'interpretazione compiuta dalla Corte militare d'Appello, la quale, con attenta ed adeguata utilizzazione di precisi elementi di ordine letterale e logico, ha ricostruito l'ambito applicativo dell'Accordo osservando che la somma è stata versata dalla Repubblica Federale di Germania "a definizione delle questioni economiche pendenti" (art. 1) e che la definizione concerne "tutte le rivendicazioni e richieste della Repubblica Italiana, o di persone fisiche o giuridiche italiane, ancora pendenti nei confronti della Repubblica Federale di Germania o nei confronti di persone fisiche o giuridiche tedesche" (art. 2, comma 1), con la precisazione che "il Governo italiano terrà indenne la Repubblica Federale di Germania e le persone fisiche e giuridiche tedesche da ogni

eventuale azione o altra pretesa legale da parte di persone fisiche o giuridiche italiane per le rivendicazioni e richieste suddette" (art. 2, comma 2).

Pertanto, va riconosciuto che è munita di solida base giustificativa l'opinione accolta nella sentenza impugnata secondo cui è da escludere che possa applicarsi l'Accordo del 1961 ad una controversia, come quella dedotta nel presente processo, non ancora pendente, perché neppure iniziata alla data di stipulazione della convenzione tra i due Stati, tanto più che nessun apprezzabile argomento depone a favore della tesi del ricorrente, il quale ha sostenuto, senza convincenti argomenti, che il regolamento di alcune questioni di carattere patrimoniale, economico e finanziario, concordato con detto Accordo, comprenderebbe anche le rivendicazioni e le domande relative al ristoro dei danni morali cagionati da crimini internazionali commessi attraverso la grave lesione dei diritti inviolabili dell'uomo.

Alla luce di tutte le considerazioni che precedono il ricorso risulta infondato in tutte le sue prospettazioni, sicchè deve pronunciarsene il rigetto, con la condanna del ricorrente al pagamento delle spese processuali, oltre alla rifusione delle spese sostenute nel grado dalle parti civili, che vengono liquidate come in dispositivo.

P. Q. M.

La Corte Suprema di Cassazione, Prima Sezione Penale, rigetta il ricorso e condanna la ricorrente al pagamento delle spese processuali, nonché alla rifusione delle spese sostenute nel grado dalle parti civili, liquidate per quelle rappresentate dall'avv. De Fraja in euro 4.800 e per quelle rappresentate dall'avv. Bianconi in euro 8.800, oltre per entrambi gli accessori di legge.

Così deciso in Roma in data 21 ottobre 2008.

Il Consigliere estensore

Il Presidente

DEPOSITATA IN CANCELLERIA

1 3 GEN. 2009

IL CANCELLIERE

Translation

01072/09

ITALIAN REPUBLIC
ON BEHALF OF THE ITALIAN PEOPLE
THE SUPREME COURT OF CASSATION
FIRST CRIMINAL SECTION

Public Hearing of 21.10.2008
Judgment no 1263/08

Composed of:

Eduardo FAZZIOLI	President
Giovanni SYLVESTRI	Judge
Umberto GIORDANO	Judge
Maria Cristina SIOTTO	Judge
Marcello ROMEOLA	Judge

General Register No 017667/2008

JUDGMENT

ON THE APPEAL LODGED BY:

1) FEDERAL REPUBLIC OF GERMANY
2) MAX JOSEF MILDE, born 20.11.1922

Against the JUDGMENT of 18.12.2007
Military Court of Appeal, Rome

Having regard to the documents in the case, the judgment and the appeal;
Having heard the report by Giovanni SILVESTRI at the PUBLIC HEARING;

Having heard the Public Prosecutor in the person of Roberto Rosiu who concluded that the appeal should be dismissed;

Having heard counsels for the civil party, N. Branconi and R. de Freja;

Having heard counsel for the liable civil party, Avv. Dossena;

THE JUDICIAL PROCEEDINGS

By judgment of 10 October 2006, the Tribunale Militare, La Spezia, sentenced Max Josef Milde to life imprisonment for participation in the crime punishable under Article 185 of the Codice Penale Militare di Guerra of repeated violence and homicide against private enemies, aggravated on several counts, who, during the state of war between Italy and Germany, following the killing of four German soldiers, acting in the capacity of sergeant of the "Hermann Goering" armoured parachute division, by contributing to the material commission of the crime and in any case encouraging its commission, on 29 June 1944, in the territory of the communes of Civitella, Cornia and S. Pancrazio, without any need and without due cause, for reasons not unconnected with the war and certainly within the framework and for the purpose of a comprehensive rounding up operation against partisans and the civilians who supported them, did cause the death of two hundred and three persons (including elderly persons, women and children) unconnected with the military operations, acting cruelly and with premeditation, using sexual violence with many women and defiling numerous corpses. In the same judgment, the military court declared that there was no longer any cause to prosecute Siegfred Bottcher, the crime being extinguished following the death of its perpetrator, and upheld the applications by the civil parties against the Federal Republic of Germany, sued in its capacity as the liable civil party.

On 18 December 2007, the military court of appeal rejected the appeal lodged by counsel for the accused and the liable civil party. That court held that it was necessary to uphold the reconstruction of the facts concerning the involvement of Milde and his significant causal role in the slaughter of civilians, entailing the indiscriminate killing of men, women and children, and stated that the facts indicated that the subjective and objective elements of a crime punishable under Article 185 c.p.m.g. (wartime military penal code) were present and that extenuating circumstances, consisting of performance of duty and need, could not be countenanced, nor was there any cause to apply any general extenuating circumstances.

The military court also held that there was no irregularity concerning the ruling that the Federal Republic of Germany must provide redress: indeed, the court ruled that the objection of inadmissibility was unfounded, as was the plea concerning the impossibility of bringing a civil action in view of the international obligations entered into by Italy under Article 77 of the Peace Treaty of 10 February 1947, ratified and rendered enforceable by Legislative Decree No 1430 of 28 November 1947, and under the Agreement between the Federal Republic of Germany and the Italian Republic settling certain questions relating to economic

and financial assets, signed in Bonn on 2 June 1961, rendered enforceable by means of D.P.R. No 1263 of 14 April 1962.

Furthermore, the military court rejected the arguments and the references to decisions of various foreign judicial bodies made by counsel for the liable civil party in order to maintain the applicability of the principle of State immunity from jurisdiction, and the absolutely binding nature of that principle, even in cases of serious human rights violations. In line with the case-law of the Combined Civil Sections of the Court of Cassation, the military court held that respect for inviolable human rights had become an overriding principle of the international legal order, thereby reducing the scope of other principles on which that order had traditionally been based, such as the "equal sovereignty" of States and the connected principle of State immunity from foreign civil jurisdiction. Indeed, as the Combined Sections ruled, the generally recognized customary rule of international law which requires States to abstain from exercising jurisdiction against foreign States is not an absolute rule, in the sense that it does not give a foreign State total immunity from the civil jurisdiction of the forum State, since that immunity may not be invoked in the presence of conduct on the part of a foreign State which is so serious that, under customary law, it constitutes international crimes because it violates those universal values of human dignity which transcend the interests of individual States (Cass., Sez. Un., 11 March 2004, no 5044).

After refuting numerous objections concerning the correctness of that case-law trend by counsel for the Federal Republic of Germany, the military court examined various legal sources, both domestic and international (in force in 1944 or enshrining a pre-existing general principle of international law), which attribute the force of *jus cogens* to rules penalizing war crimes and requiring redress for the pecuniary and non-pecuniary damage caused to victims.

Counsel for the Federal Republic of Germany, as the liable civil party, lodged an appeal in cassation objecting, in the first two grounds of the appeal, to the failure to apply and incorrect application of criminal, substantive and procedural provisions, within the meaning of Article 606 (1) (b) and (c) of the Code of Criminal Procedure, due to absence of jurisdiction and the inadmissibility and non-justiciability of a civil action in connection with the international obligations entered into by Italy in Article 77 of the 1947 Peace Treaty, the German/Italian Bonn Agreements of 1961 and the relative internal implementing laws, and due to infringement of the first paragraph of Article 10 of the Constitution. Counsel for the Federal Republic argued, in particular, that the grounds of the decision were misleading and contained clear errors of law in that there had been a failure to apply rules of constitutional, ordinary and

customary law which precluded civil actions against the German State in respect of events associated with the Second World War, pursuant to the waiver of pecuniary claims made by the Italian State, also on behalf of its nationals. It follows, in the view of the appellant, that since, under international law, the right to compensation for civil damages cannot be regarded as an inviolable human right enshrined in a peremptory norm of international law (*jus cogens*) under Article 53 of the Convention on the Law of Treaties, signed in Vienna in 1969, a State indubitably has the power validly to settle the civil aspects of war crimes by means of international agreements.

In the third ground of appeal, counsel for the liable civil party invoked various logical and legal defects in the grounds of the decision, within the meaning of Article 606 (1) (b) and (e) C.C.P., due to infringement of criminal law, inadequacy and manifest illogicality, on the grounds that the military court had failed to take account of the latest developments in international law on State immunity from civil jurisdiction and interpreted the relevant rules of international public law on immunity incorrectly. In particular, the appellant argued that the derogation from the principle of judicial immunity – upheld by the military court in line with judgment 5044/04 of the Combined Sections of the Court of Cassation – does not reflect the present state of international law, since that derogation had been held to be unfounded by the supreme courts of various EU States (Greece, Germany and France), as well as by the German constitutional court in a judgment of 15 February 2006 and by the House of Lords in a ruling of 14 June 2006. Since the norms of international law are based for the most part on the practice of the individual States, the appellant maintained that the isolated argument upheld in the cited judgment of the Italian Court of Cassation and endorsed by the military court should be regarded as unfounded: the military court had moreover followed a "third way" by arguing that the limitation on immunity from jurisdiction became operative when serious violations of fundamental human rights resulted from acts committed in the forum State. The appellant also pointed out that the European Court of Human Rights had upheld the immunity rule, even in the presence of infringements of *jus cogens*, in at least three decisions which conflicted with the decision of 5044/04 of the Combined Sections. Nor was it relevant, in support of the latter decision to cite the decisions of various US courts which had recognized the existence of a derogation from the principle of immunity with respect to States which sponsor terrorism, given that those decisions were based on internal legislative norms introduced by the 1996 amendment to the Foreign Sovereign Immunity Act, especially since no derogation is provided for in the UN Convention of 2004 on Jurisdictional Immunities of States.

On 30 September 2008, counsel for the liable civil party lodged a statement in defence in which he reproduced the opinion of Prof. Andrea Gattini, professor of international law at the Università degli Studi di Padova, which the German Ambassador had forwarded to the Italian Minister of Foreign Affairs. That opinion discussed at length the various criticisms of judgment 5044/04 of the Combined Civil Sections of the Court of Cassation, which was dubbed an isolated aberration and a "lone voice" in both domestic and international law. The appellant referred to and endorsed all the observations set out in that opinion and, after commenting on a series of decisions handed down by the Combined Sections at the hearing of 9 May 2008, concluded by seeking the annulment without further appeal of the contested judgment with respect to the civil aspects concerning joint liability under civil law for redressing the damage caused to the civil parties.

In a statement lodged on 16 October 2008, the counsels for various civil parties reiterated their objection concerning the inadmissibility of the appeal, which had been made during the course of the proceedings at second instance, maintaining that the aspect of the judgment concerning the civil liability of the Federal Republic of Germany was already *res judicata*, independently of the war crime committed by the accused, Max Josef Milde, since counsels for the Federal Republic of Germany did not have special power of attorney and were therefore not entitled to appeal the judgment at first instance.

GROUNDS OF THE DECISION

1. The objection entered by counsels for the civil parties, in relation to the lack of special power of attorney, for the purpose of obtaining a declaration that the objections made on appeal and in cassation by counsel for the Federal Republic of Germany are inadmissible, is manifestly unfounded.

In the first place the objection relates to a principle which is clearly evident from the various provisions of the code of procedure and is obvious from case-law, the latter consistently recognizing that the rules relating to objections by private parties, other than the accused, provide for and confer a power to contest on those parties in person, and not on their counsels: such that the latter – in contrast with what is established by the third paragraph of Article 571 C.C.P. in relation to counsel for the accused – may not be regarded as entitled to contest an appeal unless they have a special power of attorney (Cass., Sez. IV, 14 May 1997, *Ferrera*, rv. 208223). Pursuant to that rule and with reference to the position of the liable civil party, it has been held that counsel is not automatically entitled to lodge objections and that he may

only do so pursuant to a special power of attorney (Cass., Sez. IV, 27 September 1989, *Ronchetti*, rv. 182526; Sez. IV, 19 April 1990, *Cirulli*, rv. 184878; Sez. IV, 26 January 1993, *Tartaglia*, rv. 195854).

In this case, the military court correctly precluded that the appeal could be regarded as inadmissible for the reason given by the civil parties, pointing out, in an order in oral proceedings on 18 December 2007, that counsel's mandate was contained in a document attached to the appeal which specified that a power of attorney was conferred for "the appeal to be made against the judgment". Thus there can be no reasonable doubt regarding the existence of a special power of attorney, given that the purpose of the document was precisely to give counsel the power to contest the decision of the military court and to initiate second instance proceedings for the purpose of getting the decision on civil liability overturned.

The literal wording of defence counsel's mandate, as conferred at the end of the appeal in cassation by the Ambassador of the Federal Republic of Germany accredited to the Italian Republic, is equally explicit and unequivocal given that the said document states that Augusto Dossena of the Florence Bar is empowered to contest the decision of the Military Court of Appeal of 18 December 2007 upholding the conviction of Max Josef Milde and the liable civil party (in other words the Federal Republic). Therefore, since all formal and substantive requirements laid down in Article 122 C.C.P. have been satisfied, there can be no doubt that the documents serve as a special power of attorney to appeal for and on behalf of the liable civil party.

2. The appeal against the decision of the Military Court of Appeal solely concerns the element of the civil rulings ordering the Federal Republic of Germany to pay compensation in its capacity as the civil party liable for the crime committed by Milde. It follows that, since the latter and his counsel have not contested the decision upholding the sentence to life imprisonment for violence with butchery provided for in Article 185 c.p.m.g., the judgment has become final on that head and the reconstruction of the facts can no longer be disputed.

It follows from the foregoing that the matter to be reviewed, following the appeal lodged by the Federal Republic of Germany, must of necessity relate to the following points of reference:

a) on 29 June 1944, during the state of war between Italy and Germany, the accused, Max Josef Milde, a sergeant in the "Hermann Goering" armoured parachute division, took part in a

retaliatory operation in the communes of Civitella, Cornia and S. Pancrazio ordered by Nazi commanders following the killing of four German soldiers by partisans; the operation consisted of rounding up the people from those villages and massacring two hundred and three of them (including elderly persons, women and children) who had nothing to do with the military operations, acting cruelly and with premeditation, sexually assaulting many women and defiling numerous corpses;

b) the crime punishable under Article 185 c.p.m.g. is included in crimes against the law and wartime practice and can be regarded as a breach of the rules laid down by States to control violence in armed conflict (*jus in bello*) in order to safeguard interests protected by international law and to protect the human being as the ultimate good: this is therefore an incriminating provision closely linked to wartime humanitarian law as governed by international conventions and practices, with the result that this incident, by seriously infringing the values recognized by every civil society, can be regarded as an international war crime (see Cass., Sez. I, 8 November 2007, *Sommer and others*, in connection with the massacre of S. Anna di Stazzema perpetrated by German troops who meted out similar treatment to the civil population).

The above two points, which were exhaustively investigated by the military court in the contested decision, have not been contested by the Federal Republic of Germany, in that the grounds of the appeal only dispute the legal possibility of ordering the State to pay compensation for activities which, under customary international law, are covered by immunity from jurisdiction and cannot, therefore, give rise to civil liability, whereas the possibility of the Federal Republic being held liable for the unlawful activities of Nazi troops of the Third Reich during the Second World War has not even been disputed.

3. In terms of the objections formulated by the appellant, the question which this court is called up to examine and resolve is whether the customary norm of international law which recognizes State immunity from jurisdiction in respect of acts committed in the exercise of their sovereign powers should or should not be applied in the case of conduct which constitutes international crimes.

On this point, the traditional position adopted by lawfulness case-law has been unanimously in favour of the absolute and unchallengeable applicability of the principle of customary international law of "restricted or relative immunity", pursuant to which the exemption of foreign States from civil jurisdiction relates to acts *iure imperii*, whereby they exercise their sov-

ereignty, and does not extend to acts pursued by the State *iure gestionis* or *iure privatorum,* which are unconnected with the exercise of their sovereign power, in the guise of a private individual (cf. *ex plurimis*, Cass., Sez. Un. Civ., 12 June 1999, No 328; 3 February 1996, No 919; 24 September 1993, No 9675; 30 May 1990, No 5091).

An abrupt *virement* in this pattern of case-law came with judgment 5044 of 11 March 2004 when the Combined Civil Sections of the Court of Cassation deliberately argued from a different angle and, whilst upholding the principle of restricted immunity, held that this principle encountered a limitation whenever the conduct attributable to the State, even if it could be classed as exercise of sovereign powers (such as those deployed in wartime), constituted a serious violation of human freedom and dignity which could be classed as international crimes. The innovative principles expressed in that decision are neatly synthesized in the following official maxim: "Respect for inviolable human rights has acquired the force of a fundamental principle of the international legal order, thereby reducing the scope and ambit of other principles on which that order has traditionally been based, such as the principle of the "sovereign equality" of States, linked to which is a recognition of State immunity from foreign civil jurisdiction; it follows that the generally recognized customary norm of international law which requires States to abstain from exercising jurisdiction against foreign States is not an absolute rule, in the sense that it does not confer complete immunity from jurisdiction on a foreign State in the territory of the forum State, since that immunity may not be invoked in the presence of conduct on the part of the foreign State which is so serious as to constitute international crimes, under customary rules of international law, because it infringes those universal values of respect for human dignity which transcend the interests of individual States; therefore the Italian court has jurisdiction in connection with the claim for damages made against the Federal Republic of Germany by an Italian citizen who complains of being captured following the Nazi invasion of Italy during the Second World War, deported to Germany and used as slave labour in German firms, given that the deportation and subjection to forced labour must be regarded as war crimes and, therefore, as crimes under international law, since the international community has formed a general norm of customary law on this matter" (Cass., Sez. Un., 11 March 2004, 5044, *Ferrini* v *Federal Republic of Germany*).

The interpretative guidelines provided in *Ferrini* have been taken on board and reiterated in all the subsequent case-law of this court. When settling a question of jurisdiction in relation to the action brought against the Argentine Republic in connection with the sale of bonds and the moratorium on reimbursement, the Combined Civil Sections did declare a lack of juris-

diction pursuant to the principle of restricted immunity whilst confirming, however, that that principle is subject to the limitation resulting from the fundamental principle of the international legal order relating to the duty of States to respect inviolable human rights, meaning that acts constituting the exercise of sovereignty cannot be covered by immunity where a foreign State commits grave infringements of those universal values of respect for human dignity which transcend the interests of individual States: with the further consequence that immunity from jurisdiction is not admissible in the case of a claim for damages connected with war crimes attributable to a foreign State which has been sued by an Italian citizen before the Italian courts (Cass., Sez. Un. Civ., 27 May 2005, 11225).

This interpretative guideline has recently been confirmed by two decisions of the Combined Civil Sections in disputes to which the Federal Republic of Germany was a party. In the first judgment, the Combined Civil Sections ruled – in connection with the recognition of foreign judgments – that the judgment of the Greek Court of Cassation ordering the Federal Republic of Germany to pay court costs in connection with an (upheld) application for compensation brought by the heirs of victims of a civilian massacre perpetrated by German armed forces in Greek territory during the Second World War, was not contrary to internal public policy. This was because the customary norm of international law, which requires States to refrain from exercising their power of jurisdiction in respect of acts *iure imperii*, is not unconditional but is limited by the recognition afforded to the absolute primacy of the fundamental values of human freedom and dignity and, as a result may not be invoked where acts of a foreign State are sufficiently serious as to be regarded as crimes against humanity in that they adversely affect those universal values of respect for human dignity which transcend the interests of individual States (Cass., Sez. Un. Civ., 29 May 2008, 14199). The same reasoning was following in a contemporaneous order settling a question of jurisdiction, in which the court held, once again, that "respect for inviolable human rights has acquired the force of a fundamental principle of the international legal order, thereby reducing the scope and ambit of other principles on which that order has traditionally been based, such as the principle of reciprocal sovereignty, linked to which is a recognition of State immunity from foreign civil jurisdiction; it follows that the generally recognized customary rule of international law which requires States to refrain from exercising their powers of jurisdiction against foreign States in relation to acts *iure imperii*, is not an unconditional rule; when it comes into conflict with the parallel principle, which has formed in international law, of the absolute primacy of the fundamental values of human freedom and dignity, it must respect the latter, with the result that the foreign State does not have absolute immunity from civil jurisdiction in the forum State, in the presence of acts which are sufficiently serious as to constitute crimes against humanity and which,

because they adversely affect those universal values of respect for human dignity which transcend the interests of the individual States, are a breaking point in the tolerable exercise of sovereignty (Cass., Sez. Un. Civ., 29 May 2008, 14201).

This new line of argument on the conditional judicial immunity of States has also been incorporated into a recent criminal judgment of this Section which, when examining the functional immunity, or immunity *ratione materiae,* from criminal jurisdiction of the State organ of the foreign State for acts committed *iure imperii* in the exercise of the tasks and functions conferred upon it, explained that such immunity encounters a precise limitation in serious violations of international humanitarian law, namely crimes infringing the inviolable human rights of freedom and dignity (Cass., Sez. I, 19 June 2008, P.G. in proc. Lozano, rv. 240556). It is significant that, in order to justify the *ratio decidendi* of its decision, the court recalled the red light given by the combined civil sections in the *Ferrini* judgment of 11 March 2004, when they recognized that international crimes placed a limitation on State immunity from jurisdiction. That reference must be regarded as timely and relevant in that the parallel between the functional immunity of the State organ and the immunity of the State was examined specifically in the last part of the grounds in *Ferrini* where the court held that "it is generally agreed that functional immunity is a specific case of the immunity conferred on States, in that it responds to the need to prevent the prohibition on suing a foreign State being nullified by suing the person through whom its activity was expressed. However, if that comment is correct, in the view of this court, we must then agree with those who maintain that if functional immunity is not applicable, because the act committed is classed as an international crime, there is no valid reason for continuing to uphold the immunity of the State, and hence for denying that its liability can be invoked before the judicial authorities of a foreign State."

These considerations lead us to conclude that in recent years a sufficiently consistent trend has emerged to indicate that the interpretation which precludes State immunity from civil jurisdiction in the presence of international crimes is now a solid point of reference in lawfulness case-law.

4. This court intends fully to endorse this hermeneutic orientation whose correctness is fully confirmed by a series of precise and reliable, logical and systematic arguments which demonstrate unequivocally that the customary principle of State immunity from jurisdiction is not absolute or indiscriminate in scope, but will in fact be inoperative in cases where it competes with the parallel principle of customary international law which legitimizes recourse to the

means of protection provided for obtaining redress for damage caused by international crimes stemming from serious infringements of inviolable human rights.

The appellant's arguments seek principally to dispute the legal principle established in judgment 5044/2004, endorsed by the later decisions cited above, by assembling the various rulings of the supreme courts of several national legal orders which have attributed an absolute value to the principle of State immunity from civil jurisdiction, which is not subject to limitation even in the presence of conduct constituting international crimes. In the view of the appellant, the line of reasoning adopted by the Court of Cassation occupies a completely isolated position in international practice and in no way reflects the legislation actually in force concerning relations between States.

The appellant's argument does not hold water.

In the first place, it should be pointed out that the Combined Civil Sections of the Court of Cassation, in judgment 5044/2004, made a careful and thorough analysis of the content of the decisions handed down by the foreign courts referred to by the appellant, highlighting, in some cases, the differences between the situation in this case and in the cases forming the subject-matter of the earlier decisions. They pointed out that there are other rulings by foreign judicial authorities to the effect that the principle of State immunity from jurisdiction may not paralyse the exercise of legal actions which seek to uphold individual rights vis-à-vis international crimes deriving from violations of the rules established for the protection of fundamental human rights.

That same close examination was made in the case of the disputed judgment of the Military Court of Appeal which followed the precise and well-reasoned arguments in *Ferrini*. In the absence of different and more convincing arguments, this court entirely endorses the outcome of the scrutiny made by the Combined Civil Sections; for that reason it is sufficient to refer to the military court's full acceptance of those conclusions and there is no need to re-examine the reasons for and against the argument of the absolute nature of State immunity, as inferred from the various decisions of foreign courts.

Moreover, it is particularly important to stress that the solution to the question here discussed cannot be resolved on a purely quantitative basis, in other words it cannot depend on how many rulings supported this or that position. It should be pointed out in this connection that although it is true that an examination of the practice of the courts of the various States is a

meaningful way of ascertaining the application of customary rules of international law, it is equally true that the task of interpretation cannot be reduced to a mere mathematical computation of the data inferred from judicial practice, since it must also take into account not only the difficulties of verifying the actual existence of customary practices but also their qualitative relevance, the interrelationship between them, their interdependence and the hierarchy attributed to each norm in relation to the scale of values generally recognized by the international legal order.

Put in this way, the subject-matter of our scrutiny and of the resultant ruling concerns a determination whether the principle of State immunity from jurisdiction constitutes an unconditional rule not subject to limitation or whether primacy should be accorded to those other rules of customary law which protect the fundamental values associated with human beings as such, the infringement of which always requires the application of reparation penalties even if the conduct in question can be attributed to a State.

5. The complexity of the question to be answered therefore hangs on the parallel existence of various norms of customary international law whose scope and sphere of operation must be examined in order to ascertain whether they are mutually compatible or whether the applicability of one should prevail over another.

There is no doubt that the principle of State immunity from jurisdiction is a generally recognized rule of customary international law in relation to activities which are a direct expression of sovereign powers.

Likewise, there is no doubt that customary norms have been operative for some time in the international legal order, with a view to protecting human freedom and dignity which are considered to be fundamental and inalienable human values. Some of these, whilst having their origins in customary law, have been solemnly enshrined in international conventions which have explicitly set forth certain fundamental principles, formerly consolidated in relations between States, on the basis of their general acceptance by the entire international community; this was the case, for example, with the International Covenant on Civil and Political Rights, adopted in New York on 16 December 1966 by the United Nations General Assembly, with the Hague Convention of 1907 Respecting the Laws and Customs of War and with the four Geneva Conventions of 1949 and the two additional Protocols, which constitute so-called humanitarian law.

It is undisputed that violations of inalienable human rights, protected by customary norms, constitute international crimes which must be prosecuted and punished by every State in that they undermine vital interests, thereby seriously damaging the international order. Within the category of international crimes, a specific hierarchy must be attributed to crimes against humanity, in other words – as the best legal authorities have said – to those unlawful acts which can be categorized as follows: a) particularly heinous crimes which seriously compromise human dignity or gravely humiliate one or more human beings; b) crimes which are not isolated or sporadic occurrences but rather constitute an extensive or systematic pattern of atrocities; c) crimes which should be prosecuted and punished whether they are committed in wartime or peacetime; d) crimes whose victims are civilians or, if committed in wartime, persons who are not taking part in armed hostilities.

Rules for the protection of fundamental human rights, the infringement of which gives rise to the objective element which distinguishes crimes against humanity, are an expression in the international legal order of the primacy generally afforded to respect for human dignity, assuming "the role of a fundamental principle due to their axiological connotation as the ultimate value", meaning that their infringement "marks the breaking point in the exercise of tolerable sovereignty" (Cass., Sez. Un., order 14201 of 29 May 2008, op. cit.). Thus the principle of respect for the "sovereign equality" of States must cease to be effective in the presence of crimes against humanity, or serious criminal conduct the true substance of which constitutes an abuse of State sovereignty.

6. The parallel presence, in the same case, of customary international norms relating, on the one hand, to State immunity from jurisdiction, and on the other, to the necessary reparation for serious violations of fundamental human rights which constitute international crimes entails their coordination in order to determine which norm should prevail and how to resolve the conflict between normative precepts where they are alternatives and irreconcilable.

This coordination must of necessity be achieved on the basis of value judgments which perfectly reflect the options sanctioned by the international order. In this connection, we would fully endorse, for their clarity and incisive logic, the clearly expressed views set forth in the judgment of this Section cited above, which identified the key to settling a conflict of norms in the following terms: "It follows, as a logical corollary, from the parallel and antinomic existence in the international order of the two principles of general application that any conflict, where they both come into play at the same time, must be resolved through their systematic coordination and on the basis of the criterion of a balancing of interests, according

primacy to the higher-ranking principle of *jus cogens*, and hence to the guarantee that the most serious crimes against the inviolable human rights of freedom and dignity will not go unpunished" (Cass., Sez. I, 19 June 2008, Lozano, rv. 240556, op. cit.).

The different qualitative character of customary norms is confirmed by the different value and different force conferred on them by the international order, given that legal writers and case-law both agree that derogations from the customary principle of State immunity from jurisdiction may be made in suitable conventions, whereas no derogation is permitted from customary norms which have come into being for the protection of inviolable human rights and which belong to the system of peremptory norms of general international law or *jus cogens*. The pre-eminence of that category of norms derives indisputably from the content of Article 53 of the Vienna Convention on the Law of Treaties, adopted on 23 May 1969 and ratified and rendered enforceable by Law 112 of 12 February 1974, which provides that "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law," and continues "For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

The classification of customary norms protecting fundamental human rights under *jus cogens* has been upheld on many occasions by the case-law cited above, precisely in order to justify the primacy of those norms over a norm concerning State immunity from jurisdiction, on the basis that the former norms have been placed at the pinnacle of the international order and that their serious and systematic violation amounts to international crimes which threaten humanity in general and undermine the very foundations of international coexistence (Cass., Sez. Un. Civ., 5044/2004, op. cit.).

Moreover, the particular value of those norms has recently been recognized by the Court of First Instance of the European Community which ruled that measures in relation to assets adopted for the purpose of combating international terrorism pursuant to UN Security Council resolutions were not unlawful and held that such legislation "does not infringe the fundamental rights of the person concerned, measured by the standard of universal protection of the fundamental rights of the human person covered by *jus cogens*" (judgment in Cases T-315/01 and T-306/01 of 21 September 2005; judgment in Cases T-253/02 and T-49/04 of 12 July 2006).

7. The results of a systematic interpretation fully accord with those of a logical interpretation. In fact, if it is true that the justification for rules protecting human freedom and dignity can be found in universal principles from which no derogation is permitted and which are perceived as such by the entire international community, the internal coherence of the system requires that violation of those fundamental values unfailingly entails punitive action by the components of that community and action for redress by the victims of such violations, given that, if this were not the case, there would be no sense in proclaiming the primacy of fundamental human rights and then confounding that statement by denying access to the courts, thereby denying individuals the possibility of relying on the essential means of ensuring the effectiveness and primacy of those fundamental rights infringed by the criminal conduct of a State.

Finally, it is worth highlighting the importance of the methodology consisting in assessing the reliability of the results obtained from scrutinizing the values and principles which permeate the Italian constitutional system, a system which includes the provision in paragraph 1 of Article 10, to the effect that "the Italian legal order shall conform to the generally recognized principles of international law". It appears from the work of the constituent Assembly, that there was a universal desire to introduce, by means of that provision, a rule on judicial activity, having the function of a mobile or formal reference, the operation of which would have the effect of constantly and automatically updating the internal order to the rules of general international law, in other words to the customary rules and general principles which are recognized as binding by the international community as a whole. Even disregarding the various scholarly opinions concerning the rank of the adaptation provisions referred to in paragraph 1 of Article 10 of the Constitution, it should be stressed that even those authors who are in favour of classifying them, even partially, as constitutional norms, agree that the adaptation "must be full and complete, but must not lead to infringement of the vital cornerstones of our legal order, namely those principles which the constituent assembly felt to be jointly essential to the current constitutional order, absolutely paramount and therefore not subject to amendment". It is highly significant that fundamental human rights are numbered among those constitutional principles from which no derogation is permitted under generally recognized international norms.

It must therefore follow, from the above considerations, that in this case the disputed judgment correctly precluded the immunity of the Federal Republic of Germany from civil jurisdiction on the grounds that the right invoked by the civil parties flows from a crime against humanity. In this latter connection it must be pointed out that confirmation for this classification can undoubtedly be found in the judgments of this court concerning other inhuman

deeds perpetrated by German troops in Italy during the last world war, following a premeditated trail of systematic ferocity, ordered by Nazi commanders, against the civil population in violation of their supreme right to life and dignity (cf. Cass., Sez. I, 16 November 1998, 1230, *Priebke and Hass*, concerning the Fosse Ardeatine massacre; Sez., I, 8 November 2007, 4060/08, *Sommer and others*, in connection with the S. Anna di Stazzema massacre). Furthermore, it should be noted that not even counsel for the appellant has been able to invoke any objection against the vicious massacre of two hundred and three people unconnected with the military operations, including old people and children, being classified as a crime against humanity.

In conclusion, the complaints brought against the judgment of the Military Court of Appeal, which correctly denied immunity from jurisdiction in connection with the application for redress brought against the liable civil party, must be regarded as unfounded.

8. The topic of immunity from jurisdiction does not affect the appellant's objections that recognition of the right upheld by the civil parties is precluded by Article 77 (4) of the Peace Treaty of 10 February 1947, approved by legislative decree no 1430 of the provisional Head of State of 28 November 1947 whereby – according to the appellant – Italy waived on its own behalf and on behalf of Italian nationals, all claims for compensation against Germany and German citizens outstanding on 8 May 1945, with the sole exception of those rights acquired prior to 1 September 1939. In this connection we fully uphold the arguments whereby the military court, with irrefutable logic and legal accuracy, rejected the objection on the grounds that the rules laid down in the 1947 Peace Treaty are inapplicable to this dispute since the Federal Republic of Germany is not a party to the Treaty, the provisions of which concern rights *in rem* in respect of material damage and not the moral damage for which reparation must be made to the relatives of victims of war crimes.

Equally unfounded is the objection directed at the military court's alleged infringement of the Bonn Agreement of 2 June 1961 "for the settlement of certain questions concerning economic and financial assets" rendered enforceable by Presidential decree 1263 of 14 April 1962, whereby the Italian Government declared that "all claims ... by Italian natural and legal persons ... deriving from rights arising between 1 September and 8 May 1945 shall be regarded as settled", undertaking to "indemnify the Federal Republic of Germany against all actions or other claims in law". In view of the fact that, pursuant to that agreement, D.P.R 2043 of 6 October 1963 laid down rules for distributing the sum paid by the government of the Federal Republic of Germany, it is necessary fully to endorse the interpretation of the military court of

appeal which, using appropriate and precise literal and logical arguments, provided a reconstruction of the scope of the agreement, pointing out that that sum had been paid by the Federal Republic "in settlement of outstanding economic matters" (Art.1) and that the settlement related to "all claims and applications by the Italian Republic, or by Italian natural or legal persons, outstanding against the Federal Republic of Germany or against German natural or legal persons" (Art. 2 (1)), specifying that "the Italian Government shall indemnify the Federal Republic of Germany and German natural and legal persons against any action or other legal claim by Italian naturals and legal persons in respect of the above claims and applications" (Article 2 (2)).

Therefore, it must be recognized that there is solid justification for the view propounded in the disputed decision to the effect that the 1961 Agreement is not applicable to a dispute such as that which forms the subject-matter of these proceedings, which is not outstanding because it had not even been initiated at the time the convention was entered into between the two States; thus no realistic argument can be advanced in support of the appellant's view, expressed without the support of any convincing reasoning, that the settlement of certain questions relating to economic and financial assets, pursuant to that Agreement, also covers claims and applications concerning reparation for moral damage caused by international crimes committed as a result of serious infringements of inviolable human rights.

In light of the above considerations, the appeal must be rejected as unfounded in all respects, and the appellant ordered to pay the costs of the proceedings and to reimburse the expenses incurred on appeal by the civil parties as specified below.

FOR THE ABOVE REASONS

The Supreme Court of Cassation, First Criminal Section, rejects the appeal and orders the appellant to pay the costs of proceedings, to reimburse the expenses incurred on appeal by the civil parties, paid on behalf of those represented by Mr De Fraja in the sum of EUR 4,800 and on behalf of those represented by Mr Bianconi in the sum of EUR 8,800, and in respect of both the incidental expenses required by law.

Thus decided in Rome on 21 October 2008.

The Judge-Rapporteur The President

Annex 17

Regional Court of Livadia

Judgment 137/1997

25 September/30 October 1997

2 bis

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N° 92.232

AU NOM DU PEUPLE HELLÉNIQUE

NUMÉRO 137/1997

Le Tribunal de Grande Instance de LIVADIA

Composition :

M.M. Athanasios HAGKANIS, *Président* du Tribunal de Première Instance,
Haralampos TRIVIZAS, Juge du Tribunal de Première Instance,
et Mme Aikaterini SETTA, Juge du Tribunal de Première Instance-Rapporteur

A tenu séance publique en son audience du 12 décembre 1996, assisté de Mme Malama VALAKOU-PAPAVASILIOU, *Greffier*, pour statuer sur l' affaire entre :

L' ADMINISTRATION DÉPARTEMENTALE LOCALE DE BÉOTIE, Personne Morale de Droit Public, dont le siège est sis à LIVADIA – Grèce, légalement représentée par Me Ioannis E. STAMOULIS, Préfet de Béotie,

DEMANDERESSE

tant personnellement qu' en sa qualité de représentante des personnes ci-dessous :

1. M. Konstantinos AVORITIS, fils d' Ioannis ;
2a. Mme Aikaterini KALOGEROPOULOU ;
b. M. Panagiotis ANESTIS ;
c. Mme Nikolia KAROUZOU ;
3. Mme Ioanna MARIOU ;
4a. Mme Maria DIMAKA ;
b. Mme Vasiliki KAVRAKOU ;
c. M. Nikolaos VASILARAKOS ;
d. M. Georgios VASILARAKOS ;
e. Mme Irini SFOUNTOURI;
f. M. Dimitrios VASILARAKOS ;
5. Mme Astero DIMAKA ;
6. Mme Ourania GAMVRILI ;
7. Mme Loukia GAMVRILI ;

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

8. M. Petros GAMVRILIS ;
9a. M. Dimitrios GAMVRILIS ;
b. M. Aristidis GAMVRILIS ;
10. Mme Panagiota GAMVRILI ;
11. Mme Asimina PITSOU ;
12a. M. Ioannis DIMAKAS ;
b. M. Panagiotis DIMAKAS ;
c. M. Georgios DIMAKAS ;
d. M. Anastasios DIMAKAS;
e. Mme Aggeliki PLATI;
13. Mme Asimina PANAKOU ;
14. M. Loukas I. ZAKKAS;
15a. Mme Eleni ZAKKA ;
b. Mme Zoï BOURA ;
c. M. Loukas ZAKKAS ;
16a. Mme Paraskevi MARGELOU;

Numéro d' ordre	Nom et prénom du requérant
16b.	Mme Pagona PAPPA ;
	c. M. Ioannis ZISIS ;
17.	M. Ioannis ZISIS ;
18.	Mme Kondylia ZISI ;
19.	Mme Anna CHRISTOPOULOU ;
20.	Mme Athanasia KAÏLI;
21a.	Mme Vasiliki PITSOU ;
	b. M. Ioannis KAÏLIS;
22a.	Mme Asimina KALEGKA;
	b. Mme Aggeliki GAMVRILI;
23.	M. Evaggelos KAÏLIS;
24.	Mme Asimina STAVROU;

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

25. Mme Panagiota KRAPSI ;

26. Mme Athina HATZHLIADI ;

27a. M. Andreas KAROUZOS ;

b. M. Ioannis KAROUZOS;

28a. Mme Vasiliki KAROUZOU ;

b. Mme Aspasia KAROUZOU ;

29a. M. Georgios KASTRITIS ;

b. M. Aggelos KASTRITIS;

c. M. Aggelos PITSOS;

d. Mme Theofani MIHA ;

e. Mme Loukia BASDEKI ;

f. Mme Asimina FOUNTA ;

g. M. Efstathios PITSOS ;

h. M. Ioannis KAROUZOS ;

30a. M. Theofanis MIHAS ;

b. Mme Loukia BASDEKI;

c. M. Aggelis PITSOS ;

d. M. Efstathios PITSOS ;

e. Mme Asimina FOUNTA ;

31. Mme Liza PANOURIA ;

32. Mme Panagiota RALLI ;

33a. Mme Georgia KELERMENOU ;

b. Mme Areti KELERMENOU;

c. M. Nikolaos KELERMENOS ;

d. M. Panagiotis KELERMENOS;

34a. M. Loukas KELERMENOS;

b. M. Dimitrios KELERMENOS;

c. Mme Nikolia TZATHA;

35a. Mme Pagoula SFOUNTOURI ;

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

b. Mme Anastasia SIDERI ;

c. Mme Aggeliki KAÏLI;

36a. Mme Asimina KELERMENOU ;

b. M. Nikolaos KELERMENOS ;

c. M. Efstathios KELERMENOS;

37a. Mme Panaglota KINIA;

b. Mme Dimitra KINIA ;

38a. M. Anastasios KOKKINIS ;

b. Mme Maria VAROULI;

39. L. M. KOUROUBALI ;

40a. M. Georgios KOUTRIARIS ;

b. Mme Maria BARLOU;

41a. Mme Maria ANDRITSOPOULOU ;

b. M. Athanasios KRITSOPIS ;

42. Mme Efstathia KREMMOU;

43a. Mme Archonto GEORGANTA ;

b. M. Georgios KONTANTINOU;

c. Mme Anastasia DAVAKI;

44. Mme Alefanto KAÏLI;

45a. M. Ioannis P. LABROU;

b. M. Nikolaos P. LABROU;

c. M. Athanasios P. LABROU;

46a. Mme Maria N. LABROU ;

b. Mme Nikolia N. LABROU ;

47. Agg. BALAGOURAS ;

48. M. Spyridon V. ZISIS;

49a. M. Anastasios I. LOUKAS;

b. M. Georgios I. LOUKAS;

50a. M. Anastasios I. LOUKAS;

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

b. M. Ser. Ar. SFOUNTOURIS;

51a. Mme Aikaterini ANDREOU;

b. Mme Evmorfia BEZENTE ;

c. M. Ioannis G. LOUKAS ;

d. M. Loukas G. LOUKAS ;

52a. Agg. TZEREMOPOULOS ;

b. M. Loukas An. MALAMOS;

53a. M. Ioannis Sp. MALAMOS;

b. Mme Konstantina Al. KARVOUNIS;

c. Mme Ioanna D. STATHA ;

d. Mme Pagona I. SKOUTA ;

54. M. Dimosthenis P. MARIOS;

55a. Mme Lelouda TSEKOURA ;

b. Panag. VASILAKAKIS ;

56a. N. N. MASTROGIANNIS ;

b. G. L. MASTROGIANNIS;

57a. M. Nikolaos G. MIHAS;

b. Mme Zoï KRONTIRA ;

c. M. Ioannis G. MIHAS ;

d. Mme Astero BALAOURA ;

58a. M. Ioannis Hir. MIHAS;

b. Mme Styliani ALEXIADOU;

c. Mme Evanthia TASOU ;

d. M. Dimitrios EVAGGELIOU ;

e. M. Hiraklis EVAGGELIOU ;

f. Mme Panaglota LAOUTARI;

g. Mme Kyriakoula VIDALI ;

h. Mme Efthymia EVAGGELIOU ;

59a. M. Ioannis N. BALAGOURAS ;

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

b. Mme Sofia S. NIKOLAOU ;

c. Mme Despina VASILARAKOU ;

60. Mme Pagona D. TSOKOU ;

61a. Mme Krystallo KIOUSI ;

b. Mme Anastasia BARLOU ;

c. P. L. BARLOU ;

d. Mme Panagiota L. BARLOU ;

e. M. Christ. L. BARLOS;

62a. M. Ioannis A. BASDEKIS ;

b. M. Panagiotis A. BASDEKIS ;

c. M. Georgios A. BASDEKIS ;

63a. M. Efth. A. BASDEKIS;

b. M. Efth. Od. BARLOS;

64. M. Fotios N. BOURAS;

65. Mme Vasiliki NTAOULA ;

66. Mme Aggeliki D. BOURA ;

67a. Mme Maria I. LEMONI ;

b. Mme Theofani Ath. KAÏLI;

68a. Mme Theofani N. BOURA ;

b. Mme Afroditi N. BOURA ;

c. Zaf. N. BOURA;

d. M. Dimitrios G. BOURAS ;

69. Mme Spila P. ILIOPOULOU ;

70. Mme Eleni D. SFOUNTOURI ;

71. Mme Aggeliki I. BALAGOURA ;

72a. Mme Olga IGGLEZOU ;

b. Mme Marg. KARAGIANNI

c. Mme Diamanto STATHA

d. Mme Anna PETRAKOU

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

Nº

73. M. Aristodimos N. NIKOU

74a. Mme Christina KASTRITI

b. Mme Garoufalia SFOUNTOURI

c. M. Ioannis Kon. NTAÏS

75a. Mme Irini L. DERBENAGA

b. Mme Maria D. KOTRONI

76. M. Par. K. Nikolaou

77a. Mme Maria Ath. PANOURGIA

b. Io. Ath. PANOURGIA

c. Mme Stamatia A. PANOURGIA

78a. Le/do N. PANTISKA

b. Mme Maria G. MIHA

c. Mme Panagiota I. MIHA

79a. Mme Efthymia ARGUROPOULOU

b. M. Ioannis D. PAPADIAS

c. Mme Georgia KATSOULIERI

d. M. TSAPAROPOULOU

e. M. Anargyros PAPADIAS

80a. Ef. Th. SFOUNTOURI

b. Io. N. PAPATHANASIOU

81a. El. I. PAPATHANASIOU

b. Mme Loukia KARMA

c. L. L. PAPATHANASIOU

82. Mme Efthymia G. LABROU

83a. M. Nikolaos Ef. MIHAS

b. Mme Asimina KASTRITI

c. Mme Violetta SIDERI

84. D. N. KALOGEROPOULOU

84.

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

85a. Ef. A. PAPAÏOANNOU
b. G.G. PAPAÏOANNOU

86a. M. Loukas I. LABROU
b. Mme Maria PERGANTA
c. Mme Eleni TSAMI

87a. Mme Pagona KELERMENOU
b. Mme Georgia BOKA

88. Vas. I. PAPANOPOULOU

89. Kon. D. PASCHOULI

90a. Mme Glyk. Sp. PELEKANOU
b. Mme Tr/fyllia Th. MINAKI
c. Ath. Sp. PELEKANOU

91a. Christ. Il. PELEKI
b. Mme Aggeliki Il. PELEKI
c. Nik. Il. PELEKI

92a. Nik. I. PERGANTA
b. Mme Anastasia A. BOURA
c. Mme Panorala I. STATHIA

93. Mme Argyro N. MIHA

94a. Ar. G. SFOUNTOURI
b. G. N. PERGANTA

95a. M. Loukas V. PERGANTAS
b. M.Thomas V. PERGANTAS

96. Mme Olympia K. PERGANTA

97a. M. Ioannis N. PERGANTAS
b. Mme Maria I. BASDEKI
c. Mme Olga S. BASDEKI

98a. Efr. V. PERGANTA
b. M. Haral. V. PERGANTAS

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

c. M. Loukas V. PERGANTAS

99. Mme Ioulia PAPALEXI

100a. M. Loukas G. SEHREMELIS

b. Mme Kyriaki K. PERGANTINA

101. Mme Chrysiada P. GAMVRILI

102. Pan. An. SEHREMELI

103a. Mme Aggeliki A. SFOUNTOURI

b. M. E. TRIANTAFYLLOU

c. M. Efthymios L. SIDERAS

104. M. Ioannis G. SIDERIS

105a. Mme Panagiota I. SKOUTA

b. M. Dimitrios I. SKOUTAS

c. Mme Diamanto Efs. LYTRA

106a. Anast. I. SKOUTA

b. Mme Maria I. SKOUTA

c. I. I. KALOGEROPOULOU

107a. M. Theofanis Chr. SKOUTAS

b. M. Ioannis Chr. SKOUTAS

c. Mme Panagiota Sp. SKOUTA

d. M. Ilias Chr. SKOUTAS

e. M. Spyridon Chr. SKOUTAS

108. M. Evaggelos STATHAS

109. Pan. Th. PERGANTA

110a. M. Ilias St. STATHAS

b. Mme Ioanna L. ZAKKA

111a. Anast. I. STAVROU

b. M. Georgios A. STAVROU

112a. Anast. I. STAVROU

b. Mme Panagiota El. STATHA

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

113a. Mme Maria A. STERGIOU
b. Mme Georgia KASTANA
c. Mme Efstathia A. STERGIOU

114a. Pan. Ath. SFOUNTOURI
b. M. N. PAPAÏOANNOU
c. M. P. PAPANIKOLAOU
d. Al. Ch. MARKOPOULOU
e. Pan. N. SFOUNTOURI

115a. Mme Asteria E. ATHANASIOU
b. K. Ar. SFOUNTOURI

---

116. Mme Anthoula St. PEFANI

---

117. M. Dimitrios PANOUSIS
M. Athanasios PANOUSIS

---

118. G. Th. SFOUNTOURI

119a. Tim. G. SFOUNTOURI
b. Mme G/gia I. GERASIMOU
c. Mme S/tia A. NTARNTANI
d. Mme A/na Chr. MAVRAGAKI

120a. L. G. SFOUNTOURI
b. Mme Aggeliki BOURA

121a. Mme Stamatia I. PANTISKA
b. Diom. I. SFOUNTOURI
c. A/ki A. PAPAÏOANNOU
d. Io. I. SFOUNTOURI
e. Mme Aik. L. PANOURGIA

122a. Mme Aggeliki BOURA
b. M. Stamatia I. BELLOU

123a. P. Ath. SFOUNTOURI
b. M. N. PAPAÏOANNOU

N°

c. M. P. PAPANIKOLAOU

d. Al. Ch. MARKOPOULOU

e. P. N. SFOUNTOURI

124. Mme Georgia I. GAMVRILI

125a. Mme Chrysoula E. TZATHA

b. Mme Astero An. LIASKOU

c. Kond. N. SFOUNTOURI

d. Arg. N. SFOUNTOURI

126a. Ag. An. KOSTAGIANNI

b. Mme Maria Il. LITSOU

c. Mme Vasiliki P. ANESTI

d. Io. Har. ANESTI

127a. Mme Paraskevi D. TZATHA

b. M. Panagiotis D. TZATHAS

c. Kond. G. KOUTRIARI

128. Mme Parauskevi G. LITSOU

129. Mme Xasou PAPALEXIOU

130. M. Panagiotis I. TSAMIS

131a. Mme Pagona D. TSOKOU

b. M. Lazaros D. TSOKOS

c. M. Christos D. TSOKOS

d. M. Nikolaos D. TSOKOS

132. Efsth. G. KELERMENOU

Représentés dans le procès, en vertu d' actes de procuration spéciale, par leurs avocats mandataires, Mes Taxiarchis GALANOS, Ioannis PERGANTAS et Andreas KOUTSOUMPAS, nommés par le Préfet ci-dessus qui comparut personnellement.

L' ÉTAT ALLEMAND, légalement représenté, qui n' a ni comparu ni été représenté dans le procès ;

DÉFENDEUR

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

Les requérants demandent au tribunal de déclarer recevable leur action en date du 27-11-1995, déposée au Greffe de cette Cour sous le numéro 160/1995, et dont l' audience fixée en premier lieu pour le 04-04-1996 et rapportée au 06-06-1996, puis au 14-11-1996, eut finalement lieu ce jour, sur enregistrement au rôle.

En l' audience, les avocats mandataires des demandeurs demandèrent au tribunal de déclarer recevable ce qui est mentionné à leurs conclusions.

APRÈS AVOIR EXAMINÉ LE DOSSIER

A PENSÉ CONFORMÉMENT À LA LOI

De la disposition de l' article 15 par. 1 de la Convention Internationale de La Haye du 15-11-1965, portant sur la signification et la notification à l' étranger d' actes judiciaires et extrajudiciaires en matière civile ou commerciale, ladite Convention étant ratifiée par la Loi n° 1334/1983 et entrée en vigueur le 18-03-93 pour la Grèce, d' une part, et, d' autre part, le 26-06-1979 pour la République Fédérale d' Allemagne, il ressort que le fait que le juge saisi ne constate pas que la signification à l' étranger d' un exploit introductif au procès ou d' une pièce équivalent concernant une affaire à caractère civil, ou commercial, et dont le destinataire réside à une adresse connue, eut lieu, soit selon les normes établies par la législation de l' État requis, soit par voie de signification effective au défendeur selon une autre procédure prévue à la Convention (à titre d' exemple, par voie diplomatique) en tout état de cause dans les délais afin que le défendeur puisse se défendre, ce fait constitue un motif d' ajournement du prononcé du jugement, sauf s' il s' agit de jugements rendus en urgence en matière de mesures provisoires ou conservatrices (article 15 par. 3). Or, par exception, aux termes du par. 2 de l' article ci-dessus, un jugement peut être rendu – même s' il n' y a pas eu la constatation requise – si a) l' exploit fut fait parvenir selon les modalités prévues à ladite Convention ; b) un délai de six mois au minimum s' écoula, à compter de la date d' envoi de l' exploit, ledit délai étant chaque fois

évalué par le juge quant à sa suffisance, et c) malgré les démarches opportunes, auxquelles procèdent les autorités compétentes de l' État requis, aucune attestation ne put être obtenue, d' une part, et, d' autre part, l' État contractant, dont un juge est saisi, procéda à une déclaration y relative d' application de la réglementation ci-dessus, conformément à l' article 21 de la Convention, laquelle déclaration fut faite par la Grèce également depuis le 01-06-90 (voir le document n° 0532/ΑΣ 420/18-6-1990 émanant du Service Juridique Spécial, du Ministère des Affaires Étrangères ; arrêt n° 250/1993 rendu par l' assemblée plénière de la Cour de cassation, *Hell.Dik.* 35.1305 ; arrêt n° 423/93 rendu par la Cour de cassation, *Dni* 36.157).

Parallèlement, même aux termes de l' article 5 – que la Convention internationale ci-dessus ne lèse pas, conformément à la disposition générale de l' article 25 de celle-ci – de la Convention d' entraide judiciaire en matière civile et pénale, signée entre la Grèce et l' Allemagne le 11-05-1938, ratifiée par l' article unique du D.-L. n° 1432/1938 et remise en vigueur depuis le 01-02-1952 par communication faite par le Ministère des Affaires Étrangères les 24-11/15-12-1952 (J.O. n° 338/15-12-1952 / I), ladite Convention n' ayant pas été lésée par l' Introduction du Code de Procédure Civile (art. 2 de la Loi d' accompagnement du Code de Procédure Civile), la preuve de la signification des pièces transmises aux fins de la signification, ou de la notification de pièces à l' étranger, doit ressortir, soit de l' avis – dûment certifié conforme – de réception par le destinataire de la pièce, soit d' un certificat délivré par l' autorité de l' État requis, énonçant le fait, le lieu et la date de signification ; à défaut, le juge doit ajourner le prononcé du jugement, lorsqu' il n' est pas constaté que celui auquel est adressée la signification, ou la notification, prit connaissance de la pièce à signifier. En outre, les dispositions des conventions internationales précitées sont applicables parallèlement (arrêt n° 601/1992 rendu par la Cour de cassation, *Hell. Dik.* 34, 1077 ; arrêt n° 1725/1991 rendu par la Cour de cassation, *Hell. Dik.* 34 (1993), 586). En tout

N°

état de cause, vu le fait que les conventions internationales ci-dessus n' abrogent pas directement le droit interne des pays contractants, mais qu' elles renversent le sens effectif de la signification fictive au Procureur, aux termes de l' article 136 par. 1 du Code de Procédure Civile, elles n' excluent pas le droit de la partie à ce qu' elle choisit les modalités de signification visées par le droit interne de son pays, à savoir, en l' espèce, le droit hellénique. Toutefois, la seule signification au Procureur compétent ne suffit pas, mais il faut prouver que la pièce fut effectivement signifiée à l' intéressé ; à défaut, surviennent les conséquences de la signification illégale (arrêt n° 440/92 rendu par la Cour de cassation, *Dni* 34.1076; arrêt n° 12430/1988 rendu par la Cour d' appel d' Athènes, *D.* 20, 42 ; arrêt n° 1312/1991 rendu par la Cour d' appel de Thessalonique, *Hell. Dik.* 33, 1232; Gestou Faltsi, *La signification d' exploits à l' étranger*, p. 64).

En l' espèce, assignation est donnée au défendeur qui ne comparaît pas, dont l' adresse connue, à savoir en République Fédérale d' Allemagne, où il réside, selon ce qui est exposé en détail dans le cadre du considérant majeur, conformément aux dispositions de la Convention de La Haye, combinées avec celles de la Convention précitée du 11-05-1938 entre la Grèce et l' Allemagne, vu le fait que d' aucune pièce du dossier ne ressort que l' État étranger ci-dessus nomma un avoué en Grèce, soit par déclaration faite auprès du Greffe de cette Cour, soit par clause à la convention, son ambassadeur n' étant pas considéré comme avoué (arrêt n° 1348/1986, *Hell. Dik.* 28, 1029), sans pour autant exclure le choix des modalités de signification prévues par le droit interne, en l' espèce le droit hellénique, lorsqu, cependant, selon ce qui précède, il est prouvé que la pièce fut effectivement signifiée à l' intéressé afin que les conséquences de la signification légale surviennent.

Dans l' affaire en jugement, une expédition certifiée conforme à l' original de l' action en justice fut signifiée pour l' État allemand défendeur au

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

Procureur compétent près du Tribunal de Première Instance de Livadia, comme il ressort du procès-verbal n° 319/16-1-1996 dressé par l' huissier de justice auprès du Tribunal de Première Instance de Livadia, M. I. MELETIOU, que les demandeurs invoquent et présentent. En plus, la demanderesse présente et invoque le document n° 109581/16-9-1996 émanant de la Direction de l' Élaboration des Lois, du Ministère de la Justice, prouvant que l' action fut adressée au Ministère des Affaires Étrangères, qu' elle fut transmise par la suite à l' Ambassade de Grèce à Bonn, qui, à son tour, la remit, par note verbale, au Ministère des Affaires Étrangères d' Allemagne, lequel Ministère la rendit cependant le 14-02-96, en alléguant qu' elle ne serait pas conforme au Droit Internationale. De ce qui précède il ressort que l' action en jugement fut effectivement signifiée au défendeur conformément à la convention internationale de La Haye du 15-11-1965, et que sa signification eut lieu dans les délais, afin que ledit État puisse se défendre.

En outre, la demanderesse présente un document no 683/68/Α.Σ 540/7-10-1996 émanant du Ministère des Affaires Étrangères, et indiquant qu' une expédition de l' action en jugement, accompagnée d' un acte de fixation de jour d' audience et d' une assignation au défendeur, cité à comparaître en l' audience, fut signifiée, conformément aux dispositions de la Convention du 11-05-1938 entre la Grèce et l' Allemagne, au Président du Tribunal de Première Instance de Bonn, comme il ressort d' une attestation en date du 03-04-1996, émanant du Tribunal de Première Instance de Bonn, qui rendit l' action au motif qu' elle ne serait pas conforme au Droit International, car les droits souverains de l' État allemand seraient lésés. De ce qui précède il ressort également que l' action en jugement fut signifiée au défendeur conformément à la Convention d' entraide judiciaire en matière civil et commercial, signée le 11-05-1938 entre la Grèce et l' Allemagne, et que, par conséquent, le défendeur - qui ne comparût pas en l' audience du 12-12-96, le jour d' audience ayant été en premier lieu fixé pour le 04-04-1996 et

N°

rapporté au 06-06-1996, puis au 14-11-1996 - doit, vu la disposition de l' article 226 par. 2 du Code de Procédure Civile, selon laquelle l' ajournement et l' enregistrement au rôle équivalent à une citation de l' ensemble des parties, ce qui est valable même au cas d' ajournements consécutifs (arrêt n° 33/95 rendu par la Cour Suprême Spéciale, *Dni* 36.71 ; arrêt n° 5959/95 rendu par la Cour d' appel d' Athènes, *Dni* 37.161) être jugé par défaut, et qu' il faut fixer un dépôt judiciaire à titre de contumace (articles 271, 505 du Code de Procédure Civile).

Conformément à la disposition de l' article 3 du Code de Procédure Civile, « sont soumis à la juridiction des tribunaux civils (grecs) les ressortissants grecs et étrangers, lorsque le tribunal grec est compétent. Ne sont pas soumis à la juridiction des tribunaux grecs les ressortissants étrangers jouissant de l' exterritorialité, sauf s' il s' agit de différends relevant des dispositions de l' article 29 du Code de Procédure Civile ». Conformément à la disposition de l' article 4 du Code de Procédure Civile, « les tribunaux examinent même d' office s' il y a absence de compétence aux cas des articles 1 et 2, alors qu' aux cas de l' article 3 ils procèdent à cet examen d' office si le défendeur ne comparaît pas en l' audience initiale ou s' il s' agit de contestations relatives à des biens immobiliers sis à l' étranger. Si le tribunal se déclare incompétent, il rejette l' action ou la demande ». En outre, de la disposition de l' article 3 par. 2 du Code de Procédure Civile, en association avec la doctrine du Droit International Public aussi, il ressort que de la prérogative d' exterritorialité, à savoir éviter la juridiction des tribunaux de l' État étranger en général (Kerameas, *Droit Civil* 11 et suiv. ; Hortatos, *L' Exterritorialité des États et les problèmes surgissant de celle-ci*, ΕΕΝ 27, 913 ; arrêt n° 291/1958 rendu par la Cour de cassation, *Nomiko Vima* 7, 107 ; Logothetis, *AID* 5, 505 ; Lekkas, *L' exterritorialité selon le Code de Procédure Civile, Nomiko Vima* 17, 1022), jouissent également des États étrangers en tant que sujets à un droit et à des relations internationales. Or, cette dispense

N°

n'est pas absolue, mais elle est relative, ne s' étendant qu' aux relations des États relevant du droit public, à savoir, pour toute démarche, tout acte ou toute relation par laquelle se manifeste leur pouvoir souverain et étatique (IMPERIUM) et non pour les actes ou les démarches relevant du droit privé (transactions) que l' État étranger fait en tant que FISCUS, car, quant à ceux-ci, l' État étranger ne se présente pas comme exerçant un pouvoir étatique, lequel pouvoir est incompatible avec la sphère du droit privé, mais, comme un simple sujet de droit, il contribue ou coopère sur base d' égalité avec une autre personne, physique ou morale, sujet de droit (JURE GESTIONIS), l' exterritorialité étant exclue dans ce contexte, afin de sauvegarder la notion même de la justice dans les relations internationales (arrêt n° 1398/1986 rendu par la Cour de cassation, *Hell. Dik.* 28, 1029 ; arrêt n° 1822/1992 rendu par la Cour d' appel d' Athènes, *Hell. Dik.* 34, 166 ; arrêt n° 13043/1988 rendu par la Cour d' appel d' Athènes, *D* 21, 289 ; arrêt n° 2724/1985 rendu par la Cour d' appel d' Athènes, *Hell. Dik.* 26, 530 ; Delikostopoulos-Sinanioti, *article 3 n° III, 2* ; Efstathiadis, *Droit International* 16 et suiv., 27 et suiv. ; Spyropoulos, *Droit International Public* 125 ; Lekkas, *Nomiko Vima* 17, 1022 ; Pleionis, *Juridiction Internationale*, 106 et suiv. ; Markezinis, *V D5/603* ; Hortatos, EEN 27, 913 et suiv. ; Psomas, I. EEN 44, 356, et notamment, en ce qui concerne l' exterritorialité des États, voir Emm. Roukounas, *Droit International III* 1983 pp. 78-95).

Par ailleurs, selon les principes établis par le droit international, il incombe au législateur national de délimiter la juridiction internationale, et, en conséquence, il faut répondre à la question de savoir si en l' espèce il s' agit d' un acte d' exercice de pouvoir étatique (JURE IMPERIT) exprimant la souveraineté de l' État, ou d' un acte relevant de relations de droit privé (JURE GESTIONIS), selon la LEX FORI, à savoir la qualification de ces actes est jugée, selon l' avis la plus correct que cette Cour partage, par les tribunaux de l' État saisis du différends y relatifs, conformément à son droit

interne, lequel droit est cependant influencé par les conventions internationales et par la perspective internationale, la notion de réciprocité étant prééminente (arrêt n° 1398/1986 rendu par la Cour de cassation, *Hell. Dik.* 28, 1029 ; arrêt n° 6425/1977 rendu par la Cour d' appel d' Athènes, *Nomiko Vima* 26, 742 ; arrêt n° 578/1975 rendu par la Cour d' appel d' Athènes, *Nomiko Vima* 24, 89). Or, n' est pas exclu le manque de juridiction pour des actes ou démarches de l' État étranger agissant en tant que FISCUS, si les démarches judiciaires portent atteinte aux droits souverains de l' État défendeur. Dans ce cas, le privilège de l' exterritorialité de l' État étranger s' étend à celles-ci aussi (voir l' arrêt n° 2724/1985 rendu par la Cour d' appel d' Athènes, *Hell. Dik.* 26, 530 ; l' arrêt n° 4054/1979 rendu par la Cour d' appel d' Athènes, *Nomiko Vima* 27, 1137 ; l' arrêt n° 6425/1977 rendu par la Cour d' appel d' Athènes, *Nomiko Vima* 26, 742 ; l' arrêt n° 503/1976 rendu par la Cour d' appel d' Athènes, *Nomiko Vima* 24, 647). En outre, conformément à une règle reconnue par la science de Droit International et la jurisprudence, et formulée par la 4e Convention de La Haye de 1907 (article 43 du Règlement annexé à ladite Convention), l' envahissement d' un pays, suite aux événements guerriers, par l' armée d' occupation, n' entraîne pas de modification de souveraineté mais seulement un changement provisoire de l' agent qui l' exerce, par l' occupant, qui est tenu de respecter lors de l' administration de l' occupé, tant la législation de ce dernier (article 43 de la 4e Convention de La Haye de 1907) que les règles du droit international, entre autres, les dispositions du Règlement des Lois et Coutumes de la Guerre Terrestre, annexé à la 4e Convention de La Haye du 19 octobre 1907, et notamment la disposition dudit article 46, aux termes de laquelle « l' honneur selon les droits de famille, la vie des personnes et leurs biens...doivent être respectés », laquelle disposition, comme la science l' admet, constitue – du fait qu' elle contient une obligation précise des armées d' occupation – un JUS COGENS. Parallèlement, selon la doctrine et la pratique contemporaines

en matière de droit international, que Votre Cour admet, un État n' a pas la faculté d' invoquer l' exterritorialité, lorsque l' acte incriminé, du chef duquel il est poursuivi en justice, fut commis en infraction à une règle du JUS COGENS. Dans ce cas, il est retenu que l' État défendeur répudia indirectement l' exterritorialité (voir, notamment, l' analyse de S. RICHMAN, CALL THE FSIA GRANT IMMUNITY FOR VIOLATIONS OF JUS COGENS NORMS. BROOK JOURNAL OF INTERNATIONAL LAW 1993, pp 967 ET SEQ). À l' origine de cette norme d' exception se trouve l' arrêt rendu par la Cour Martiale Générale de Nurember qui conclut que le droit d' exterritorialité n' est pas applicable lorsqu' il s' agit d' infractions ou d' actes que le droit international désapprouve, d' une part, et, d' autre part, ladite norme se fonde – quant à la motivation – sur les constatations suivantes : a) Lorsqu' un État viole des règles de droit international forcé, il ne peut pas estimer de manière justifiée qu' il se verra reconnaître le droit d' exterritorialité. Par conséquent, il est réputé renoncer tacitement à ce droit (CONSTRUCTIVE WALVER THROUGH THE OPERATION OF INTERNATIONAL LAW) ; b) Des actes d' un État qui violent le droit international forcé, n' ont pas le caractère d' actes souverains. Dans ces cas, il est estimé que l' État défendeur n' a pas agi dans le cadre de sa capacité en tant que souverain ; c) Des actes contraires au droit international forcé sont invalides et non productifs d' effet, et ils ne peuvent pas constituer une source de droits légaux, tels le droit d' exterritorialité (en application du principe général du droit EX INJURIA JUS NON ORITUR) ; d) la reconnaissance d' exterritorialité quant à un acte contraire au droit international forcé, équivaudrait à l' intervention du tribunal national à la promotion d' un acte vivement désapprouvé par l' ordre juridique international ; e) Avancer l' exterritorialité pour des actes litigieux qui furent commis en infraction à une règle forcée du droit international, constituerait un abus de droit. En, enfin, f) Étant donné que le principe de la souveraineté territoriale, en tant que règle fondamentale de l' ordre juridique international, l'

emporte sur le principe de l' exterritorialité, un État qui viole ledit principe suite à l' occupation d' un territoire étranger, ne saurait pas invoquer le principe de l' exterritorialité pour des actes commis lors de l' occupation belliqueuse illicite (voir l' avis émis par M. Ioannis KRATEROS et portant sur les réparations allemandes et les prétentions de ressortissants grecs à l' égard de l' Allemagne du chef de préjudices subis pendant l' occupation allemande, *Hel. Dik.* 37 (1996), pp 1526 et suiv. et 1530 et notices).

En l' espèce, par l' action en jugement, la demanderesse demande au tribunal de reconnaître – à la suite de la limitation recevable de ladite action en récognitive (art. 224 du Code de Procédure Civile) – l' obligation de l' État allemand défendeur de lui verser – ladite somme étant productive d' intérêts à compter de la date de signification de ladite action – à elle personnellement ou en tant que mandataire des mandants visés à ladite action, en vertu de procurations y relatives accordées à la demanderesse conformément à l' article 713 du Code Civil – les montants mentionnés à ladite action, à savoir 9.448.105.000 drachmes à titre d' indemnité et de satisfaction pécuniaire correspondant au préjudice et à la lésion morale subis par ses mandants ci-dessus suite aux actes d' injustice décrits en détail à ladite action, que les troupes de l' État défendeur commirent lors de l' occupation, par celui-ci, de la Grèce pendant la guerre. Lesdits actes seraient commis au préjudice des mandants ci-dessus à Distomo – Béotie, le 10-06-1944, par les troupes ci-dessus en infraction aux dispositions mentionnées à ladite action, tant du droit interne alors en vigueur que du droit coutumier international forcé de la Convention Internationale de La Haye de 1907, et notamment à la disposition relative au respect de la vie et des biens des citoyens de l' État occupé (Grèce).

Cette action – sur laquelle les juridictions helléniques sont compétentes de statuer, puisque, selon ce qui précède, bien qu' il soit vrai que le préjudice subi par les mandants ci-dessus et les prétentions de ces derniers se

rapportent à des actes d' organes de l' État Allemand qui eurent lieu sur le territoire de la République Hellénique lors de l' occupation belliqueuse de celle-ci par l' État défendeur, cependant ces actes ne sauraient pas passer pour être des actes de pouvoir souverain, car ils seraient commis par les organes ci-dessus en infraction aux règles de droit international forcé, et notamment en infraction à l' article 46 ci-dessus du Règlement de La Haye de 1907, l' État défendeur ne jouissant pas en conséquence, pour tous les motifs mentionnés ci-dessus, de la prérogative de l' exterritorialité – est dûment introduite de façon recevable devant cette Cour (article 5 de la Convention de Bruxelles, ratifiée par la Loi n° 1814/1989) qui est compétente *ratione materiae* (art. 18 du Code de Procédure Civile) et *ratione loci* (art. 26 du Code Civil et 35 du Code de Procédure Civile), puisqu' il s' agit d' un différend surgi d' actes punissables en matière pénale, prévus et punis non seulement par le Code Pénal mais aussi par les dispositions de la Loi Pénale du 19-04-1834, en vigueur en vertu de l' art. 3 du Décret du 24-06-1835, qui demeura en vigueur pendant l' occupation de la Grèce par les troupes allemandes, étant donné que, selon ce qui précède, l' occupation militaire n' entraîne pas d' abolition ou de modification de souveraineté, ni, par conséquent, de suppression du droit en vigueur dans l' État occupé, mais qu' elle n' entraîne qu' une modification provisoire de l' agent d' exercice par l' occupant qui doit respecter le droit en vigueur (arrêt n° 117/26 rendu par la Cour de cassation, *Th.LTh* 6, 627; cit.op. Ioannis KRATEROS, p. 1528).

En outre, l' action en jugement est jugée irrecevable dans la mesure où elle est intentée par l' Administration Départementale Locale de Béotie personnellement, au motif qu' il n' y a pas de qualité de demandeur, puisque, ni des dispositions des statuts de l' Administration Départementale Locale – Loi n° 2218/1994 – ni des dispositions de la Charte Européenne des Collectivités Locales, signée à Strasbourg le 15-10-1985 par les pays membres du Conseil de l' Europe et ratifiée par la Loi n° 1850/1989, il ne

ressort que les collectivités locales un droit de recours dans le cadre d' affaires y relatives, lesdites collectivités locales n' ayant un droit de recours que pour assurer le libre exercice de leurs attributions et le respect des principes de l' autonomie locale, prévus par la Constitution ou la législation interne, ce dont il n' y a pas lieu en l' espèce. Par contre, l' action en jugement est jugée recevable dans la mesure où elle est intentée par l' Administration Départementale Locale de Béotie en sa qualité de mandataire générale des mandants y visés, étant donné que, bien qu' il soit vrai que les dispositions des articles 67 et 74 du Code de Procédure Civile établissent le principe selon lequel une personne ne peut pas être partie à un procès pour autrui en agissant à son propre nom en tant que partie, cependant, ceci n' exclut pas le consentement visé au droit civil quant à un mandat d' ordre général (article 713 du Code Civil) à l' égard du tiers, comprenant également le droit d' intenter des actions, à condition que, dans ce cas, pour que le mandataire ait la qualité de demandeur, l' exploit contienne une déclaration précisant que ledit mandataire agit en sa qualité de mandataire général, nettement délimitée, pour le compte de son mandant, et que les conséquences du procès porteront sur lui (arrêt n° 1551/91 rendu par la Cour de cassation, *EDP* 1991, 270 ; arrêt n° 981/1973 rendu par la Cour de cassation, *Nomiko Vima* 22, 509 ; arrêt n° 806/1980 rendu par la Cour d' appel d' Athènes, *Nomiko Vima* 28, 1202), éléments énoncés par l' exploit en jugement. L' action est conforme à la loi et fondée sur les dispositions des articles 3 de la Convention Internationale de La Haye de 1907, aux termes duquel « le belligérant qui violerait les dispositions du Règlement, sera contraint, le cas échéant, à une indemnité, et il sera responsable de tous les actes commis par les personnes participant à sa force militaire », 46 du Règlement des Lois et Coutumes de la Guerre terrestre, annexé à la Convention Internationale de La Haye du 19-10-1907, ledit Règlement étant opposable à l' État Allemand défendeur - bien que non ratifié par la Grèce – les règles contenues audit Règlement

constituant des règles généralement admises du droit International, à savoir une coutume Internationale, contraignants pour l' Allemagne occupante (G. TENEKIDIS, L' Occupation pour cause de guerre et la rese de juris rem dence g fecque, Journal de Droit International 1153, pp 822 E.Th.E. 21/47, 18/49) 26, 914, 932, 340, 345, puisque la renonciation à la demande tendant à ce que le montant soit accordé, n' entraîna pas l' élimination de ses effets en tant que mise en demeure productive du débiteur (arrêt n° 13/94 rendu par la Cour de cassation, en formation plénière, *Dni* 35.1260) C, 299 CP, 70, 176 CPC, à part les montants mentionnés ci-dessus, quant auxquels l' action doit être rejetée pour le motif y mentionné.

Il convient de noter que : a) la phrase comprise à la disposition ci-dessus de l' article 3 de la Convention Internationale de La Haye de 1907, à savoir « le cas échéant », ne constitue pas de clause de flexibilité de la disposition, mais elle souligne en particulier qu' un préjudice patrimonial doit avoir eu lieu (K. EFSTATHIADIS, Sanctions frappant les violations des règles de la guerre, Athènes 1943, paru de nouveau à « Études de Droit International », Volume II, Athènes 1959, p. 321) ;

b) de manière recevable, les prétentions des demandeurs sont réclamées en justice personnellement et non par l' État dont ils sont ressortissants, puisque ceci n' est exclu d' aucune règle du Droit International (op.cit., Ioannis KRATEROS ; arrêt n° 33/93 rendu le 13-05-1996 par le Tribunal Constitutionnel Fédéral de Karlsruhe) ;

c) la poursuite des prétentions des demandeurs en justice n' est entravée ni de la réserve expresse prévue à la Loi n° 2023 des 10/13-03-1952, portant sur la levée de l' état de guerre avec l' Allemagne, aux termes de laquelle « L' état de guerre entre la Grèce et l' Allemagne prend fin à partir du 10 juin 1951 sous réserve du règlement des questions et différends, surgis suite à la guerre, par le pacte de paix à conclure », ni de l' obstacle dilatoire visé à l' article 5 par. 2 de la Convention de Londres, du 27-02-1953, portant sur les

N°

dettes externes allemandes, à laquelle Convention la Grèce adhéra le 21-04-1956, cette Convention ayant préalablement été ratifiée par la Loi n° 3480/1956, son article 5 par. 2 disposant que « il convient de suspendre – jusqu' à ce que le problème des réparations soit définitivement réglé – l' examen des prétentions relevant de la seconde guerre mondiale, formées par les pays qui furent en état de guerre avec l' Allemagne ou occupés par celle-ci au cours de cette guerre, et par les ressortissants de ces pays, contre le Reich et ceux qui l' ont servi, y compris les frais de l' occupation allemande des actifs à des comptes compensatoires, acquis pendant l' occupation, ainsi que des prétentions contre REICHSKREDIT KASSEN », puisque ceci fut levé par la signature du Traité de Moscou du 12-09-1990, portant sur le règlement définitif par rapport à l' Allemagne, signé entre la République Fédérale d' Allemagne, la République Populaire d' Allemagne, l' URSS, le Royaume-Uni et les États-Unis d' Amérique, lequel Traité constitue une pacte de paix, vu le fait que par celui-ci est définitivement réglé l' héritage juridique et réel du conflit armé de la seconde guerre mondiale (cit.op. Ioannis KRATEROS ; arrêt n° 33/93 rendu le 13-05-1996 par le Tribunal de Karlsruhe ci-dessus), à laquelle (pacte de paix) est manifestement visée la disposition ci-dessus de l' article 5 par. 2 de l' Accord de Londres, par la phrase « jusqu' à ce que le problème des réparations soit définitivement réglé » (op.cit. Ioannis KRATEROS, pp 1529, 1530 ; cf. l' arrêt rendu par le Tribunal de Karlsruhe). En particulier, doivent être rejetés, comme vagues, les montants relatifs à chacun des mandants ci-dessus et portant sur I) une indemnité suite à la destruction des bâtisses et des autres biens mobiliers y mentionnés (meubles, articles d' habillement, outils et produits agricoles), du fait que a) les bâtisses détruits ne sont pas suffisamment décrites, et qu' il n' est pas indiqué leur valeur au moment de la destruction (arrêt n° 183/91 rendu par la Cour de cassation, *Dni* 33.810) sur la base de laquelle sera calculée par réduction, au moment de la première audience, leur valeur fiscale (arrêt n°

23/94 rendu par la Cour de cassation, en formation plénière, *Dni* 36.577), ni les modalités d' acquisition de la propriété (arrêt n° 208/1980 rendu par la Cour de cassation, *E.E.* 1980) ; b) ne sont pas précisés les meubles, articles d' habillement, outils et produits agricoles qui auraient été détruits, ni la valeur de chacun d' eux ;

II) une indemnité pour privation de pension subie par les mandants-ayants droits suite à la mort de leurs parents ou conjoint, du fait qu' il n' y a aucune mention portant sur les revenus des personnes ayant une obligation alimentaire, à partir du montant desquels est déterminé, entre autres, le montant de la pension alimentaire (arrêt n° 255/93 rendu par la Cour de cassation, *Dni* 35.1523), ni sur l' âge et l' éventuelle durée de vie des redevables (arrêt n° 695/92 rendu par la Cour de cassation, *Dni* 35.101), et III) une satisfaction pécuniaire pour la lésion morale qu' auraient subie lesdits mandants suite à la destruction de leurs maisons et de leurs autres biens mobiliers, du fait que, à la suite du rejet, comme vagues, des montants relatifs à leur valeur, il n' y a pas d' élément déterminant de fixation de la satisfaction pécuniaire due, puisque, au sens de la disposition de l' article 932 du Code Civil, le caractère raisonnable de la satisfaction pécuniaire susceptible d' être accordée selon le jugement du Tribunal, n' est pas détaché du rapport existant entre celle-ci et les éléments de fixation de celle-ci, tels, entre autres, la portée de la lésion (arrêt n° 1349/93 rendu par la Cour de cassation, *Dni* 35.1272 ; Georgiadis-Stathopoulos, art. 932 II n° 1 vol. IV p. 819).

En particulier, sont déclarés irrecevables 1) quant au mandant n° 1, tous les sommes réclamées à titre d' indemnité : a) pour brûlement de sa maison, à savoir 40.000.000 GRD, et b) pour destruction des effets du ménage et du mobilier, des outils et ustensiles agricoles, et des produits de celui-ci, à savoir 8.000.000 GRD, c) satisfaction pécuniaire pour lésion morale subie suite à la destruction de ses biens, à savoir 10.000.000 GRD ; 2) quant aux mandants n° 2, les sommes réclamées à titre d' indemnité pour privation de prestation

de services et de pension de la part de leur mère exécutée, à savoir 8.400.000 GRD pour la première mandante, 6.600.000 GRD pour le second mandant, et 1.800.000 GRD pour la troisième mandante ; 3) quant aux mandants n° 4, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part de leur père exécuté, à savoir 2.400.000 GRD pour le quatrième mandant, 4.200.000 GRD pour la cinquième mandante, 6.000.000 GRD pour le sixième mandant, et 9.600.000 GRD pour le septième mandant ; 4) quant à la mandante n° 5, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de son père exécuté, à savoir 10.200.000 GRD ; 5) quant à la mandante n° 6, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de ses parents exécutés, à savoir 13.200.000 GRD ; 6) quant à la mandante n° 7, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de sa mère exécutée, à savoir 7.800.000 GRD ; 7) quant au mandant n° 8, tous les sommes réclamées à titre d' indemnité : a) pour brûlement de sa maison, à savoir 14.000.000 GRD, et b) pour destruction des effets du ménage et du mobilier, à savoir 4.000.000 GRD, et c) pour destruction des produits agricoles décrits, à savoir 1.500.000 GRD, d) satisfaction pécuniaire pour lésion morale subie suite à la destruction de ses biens, à savoir 10.000.000 GRD ; 8) quant à la mandante n° 10, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de sa mère exécutée, à savoir 8.400.000 GRD ; 9) quant au mandant n° 14, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de ses parents exécutés, à savoir 13.200.000 GRD ; quant aux mandants n° 15, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part du conjoint exécuté de la première, à savoir 21.000.000 GRD, du père exécuté de la seconde et du troisième, à savoir 9.000.000 GRD et 12.000.000 GRD

respectivement ; 11) quant à la mandante n° 18, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de son conjoint exécuté, à savoir 21.000.000 GRD ; 12) quant à la mandante n° 20, toutes les sommes réclamées à titre d' indemnité a) pour destruction complète de sa maison, à savoir 35.000.000 GRD, b) pour destruction des effets du ménage et du mobilier, des outils et ustensiles agricoles, et des produits agricoles de celle-ci, à savoir 20.000.000 GRD, c) satisfaction pécuniaire pour lésion morale subie suite à la destruction de ses biens, à savoir 10.000.000 GRD ; 13) quant au mandant n° 23, toutes les sommes réclamées à titre d' indemnité a) pour destruction complète de sa maison, à savoir 25.000.000 GRD, b) pour destruction des effets du ménage et du mobilier, des outils et ustensiles agricoles, et des produits agricoles de celle-ci, à savoir 1.500.000 GRD et 450.000 GRD respectivement, c) satisfaction pécuniaire pour lésion morale subie suite à la destruction de ses biens, à savoir 10.000.000 GRD ; 14) quant à la mandante n° 25, toutes les sommes réclamées à titre d' indemnité a) pour destruction complète de sa maison et de l' écurie y annexée, à savoir 35.000.000 GRD, b) pour destruction des effets du ménage et du mobilier, à savoir 2.000.000 GRD, et pour destruction des produits agricoles, à savoir 180.000 GRD ; 15) quant à la mandante n° 26, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de sa mère exécutée, à savoir 8.400.000 GRD ; 16) quant au premier mandant n° 27, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de sa mère exécutée, à savoir 4.200.000 GRD ; 17) quant aux mandantes n° 28, toutes les sommes réclamées à titre d' indemnité a) pour destruction complète de la maison, de la pharmacie et de l' épicerie de leur père, qu' elles héritèrent après son décès, à savoir 35.000.000 GRD, et b) pour destruction des effets du ménage et du mobilier, des médicaments et des produits agricoles, à savoir 7.500.000 GRD; 18) quant aux premier et second des

mandants n° 29, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part de leur mère exécutée, à savoir 9.000.000 et 7.200.000 GRD respectivement ; 19) quant aux mandantes n° 30, les sommes réclamées à titre d' indemnité a) pour destruction complète de la maison et de l' entrepôt y annexé, à savoir 40.000.000 GRD ; b) pour destruction des effets du ménage et du mobilier, à savoir 4.000.000 GRD; c) pour destruction de produits agricoles, à savoir 4.000.000 GRD ; d) la somme de leur satisfaction pécuniaire pour lésion morale subie suite à la destruction de leurs biens, à savoir 10.000.000 GRD ; 20) quant à la mandante n° 32, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de sa mère exécutée, à savoir 1.200.000 GRD ; 21) quant aux mandants n° 33, toutes les sommes réclamées pour a) incendie causée à leur maison, à savoir 20.000.000 GRD ; b) destruction des effets du ménage, à savoir 3.000.000 GRD ; c) destruction de produits agricoles, à savoir 900.000 GRD ; 22) quant à la troisième des mandantes n° 35, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de leur mère exécutée, à savoir 600.000 GRD; 23) quant aux mandantes n° 37, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part du conjoint –quant à la première– et père – quant à la seconde– exécuté, à savoir 21.000.000 et 12.300.000 GRD respectivement; 24) quant au mandant n° 39, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de ses parents exécutés, à savoir 16.800.000 GRD; 25) quant au premier des mandants n° 40, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de sa mère exécutée, à savoir 3.600.000 GRD, et quant à la seconde ayant droit n° 40, la somme réclamée à titre de satisfaction pécuniaire, à savoir 30.000.000 GRD, pour lésion morale subie suite à la mort de sa belle-mère, étant donné que la belle-mère

ne relève pas de la notion de la famille, et, par conséquent, cette demande est déclarée irrecevable, comme non conforme à la loi (arrêt n° 6772/1978 rendu par la Cour d' appel d' Athènes, *Nomiko Vima* 27, 588 ; arrêt n° 3720/1993 rendu par la Cour d' appel d' Athènes, *Hell.Dik.* 36(1995)202) ; 26) quant à la mandante n° 42, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de ses parents exécutés, à savoir 6.000.000 GRD ; 27) quant au troisième des mandants n° 45, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de sa mère exécutée, à savoir 4.200.000 GRD ; 28) quant aux mandantes n° 46, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part du conjoint -quant à la première- et père --quant à la seconde-- exécuté, à savoir 21.000.000 et 12.250.000 GRD respectivement; 29) quant aux mandants n° 51, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part de leurs parents exécutés, à savoir 3.600.000 GRD pour la première, 6.000.000 GRD pour la seconde, 12.000.000 GRD pour le troisième, et 6.000.000 GRD pour le quatrième ; 30) quant aux mandants n° 52, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part de leur mère exécutée, à savoir 3.000.000 GRD pour la première, et 9.600.000 GRD pour le second ; 31) quant à la quatrième des mandants n° 53, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de son père exécuté, à savoir 4.800.000 GRD ; 32) quant aux mandantes n° 55, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part de leur mère exécutée, à savoir 6.600.000 GRD pour la première, et 9.000.000 GRD pour la seconde ; 33) quant au second des mandants n° 56, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de sa mère exécutée, à savoir 10.200.000 GRD ; 34) quant aux troisième et

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

quatrième des mandants n° 57, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part de leur père exécuté, à savoir 3.000.000 et 5.400.000 GRD respectivement; 35) quant aux premier et troisième des mandants n° 59, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part de leur père exécuté, à savoir 6.600.000 et 7.800.000 GRD respectivement; 36) quant aux second et troisième des mandants n° 62, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part de leur mère exécutée, à savoir 7.800.000 et 9.000.000 GRD respectivement ; 37) quant à la mandante n° 65, toutes les sommes réclamées à titre d' indemnité pour enlèvement des produits agricoles, d' élevage, et de ses effets du ménage, mentionnés à l' action, à savoir 6.025.000 GRD au total ; 37) quant à la mandante n° 66, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de son conjoint exécuté, à savoir 27.000.000 GRD ;

38) quant aux mandants n° 68, toutes les sommes réclamées pour a) destruction complète de la maison et de l' entrepôt y annexé, à savoir 40.000.000 GRD ; b) destruction de leurs effets du ménage, à savoir 2.500.000 GRD, et pour destruction de produits agricoles, à savoir 2.600.000 GRD ; 39) quant à la mandante n° 70, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de ses parents exécutés, à savoir 10.800.000 GRD; 40) quant à la mandante n° 71, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de sa mère exécutée, à savoir 11.400.000 GRD ; 41) quant aux mandantes n° 75, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part de leur père exécuté, à savoir 3.600.000 GRD, quant à la première, et 7.800.000 GRD, quant à la seconde ; 42) quant aux mandants n° 77, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

pension de la part de leur père exécuté, à savoir 4.800.000 GRD, quant à la première, et 7.200.000 GRD, quant au seconde, et 9.000.000 GRD, quant à la troisième ; 43) quant aux deux premiers mandants n° 78, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part de leur mère exécutée, à savoir 4.600.000 GRD, quant au premier, et 1.200.000 GRD, quant à la seconde ; 44) quant aux deuxième, troisième, quatrième et cinquième des mandants n° 79, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part de leur père exécuté, à savoir 1.200.000 GRD, quant au second, 3.600.000 GRD, quant à la troisième, 5.400.000 GRD, quant à la quatrième, et 10.800.000 GRD, quant au cinquième ; 45) quant aux mandants n° 81, toutes les sommes réclamées pour a) destruction complète de la maison mentionnée, à savoir 35.000.000 GRD ; b) destruction des effets du ménage, à savoir 3.000.000 GRD ; c) destruction de produits agricoles, à savoir 3.000.000 GRD ; 46) quant aux mandants n° 85, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part du conjoint – quant à la première – et père – quant au second - exécuté, à savoir 24.000.000 et 12.000.000 GRD respectivement; 47) quant aux mandantes n° 87, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part de leur mère exécutée, à savoir 6.600.000, quant à la première, et 9.000.000 GRD, quant à la seconde ; 48) quant au mandant n° 89, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de sa mère exécutée, à savoir 6.600.000 GRD; 49) quant à la première des mandants n° 90, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de son conjoint exécuté, à savoir 42.000.000 GRD; 50) quant aux mandants n° 94, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part de leurs parents exécutés, à savoir 1.200.000 GRD, quant

N°

à la première, et 9.600.000 GRD, quant au second; 51) quant à la mandante n° 96, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de sa mère exécutée, à savoir 1.200.000 GRD; 52) quant aux mandants n° 98, toutes les sommes réclamées pour a) destruction complète de la maison mentionnée à l' action, à savoir 19.000.000 GRD ; b) destruction des effets du ménage et des produits agricoles, à savoir 3.000.000 GRD ; 53) quant à la mandante n° 101, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de sa mère exécutée, à savoir 1.800.000 GRD; 54) quant aux mandants n° 103, toutes les sommes réclamées pour a) destruction complète de la maison mentionnée à l' action, à savoir 13.000.000 GRD ; b) destruction des effets du ménage et des produits agricoles, à savoir 3.500.000 et 1.100.000 GRD respectivement ; 55) quant aux mandants n° 105, toutes les sommes réclamées pour a) destruction complète de la maison mentionnée à l' action, à savoir 25.000.000 GRD ; b) destruction des effets du ménage et des produits agricoles, à savoir 3.000.000 et 900.000 GRD respectivement ; 56) quant à la seconde des mandants n° 106, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de son père exécuté, à savoir 1.800.000 GRD; 57) quant aux première et cinquième des mandants n° 107, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part du conjoint – quant à la première – et père – quant au cinquième - exécuté, à savoir 21.000.000, quant à la première, et 3.600.000 GRD, quant au cinquième ; 58) quant au second des mandants n° 111, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de sa mère exécutée, à savoir 9.600.000 GRD; 59) quant à la seconde des mandants n° 112, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de son père exécuté, à savoir 2.400.000 GRD; 60) quant aux mandants n° 113, toutes les sommes

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

réclamées pour a) destruction complète de la maison mentionnée à l' action, à savoir 18.500.000 GRD ; b) destruction des effets du ménage, à savoir 3.000.000 GRD ; c) destruction des produits agricoles, à savoir 2.500.000 GRD ; 61) quant au premier et à la seconde des mandants n° 114, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part de leurs parents exécutés, à savoir 18.000.000 GRD, quant au premier, et 20.400.000 GRD, quant à la seconde ; 62) quant aux mandants n° 115, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part de leur mère exécutée, à savoir 3.000.000 GRD, quant à la première, et 6.000.000 GRD, quant au second ; 63) quant au mandant n° 118, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de sa mère exécutée, à savoir 10.800.000 GRD ; 64) quant aux mandants n° 119, toutes les sommes réclamées pour a) destruction complète de leur maison, à savoir 20.000.000 GRD ; b) destruction des effets du ménage et des produits agricoles, à savoir 5.500.000 GRD ; 65) quant à la seconde des mandants n° 120, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de son père exécuté, à savoir 1.800.000 GRD ; 66) quant aux mandants n° 121, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part de leur mère exécutée, à savoir 1.200.000 GRD, quant à la première, 3.600.000 GRD, quant au second, 2.400.000 GRD, quant à la troisième, 6.000.000 GRD, quant au quatrième, et 7.200.000 GRD, quant à la cinquième ; 67) quant à la seconde des mandantes n° 122, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de ses parents exécutés, à savoir 6.000.000 GRD ; 68) quant aux mandants n° 125, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part de leurs parents exécutés, à savoir 10.800.000 GRD, quant à la première, 14.400.000 GRD,

N°

quant à la seconde, 18.000.000 GRD, quant à la troisième, et 21.000.000 GRD, quant au quatrième; 69) quant aux mandants n° 126, les sommes réclamées pour a) destruction complète de la maison mentionnée à l' action, à savoir 22.000.000 GRD ; b) destruction des effets du ménage et des produits agricoles, à savoir 2.000.000 et 600.000 GRD respectivement ; B) quant à la troisième des mandants n° 126 ci-dessus, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de ses parents exécutés, à savoir 3.600.000 GRD ; 70) quant aux mandants n° 127, les sommes réclamées à titre d' indemnité pour privation de prestation de services et de pension de la part du conjoint – quant à la première – et père – quant aux second et troisième - exécuté, à savoir 42.000.000 GRD, quant à la première, 7.800.000 GRD, quant au second, et 9.600.000 GRD, quant à la troisième ; 71) quant à la première des mandants n° 131, la somme réclamée à titre d' indemnité pour privation de prestation de services et de pension de la part de son conjoint exécuté, à savoir 48.000.000 GRD.

Contre l' action, il n' y a – à part celle formée et visée ci-dessus – aucune autre exception susceptible d' examen d' office ; quant aux faits mentionnés à son exploit, l' aveu est autorisé. Il convient, par conséquent, dans la mesure où elle fut déclarée conforme à la loi et précise, d' être déclarée recevable comme bien fondée du point de vue du fond aussi, car, puisque l' État défendeur fait défaut, sont pleinement établies les allégations effectives contenues à son exploit, considérées comme avouées par ce dernier (à savoir l' État défendeur) (article 271 par. 3 en association avec l' article 352 par. 1 du Code de Procédure Civile) ; reconnaître son obligation de verser à la demanderesse pour le compte des mandants visés au dispositif, à titre de satisfaction pécuniaire de ceux-ci pour la lésion morale qu' ils subirent suite à la mort de leurs parents et alliés mentionnés à l' action, les sommes mentionnées au dispositif, auxquelles doit être fixer - vu la nature de la lésion

N°

et les conditions dans lesquelles les parties lésées la subirent, vu le degré du délit et le statut social et économique des parties – la satisfaction pécuniaire non couvert par la présomption de défaut. Les frais et dépens sont en partie à la charge de l' État défendeur, du fait de les parties vainquent en partie et succombent en partie (article 178 du Code de Procédure Civile).

PAR CES MOTIFS

Juge par défaut du défendeur ;

Fixe le dépôt de défaut à 60.000 GRD ;

Déclare l' action *irrecevable* quant à sa partie intentée par l' Administration Départementale Locale de Béotie personnellement, ainsi qu' à sa partie intentée par celle-ci en sa qualité de mandataire de : M. Konstantinos AVORITIS, d' Ioannis ; M. Petros GAMVRILIS ; Mme Athanasia KAÏLI; M. Evaggelos KAÏLIS; Mme Panagiota KRAPSI; Mme Vasiliki KAROUZOU; Mme Aspasia KAROUZOU; Mme Theofani MIHA; Mme Loukia BASDEKI; M. Aggelis PITSOS; M. Efstathios PITSOS; Mme Asimina FOUNTA; Mme Georgia KELERMENOU; Mme Areti KELERMENOU; M. Nikolaos KELERMENOS; M. Panagiotis KELERMENOS; Mme Vasiliki DAOULA; Mme Theofani N. BOURA; Mme Afroditi N. BOURA; Mme Zafeiroula ép. N. BOURA; M. Dimitrios G. BOURAS; Mme Eleni veuve d' Io. PAPATHANASIOU; Mme Loukia KARMA; M. Labros PAPATHANASIOU, de Loukas; Mme Efrosyni veuve de Vas. PERGANTAS; M. Haralambos Vas. PERGANTAS; M. Loukas V. PERGANTAS; Mme Aggeliki ép. Ath. SFOUNTOURI; Mme Maria ép. Efth. TRIANTAFYLLOU; M. Efthymios L. SIDERAS; Mme Panagiota veuve d' Ioannis SKOUTAS; M. Dimitrios Io. SKOUTAS; Mme Diamanto ép. Efst. LYTRA; Mme Maria veuve d' Antonios STERGIOU; Mme Georgia KASTANA; M. Efstathios Anton. STERGIOU; M. Timoleon SFOUNTOURIS; Mme Georgia épouse d' Ilias GERASIMOU; Mme Stamatia veuve d' Ath. DARDANIS; Mme Asimina épouse de Christos MAVRAGAKIS;

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

Déclare l' action *recevable* pour le surplus;

Reconnaît que l' État défendeur doit verser à l' Administration Départementale Locale demanderesse, en sa qualité de mandataire des mandants ci-dessous, les montants figurant ci-contre, ces sommes étant productives d' intérêts à compter du lendemain de la signification de l' action.

En particulier, pour le compte de :

1a. Mme Aikaterini KALOGEROPOULOU, 40.000.000 drachmes ; b) M. Panagiotis ANESTIS, 40.000.000 drachmes ; Mme Nikolia KAROUZOU, 40.000.000 drachmes ; 2) Mme Ioanna MARIOU, 20.000.000 drachmes ; 3a) Mme Maria DIMAKA, 30.000.000 drachmes ; b) Mme Vasiliki KAVRAKOU, 30.000.000 drachmes ; c) M. Nikolaos VASILARAKOS, 30.000.000 drachmes ; d) M. Georgios VASILARAKOS, 30.000.000 drachmes ; e) Mme Irini SFOUNTOURI, 30.000.000 drachmes ; f) M. Dimitrios VASILARAKOS, 30.000.000 drachmes ; g) M. Loukas VASILARAKOS, 30.000.000 drachmes ; 4) Mme Astero DIMAKA, 30.000.000 drachmes ; 5) Mme Ourania GAMVRILI, 100.000.000 drachmes ; 6) Mme Loukia GAMVRILI, 30.000.000 drachmes ; 7a) M. Dimitrios GAMVRILIS, 20.000.000 drachmes ; b) M. Aristidis GAMVRILIS, 20.000.000 drachmes ; 8) Mme Panagiota GAMVRILI, 30.000.000 drachmes ; 9) Mme Asimina PITSOU, 10.000.000 drachmes ; 10a) M. Ioannis DIMAKAS, 10.000.000 drachmes ; b) M. Panagiotis DIMAKAS, 10.000.000 drachmes ; c) M. Georgios DIMAKAS, 10.000.000 drachmes ; d) M. Anastasios DIMAKAS, 10.000.000 drachmes ; e) Mme Aggeliki PLATI, 10.000.000 drachmes ; Mme Asimina PANAKOU, 10.000.000 drachmes ; 12) M. Loukas I. ZAKKAS, 60.000.000 drachmes ; 13a) Mme Eleni ZAKKA, 30.000.000 drachmes ; b) Mme Zoï BOURA, 30.000.000 drachmes ; c) M. Loukas ZAKKAS, 30.000.000 drachmes ; 14a) Mme Paraskevi MARGELOU, 40.000.000 drachmes ; b) Mme Pagona PAPPA, 40.000.000 drachmes ; M. Ioannis ZISSIS, 40.000.000 drachmes ; 15) M.

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

Ioannis ZISSIS, 10.000.000 drachmes ; 16) Mme Kondylia ZISSI, 90.000.000 drachmes ; 17) Mme Anna CHRISTOPOULOU, 50.000.000 drachmes ; 18a) Mme Vasiliki PITSOU, 10.000.000 drachmes ; b) M. Ioannis KAÏLIS, 10.000.000 drachmes; 19a) Mme Asimina KALEGKA, 30.000.000 drachmes; b) Mme Aggeliki GAMVRILI, 30.000.000 drachmes; 20) Mme Asimina STAVROU, 50.000.000 drachmes; 21) Mme Athina HATZILIADI, 40.000.000 drachmes; 22a) M. Andreas KAROUZOS, 40.000.000 drachmes; b) M. Ioannis KAROUZOS, 40.000.000 drachmes; 23a) M. Georgios KASTRITIS, 50.000.000 drachmes; b) M. Aggelos KASTRITIS, 50.000.000 drachmes; c) M. Aggelos PITSOS, 20.000.000 drachmes; d) M. Theofanis MIHAS, 20.000.000 drachmes; e) Mme Loukia BASDEKI, 20.000.000 drachmes; f) Mme Asimina FOUNTA, 20.000.000 drachmes; g) M. Efstathios PITSOS, 20.000.000 drachmes; h) M. Ioannis KAROUZOS, 20.000.000 drachmes; 24) Mme Lisa PANOURIA, 40.000.000 drachmes; 25) Mme Panagiota RALLI, 30.000.000 drachmes; 26a) M. Loukas KELERMENOS, 10.000.000 drachmes; b) M. Dimitrios KELERMENOS, 10.000.000 drachmes; c) Mme Nikolia TZATHA, 10.000.000 drachmes; 27a) Mme Pagoula SFOUNTOURI, 30.000.000 drachmes; b) Mme Anastasia SIDERI, 30.000.000 drachmes; c) Mme Aggeliki KAÏLI, 30.000.000 drachmes; 28a) Mme Asimina KELERMENOU, 10.000.000 drachmes; b) M. Nikolaos KELERMENOS, 10.000.000 drachmes; c) M. Efstathios KELERMENOS, 10.000.000 drachmes; 29a) Mme Panagiota KINIA, 30.000.000 drachmes; b) Mme Dimitra KINIA, 30.000.000 drachmes; 30a) M. Anastasios KOKKINIS, 20.000.000 drachmes; b) Mme Maria VAROULI, 20.000.000 drachmes; 31) M. Loukas M. KAROUBALIS, 60.000.000 drachmes; 32a) M. Georgios KOUTRIARIS, 80.000.000 drachmes; b) Mme Maria BARLOU, 40.000.000 drachmes; 33a) Mme Maria ANDRITSOPOULOU, 60.000.000 drachmes; b) M. Athanasios KRITSOPIS, 60.000.000 drachmes; 34) Mme Efstathia

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

KREMMOU, 90.000.000 drachmes; 35a) Mme Archonto GEORGANTA, 40.000.000 drachmes; b) M. Georgios KONSTANTINOU, 40.000.000 drachmes; c) Mme Anastasia DAVAKI, 40.000.000 drachmes; 36) Mme Alefanto KAÏLI, 10.000.000 drachmes; 37a) M. Ioannis P. LABROU, 30.000.000 drachmes; b) M. Nikolaos P. LABROU, 30.000.000 drachmes; c) M. Athanasios P. LABROU, 30.000.000 drachmes; 38a) Mme Maria N. LABROU, 30.000.000 drachmes; b) Mme Nikolia N. LABROU, 30.000.000 drachmes; 39) Mme Aggeliki BALAGOURA, 10.000.000 drachmes; 40) M. Spyridon V. ZISIS, 10.000.000 drachmes; 41a) M. Anastasios I. LOUKAS, 10.000.000 drachmes; b) M. Georgios I. LOUKAS, 10.000.000 drachmes; 42a) M. Anastasios I. LOUKAS, 60.000.000 drachmes; b) M. Serafim Ar. SFOUNTOURIS, 10.000.000 drachmes; 43a) Mme Aikaterini ANDREOU, 60.000.000 drachmes; b) Mme Evmorfia BEZENTÉ, 60.000.000 drachmes; c) M. Ioannis G. LOUKAS, 60.000.000 drachmes; d) M. Loukas G. LOUKAS, 60.000.000 drachmes; 44a) Mme Aggeliki TZEREMOPOULOU, 40.000.000 drachmes; b) M. Loukas An. MALAMOS, 40.000.000 drachmes; 45a) M. Ioannis Sp. MALAMOS, 40.000.000 drachmes; b) Mme Konstantina Al. KARVOUNI, 40.000.000 drachmes; c) Mme Ioanna D. STATHA, 40.000.000 drachmes; d) Mme Pagona I. SKOUTA, 40.000.000 drachmes; 46) M. Dimosthenis P. MARIOS, 30.000.000 drachmes; 47a) Mme Lelouda TSEKOURA, 30.000.000 drachmes; b) Mme Panagiota VASILAKAKI, 30.000.000 drachmes; 48a) M. Nikolaos N. MASTRIGIANNIS, 40.000.000 drachmes; b) M. Georgios L. MASTROGIANNIS, 40.000.000 drachmes, 49a) M. Nikolaos G. MIHAS, 30.000.000 drachmes; b) Mme Zoï KRONTIRA, 30.000.000 drachmes; c) M. Ioannis G. MIHAS, 30.000.000 drachmes; d) Mme Astero BALAOURA, 30.000.000 drachmes; 50a) M. Ioannis Ir. MIHAS, 30.000.000 drachmes; b) Mme Styliani ALEXIADOU, 30.000.000 drachmes; c) Mme Evanthia TASOU, 30.000.000 drachmes; d) M. Dimitrios

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°_____

EVAGGELIOU, 10.000.000 drachmes; e) M. Iraklis EVAGGELIOU, 10.000.000 drachmes; f) Mme Panagiota LAOUTARI, 10.000.000 drachmes; g) Mme Kyriakoula VIDALI, 10.000.000 drachmes; h) Mme Efthymia EVAGGELIOU, 10.000.000 drachmes; 51a) M. Ioannis M. BALAOUGOURAS, 40.000.000 drachmes; b) Mme Sofia S. NIKOLAOU, 40.000.000 drachmes; c) Mme Despina VASILARAKOU, 40.000.000 drachmes; 52) Mme Pagona D. TSOKOU, 10.000.000 drachmes; 53a) Mme Krystallo KIOUSI, 10.000.000 drachmes; b) Mme Anastasia BARLOU, 10.000.000 drachmes; c) M. Panagiotis L. BARLOS, 10.000.000 drachmes; d) Mme Panagiota L. BARLOU, 10.000.000 drachmes; e) M. Christoforos L. BARLOS, 10.000.000 drachmes; 54a) M. Ioannis A. BASDEKIS, 50.000.000 drachmes; b) M. Panagiotis A. BASDEKIS, 50.000.000 drachmes; c) M. Georgios A. BASDEKIS, 50.000.000 drachmes; 55a) M. Efthymios A. BASDEKIS, 10.000.000 drachmes; b) M. Efthymios Odys. BARLOS, 10.000.000 drachmes; 56) M. Fotios N. BOURAS, 30.000.000 drachmes; 57) Mme Aggeliki D. BOURA, 120.000.000 drachmes; 58a) Mme Maria I. LEMONI, 60.000.000 drachmes; b) Mme Theofani Ath. KAÏLI, 60.000.000 drachmes; 59) Mme Spyridoula P. ILIOPOULOU, 10.000.000 drachmes; 60) Mme Eleni D. SFOUNTOURI, 80.000.000 drachmes; 61) Mme Aggeliki I. BALAGOURA, 30.000.000 drachmes; 62a) Mme Olga IGGLEZOU, 10.000.000 drachmes; b) Mme Margarita KARAGIANNI, 10.000.000 drachmes; c) Mme Diamanto STATHA, 10.000.000 drachmes; d) Mme Anna PETRAKOU, 10.000.000 drachmes; 63) M. Aristodimos N. NIKOU, 60.000.000 drachmes; 64a) Mme Christina KASTRITI, 10.000.000 drachmes; b) Mme Garyfallia SFOUNTOURI, 10.000.000 drachmes; c) M. Ioannis Kon. DAÏS, 10.000.000 drachmes; 65a) Mme Irini L. DERVENAGA, 30.000.000 drachmes; b) Mme Maria D. KOTRONI, 30.000.000 drachmes; 66) Par. K. NIKOLAOU, 10.000.000 drachmes; 67a) Mme Maria Ath. PANOURGIAS, 30.000.000 drachmes; b) M.

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

Ioannis Ath. PANOURGIAS, 30.000.000 drachmes; c) Mme Stamatia A. PANOURGIA, 30.000.000 drachmes; 68a) M. Leonardos N. PANTISKAS, 30.000.000 drachmes; b) Mme Maria G. MIHA, 30.000.000 drachmes; c) Mme Panagiota I. MIHA, 30.000.000 drachmes; 69a) Mme Efthymia ARGYROPOULOU, 30.000.000 drachmes; b) M. Ioannis D. PAPADIAS, 30.000.000 drachmes; c) Mme Georgia KATSOULIERI, 30.000.000 drachmes; d) Mme Maria TSAPAROPOULOU, 30.000.000 drachmes; e) M. Anargyros PAPADIAS, 30.000.000 drachmes; 70a) Mme Efrosyni Th. SFOUNTOURI, 10.000.000 drachmes; b) M. Ioannis N. PAPATHANASIOU, 10.000.000 drachmes; 71) Mme Efthymia G. LABROU, 10.000.000 drachmes; 72) a) M. Nikolaos Ef. MIHAS, 10.000.000 drachmes; b) Mme Asimina KASTRITI, 10.000.000 drachmes; c) Mme Violetta SIDERI, 10.000.000 drachmes; 73) Mme Dimitra N. KALOGEROPOULOU, 40.000.000 drachmes; 74a) Mme Efrosyni A. PAPAÏOANNOU, 30.000.000 drachmes; b) M. Georgios G. PAPAÏOANNOU, 30.000.000 drachmes; 75a) M. Loukas I. LABROU, 10.000.000 drachmes; b) Mme Maria PERGANTA, 10.000.000 drachmes; c) Mme Eleni TSAMI, 10.000.000 drachmes; 76a) Mme Pagona KELERMENOU, 40.000.000 drachmes; b) Mme Georgia BOKA, 40.000.000 drachmes; 77) M. Vasilios I. PAPANOPOULOS, 60.000.000 drachmes; 78) M. Konstantinos D. PASHOULIS, 40.000.000 drachmes; 79a) Mme Glykeria Sp. PELEKANOU, 30.000.000 drachmes; b) Mme Triantafylla Th. MINAKI, 30.000.000 drachmes; c) M. Athanasios Sp. PELEKANOS, 30.000.000 drachmes; 80a) M. Christoforos Il. PELEKIS, 30.000.000 drachmes; b) Mme Aggeliki Il. PELEKI, 30.000.000 drachmes; c) M. Nikolaos Il. PELEKIS, 30.000.000 drachmes; 81a) M. Nikolaos I. PERGANTAS, 30.000.000 drachmes; b) Mme Anastasia A. BOURA, 30.000.000 drachmes; c) Mme Panoraia I. STATHIA, 30.000.000 drachmes; 82) Mme Argyro N. MIHA, 50.000.000 drachmes; 83a) Mme Aristea G. SFOUNTOURI, 70.000.000

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

drachmes; b) M. Georgios N. PERGANTAS, 70.000.000 drachmes; 84a) M. Loukas V. PERGANTAS, 10.000.000 drachmes; b) M. Thomas V. PERGANTAS, 10.000.000 drachmes; 85) Mme Olympia K. PERGANTA, 30.000.000 drachmes; 86a) M. Ioannis N. PERGANTAS, 10.000.000 drachmes; b) Mme Maria I. BASDEKI, 10.000.000 drachmes; c) Mme Olga S. BASDEKI, 10.000.000 drachmes; 87) Mme Ioulia PAPALEXI, 10.000.000 drachmes; 88a) M. Loukas S. SEHREMELIS, 20.000.000 drachmes; b) Mme Kyriaki K. PERGANTINA, 20.000.000 drachmes; 89) Mme Chrysiada P. GAMVRILI, 30.000.000 drachmes; 90) M. Panagiotis An. SEHREMELIS, 20.000.000 drachmes; 91) M. Ioannis G. SIDERIS, 10.000.000 drachmes; 92a) M. Anastasios I. SKOUTAS, 30.000.000 drachmes; b) Mme Maria I. SKOUTA, 30.000.000 drachmes; c) Mme Ioanna I. KALOGEROPOULOU, 30.000.000 drachmes; 93a) M. Theofanis Chr. SKOUTAS, 30.000.000 drachmes; b) M. Ioannis Chr. SKOUTAS, 30.000.000 drachmes; c) Mme Panagiota Sp. SKOUTA, 30.000.000 drachmes; d) M. Ilias Chr. SKOUTAS, 30.000.000 drachmes; e) M. Spyridon Chr. SKOUTAS, 30.000.000 drachmes; 94) M. Evaggelos STATHAS, 10.000.000 drachmes; 95) M. Panagiotis Th. PERGANTAS, 10.000.000 drachmes; 96a) M. Ilias St. STATHAS, 30.000.000 drachmes; b) Mme Ioanna L. ZAKKA, 10.000.000 drachmes; 97a) M. Anastasios I. STAVROU, 40.000.000 drachmes; b) M. Georgios A. STAVROU, 30.000.000 drachmes; 98a) M. Anastasios I. STAVROU, 40.000.000 drachmes; b) Mme Panagiota El. STATHA, 40.000.000 drachmes; 99a) M. Panagiotis Ath. SFOUNTOURIS, 80.000.000 drachmes; b) Mme Maria épouse N. PAPAÏOANNOU, 80.000.000 drachmes; b) Mme Maria épouse P. PAPAÏOANNOU, 10.000.000 drachmes; d) M. Alexandros H. MARKOPOULOS, 10.000.000 drachmes; e) M. Panagiotis N. SFOUNTOURIS, 10.000.000 drachmes; 100a) M. Asterias E. ATHANASIOU, 30.000.000 drachmes; b) M. Konstantinos Ar. SFOUNTOURIS, 30.000.000

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°.....

drachmes; 101) Mme Anthoula St. PEFANI, 10.000.000 drachmes; 102) M. Dimitrios PANOUSIS, 10.000.000 drachmes; b) M. Athanasios PANOUSIS, 10.000.000 drachmes; 103) M. Georgios Th. SFOUNTOURIS, 50.000.000 drachmes; 104a) M. Loukas G. SFOUNTOURIS, 50.000.000 drachmes; b) Mme Aggeliki BOURA, 50.000.000 drachmes; 105) a) Mme Stamatia I. PANTISKA, 30.000.000 drachmes; b) M. Diomidis I. SFOUNTOURIS, 30.000.000 drachmes; c) Mme Aggeliki épouse Aristotelis PAPAÏOANNOU, 30.000,000 drachmes; d) M. Ioannis I. SFOUNTOURIS, 30.000.000 drachmes; e) Mme Aikaterini L. PANOURGIA, 30.000.000 drachmes; 106a) Mme Aggeliki BOURA, 90.000.000 drachmes; b) Mme Stamatia I. BELLOU, 90.000.000 drachmes; 107a) M. Panagiotis Ath. SFOUNTOURIS, 10.000.000 drachmes; b) Mme Maria épouse N. PAPAÏOANNOU, 10.000.000 drachmes; c) Mme Maria épouse N. PAPAÏOANNOU, 10.000.000 drachmes; d) M. Alexandros H. MARKOPOULOS, 10.000.000 drachmes; e) M. Panagiotis N. SFOUNTOURIS, 10.000.000 drachmes; 108) Mme Georgia I. GAMVRILI, 10.000,000 drachmes; 109a) Mme Chrysoula E. TZATHA, 60.000.000 drachmes; b) Mme Astero An. LIASKOU, 60.000.000 drachmes; c) Mme Kondylo N. SFOUNTOURI, 60.000.000 drachmes; d) M. Argyrios N. SFOUNTOURIS, 60.000.000 drachmes; 110a) Mme Aggeliki An KOSTAGIANNI, 60.000.000 drachmes; b) Mme Maria Il. LITSOU, 60.000,000 drachmes; c) Mme Vasiliki P. ANESTI, 60.000.000 drachmes; d) M. Ioannis Har. ANESTIS, 60.000.000 drachmes; 111a) Mme Paraskevi D. TZATHA, 30.000.000 drachmes; b) M. Panagiotis D. TZATHAS, 30.000.000 drachmes; c) Mme Kondylia G. KOUTRIARI, 30.000.000 drachmes; 112) Mme Paraskevi G. LITSOU, 40.000.000 drachmes; 113) Mme Hasou PAPALEXIOU, 40.000.000 drachmes; 114) M. panagiotis I. TSAMIS, 30.000.000 drachmes; 115a) Mme Pagona D. TSOKOU, 30.000.000 drachmes; b) M. Lazaros D. TSOKOS, 30.000.000 drachmes; c) M. Christos D. TSOKOS, 30.000.000

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

drachmes; d) M. Nikolaos D. TSOKOS, 30.000.000 drachmes; 116) M. Efstathios G. KELERMENOS, 10.000.000 drachmes.

Condamne l' État défendeur à une partie des frais et dépens de la demanderesse, dont il fixe le montant à 150.000.000 drachmes.

Jugé et décidé à LIVADIA, le 25 septembre 1997.

LE PRÉSIDENT LA GREFFIÈRE

[signature] [signature]

Prononcé en même lieu et lors d' une séance extraordinaire en son audience du 30 octobre 1997, la demanderesse et ses avocats mandataires n' étant pas présents.

LE PRÉSIDENT LA GREFFIÈRE

[signature] [signature]

[Visa du Rapporteur]

On mande et ordonne à tous huissiers ou agents légalement habilités sur ce requis de mettre le présent jugement à exécution, lorsqu' ils en seront légalement requis.

Aux Procureurs d' y tenir la main.

À tous Commandants et officiers de la force publique de prêter main forte lorsqu' ils en seront légalement requis.

LE PRÉSIDENT LA GREFFIÈRE

[signature] [signature]

Pour grosse exécutoire sous le numéro 92/2000 – droit payé sur état : 150 GRD à titre de dépens, quant à sa délivrance.

LIVADIA, le 03-05-2000.

LA GREFFIÈRE

Signé : [illisible]

[sceau :]

RÉPUBLIQUE HELLÉNIQUE

ΕΠΙΣΗΜΗ ΜΕΤΑΦΡΑΣΗ TRADUCTION OFFICIELLE OFFICIAL TRANSLATION

N°

TRIBUNAL DE PREMIÈRE INSTANCE DE LIVADIA

VU

Pour enregistrement conformément à la loi et délivrance par ordre de commission.

LIVADIA, le 03-05-2000

Le Chef du Service

Signé : [illisible]

[sceau :]

RÉPUBLIQUE HELLÉNIQUE

TRIBUNAL DE PREMIÈRE INSTANCE DE LIVADIA

[timbres oblitérés]

Pour photocopie conforme à la copie légalement certifiée conforme et conservée dans mes archives.

Athènes, le 11-06-2003.

Signé : Me Ioannis E. STAMOULIS

[cachet :]

Me Ioannis E. STAMOULIS

AVOCAT (N° Vestiaire: 7849)

41, RUE AKADIMIAS – ATHÈNES

N° Code fiscal: 001849889 – 4e Administration Fiscale d' Athènes

Téléphone: 3604504

Traduction en la langue française conforme à la photocopie ci-jointe établie en la langue hellénique et certifiée conforme à l' original.

LA TRADUCTRICE

MARIA P. PAPADOPOULOU

Annex 18

Court of Appeal of Florence

Decision ("decreto") of 2 May 2005

COPIA

Con. 45/05

Rep. 374

LA CORTE D'APPELLO DI FIRENZE

SEZIONE PRIMA CIVILE

Composta dai magistrati

DR. GIOVACCHINO MASSETANI Presidente

DR. BRUNO RADOS Consigliere

DR. ALESSANDRO TURCO Consigliere

nella causa iscritta al n. 308/05 del registro VG

ha pronunciato il seguente

DECRETO

Vista l'istanza presentata il 22.04.05 da

AMMINISTRAZIONE REGIONALE di VOIOTIA (GRECIA), in persona del Prefetto Klearchos PERGANTAS con domicilio eletto a Firenze in Via delle Farine n. 2 il difensore avv. Joachim Lau

contro

REPUBBLICA FEDERALE DI GERMANIA, IN QUANTO PROPRIETARIA DI IMMOBILI E MOBILI POSTI nel distretto della Corte di Appello di Firenze;

letti gli atti allegati;

vista la legge 218/95;

visto il Capo III del Regolamento (CE) n. 44/2001 (GU L. 012 del 16.01.2001)

DICHIARA ESECUTIVA IN ITALIA

la sentenza di condanna al rimborso delle spese processuali pari a 1.000.000= di dracme e a 2.934,70 Euro, emessa contro la REPUBBLICA FEDERALE DI GERMANIA ed a favore della Amministrazione Regionale di Voiotia ed altri emessa in data 13 aprile 2000- 4 maggio 2000 dalle Sezioni Unite civili della Corte di Cassazione Greca e rilasciata con formula esecutiva;

N° 11/2000

liquida anche le spese della presente procedura nella somma di € 747,38 (diritti 603,00, esborsi 63,00 + 11,38 + 70,00) oltre IVA e CAP di legge.

La parte esecutanda potrà opporsi entro un mese dalla notifica del presente decreto in difetto di che potrà essere apposta la formula esecutiva.

Firenze, 02.05.2005

Il Presidente

G. Massetani

CORTE D'APPELLO DI FIRENZE
Copia in Cancelleria oggi 5-5-05
IL CANCELLIERE

Translation

THE FLORENCE COURT OF APPEAL

FIRST CIVIL SECTION

Consisting of the Honourable Justices:

Mr. Giovacchino Massetani	President
Mr. Bruno Rados	Justice
Mr. Alessandro Turco	Justice

in the proceeding registered under No. 308/05 in the Court Ordered Sale Register

has issued the following

ORDER

Considering the request filed on 22 April 2005 by

THE REGIONAL ADMINISTRATION OF VOIOTIA, GREECE, in the person of the Prefect Klearchos PERGANTAS, with elected domicile at via delle Farine 2, Florence, in the offices of its defence attorney Joachim Lau, Esq.

versus

the FEDERAL REPUBLIC OF GERMANY, in its capacity as the OWNER OF PERSONAL PROPERTY AND REAL ESTATE falling under the jurisdiction of the Florence Court of Appeal;

having read the enclosed records;

considering Law No. 218/95;

considering Chapter III of EC Regulation No. 44/2001 (OJEC L 012/2001 of 16 January 2001)

DECLARES TO BE ENFORCEABLE IN ITALY

the judgment ordering the FEDERAL REPUBLIC OF GERMANY to pay the Regional Administration of Voiotia and others the legal expenses equal to 1,000,000 drachmas, the equivalent of 2,934.70 euro, issued on 13 April 2000-4 May 2000 by the Civil Division *en banc* of the Greek Court of Cassation, No. 11/2000, and issued with an enforcement order;

also sets the expenses for this proceeding at € 747.38 (including 603.00 for costs, and 63.00 + 11.38 + 70.00 for expenditures) plus VAT and Lawyers' Pension Fund charges according to Law.

The affected party may appeal against service of this order within one month. If no such appeal is made, the enforcement order will be enforceable.

Florence, 2 May 2005

The President
(sgd) G. Massetani

stamp: FLORENCE COURT OF APPEAL
Filed with the Registry on 5 May 2005
(sgd) The Clerk

Annex 19

Court of Appeal of Florence

Decision ("decreto") of 6 February 2007

REPUBBLICA ITALIANA

IN NOME DEL POPOLO ITALIANO

LA CORTE D'APPELLO DI FIRENZE

SEZIONE I CIVILE

Composta dai Signori Magistrati:

Dott. Adriano Cini	Presidente
Dott. Aldo Chiari	Consigliere
Dott. Giulio De Simone	Consigliere rel.

ha pronunciato la seguente

sentenza

nella causa civile iscritta al n. 2360/2005 del Ruolo generale contenzioso di questa Corte e vertente tra

Repubblica Federale di Germania, in persona dell'ambasciatore accreditato *pro tempore* presso la Repubblica Italiana Michael H. Gerdts, rappresentato e difeso dagli Avv.ti Achille Accolti Gil ed Augusto Dossena, elettivamente domiciliato in Firenze presso il loro studio in via Bolognese n. 55, giusta procura in calce all'atto di citazione

ATTRICE OPPONENTE

e

Amministrazione Regionale della Vojotia, Grecia, in persona del prefetto Klearchos Pergantas, rappresentata e difesa dall'Avv. Joachim Lau ed elettivamente domiciliata in Firenze presso lo studio del predetto legale, in via

delle Farine n. 2, in forza di procura a margine del ricorso per l'esecutività della sentenza straniera

CONVENUTA

Oggetto: esecutività in Italia di sentenza straniera.

All'udienza del 13 ottobre 2006 i procuratori delle parti così concludevano:

per l'attore: "Voglia la Corte revocare il decreto con cui ha concesso esecutività in Italia la sentenza di condanna al rimborso delle spese processuali emessa dalle Sezioni Unite Civili della Corte di Cassazione Greca contro la Repubblica Federale di Germania, con vittoria di spese".

Per la convenuta: "Voglia la Corte respingere le domande della Germania Federale perché infondate in fatto e diritto; in subordine voglia dichiarare che sussistono le condizioni per il riconoscimento della sentenza n. 11/2000 della Corte Suprema Greca e condannare conseguentemente la Germania al pagamento delle spese; in via ancora subordinata voglia rimettere la causa alla Corte di Giustizia Europea per chiedere se sussistano le condizioni per l'applicazione del regolamento n. 44 del 22.12.2000."

SVOLGIMENTO DEL PROCESSO

Con ricorso depositato il 22 aprile 2005 nella cancelleria di questa Corte, l'Amministrazione Regionale della Vojotia chiedeva la concessione dell'esecutività in Italia della sentenza pronunciata il 13 aprile-4 maggio 2000 dalla Corte di Cassazione Greca, portante condanna al pagamento delle spese di giudizio, pari ad € 2.934,70 a carico della Repubblica Federale di Germania. La Corte accoglieva il ricorso, con provvedimento avverso cui proponeva rituale opposizione la Repubblica Federale di Germania, che notificava alla predetta Amministrazione Regionale atto di citazione in data 11 ottobre 2005. Deduceva l'opponente che il regolamento CE 44/2001, in forza

del quale era stata accordata l'esecutività alla menzionata sentenza, non era applicabile al caso concreto, essendo entrato in vigore soltanto dal 1 marzo 2002, mentre la sentenza di cui si tratta è stata emessa il 14 aprile 2000. La materia di cui alla ricordata sentenza non rientrerebbe, inoltre, nell'ambito di applicabilità di quel regolamento, poiché la controversia definita dalla decisione greca è relativa ad attività che costituisce espressione della sovranità dello Stato. Deduceva ancora l'opponente che la sentenza della Cassazione greca, portante condanna contro uno Stato estero, non avrebbe efficacia esecutiva nello Stato in cui è stata pronunciata difettando ancora l'autorizzazione di quel Ministro della Giustizia, prevista in simili casi dall'art. 923 del codice di rito ellenico. La sentenza in discorso sarebbe stata, ancora, contraria ai principi di diritto internazionale vigenti e per conseguenza al principio sancito dall'art. 10 della Costituzione italiana. Eccepiva poi l'opponente l'incompetenza per territorio di questa Corte e la non proponibilità della domanda di esecutività prevista dall'art. 67 della legge 218/1995 tramite ricorso, anziché tramite atto di citazione, rivolto alla Corte d'Appello. Si costituiva la convenuta Amministrazione Regionale, che contestava la fondatezza di ciascuno dei motivi di opposizione.

MOTIVI DELLA DECISIONE

Per ciò che attiene all'ammissibilità della procedura, già svoltasi avanti questa Corte per la declaratoria di esecutività della sentenza greca e conclusasi con il provvedimento oggetto della presente opposizione, nonché ai fini di quanto meglio sarà chiarito in seguito, è opportuno ricordare il tenore letterale dell'art. 66 del regolamento n. 44 del 22 dicembre 2000 del Consiglio dell'Unione Europea: "*Le disposizioni del presente regolamento si applicano solo alle azioni proposte ed agli atti pubblici formati posteriormente alla sua entrata in*

vigore. Tuttavia, nel caso in cui un'azione sia stata proposta nello Stato membro d'origine prima dell'entrata in vigore del presente regolamento, la decisione emessa dopo tale data è riconosciuta ed eseguita secondo le disposizioni del capo III: a) se nello Stato membro di origine l'azione è stata proposta posteriormente all'entrata in vigore, sia in quest'ultimo Stato membro che nello Stato membro richiesto, della convenzione di Bruxelles o della convenzione di Lugano...". La Grecia ha aderito, a far tempo dal 1988, alla Convenzione di Bruxelles, quindi il Regolamento si applica anche alla presente procedura, che attiene a domanda proposta il 27 novembre 1995.

Dalla documentazione prodotta dalla parte convenuta risulta che nel distretto di questa corte la Repubblica Federale di Germania è titolare di beni immobili, pervenutile per testamento. È per conseguenza radicata, per come previsto dall'art. 39 comma 2 del Regolamento CE, la competenza per territorio della Corte d'Appello di Firenze a conoscere dell'esecutività in Italia della decisione greca. Può ancora rilevarsi, sul medesimo argomento, che affinché vi sia immunità dalla giurisdizione esecutiva dei beni di uno Stato estero in base al diritto internazionale generale, occorre che i beni siano destinati all'adempimento di funzioni pubbliche di detto Stato, senza che rilevi l'esistenza della reciprocità; la condizione di reciprocità, già stabilita dal r.d.l. 30 agosto 1925 n. 1621 (convertito nella l. 15 luglio 1926 n. 1263), è venuta meno per effetto dell'art. 10, comma 1 cost., in conformità con la norma di diritto internazionale generale; in questi termini si è pronunciata la Corte Costituzionale, con la sentenza 15 luglio 1992, n. 329 .

La domanda introduttiva per il riconoscimento dell'efficacia esecutiva in Italia della decisione greca è stata proposta con ricorso. L'art. 67 l. 218 del 1995, nel

disporre che l'istanza per l'accertamento dei requisiti del riconoscimento di una sentenza straniera va proposta alla corte di appello, nulla dice in ordine al come detta istanza debba essere proposta, se cioè con citazione o con ricorso. Ciò che non può essere trascurato, nell'una e nell'altra ipotesi, è il rispetto per il principio del contraddittorio, che è stato garantito con la notificazione del decreto alla Repubblica di Germania e l'avviso che era possibile instaurare un giudizio a cognizione piena. Ma nella presente sede ad interessare non è quella procedura, destinata ad ottenere una delibazione sommaria dell'istanza di esecutività e che si è già conclusa, ma il merito, cioè la sussistenza delle condizioni perché quella decisione greca sia eseguita in Italia.

Nel merito, è necessario precisare che oggetto della decisione greca, che si chiede di poter eseguire in Italia, non è la condanna al pagamento delle spese di giudizio; quest'ultima è una delle statuizioni che hanno formato oggetto d'esame da parte della Corte di Cassazione Ellenica, ma non certo l'argomento principale e caratterizzante di quella controversia. Invero, in quella sede si trattava della domanda di indennizzo proposta dagli eredi delle vittime di un massacro di civili, che l'esercito tedesco ha compiuto in Grecia durante la seconda guerra mondiale. Tale essendo l'oggetto del giudizio e della decisione, la tesi dell'esenzione degli Stati dalla giurisdizione civile per le condotte poste in essere nell'esercizio delle rispettive potestà d'imperio non può essere condivisa. In proposito, merita d'essere seguito l'insegnamento che proviene da quello che nella giurisprudenza non solo europea è andato consolidandosi come diffuso e costante e che, in Italia, la Suprema Corte (Sez. Un. Civili, 11 marzo 2004, n. 5044) ha diffusamente chiarito affermando che *"Le norme di diritto internazionale generalmente riconosciute che tutelano la libertà e la dignità della persona umana come valori fondamentali, e che configurano come*

crimini internazionali i comportamenti che più gravemente attentano all'integrità di tali valori, sono parte integrante dell'ordinamento italiano e costituiscono parametro dell'ingiustizia del danno causato da un fatto doloso o colposo altrui. In particolare, la deportazione della popolazione civile, nel corso di un conflitto armato - consumatosi, nel caso di specie, in territorio italiano - e l'assoggettamento dei deportati ai lavori forzati devono essere qualificati come crimini internazionali. La commissione di tali crimini comporta la possibilità di esercitare la giurisdizione civile nei confronti dello Stato cui essi risultino attribuibili, in applicazione del principio della giurisdizione universale ed in stretta analogia con la disciplina prevista per l'immunità funzionale degli organi statali nelle medesime ipotesi. I crimini suddetti si traducono inoltre in violazione di norme inderogabili poste a protezione dei diritti fondamentali della persona umana, che si collocano al vertice dell'ordinamento internazionale e tendono quindi a prevalere su ogni altra norma, di carattere convenzionale o consuetudinario. Tali norme precludono allo Stato straniero, convenuto per il risarcimento dei danni derivanti dalla loro violazione, di giovarsi dell'immunità della giurisdizione, in ragione del carattere essenziale che i valori da esse tutelati rivestono per l'intera comunità internazionale". A quest'illustre insegnamento si può aggiungere, per rafforzare il concetto che la sottoposizione degli Stati alla giurisdizione civile non è contraria ai principi dell'ordine pubblico internazionale, quanto è espressamente affermato dall'ultima parte del comma 3 dell'art. 35 del Regolamento: *"Le norme sulla competenza non riguardano l'ordine pubblico contemplato dall'articolo 34, punto 1".* Trattandosi dunque di pretesa risarcitoria che assume puro carattere civile, non sussistono ragioni per non applicare alle decisioni pronunciate su detta materia le norme del Regolamento. L'allegazione, come ha fatto l'attrice, di un

passo della sentenza sopra citata, estrapolandolo dal contesto e dalle conclusioni cui è pervenuta la Suprema Corte, per accreditare la tesi contraria a quanto affermato dalla Suprema Corte, costituisce operazione scorretta.

La sentenza pronunciata dalla Corte di Cassazione della Repubblica Greca reca in calce l'attestazione di cancelleria, relativa alla sua esecutività. In presenza di questo requisito, non è necessario, ai fini che qui interessano, che vi sia anche l'autorizzazione del Ministro della Giustizia greco all'esecutività all'estero, onde va disattesa la contraria deduzione dell'attrice, che aveva invocato il disposto dell'art. 923 del codice di rito ellenico: l'art. 38 del Regolamento 44/2001 afferma infatti che "*Le decisioni emesse in uno Stato membro e ivi esecutive sono eseguite in un altro Stato membro dopo essere state ivi dichiarate esecutive su istanza della parte interessata*".

Respinta l'opposizione al decreto d'esecutività, l'attrice Repubblica Federale di Germania dovrà rifondere all'Amministrazione Regionale della Vojotia le spese di questo giudizio, liquidate in complessivi € 759,38 (€ 11,00 per esborsi imponibili, € 70,00 per non imponibili, € 603,00 per diritti, e 75,38 per rimborso forfettario) oltre IVA se dovuta e CAP.

P.Q.M.

La Corte d'Appello di Firenze, Sez. I Civile, definitivamente pronunciando, respinge l'opposizione proposta dalla Repubblica Federale di Germania avverso il decreto di esecutività emesso da questa Corte in data 2 maggio 2005, in relazione alla sentenza emessa dalle Sezioni Unite Civili della Corte di Cassazione Greca e condanna l'opponente a rifondere alla convenuta Amministrazione Regionale della Vojotia le spese di questo giudizio, liquidate in € 759,38, oltre IVA se dovuta e CAP.

Così deciso in Firenze il 6 febbraio 2007.

Il Presidente

Dott. Adriano Cini

Il Cons. est.

Dott. Giulio De Simone

Translation

REPUBLIC OF ITALY
IN THE NAME OF THE ITALIAN PEOPLE
THE FLORENCE COURT OF APPEAL
FIRST CIVIL DIVISION

Consisting of the Honourable Justices:

Mr. Adriano Chini	President
Mr. Aldo Chiari	Justice
Mr. Giulio De Simone	Justice Rapporteur

has issued the following

Judgment

in the civil case registered under No. 2360/2005 of the General Register of Cases at this Court, pending between

The Federal Republic of Germany, in the person of the accredited Ambassador for the Republic of Italy, Michael H. Gerdts, *pro tempore*, represented and defended by Achille Accolti Gil, Esq., and Augusto Dossena, Esq., and with elected domicile in their offices at via Bolognese 55, Florence, according to the Power of Attorney at the bottom of the Summons

PLAINTIFF

and

the Regional Administration of Voiotia, Greece, in the person of the Prefect Klearchos Pergantas, represented and defended by Joachim Lau, Esq., with elected domicile in the attorney's office at via delle Farine 2, Florence, in accordance with the Power of Attorney in the margin of the request for enforcement of the foreign judgment

DEFENDANT

Subject: enforceability in Italy of a foreign judgment

At the hearing of 13 October 2006, the Attorneys for the two parties submitted the following conclusions:

for the Plaintiff: "May it please the Court to revoke the order by which it allowed enforcement in Italy of the judgment ordering the Federal Republic of Germany to pay the expenses of the legal proceeding, issued by the Civil Division *en banc* of the Greek Court of Cassation, awarding costs to the losing party."

For the Defendant: "May it please the Court to reject Germany's requests because they are without merit in matters of fact and law; alternatively, may it please the Court to find that the conditions exist to uphold Judgment No. 11/2000 of the Greek Supreme Court, and accordingly, to order Germany to pay the expenses; as a final alternative, may it please the Court to refer the case to the European Court of Justice, to determine whether the criteria are satisfied for the application of EC Regulation No. 44 of 22 December 2000."

DEVELOPMENT OF THE PROCEEDINGS

By a petition filed at the Office of the Clerk of this Court on 22 April 2005, the Regional Administration of Voiotia requested that enforcement be granted in Italy of the judgment issued on 13 April-4 May 2000 by the Greek Court of Cassation, which ordered the Federal Republic of Germany to pay the expenses for the legal proceeding, equal to € 2,934.70. The Court granted the request, and issued an adverse order. The Federal Republic of Germany filed a procedural objection to that order, by service of a writ of summons on the cited Regional Administration on 11 October 2005. The Defendant argued that EC Regulation No. 44/2001, based on which the enforcement of the above-mentioned judgment had been granted, was not applicable to the case in point, because it only took effect on 1 March 2002, while the judgment under consideration was issued on 14 April 2000. The Federal Republic of Germany also argued that the subject of the said judgment is not included within the scope of applicability of that Regulation, since the dispute settled by the Greek decision relates to an activity which constitutes an expression of state sovereignty. The Defendant also argued that the judgment of the Greek Court of Cassation, which involves a judgment against a foreign state, could not be enforced in the State in which it was issued, as the authorization of that State's Ministry of Justice was lacking. Such authorization is required in this type of case by Art. 923 of the Greek Procedural Code. In addition, Germany claimed that the judgment was contrary to current principles of international law, and consequently, contrary to the principle established by Art. 10 of the Italian Constitution. Finally, the Defendant argued that this Court lacks territorial jurisdiction over the matter, and that the request for an order of enforcement to the Court of Appeal pursuant to Art. 67 of Law 218/1995 by Petition, rather than by

Summons, is not prosecutable. The Regional Administration, as defendant, appeared before the Court, and challenged each of ground of the appeal.

GROUNDS FOR THE JUDGMENT

As regards the admissibility of the proceeding for the declaration of enforceability of the Greek judgment, which has already taken place before this Court and which concluded with the order under appeal here, and the purpose of which will be explained more specifically below, it is appropriate to recall the wording of Art. 66 of European Council Regulation No. 44 of 22 December 2000: *"This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof. However, if the proceedings in the Member State of origin were instituted before the entry into force of this Regulation, judgments given after that date shall be recognized and enforced in accordance with Chapter III, (a) if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the Member State of origin and in the Member State addressed ..."* Greece joined the Brussels Convention in 1988, and thus, the Regulation does apply to this proceeding, which concerns a request filed on 27 November 1995.

The documentation submitted by the Defendant demonstrates that the Federal Republic of Germany owns property within this Court's jurisdiction, which it received by testament. Therefore, as provided for by Art. 39 Section 2 of the EC Regulation, the Florence Court of Appeal does have jurisdiction to decide on the enforceability in Italy of the Greek decision. Concerning this same subject, it may also be important to note that in order for the assets of a foreign State to be immune from enforcement based on general international law, those assets must be used for the fulfilment of that State's public functions, without regard to the existence of reciprocity. The requirement of reciprocity, formerly established by Royal Decree Law No. 1621 of 30 August 1925 (and converted into Law No. 1263 of 15 July 1926), was later abrogated as a result of the effects of Art. 10 Section 1 of the Italian Constitution, in compliance with the rules of general international law. This is the position of the Constitutional Court, as pronounced in Judgment No. 329 of 15 July 1992.

The initial application for the recognition of the enforceability in Italy of the Greek judgment was filed by petition. Art. 67 of Law 218 of 1995, in stating that a request for the verification of the requirements for the recognition of a foreign judgment must be filed before the Court of Appeal, fails to specify how such a request has to be presented, i.e. whether by a writ of

summons or by petition. In both cases, however, the discovery of documents phase has to be observed, which was guaranteed by service of the order on the [Federal] Republic of Germany, and notice that it was possible to initiate a proceeding with full powers of jurisdiction. However, the case in point, the aim is not to initiate a summary enforcement proceeding to decide upon the request for enforcement, which moreover has already been concluded; rather, it is to deal with the merits of the case, i.e. whether or not the conditions exist in Italy for the Greek judgment to be enforced.

On the merits, it is necessary to specify that the subject of the Greek judgment, the enforcement of which has been requested in Italy, is not the order to pay the expenses of the legal proceeding; this issue was examined by the Greek Court of Cassation, and is certainly not the principal subject of contention here. Indeed the Greek jurisdiction examined the request for damages brought by the heirs of the victims of a massacre of civilians, carried out by the German army in Greece during the Second World War. As this was the subject of the proceeding and the decision, the theory whereby a State should be exempt from civil jurisdiction for acts that are an expression of their sovereignty, can not be accepted. In this respect, the widely accepted and consistently reiterated European (and other) case law is to be followed, which moreover, the Supreme Court has amply clarified (Civil Division *en banc*, Judgment No. 5044 of 11 March 2004), stating that *"The principles of generally recognized international law which safeguard the liberty and dignity of the human person as fundamental values, and define conduct that most gravely undermines the integrity of those values as international crimes, are an integral part of the Italian legal system and constitute a parameter of the injustice of the damage caused by the wilful and culpable acts of others. In particular, the deportation of the civilian population during an armed conflict – which, in the case at hand, took place in the territory of Italy – and subjecting deportees to forced labour, have to be defined as international crimes. The commission of those crimes allows civil jurisdiction to be exercised with respect to the State attributed with having committed them, in application of the principle of universal jurisdiction, and closely related to the normative framework applicable to the functional immunity of state bodies in such situations. The cited crimes also amount to violations of binding rules established for the protection of the fundamental rights of the human person, and constitute the most important principles of the international legal order, and thus tend to take primacy over all other norms, whether written or customary. Those principles prevent a foreign State, which has been sued for damages on the basis of a violation of those principles, from benefiting from immunity from jurisdiction on account of the fundamental nature ascribed to those principles by the entire international community."* In order to further strengthen the concept that the subjection of States to civil jurisdiction is not

contrary to the principles of international public law, this illustrious body of case law can be supplemented by referring to what is expressly reiterated in the last part of Section 3 of Art. 35 of the Regulation: *"The test of public policy referred to in point 1 of Article 34 does not apply to the rules relating to jurisdiction."* Therefore, as the matter at issue is a claim for damages which is of a purely civil character, there are no reasons for not applying the provisions of the Regulation to the judgment pronounced on that subject. The Plaintiff was wrong to cite a passage out of context from the aforecited judgment to substantiate a claim contrary to conclusions reached by the Supreme Court.

The judgment issued by the Greek Court of Cassation bears the stamp of the Office of the Clerk of Court at the bottom in confirmation of its enforceability. Given that this condition is satisfied, it does not additionally require the authorization of the Greek Ministry of Justice in order to be enforceable abroad. Hence, the Plaintiff's deduction to the contrary, relying on the terms of Art. 923 of the Greek Procedural Code, is to be disregarded. Indeed, Art. 38 of Regulation 44/2001 states that *"A judgment given in a Member State and enforceable in that State shall be enforced in another Member State after having been declared enforceable there upon application for the same by the interested party".*

Since the appeal against the enforcement order has been rejected, the Plaintiff, the Federal Republic of Germany, shall reimburse the Regional Administration of Voiotia for the expenses pertaining to this legal proceeding, set at a total of € 759.38 (€ 11.00 taxable expenditures, € 70.00 for non-taxable expenditures, € 603.00 per costs, and 75.38 for the standard Court fee) plus VAT, if applicable, and Lawyer's Pension Fund charges.

FOR WHICH REASONS

The Florence Court of Appeal, First Civil Division, hereby issues a final decision rejecting the appeal brought by the Federal Republic of Germany against the order for enforcement issued by this Court on 2 May 2005, relating to the judgment issued by the Greek Court of Cassation *en banc*, and orders the Defendant to reimburse the Regional Administration of Voiotia for the expenses of this legal proceeding, set at € 759.38, plus VAT, if applicable, and Lawyer's Pension Fund charges.

Thus decided in Florence on 6 February 2007.

The Justice Rapporteur
Giulio De Simone

The President
Adriano Cini

Annex 20

Corte di Cassazione

Judgment No. 14199

29 May 2008

PETRILLO

14199/08

REPUBBLICA ITALIANA

IN NOME DEL POPOLO ITALIANO

LA CORTE SUPREMA DI CASSAZIONE

SEZIONI UNITE CIVILI

Oggetto

- IMMUNITA' STATO STRANIERO DA GIURISDIZIONE CIVILE - RESPONSABILITA' PER CRIMINI DI GUERRA - - ESCLUSIONE -

R.G.N. 24290/07

Cron. 14199

Rep.

Ud. 06/05/08

Composta dagli Ill.mi Sigg.ri Magistrati:

Dott. Vincenzo CARBONE - Primo Presidente -

Dott. Alessandro CRISCUOLO - Presidente di sezione -

Dott. Mario Rosario MORELLI - Rel. Consigliere -

Dott. Giovanni SETTIMJ - Consigliere -

Dott. Giuseppe SALME' - Consigliere -

Dott. Salvatore SALVAGO - Consigliere -

Dott. Aldo DE MATTEIS - Consigliere -

Dott. Fabrizio FORTE - Consigliere -

Dott. Stefano BENINI - Consigliere -

ha pronunciato la seguente

CORTE SUPREMA DI CASSAZIONE

S E N T E N Z A

sul ricorso proposto da:

REPUBBLICA FEDERALE DI GERMANIA, in persona dell'Ambasciatore accreditato pro-tempore in Italia, elettivamente domiciliata in ROMA, VIA DUILIO 13, presso lo studio dell'avvocato PETRILLO ANDREA, rappresentata e difesa dall'avvocato DOSSENA AUGUSTO, giusta delega in calce al ricorso;

2008

- ricorrente -

508

contro

AMMINISTRAZIONE REGIONALE DELLA VOJOTIA - GRECIA, in persona del Prefetto pro-tempore, elettivamente domiciliata in ROMA, VIA XXIV APRILE 69, presso lo studio dell'avvocato GIANGIACOMO CLAUDIO, rappresentata e difesa dagli avvocati LAU JOACHIM, STAMOULIS E. IOANNIS, giusta procura speciale del notaio dott. Konstantinos Panagioti Kotsonas di Livadia, rep. 132661 del 10/09/07, in atti;

- *controricorrente* -

avverso la sentenza n. 486/07 della Corte d'Appello di FIRENZE, depositata il 20/03/07;

udita la relazione della causa svolta nella pubblica udienza del 06/05/08 dal Consigliere Dott. Mario Rosario MORELLI;

uditi gli avvocati Augusto DOSSENA, Joachim LAU;

udito il P.M. in persona del Sostituto Procuratore Generale Dott. Antonio MARTONE, che ha concluso per l'accoglimento del ricorso.

Fatto e diritto

1. La Repubblica Federale di Germania impugna per cassazione la sentenza in data 20 marzo 2007, con la quale la Corte di Firenze ha respinto l'opposizione da essa proposta avverso il decreto concessorio di *exequatur* alla sentenza della Corte di cassazione greca recante sua condanna al paga-

mento, in favore dell'Amministrazione regionale della Vojotia, delle spese processuali (per euro 2.934,70) relative ad un giudizio per indennizzo agli eredi delle vittime di un massacro di civili compiuto, in Grecia, dall'esercito tedesco.

Resiste la Regione greca intimata con controricorso.

Entrambe le parti hanno depositato memorie.

2. Con i tre motivi, in cui si articola l'odierno ricorso, la R.F.G., rispettivamente, denuncia l'erronea applicazione alla fattispecie del Reg. CE 44/01 e sostiene la non riconoscibilità in Italia della suddetta sentenza greca sotto il duplice profilo, ostativo, del difetto di sua esecutività e della sua contrarietà all'ordine pubblico interno ex art. 64 l. 218/1995.

3. Precede, all'esame delle riferite censure della R.F.G., quello della eccezione pregiudiziale, formulata dalla Regione resistente, di inammissibilità del ricorso, per asserita invalidità della procura alla lite, in quanto "firmata dall'ambasciatore M. Steiner mentre il ricorso è dichiaratamente presentato in mome e per conto dell'ambasciatore M.H. Gerdy".

L'eccezione è comunque infondata, per essere

pacifico in fatto che la procura in questione è stata sottoscritta da soggetto (l'ambasciatore Steiner) che, alla data di conferimento del mandato, era titolare del potere rappresentantivo dello Stato ricorrente e poteva quindi, validamente conferirla; mentre l'errore materiale, costituito dalla indicazione, in epigrafe del ricorso, del nome del precedente ambasciatore, evidentemente non assume rilievo invalidante dell'atto stesso.

4. Nel merito, l'improprio riferimento al Regolamento CE 44/01 - inapplicabile alla fattispecie *ratione materiae* (cfr. Corte di Giustizia CE 295/05) oltrechè *ratione temporis*, come da prima censura della ricorrente, cui aderisce la stessa resistente - comporta la correzione (sul punto) della motivazione ma, ex art. 384, ult. parte, c.p.c., non anche la cassazione della sentenza impugnata.

Atteso che l'esecutività in Italia della pronunzia della Cassazione greca vi risulta dichiarata in corretta applicazione, comunque, delle norme di d.i.p. di cui agli artt. 64 ss. della l. n. 218/1995.

5. E, ben vero, la contestazione che, con i residui due motivi del ricorso, la R.F.G. muove in

ordine alla (denegata) sussistenza, nella specie, dei requisiti della esecutività e della non contrarietà all'ordine pubblico interno della sentenza straniera delibanda (ex lettere *d*) e *g*) del citato art. 64), è in ogni sua parte, priva di fondamento.

5.1. Quanto al primo profilo, è pacifico, infatti, e risulta documentalmente provato, che la sentenza in questione sia passata in cosa giudicata e rechi in calce espressa formula esecutiva.

Dal che, appunto, l'assolvimento del requisito di riconoscibilità in Italia di cui alla lettera d) dell'art. 64 l. 218/95.

Né rileva in contrario il fatto che, nel momento, e in relazione ai beni, in cui venga richiesta l'esecuzione di sentenza resa nei confronti di Stato straniero possa - come la ricorrente deduce, e la resistente non contesta, essere avvenuto nella specie - restare impedita per diniego dell'autorizzazione all'uopo prevista dall'art. 923 del codice di procedura greca.

Detta norma - secondo il cui testuale dettato una esecuzione forzata nei confronti di stato estero non può avere luogo senza previa autorizzazione del Ministero della Giustizia ("Αναγκαστική εκτέλεση κατά αλλοδαπού δημοσίου δεν μπορεί να

γίνει χωρίσ προηγούμενη άδεια του Ψπουργού τησ Δικαιοσύνησ")

- attiene, infatti, alla fase contingente della esecuzione forzata, ma non condiziona né elimina - ed anzi presuppone - la previa acquisizione di efficacia esecutiva della sentenza contro Stato straniero, la cui concreta esecuzione ben può essere quindi attuata in un successivo diverso contesto temporale e/o spaziale.

5.2. Quanto poi alla pretesa incompatibilità del riconoscimento della sentenza della Cassazione greca, di che si discute, con principi di ordine pubblico interno, questa è parimenti, a sua volta, insussistente.

E' pur vero, infatti, che la statuizione di condanna alle spese di giudizio, che l'Amministrazione greca chiede di riconoscere in Italia non è scindibile dal contesto della decisione sul merito della (accolta) domanda di indennizzo proposta da eredi delle vittime di un massacro di civili compiuto in Grecia dall'esercito tedesco durante la seconda guerra mondiale.

Ma la non estensibilità della immunità dalla giurisdizione civile degli Stati stranieri agli atti *iure imperi* di questi configurabili come crimini contro l'umanità - presupposta da quella sentenza -

lungi dal porsi in contrasto, è perfettamente invece in sintonia con il principio già enunciato da questa Corte a Sezioni unite, con la sentenza n. 5044 del 2004, e che qui si ribadisce, in coerenza al riconoscimento del primato assoluto dei valori fondamentali di libertà e dignità della persona umana (cfr. anche le numerose ordinanze rese su regolamenti preventivi di giurisdizione proposti dalla Repubblica di Germania, del pari decisi in data odierna).

6. Il ricorso va integralmente, pertanto, respinto.

7. La novità di parte delle questioni dibattute e della stessa fattispecie sottostante giustifica la compensazione delle spese di questo giudizio.

P.Q.M.

La Corte, a Sezioni unite, respinge il ricorso e compensa le spese.

Roma, 6 maggio 2008

Il Presidente

L'estensore

Depositata in Cancelleria
29 MAG 2008
IL CANCELLIERE
Giovanni Giammaria

IL CANCELLIERE
Giovanni Giammaria

Translation

Immunity of a foreign State
from civil jurisdiction – Liability
for war crimes – exclusion

R.G.N. 24290/07
Cron. 14199
Rep.
Ud. 06/05/08

ITALIAN REPUBLIC

ON BEHALF OF THE ITALIAN PEOPLE

THE SUPREME COURT OF CASSATION

COMBINED CIVIL SECTIONS

Comprising the following magistrates:
Vincenzo CARBONE – First President
Alessandro CRISCUOLO – Section President
Mario Rosario MORELLI – Judge-Rapporteur
Giovanni SETTIMI – Judge
Giuseppe SALME – Judge
Salvatore SALVAGO – Judge
Aldo DE MATTEIS – Judge
Fabrizio FORTE – Judge
Stefano BENINI – Judge
has delivered the following

JUDGMENT

on the appeal in cassation entered by
the FEDERAL REPUBLIC OF GERMANY, in the person of its accredited Ambassador in Office in Italy, with an address for service in ROME at Via Duilio 13, at the chambers of Andrea PETRILLO, represented and defended by Augusto DOSSENA, pursuant to the attached authorization;

– Appellant –

v

AMMINISTRAZIONE REGIONALE DELLA VOJOTIA – GREECE, in the person of the Provincial Governor in Office, with an address for service in ROME at Via XXIV Aprile 69, at the chambers of Claudio GIANGIACOMO, represented and defended by Joachim LAU and Ioannis E. STAMOULIS, pursuant to a special authorization drawn up by notary Kotsonas Panagioti of Livadia, rep. 132661, of 10 September 2007, included in the file;

– Respondent –

against judgment no. 486/07 of the Court of Appeal, Florence, handed down on 20 March 2007;

having heard the report for the public hearing of 6 March 2008 by Mario Rosario MORELLI;

having heard advocates Augusto DOSSENA and Joachim LAU;

having heard the Public Prosecutor in the person of the deputy prosecutor Antonio MARTONE, who concluded that the claim should be upheld.

Facts and law

1. The Federal Republic of Germany here disputes the judgment of 20 March 2007 whereby the Appeal Court, Florence, overruled the objection lodged by Germany against the order of exequatur in relation to the judgment of the Greek Court of Cassation [Arios Pagos] ordering Germany to pay to the Regional Administration of Vojotia the costs (EUR 2,934.70) of a judgment awarding damages to the successors of victims of a civilian massacre, perpetrated in Greece by the German army.

The Greek region has made a counterclaim.

Both parties have submitted statements.

2. In three grounds, forming the basis of its appeal, the FRG objects to incorrect application to this case of Regulation (EC) 44/2001 on the grounds that the Greek judgment was not enforceable in Italy, maintains that the conditions for the enforceability of the Greek judgment did not prevail and that it is contrary to Italian public policy pursuant to Article 64 of Law 218/1995.

3. Prior to examining the claims made by the FRG, it is necessary to consider a preliminary objection lodged by the Greek Region concerning the inadmissibility of the German claim due to the alleged invalidity of the *procura ad litem*, in that it was "signed by Ambassador

M. Steiner, whereas the appeal was clearly submitted for and on behalf of Ambassador M. H. Gerdy".

That objection is without grounds however because it is in fact clear that the authorization in question was signed by a person (Ambassador Steiner) who, on the date the mandate was conferred, had the power to represent the appellant State and could therefore validly give that authorization; the material error consisting in the indication of the former ambassador's name in the application obviously does not invalidate the instrument itself.

4. As to the merits, the incorrect reference to Regulation (EC) No. 44/2001 – which is inapplicable to this case *ratione materiae* (cf. Court of Justice Case C-295/05) and also *ratione temporis*, according to the first head of claim – means that the grounds should be corrected (on this point); however, pursuant to the last part of Article 384 CCP, this does not mean that the contested decision must be set aside.

This is because the enforceability in Italy of the decision of the Greek Court of Cassation was declared correctly, pursuant to the provisions of Article 64 et seq. of Law 218/1995 on international private law.

5. Indeed, the claim made by the FRG in the remaining two grounds of its appeal concerning the (denied) existence, in this case, of the requirements governing enforceability and the (disputed) non-infringement of Italian public policy by the foreign judgment in question (under Article 64 (d) and (g)) is in all parts unfounded.

5.1 As to the first claim, it is clear and documentarily proven that the judgment in question has become *res judicata* and that an express enforcement order is appended.

Thus the requirement for recognition in Italy under Article 64 (d) of Law no. 218/1995 has been fulfilled.

Nor, in the contrary hypothesis, is it of any relevance that at the time, and in connection with the property for which the enforcement is sought, the enforcement of the judgment against a foreign State could – as the appellant alleges to be the case and the respondent does not contest – be precluded due to absence of the authorization provided for in Article 923 of the Greek Code of Procedure.

That rule – which specifically states that enforcement against a foreign State may not take place without the prior authorization of the Ministry* of Justice ("Αναγκαστική εκτέλεση κατά αλλοδαπού δημοσίου δεν μπορεί να γίνει χωρίς προηγούμενη άδεια τοθ Υπουργού* της Δικαιοσύνης") – relates to the subsequent phase of enforcement, but it is not a condition for and does not preclude – indeed it assumes – that the judgment has already become enforceable as against the foreign State, and its actual enforcement can certainly take place in a different context of time and space.

5.2 As to the alleged incompatibility of recognition of the judgment of the Greek Court of Cassation with the principles of Italian public policy, this is also unfounded.

It is indeed the case that the decision on costs, for which the Greek Administration seeks enforcement in Italy, cannot be separated from the context of the decision on the merits of the (upheld) application for compensation by the successors of the victims of a civilian massacre perpetrated in Greece by the German army during the Second World War.

However, the non-extendibility of the immunity of foreign States from civil jurisdiction to acts of the latter *iure imperii* which are considered to be crimes against humanity – as assumed by that judgment – far from conflicting with the principle already laid down by the Combined Sections of this Court in judgment no. 5044/2004, here reiterated, is perfectly in accordance with that reasoning, in line with the absolute primacy of the fundamental values of human dignity and freedom (cf. also the numerous rulings on applications for foreign State immunity entered by the Federal Republic of Germany, also decided here today).

6. The appeal must therefore be rejected in its entirety.

7. The unusual nature of some of the questions debated and the underlying subject-matter justifies offsetting the costs of these proceedings.

---

* Translator's note: Italian reads 'Ministry'; Greek reads 'Minister'.

ON THOSE GROUNDS

The Combined Sections of the Court of Cassation rejects the appeal and offsets the costs thereof.

Rome, 6 May 2008

The President
[signed]

The Clerk
[signed]

Entered in the Registry
29 May 2008
The Registrar
(sgd) Giovanni Giambattista

Annex 21

Court of Appeal of Florence
Decision ("decreto") of 13 June 2006

COPIA

LA CORTE D'APPELLO DI FIRENZE

SEZIONE PRIMA CIVILE

Composta dai magistrati

DR. GIOVACCHINO MASSETANI Presidente

DR. BRUNO RADOS Consigliere

DR. PAOLO OCCIPINTI Consigliere

nella causa iscritta al n. 499/V/06 del registro VG

ha pronunciato il seguente

D E C R E T O

Vista l'istanza presentata il 08/06/06 da

AUTOGESTIONE PREFETTIZIA di VOIOTIA (GRECIA) in persona del Prefetto Kleerchos PERGANTAS con domicilio eletto a Firenze in Via delle Farine n. 2 presso il difensore avv. Joachim Lau

Contro

REPUBBLICA FEDERALE DI GERMANIA, proprietaria di immobili e mobili posti nel distretto della Corte di Appello di Firenze;

letti gli atti allegati;

vista la legge 218/95;

visto il Capo III del Regolamento CE n. 44/2001

DICHIARA ESECUTIVA IN ITALIA

La sentenza di condanna n. 137/97 emessa in data 30 ottobre 1997 dal Tribunale collegiale di Primo grado di Livadia contro la REPUBBLICA FEDERALE DI GERMANIA ed a favore della AUTOGESTIONE PREFETTIZIA DI VOIOTIA dei suoi numerosi rappresentati ivi nominativamente indicati con le specifiche somme di pertinenza (ad eccezione dei nominativi del gruppo n. 109: a) Tzatha Chrisoula; b) Liaskou Astero; c) Sfountouri Kandilo; d) Sfountouris Argiris);

liquida anche le spese della presente procedura pari ad € 2.090,00 per diritti, € 30.836,00 per onorari, € 142,00+4.115,75 per esborsi anche forfetari, oltre CAP ed IVA di legge.

La parte esecutanda potrà opporsi al presente decreto entro i 30 giorni dalla notificazione.

Firenze 13.06.06

Il Presidente

G. Massetani

Depositato in Cancelleria

oggi 15-6-06

Il Cancelliere

Translation

THE COURT OF APPEAL, FLORENCE
FIRST CIVIL SECTION

Composed of the following magistrates:

DR.GIOVACCHINO MASSETANI	President
DR. BRUNO RADOS	Judge
DR. PAOLO OCCIPINTI	Judge

in the case entered under no 499/V/06 of the VG register
has issued the following

DECREE

Having regard to the application lodged on 8 June 2006 by AUTOGESTIONE PREFETTIZIA di VOIOTIA [AUTONOMOUS PREFECTURE OF VOIOTIA] (GREECE) in the person of the Prefect Klearchos PERGANTAS with an address for service in Florence at Via delle Farine, 2, at the chambers of his counsel Joachim Lau

against

THE FEDERAL REPUBLIC OF GERMANY, the owner of movable and immovable property situated in the district covered by the Court of Appeal, Florence;
Having read the attached documents;
Having regard to Law 218/95;
Having regard to Chapter III of Regulation (EC) No 44/2001;

DECLARES ENFORCEABLE IN ITALY

Judgment 137/97 of 30 October 1997 handed down by the Tribunale collegiale di Primo Grado di Livadia [Collegial Court of First Instance of Livadia] against the FEDERAL REPUBLIC OF GERMANY and in favour of AUTOGESTIONE PREFETTIZIA DI VOIOTIA together with the numerous persons represented and named in the judgment with the specific amounts owing
(with the exception of those named in group 109: a) Tzatha Chrisoula; b) Liaskou Astero; c) Sfountouri Kandilo; d) Sfountouris Argiris);

Also awards the costs of these proceedings, being EUR 2,090.00 in tax, EUR 30,836.00 in fees, EUR 142.00 + 4,115.75* in disbursements, including statutory disbursements, plus obligatory contribution to CAP (Lawyers' Provident Fund) and VAT.

The executing party may enter an appeal against this decree within 30 days of notification thereof.

Florence, 13 June 2006

Entered in the Registry
15 June 2006

The President
G. Massetani

* Translator's note: The source text appears to have a division sign here but it would seem more likely that a plus sign is meant. The quality of the text makes this unclear.

Annex 22

Avvocatura Distrettuale dello Stato di Firenze

Submission of 11 September 2008

Ct 3303/07 Avv. Pirollo

CORTE DI APPELLO DI FIRENZE

Comparsa conclusionale

per

La Presidenza del Consiglio dei Ministri, con l'Avvocatura Distrettuale dello Stato di Firenze

-interveniente-

Contro

L'Autogestione Prefettizia di Voiotia, con l'Avv. Joachim Lau

-opposta-

e nei confronti della

Repubblica Federale di Germania, con gli Avv.ti Achille Accolti Gil ed Augusto Dossena.

-opponente-

* * * * * *

Svolgimento del giudizio.

Con atto di citazione del 2.8.07, la Repubblica Federale di Germania proponeva opposizione avverso il decreto del 13.6.06 con cui la Corte di Appello di Firenze dichiarava esecutiva la sentenza n° 137/97 emessa in data 30.10.97 dal Tribunale collegiale di primo grado di Livadia (Grecia) in favore della Autogestione Prefettizia di Voiotia.

Deduceva, quali motivi di opposizione, la nullità del ricorso introduttivo per carenza dei poteri rappresentativi dell'Autogestione Prefettizia di Voiotia e per nullità del mandato ad litem, l'inapplicabilità del regolamento Ce 44/01 , la contrarietà all'ordine pubblico, l'incompetenza territoriale della Corte di Appello di Firenze, la nullità del decreto per erronea indicazione per proporre opposizione e per mancato deposito del fascicolo del decreto, la non esecutività della sentenza straniera nel paese di origine.

Si costituiva in giudizio l'Auogestione Prefettizia di Voiotia che contestava l'avversa opposizione e chiedeva in via riconvenzionale l'accertamento dell'esecutività della decisione greca.

Con atto di intervento in favore del governo tedesco si costituiva in giudizio la Presidenza del Consiglio dei Ministri, attesa l'avvenuta iscrizione ipotecaria sull'immobile denominato "Villa Vigoni" , in ragione del decreto di esecutività rilasciato dalla Corte ed oggetto di opposizione, immobile destinato a centro per la promozione delle relazioni culturali fra la Repubblica Federale di Germania e l'Italia.

La causa, istruita documentalmente, veniva trattenuta in decisione all'udienza del 2.7.08 con termini per conclusionali e repliche.

Diritto

A seguito della pronuncia del decreto della Corte di Appello di Firenze del 13.3.06 anzitempo munito di formula esecutiva, L'Autogestione Prefettizia di Voiotia ha iscritto ipoteca su "Villa Vigoni", immobile che ospita il Centro Italo-Tedesco destinato a promuovere le relazioni fra i due Paesi nei campi della scienza, dell'educazione , della cultura, della politica, istituito a seguito di scambio di Note diplomatiche avvenuto il 21.4.86 tra la Repubblica Federale di Germania e la Repubblica Italiana.

In attuazione di tale accordo e per consentire il perseguimento delle finalità statutarie dell'Associazione culturale "Villa Vigoni", con legge 16 marzo 1986 n° 89[1] è stata autorizzata la concessione di un contributo di 300 milioni di lire per gli anni 1987 e 1988, e di 150 milioni di lire per gli anni successivi, di seguito adeguato con legge 17 maggio 1991 n° 161[2] e successiva legge 23 aprile 2002 n° 78[3].

---

[1] **Legge 16 marzo 1988, n. 89.**
Concessione di un contributo all'Associazione culturale "Villa Vigoni" di Menaggio (G.U. 23 marzo 1988, n. 69)

Art. 1.
1. Per il perseguimento delle finalità statutarie, è autorizzata la concessione di un contributo all'Associazione culturale italo-tedesca "Villa Vigoni" di Menaggio (Como) di lire 300 milioni annui per gli anni 1987 e 1988 e di un contributo di lire 150 milioni annui negli anni successivi.

Art. 2.
1. All'onere derivante dall'applicazione della presente legge, pari a lire 300 milioni per ciascuno degli anni 1987 e 1988 e a lire 150 milioni a decorrere dall'anno 1989, si provvede, per l'anno 1987, mediante corrispondente riduzione dello stanziamento iscritto al capitolo 6856 dello stato di previsione del Ministero del tesoro per il medesimo anno finanziario, all'uopo parzialmente utilizzando l'accantonamento predisposto per "Ratifica ed esecuzione di accordi internazionali"; per gli anni 1988, 1989 e 1990, mediante corrispondente riduzione dello stanziamento iscritto, ai fini del bilancio triennale 1988-1990, al capitolo 6856 dello stato di previsione del Ministero del tesoro per l'anno finanziario 1988, all'uopo parzialmente utilizzando l'accontanamento predisposto per "Ratifica ed esecuzione di accordi internazionali ed interventi diversi".
2. Il Ministro del tesoro è autorizzato ad apportare, con propri decreti, le occorrenti variazioni di bilancio.

Art. 3.
1. La presente legge entra in vigore il giorno successivo a quello della sua pubblicazione nella Gazzetta Ufficiale.

[2] **Legge 17 maggio 1991, n. 161.**
Adeguamento del contributo all'associazione culturale "Villa Vigoni" di Menaggio (G.U. 25 maggio 1991, n. 121)

Art. 1.
1. Il contributo di cui alla legge 16 marzo 1988, n. 89, concesso all'associazione culturale "Villa Vigoni" di Menaggio è elevato a lire 300 milioni annui.

Art. 2.
1. All'onere derivante dall'applicazione della presente legge, pari a lire 150 milioni a

La genesi dell'associazione "Villa Vigoni" , un accordo diplomatico , lo strumento giuridico utilizzato , la creazione di due distinte associazioni in Italia ed in Germania con presenza di rappresentanti dei due Governi nei rispettivi organi statutari , le finalità perseguite, la promozione dello sviluppo delle relazioni fra Stati , il finanziamento pubblico, sono elementi tutti che depongono inequivocabilmente per una comunanza di interessi con la Repubblica Federale di Germania tale da giustificare l'intervento della Presidenza del Consiglio nel presente giudizio.

Vi è dunque interesse per sentir anzitutto dichiarare la nullità e/o inefficacia del decreto opposto in quanto titolo che ha consentito l' iscrizione di garanzia ipotecaria su Villa Vigoni, pregiudizievole per le finalità pubblicistiche comuni alla Repubblica Federale di Germania, parte in causa nel presente giudizio.

E vi è anche interesse ad ottenere la cancellazione dell'ipoteca, da disporre da parte di codesta Ecc.ma Corte o anche eventualmente da altro giudice ritenuto competente per materia o territorio .

2) Ciò premesso , assume rilevanza ai fini del decidere l'eccezione di inapplicabilità del regolamento Ce 44/01 sollevata dalla difesa del governo tedesco alla luce della recente decisione della Corte di Giustizia Europea del 15.2.07 in causa C-292/05, di poco successiva al precedente pronunciamento di Codesta Ecc.ma Corte del 6.2.07.

---

decorrere dall'anno 1991, si provvede mediante corrispondente riduzione dello stanziamento iscritto, ai fini del bilancio triennale 1991-1993, al capitolo 6856 dello stato di previsione del Ministero del tesoro, all'uopo parzialmente utilizzando l'accantonamento "Ratifica ed esecuzione di accordi internazionali".

2. Il Ministro del tesoro è autorizzato ad apportare, con propri decreti, le occorrenti variazioni di bilancio.

[3] **L. 23 aprile 2002, n. 78.**

Aumento del contributo ordinario all'Associazione culturale «Villa Vigoni», con sede in Menaggio.

(G.U. 30 aprile 2002, n. 100).

Art. 1.

1. Il contributo annuo, pari a 154.937 euro, concesso all'Associazione culturale «Villa Vigoni», con sede in Menaggio, ai sensi della legge 17 maggio 1991, n. 161, viene elevato a 464.811 euro per l'anno 2002 e a 309.874 euro a decorrere dall'anno 2003.

2. Entro il 31 dicembre di ogni anno l'Associazione di cui al comma 1 è tenuta a presentare al Ministero degli affari esteri una relazione attestante l'attività svolta e le spese sostenute con il contributo dello Stato. In caso di mancata presentazione della relazione, il contributo statale viene sospeso.

Art. 2.

1. All'onere derivante dall'attuazione della presente legge, pari a 309.874 euro per l'anno 2002 ed a 154.937 euro a decorrere dall'anno 2003, si provvede mediante corrispondente riduzione dello stanziamento iscritto, ai fini del bilancio triennale 2002-2004, nell'àmbito dell'unità previsionale di base di parte corrente «Fondo speciale» dello stato di previsione del Ministero dell'economia e delle finanze per l'anno finanziario 2002, allo scopo parzialmente utilizzando l'accantonamento relativo al Ministero degli affari esteri.

2. Il Ministro dell'economia e delle finanze è autorizzato ad apportare, con propri decreti, le occorrenti variazioni di bilancio.

Ebbene, la Corte di Giustizia ha affermato che *"Le norme in materia di competenza enunciate dalla convenzione di Bruxelles del 27 settembre 1968, concernente la competenza giurisdizionale e l'esecuzione delle decisioni in materia civile e commerciale, devono essere interpretate nel senso che non rientra nella materia civile l'azione giudiziaria promossa da persone fisiche in uno stato contraente nei confronti di un altro stato contraente e volta ad ottenere il risarcimento del danno subito dalle vittime di azioni delle forze armate nell'ambito di operazioni di guerra sul territorio del primo stato".*

Analogamente già Cass., sez. un., 11-03-2004, n. 5044, Ferrini, alla luce dei precedenti comunitari aveva escluso che la convenzione di Bruxelles, poi recepita dal Reg. Ce 44/01, fosse applicabile alle controversie relative ad attività che costituiscono espressione della sovranità dei singoli Stati, per essere stato chiarito a più riprese dalla Corte di giustizia affermando, in tema di responsabilità della pubblica amministrazione, che la pretesa risarcitoria del danneggiato assume carattere «civile» (e rientra, quindi, nell'ambito di applicazione della convenzione) solo se è fondata su fatti che non siano stati commessi dalla pubblica amministrazione nell'esercizio della sua potestà d'impero.

Tanto premesso in punto di diritto, si osserva come il ricorso introduttivo sia stato proposto ex artt 67 l. 218/85 e 38 Reg. Ce 44/01 mentre nel preambolo del provvedimento della Corte, oggetto di successiva opposizione, si richiama tanto la legge 218/95 quanto il capo III del Regolamento CE n° 44/01, di cui è stato seguito il rito, e per l'avvenuta adozione di un provvedimento monitorio reso inaudita altera parte ma suscettibile di contraddittorio differito, e per la conseguente previsione di un termine per proporre opposizione.

Ed il giudizio di opposizione è stato instaurato ai sensi del Reg. Ce 44/01 secondo il rito indicato dalla Corte.

Il procedimento è dunque quello previsto dal Reg.Ce 44/01, tuttavia inapplicabile al caso in esame alla luce della giurisprudenza della Corte di Giustizia prima richiamata, la cui interpretazione è da ritenersi vincolante per il giudice nazionale avendo essa l'obiettivo di garantire l'applicazione uniforme della convenzione di Bruxelles (in tal senso, di recente, vedasi Cass., sez. un., 09-01-2008, n. 169).

Il che significa che il provvedimento con cui la Corte fiorentina ha dichiarato esecutiva in Italia la sentenza greca è stato pronunciato al di fuori delle condizioni stabilite dalla legge ed è per ciò solo affetto da nullità.

Sebbene il giudizio di cognizione instaurato a seguito di opposizione investa la Corte del potere dovere di pronunciarsi comunque sulle pretese fatte valere in giudizio nonostante i vizi del decreto opposto, ciò tuttavia non esonera il giudice dell'opposizione dal dichiarare la nullità del decreto,

alla luce di quanto accade nelle analoghe procedure monitorie disciplinate dal codice di rito agli artt. 633 cpc e ss. nella interpretazione del diritto vivente fornita dai giudici di legittimità.

Né va sottaciuto che la nullità del decreto dovrà essere pronunciata anche per le ulteriori ragioni di opposizione fatte valere dalla difesa della Repubblica Federale di Germania, quale la errata indicazione del termine per proporre opposizione ai sensi dell'art. 43 n° 5 Reg Ce 44/01 nonché la mancata disponibilità del fascicolo di parte.

Con la conseguenza che tali molteplici nullità determinano il venir meno del titolo in base al quale è stata iscritta ipoteca su "Villa Vigoni".

E non è detto che tale iscrizione, una volta caducata perché effettuata in base a titolo nullo, venga successivamente rinnovata a fronte di un nuovo titolo in caso di ipotetica delibazione favorevole della Corte di Appello di Firenze resa all'esito del presente giudizio, tenuto conto dell'immunità ristretta di cui gode l'immobile per essere innegabilmente destinato al perseguimento di fini pubblicistici.

3) Al medesimo risultato della nullità del decreto conduce la mancanza di esecutività della sentenza straniera, il cui difetto è di tale gravità da impedire anche la delibazione favorevole richiesta dalla Autogestione Prefettizia di Voiotia.

E' noto come uno degli aspetti più innovativi della riforma del sistema del diritto internazionale privato, di cui alla L. 31 maggio 1995, n. 218, sia stata la reintroduzione del principio del riconoscimento automatico, in presenza delle condizioni di cui all'art. 64 c.p.c., delle sentenze straniere passate in giudicato, nel loro effetto di cosa giudicata sostanziale e di cosa giudicata formale o processuale, sia tra le parti sia nei confronti dei giudici italiani, sotto l'aspetto positivo dell'obbligo di attenersi ad esse e sotto l'aspetto negativo dell'impedimento al formarsi di un giudicato italiano sulla stessa lite.

Viene, così, generalizzato un principio che precedentemente era previsto solo da alcune convenzioni bilaterali e nel cd. "sistema di Bruxelles" (conv. di Bruxelles del 1968 e succ. mod. e conv. di Lugano del 1988).

Solo per far valere gli effetti esecutivi del giudicato, o per superare la contestazione degli altri effetti o la mancata ottemperanza, è previsto in via residuale un procedimento giudiziario di accertamento delle condizioni che consentono il riconoscimento automatico dall'art. 67 c.p.c.

In siffatto procedimento, il controllo giudiziario si incentra sulla astratta ricorrenza dei requisiti prescritti perchè l'atto straniero possa esplicare i propri effetti, a decorrere dal passaggio in giudicato (se sentenza) o dalla pubblicazione.

La Corte di Appello è dunque tenuta a verificare se la sentenza greca sia divenuta cosa giudicata e sia in astratto eseguibile, ossia possa produrre effetti giuridici secondo le regole proprie dell'ordinamento in cui è stata pronunziata.

Diversamente opinando, ove dovesse dichiararsi esecutiva in Italia una pronuncia non esecutiva nel paese di provenienza , si realizzerebbe una violazione manifesta dei principi, logici, di identità e non contraddizione.

Ciò premesso, anzitutto non risulta la certificazione ex art. 54 [4] Reg. Ce 44/01, non essendo stato utilizzato il modello previsto dal quel regolamento che consente al titolo di circolare secondo un comune segno riconoscibile nei vari ordinamenti all'evidente fine di garantire l'applicazione uniforme della convenzione di Bruxelles.

Il titolo non è dunque astrattamente esecutivo alla luce della Convenzione di Bruxelles.

Inoltre, non risulta in atti l'autorizzazione del Ministero di Giustizia prevista dall'art. 923 del cpc greco, anche alla luce del precedente dell'Aeropago greco n° 36/02.

Ragion per cui la sentenza greca non può essere delibata.

In ogni caso, ove ritenuto necessario, ben può la Corte di Appello di Firenze acquisire tramite il Ministero della Giustizia gli elementi utili ad acclarare l'esecutività della decisione di cui si chiede la delibazione.

* * * * *

Tanto premesso, si confida nell'accoglimento delle conclusioni rese in sede di precisazione.

Firenze, 11 settembre 2008. Piercarlo Pirollo, Avvocato dello Stato.

---

[4] **Art. 54.**
Il giudice o l'autorità competente dello Stato membro nel quale è stata emessa la decisione rilascia, su richiesta di qualsiasi parte interessata, un attestato compilato utilizzando il formulario di cui all'allegato V del presente regolamento.

Translation

Avvocatura Distrettuale
TIS 1365/08(a)

Ct 3303/07 Avv. Pirollo

COURT OF APPEAL, FLORENCE

Statement of Claim

for

The Presidency of the Council of Ministers, with the Avvocatura Distrettuale dello Stato, Florence

– intervener–

against

Autogestione Prefettizia di Voiotia, with advocate Joachim Lau

– defendant –

in relation to

Federal Republic of Germany, with advocates Achille Accolti Gil and Augusto Dossena

– opposing party –

* * * * * *

Procedure

On 2 August 2007 the Federal Republic of Germany instituted proceedings to contest the order of the Appeal Court, Florence, of 13 June 2006 in which the latter declared enforceable decision no. 137/997 of 30 October 1997 of the Collegial Court of First Instance, Livadia (Greece) in favour of Autogestione Prefettizia di Voiotia [Autonomous Prefecture of Voiotia]. In support of its appeal, the Federal Republic of Germany invoked the nullity of the application initiating proceedings on the grounds of a lack of representational powers on the part of the Prefecture and the nullity of its authorization *ad litem*, the inapplicability of Regulation (EC) No. 44/2001, breach of public policy, lack of jurisdiction *ratione loci* on the part of the Appeal Court, Florence, nullity of the order due to erroneous indication of how to contest it and failure to deposit the file relating to the decree, and non-enforceability of the foreign judgment in the country of origin.

The Autonomous Prefecture of Voiotia contested the appeal and made a counter-claim seeking a declaration that the Greek decision was enforceable.

The Presidency of the Council of Ministers intervened in support of the German Government in view of the registration of a mortgage, following the order for enforcement here disputed, in respect of the building known as "Villa Vigoni", a building used as a centre for the promotion of cultural relations between the Federal Republic of Germany and Italy.

The case, which was examined on the basis of documents, was left open until the hearing of 2 July 2008 and time-limits were set for submitting statements and replies.

Law

Following the decision of the Appeal Court, Florence, of 13 March 2006, which was the subject of a premature enforcement order, the Autonomous Prefecture of Voiotia registered a mortgage on "Villa Vigoni", a building which houses the Italo-German Centre for the promotion of relations between the two countries in the fields of science, education, culture and politics, founded following a diplomatic Exchange of Notes of 21 April 1986 between the Federal Republic of Germany and the Italian Republic.

In pursuance of that agreement and in order to further the statutory aims of the "Villa Vigoni" cultural association, Law no. 89[1] of 16 March 1986 authorized a grant of Lit. 300 million for

---

[1] **Law no. 89 of 16 March 1988**
Award of a grant to the "Villa Vigoni" Cultural Association, Menaggio (G.U. No. 69, 23 March 1988)

Art. 1
1. For the furtherance of its statutory aims, a grant is hereby given to the Italo-German Cultural Association "Villa Vigoni" of Menaggio (Como) in the sum of Lit. 300 million per annum for the years 1987 and 1988 and Lit. 150 million thereafter.

Art. 2
1. The obligation deriving from the application of this law, namely Lit. 300 million for each of the years 1987 and 1988 and Lit. 150 million as from 1989 shall be financed, for 1987, by a corresponding reduction of the appropriation under heading 6856 of the budget estimate of the Ministry of the Treasury for the same financial year, if necessary partially drawing on the reserve set aside for "Ratification and implementation of international agreements"; for 1988, 1989 and 1990, by a corresponding reduction of the appropriation entered, for the purposes of the 1988-1990 three-year budget, under heading 6856 of the budget estimate of the Ministry of the Treasury for the financial year 1988, if necessary partially drawing on the reserve set aside for "Ratification and implementation of international agreements and miscellaneous initiatives".
2. The Minister of the Treasury is hereby authorized to make the necessary adjustments to the budget, by means of appropriate decrees.

Art. 3
This law shall enter into force on the day following its publication in the *Gazzetta Ufficiale*.

the years 1986 and 1987 and Lit. 150 million for subsequent years, an amount later adjusted by Law no. 161[2] of 17 May 1991 and Law no. 78[3] of 23 April 2002.

The genesis of the "Villa Vigoni" Association, a diplomatic agreement, the legal instrument used, the creation of two distinct associations in Italy and in Germany with representatives of both governments on the respective statutory bodies, the aims pursued, the promotion of enhanced relations between States, the public financing, are all elements which demonstrate unequivocally a communality of interests with the Federal Republic of Germany, such as to justify the intervention of the Presidency of the Council of Ministers in this case.

There is therefore an interest in favour, first and foremost, of a declaration that the contested decree is null and/or void, since that decree enabled a mortgage to be registered for the Villa Vigoni, thereby damaging the mutual public law interests of the Federal Republic of Germany, a party to this case.

---

[2] **Law no. 161 of 17 May 1991**
Adjustment of the grant to the "Villa Vigoni" Cultural Association, Menaggio
(G.U. No. 121 of 25 May 1991)

Art. 1
1. The grant referred to in Law no. 89 of 16 March 1988, awarded to the "Villa Vigoni" Cultural Association, Menaggio, shall be raised to Lit. 300 million per annum.

Art. 2
1. The obligation deriving from the application of this law, namely Lit. 150 million as from 1991, shall be financed by a corresponding reduction of the appropriation entered, for the purposes of the 1991-1993 three-year budget, under heading 6856 of the budget estimate of the Ministry of the Treasury, if necessary drawing partially on the reserve set aside for "Ratification and implementation of international agreements".
2. The Minister of the Treasury is hereby authorized to make the necessary adjustments to the budget, by means of appropriate decrees.

[3] **Law no. 78 of 23 April 2002**
Increase in the ordinary grant to the "Villa Vigoni" Cultural Association, Menaggio
(G.U. No. 100 of 30 April 2002)

Art. 1
1. The annual grant of EUR 154,937 awarded to the "Villa Vigoni" Cultural Association, Menaggio, under Law no. 161 of 17 May 1991, shall be raised to EUR 464,811 for the year 2002 and to EUR 309,874 per annum from 2003.
2. Before 31 December of every year, the Association referred to in paragraph 1 above shall submit a report to the Ministry of the Treasury on the activities undertaken and the expenditure incurred using the grant from the State. Failure to submit this report shall lead to suspension of the State contribution.

Art. 2
1. The obligation deriving from the application of this law, namely EUR 309,874 for 2002 and EUR 154,937 as from 2003, shall be financed by a corresponding reduction of the appropriation entered, for the purposes of the 2002-2004 budget, under the "Special Fund" current basic estimate in the budget forecast of the Ministry of Economy and Finance for the financial year 2002, to that end drawing partially on the reserve of the Ministry of Foreign Affairs.
2. The Minister of Economy and Finance is hereby authorized to make the necessary adjustments to the budget, by means of appropriate decrees.

There is also an interest in the mortgage being cancelled, either by this court or by any other court deemed to have jurisdiction *ratione loci* or *ratione materiae*.

2) This being so, it is important in terms of the decision in this case, to consider the objection of inapplicability of Regulation (EC) No. 44/2001 raised by the German defence in the light of the recent decision of the European Court of Justice of 15 February 2007 in Case C-292/05, handed down very shortly after the judgment of this Court of Appeal on 6 February 2007.

The Court of Justice held that: *"on a proper construction of the rules on jurisdiction laid down in the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 'civil matters' within the meaning of that provision does not cover a legal action brought by natural persons in a Contracting State against another Contracting State for compensation in respect of the loss or damage suffered by [.....] the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State".*

The Combined Sections of the Court of Cassation had already held in judgment no. 5044 of 11 March 2004 in *Ferrini,* in the light of Community case-law, that the Brussels Convention, which had been incorporated by Regulation (EC) 44/2001, was not applicable to disputes concerning activities which were the expression of the sovereignty of individual States. This has been clarified on several occasions by the Court of Justice which ruled, in connection with the liability of public authorities, that a claim for compensation on the part of an injured party is a "civil matter" (which therefore falls within the scope of the Convention) only if it is based on acts which were not perpetrated by the public authority in the exercise of its public powers.

In view of the foregoing considerations in law, it should be noted that the application instituting proceedings was brought on the basis of Articles 67 of Law 218/85 and Article 38 of Regulation (EC) No. 44/2001, whereas in the preamble to the ruling of the Italian court, later contested, reference was made to Law 218/95 and to Chapter III of Regulation (EC) No. 44/2001, whose procedure was followed both for the adoption of a summary measure *inaudita altera parte,* subject to the submission of observations at a later stage, and for the consequent fixing of a time-limit for any objections.

The appeal was lodged within the meaning of Regulation (EC) No. 44/2001 according to the procedure laid down by the Court.

The procedure is therefore as set out in Regulation (EC) No. 44/2001, which is inapplicable in this case however, in the light of the case-law of the Court of Justice mentioned above, the interpretation of which is binding on the national court since it aims to ensure uniform application of the Brussels Convention (in this connection see the recent judgment of the Combined Sections of the Court of Cassation No. 169 of 9 January 2008).

This means that the decision whereby the Florentine court declared the Greek judgment enforceable in Italy was handed down outside its statutory remit and is therefore null on that account alone.

Although the review embarked upon following the appeal gives the court the power/duty to examine the claims made in the judgment irrespective of the defects of the contested decree, that does not exempt the appeal court from declaring the nullity of the decree, in the light of current practice in similar summary proceedings governed by the code of practice in Articles 633 et seq. of the Code of Civil Procedure, as interpreted by the courts ruling on the lawfulness of legislation in force.

Nor should it be forgotten that the nullity of the decree must also be declared on account of the further objections raised by counsel for the Federal Republic of Germany, such as the incorrect indication of the time-limit for lodging appeals within the meaning of Regulation (EC) No. 44/2001, and also the unavailability of the party's file.

These various heads of nullity therefore invalidate the title on the basis of which the "Villa Vigoni" mortgage was registered.

This is not to say that the registration, rendered ineffectual on the basis of invalid title, cannot be renewed later on the basis of a new title in the case of a favourable decision by the Florence Court of Appeal at the end of this case, bearing in mind the restricted immunity applicable to the property since it is undeniably used for public purposes.

3) The nullity of the decree is also determined by the unenforceability of the foreign judgment, a serious defect which precludes the enforcement sought by the Autonomous Prefecture of Voiotia.

As we all know, one of the more innovatory aspects of the reform of the international private law system, covered in Law no. 218 of 31 May 1995, was the re-introduction of the principle of automatic recognition of foreign judgments which have become final, where the requirements of Article 64 CCP are met, in terms of their substantive or procedural effect as *res judicata*, whether between the parties or with respect to the Italian courts, both as regards the positive obligation to comply with those judgments and also the preclusion of any Italian proceedings being instituted in connection with the same dispute.

Thus, general recognition has been afforded to a principle which was previously only recognized in certain bilateral conventions and in the so-called "Brussels system" (Brussels Convention of 1968 and later amendments and Lugano Convention of 1988).

Purely for the purpose of invoking the enforceability of a judgment or overcoming an objection to its other effects, or a failure to comply with it, a residual remedy lies in a judicial procedure to ascertain whether the conditions prevail for allowing automatic recognition under Article 67 CCP.

Under that procedure, judicial review focuses on theoretical compliance with the formal requirements for the foreign judgment to take effect, once it has become *res judicata* (in the case of a judgment) or has been published.

The Court of Appeal is therefore required to ascertain whether the Greek judgment has the force of *res judicata* and is theoretically enforceable, in other words whether it can produce legal effects according to the rules of the legal order under which it was delivered.

To take the contrary view, if a judgment declared enforceable in Italy were not enforceable in the country of origin, there would be a manifest violation of the logical principles of identity and non-contradiction.

This being said, the certification requirement in Article 54[4] of Regulation (EC) No. 44/2001 has not been fulfilled in view of the failure to use the model laid down in that provision, which allows the certificate to circulate in a common format in the various legal orders so as to ensure uniform application of the Brussels Convention.

Therefore the certificate is theoretically non-enforceable in the light of the Brussels Convention.

Furthermore, the file for the case does not include the authorization of the Ministry of Justice prescribed by Article 923 of the Greek Code of Civil Procedure, also in view of the ruling of the Greek Aeropagus in judgment no. 36/02.

For these reasons the Greek judgment cannot be enforced.

At any rate, if it were held to be necessary, the Florentine Court of Appeal could easily obtain through the Ministry of Justice the elements needed to clarify the enforceability of the decision whose enforcement is sought.

* * * * * *

On the above grounds, we trust that the court will uphold these conclusions made by way of clarification.

Florence, 11 September 2008 — Piercarlo Pirollo, State Advocate

---

[4] **Art. 54**
The court or competent authority of a Member State where a judgment was given shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Regulation.

Annex 23

Court of Appeal of Florence
Decision of 21 October 2008

N. 1849/07 R.G.

REPUBBLICA ITALIANA

IN NOME DEL POPOLO ITALIANO

LA CORTE D'APPELLO DI FIRENZE

SEZ. I CIV.

composta dai magistrati:

1) dott. Antonio Chini — Presidente

2) dott. Giulio De Simone — Consigliere

3) dott. Edoardo Monti — Consigliere rel.

ha pronunciato la seguente

SENTENZA

nella causa civile promossa

da

- Repubblica Federale di Germania, rappresentata e difesa dagli avv.ti Achille Accolti Gil e Augusto Dossena per delega in atti, con domicilio eletto in Firenze via Bolognese 55 presso lo studio dei medesimi

- attore opponente -

- Presidenza del Consiglio dei Ministri, rappresentata e difesa per legge dall'Avvocatura Distrettuale dello Stato, presso i cui uffici è domiciliata in via degli Arazzieri 4 Firenze

- terzo intervenuto -

contro

- Autogestione Prefettizia di Voiotia, rappresentata e difesa dall'avv. Joachim Lau per delega in atti, con domicilio eletto in Firenze via delle Farine 2 presso lo studio del medesimo

- convenuta opposta -

avente ad oggetto l'esecutività in Italia della sentenza emessa in data 30 ottobre 1997 dal Tribunale collegiale di primo grado di Livadia (Grecia)

sulle seguenti

CONCLUSIONI

- per la Presidenza del Consiglio dei Ministri:

accogliere l'opposizione proposta dalla Repubblica Federale di Germania avverso il decreto della Corte d'Appello di Firenze emanato in data 13 giugno 2006 con cui è stata dichiarata esecutiva la sentenza n. 137/97 emessa dal tribunale collegiale di primo grado di Livadia (Grecia) e per l'effetto ordinare al Conservatore dei Registri Immobiliari presso l'Agenzia del territorio, Ufficio Provinciale di Como, di provvedere alla cancellazione dell'iscrizione ipotecaria 80026770849 n. 20821 del registro generale e n. 4217 del registro particolare del 7 giugno 2007 iscritta sull'immobile di via Giulio Vigoni, Comune di Menaggio, Como

- per la Repubblica Federale di Germania:

SVOLGIMENTO DEL PROCESSO

Con decreto emesso il 13 giugno 2006 su ricorso dell'Autogestione Prefettizia di Voiotia (Grecia), questa Corte dichiarava esecutiva in Italia la sentenza emessa il 30 ottobre 1997 dal Tribunale collegiale di primo grado di Livadia (Grecia), con cui la Repubblica Federale di Germania era stata condannata al risarcimento di danni per un massacro compiuto durante la seconda guerra mondiale da militari tedeschi contro la popolazione civile del paese di Distomo, nella provincia di Voiotia in Grecia.

Con atto di citazione notificato il 3 agosto 2007, la Repubblica Federale di Germania proponeva opposizione al decreto di esecutività della sentenza straniera, deducendo i seguenti motivi:

a) nullità dell'atto per carenza dei poteri di rappresentanza dell'Autogestione Prefettizia di Voiotia e per nullità del mandato *ad litem*;
b) inapplicabilità del regolamento CE 44/01 in base al quale era stata accordata l'esecutività;
c) contrarietà della decisione all'ordine pubblico italiano ed internazionale;
d) incompetenza per territorio della Corte d'Appello di Firenze;
e) nullità del decreto di esecutività per erronea indicazione del termine per proporre opposizione e per mancato deposito del fascicolo;
f) non esecutività della sentenza nel Paese d'origine.

L'opposta si costituiva in giudizio contestando le ragioni avverse e chiedendo il rigetto dell'opposizione con vittoria di spese.

Con atto depositato in cancelleria il 18 marzo 2008, interveniva in giudizio la Presidenza del Consiglio dei Ministri della Repubblica Italiana associandosi alle richieste della Repubblica Federale di Germania.

Senza svolgimento di attività istruttoria diversa dalla produzione documentale, sulle conclusioni trascritte in epigrafe, così come precisate all'udienza del 2 luglio 2008, decorsi i termini assegnati per il deposito delle

difese finali, la causa veniva rimessa in decisione e discussa all'odierna camera di consiglio.

MOTIVI DELLA DECISIONE

Non è fondata e va respinta l'eccezione d'invalidità o inefficacia del mandato difensivo annesso al ricorso volto ad ottenere la dichiarazione di esecutività della sentenza straniera. Dalla semplice lettura della sentenza emerge infatti la legittimazione del Prefetto di Voiotia a chiedere il pagamento delle somme liquidate a titolo di risarcimento danni e, siccome la sentenza è passata in giudicato nel Paese d'origine, ogni aspetto sostanziale e processuale della vicenda deve ritenersi indiscutibile, ivi compreso il profilo della legittimazione attiva del Prefetto di Voiotia, che in persona del titolare *pro tempore* Klearchos Pergantas ha conferito il mandato difensivo all'avv. Joachim Lau.

Discorso più articolato si addice al tema dell'applicabilità del regolamento CE 44/01 richiamato nel decreto di esecutività. Invero, la Corte di Giustizia Europea s'è pronunciata il 15 febbraio 2007 in caso analogo escludendo che detto regolamento (ex convenzione di Bruxelles 27 settembre 1968) sia applicabile a pronunce relative al risarcimento di danni per crimini di guerra. Anche la Corte di Cassazione, con sentenza dell'11 marzo 2004 n. 5044, era già pervenuta alla stessa conclusione, recentemente ribadita dalle Sezioni Unite nella sentenza del 6 maggio 2008 n. 14199 relativa (sotto altro profilo) alla stessa vicenda in oggetto. In quest'ultima pronuncia nondimeno si segnala che l'esecutività di una sentenza straniera di quel genere va comunque ammessa in base ai principi di diritto internazionale privato sanciti dalla legge n. 218/1995. Conscia di tale autorevole indicazione alternativa, la difesa dello Stato opponente eccepisce che "*la procedura monitoria è applicabile solo al rito semplificato disciplinato dal Regolamento, mentre per la procedura ordinaria prevista dall'art. 67 legge 218/95 la dichiarazione di sussistenza dei requisiti della sentenza straniera può essere stabilita solo con sentenza a seguito dell'instaurazione di un procedimento ordinario a cognizione piena*" (pag. 15

comparsa conclusionale). Di conseguenza, sarebbe invalida e priva di effetti l'apposizione della formula esecutiva in epoca anteriore alla notificazione del procedimento al debitore, tanto più che una certa giurisprudenza (cfr. App. Venezia 19 gennaio 1988) riteneva comunque inammissibile l'esecutività provvisoria in pendenza del termine per l'opposizione. Ora, non v'è dubbio che nel quadro della procedura ordinaria, la formula esecutiva dovrebbe giungere all'esito della delibazione, tuttavia occorre considerare che, a seguito dell'opposizione, s'è instaurato in questa sede un ordinario processo di cognizione in tutto e per tutto equipollente a quello che l'opponente avrebbe desiderato fin dall'inizio, sicché questa Corte, bene o male investita del problema dell'esecutorietà, non può che disporsi a definirlo nel merito, così come capita in tutti i casi in cui, sebbene attraverso un percorso processuale erroneo, il *thema decidendum* giunge infine davanti alla cognizione del giudice competente (cfr. per analogia Cass. 25 giugno 2007 n. 14687 e Cass. 24 novembre 2006 n. 25013). Né il problema della decorrenza degli effetti esecutivi può disturbare più di tanto, giacché l'eventuale rigetto dell'opposizione (ovvero accoglimento della domanda di delibazione per tuziorismo formulata in via riconvenzionale dalla parte opposta) assumerebbe valore di ratifica, legittimando *ex nunc* gli atti esecutivi compiuti (tenendoli quindi in vita), mentre la decisione opposta farebbe comunque cadere *ex tunc* l'eventuale vincolo esecutivo iscritto, soddisfacendo pienamente le ragioni di doglianza del debitore. Il motivo di opposizione sollevato in rito sub b) va dunque respinto in quanto si risolve nel merito.

Quanto alla contestata competenza per territorio, basterà osservare che dalla documentazione prodotta da parte convenuta emerge la presenza nel distretto fiorentino di beni pervenuti per testamento alla Repubblica Federale di Germania e non destinati all'adempimento di funzioni pubbliche statuali, sui quali sarebbe astrattamente possibile procedere *in executivis*, così da radicare la competenza territoriale nel distretto, a nulla rilevando che di fatto l'opposto,

dopo avere ottenuto la formula esecutiva, abbia preferito iscrivere ipoteca su un bene immobile ubicato in provincia di Como.

Ininfluente, ancor prima che infondata, deve ritenersi l'eccezione di nullità del decreto di esecutività per erronea indicazione del termine per proporre opposizione o per mancato deposito del fascicolo del ricorrente, giacché l'opposizione è stata proposta ed il fascicolo depositato, sicché lo scopo è stato raggiunto, il contraddittorio s'è adeguatamente perfezionato e nessun interesse processualmente rilevante rimane vulnerato. Se dunque è vero che la Repubblica Federale di Germania è stata costretta a proporre l'opposizione senza poter preventivamente visionare i documenti avversari, è altrettanto vero che poi ha potuto prenderne compiutamente visione e sanare adeguatamente la lacuna, tanto che non ha nemmeno chiesto un termine per integrare le difese, evidentemente ritenute esaustive.

L'opponente eccepisce altresì l'improcedibilità della domanda avversaria per carenza originaria di esecutività della sentenza greca. In tale prospettiva, la difesa osserva che "*il necessario ed imprescindibile presupposto processuale affinché la domanda svolta da controparte sia procedibile, è che la sentenza sia suscettibile di esecuzione, e quindi abbia natura di condanna. Viceversa la sentenza greca in oggetto è esecutiva solo per la parte relativa alle spese legali. Infatti, la sentenza ha natura meramente dichiarativa e non di condanna*" (pag. 22 comparsa conclusionale). A questo, la difesa aggiunge che la sentenza non è comunque eseguibile in Grecia, stante la mancata autorizzazione governativa necessaria a norma dell'art. 923 del locale codice di procedura. La tesi di parte opponente non può essere condivisa per una serie convergente di ragioni, in appresso brevemente indicate. In primo luogo, il tenore del dispositivo, recando la condanna al risarcimento dei danni accertati nel corso del giudizio (..."... *il convenuto deve corrispondere all'attrice, Autogestione Prefettizia di Voiotia ... gli importi indicati a fianco*..."...), induce a ravvisare, sulla base degli usuali canoni ermeneutici, la natura esecutiva e non di mero accertamento della pronuncia. In secondo luogo,

l'attestazione dello stesso Tribunale emittente dimostra che la sentenza è passata in giudicato ed è dotata di formula esecutiva espressa (..."... *comandiamo a tutti gli Ufficiali Giudiziari che ne siano richiesti e a chiunque spetti di mettere in esecuzione la presente sentenza, al Pubblico Ministero di darvi assistenza e a tutti gli Ufficiali della Forza Pubblica di concorrervi, in ogni modo legale, quando ne siano legalmente richiesti...*"...). In terzo luogo, la Corte di Appello di Atene, nel disporre la sospensione della vendita dei beni pignorati alla Repubblica Federale di Germania in applicazione dell'art. 923 del codice di procedura greco, ha esplicitamente dichiarato che i "*creditori possono realizzare il loro diritto all'esecuzione della sentenza n. 137/97 del Tribunale di Livadia in un altro Stato o in un altro momento più idoneo*", con ciò confermando la natura intrinsecamente esecutiva della pronuncia, sebbene il Governo greco, per sua insindacabile scelta politica, avvalendosi degli speciali poteri riconosciuti dalla legge interna, abbia inteso all'occasione impedire l'esecuzione forzata in danno dello Stato sovrano esterno. La deroga "*attiene infatti alla fase contingente dell'esecuzione forzata, ma non condiziona né elimina - ed anzi presuppone - la previa acquisizione di efficacia esecutiva della sentenza contro lo Stato straniero, la cui concreta esecuzione ben può essere quindi attuata in un successivo diverso contesto temporale e/o spaziale*" (così testualmente Cass. Sez. Un. 29 maggio 2008 n. 14199).

Resta da affrontare l'argomento, quanto mai grave e spinoso, della supposta contrarietà della richiesta di delibazione della sentenza straniera alle norme d'ordine pubblico interno e internazionale generalmente riconosciute anche nel nostro ordinamento ai sensi dell'art. 10 cost., norme che, a parere della difesa opponente, assicurano l'immunità dalla giurisdizione civile alle azioni compiute dagli Stati sovrani *iure imperii*, tra le quali tipicamente rientrano le azioni belliche, anche quando trasmodano dall'esercizio legittimo della guerra. Il problema è stato espressamente esaminato e risolto dalla Corte di Cassazione a Sezioni Unite nei seguenti termini: "*quanto ... alla pretesa incompatibilità del riconoscimento della sentenza ... greca di che si discute con principi di*

ordine pubblico interno, questa è parimenti, a sua volta, insussistente. È pur vero, infatti, che la statuizione di condanna ... che l'Amministrazione greca chiede di riconoscere in Italia non è scindibile dal contesto della decisione sul merito della (accolta) domanda di indennizzo proposta da eredi delle vittime di un massacro di civili compiuto in Grecia dall'esercito tedesco durante la seconda guerra mondiale. Ma la non estensibilità della immunità dalla giurisdizione civile degli Stati stranieri agli atti iure imperii di questi configurabili come crimini contro l'umanità - presupposta da quella sentenza - lungi dal porsi in contrasto, è perfettamente invece in sintonia con il principio già enunciato da questa Corte a Sezioni unite, con la sentenza n. 5044 del 2004, e che qui si ribadisce, in coerenza al riconoscimento del primato assoluto dei valori fondamentali di libertà e dignità della persona umana (cfr. anche le numerose ordinanze rese su regolamenti preventivi di giurisdizione proposti dalla Repubblica di Germania, del pari decisi in data odierna)". Da tale insegnamento non v'è motivo di discostarsi, giacché escludendo dalla consueta sfera d'immunità civile l'ipotesi dei crimini contro l'umanità non si fa altro che riconoscere il primato dei diritti inviolabili dell'uomo rispetto all'esplicazione dei poteri sovrani degli Stati, secondo l'indubbia gerarchia che va affermandosi in tal senso nella più recente ed apprezzabile evoluzione del diritto internazionale generalmente accettato.

Sussistendo tutti i presupposti per ritenere dunque eseguibile in Italia la sentenza in oggetto, che risponde ad una pretesa risarcitoria di puro carattere civile, va respinta l'opposizione proposta dalla Repubblica Federale di Germania con l'ausilio dell'intervenuta Presidenza del Consiglio dei Ministri e, per l'effetto, va confermata l'esecutività della sentenza greca.

Le spese del procedimento vanno poste solidalmente a carico dell'opponente e della terzo intervenuto *ad adiuvandum* in base al criterio della soccombenza e liquidate, tenuto conto della fisionomia e dello svolgimento del procedimento, in complessivi € 3.600,00 (di cui € 3.000,00 per

onorari ed € 600,00 per diritti), oltre alle spese forfettarie, nonché al trattamento fiscale e previdenziale dovuto.

P.Q.M.

la Corte d'Appello di Firenze, sezione I civile, definitivamente pronunciando nella causa in oggetto, ogni altra domanda, eccezione e deduzione disattesa:

1) respinge l'opposizione proposta dalla Repubblica Federale di Germania avverso il decreto di esecutività emesso da questa Corte in data 13 giugno 2006 e comunque ribadisce l'esecutività in Italia della sentenza n. 137 pronunciata in data 30 ottobre 1997 dal Tribunale collegiale di primo grado di Livadia (Grecia);
2) condanna la Repubblica Federale di Germania in solido con l'intervenuta Presidenza del Consiglio dei Ministri della Repubblica Italiana al pagamento delle spese del presente procedimento, liquidate in complessivi € 3.600,00 oltre accessori, a favore dell'Autogestione Prefettizia di Voiotia.

Firenze, 21 ottobre 2008

Il Consigliere est. Il Presidente

Translation

Record No. 1849/07

REPUBLIC OF ITALY
IN THE NAME OF THE ITALIAN PEOPLE
THE FLORENCE COURT OF APPEAL
FIRST CIVIL DIVISION

Consisting of the Honourable Justices:

1)	Mr. Antonio Chini	President
2)	Mr. Giulio De Simone	Justice
3)	Mr. Edoardo Monti	Justice Rapporteur

has issued the following

JUDGMENT

in the civil case brought by

- the Federal Republic of Germany, represented and defended by Achille Accolti Gil, Esq., and Augusto Dossena, Esq., in accordance with the Power of Attorney on record, and with elected domicile in their offices at via Bolognese 55, Florence

– Plaintiff –

- The Office of the Prime Minister, represented and defended by law by the District Office of the Solicitor General, with elected domicile in those offices at via degli Arazzieri 4, Florence

– Third Party Intervener –

versus

- The Self-governing Prefecture of Voiotia, represented and defended by Joachim Lau, Esq., in accordance with the Power of Attorney on record, with elected domicile in via delle Farine 2, Florence, in the attorney's office

– Defendant –

concerning the enforceability in Italy of the Judgment issued on 30 October 1997 by the Court of First Instance *en banc* of Livadia (Greece)

on the following

CONCLUSIONS

- for the Office of the Prime Minister:
to admit the appeal brought by the Federal Republic of Germany against the order issued by the Florence Court of Appeal on 13 June 2006, which declared Judgment No. 137/97 issued by the Court of First Instance *en banc* of Livadia (Greece) to be enforceable, and accordingly, to order the Land Registrar at the Land Registry Office for the Province of Como, to cancel mortgage lien 80026770849 No. 20821 in the General Register, and No. 4217 in the Specific Register, of 7 June 2007, attached to the property in via Giulio Vigoni, in the Municipality of Menaggio, Province of Como

- for the Federal Republic of Germany:

DEVELOPMENT OF THE PROCEEDINGS

By an order issued on 13 June 2006, in response to the petition of the Self-governing Prefecture of Voiotia (Greece), this Court declared the judgment issued on 30 October 1997 by the Court of First Instance *en banc* of Livadia (Greece) to be enforceable. By that Judgment, the Federal Republic of Germany had been ordered to pay damages for a massacre perpetrated by German soldiers during the Second World War against the civilian population of Distomo, in the Voiotia province of Greece.

By a Summons served on 3 August 2007, the Federal Republic of Germany appealed against the order for enforcement of the foreign judgment, stating its reasons as follows:

a) The action is void due to the lack of legal standing of the Self-governing Prefecture of Voiotia and the nullity of the Power of Attorney *ad litem;*
b) EC Regulation 44/01, on the basis of which the action was considered enforceable, is inapplicable;
c) The decision is contrary to Italian and international public order;
d) The Florence Court of Appeal lacks territorial jurisdiction;
e) The enforcement order is void due to the erroneous instructions concerning the deadline for lodging an appeal, and the failure to file the trial record;
f) The judgment is not enforceable in the country of origin.

The defendant party appeared before the Court, objecting to these arguments and asking that they be rejected, with costs awarded against the plaintiff.

In an Act filed with the Clerk of Court's Office on 18 March 2008, the Office of the Prime Minister of the Republic of Italy joined the case, supporting the requests made by the Federal Republic of Germany.

Without any preliminary procedures other than the submission of documents being carried out concerning the conclusions set out above, as set forth in the hearing of 2 July 2008, upon the expiry of the deadline for filing the final defence statements, the case was referred for judgment and discussed in the hearing in chambers on today's date.

GROUNDS FOR THE DECISION

The objection of invalidity or nullity of the Power of Attorney annexed to the petition filed for the purpose of obtaining a declaration of enforceability of the foreign judgment, is without merit and is therefore to be rejected. Indeed, a simple reading of the judgment shows that the Prefect of Voiotia has legal standing to request the payment of the amounts set for damages, and since the judgment has become final in the country of origin, every substantive and procedural aspect of the matter must be considered to be indisputable. This includes the standing to sue on the part of the Prefect of Voiotia, who, in the person of the *pro tempore* holder of that position, Klearchos Pergantas, granted the Power of Attorney to Joachim Lau, Esq.

The issue of the applicability of EC Regulation 44/01, referred to in the enforcement order, is more complicated. Indeed, the European Court of Justice ruled on a similar case on 15 February 2007, excluding the possibility of the said regulation applying to judgments related to payment for damages for war crimes (pursuant to the Brussels Convention of 27 September 1968). In Judgment No. 5044 of 11 March 2004, the Court of Cassation had already reached the same conclusion, which was recently reaffirmed by the Court *en banc* in Judgment No. 14199 of 6 May 2008, relating to the same matter (although from a different standpoint). In this latter judgment, however, it is to be noted that the enforceability of a foreign judgment of that type is in any case to be admitted according to the principles of private international law as is confirmed by Law No. 218/1995. Aware of that authoritative contrary position, the plaintiff State's defence alleged that *"the summary proceeding is only applicable to the simplified procedure under the Regulation, whereas for the ordinary procedure as foreseen by Art. 67 of Law 218/95, in order for a declaration to be made in confirmation of a foreign judgment meeting the applicable criteria, such a judgment can only be reached following the initiation of an ordinary procedure with full powers of jurisdiction"* (page 15, Statement of Claim). Consequently, the granting of an order for enforcement prior to notifying the debtor of the proceeding would be null and void, all the more so because certain case law (Cf. Venice Court of Appeal, 19 January 1988) has moreover found that granting an interim enforcement prior to the deadline for lodging an appeal was inadmissible. Now, there can be no doubt that in the context of an ordinary procedure, the issue of an order for enforcement should be determined at the conclusion of the enforcement proceeding itself. However, it is necessary to consider that, following the lodging of the appeal, an ordinary proceeding for jurisdiction was initiated before this Court, which had precisely been in accordance with the Defendant's wishes from the beginning. Thus, this Court, whether rightly or wrongly seized to

determine the issue of enforceability, can only base its decision on the merits of the case in point, as is the case in all court actions in which the issue is ultimately submitted to the competent Court for deliberation, including those where procedural errors are made (Compare with Cassation Judgment No. 14687 of 25 June 2007 and Cassation Judgment No. 25013 of 24 November 2006). Nor can the issue of the date from which an enforcement order take effects be of much consequence, since rejection of the appeal (or, alternatively, the admission of a request for interim enforcement of a counterclaim by the opposing party) would be tantamount to its endorsement, thereby legitimizing *ex nunc* the enforcement actions carried out (and thus preserving their effects). The opposite conclusion would however result in the lapsing *ex tunc* any enforceable orders, thus fully satisfying the claims advanced by the defendant. The grounds for the appeal raised under point b) of the procedure are thus to be rejected, as the issue is to be resolved on the merits.

As for the objection to territorial jurisdiction, suffice it to note that the documentation produced by the defendant demonstrates the presence in the Florence jurisdiction of the assets received by the Federal Republic of Germany by testament, which are not used for the fulfilment of public, state functions. Thus, in theory, enforcement actions could be taken in relation to those assets, tending to confirm the existence of territorial jurisdiction in the district. The fact that the Defendant, after obtaining the order for enforcement, preferred to record the lien on a property located in the province of Como, is irrelevant.

The claim that the order for enforcement is void due to erroneous indication of the deadline for lodging an appeal, or due to the petitioner's failure to file the trial record, is irrelevant, even prior to it being found groundless, because the objective has been reached, the discovery of documents phase was adequately completed, and no procedurally relevant interest remains violated. Therefore, although it is true that the Federal Republic of Germany was forced to make its appeal without being able to review the opposing party's documents in advance, it is also true that the Federal Republic of Germany was then able to fully review them and adequately bridge that gap, to such an extent that it did not even ask for a delay within which to supplement the defence, which it apparently considered to be exhaustive.

The Defendant also argues for the preclusion of the opposing party's request based on the lack of enforceability of the original Greek judgment. From that standpoint, the defence states that *"in order for the opposing party's request to be prosecutable, the necessary and unavoidable procedural pre-requisite is that the judgment is enforceable, and thus has the quality of a final sentence. To the contrary, however, the Greek judgment under consideration is only*

enforceable as regards the part concerning the legal expenses. In fact, the judgment is merely declaratory, and not a final sentence" (page 22 of the Statement of Claim). The defence adds that, in any case, the judgment is not enforceable in Greece, given the absence of any governmental authorization required pursuant to Art. 923 of the local Procedural Code. The plaintiff's argument cannot be accepted for a convergent series of reasons which are briefly set forth below. First of all, the tenor of the order itself, which includes an order to pay the damage confirmed during the proceeding (*..."... the defendant must pay the plaintiff, the Self-governing Prefecture of Voiotia ... the amounts indicated here to the side ..."...),* leads one to recognize, based on usual hermeneutic canons, that the ruling is enforceable, and not merely declaratory. Secondly, the issuing Court's statement shows that the judgment is final and includes an express order for enforcement (*..."... we order all Judicial Officials who are so requested or required, to enforce this judgment, the Public Prosecutor to provide assistance, and all Police Officials to cooperate, in every legal manner, when they are requested to do so under law ..."...).* Thirdly, the Athens Court of Appeal, in ordering the suspension of the sale of assets seized from the Federal Republic of Germany in application of Art. 923 of the Greek Procedural Code, explicitly stated that the *"creditors are entitled to enforce Judgment No. 137/97 of the Court of Livadia in another State, or at another appropriate time,"* thus confirming the intrinsically enforceable nature of the ruling. This, despite the fact that the Greek government taking advantage of its full political discretion and the special powers granted to it by domestic law, chose on that occasion to prevent its forced execution to the detriment of a sovereign foreign state. The exemption *"indeed relates to the contingent phase of the enforcement, but does not condition or eliminate – and actually requires – the prior determination of the enforceable character of the judgment against the foreign state, the actual enforcement of which can thus certainly be carried out in a different, subsequent, temporal or spatial context"* (see verbatim, Cassation *en banc*, Judgment No. 14199 of 29 May 2008).

The contentious and difficult issue surrounding the allegation that the request for an enforcement proceeding concerning the foreign judgment conflicts with internal and international principles of public order generally recognized in our legal system pursuant to Art. 10 of the Constitution now remains to be considered. The plaintiff alleges that those principles ensure a sovereign State's acts are immune from the civil jurisdiction of foreign States. Acts of war, even when they exceed the permitted limits of the legitimate exercise of war, are typically included among such acts. The problem has been expressly examined and ruled upon by the Court of Cassation *en banc*, in the following terms: *"as for ... the alleged incompatibility of the recognition of the Greek ... judgment under discussion with principles of internal public*

order, this is likewise, in turn, unfounded. Indeed, it is true that the issuance of a judgment ... which the Greek administration asks be recognized in Italy, cannot be separated from the context of the decision on the merits of the (granted) request for compensation brought by the heirs of the victims of a massacre of civilians carried out by the German army in Greece during the Second World War. However, the fact that immunity from the civil jurisdiction of foreign States for acts that are an expression of a state's sovereignty can not be extended to acts which can be classified as crimes against humanity – which is assumed by the judgment – far from contrasting with the principle already pronounced by this Court en banc, in Judgment No. 5044 of 2004, is in complete agreement with that judgment. We reaffirm that principle here, consistent with the recognition of the absolute primacy of the fundamental values of liberty and dignity of the human person (Cf. also the numerous orders issued concerning proceedings to establish jurisdiction brought by the [Federal] Republic of Germany, likewise decided on today's date)." There is no reason to diverge from that precept, because, by excluding the possibility of crimes against humanity from the customary sphere of civil immunity, all that is done to recognize the primacy of the inviolable rights of man with respect to the exercise of the sovereign powers of states, based on an indubitable hierarchy which is increasingly being affirmed in the most recent and commendable evolution of generally-accepted international law.

Therefore, as all of the criteria are fulfilled for the enforceability of the judgment under consideration under Italian law, and given that the judgment itself answers a claim for compensation of purely civil nature, the appeal brought by the Federal Republic of Germany, with the assistance of the Office of the Prime Minister, is to be rejected, and the enforceability of the Greek sentence confirmed.

Expenses for the proceeding are to be paid jointly and severally by the Defendant and the Third Party Intervener *ad adiuvandum,* based on the principle whereby the costs are to be borne by the losing party, and taking into account the nature and development of the proceeding. The expenses are set at a total of € 3,600.00 (including € 3,000.00 per fees and € 600.00 per charges), in addition to standard Court fees, as well as the relevant tax and pension payments due.

FOR WHICH REASONS

the Florence Court of Appeal, First Civil Division, hereby issues a final judgment in the case identified above, *contrariis reiectis,* the Court:

1) dismisses the appeal brought by the Federal Republic of Germany against the enforcement order issued by this Court on 13 June 2006, and in any event reaffirms the enforceability in Italy of Judgment No. 137 issued by the Court of First Instance *en banc* of Livadia (Greece) on 30 October 1997;

2) orders the Federal Republic of Germany, jointly and severally with the Office of the Prime Minister of the Republic of Italy, to pay the expenses for this proceeding, set at a total of € 3,600.00 plus additional costs, to the Self-governing Prefecture of Voiotia.

Florence, 21 October 2008

The Justice Rapporteur

The President

Annex 24

Exchange of notes constituting an arrangement concerning the establishment of the "Villa Vigoni" Association as a German-Italian Centre

21 April 1986, 1501 UNTS 57, No. 25828, 25829

Article 8. Le présent Protocole entrera en vigueur à la date de sa signature.

FAIT à Brasília le 9 décembre 1983, en deux exemplaires originaux, chacun en langues allemande et portugaise, les deux textes faisant également foi.

Pour le Gouvernement de la République fédérale d'Allemagne :

GÖTZ-ALEXANDER MARTIUS

Pour le Gouvernement de la République fédérative du Brésil :

JOÃO CLEMENTE BAENA SOARES

No. 25828

FEDERAL REPUBLIC OF GERMANY
and
ITALY

Exchange of notes constituting an arrangement concerning the establishment of the "Villa Vigoni" Association as a German-Italian Centre. Bonn, 21 April 1986

Authentic texts: German and Italian.

Registered by the Federal Republic of Germany on 8 April 1988.

RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE
et
ITALIE

Échange de notes constituant un arrangement concernant la création de l'Association «Villa Vigoni» en tant que Centre germano-italien. Bonn, 21 avril 1986

Textes authentiques : allemand et italien.

Enregistré par la République fédérale d'Allemagne le 8 avril 1988.

EXCHANGE OF NOTES CONSTITUTING AN ARRANGEMENT[1] BETWEEN THE FEDERAL REPUBLIC OF GERMANY AND THE ITALIAN REPUBLIC CONCERNING THE ESTABLISHMENT OF THE "VILLA VIGONI" ASSOCIATION AS A GERMAN-ITALIAN CENTRE

ÉCHANGE DE NOTES CONSTITUANT UN ARRANGEMENT[1] ENTRE LA RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE ET LA RÉPUBLIQUE ITALIENNE CONCERNANT LA CRÉATION DE L'ASSOCIATION «VILLA VIGONI» EN TANT QUE CENTRE GERMANO-ITALIEN

I

[GERMAN TEXT — TEXTE ALLEMAND]

Bonn den 21. April 1986

DER BUNDESMINISTER DES AUSWÄRTIGEN

Herr Minister,

ich beehre mich, Ihnen im Namen der Regierung der Bundesrepublik Deutschland und unter Bezugnahme auf das zwischen unseren beiden Regierungen geschlossene Kulturabkommen vom 8. Februar 1956 folgende Vereinbarung über den zu gründenden Verein „Villa Vigoni", einem deutsch-italienischen Zentrum für Studienaufenthalte und Begegnungen auf den Gebieten der Wissenschaft, der Bildung und der Kultur, vorzuschlagen:

1. Der Verein „Villa Vigoni" wird nach deutschem Privatrecht gegründet und im Vereinsregister Bonn eingetragen. Er wird in Italien auf der Grundlage der italienischen Rechtsordnung anerkannt.

2. Der Verein fördert die deutsch-italienischen Beziehungen auf den Gebieten der Wissenschaft, der Bildung und der Kultur unter Einbeziehung ihrer Verknüpfungen mit Wirtschaft, Gesellschaft und Politik durch Studienaufenthalte, Kolloquien, Gesprächsrunden, Sommerakademien und künstlerische Veranstaltungen in der Villa Vigoni.

Der Verein widmet der Begegnung des wissenschaftlichen, künstlerischen und beruflichen Nachwuchses besondere Aufmerksamkeit. Er bietet ein Forum für die Erörterung der wissenschaftlichen und technologischen, sozialen, wirtschaftlichen und ökologischen Herausforderungen, denen sich beide Länder und Europa gegenübersehen.

Interdisziplinarität, die Einbindung in die Kultur beider Länder, das Aufgreifen von Themenschwerpunkten von besonderer regionaler Bedeutung und die Offenheit für Themen und Teilnehmer aus anderen Staaten Europas und der Welt sind wichtige Grundprinzipien der Vereinsarbeit. Der Verein verfolgt unmittelbar und ausschließlich gemeinnützige Ziele.

[1] Came into force on 21 April 1986, the date of the note in reply, in accordance with the provisions of the said notes.

[1] Entré en vigueur le 21 avril 1986, date de la note de réponse, conformément aux dispositions desdites notes.

3. Die Regierung der Bundesrepublik Deutschland, vertreten durch den Bundesminister für Bildung und Wissenschaft, wird nach Maßgabe des jeweiligen Bundeshaushaltsplans dem Verein die ererbte Liegenschaft Villa Vigoni zur unentgeltlichen Nutzung überlassen, ihm außerdem einen jährlichen Zuschuß als Beitrag für seine Aufgabenerfüllung sowie die erforderlichen Mittel für die Erhaltung der Liegenschaft zur Verfügung stellen. Die Liegenschaft ist in ihrem Bestand ungeschmälert zu erhalten.

4. Die Regierung der Italienischen Republik, vertreten durch den Minister für Auswärtige Angelegenheiten, verpflichtet sich, sobald wie möglich das Gesetzgebungsverfahren in Gang zu bringen, womit dem Verein ein jährlicher Zuschuß bewilligt wird, der jeweils im Haushaltsplan des Ministeriums für Auswärtige Angelegenheiten zu veranschlagen ist und der grundsätzlich dem deutschen Beitrag zur Erfüllung der Vereinsaufgaben entspricht.

Bis zum Abschluß des vorgenannten Gesetzgebungsverfahrens und sobald sich der Verein auf paritätischer Grundlage konstituiert hat, wird sich die Regierung der Italienischen Republik in Übereinstimmung mit dem dafür in Italien vorgesehenen Verfahren finanziell an der Durchführung einzelner, vom Verein vorgesehener Veranstaltungen beteiligen, wenn sie kulturell, technisch und wissenschaftlich besonders wertvoll sind und zugleich zur Förderung der Beziehungen zwischen beiden Ländern beitragen.

5. Beide Regierungen beteiligen sich an der Arbeit des Vereins in seinen Organen gemäß seinen als Anlage zu dieser Note beigefügten Statuten.

Sie unterstützen im weitesten Ausmaß eine vergleichbare Beteiligung ihrer eigenen Staatsangehörigen, Körperschaften und Organisationen an der Villa Vigoni e. V. und ihren Aktivitäten und tragen dazu bei, daß sie auch außerhalb der eigenen Landesgrenzen bekanntgemacht und Beachtung finden werden.

6. Zur Aufnahme des Vereins „Villa Vigoni" in den Rahmen des deutsch-italienischen Kulturabkommens vom 8. Februar 1956 und der hierzu erfolgten Briefwechsel vom 8. Februar 1956 und vom 12. Juli 1961 wird auf den unter dem heutigen Datum zwischen den beiden Regierungen vollzogenen Notenwechsel verwiesen.

7. Diese Vereinbarung gilt auch für das Land Berlin, sofern nicht die Regierung der Bundesrepublik Deutschland gegenüber der Regierung der Italienischen Republik innerhalb von drei Monaten nach Inkrafttreten der Vereinbarung eine gegenteilige Erklärung abgibt.

Falls sich die Regierung der Italienischen Republik mit den oben gemachten Vorschlägen einverstanden erklärt, werden diese Note und die das Einverständnis Ihrer Regierung zum Ausdruck bringende Note Eurer Exzellenz eine Vereinbarung zwischen unseren beiden Regierungen bilden, die mit dem Datum Ihrer Antwortnote in Kraft tritt.

Genehmigen Sie, Herr Minister, die Versicherung meiner ausgezeichneten Hochachtung.

GENSCHER

Seiner Exzellenz
dem Außenminister der
Italienischen Republik
Herrn Giulio Andreotti

[TRANSLATION]

THE FEDERAL MINISTER FOR FOREIGN AFFAIRS

Bonn, 21 April 1986

Sir,

I have the honour to propose to you on behalf of the Government of the Federal Republic of Germany, and with reference to the Cultural Agreement of 8 February 1956[1] between our two Governments, the following agreement concerning the "Villa Vigoni" Association, to be established as a German-Italian centre for study visits and meetings in the fields of science, education and culture:

1. The "Villa Vigoni" Association shall be established under German private law and entered in the Register of Associations, Bonn. It shall be recognized in Italy on the basis of Italian legislation;

2. The Association shall promote German-Italian relations in the fields of science, education and culture, including their linkages with the economy, society and politics, through study visits, symposiums, round tables, summer schools and art exhibitions in the Villa Vigoni.

The Association shall pay particular attention to contacts within the new generation of scientists, artists and professionals. It shall provide a forum for discussion of the scientific and technical, social, economic and environmental challenges facing the two countries and Europe.

Interdisciplinarity, ties between the cultures of the two countries, the consideration of key issues of particular regional significance and openness to issues and participants from other States of Europe and of the world are important basic principles of the Association's activities. The Association shall pursue directly and exclusively non-profit-making purposes.

3. The Government of the Federal Republic of Germany, represented by the Federal Minister of Education and Science, shall, in accordance with the provisions of the current federal budget, assign the inherited Villa Vigoni property to the Association for its use free of charge, and shall in addition make available to it an annual allowance as a contribution to support the discharge of its duties, as well as the necessary resources for the maintenance of the property. The property shall be maintained intact.

4. The Government of the Italian Republic, represented by the Minister for Foreign Affairs, undertakes to set in motion as soon as possible the legislative procedure for authorization of the payment to the Association of an annual allowance, which shall be included in the budget of the Ministry of Foreign Affairs and in essence matches the German contribution for the discharge of the Association's functions.

Pending the completion of the abovementioned legislative procedure, and as soon as the Association has been established on a basis of parity, the Government of the Italian Republic shall, in accordance with its own domestic procedures, participate financially in the conduct of activities organized by the Association that are of particular cultural, technical and scientific value and contribute to the furtherance of relations between the two countries.

[1] United Nations, *Treaty Series*, vol. 1577, No. I-27532.

[TRADUCTION]

LE MINISTRE FÉDÉRAL DES AFFAIRES ÉTRANGÈRES

Bonn, le 21 avril 1986

Monsieur le Ministre,

Au nom du Gouvernement de la République fédérale d'Allemagne, j'ai l'honneur de me référer à l'Accord culturel conclu entre nos deux Gouvernements le 8 février 1956[1] et de vous proposer l'arrangement suivant au sujet de l'Association « Villa Vigoni » qui doit être créée et fonctionner comme centre germano-italien destiné à des séjours d'études et à des rencontres dans les domaines de la science, de l'éducation et de la culture :

1. L'Association « Villa Vigoni » sera créée conformément au droit privé allemand et sera inscrite au registre des associations de Bonn. Elle sera reconnue en Italie conformément à la législation italienne.

2. L'Association encouragera les relations germano-italiennes dans les domaines de la science, de l'éducation et de la culture, y compris leurs liens avec la vie économique, sociale et politique, au moyen de séjours d'études, de colloques, de réunions de table ronde, de cours d'été et de manifestations artistiques à la Villa Vigoni.

L'Association accordera une attention particulière aux rencontres avec les nouvelles générations de scientifiques, d'artistes et de membres des diverses professions. Elle servira de centre de discussion des nouveaux enjeux auxquels sont confrontés les deux pays et l'Europe dans les domaines scientifiques et techniques, sociaux, économiques et écologiques.

Le pluralisme des disciplines, le rattachement aux cultures des deux pays, l'intérêt pour les principaux thèmes présentant une importance régionale particulière et l'ouverture à des thèmes et à des participants venus d'autres pays d'Europe et du monde font partie des principes importants qui doivent inspirer les activités de l'Association. L'Association a directement et exclusivement des buts non lucratifs.

3. Dans les limites des crédits de son budget fédéral en cours, le Gouvernement de la République fédérale d'Allemagne, représenté par son Ministre fédéral de l'éducation et de la culture, mettra gratuitement le patrimoine de la Villa Vigoni à la disposition de l'Association pour l'usage de celle-ci et lui fournira une contribution annuelle pour l'aider à s'acquitter de ses fonctions ainsi que les ressources nécessaires à l'entretien des biens immobiliers. Lesdits biens immobiliers devront être maintenus dans leur intégrité.

4. Le Gouvernement de la République italienne, représenté par son Ministère des affaires étrangères, engagera dès que possible la procédure législative nécessaire pour que soit mise à la disposition de l'Association, sur les crédits inscrits au budget du Ministère des affaires étrangères, une contribution annuelle dont le montant correspondra en principe à la contribution fournie par la République fédérale d'Allemagne à l'Association pour permettre à celle-ci de s'acquitter de ses fonctions.

Jusqu'au terme de la procédure législative mentionnée ci-dessus et dès que l'Association aura été constituée paritairement, le Gouvernement de la République italienne, conformément aux modalités prévues par sa législation, participera financièrement à la conduite de manifestations prévues par l'Association qui seront particulièrement utiles sur les plans culturels, techniques et scientifiques et contribueront en même temps à promouvoir les relations entre les deux pays.

[1] Nations Unies, *Recueil des Traités*, vol. 1577, n° I-27532.

5. The two Governments shall participate in the work of the Association in its organs in conformity with the statute of the Association annexed to the present note.

They shall extend the fullest support to the comparable participation of their own nationals, corporations and organizations in the Villa Vigoni and its activities, and shall take steps to ensure that these are also publicized and receive attention beyond their own national frontiers.

6. With respect to the inclusion of the Villa Vigoni Association within the scope of the German-Italian cultural agreement of 8 February 1956 and the exchanges of letters relating thereto of 8 February 1956 and 12 July 1961,[1] reference is made to the exchange of notes concluded today between the two Governments.

7. This Agreement shall also apply to *Land Berlin*, provided that the Government of the Federal Republic of Germany has not made a contrary declaration to the Government of the Italian Republic within three months from the date of entry into force of this Agreement.

In the event that the Government of the Italian Republic is in agreement with the above proposals, this note and your note indicating the agreement of your Government shall constitute an agreement between our two Governments which shall enter into force on the date of your reply.

Accept, Sir, etc.

GENSCHER

His Excellency
Mr. Giulio Andreotti
Minister for Foreign Affairs
of the Italian Republic

[1] See note 1, p. 58, of this volume.

5. Les deux Gouvernements participeront aux travaux de l'Association dans le cadre de ses organes, conformément aux statuts de l'Association joints en annexe à la présente note.

Ils apporteront leur soutien le plus complet à une participation comparable de leurs propres ressortissants, sociétés et organismes à l'Association «Villa Vigoni» et aux activités de celle-ci et ils feront en sorte d'assurer la notoriété et la réputation de l'Association également en dehors de leurs propres frontières.

6. Au sujet du cadre que constitue, pour la création de l'Association «Villa Vigoni», l'Accord culturel germano-italien du 8 février 1956 et les échanges de notes, relatifs audit Accord en date des 8 février 1956 et 12 juillet 1961[1], il est fait référence à l'échange de notes effectué ce jour entre les deux Gouvernements.

7. Les présentes dispositions s'appliqueront aussi au *Land Berlin* pour autant que le Gouvernement de la République fédérale d'Allemagne n'aura pas fait de déclaration contraire au Gouvernement de la République italienne dans les trois mois suivant l'entrée en vigueur du présent Accord.

Si les dispositions énoncées ci-dessus rencontrent l'agrément du Gouvernement de la République italienne, je propose que la présente note et la note de confirmation de Votre Excellence constituent, entre nos deux Gouvernements, un Accord qui entrera en vigueur à la date de votre réponse.

Veuillez agréer, etc.

GENSCHER

Son Excellence
Monsieur Giulio Andreotti
Ministre des affaires étrangères
de la République italienne

[1] Voir note 1, p. 58, du présent volume.

II

[ITALIAN TEXT — TEXTE ITALIEN]

IL MINISTRO DEGLI AFFARI ESTERI

Bonn, 21 aprile 1986

Signor Ministro,

ho l'onore di confermare ricevuta della Sua nota in data odierna il cui testo è il seguente:

"ho l'onore di proporLe, in nome del Governo della Repubblica Federale di Germania e con riferimento all'Accordo Culturale concluso l'8 febbraio 1956 fra i nostri due Governi, il seguente Accordo sulla costituenda Associazione "Villa Vigoni", Centro italo-tedesco per soggiorni di studio ed incontri nei campi della scienza, dell'educazione e della cultura:

1. L'Associazione "Villa Vigoni", sarà fondata conformemente al diritto privato tedesco ed iscritta nel Registro delle Associazioni di Bonn. Essa verrà riconosciuta in Italia in base all'ordinamento giuridico italiano.

2. L'Associazione promuove le relazioni italo-tedesche nei campi della scienza, dell'educazione e della cultura, incluse le loro connessioni con l'economia, la società e la politica, attraverso soggiorni di studio, colloqui, tavole rotonde, seminari estivi e manifestazioni artistiche nella Villa Vigoni.

L'Associazione dedica particolare attenzione all'incontro delle nuove leve del mondo scientifico, artistico e professionale. Offre un centro per la discussione delle sfide scientifiche, tecnologiche, sociali, economiche ed ecologiche che si presentano ai due Paesi ed all'Europa. L'interdisciplinarietà, i legami tra le culture di entrambi i Paesi, la considerazione di temi chiave di particolare rilevanza regionale, e l'apertura a temi e partecipanti di altri Stati d'Europa e del mondo sono rilevanti principi base dell'attività dell'Associazione. L'Associazione persegue direttamente ed esclusivamente fini di utilità pubblica.

3. Il Governo della Repubblica Federale di Germania, rappresentato dal Ministro federale dell'Educazione e della Scienza, metterà a disposizione dell'Associazione, in conformità a quanto stabilito nel corrispondente bilancio preventivo federale, l'ereditata proprietà della Villa Vigoni per l'uso gratuito, nonchè un sussidio annuale come contributo per l'assolvimento dei suoi compiti, ed i mezzi necessari alla conservazione della proprietà. La proprietà dovrà essere conservata nella sua sostanza integrale.

4. Il Governo della Repubblica Italiana, rappresentato dal Ministro degli Affari Esteri, si impegna ad iniziare quanto prima possibile l'iter legislativo per la messa a disposizione dell'Associazione di un sussidio annuale, via via stabilito nel bilancio preventivo del Ministero degli Affari Esteri, corrispondente, in linea di massima, al contributo tedesco, per l'adempimento dei compiti dell'Associazione.

Nell'attesa del perfezionamento dell'iter legislativo suddetto ed allorchè l'Associazione si sia costituita su basi paritetiche, il Governo della Repubblica Italiana, nel rispetto delle proprie procedure interne, contribuirà finanziariamente alla realizzazione di singole manifestazioni indette dall'Associazione che

si rivelino di particolare valore sul piano culturale, tecnico e scientifico e contribuiscano comunque alla promozione delle relazioni tra i due Paesi.

5. Entrambi i Governi parteciperanno al lavoro dell'Associazione nei suoi organi secondo lo statuto della stessa allegato alla presente Nota.

Essi favoriranno la partecipazione quanto più ampia possibile, su base analoga, di propri cittadini, enti ed organizzazioni all'Associazione Villa Vigoni e alle sue attività, contribuendo a dare ad esse diffusione e rilevanza anche al di fuori delle rispettive frontiere.

6. Per quanto concerne l'inserimento dell'Associazione "Villa Vigoni" nell'ambito dell'Accordo Culturale italo-tedesco dell'8 febbraio 1956 e dei relativi scambi di Lettere dell'8 febbraio 1956 e del 12 luglio 1961, si fa riferimento allo scambio di Note effettuato in data odierna tra i due Governi.

7. Il presente Accordo vale anche per il Land di Berlino, a meno che il Governo della Repubblica Federale di Germania non rimetta al Governo della Repubblica Italiana una dichiarazione in senso contrario entro tre mesi dall'entrata in vigore del presente Accordo.

Se il Governo della Repubblica Italiana si dichiara d'accordo con le suddette proposte, la presente Nota e alla Nota di Vostra Eccellenza esprimente l'assenso del Suo Governo costituiranno un Accordo fra i nostri due Governi che entrerà in vigore alla data della Sua Nota di risposta."

Ho l'onore di comunicarLe che il Governo italiano è d'accordo sul contenuto della Sua Nota predetta e che considera la Sua Nota con la mia risposta in data odierna come un Accordo intervenuto fra i nostri due Governi.

Voglia gradire, Signor Ministro, l'espressione della mia più alta considerazione.

[*Signed — Signé*][1]

Sua Eccellenza
Hans-Dietrich Genscher
Ministro degli Affari Esteri
della Repubblica Federale di Germania

[1] Signed by Giulio Andreotti — Signé par Giulio Andreotti.

[TRANSLATION]

THE MINISTER FOR FOREIGN AFFAIRS

Bonn, 21 April 1986

Sir,

I have the honour to acknowledge receipt of your note of today's date, which reads as follows:

[*See note I*]

I have the honour to inform you that the Italian Government is in agreement with the contents of your note, and that it considers your note and my reply of today's date as constituting an agreement between our two Governments.

Accept, Sir, etc.

[GIULIO ANDREOTTI]

His Excellency
Hans-Dietrich Genscher
Minister for Foreign Affairs
of the Federal Republic of Germany

[TRADUCTION]

LE MINISTRE DES AFFAIRES ÉTRANGÈRES

Bonn, le 21 avril 1986

Monsieur le Ministre,

J'ai l'honneur d'accuser réception de votre note en date de ce jour dont le texte est le suivant :

[*Voir note I*]

Je vous confirme que le Gouvernement italien approuve les dispositions énoncées dans votre note et considère celle-ci et ma réponse de ce jour comme constituant un Accord entre nos deux Gouvernements.

Veuillez agréer, etc.

[GIULIO ANDREOTTI]

Son Excellence
M. Hans-Dietrich Genscher
Ministre des affaires étrangères
de la République fédérale d'Allemagne

No. 25829

FEDERAL REPUBLIC OF GERMANY
and
ITALY

Exchange of notes constituting an arrangement concerning the inclusion of the "Villa Vigoni" Association within the scope of the German-Italian Cultural Agreement of 8 February 1956 and of related subsequent exchanges of letters. Bonn, 21 April 1986

Authentic texts: German and Italian.

Registered by the Federal Republic of Germany on 8 April 1988.

RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE
et
ITALIE

Échange de notes constituant un arrangement en vue d'accorder à l'Association «Villa Vigoni» le bénéfice des dispositions de l'Accord culturel germano-italien du 8 février 1956 et d'échanges de lettres connexes ultérieures. Bonn, 21 avril 1986

Textes authentiques : allemand et italien.

Enregistré par la République fédérale d'Allemagne le 8 avril 1988.

EXCHANGE OF NOTES CONSTITUTING AN ARRANGEMENT[1] BETWEEN THE FEDERAL REPUBLIC OF GERMANY AND THE ITALIAN REPUBLIC CONCERNING THE INCLUSION OF THE "VILLA VIGONI" ASSOCIATION WITHIN THE SCOPE OF THE GERMAN-ITALIAN CULTURAL AGREEMENT OF 8 FEBRUARY 1956 AND OF RELATED SUBSEQUENT EXCHANGES OF LETTERS

ÉCHANGE DE NOTES CONSTITUANT UN ARRANGEMENT[1] ENTRE LA RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE ET LA RÉPUBLIQUE ITALIENNE EN VUE D'ACCORDER À L'ASSOCIATION «VILLA VIGONI» LE BÉNÉFICE DES DISPOSITIONS DE L'ACCORD CULTUREL GERMANO-ITALIEN DU 8 FÉVRIER 1956 ET D'ÉCHANGES DE LETTRES CONNEXES ULTÉRIEURES

I

[GERMAN TEXT — TEXTE ALLEMAND]

Bonn, den 21. April 1986

DER BUNDESMINISTER DES AUSWÄRTIGEN

Herr Minister,

ich beehre mich, unter Bezug auf den heute unterzeichneten Notenwechsel zu dem zu gründenden deutschen privatrechtlichen Verein „Villa Vigoni", der beim Amtsgericht Bonn eingetragen und in Loveno di Menaggio (Como) tätig werden soll, folgendes vorzuschlagen:

1. Der zu gründende Verein wird in den Rahmen des deutsch-italienischen Kulturabkommens vom 8. Februar 1956 und der hierzu erfolgten Briefwechsel vom 8. Februar 1956 und vom 12. Juli 1961 aufgenommen, damit er die Ziele, derentwegen er gegründet wurde, besser verwirklichen und dieselben Rechte und Vergünstigungen genießen kann, die den deutschen Kulturinstituten in Italien und den italienischen Kulturinstituten in der Bundesrepublik Deutschland nach Artikel 3 des genannten Abkommens sowie der Briefwechsel vom 8. Februar 1956 und vom 12. Juli 1961 eingeräumt werden.

2. Im einzelnen wird der Verein folgende Steuerbefreiungen genießen:

— die Befreiung von den direkten staatlichen wie auch örtlichen Steuern, die in Menaggio für die Grundstücke im Besitz der Regierung der Bundesrepublik Deutschland anfallen würden und die dem deutsch-italienischen Zentrum „Villa Vigoni" für seine institutionellen Ziele zur Verfügung gestellt werden;

[1] Came into force on 21 April 1986, the date of the note in reply, in accordance with the provisions of the said notes.

[1] Entré en vigueur le 21 avril 1986, date de la note de réponse, conformément aux dispositions desdites notes.

— die Befreiung von staatlichen wie auch von örtlichen Steuern und Abgaben bei entgeltlicher oder unentgeldlicher Übereignung von Grundstücken, die der Verein „Villa Vigoni" erwerben würde;

— die Befreiung von Zöllen und allen anderen Gebühren bei der Einfuhr von Ausstattungs-, Lehr-, Studien- und Wissenschaftsmaterial, das zur Einrichtung und zum Betrieb des Zentrums notwendig ist.

3. Diese Vereinbarung gilt auch für das Land Berlin, sofern nicht die Regierung der Bundesrepublik Deutschland gegenüber der Regierung der Italienischen Republik innerhalb von drei Monaten nach Inkrafttreten der Vereinbarung eine gegenteilige Erklarung abgibt.

Falls sich die Regierung der Italienischen Republik mit den oben gemachten Vorschlägen einverstanden erklärt, werden diese Note und die das Einverständnis Ihrer Regierung zum Ausdruck bringende Note Eurer Exzellenz eine Vereinbarung zwischen unseren beiden Regierungen bilden, die mit dem Datum Ihrer Antwortnote in Kraft tritt.

Genehmigen Sie, Herr Minister, die Versicherung meiner ausgezeichneten Hochachtung.

GENSCHER

Seiner Exzellenz
dem Außenminister der
Italienischen Republik
Herrn Giulio Andreotti

[TRANSLATION]

THE FEDERAL MINISTER FOR FOREIGN AFFAIRS

Bonn, 21 April 1986

Sir,

I have the honour to propose the following with reference to the exchange of notes signed today concerning the Villa Vigoni Association to be established under German private law and registered with the municipal court, Bonn, which will carry out its activities at Loveno di Menaggio (Como).

1. The Association to be established shall be included within the scope of the German-Italian cultural agreement of 8 February 1956 and the exchanges of letters relating thereto of 8 February

[TRADUCTION]

LE MINISTRE FÉDÉRAL DES AFFAIRES ÉTRANGÈRES

Bonn, le 21 avril 1986

Monsieur le Ministre,

J'ai l'honneur de me référer à l'échange de notes signées ce jour au sujet de l'Association de droit privé allemand «Villa Vigoni» qui doit être enregistrée auprès du Tribunal administratif de Bonn et qui exercera ses activités à Loveno di Menaggio (Côme), et de vous proposer ce qui suit :

1. L'Association qui sera créée le sera dans le cadre de l'Accord culturel conclu entre la République fédérale d'Allemagne et la République italienne le 8 février 1956 et des échanges de notes

1956 and 12 July 1961[1], in order that it may perform more effectively the functions for which it was established and enjoy the rights and privileges extended to German cultural institutes in Italy and Italian cultural institutes in the Federal Republic of Germany in accordance with article 3 of that agreement and the exchanges of letters of 8 February 1956 and 12 July 1961;

2. Specifically, the Association shall enjoy the following tax exemptions:

— Exemption from direct State and local taxes that would be levied in Menaggio on the property owned by the Government of the Federal Republic of Germany and made available to the Villa Vigoni German-Italian Centre for its institutional purposes;
— Exemption from State and local taxes and charges levied on the transfer of ownership, whether or not against payment, of property acquired by the Villa Vigoni Association;
— Exemption from customs duties and all other charges levied on the import of equipment, teaching and study aids and scientific materials required for the installation and operation of the Centre.

3. This agreement shall also apply to *Land Berlin*, provided that the Government of the Federal Republic of Germany has not made a contrary declaration to the Government of the Italian Republic within three months from the date of entry into force of this agreement.

In the event that the Government of the Italian Republic is in agreement with the above proposals, this note and your note indicating the consent of your Government shall constitute an agreement between our two Governments which shall enter into force on the date of your reply.

Accept, Sir, etc.

GENSCHER

His Excellency
Mr. Giulio Andreotti
Minister for Foreign Affairs
of the Italian Republic

[1] United Nations, *Treaty Series*, vol. 1577, No. I-27532.

relatifs à cet accord des 8 février 1956 et 12 juillet 1961[1] pour lui permettre de mieux atteindre les objectifs qui lui ont été assignés et de jouir des mêmes droits et des mêmes privilèges que ceux qui ont été accordés aux instituts culturels de la République fédérale d'Allemagne en Italie et aux instituts culturels de la République italienne en République fédérale d'Allemagne, conformément à l'article 3 de l'Accord susmentionné et aux échanges de notes des 8 février 1956 et 12 juillet 1961.

2. Plus précisément, l'Association bénéficiera des avantages fiscaux suivants :

— Exemption des impôts directs nationaux et des impôts locaux sur les terrains appartenant, à Menaggio, au Gouvernement de la République fédérale d'Allemagne, qui sont mis à la disposition du centre italo-allemand «Villa Vigoni» au profit de ses activités institutionnelles;
— Exemption des droits et impôts nationaux et locaux de mutation sur les terrains que l'Association «Villa Vigoni» pourrait acquérir, à titre onéreux ou gratuit;
— Exemption des droits de douane et de tout autre droit d'importation d'équipement, de matériel d'étude ainsi que de matériel didactique et scientifique nécessaires à l'installation et à l'exploitation du centre.

3. Les présentes dispositions s'appliqueront aussi au *Land Berlin* pour autant que le Gouvernement de la République fédérale d'Allemagne n'aura pas fait de déclaration contraire au Gouvernement de la République italienne dans les trois mois suivant l'entrée en vigueur du présent Accord.

Si les dispositions énoncées ci-dessus rencontrent l'agrément du Gouvernement de la République italienne, je propose que la présente note et la note de confirmation de Votre Excellence constituent, entre nos deux Gouvernements, un Accord qui entrera en vigueur à la date de votre réponse.

Veuillez agréer, etc.

GENSCHER

Son Excellence
Monsieur Giulio Andreotti
Ministre des affaires étrangères
de la République italienne

[1] Nations Unies, *Recueil des Traités*, vol. 1577, n° I-27532.

II

[ITALIAN TEXT — TEXTE ITALIEN]

A MINISTRO DEGLI AFARI ESTERI

Bonn, 21 aprile 1986

Signor Ministro,

ho l'onore di confermare ricevuta della Sua Nota in data odierna, il cui testo è il seguente:

"con riferimento allo scambio di Note firmato in data odierna e relativo alla costituenda Associazione di diritto privato tedesco "Villa Vigoni", che sarà registrata presso la pretura di Bonn ed opererà a Loveno di Menaggio (Como), ho l'onore di proporLe quanto segue:

1. La costituenda Associazione verrà inserita nell'ambito dell'Accordo Culturale italo-tedesco dell'8 febbraio 1956, e dei relativi scambi di lettere dell'8 febbraio 1956 e del 12 luglio 1961, affinchè possa meglio realizzare gli obiettivi per i quali sarà costituita, e godere degli stessi diritti e benefici accordati agli istituti culturali tedeschi in Italia ed agli istituti culturali italiani nella Repubblica Federale di Germania ai sensi dell'art. 3 del detto Accordo nonchè degli scambi di Lettere dell'8 febbraio 1956 e del 12 luglio 1961.

2. In particolare l'Associazione beneficierà delle seguenti esenzioni fiscali:

— L'esenzione dalle imposte dirette, sia erariali sia locali, che colpirebbero a Menaggio gli immobili di proprietà del Governo della Repubblica Federale di Germania messi a disposizione del Centro italo-tedesco "Villa Vigoni" per i suoi scopi istituzionali;
— l'esenzione dalle imposte e tasse, sia erariali sia locali, sui trasferimenti a titolo oneroso o gratuito dei beni immobili che verrebbero acquistati dall'Associazione "Villa Vigoni";
— l'esenzione dai dazi e da tutti gli altri tributi dovuti per l'importazione di oggetti di arredamento, di materiale didattico, di studio e scientifico necessari per l'attrezzatura ed il funzionamento del Centro.

3. Il presente Accordo vale anche per il Land di Berlino, a meno che il Governo della Repubblica Federale di Germania non rimetta al Governo della Repubblica Italiana una dichiarazione in senso contrario entro tre mesi dall'entrata in vigore del presente Accordo.

Se il Governo della Repubblica italiana si dichiara d'accordo con le suddette proposte, la presente Nota e la Nota di Vostra Eccellenza esprimente l'assenso del Suo Governo costituiranno un Accordo fra i nostri due Governi che entrerà in vigore alla data della Sua Nota di risposta."

Ho l'onore di comunicarLe che il Governo italiano è d'accordo sul contenuto della Sua Nota predetta e che considera la Sua Nota con la mia risposta in data odierna come un Accordo intervenuto fra i nostri due Governi.

Voglia gradire, Signor Ministro, l'espressione della mia più alta considerazione.

[*Signed — Signé*][1]

Sua Eccellenza
Hans-Dietrich Genscher
Ministro degli Affari Esteri
della Repubblica Federale di Germania

[TRANSLATION]

THE MINISTER FOR FOREIGN AFFAIRS

Bonn, 21 April 1986

Sir,

I have the honour to acknowledge receipt of your note of today's date, which reads as follows:

[*See note I*]

I have the honour to inform you that the Italian Government is in agreement with the contents of your note, and that it considers your note and my reply of today's date to constitute an agreement between our two Governments.

Accept, Sir, etc.

[GIULIO ANDREOTTI]

His Excellency
Hans-Dietrich Genscher
Minister for Foreign Affairs
of the Federal Republic of Germany

[TRADUCTION]

LE MINISTRE DES AFFAIRES ÉTRANGÈRES

Bonn, le 21 avril 1986

Monsieur le Ministre,

J'ai l'honneur d'accuser réception de votre note en date de ce jour dont le texte est le suivant :

[*Voir note I*]

Je vous confirme que le Gouvernement italien approuve les dispositions énoncées dans votre note et considère celle-ci et ma réponse de ce jour comme constituant un Accord entre nos deux Gouvernements.

Veuillez agréer, etc.

[GIULIO ANDREOTTI]

Son Excellence
M. Hans-Dietrich Genscher
Ministre des affaires étrangères
de la République fédérale d'Allemagne

[1] Signed by Giulio Andreotti — Signé par Giulio Andreotti.

No. 25830

UNITED NATIONS (UNITED NATIONS DEVELOPMENT PROGRAMME) and NIGERIA

Standard Basic Assistance Agreement. Signed at Lagos on 12 April 1988

Authentic text: English.

Registered ex officio *on 12 April 1988.*

ORGANISATION DES NATIONS UNIES (PROGRAMME DES NATIONS UNIES POUR LE DÉVELOPPEMENT) et NIGÉRIA

Accord type d'assistance de base. Signé à Lagos le 12 avril 1988

Texte authentique : anglais.

Enregistré d'office le 12 avril 1988.

Annex 25

Inscription of a judicial mortgage in the land register covering "Villa Vigoni"

BOLLO ASSOLTO
in modo virtuale art. 6
tariffa all. a D.P.R.
26-10-1972 N. 642

80026770489 N.Rep. 1648/2006 Prog. - Vers. 1

AGENZIA DEL TERRITORIO - SERVIZIO DI PUBBLICITA' IMMOBILIARE

NOTA DI ISCRIZIONE

Ufficio Provinciale del Territorio di COMO

Data richiesta: 07/06/2007 N.pres. 138 Reg. gen. 20821 Reg. part. 4217
Nota presentata su supporto informatico

QUADRO A

DATI RELATIVI AL TITOLO

Descrizione : ATTO GIUDIZIARIO
Data : 13/10/2006 N. Rep.: 1648/2006
Pubblico Ufficiale : CORTE D'APPELLO Cat. : 2
C.F. : 800 267 70489
Sede : FIRENZE Prov. : FI

DATI RELATIVI ALL'IPOTECA O AL PRIVILEGIO

Specie dell'ipoteca / privilegio : IPOTECA GIUDIZIALE
Derivante da : SENTENZA DI CONDANNA
Codice : 283
Somma garantita :
Capitale €. 20.000,00 Tasso int. annuo - Tasso int. som. -
Importo interessi €. 3.000,00 Spese €. 2.000,00
Totale €. 25.000,00 Importi variabili: No Valuta estera: No
Somma iscritta da aumentare automaticamente: No
Presenza di condizione risolutiva : No Durata: -
Termine dell'ipoteca : - Titoli di credito garantiti n.: -
Stipulazione con un unico contratto: No Elenco macchinari e pertinenze: No

ALTRI DATI

Formalità di riferimento: Data: - Numero registro particolare: -
Quadro D : Presenza di parti libere relative al: quadro A: No quadro B: No quadro C: No
Richiedente: AVVOCATO JOACHIM LAU
Indirizzo : VIA DELLE FARINE N. 2 - FIRENZE

LIQUIDAZIONE

Unità negoziali	: 1	Imposta ipotecaria	: €.	500,00
Soggetti a favore	: 1	Sanzioni amm.vo	: €.	-
Soggetti contro	: 1	Imposta di Bollo	: €.	59,00
Liquidazione contestuale		Tassa ipotecaria	: €.	35,00
		Totale generale	: €.	594,00

ESEGUITA LA FORMALITÀ. Importi versati ai sensi del D.LGS N.237/1997 e succ. mod.
ESATTI EURO: *cinquecentonovantaquattro e zero centesimi*

BOLLO RISCOSSO IN MODO VIRTUALE IL CONSERVATORE

LBRFNC52P14A202A IL GERENTE
Emanuele Cappetta

TIMBRO A CALENDARIO

1 - segue

Iscr. 80026770489 N. rep. 1648/2006 Prog.- Vers. 1
Data richiesta: 07/06/2007 N.pros. 138 Reg. gen. 20821 Reg. part. 4217

QUADRO B - IMMOBILI

Unità negoziale: 1 Progressivo Immobile: 1
Identificazione attuale:
Comune di MENAGGIO Prov. CO
Cod. C4K9 Catasto U Sez. LOV Fgl. 9 Part. 61 Sub. 703
Nat. A8 Ettari: - Are: - Centiare:- M.quadri: - N.vani: 60 M.cubi: -
Indirizzo: VIA GIULIO VIGONI
Nr.1 Sc.- Int.- Piano T-1 Edif.- Lotto - Gruppo immobili graffati nr. -
Identificazione precedente: -

Unità negoziale: 1 Progressivo Immobile: 2
Identificazione attuale:
Comune di MENAGGIO Prov. CO
Cod. C4KP Catasto U Sez. LOV Fgl. 9 Part. 61 Sub. 704
Nat. A3 Ettari: - Are: - Centiare:- M.quadri: - N.vani: 8 M.cubi: -
Indirizzo: VIA GIULIO VIGONI
Nr.1 Sc.- Int.- Piano T-S1 Edif.- Lotto - Gruppo immobili graffati nr. -
Identificazione precedente: -

Unità negoziale: 1 Progressivo Immobile: 3
Identificazione attuale:
Comune di MENAGGIO Prov. CO
Cod. C4KP Catasto U Sez. LOV Fgl. 9 Part. 61 Sub. 705
Nat. A3 Ettari: - Are: - Centiare:- M.quadri: - N.vani: 3,5 M.cubi: -
Indirizzo: VIA GIULIO VIGONI
Nr.1 Sc.- Int.- Piano T Edif.- Lotto - Gruppo immobili graffati nr. -
Identificazione precedente: -

QUADRO C - SOGGETTI

A FAVORE
Progressivo Soggetto: 1 Riga: 1
Denominazione o Ragione Sociale:
AUTOGESTIONE PREFETTIZIA DI VOIOTIA
Sede: GRECIA Prov. EE
Codice fiscale: 01644460519
Quota: 1/1 relativamente all' unità neg. 1 Codice: 1 Diritto: PROPRIETA'
Domicilio ipotecario eletto: C/O AVV. JOACHIM LAU - VIA DELLE FARINE N.2 - FIRE

CONTRO
Progressivo Soggetto: 1 Riga: 1
Denominazione o Ragione Sociale:
GERMANIA
Sede: GERMANIA Prov. EE
Codice fiscale: 93002010135
Quota: 1/1 relativamente all' unità neg. 1 Codice: 1 Diritto: PROPRIETA'

DEBITORI NON DATORI DI IPOTECA
Progressivo Soggetto: - Riga: -

QUADRO D

Descrizione della condizione risolutiva cui è sottoposta l'ipoteca e/o dai titoli di credito allegati
(ovvero altri aspetti che si ritiene utile pubblicare)

IL RICHIEDENTE: AVVOCATO JOACHIM LAU

2 - segue

Translation

VILLA VIGONI

GERMAN – ITALIAN CENTRE

Director General Christoph Ehrenberg
European and International Cooperation
in Education and Research
Federal Ministry of Education and Research
Heinemannstr. 2

D-53175 Bonn

By Fax: 0049/1888/5785013

Loveno di Menaggio
14 June 2007

Enc.: Certificate of forced registration of mortgage, decision of the Higher Regional Court of Florence of 13 October 2006

Dear Mr Ehrenberg,

With reference to your e-mail of 12 June 2007 and the telephone conversation conducted with you on 13 June 2007, please find herewith copies of the abovementioned documents.

In order to complete those documents, we will send you by post a copy of the Italian translation of the Greek court's judgment.

Yours sincerely,

(sgd) Aldo Venturelli

Translation

LAND AGENCY – PUBLICATION SERVICE
RECORD OF REGISTRATION

Provincial Office of the Territory of COMO
Date of request: 7.6.2007 Pres. no 138 Gen. Reg. no 20821 Indiv. Reg. no. 4217
Computer-generated record

SCHEDULE A
PARTICULARS OF TITLE

Description: Judicial act Rep. no: 1648/2006
Date: 13.10.2006 Cat. 2
Public official: COURT OF APPEAL
C.F.: 800 267 70489 Prov.: Fl.
Seat: FLORENCE

PARTICULARS OF MORTGAGE OR PREFERENTIAL CLAIM

Type of mortgage/preferential claim: JUDICIAL MORTGAGE
Cause: SENTENCE
Code: 283
Sum guaranteed:

Capital	EUR 20 000.00	Annual int. rate	int. rate [illegible]
Interest	EUR 3 000.00	Expenses EUR 2 000.00	
Total	EUR 25 000.00	Variable amounts: No	Foreign currency: No

Registered amount to be automatically increased: No
Any condition subsequent: No Duration:
Mortgage term: – Credit instruments guaranteed: –
Drawn up in a single contract: No List of machinery and appliances: No

OTHER INFORMATION

Reference formalities: Date: - Individual registry no. : -
Sched. D: Presence of unmortgaged parts vis à vis : Sched. A: No Sched. B: No
Sched. C: No
Applicant: Advocate Joachim Lau

Address: Via delle Farine, no. 2 – FLORENCE

		PAYMENT	
Contract units: 1	Mortgage duty:	EUR	500.00
Parties for: 1	Penalties:	EUR	
Parties against: 1	Stamp duty:	EUR	59.00
Concomitant payment	Mortgage tax:	EUR	35.00
	General Total	EUR	594.00

FORMALITY COMPLETED Amounts paid pursuant to D. Law No 237/1997 as amended.
EXACT AMOUNT IN EUROS: five hundred and ninety four euros and no cents.

STAMP PAID ONLINE THE REGISTRAR
[SIGNATURE/STAMP]

Translation

Reg. 80026770489 Roll no 1648/2006 Prog. Vers. 1
Date requested: 7.6.2007 pres. no 138 Gen. Reg. 20821 Indiv. Reg. 4217

SCHEDULE B – IMMOVABLE PROPERTY

Contract units: 1 Graduated tax: 1
Current identification:
Municipality of MENAGGIO Prov. COMO
Cod. C4KP Cadaster U Sect. LOV Folio 9 Section 61 Sub. 703
Nat. A8 Hectares: - Ares: - Centiares: - m^2: - No rooms: 60 m^3: -
Address: VIA GIULIO VIGONI
No 1 Sc. - Int. - Floor T-1 Edif Plot - Group of contiguous buildings no
Previous identifier: -

Contract units: 1 Graduated tax: 2
Current identification:
Municipality of MENAGGIO Prov. COMO
Cod. C4KP Cadaster U Sect. LOV Folio 9 Section 61 Sub. 704
Nat. A3 Hectares: - Ares: - Centiares: - m^2: - No rooms: 8 m^3: -
Address: VIA GIULIO VIGONI
No 1 Sc. - Int. - Floor T-S1 Edif Plot - Group of contiguous buildings no
Previous identifier: -

Contract units: 1 Graduated tax: 3
Current identification:
Municipality of MENAGGIO Prov. COMO
Cod. C4KP Cadaster U Sect. LOV Folio 9 Section 61 Sub. 705
Nat. A3 Hectares: - Ares: - Centiares: - m^2: - No rooms: 3.5 m^3: -
Address: VIA GIULIO VIGONI
No 1 Sc. - Int. - Floor T Edif Plot - Group of contiguous buildings no
Previous identifier: -

SCHEDULE C – PARTIES

FOR

Liability to graduated tax: 1 Line: 1

Name or company name:

AUTOGESTIONE PREFETTIZIA DI VOIOTIA

Registered office: GREECE

Tax code: 01644460529

Share: 1/1 concerning transaction unit 1 Code: 1 Law: PROPERTY

Service address for mortgage purposes: c/o Avv. Joachim Lau – Via delle Farine no 2, Florence

AGAINST

Liability to graduated tax: 1 Line: 1

Name or company name:

GERMANY

Registered office: GERMANY

Tax code: 93002010135

Share: 1/1 concerning transaction unit 1 Code: 1 Law: PROPERTY

NON-MORTGAGE DEBTORS

Liability to graduated tax: - Line: -

SCHEDULE D

Description of the rescission clause to which the mortgage and/or attached credit instruments are subject (or other elements which could be useful in the public domain)

APPLICANT: ADVOCATE JOACHIM LAU

Annex 26

Avvocatura Distrettuale dello Stato di Milano

Submission of 6 June 2008

Avvocatura dello Stato

Ct 2905/08 Avv. S.Vanadia

12 GIU. 2008

IL CANCELLIERE

TRIBUNALE DI COMO

RG 6112/2007

Atto di intervento

per

La Presidenza del Consiglio dei Ministri, in persona del Presidente pro tempore, rappresentata e difesa per legge dall'Avvocatura Distrettuale dello Stato di Milano presso i cui uffici, in via Freguglia 1 è pure legalmente domiciliata

contro

L'Autogestione Prefettizia di Voiotia,

e nei confronti della

Repubblica Federale di Germania.

* * * * * *

Presa visione dell'atto di citazione proposto dalla Repubblica Federale di Germania, con il presente atto si costituisce in giudizio la Presidenza del Consiglio dei Ministri, la quale ha interesse ad intervenire nel presente procedimento per i seguenti

MOTIVI

Preliminarmente si ricorda che, in esecuzione del decreto della Corte di Appello di Firenze del 13/6/ 06 , è stata iscritta ipoteca giudiziale su Villa Vigoni, un immobile che ospita il centro culturale Italo-Tedesco sorto 1986 a seguito di un accordo tra la Repubblica Federale di Germania e la Repubblica Italiana.

Tale accordo faceva seguito all'accettazione nel 1983 da parte della Repubblica Federale di Germania del testamento di Ignazio Vigoni, che lasciava alla Germania le

alta cultura per le relazioni tra Italia e Germania, il quale rinnovasse le tradizioni di Goethe e di Heinrich Milius, in ricordo delle origini tedesche della proprietà di Villa Vigoni. Era stato infatti Heinrich Milius, banchiere ed imprenditore, legato ai circoli goethiani, a Weimar e a quelli manzoniani e romantici a Milano, ad acquistare nel 1829 la Villa, poi passata alla famiglia Vigoni più volte imparentatasi con altri rami della famiglia Mylius.

La villa Mylius-Vigoni è quindi una testimonianza, rimasta fino ad oggi intatta, di una grande tradizione culturale, che ha saputo dar vita altresì ad importanti processi di innovazione economica, tecnologia e sociale.

Lo strumento scelto dai due Paesi per realizzare questo progetto di un centro di alta cultura, diretto e amministrato da entrambi attraverso una collaborazione rafforzata, è quello della Associazione: sotto il profilo giuridico Villa Vigoni opera come una Associazione in Italia e come una Verein in Germania, diretti però da un unico consiglio di amministrazione e un'unica assemblea di soci , da un unico segretario generale (al momento, il Prof Aldo Venturelli) e da due Presidenti, uno di parte italiana (L'Ambasciatore Umberto Vattani) ed uno di parte tedesca (la Prof.ssa Ellisabeth Kieven, Direttrice della Biblioteca Hertziana di Roma).

Per quanto riguarda il rapporto istituzionale con i due Governi, esso è assicurato dalla presenza negli organi societari e dal riferimento costante al Ministero della Ricerca della Repubblica Federale di Germania ed al Ministero degli Affari Esteri della Repubblica Italiana; altri Ministeri, Regioni, Enti Locali ed Istituzioni Scientifiche figurano come membri istituzionali dell'Associazione.

Nel vertice dei governi italiano e tedesco , tenutosi nel settembre 2000 a Berlino, Villa Vigoni fu definita come centro di eccellenza per le relazioni culturali e politiche tra Italia e Germania.

Questo carattere di eccellenza di Villa Vigoni fu ribadito dai due Capi di Stato di allora, Carlo Azeglio Ciampi e Johannes Rhau, in occasione della visita a Villa Vigoni nel 2002. Esso rappresenta infine il principio fondamentale del nuovo Statuto che è risultato dalle Consultazioni nel 2005 tra i rappresentanti dei due Governi, ove si è sottolineato ulteriormente il carattere europeo del Centro.

Grazie a queste caratteristiche , Villa Vigoni è al centro di un vasto network, che riguarda in primo luogo le principali istituzioni scientifiche e accademiche dei due Paesi, il Censis , il DAAD, la Alexander von Humboldt-Stiftung; rapporti

particolarmente intensi sono intrattenuti con le Conferenze dei Rettori dei due Paesi e con numerose Università e Centri di Ricerca.

Un parziale finanziamento delle attività di VillaVigoni ,che copre principalmente il mantenimento delle strutture ed i costi del personale, è assicurato dalla Repubblica Federale di Germania e, in parte, dalla Repubblica Italiana (dal 2001 il contributo annuale italiano, tramite il Ministero degli Affari Esteri, e tedesco, tramite il Ministero della Ricerca BMBF, ammonta a 310.000 euro; la Germania versa un ulteriore contributo annuale di circa 600.000 euro per le spese di manutenzione della proprietà) . Altri contributi sono versati su base annuale da Regioni e Laender che hanno aderito all'Associazione e da altri Ministeri (Università e Ricerca Scientifica, Beni e Attività Culturali) interessati all'attività del centro.

Infine, in contatto costante con alcuni Istituti di politica internazionale come ISPI, IEP, SWP, IAL, Villa Vigoni svolge una significativa funzione di ricerca per delineare nuove prospettive di politica europea ed internazionale che vengono annualmente discusse in un incontro con i giornalisti dei due Paesi.

Alla luce di tanto, vi è tutto l'interesse della Presidenza del Consiglio dei Ministri a che venga accolta la domanda della Repubblica Federale di Germania volta a far cancellare l'iscrizione ipotecaria ai danni di un immobile destinato a promuovere le relazioni italo tedesche nei campi della scienza, dell'educazione, della cultura , dell'economia, della società e della politica.

***

D'altra parte, l'illegittimità dell'iscrizione dell'ipoteca risulta anche sotto diverso profilo.

Ed infatti, secondo quanto appena esposto, ed anche alla luce della decisione della Corte Costituzionale n. 329/1992, deve ritenersi che Villa Vigoni abbia una destinazione pubblicistica e goda di un'immunità rispetto alle azioni cautelari ed esecutive.

Al riguardo la Corte Costituzionale, con la sentenza sopra citata, ha precisato che l'immunità degli Stati esteri dalla giurisdizione cautelare ed esecutiva dello Stato del foro non è un semplice prolungamento dell'immunità dalla giurisdizione di cognizione.

L'immunità dall'esecuzione conserva infatti un ambito normativo più ampio di quello in cui opera l'immunità dalla giurisdizione: per negarla non basta un titolo esecutivo efficace nel territorio dello Stato del foro, oppure, se è chiesta una misura cautelare, la

soggettività del rapporto controverso alla cognizione delle corti di questo o di altro Stato, ma occorre altresì che i beni investiti dalla domanda di sequestro o dal procedimento esecutivo non siano destinati all'adempimento di funzioni pubbliche (iure imperii) dello Stato estero.

Così intesa, l'immunità ristretta (o funzionale) in materia cautelare ed esecutiva, verso la quale la giurisprudenza italiana si era orientata già nel primo dopoguerra (cfr. Cass., s.u., 13 marzo 1926, n. 729), è stata affermata, per esempio, dalla Corte di cassazione francese a partir e dagli arrets Englander dell'11 febbraio 1969 e Clerget del 2 novembre 1971, dalla Corte costituzionale della Germania federale con le sentenze 13 dicembre 1977 (in una causa contro la Repubblica delle Filippine) e 12 aprile 1983 (in una causa contro la National Iranian Oil Company), dal Tribunale federale svizzero con numerose pronunce (da ultimo, sentenza 19 gennaio 1987, in una causa contro la Repubblica socialista della Romania) e dalla Corte d'appello dell'Aja (sentenza 28 novembre 1968, in causa N.V. Cabolent c. National Iranian Oil Company). Al principio dell'immunità ristretta in executivis sono improntate anche le recenti legislazioni del Regno Unito (State Immunity Act, cit.), degli U.S.A. (Foreign Sovereign Immunities Act del 21 ottobre 1976) e altre di tipo analogo (Canada, Sud Africa, Pakistan, Singapore e Australia), le quali impostano il limite con criteri e misure diversi dalla distinzione tra beni destinati ad atti iure imperii e beni destinati ad atti iure gestionis. La Corte non si nasconde che la distinzione dà luogo a difficoltà applicative, soprattutto nel caso di beni a destinazione promiscua, come i depositi bancari o i conti correnti intestati a un'ambasciata straniera, ma, in mancanza di un intervento legislativo, essa è l'unica disponibile.

E' opportuno ricordare in proposito che non è generalmente riconosciuto, e in particolare è rifiutato dagli Stati dell'Europa occidentale, compreso il Regno Unito, il limite ulteriore per cui non basterebbe la destinazione del bene aggredito a fini (lato sensu) commerciali, ma occorrerebbe inoltre un legame specifico con l'oggetto della domanda, cioè la destinazione specifica del bene all'operazione commerciale da cui deriva il rapporto controverso.

I principi appena esposto portano dunque ad escludere che sussista una giurisdizione del Giudice Italiano in ordine all'azione esecutiva su Villa Vigoni, con al conseguenza che sulla stessa non sarà nemmeno possibile l'iscrizione dell'ipoteca.

*****

Tanto premesso, la resistente del Consiglio dei Ministri [illegible]

conclude

per l'accoglimento delle domande proposte dalla Repubblica Federale di Germania.

Si depositano:

- copia delle lettere in data 21 aprile 1986 a firma dell'allora Ministero degli Affari Esteri On. Andreotti, che completavano l'accordo per la restituzione del centro;
- copia sentenza Corte Costituzionale n° 329/92.

Milano, 6 giugno 2008

Avv. Silvana Vanadia
Avvocato dello Stato

Translation

State Legal Advisory Office
Ct. 2905/08 Avv. S. Vanadia

TRIBUNALE DI COMO
RG 6112/2007

Intervention

on behalf of

the Presidency of the Council of Ministers, in the person of the President in Office, represented and defended in law by the Avvocatura Distrettuale dello Stato di Milano (State Legal Service for the District of Milan) with an address for service at the chambers of the Legal Service in via Freguglia 1,

against

Autogestione Prefettizia di Voiotia (Autonomous Prefecture of Voiotia)

and in relation to

the Federal Republic of Germany,

* * * * *

Having examined the application lodged by the Federal Republic of Germany, the Presidency of the Council of Ministers, by means of this document, declares its interest in intervening in this case on the following

GROUNDS:

First, it should be noted that, pursuant to the decree of the Court of Appeal, Florence, of 13 June 2006, a judicial mortgage was registered in respect of Villa Vigoni, a building which

houses the Italo-German cultural centre, founded in 1986 following an agreement between the Federal Republic of Germany and the Italian Republic.

That agreement was entered into following the acceptance in 1983 by the Federal Republic of Germany of the will of Ignazio Vigoni, who bequeathed to Germany his properties in Loveno di Menaggio, provided that they be used to promote high culture in relations between Italy and Germany, renewing the traditions of Goethe and Heinrich Milius, in memory of the German origins of Villa Vigoni. Indeed it was Heinrich Milius, a banker and businessman who frequented the circles of Goethe, in Weimar, and Manzoni and the Romantics in Milan, who bought the Villa in 1829, which then passed down to the Vigoni family, related by marriage to other branches of the Milius family.

The Milius-Vigoni villa is therefore testimony, still intact to this day, to a great cultural tradition which also acted as a springboard for major economic, technological and social innovations.

The instrument chosen by the two countries for carrying forward this project for a centre of high culture, jointly managed and administered through close cooperation, was that of an Association: from a legal viewpoint Villa Vigoni operates as an Association in Italy and a Verein in Germany, both managed by a single board of directors and a single general meeting of members, one general secretary (currently Aldo Venturelli) and two Presidents, one for the Italian side (Ambassador Umberto Vattani) and one for the German side (Ellisabeth Kieven, Director of the Biblioteca Hertziana in Rome).

As regards the institutional relationship with the two governments, this is provided by the presence in the company organs of, and constant reference to, the Ministry of Research of the Federal Republic of Germany and the Ministry of Foreign Affairs of the Italian Republic; other ministries, regions, local authorities and scientific institutions are institutional members of the Association.

At the summit meeting of the Italian and German Governments held in September 2000 in Berlin, Villa Vigoni was defined as a centre of excellence for cultural and political relations between Italy and Germany.

This quality of excellence of Villa Vigoni was reiterated by the two Heads of State, Carlo Azeglio Ciampi and Johannes Rau, on the occasion of a visit to Villa Vigoni in 2002. This is

the underlying principle of the new Statute which resulted from the talks in 2005 between representatives of the two governments, and attention has subsequently been drawn to the European nature of the Centre.

Due to these qualities, Villa Vigoni is at the centre of a vast network involving primarily the main scientific and academic institutions of the two countries, Censis, DAAD, the Alexander von Humboldt-Stiftung; particularly close relations are maintained with the Conferences of Rectors of the two countries and with numerous universities and research centres.

Partial funding of the activities of the Centre, assigned principally to maintaining structures and paying staff, is provided by the Federal Republic of Germany and, partly, by the Italian Republic (since 2001 the annual total contribution has been EUR 310,000, of which the Italian contribution has been paid via the Ministry of Foreign Affairs and the German contribution via the Federal Ministry of Education and Research; Germany pays a further annual contribution of around EUR 600,000 which is allocated to property maintenance). Other contributions are paid on an annual basis by the Italian regions and German Länder which are members of the Association and by other ministries (Universities and Scientific Research, Cultural Heritage and Activities) which are interested in the activities of the Centre.

Finally, by liaising constantly with certain international policy institutes such as ISPI, IEP, SWP, IAL, Villa Vigoni pursues a considerable research function aimed at identifying new guidelines for European and international policy, guidelines which are discussed annually at a meeting with journalists from the two countries.

In the light of all this, the Presidency of the Council of Ministers has a very evident interest in the acceptance of the application by the Federal Republic of Germany, seeking the cancellation of the mortgage registration against a building which seeks to promote Italo-German relations in the fields of science, education, culture, economics, social affairs and politics.

* * * *

Furthermore, the mortgage registration is unlawful from another, different perspective.

In the light of the above comments, and also in the light of Decision no 329/1992 of the Constitutional Court, it must be held that Villa Vigoni has a public purpose vocation and enjoys immunity from summary and executory measures.

In this connection, the Constitutional Court held, in the above judgment, that the immunity of foreign States from the summary and executory jurisdiction of the forum State is not a mere extension of their immunity from cognitive jurisdiction. Immunity from enforcement is in fact broader in scope than immunity from jurisdiction: to refute it requires more than just an enforcement order which is valid in the territory of the forum State, or, where a summary measure is sought, the subjection of the disputed relationship to examination by the courts of this or another State; it is also necessary for property subject to an application for seizure or to an enforcement procedure not to be used by the foreign State in the exercise of its public powers.

On this construction, the restricted (or functional) immunity in summary and executory matters towards which Italian case-law moved in the immediate post-war period (cf. Cass., combined sections, no 729 of 13 March 1926) has been confirmed, for example, by the French Court of Cassation in its judgments of 11 February 1969 in *Englander* and of 2 November 1971 in *Clerget,* by the Constitutional Court of the Federal Republic of Germany in a judgment of 13 December 1977 (in a case against the Republic of the Philippines) and of 12 April 1983 (in a case against the National Iranian Oil Company), by the Swiss Federal Court in numerous judgments (most recently, the judgment of 19 January 1987 in a case against the Socialist Republic of Romania) and by the Court of Appeal in The Hague (judgment of 28 November 1968 in *N.V. Caabolent* v *National Iranian Oil Company*). The principle of restricted immunity *in executivis* has also been used as a basis for recent legislation by the United Kingdom (State Immunity Act, op. cit.) by the United States (Foreign Sovereign Immunities Act of 21 October 1976) and other legislations of a similar type (Canada, South Africa, Pakistan, Singapore and Australia), which place the limit on the basis of criteria other than the distinction between property used for activities *iure imperii* and property used for activities *iure gestionis*. The Court does not deny that the distinction is somewhat difficult to apply, especially in the case of assets with multiple purposes, such as bank deposits or current accounts in the name of a foreign embassy, but in the absence of legislative intervention, it is the only available distinction.

It should be noted in this connection that there is no general recognition, and none whatever in western European States, including the United Kingdom, of the further limitation whereby it is not sufficient for the property subject to restraint to be used for commercial (in the wide sense) purposes, and there must also be a specific connection with the subject-matter of the application, in other words the property must be used specifically for the commercial activities giving rise to the contested relationship.

The principles set out above point to the conclusion that the jurisdiction of the Italian courts must be precluded in relation to the action for enforcement concerning Villa Vigoni, with the result that it will not even be possible for the mortgage on it to be registered.

In view of the foregoing, the Presidency of the Council of Ministers concludes, as above, that the applications made by the Federal Republic of Germany should be upheld.

Documents lodged:

- copy of the letters of 21 April 1986 signed by the Minister of Foreign Affairs at the time, Mr Andreotti, finalizing the agreement for the handing over of the centre;
- copy of judgment 329/92 of the Constitutional Court.

Milan, 6 June 2008 Silvana Vanadia, State Advocate

Annex 27

Corte di Cassatione

Judgment No. 1653/1974, 6 June 1974

English translation: 65 ILR 308

1653 — 6 giugno 1974 — SS.UU. — Pres. (ff.) LAPORTA, Rel. SAVA, P.M. PEDACE (diff.) — Assoc. Cavalieri italiani del Sovrano Militare Ordine di Malta (avv.ti Gazzoni e Nicolò) c. Piccoli (avv. Budetta) — (*Regola giurisdizione, Trib. Salerno 16 maggio 1972*).

Competenza e giurisdizione - Principi generali - Stati ed Enti esteri - Soggezione alla giurisdizione italiana - Esclusione - Condizioni e limiti - Enti pubblici stranieri - Applicabilità del principio.

Competenza e giurisdizione - Principi generali - Stati ed Enti esteri - Sovrano Militare Ordine di Malta - E' tale - Immunità dalla giurisdizione italiana - Compete.

Competenza e giurisdizione - Principi generali - Stati ed Enti esteri - Sovrano Militare Ordine di Malta - Scopo istituzionale - Associazione dei Cavalieri italiani - Natura - Immunità dalla giurisdizione italiana - Compete.

Competenza e giurisdizione - Principi generali - Stati ed Enti esteri - Attività - Natura pubblica - Rilevanza esclusiva del carattere dell'attività - Fattispecie relativa all'Associazione Cavalieri italiani del S.M.O.M..

Pubblico impiego - Costituzione del rapporto - Requisiti - Assunzione mediante contratto - Automatica esclusione del rapporto di pubblico impiego - Inconfigurabilità.

Competenza e giurisdizione - Impiego pubblico e privato - Dipendenti Enti internazionali - Giurisdizione italiana - Esclusione - Fattispecie relativa all'Associazione Cavalieri italiani del S.M.O.M..

In virtù del principio consuetudinario par in parem non habet jurisdictionem, *universalmente accettato e rientrante nella previsione dell'art. 10 primo comma Cost., gli Stati esteri non sono soggetti alla giurisdizione italiana neppure per gli atti compiuti nel territorio della Repubblica, purché si tratti di un'attività diretta alla realizzazione dei loro fini pubblici, mentre l'immunità non spetta se vi sia stato esercizio di un'attività meramente privata; il principio dell'immunità vale non solo per lo Stato estero, bensì per i suoi Enti pubblici, dato che i fini collettivi possono essere perseguiti anche in maniera indiretta mediante tali Enti* (1).

Il Sovrano Militare Ordine ospedaliero di Malta costituisce un soggetto internazionale sovrano, in tutto equiparato, anche se privo di territorio, ad uno Stato estero, con il quale l'Italia ha normali relazioni diplomatiche; pertanto, al detto Ordine compete il trattamento giuridico spettante agli Stati stranieri, e quindi anche l'esenzione giurisdizionale relativamente all'attività concernente l'attuazione dei suoi fini pubblici (2).

Il Sovrano Militare Ordine di Malta, accanto a quello religioso, ha lo scopo istituzionale e fondamentale dell'assistenza sanitaria e ospedaliera degli infermi in tempo di pace e in tempo di guerra, qualunque sia lo Stato di appartenenza (art. 2 Carta costituzionale dell'Ordine), e tale finalità assistenziale persegue per mezzo dei suoi appositi Enti — previsti e disciplinati dall'art. 33 della detta Carta costituzionale — denominati «Associazioni nazionali dell'Ordine» ed operanti in varie Nazioni; l'Associazione dei Cavalieri italiani (A.C.I. S.M.O.M.), che opera in Italia — al pari delle Associazioni costituite ed operanti in altri Stati —, ha natura di Ente pubblico internazionale dell'ordinamento giuridico melitense (come, peraltro, è riconosciuto esplicitamente nella normativa italiana e, in particolare, nella l. 4 gennaio 1958 n. 23) e, pertanto, ad essa compete lo stesso trattamento giuridico spettante al Sovrano Ordine, compresa l'immunità dalla giurisdizione italiana.

Al fine di qualificare di natura pubblica l'attività svolta dallo Stato o Ente straniero, ciò che rileva è unicamente il carattere dell'attività stessa, e precisamente la sua preordinazione all'attuazione dei fini pubblici dello Stato e

dell'Ente medesimi, e non già la natura del diritto sui beni strumentali attraverso i quali la detta attività viene esplicata. (Nella specie, è stata ritenuta di natura pubblicistica l'attività istituzionale esplicata dall'Associazione dei Cavalieri italiani del Sovrano Militare Ordine di Malta, anche se svolgentesi in un ospedale del Comune di Sarno, non di proprietà dell'Associazione, ma cedutole con un contratto di diritto privato dall'Ente comunale di assistenza di quella Città).

L'assunzione del dipendente per mezzo di contratto, anziché — come generalmente avviene — mediante atto unilaterale di nomina da parte della Pubblica amministrazione, non è elemento decisivo per escludere la sussistenza del rapporto di pubblico impiego.

La cognizione della controversia attinente al rapporto d'impiego sussistente tra un dipendente con mansioni di concetto od esecutive (nella specie, segretaria amministrativa assunta dall'Associazione dei Cavalieri italiani del Sovrano Militare Ordine di Malta) e un Ente pubblico internazionale è sottratta alla giurisdizione italiana (3).

(1) Cfr. Cass. 13 marzo 1957 n. 841 e 14 luglio 1960 n. 1919, in *Mass. Foro it.* 1957, 166 e 1960, 421.
(2) Cfr. Cass. 22 giugno 1960 n. 1653, in *questa Rassegna* 1960, II, 478.
(3) Cfr. Cass. 25 novembre 1971 n. 3441, in *La Settimana giuridica* 1971, II, 1559.

DIRITTO — Con l'unico mezzo la ricorrente Associazione dei Cavalieri italiani del Sovrano Militare Ordine Ospedaliero di Malta, deducendo la violazione dell'art. 10 della Costituzione della Repubblica e dei principî generali di diritto internazionale pubblico in relazione all'art. 360, nn. 3 e 5 Cod. proc. civile, sostiene che erroneamente il tribunale ha affermato la giurisdizione del giudice italiano.

La censura è fondata.

In virtù del principio consuetudinario *par in parem non habet jurisdictionem*, universamente accettato e rientrante nella previsione dell'art. 10, primo comma della Costituzione repubblicana, gli Stati esteri non sono soggetti alla giurisdizione italiana anche per gli atti compiuti nel territorio della Repubblica, purché si tratti di un'attività diretta alla realizzazione dei loro fini pubblici, mentre l'immunità non spetta se vi sia stato esercizio di un'attività meramente privata. Il principio vale non solo per lo Stato estero, che agisce — secondo un modello conosciuto dal nostro diritto interno — quale persona giuridica attraverso i suoi organi, bensì anche per i suoi enti pubblici, dato che i fini collettivi possono essere perseguiti anche in maniera indiretta mediante tali enti, rispetto ai quali pertanto ricorre la medesima *ratio* che sta a fondamento di esso. L'esclusione degli enti pubblici stranieri dall'immunità sarebbe del tutto ingiustificata e, al limite, in relazione all'ordinamento interno dei singoli Stati esteri, potrebbe notevolmente ridurre, se non addirittura annullare, la prerogativa della esenzione giurisdizionale (cfr. in senso sostanzialmente conforme: SS.UU. 15 marzo 1957 n. 841; 14 luglio 1960 n. 1919), in *Mass. Foro it.* 1957, 166 e 1960, 421.

Ciò premesso, in linea generale, osserva il Collegio che il Sovrano Militare Ordine Ospedaliero di Malta costituisce un soggetto internazionale sovrano, in tutto equiparato, anche se privo di territorio, a uno Stato estero, con il quale l'Italia ha normali relazioni diplomatiche, sicché non è dubbio, come già questa Corte Suprema ha avvertito, che ad esso compete il trattamento giuridico spettante agli Stati stranieri e quindi anche l'esenzione giurisdizionale nei limiti sopra indicati e cioè relativamente all'attività concernente l'attuazione dei suoi fini pubblici (cfr. sent. 14 luglio 1933 n. 2281; 22 giugno 1960 n. 1653, in *questa Rassegna* 1960, I, 478).

In proposito va subito rilevato che l'Ordine, accanto a quello religioso,

ha lo scopo istituzionale e fondamentale dell'assistenza sanitaria e ospedaliera degli infermi in tempo di pace e in tempo di guerra, qualunque sia lo Stato di appartenenza (art. 2 della Carta Costituzionale dell'Ordine) e tale fine è talmente caratterizzante da essere ricordato anche nella denominazione, che è appunto quella di «Sovrano Militare Ordine Ospedaliero di Malta».

L'Ordine persegue la suindicata finalità assistenziale normalmente per mezzo di suoi appositi enti, che prendono il nome di «Associazioni nazionali dell'Ordine» e che operano, rispettivamente, nei singoli Stati ai quali ciascuna di esse è destinata avendosi così l'Associazione nazionale dei Cavalieri italiani per l'Italia ed analoghe Associazioni per le altre Nazioni.

Dette Associazioni, secondo la disciplina dell'art. 33 della ricordata Carta Costituzionale dell'Ordine, vengono erette con decreto del Gran Maestro dell'Ordine, sono regolate da statuti approvati dallo stesso Gran Maestro e dal sovrano Consiglio, i quali sono anche competenti a ratificare la nomina del Presidente e dei membri del Consiglio centrale di ogni associazione. La creazione delle Associazioni nazionali è dovuta alla diversità di condizioni e di esigenze dei vari Stati, la quale richiede una differente azione affinché l'attività filantropica dell'Ordine venga appropriatamente esplicata. L'attributo «nazionali» sta perciò a significare soltanto che la singola Associazione è preposta ad operare nella Nazione, per la quale è stata eretta, non già che essa diventa un ente dell'ordinamento interno di detta Nazione: l'Associazioni sono enti pubblici dell'ordinamento giuridico melitense e ad esse compete pertanto lo stesso trattamento giuridico spettante al Sovrano Militare Ordine Ospedaliero di Malta.

La natura di ente pubblico internazionale dell'Associazione che opera in Italia ha trovato, peraltro, esplicito riconoscimento nella normativa nazionale e, in particolare, nella L. 4 gennaio 1938 n. 23, contenente disposizioni riguardanti il personale addetto al funzionamento dei servizi della Associazione predetta. Da tutto il complesso di essa si evince in maniera evidente come lo Stato consideri l'Associazione predetta come un ente internazionale, essendo previsto, tra l'altro, che la «cooperazione tra l'Associazione e lo Stato» sarà regolata da «apposite convenzioni» (art. 1), che l'Associazione può assumere nel suo personale «cittadini del Regno» (art. 3) e che il servizio prestato dal personale in tempo di guerra è considerato, a ogni effetto, «come reso allo Stato» (art. 8); e ciò trova precisa conferma in molteplici elementi, tra cui è sufficiente ricordare la convenzione del 1° febbraio 1966 intervenuta tra lo Stato e l'Associazione, la quale non lascia alcun dubbio che si tratti di un accordo tra due diversi soggetti di diritto internazionale. Né in contrario potrebbe addursi la disposizione dell'art. 1 cit., secondo cui gli appartenenti al personale dell'Ordine quando prestano il servizio a cui sono preposti, «sono considerati» anche pubblici ufficiali: è chiaro, infatti, che la norma, intanto ha una ragion d'essere, in quanto il legislatore ha considerato l'Associazione come appartenente a un ordinamento straniero e non già quale un ente interno nazionale, giacché, diversamente, la qualità di pubblico ufficiale sarebbe derivata dalla disciplina generale (art. 357 Cod. pen.) e non sarebbe certo occorsa una specifica previsione; la quale, invece, serve a conferire quella più energica tutela penale, che senza di essa non vi sarebbe stata, nell'evidente intento di maggiormente tutelare un'attività considerata particolarmente importante per l'attuazione della cooperazione indicata nell'art. 1 della medesima legge.

Precisata così, in relazione ai dubbi mossi dal Procuratore generale la posizione giuridica della ricorrente Associazione e chiarito altresì che l'attività sanitaria-ospedaliera costituisce l'attuazione dello scopo fondamentale dell'ordinamento melitense, al quale essa appartiene, occorre specificatamente soffer-

marsi su alcune considerazioni che hanno indotto il tribunale ad affermare, ciò nonostante, la giurirdizione del giudice italiano.

La prima, a cui si è riferito anche il Procuratore generale, si ricollega alla circostanza che l'Associazione esplicava la sua attività in un ospedale di Sarno, il quale non era di sua proprietà, ma le era stato ceduto dall'Ente comunale di assistenza di quella città con un negozio di diritto privato deducendoli da ciò che anche l'attività ospedaliera in esso svolta non poteva non essere privata. In contrario è però da osservare che, così argomentando, si viene a stabilire un collegamento necessario tra due istituti che, invece, sono affatto indipendenti, non essendovi alcuna influenza reciproca, com'è fatto palese dai molteplici esempi che si potrebbero formulare (come quello di un immobile preso in locazione da uno Stato estero per ivi istallare la sua rappresentanza diplomatica). Quel che rileva, ai fini considerati, è unicamente il carattere dall'attività svolta dallo Stato o ente straniero e precisamente la sua preordinazione all'attuazione dei fini pubblici dello Stato o dell'ente medesimi, non già la natura del diritto, sui beni con i quali detta attività è esplicata: in modo che, se anche tale diritto, come peraltro spesso accade, ha carattere privatistico, ben può essere pubblica l'attività predetta se essa, come nella specie, viene a realizzare un fine istituzionale del soggetto pubblico internazionale. Diversa sarebbe stata la situazione nel caso inverso e cioè, se vi fosse stato un atto di diritto pubblico relativo alla concessione di un pubblico servizio da parte di un ente pubblico italiano, potendosi, in tale ipotesi, proprio per effetto dell'assoggettamento del concessionario al pubblico potere interno, escludere l'immunità giurisdizionale. Ma nel caso qui considerato, è stato, invece, un negozio che la stessa resistente riconosce essere di diritto privato, mediante il quale la ricorrente Associazione si è soltanto procurato i beni strumentali per l'esercizio della sua funzione istituzionale.

Il Tribunale ha ritenuto poi che non fosse configurabile un rapporto di impiego pubblico perché la resistente fu assunta mediante contratto e perché inoltre essa venne assicurata presso gli uffici previdenziali italiani. Sotto il primo profilo, è brevemente da rilevare che l'assunzione per contratto non è affatto decisiva per ritenere che si tratti di impiego privato, in quanto tale assunzione è consentita anche dal nostro diritto interno per il rapporto di pubblico impiego (es.: art. 4 D.L. 4 febbraio 1937 n. 100), se pure generalmente per lo Stato nei confronti degli impiegati di ruolo è adottato normalmente il sistema dell'atto unilaterale di nomina. Né alcun elemento è consentito trarre dal fatto che l'Associazione aveva provveduto alle assicurazioni sociali della resistente, in quanto a ciò essa era tenuta in base all'art. 8 della citata L. 4 gennaio 1938 n. 23, il quale prescrive che per il personale deve essere stabilito a cura dell'Associazione apposito trattamento per gli eventi di infortunio e di malattie ed era logico conseguentemente che venissero utilizzati gli istituti accolti dall'ordinamento italiano. Pertanto, essendosi il rapporto svolto su un piano di autorità e non di parità, non è possibile considerarlo come impiego privato per effetto delle due circostanze ora indicate.

Il Tribunale, infine, ha ritenuto che, essendo stata la resistente assunta come segretaria amministrativa, non spetti l'immunità giurisdizionale, in quanto questa compete soltanto per i funzionari investiti di potestà deliberativa. Anche tale argomento è giuridicamente infondato, in quanto del tutto arbitraria risulta la limitazione posta, spettando l'immunità rispetto a tutti gli impiegati e quindi non solo per quelli direttivi, ma anche per gli altri, che, seguendo la terminologia del nostro diritto interno (D.P.R. 10 gennaio 1957 n. 3), sarebbero compresi nel personale di concetto o, esecutivo (cfr. S.U. 26 giugno 1971 n. 3441, in *La Settimana giuridica* 1971, II, 159). Questo Supremo collegio ha qualche volta escluso l'immunità per i lavoratori puramente manuali, quali in concreto

lo sguattero assunto da un Comando militare statunitense e l'inserviente di una mensa di una missione navale venezuelana (sent. n. 467 del 1964 e 3160 del 1959), ma da tale giurisprudenza non può trarsi alcun elemento utile alla fattispecie, in quanto la resistente, come da lei stessa dedotto, fu assunta come segretaria amministrativa ed esercitò funzioni amministrative e contabili tipiche, secondo la ricordata terminologia, del personale di concetto. Pertanto deve ritenersi che sussista l'immunità giurisdizionale analogamente a quanto già deciso con la citata sentenza n. 3441 del 1971 relativamente a un bibliotecario dell'*United States Information Service* (*U.S.I.S.*) sul presupposto appunto che egli aveva svolto funzioni di concetto nel senso ora indicato.

Per le suesposte considerazioni si deve concludere che, essendo la ricorrente Associazione un ente pubblico dell'ordinamento melitense ed essendo stato dedotto in giudizio un rapporto di impiego pubblico, compete l'invocata immunità giurisdizionale.

Il proposto ricorso va perciò accolto con l'annullamento della sindicata sentenza, dichiarandosi il difetto di giurisdizione del giudice italiano.

Il deposito va restituito, mentre concorrono giusti motivi per disporre la compensazione delle spese del giudizio.

1665 — 6 giugno 1974 — Sez. II — Pres. FERRATI, Rel. SANNULLI, P.M. PEDACE (conf.) — Soc. Serretto (avv.ti Contaldi, Simonetti e Piccini) c. Gallo (avv.ti Pulvirenti, Vernetti e Rocchi) — (*Rigetta, App. Genova 28 gennaio* 1972).

Edilizia ed urbanistica - Distanze - Sporti - Aventi carattere esclusivamente ornamentale - Differenza dalle sporgenze - Balconi formati da solette di apprezzabile profondità ed ampiezza e sviluppate sul fronte dell'edificio - Computo ai fini delle distanze - Necessità.

Edilizia ed urbanistica - Regolamento comunale - Violazione di norme relative all'altezza - Condanna generica al risarcimento del danno - Ammissibilità.

Gli sporti costituenti semplici motivi architettonici ed ornamentali delle costruzioni debbono tenersi distinti dalle sporgenze, costituenti per i loro caratteri strutturali e funzionali veri e propri aggetti, comportanti un ampliamento dell'edificio in superficie e volume; pertanto, devono qualificarsi aggetti e, come tali, devono essere computati ai fini del calcolo delle distanze tra costruzioni, i balconi formati da solette aggettanti (anche se scoperti) di apprezzabile profondità, ampiezza e consistenza, e sviluppate lungo il fronte (in tutto o in parte) dell'edificio (1).

In caso di violazione, anche minima, di norme edilizie relative all'altezza delle costruzioni, può essere legittimamente emessa una pronuncia di condanna generica al risarcimento dei danni, per essere siffatte violazioni comunque potenzialmente produttive di danno (2).

(1) Cfr. Cass. 4 agosto 1972 n. 2624 e 7 maggio 1969 n. 1552, in *La Settimana giuridica* 1972, II, 1222; 1970, II, 139.

(2) Cfr. Cass. 15 settembre 1970, n. 1489 e 7 marzo 1968 n. 729, in *La Settimana giuridica* 1970, II, 1808; 1968, II, 688.

1688 — 7 giugno 1974 — Sez. I — Pres. ICARDI, Rel. D'ORSI, P.M. MILLOTTI (conf.) — ENEL (avv.ti Guerra, Carbone e Paternò) c. Farina (avv.ti Marotta L. e G.) — (*Cassa con rinvio, App. Napoli 5 giugno* 1970).

Leggi e decreti - Dichiarazione di incostituzionalità - Efficacia - Limiti - Fattispecie relative all'art. 123 T.U. n. 1775 del 1933 sulle acque e gli impianti elettrici.

In the light of the above considerations, the Court upholds the jurisdiction of the Italian judge to decide this issue, as well as the *legitimatio ad causam* of the French Ministry of Foreign Affairs and the *legitimatio ad processum* of the French Ambassador in Italy.

[Reports: *Rivista di diritto internazionale privato e processuale,* 1975, p. 98 (in Italian); *Italian Yearbook of International Law,* 1976, p. 322. (English translation)]

Sovereign immunity — Foreign sovereign entities — Association of Italian Knights of the Order of Malta—Whether a subject of international law — Employee — Contract of employment — Action for unpaid salary — Whether Association entitled to jurisdictional immunity—Acts *iure imperii* and *iure gestionis*—The law of Italy

ASSOCIATION OF ITALIAN KNIGHTS OF THE ORDER OF MALTA *v.* PICCOLI[1]

Italy, Court of Cassation (Joint Session). 6 June 1974

SUMMARY: *The facts:*—The respondent was employed for nearly 15 years as an administrative secretary at a hospital operated by the appellants in Salerno. She brought an action for failure to be paid a fair salary and the appellants pleaded, as a preliminary issue, that the Court lacked jurisdiction since their Association (ACISMOM) was a subject of international law recognised by Italy. The Court of Salerno rejected the plea on the ground that, whilst there was no doubt that the order of Malta was recognised as sovereign and entitled to immunity by the Italian State, jurisdictional immunity with regard to employment relations between Italian nationals and foreign States only applied to cases where the work of the employee involved the exercise of public functions whereas the respondent had performed purely executive duties in the widest sense.[2] The Association appealed to the Court of Cassation.

Held:—The respondent was entitled to jurisdictional immunity.

(1) The Order of Malta constituted a sovereign international subject and, though deprived of territory, was equal in all respects to a foreign State with which Italy had normal diplomatic relations. It was therefore entitled to jurisdictional immunity in the same way as a foreign State, to the extent that the fulfilment of its public ends of giving medical and hospital assistance to the sick in times of war and peace, were concerned. The national associations of the Order were entitled to the same treatment as the Order itself.

[1] Case No. 1653. For proceedings in which the immunity from taxation of the Association was at issue, see below p. 320.

[2] The judgment of the Court of Salerno is reported in *Italian Yearbook of International Law,* 1976, p. 329.

(2) To limit the application of jurisdictional immunity to officials with decision-making powers, thereby excluding an administrative secretary, was totally arbitrary. Immunity applied to all employees who according to municipal law would be included in the category of executive personnel.

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

By virtue of the customary principle *par in parem non habet jurisdictionem,* universally accepted and envisaged by Article 10, paragraph 1, of the Republican Constitution, foreign States are not subject to Italian jurisdiction for those acts carried out in the Italian territory of the Republic, as long as the activity concerned aims at the fulfillment of their public functions. Immunity does not apply to a merely private activity. The principle applies not only for the foreign State, which acts—according to a model recognised by our municipal law—through its organs as a legal person, but also for its public bodies, since the collective aims may be followed in an indirect way also through these bodies to which, however, applies the same *ratio* on which the principle is grounded.

It would be utterly unjustifiable to exclude foreign public organisations from immunity. This in relation to the legal system of the individual foreign States, could notably reduce, or eliminate outright, the prerogative of jurisdictional exemption (see in this context: *Sezioni Unite,* No. 841 of 15 March 1957;[3] No. 1919 of 14 July 1960).[4]

This having been said, the Court observes that in general, the Sovereign Military Order of Hospitallers of Malta constitutes a sovereign international subject and, though deprived of territory, is equal in all respects to a foreign State with which Italy has normal diplomatic relations. There is therefore no doubt that, as already affirmed by this Supreme Court, it is entitled to the legal treatment due to foreign States and therefore jurisdictional immunity also, within the limits mentioned above and namely with regard to the activity concerning the fulfillment of its public ends (see judgments No. 2281 of 14 July 1933 [*sic*] and No. 1653 of 22 June 1960).

On this subject, it must immediately be pointed out that the Order has—apart from a religious purpose—the institutional and fundamental purpose of giving medical and hospital assistance to the sick in times of peace and war, regardless of the State to which they belong (Article 2 of the Constitutional Charter of the Order). This aim is so characteristic that it is also recalled in the name which is precisely "the Sovereign Military Order of *Hospitallers* of Malta". The Order normally pursues the above-mentioned aim of assistance through its appropriate bodies called "national associations of the Order" which

[3] 24 *I.L.R.* 214.]
[4] 40 *I.L.R.* 59.]

operate respectively in the individual States for which they are intended. There is thus the National Association of Italian Knights for Italy and similar associations for the other nations. According to what is established in Article 33 of the said Constitutional Charter of the Order, these associations are set up by a decree of the Grand Master of the Order, and are governed by statutes approved by the same Grand Master and the Sovereign Council, who are also competent to ratify the appointment of the President and the members of the Central Council of every association. The setting up of national associations is due to the diverse conditions and needs of the various States which require a different action to carry out properly the philanthropic activities of the Order. The term "national" therefore means only that the individual association is intended to operate within the nation for which was set up, and not that it becomes a corporate body under the legal system of that nation. The associations are public bodies under the legal system of the Maltese Order and they are entitled to the same legal treatment due to the Sovereign Military Order of Hospitallers of Malta.

Italian legal rules, and particularly Law No. 23 of 4 January 1938 containing provisions on personnel in the service of the Association operating in Italy, have expressly recognised that the latter has the nature of a public international body. It evidently results from the law as a whole that the State considers the said Association as an international body. It is envisaged that "the cooperation between the Association and the State" shall be regulated by "appropriate conventions" (Art. 1), that the Association may employ "nationals of the Kingdom" as its personnel (Article 3) and that service given by personnel in time of war is, for all effects, "deemed to be rendered to the State" (Article 8). This is specifically confirmed by several instances. It suffices to recall the Convention of 1 February 1966 between the State and the Association which leaves no doubt whatsoever that it is an agreement between two different subjects of international law. The provisions of the above-mentioned Article 1 may not, moreover, be adduced as evidence to the contrary. This article provides that when carrying out their duties, the members of personnel of the Order "are also considered as public officials". It is clear that this rule is justified in that the legislator has considered the Association as belonging to a foreign system and not as a municipal body. Otherwise, the nature of a public official would have resulted from the general rules (Article 357 of the Criminal Code), and no special provision would have been necessary. The latter, instead, serves to provide a more forceful safeguard in criminal law, which would not have otherwise resulted, with the clear purpose of better protecting an activity which is considered to be particularly important for the fulfillment of the co-operation referred to in Article 1 of the same law.

Having thus specified, with regard to the doubts raised by the Attorney-General, the legal position of the appellant Association as well as clarified the medico-hospital activity which constitutes the fulfillment of the fundamental aim of the Maltese Order to which it belongs, it is necessary to study specifically some considerations which led the lower Court to affirm nonetheless the jurisdiction of the Italian judge.

The first consideration, referred to also by the Attorney-General, is related to the fact that the Association carried out its activity in a hospital at Sarno which it did not own but which had been allocated to it by the Town Welfare authority by a private law transaction, thus concluding that the hospital activity carried out therein could not but be of a private nature. It should be noted, on the contrary, that by so arguing a necessary link is established between two situations which are totally independent, without any mutual effects. This clearly appears from the several examples that may be considered, such as that of a building taken on rent by a foreign State for its diplomatic mission.

For the purposes under consideration what counts is solely the character of the activity carried out by the State or foreign body and specifically that the activity is intended to fulfill the public ends of the State or the body itself, and not the nature of the right on the property used to carry out the said activity. Therefore even if, as often happens, the right is of a private nature, the said activity may well be public if, as in this instance, it fulfills an institutional aim of the international public subject. The situation would have been different in the reciprocal case, namely if there had been an act of Italian public law. In such a case jurisdictional immunity could be excluded precisely because the grantee is subjected to internal public authority. In the case under consideration, however, there has instead been a private law transaction which even the appellee recognises to be so, and through which the appellant Association has solely procured the necessary means to exercise its institutional functions.

The lower court has also held that there could not be a public employment relationship because the respondent was employed by contract and was insured with Italian social security offices. As regards the first point, it should be briefly stated that a contract of employment is not decisive in concluding that there is a private employment, since our municipal law permits it for public employment (e.g. Article 4 of Decree No. 100 of 4 February 1937), even if the Government generally appoints permanent employees unilaterally. Nor can any argument be inferred from the fact that the Association had provided for the social insurance of the respondent in so far as it was bound under Article 8 of the said Law No. 23 of 4 January 1938. This Article provides for appropriate benefits by the Association for personnel in

cases of accident or sickness. It was therefore logical that use be made of the offices within the Italian system. Consequently, it is not possible to consider the relationship, which is based on authority and not parity, as a private employment because of the two above-mentioned circumstances.

The lower Court finally held that as the respondent had been employed as an administrative secretary there was no jurisdictional immunity which applied only in relation to officials having decision-making powers. This argument too is legally ill-founded since the limit thus stated is totally arbitrary. Immunity applies to all employees not only in the case of decision-making officials but also with respect to those others who, according to the terminology of our municipal law (D.P.R. No. 3 of 10 January 1957), would be included in the executive personnel (see *Sezioni Unite,* No. 3441 of 26 June 1971).[5] This Supreme Court has sometimes excluded immunity for purely manual workers such as the scullery-boy employed by the U.S. Military Command and the kitchen help employed by a Venezuelan naval mission (judgments No. 467 of 1964 and No. 3160 of 1959). For the case in question, however, no useful element may be deduced from this case-law since the respondent, as she herself stated, was employed as an administrative secretary and carried out administrative and accountancy functions which, according to the said terminology, are typical of the executive personnel. It must therefore be held that there is jurisdictional immunity as already similarly decided by the above-mentioned judgment No. 3441 of 1971 concerning a librarian of the United States Information Service (U.S.I.S.)[5] on the assumption that she had carried out executive functions only in the sense stated above.

For the above reasons, it must be concluded that as the applicant Association is a public organ of the Maltese Order and that the subject of the lawsuit is a contract of public employment, jurisdictional immunity exists.

[Reports: *Rivista di diritto internazionale,* 1974, p. 829 (in Italian); *Italian Yearbook of International Law,* 1976, p. 333. (English translation)]

[5 See above, p. 283.]

Sovereign immunity — Foreign States and agencies — Commercial agency attached to embassy of foreign State—Employee—Contract of employment—Termination of—Action for damages—Whether foreign State entitled to jurisdictional immunity—Acts *iure imperii* and *iure gestionis*—The law of Italy

LUNA *v.* SOCIALIST REPUBLIC OF ROMANIA[1]

Italy, Court of Cassation (Joint Session). 23 *November* 1974

SUMMARY: *The facts:*—The plaintiff, an Italian subject, brought an action for damages against the Romanian State following his dismissal from employment with the Romanian commercial agency in Italy, for which he claimed to have worked for eighteen years performing various administrative and clerical functions. He applied to the Court of Cassation for settlement of the jurisdictional issue as a preliminary question, arguing that his employment relationship with the defendant was of an exclusively private nature. The defendant submitted that the agency was simply an office of the Romanian embassy in Italy performing tasks in the general collective interest of Romania in the field of the promotion and control of imports and exports and that the plaintiff's employment concerned precisely those tasks.

Held:—The defendant was entitled to jurisdictional immunity.

The employment relationship in question fell within the framework of activities of a public nature of a foreign State which were, by their very nature, correlated to the institutional ends of the State itself, in this case to the promotion and control of commercial activities in which the State in question had a collective interest.

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

In his request for a determination of jurisdiction the applicant repeats that his claim for pay and damages relates to his employment relationship with the economic agency attached to the Embassy of the Socialist Republic of Romania in Italy. He limits himself to advancing some circumstances and arguments which in his opinion should clearly show the private nature of the said relationship and consequently leave no doubt as to the jurisdiction denied by the *Tribunale di Roma.*

Luna maintains in particular that the Romanian agency, for which he worked for eighteen years, carries out commercial activities; that his relationship with the same agency was not initially based on a formal act of appointment, which meant that he had not been incorporated in the permanent staff of the Romanian State; that the

[1] Case No. 3803.

Annex 28

Corte di Cassatione

Decision 8157/2002, *Markovic*, 5 June 2002

English translation: 128 ILR 652

Cass. [ord.], sez. un., 05-06-2002, n. 8157.

SVOLGIMENTO DEL PROCESSO

La Corte
Premesso in fatto.
1. Ambretta Rampelli, agendo in qualità di procuratrice speciale di Dusan Markovic, Dusica Jontic, Zoran Markovic e Vladimir Jontic, ha convenuto in giudizio davanti al tribunale di Roma la Presidenza del Consiglio dei Ministri, il Ministero della difesa ed il Comando delle Forze Alleate dell'Europa Meridionale - Afsouth.
Ha proposto una domanda di condanna al risarcimento dei danni.
I fatti esposti nella citazione sono i seguenti.
L'edificio che ospitava gli studi della Radio Televisione Serba, nella notte del 23.4.1999, è stato deliberatamente colpito nel corso di una delle operazioni aeree condotte dalla Nato contro la Repubblica federale di Jugoslavia.
Una parte dell'edificio è crollata e nel crollo hanno trovato la morte Dejan Markovic e Slobodan Jontic, congiunti degli attori.
Queste le ragioni di diritto poste a base della domanda.
Essere stato scelto come bersaglio l'edificio della emittente televisiva costituisce un modo di conduzione delle ostilità non consentito dal I Protocollo aggiuntivo alle Convenzioni di Ginevra del 12.8.1949, perché diretto contro un obiettivo non militare e rivolto intenzionalmente a colpire civili; è poi vietato dall'art. 174 del Codice penale militare di guerra.
La responsabilità per le conseguenze che ne sono derivate deve essere riferita allo Stato italiano, sia perché come paese membro della Nato ha concorso alla determinazione di adottare l'indicato modo di condurre le ostilità, sia perché l'operazione bellica è stata compiuta a partire dal suo territorio e dunque trovano applicazione le norme dettate dall'art. VIII, paragrafo 5, della Convenzione di Londra del 19 giugno 1951, approvata con la l. 30 novembre 1955, n. 1335.
2. I convenuti si sono costituiti in giudizio.
Le amministrazioni dello Stato hanno eccepito il difetto assoluto di giurisdizione, l'Afsouth il difetto di giurisdizione del giudice italiano.
3. Le due amministrazioni, con ricorso notificato a tutte le altre parti, hanno poi chiesto che la questione di giurisdizione sia risolta dalle sezioni unite e sia dichiarato il difetto di giurisdizione dell'Autorità giudiziaria.
Hanno svolto queste considerazioni.
Lo Stato è assoggettato alla giurisdizione dei suoi giudici solo quando si presenta come l'Stato-amministrazione", perché in questo caso il potere giudiziario può porsi rispetto ad esso in posizione di alterità e quindi di terzietà.
Questa posizione di alterità e terzietà del giudice non può configurarsi quando lo Stato è chiamato davanti al giudice nella sua unitaria soggettività di "Stato-comunità" ed è ciò che accade quando in suo confronto sono fatte valere pretese che rilevano da comportamenti tenuti come soggetto sovrano nel campo dei rapporti internazionali.
In questo caso i suoi atti possono essere sindacati solo da Corti internazionali alla cui competenza giurisdizionale lo Stato si sia assoggettato in relazione a specifiche materie.
La domanda è stata proposta in confronto del Ministero della difesa sul presupposto che ricorra la competenza giurisdizionale prevista dall'art. VIII n. 5 della Convenzione di Londra del 19.6.1951, ratificata con la l. 30 novembre 1955, n. 1335.
Ma nel caso ne manca il presupposto dato dal fatto che i danni siano stati causati nel territorio dello Stato di soggiorno.
4. Gli attori, che hanno resistito e chiesto sia dichiarato che la giurisdizione sussiste, hanno svolto queste considerazioni.
Al primo argomento hanno contrapposto che deliberare e porre in atto un'operazione bellica è comportamento che si imputa allo Stato apparato e non allo Stato comunità e che, comunque, dalle convenzioni internazionali sul diritto umanitario bellico derivano limiti alla scelta dei modi in cui condurre un'azione di guerra, oltrepassati i

quali lo Stato risponde dei danni provocati dal suo atto anche nei confronti dei singoli che li subiscono, ai quali si deve quindi riconoscere il diritto di adire lo Stato davanti ai suoi giudici.
Al secondo argomento hanno contrapposto che potersi o no considerare il fatto avvenuto sul territorio italiano attiene non alla giurisdizione, ma alla responsabilità.
5. Il pubblico ministero ha concluso per iscritto, chiedendo sia dichiarato la giurisdizione del giudice ordinario.
Ha osservato che non è in questione la giurisdizione, ma l'esistenza di norme o principi che consentano di affermare la responsabilità fatta valere con la domanda.
Le parti hanno depositato una memoria.
Ritenuto in diritto.
1. Il regolamento di giurisdizione è ammissibile.
E' questione di giurisdizione, la cui soluzione può essere chiesta alle sezioni unite con l'istanza di regolamento, anche quella su cui si deve statuire che ogni giudice difetta di giurisdizione (art. 382, secondo comma, cod. proc. civ.) - Sez. Un. 9 gennaio 1978 n. 53.
2. La domanda riferisce allo Stato italiano una responsabilità che è fatta dipendere da un atto di guerra, in particolare da una modalità di conduzione delle ostilità belliche rappresentata dalla guerra aerea.
La scelta di una modalità di conduzione delle ostilità rientra tra gli atti di Governo. Sono questi atti che costituiscono manifestazione di una funzione politica, della quale è nella Costituzione la previsione della sua attribuzione ad un organo costituzionale: funzione che per sua natura è tale da non potersi configurare, in rapporto ad essa, una situazione di interesse protetto a che gli atti in cui si manifesta assumano o non assumano un determinato contenuto - Sez. Un. 12 luglio 1968 n. 2452; 17 ottobre 1980 n. 5583; 8 gennaio 1993 n. 124.
Rispetto ad atti di questo tipo nessun giudice ha potere di sindacato circa il modo in cui la funzione è stata esercitata.
3. Le norme del Protocollo di Ginevra del 1977 (artt. 35.2, 48, 49, 51, 52 e 57) e della Convenzione europea dei diritti dell'uomo (artt. 2 e 15.2), che disciplinano la condotta delle ostilità, hanno bensì come oggetto la protezione dei civili in caso di attacchi, ma in quanto norme di diritto internazionale regolano rapporti tra Stati.
Gli stessi trattati strutturano i procedimenti per accertare le violazioni, prevedono le sanzioni in caso di responsabilità (art. 91 del Protocollo; art. 41 della Convenzione), indicano le Corti internazionali competenti ad affermarla.
Le leggi che vi hanno dato applicazione nello Stato italiano non contengono per contro norme espresse che consentano alle persone offese di chiedere allo Stato riparazione dei danni loro derivati dalla violazione delle norme internazionali.
Che disposizioni con questo contenuto siano implicitamente risultate introdotte nell'ordinamento per effetto della esecuzione data alle norme di diritto internazionale è principio che trova poi ostacolo in quello contrario, di cui si è fatto cenno, per cui alle funzioni di tipo politico non si contrappongono situazioni soggettive protette.
Del resto, per assicurare nell'ambito dell'ordinamento interno una riparazione per il pregiudizio risentito in conseguenza della violazione di norme della Convenzione sui diritti dell'uomo, con riguardo all'art. 6 ed a proposito del mancato rispetto del termine di ragionevole durata del processo, si è provveduto con apposita legge (la l. 24 marzo 2001, n. 89).
4. La possibilità di assoggettare a sindacato la determinazione del Governo circa la condotta delle ostilità nell'ambito delle operazioni aeree della Nato contro la Repubblica federale di Jugoslavia non può d'altra parte essere tratta dalla Convenzione di Londra del 1951.
La circostanza che gli aerei impiegati nel bombardamento della stazione radio televisiva di Belgrado possano avere utilizzato basi ubicate sul territorio italiano costituisce un momento della più complessa operazione di cui si chiede di valutare la liceità e dunque non rileva ai fini della applicazione della norma dettata dal paragrafo 5 dell'art. VIII della Convenzione, che presuppone al contrario la commissione di un atto al riguardo del quale la valutazione di illiceità possa essere compiuta.
5. Decidendo sulla questione di giurisdizione, di cui la Presidenza del Consiglio dei

ministri ed il Ministero della difesa hanno chiesto la soluzione in relazione alla domanda proposta dagli attori nei loro confronti, si deve statuire che conoscere della controversia non spetta al giudice ordinario né ad alcun altro giudice.
5.1. Nessuna pronuncia sulla giurisdizione deve essere resa in relazione alla domanda che gli attori hanno proposto, con la stessa citazione, in confronto del Comando delle Forze Alleate dell'Europa Meridionale, ed in relazione alla quale lo stesso Comando davanti al giudice di merito ha sollevato eccezione di difetto di giurisdizione del giudice italiano.
Il Comando non ha dal canto suo presentato istanza di regolamento né ha preso parte a questa fase del giudizio chiedendo una statuizione sulla giurisdizione nei suoi confronti.
Si tratta di domanda contro diverso convenuto e la circostanza che sia stata proposta con la medesima citazione non toglie che si sia in presenza di causa diversa, sebbene riunita in un unico processo, sicché non può esercitarsi a suo riguardo, in questa sede, il potere di rilievo e decisione di ufficio sulle questioni di giurisdizione.
6. Le spese di questa fase e dell'intero giudizio, tra i ricorrenti e gli attori, debbono essere dichiarate compensate in considerazione della natura degli argomenti trattati.

PER QUESTI MOTIVI

La Corte dichiara il difetto di giurisdizione; compensa le spese dell'intero giudizio.

--- Estremi documento ---
Archivio: Cassazione Civile
Vai a: massima 1, massima 2, sentenza, Repertorio
Voci: Giurisdizione civile [3330]
Giudicante: Cass. [ord.], sez. un., 05-06-2002, n. 8157
Magistrati: Pres. Marvulli, Rel. Vittoria, P. M. Martone (diff.)
Parti: Pres. Cons. c. Markovic (Avv. Bozzi)
Giudizio precedente: Regolamento di giurisdizione

Relationship of international law and municipal law — Act of State and justiciability — NATO bombardment of Serbian Television building in Belgrade — Use of bases in Italy by aircraft involved in bombardment — Whether action of Italian Government in allowing use of bases justiciable

War and armed conflict — Conduct of military operations in war — Aerial bombardment of civilian target — Whether choice of method of conducting hostilities justiciable

States — Conduct of foreign relations — Choice of method of conducting hostilities in war — Whether subject to judicial review

Treaties — Individual rights — International humanitarian law — Rules intended to secure protection of civilians from armed attack — Whether creating rights for individuals to claim compensation for breaches — First Additional Protocol to Geneva Conventions, 1977

Jurisdiction — Visiting forces — Civil claim for damages arising from acts of NATO forces — NATO Status of Forces Agreement, 1951 — Article VIII(5) — Whether right of action against receiving State dependent upon prior characterization of act in question as unlawful — The law of Italy

PRESIDENT OF THE COUNCIL OF MINISTERS *v.* MARKOVIĆ AND OTHERS

(Decision No 8157/2002)

Italy, Court of Cassation (Plenary Session). 5 June 2002

(Marvulli, *President*)

SUMMARY: *The facts*:—The plaintiffs were civilian residents of Serbia who claimed damages for the death of their relatives, killed during the aerial bombardment of the offices of Serbian Television in Belgrade by NATO forces in April 1999. The proceedings were brought against the Italian State. The plaintiffs sought a ruling that the Italian State was responsible for the conduct of the hostilities in question either because, as a Member State of NATO, it was in agreement with them or because the military operations in question were carried out from bases located on Italian soil, thereby triggering the application of Article VIII(5) of the NATO Status of Forces Agreement, 1951. Italy argued that the Italian courts had no jurisdiction over the claim because it related to the conduct of international relations, which was a sovereign activity. The case was referred to the Court of Cassation for a preliminary ruling on the jurisdictional issue.

Held: — The Italian courts lacked jurisdiction over the claim.

(1) The claim sought to establish the responsibility of the Italian State for the conduct of military hostilities through aerial bombardment. The selection of this method of hostilities was an act performed by the Government as an expression of its function of political direction. The manner in which this function was exercised was not subject to judicial review.

(2) Certain provisions of the First Additional Protocol (1977) to the Geneva Conventions, 1949, and the European Convention on Human Rights, 1950, covering the conduct of armed conflict, were clearly intended to secure the protection of civilians from armed attack. However, the laws incorporating these provisions into the municipal legal order did not give individuals the right to claim compensation for breaches of the international norms in question. It was not possible to imply such a right since the nature of the political function at issue meant that it was impossible to protect individual interests from its consequences.

(3) The issue of the legality of the bombing at issue was complex and had not been judicially determined. Consequently the question of the applicability of Article VIII(5) of the NATO Status of Forces Agreement did not arise for decision since it assumed the commission of an act already characterized as unlawful.

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

Course of the Proceedings

Ambretta Rampelli, acting in her capacity as special attorney for Dusan Markovic, Dusica Jontic, Zoran Markovic and Vladimir Jontic, has summoned the President of the Council of Ministers, the Ministry of Defence and the Command of the Allied Forces in Southern Europe (AFSE) to appear before the Court of Rome.

The basis of the summons is a claim for damages. The facts as disclosed in the summons are as follows: On the night of 23 April 1999 the building housing the offices of Serbian Radiotelevision was deliberately hit during the course of one of the air operations being conducted by NATO against the Federal Republic of Yugoslavia. One section of the building collapsed and the bodies of Dejan Markovic and Slobodan Jontic, relatives of the plaintiffs, were discovered amongst the rubble.

This Court will now proceed to examine the legal arguments upon which the claim is based.

It is argued that to have selected the building in which the television station was located as a target constituted a method of conducting hostilities which was prohibited under the First Additional Protocol to the Geneva Conventions of 12 August 1949, on the basis that it was a direct attack on a non-military objective and deliberately aimed at civilians. Such actions are also prohibited by Article 174 of the Military Penal Code.

The State of Italy, it is also argued, ought to be held responsible for this act and its consequences, either because, as a Member State of NATO, it was in agreement with the decision to conduct hostilities in the manner just described, or because the military operations in question were carried out from bases located on Italian soil, thereby triggering the application of the norms contained in Article VIII(5) of the Treaty of London of 19 June 1951, as approved by Law No 1335 of 30 November 1955.

Each of the respondents has entered an appearance. Both Government Departments have argued a total absence of jurisdiction. AFSE has argued that the matter is beyond the jurisdiction of the Italian courts.

Both Government Departments, by way of an application on notice to all the other parties, have requested that the issue of jurisdiction be resolved by the Plenary Session of this Court with a view to it concluding that the Court has no jurisdiction to decide this matter. They have made the following submissions.

The State is subject to the jurisdiction of its courts only when acting in its capacity as civil administrator, in which case the judiciary, in its role as the third estate, has the power to challenge the decisions of the executive. However, the judiciary is not in a position to exercise this power when the State is summoned before the courts in its corporate identity as a "State community", as is the case when the claims being made against it relate to its behaviour as a sovereign entity in the field of international relations. In that case its actions can be reviewed only by those international courts to whose jurisdiction the State has submitted in relation to specific issues.

The plaintiffs have brought this claim against the Ministry of Defence in reliance on the assumption that the jurisdictional competence enshrined in Article VIII(5) of the Treaty of London of June 1951, ratified by Law No 1335 of 30 November 1955, applies in this case. However, such an assumption is invalid in this case given that the harm was caused in the territory of the receiving State.

The plaintiffs, who take issue with the above arguments and have requested a ruling that the Italian courts have jurisdiction over the matter, have made the following submissions.

In response to the defendants' first argument, the plaintiffs reply that to plan and carry out a military operation is an act of the State apparatus rather than the State community. When that is the case, international conventions on the humanitarian rules of armed conflict place limitations on the methods which a State might choose to employ when conducting military operations, beyond which the State is responsible even to individual victims for harm suffered as a result of its actions. Recognition must therefore be given to the right of those victims to sue the State in its own courts.

In response to the defendants' second argument, the plaintiffs reply that the issue of whether or not the act can be said to have occurred on Italian soil is not a question of jurisdiction but of liability.

The public prosecutor has submitted a written reply, in which he has requested that the case be submitted to the jurisdiction of the ordinary courts. He has commented that the issue is not one of jurisdiction, but of the existence of those norms and principles which would enable the plaintiffs to establish liability on the part of the defendants sufficient to succeed on the claim.

The parties have lodged a memorandum.

Reasons for the Decision

This Court has authority to decide the issue of jurisdiction. The jurisdictional question can be resolved by petitioning the Plenary Session of the Court for a ruling, even in circumstances in which the outcome of the ruling is likely to be that no courts have any jurisdiction (Article 382(2) of the Civil Procedure Rules) (Plenary Session 53, 9 January 1978).

The claim alleges the Italian State to be responsible for events arising from an act of war, more especially from a particular method of conducting military hostilities, namely aerial warfare.

The selection of a method for conducting hostilities is amongst those acts which are performed by the Government. All such acts are expressions of a political function which, under the Constitution, is envisaged as emanating from a constitutional organ. The nature of this function means that it is impossible to protect individual interests from its effects on the basis that those acts falling within its scope are incapable of precise definition (Plenary Sessions: 2454, 12 July 1968; 5583, 17 October 1980; 124, 8 January 1993).

With regard to acts of this type, no court has the power to review the manner in which the function is exercised.

The norms of the Geneva Protocol of 1977 (Articles 35(2), 48, 49, 51, 52 and 57) and of the European Convention on Human Rights (Articles 2 and 15(2)), which govern the conduct of armed conflict, clearly have as their object the protection of civilians from armed attack. However, such international law norms as these are designed to govern the relationship between States.

The aforementioned treaties lay down the procedures for establishing whether or not breaches have occurred, provide sanctions in the event of liability being established (Article 91 of the Protocol and Article 41 of the Convention) and list the international courts which are competent to assert liability.

The laws which have incorporated these international treaties into the Italian legal system do not contain any express rules which would allow individual victims to claim compensation from the State on account of harm arising from breaches of international law norms. The idea that rules of this type might have been implicitly introduced into the domestic legal order as a result of the incorporation of the international law norms in question is, as has already been seen, unsustainable on the basis that it is not possible to protect individual interests from the consequences of functions which are political in nature.

Further, with regard to the alleged lack of respect for the requirement that everyone is entitled to a fair and public hearing within a reasonable period of time under Article 6 of the European Convention on Human Rights, steps have been taken in the relevant law (Law No 89 of 24 March 2001) to ensure that domestic law provides appropriate means of redress for harm suffered as a result of breaches of the same Convention.

The Treaty of London of 1951 does not provide any grounds for reviewing the Government's decision to permit NATO air strikes to be carried out against the Federal Republic of Yugoslavia from Italian territory.

The fact that the aircraft involved in the bombing of the Belgrade radio–television station might have used bases located on Italian territory constitutes one aspect of this very complex operation, the legality of which is still under investigation. This situation does not, therefore, fall within the scope of Article VIII(5) of the Treaty, which assumes the commission of an act which has already been classified as unlawful.

On the issue, raised by the President of the Council of Ministers and the Minister of Defence, of whether the plaintiffs have jurisdiction to bring their claim, the Court has concluded that jurisdiction over this dispute belongs neither to the ordinary courts nor to any other court.

The Court declines to comment on whether the plaintiffs have jurisdiction to bring their claim against AFSE, despite the latter having relied at the merits hearing on the argument that the Italian courts lacked jurisdiction to try the matter.

AFSE has not, on its own account, requested a ruling on jurisdiction, nor has it participated in that phase of the proceedings during which such requests were made.

This is a claim which involves a single cause of action against multiple defendants properly joined in the same originating process. On that basis this Court has no power either to comment or to give an official decision on jurisdictional issues as they relate specifically to AFSE.

In view of the arguments under consideration, all parties are to be indemnified for the costs of both this hearing and the case as a whole.

[Report: *RDI* 2002, p. 799 (in Italian)]

NOTE.—A critical commentary on the above judgment, "When are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The *Marković* Case", by Micaela Frulli, is printed in the *Journal of International Criminal Justice*, 2003, p. 406.

Annex 29

Francesca De Vittor, Immunità degli Stati dalla
giurisdizione e risarcimento del danno per violazione dei diritti fondamentali:
il caso Mantelli, 2 (2008) Diritti umani e diritto internazionale, issue 3

DIRITTI CIVILI E POLITICI

Immunità degli Stati dalla giurisdizione e risarcimento del danno per violazione dei diritti fondamentali: il caso Mantelli

L'ordinanza n. 14201 della Corte di Cassazione concerne una domanda di regolamento preventivo di giurisdizione, proposta dalla Repubblica Federale di Germania, riguardo ad una causa di risarcimento dei danni derivanti dalla deportazione di un gruppo di italiani in Germania durante la seconda guerra mondiale e dalla loro sottoposizione ai lavori forzati per l'industria tedesca. Con tale ordinanza, la Suprema Corte ha affermato la giurisdizione del giudice italiano nei confronti dello Stato tedesco, confermando la posizione già assunta in argomento nella ben nota sentenza *Ferrini* (Corte di Cassazione, Sez. Unite Civili, *Ferrini c. Repubblica federale di Germania*, sentenza n. 5044 dell'11 marzo 2004, *Rivista di diritto internazionale* 2004, p. 539 ss.).

> Corte di Cassazione, Sezioni Unite Civili, *Repubblica federale di Germania c. Mantelli e altri; Daimlerchrysler c. Mantelli e altri*, ordinanza n. 14201 del 29 maggio 2008, (www.cortedicassazione.it/Documenti/14201.pdf)

La motivazione dell'ordinanza, benché un po' meno articolata di quella della precedente sentenza *Ferrini*, sembra particolarmente interessante perché la Suprema Corte afferma esplicitamente di non applicare una norma di diritto internazionale generale esistente, ma di contribuire piuttosto alla sua formazione in uno stato di incertezza del diritto. Le Sezioni Unite si dichiarano infatti "consapevoli" del fatto che "non esista, allo stato, una sicura ed esplicita consuetudine internazionale per cui il principio della immunità dello Stato straniero dalla giurisdizione civile per gli atti dal medesimo compiuti *iure imperii* [...] possa ritenersi derogato a fronte di atti di gravità tale da configurarsi come crimini contro l'umanità" (nella sentenza in commento le Sezioni Unite affermano che tale consapevolezza era peraltro già stata espressa nella sentenza *Ferrini*, riferendosi probabilmente al paragrafo 10 della stessa; va detto tuttavia che in quella precedente occasione la Corte era stata molto meno esplicita). In siffatta situazione di incertezza giuridica, argomentando anche sulla base delle opinioni espresse dai giudici di minoranza della Corte europea dei diritti umani nella sentenza *Al-Adsani c. Regno Unito* (ricorso n. 35763/97, sentenza del 21 novembre 2001) – e solo incidentalmente confermate nella sentenza *Kalogeropoulou e altri c. Grecia e Germania* (ricorso n. 59021/00, decisione del 12 dicembre 2002) – la Corte di Cassazione afferma quindi che

JCLQ 55 (2006) 437-446

"un principio limitativo della immunità dello Stato che si sia reso autore di crimini contro l'umanità può presumersi *in via di formazione*".

In assenza quindi di una norma giuridica 'vigente' o di una prassi costante tendente ad escludere l'immunità, la Corte procede ad un'analisi sistematica dell'ordinamento giuridico internazionale, constatando la 'coesistenza' in esso di due principi di portata generale: quello di "immunità dalla giurisdizione civile dello Stato straniero (volto a favorire le relazioni internazionali con il rispetto delle reciproche sovranità)", e quello "per cui i crimini internazionali minacciano l'umanità intera e minano le fondamenta stesse della coesistenza tra i popoli". Alla luce di tale coesistenza, la Corte stabilisce che "l'innegabile 'antinomia' tra i riferiti principi [...] non può altrimenti risolversi [...] che 'sul piano sistematico' dando prevalenza alle norme di rango più elevato", ovvero quelle volte a garantire "il rispetto dei diritti inviolabili della persona", il quale "ha assunto, anche nell'ordinamento internazionale, il ruolo di principio fondamentale, per il suo contenuto assiologico di metavalore".

Come già era avvenuto nella sentenza *Ferrini* (sia consentito rinviare a P. De Sena e F. De Vittor, "State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case", in *European Journal of International Law* 2005, pp. 89-112, *in part.* p. 101 e p. 110, ovvero "Immunità degli Stati dalla giurisdizione e violazioni dei diritti dell'uomo: la sentenza della Cassazione italiana nel caso *Ferrini*", in *Giurisprudenza italiana* 2005, pp. 255-265; nonché P. De Sena, voce "Diritti dell'uomo", in S. Cassese (a cura di), *Dizionario di diritto pubblico*, 2006, p. 1873), anche in questo caso, la Corte, pur invocando la superiorità gerarchica delle norme poste a tutela dei diritti umani, perviene ad affermare la giurisdizione del giudice italiano nei confronti della Germania, non tanto sulla base della prevalenza formale del diritto cogente, ma, piuttosto, procedendo ad un'interpretazione sistematica dell'ordinamento internazionale, alla luce dei valori fondamentali che lo caratterizzano sul piano sostanziale.

La scelta di muoversi sul piano del ragionamento per 'principi' piuttosto che su quello tecnico-normativo della gerarchia delle fonti, permette alla Corte di non dover giustificare il passaggio – piuttosto disinvolto – dalla qualificazione della deportazione e della sottoposizione ai lavori forzati come 'crimini internazionali', alla conclusione – se non altro implicita – secondo la quale il diritto di agire in giudizio per ottenere risarcimento del danno subito a causa dell'atto criminoso costituisca appunto conseguenza logica di tale circostanza, in quanto strumento di tutela dei diritti inviolabili (si noti che i principi che la Corte considera "coesistenti" ma 'sostanzialmente' antinomici nel caso di specie sono quello dell'immunità per atti *iure imperii* e quello relativo al rispetto dei diritti inviolabili della persona umana, e non – come invece ritiene C. Focarelli, "Diniego dell'immunità giurisdizionale degli Stati stranieri per crimini, *jus cogens* e dinamica del diritto

internazionale", in *Rivista di diritto internazionale* 2008, pp. 737-757, in part. p. 749 – il principio sull'immunità e quello sul diniego della stessa).

D'altra parte, val la pena di aggiungere, su un piano di carattere più generale, che, in tutta la sentenza, si tende sempre a parlare di 'valori fondamentali', senza dunque far ricorso al concetto di *jus cogens*.

Nel medesimo senso depone poi l'analisi di una diversa parte della sentenza, sulla quale conviene soffermarsi, dato il suo rilievo nell'economia del ragionamento della Corte, vale a dire, quella parte in cui le Sezioni Unite escludono che il difetto di giurisdizione sia effetto dei Trattati del 1947 e del 1961. Ai sensi dell'art. 77 comma 4 del Trattato di pace fra l'Italia e le Potenze Alleate ed Associate, firmato a Parigi il 10 febbraio 1947, infatti, "l'Italia rinuncia, a suo nome e a nome dei cittadini italiani, a qualsiasi domanda contro la Germania e i cittadini germanici pendente alla data dell'8 maggio 1945 [...]. Questa rinuncia sarà considerata applicarsi [...] a tutte le domande di risarcimento di perdite o di danni occorsi durante la guerra". Tale rinuncia parrebbe confermata, anche direttamente nei confronti dello Stato tedesco, con l'Accordo di Bonn del 2 giugno 1961, con il quale l'Italia, avendo ricevuto un indennizzo cumulativo da parte della Germania, considerava "definite" tutte le rivendicazioni di persone fisiche e giuridiche italiane e si impegnava a "tener indenne la Repubblica Federale di Germania da ogni eventuale azione o altra pretesa legale".

Ebbene, al fine di escludere che le disposizioni dei detti accordi comportino il difetto di giurisdizione del giudice italiano, la Corte di cassazione afferma che esse si riferiscono "ai rapporti di diritto sostanziale e non alla giurisdizione", "spettando al giudice eventualmente adito decidere nel merito in ordine alle domande oggetto della rinuncia". Al di là del fatto che tale interpretazione degli accordi di pace sembra condivisibile, ciò che preme sottolineare in questa sede è come la Corte si guardi bene dal giustificarla invocando il carattere cogente della norma relativa alla tutela dei diritti fondamentali della persona.

In altri termini, se l'applicazione della norma consuetudinaria in materia di immunità fosse stata esclusa per la prevalenza attribuita, su un piano meramente formale, alla norma gerarchicamente superiore posta a protezione del diritto individuale (qualificata come cogente), allora la Corte avrebbe potuto valutare anche gli eventuali effetti di tale ultima norma sulle clausole dei Trattati di pace con essa in conflitto. Vero è che, essendo gli accordi di pace precedenti all'entrata in vigore della Convenzione di Vienna sul diritto dei trattati, essi si sottraggono all'applicazione dell'art. 64 della stessa, a meno che non si voglia attribuire a questa norma valore di diritto consuetudinario (si rinvia sul punto a N. Ronzitti, "La disciplina dello *jus cogens* nella Convenzione di Vienna sul diritto dei trattati", in *Comunicazioni e Studi*, vol. XV, 1978, p. 293 ss.). Vero è anche che potrebbero essere sollevati dei dubbi circa la competenza della Corte di Cassazione a dichiarare l'estinzione di un trattato o di sue clausole per contrasto con una norma *di jus cogens superveniens* (a favore di una tale competenza, nel singolo caso, si veda comunque B. Conforti e A. Labella, "Invalidity and Termination of Treaties: The Role of National Courts", in

European Journal of International Law 1990, p. 44 ss., nonché l'art. 5 della Risoluzione dell'Institut du droit International del 1993 su "L'activité di juge interne et les relations internationales de l'Etat", *Rapporteur* B. Conforti). Tuttavia la Corte di Cassazione avrebbe quantomeno potuto sostenere che l'interpretazione dei Trattati di pace nel senso che essi non comportino la rinuncia dell'Italia all'esercizio della giurisdizione è l'unica 'conforme' alle norme imperative attualmente vigenti nell'ordinamento internazionale. Viceversa, la motivazione della sentenza manchine perfettamente distinto l'ambito relativo all'interpretazione del diritto pattizio da quello volto a stabilire i limiti della norma di diritto internazionale generale in tema di immunità dello Stato dalla giurisdizione.

A nostro avviso siffatta scelta non è tanto dovuta al fatto che l'invocare il diritto individuale delle vittime di crimini internazionali ad agire in giudizio come contenuto di una norma imperativa confliggente con la rinuncia convenzionale dello stato del foro ad esercitare la propria giurisdizione avrebbe costretto la Corte ad interrogarsi su tutte le spinose questioni di diritto dei trattati da noi appena accennate. Piuttosto ci sembra che gli stessi giudici siano coscienti che una norma imperativa 'specifica' di tale contenuto non esiste. L'unica norma 'gerarchicamente superiore' vigente nel diritto consuetudinario è infatti quella di natura 'sostanziale' che vieta atti lesivi dei diritti fondamentali (tra cui, senza dubbio, la deportazione e la sottoposizione ai lavori forzati). In mancanza di una prassi generalizzata, l'eccezione all'immunità dello Stato dalla giurisdizione non sarebbe altro che un 'effetto' procedurale da ricavarsi in maniera 'deduttiva' dalla norma sostanziale. Ora, un simile approccio deduttivo, tendente ad estendere in ambito procedurale la portata delle norme cogenti di natura sostanziale, è stato anche di recente respinto dalla Corte internazionale di Giustizia nella sentenza del 3 febbraio 2006 sulle *Attività armate sul territorio del Congo (Repubblica democratica del Congo c. Ruanda)* (si vedano in particolare i parr. 69 e 78, nonché i rilievi di C. Focarelli, "I limiti dello *jus cogens* nella giurisprudenza più recente", in *Rivista di diritto internazionale* 2007, pp. 637-656, in particolare p. 640). Alla luce di ciò, non può che apprezzarsi il ragionamento della Corte di Cassazione che, lungi dall'affermare, per mera implicazione logica, l'esistenza di una norma non supportata dalla prassi internazionale, procede in maniera del tutto trasparente ad un 'bilanciamento di valori' volto sì a "contribuire alla 'emersione' di una regola conformativa della immunità dello Stato", ma comunque, già in grado, *di per sé*, di limitare la portata del regime tradizionale, in funzione della tutela di diritti individuali.

Come già rilevato, la Corte invoca i 'principi fondamentali' riguardanti la tutela della persona umana e le 'norme di rango superiore', senza mai ricorrere al concetto di diritto cogente. I 'principi fondamentali' sono infatti richiamati per sostenere che è necessario si formi una norma consuetudinaria ad essi conforme. In altre parole, è il rilievo assiologico di detti principi – più che il loro

configurarsi, nel ragionamento della Corte, come diritto cogente (così, invece, C. Focarelli, "I limiti dello *jus cogens*" *cit.*, p. 648) – che induce la Corte stessa ad invocarli come base di uno sviluppo futuro, anche in senso "formale-normativo", della disciplina internazionalistica in tema di immunità.

Tale orientamento pare del resto caratterizzare in modo coerente tutta la giurisprudenza della Cassazione in materia di riconoscimento dell'immunità in relazione ad atti lesivi di diritti umani fondamentali, inaugurata con la sentenza *Ferrini* (si veda ancora P. De Sena e F. De Vittor, *op. cit.*, pp. 89-112). Solo apparentemente, infatti, le considerazioni da noi proposte sono contraddette dalla sentenza pronunciata dalla Prima sezione penale nel caso *Lozano* (sentenza n. 31171, del 19 giugno – 24 luglio 2008, www.cortedicassazione.it/Documenti/31171_Iraq.pdf). Nel valutare se al soldato americano imputato dell'omicidio e del tentato omicidio di Nicola Calipari, Andrea Carpani e Giuliana Sgrena doveva essere riconosciuta l'immunità funzionale, i giudici della prima sezione affermano che "dalla parallela e antinomica coesistenza nell'ordinamento internazionale dei due principi [quello dell'immunità funzionale e quello che impone il rispetto dei diritti umani fondamentali], entrambi di portata generale, consegue, come logico corollario, che l'eventuale conflitto, laddove essi vengano contemporaneamente in rilievo, debba risolversi sul piano sistematico del coordinamento e sulla base del criterio del bilanciamento degli interessi, dandosi prevalenza al principio di rango più elevato e di *jus cogens*, quindi alla garanzia che non resteranno impuniti i più gravi crimini lesivi dei diritti inviolabili di libertà e dignità della persona umana". Per un verso, infatti, la Corte sostiene che la perdita dell'immunità funzionale sia il "logico corollario" della norma cogente in materia di crimini contro l'umanità (salvo poi negare nel caso di specie che il delitto imputato al Lozano potesse essere qualificato come tale; per una critica di quest'ultima conclusione si veda A. Cassese, "I crimini di guerra e il caso Calipari", su *La Repubblica* del 5 agosto 2008, p. 28), dando quindi l'impressione di operare un ragionamento meramente deduttivo. Nel contempo, tuttavia, essa afferma che l'antinomia tra principi parimenti generali deve risolversi in base ad un 'bilanciamento di interessi' tendente a far prevalere quelli posti a tutela dei diritti inviolabili della persona umana, bilanciamento che non può operarsi che sul piano dei 'valori'. Non va infine dimenticato che la sentenza *Lozano* è relativa al riconoscimento dell'immunità funzionale nel giudizio penale, ambito in cui – com'è noto – la prassi rilevante è molto più abbondante (si rinvia a M. Frulli, *Immunità e crimini internazionali*, Torino, 2007, e a P. De Sena, "Immunità di organi costituzionali e crimini internazionali individuali in diritto internazionale", in *Comunicazioni e Studi*, vol. XXIII, 2007, pp. 267-300, in particolare p. 289 ss.).

Vi è poi un'ultima circostanza che merita di essere sottolineata in conclusione e che non riguarda le questioni relative alla giurisdizione sin qui considerate, bensì il possibile esito della vicenda. Il 13 marzo 2007, il Tribunale di Arezzo ha pronunciato la prima sentenza di merito nel caso *Ferrini*, affermando che il diritto vantato dall'attore deve ritenersi prescritto. La sentenza ci sembra degna di nota, non tanto

perché, ammesso che sia confermata nei successivi gradi del giudizio, rende di fatto vani gli sforzi degli anziani deportati di ottenere giustizia, ma soprattutto perché presenta una tecnica argomentativa in contrasto con quella della Cassazione sopra evidenziata. Più in particolare, avendo constatato che – sia per la legge tedesca sia per quella italiana – i termini della prescrizione ordinaria erano superati già al momento della proposizione della domanda, il Tribunale si sofferma sulla disciplina internazionalistica in tema di imprescrittibilità dei crimini internazionali. Partendo dal presupposto che "non qualsiasi norma di diritto internazionale può essere invocata a livello interno ma solo quei principi di diritto internazionale per i quali è stato accertato che si è formata una vera e propria consuetudine internazionale", il Tribunale considera la prassi in materia insufficiente – in alcuni casi ostativa – al riconoscimento di una regola di imprescrittibilità dei crimini internazionali e conclude che una simile norma è entrata a far parte dell'ordinamento italiano solo con il recepimento e l'entrata in vigore dello Statuto della Corte Penale Internazionale, che però non può trovare applicazione retroattiva. Dunque, i giudici di merito – a differenza dalla Cassazione – non procedono ad un'interpretazione sistematica dell'ordinamento internazionale, limitandosi a ricercare nella prassi gli elementi costitutivi di una consuetudine, senza preoccuparsi di "anticiparne", in qualche modo, gli effetti. Sarà allora interessante leggere la probabile, futura sentenza della Cassazione per vedere se – in linea con la soluzione data in tema di giurisdizione – anche con riguardo alla prescrizione la Suprema Corte deciderà di 'contribuire' alla 'emersione' di una regola volta a garantire una sempre maggiore tutela dei diritti inviolabili della persona.

Francesco De Vittor

Translation

Diritti umani e diritto internazionale, vol. 2 no. 32008

CIVIL AND POLITICAL RIGHTS

State immunity from jurisdiction and damages for infringement of fundamental rights: the Mantelli *case*

Court of Cassation, Combined Civil Sections, *Federal Republic of Germany* v *Mantelli and Others, Daimler-Chrysler* v. *Mantelli and Others, Order no. 14201 of 20 May 2008* (www.cortedicassazione.it/Documenti/14201.pdf)

Order no. 14201 of the Court of Cassation concerns an application for a preliminary ruling on jurisdiction lodged by the Federal Republic of Germany in connection with an action for damages resulting from the deportation of a group of Italians to Germany during the Second World War and their subjection to forced labour by German industry. In that order, the Supreme Court upholds the jurisdiction of the Italian court vis-à-vis the German State, thereby confirming its earlier position on this matter in the landmark judgment in *Ferrini* (Court of Cassation, Combined Civil Sections, *Ferrini* v *Federal Republic of Germany*, judgment no. 5044 of 11 May 2004, *Rivista di diritto internazionale*, 2004, pp. 539 et seq.).

The grounds of the order, although somewhat less detailed that those of the earlier judgment in *Ferrini*, are particularly interesting because the Supreme Court explicitly stated that it was not applying an existing rule of general international law but was contributing to the formulation of such a rule in the absence of legal certainty. The Combined Sections in fact stated their "awareness" of the fact that "at present there is no secure and explicit international practice which permits a derogation from the principle of the immunity of a foreign State from civil jurisdiction in respect of acts committed *iure imperii* [...] in the case of acts perpetrated by the latter which may be regarded as crimes against humanity" (in the judgment in question, the Combined Sections stated that they had already mentioned this awareness in *Ferrini*, probably with reference to paragraph 10 of that judgment, although it has to be said that the Court was much less explicit in the earlier judgment). Given this situation of legal uncertainty, and on the basis of the opinions expressed by the European Court of Human Rights in *Al-Adsani* v. *United Kingdom* (application 35763/97, judgment of 21 November 2001) – and confirmed only incidentally in the judgment of 12 December 2002 in *Kalogeropoulou and Others* v. *Greece and Germany* (application 59021/00) – the Court of Cassation held that "a

principle limiting the immunity of a State which has committed crimes against humanity can be regarded *as being at the formative stage*".

Thus, in the absence of an existing rule of law or a consistent practice of denying immunity, the Court made a systematic analysis of the international legal order and found that two general principles co-existed: the principle of "immunity from civil jurisdiction of a foreign State (aimed at promoting international relations and respecting reciprocal sovereignties)" and the principle "whereby international crimes threaten the very essence of humanity and undermine the foundations of co-existence between peoples". In the light of this co-existence, the Court held that "the irrefutable 'antinomy' between those principles [...] can only be resolved 'systematically' by according primacy to the higher-ranking rules", in other words those rules designed to ensure "respect for inviolable human rights" which "has assumed, in international law, the role of a guiding principle, owing to its connotation as a target value".

As had already happened in *Ferrini* (we would refer here to P. De Sena and F. De Vittor, "State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case" in *European Journal of International Law 2005*, pp. 89-112, especially pp. 101 and 110, or to "*Immunità degli Stati dalla giurisdizione e violazioni dei diritti dell'uomo: la sentenza della Cassazione italiana nel caso* Ferrini" in *Giurisprudenza italiana,* 2005, pp. 255-265; also P. De Sena, under "*Diritto dell'uomo*" in *Dizionario di diritto pubblico*, 2006, p. 1873 ed. S. Cassese), likewise in this case, the Court of Cassation, invoking the peremptory nature of the rules laid down to protect human rights, upheld the jurisdiction of the Italian courts vis-à-vis Germany, not so much on the basis of the formal supremacy of *ius cogens* rules but rather through a systematic interpretation of the international legal order in the light of the fundamental values which characterize it at a substantive level.

The decision to follow these principles, rather than adopting the more technical-normative position of hierarchy of sources, enabled the Court not to have to justify its somewhat casual leap from classifying deportation and forced labour as "international crime" to concluding – implicitly – that the right to take legal action to obtain damages in respect of a criminal act is the logical outcome of that classification, in that it is the means of guaranteeing protection of inviolable rights (note that the principles which the Court regards as co-existing, but basically antinomic, in this case are the principle of immunity of acts committed *iure imperii* and the principle of inviolability of human rights, and not – as C. Focarelli maintains in "*Diniego dell'immunità giurisdizionale degli Stati straniere per crimini* jus cogens *e dinamica del*

diritto internazionale" in *Rivista di diritto internazionale,* 2008, pp. 737-757, esp. p. 749 – the principle of immunity and that of denial of immunity).

Moreover, it is worth adding, on a more general note, that the whole judgment tends to talk in terms of "fundamental values" rather than invoking the concept of *ius cogens*.

This is also the gist of a different part of the judgment on which it is worth lingering in view of its relevance in terms of the Court's reasoning: in other words the part where the Combined Sections rule out the contention that lack of jurisdiction follows from the 1947 and 1961 Treaties. Pursuant to Article 77 of the Peace Treaty between Italy and the Allied and Associated Powers, signed in Paris on 10 February 1947, "Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on 8 May 1945 [...]. This waiver shall be deemed to include [...] all claims for loss or damage arising during the war." That waiver would appear to be confirmed, directly and vis-à-vis the Italian State, by the Bonn Treaty of 2 June 1961 whereby Italy, having received cumulative compensation from Germany, considered all claims by Italian natural and legal persons to have been "settled" and undertook to "indemnify the Federal Republic of Germany against any action or other claims in law".

In order to refute the argument that the provisions of those agreements entailed a lack of jurisdiction on the part of the Italian courts, the Court of Cassation reasoned that those provisions referred to substantive law relationships and not to jurisdiction, it being for the court to which an application has been made to decide on the merits of any claim covered by the waiver. Aside from the fact that it would appear possible to endorse this interpretation of the Peace Agreement, it is important to stress at this point that the Court took care not to justify its interpretation by invoking the peremptory nature of the rule on protection of fundamental human rights.

In other words, if application of the customary rule regarding immunity were to be excluded on account of the primacy accorded, on a purely formal level, to the higher-ranking provision designed to protect individual rights (classified as a peremptory norm), then the Court could also examine the effects of the latter provision on the clauses of the Peace Treaties which conflict with it. It is true that, because the Peace Treaties predate the entry into force of the Vienna Convention on the Law of Treaties, they are exempt from the application of Article 64 of the Convention, unless the latter provision is to be regarded as a provision of customary law (on this point see N. Ronzitti, "*La disciplina dello* jus cogens *nella Convenzione di*

Vienna sul diritto dei trattati" in *Comunicazioni e* Studi, vol. XV, 1978, p. 293 et seq.). It is also true that doubts could be expressed regarding the competence of the Court of Cassation to declare that a treaty or some of its clauses are invalid because they conflict with an overriding provision of *ius cogens* (in support of that competence, in an individual case, see however B. Conforti and A. Labella, "Invalidity and Termination of Treaties: The Role of National Courts" in *European Journal of International Law*, 1990, pp. 44 et seq., and also Article 5 of the resolution of the Institut de droit international of 1993 concerning *"L'activité du juge interne et les relations internationales de l'État"*, rapporteur B. Conforti). However, the Court of Cassation could nonetheless have maintained that to interpret the Peace Treaties as meaning that they do not entail a waiver of jurisdiction on the part of Italy is the only interpretation which is "in line" with the peremptory norms currently in force in international law. On the other hand, the grounds of the judgment maintain a distinction between considerations regarding interpretation of the law of treaties and considerations aimed at establishing the limits of a provision of general international law in terms of the immunity of a State from jurisdiction.

In our view, that choice is not so much due to the fact that invoking the individual right of victims of international crimes to bring legal action as being contained in a peremptory norm which conflicts with the waiver by the forum State of its own jurisdiction would have obliged the court to examine all the thorny questions concerning the law of treaties to which we have just alluded. Rather, it would seem to us that those judges were aware that a "specific" peremptory norm with such a content does not exist. The only "higher-ranking" norm of customary law currently in force is in fact the "substantive" rule prohibiting acts which infringe fundamental rights (which doubtless include deportation and subjection to forced labour). In the absence of any general practice, the exception to State immunity from jurisdiction would merely be a procedural "effect" to be inferred from the substantive rule. This kind of inference which tends to extend the scope of peremptory norms of a substantive nature to matters of a procedural nature has been rejected recently by the International Court of Justice in a judgment of 3 February 2006 on the Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Rwanda) (see in particular paragraphs 69-78, also the comments by C. Focarelli, *"I limiti dello* jus cogens *nella giurisprudenza più recente"*, in *Rivista di diritto internazionale* 2007, pp. 637-656, especially p. 640). In the light of which we have to applaud the reasoning of the Court of Cassation which, far from inferring, merely by logical inference, the existence of a norm which is not endorsed by international practice, quite transparently conducted a 'balancing of values' which was certainly aimed at "helping in the 'formulation of'

a rule which reflects State immunity", but is nonetheless capable, *on its own*, of limiting the scope of the traditional regime, with a view to protecting individual rights.

As we have already pointed out, the Court invoked the "fundamental principles" concerning protection of the human being and "higher-ranking" norms, without ever invoking the concept of *ius cogens*. The fundamental principles were in fact invoked for the purpose of asserting the need to formulate a customary rule which is in line with those principles. In other words, it is the assiological relevance of those principles – rather than their classification, in the Court's view, as rules of *ius cogens* (see however, C. Focarelli "*I limiti dello* jus cogens", op. cit. p. 648) – which led the Court itself to invoke them as the basis for the future development, in the "formal-normative" sense, of the international rules concerning immunity.

This reasoning seems moreover to be characteristic of the rulings of the Court of Cassation, ever since its judgment in *Ferrini*, regarding recognition of immunity vis-à-vis acts which infringe fundamental human rights (see again P. De Sena and F. De Vittor, op. cit. pp. 89-112). Our contentions are only apparently contradicted by the judgment of the First Criminal Section in *Lozano* (judgment no. 31171 of 19 June – 24 July 2008, www.corte-dicassazione.it/Documenti/31171_Iraq.pdf). When assessing whether the American soldier accused of killing Nicola Calipari, Andrea Carpani and Giuliana Sgrena should be regarded as enjoying functional immunity, the judges of the First Section held that it is a logical corollary of the parallel and antinomic coexistence in the international legal order of the two principles [that of functional immunity and that which requires respect for inviolable human rights], both of which are general in scope, that any conflict arising where they both come into play at the same time should be resolved systematically on the basis of a balancing of interests, according primacy to the higher-ranking principle and *ius cogens*, and therefore to the guarantee that the most serious crimes against the inviolable rights of human freedom and dignity will not remain unpunished. On the one hand, in fact, the Court held that the loss of functional immunity was the "logical corollary" of the peremptory norm regarding crimes against humanity (although it denied that the crime of which Lozano was accused could be regarded as such: for a criticism of that view see A. Cassese, *"I crimini di guerra e il caso Calipari"* in *La Repubblica,* 5 August 2008, p. 28) thereby giving the impression that it was following merely inferential reasoning. At the same time, however, it confirmed that the antinomy between equally general principles should be resolved on the basis of a "balancing of interests", with a tendency to favour those principles designed to protect inviolable human rights, a balancing which could only be conducted on the basis of "values". Nor should we forget that the *Lozano* judgment concerned recognition of functional immunity in criminal proceedings, a

context where – as we all know – the relevant practice is much more established (see M. Frulli, *Immunità e crimini internazionali,* Turin, 2007, and P. De Sena, "*Immunità di organi constituzionali e crimini internazionali individuali in diritto internazionale*" in *Comunicazioni e Studi*, vol. XXIII, 2007, pp. 267-300, especially pp. 280 et seq.).

In conclusion, there is one more element to which we would draw the reader's attention and this does not concern the matters of jurisdiction examined thus far, but rather the possible outcome of the case. On 13 March 2007, the Tribunale di Arezzo delivered the first ruling on the merits in the *Ferrini* case, maintaining that the right upheld by the applicant must be regarded as covered by statutory limitation. That ruling seems worthy of note, not just because, if the judgment should be confirmed at the higher levels of the judiciary, it in fact thwarts the efforts of former deportees to obtain justice, but more particularly because it follows a method of reasoning which is at odds with that followed above by the Court of Cassation. More specifically, having found that – pursuant to both German law and Italian law – the ordinary statutory limitation had been exceeded at the time of the application, the Tribunale then examined the rules of international law regarding the non-applicability of statutory limitation to international crimes. Starting from the precept that "it is not possible to invoke just any international rule on an internal level, but only those principles of international law for which it has been ascertained that a genuine international practice has been formulated", the Tribunale considered the relevant practice to be insufficient – and in some cases contrary – to recognition of a rule of non-applicability of statutory limitation to international crimes, concluding that such a rule was only incorporated into Italian law with the incorporation and entry into force of the Statute of the International Criminal Court, which could not be applied retrospectively. Thus the court deciding on the merits – unlike the Court of Cassation – did not conduct a systematic interpretation of international law, restricting itself to searching in practice for elements amounting to a custom, without concerning itself about "anticipating" to some degree the effects of such a custom. It will therefore be interesting to read the likely forthcoming judgment of the Court of Cassation to see whether – in line with the interpretation given in connection with jurisdiction – the Supreme Court decides, in relation to statutory limitation, to 'contribute' to 'the formulation of' a rule designed to guarantee increasing protection of inviolable human rights.

Francesca De Vittor

Annex 30

William H. Taft, IV, Legal Adviser, Department of State
Submission as Amicus Curiae to the US Court of Appeals
for the District of Columbia Circuit in the case of
Hwang Geum Joo v. Japan, November 2004

CASE ARGUED DECEMBER 10, 2002

No. 01-7169

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HWANG GEUM JOO, et al.,
Appellants,

v.

JAPAN,
Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF ON REMAND FOR AMICUS CURIAE THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEE

Of Counsel:
WILLIAM H. TAFT, IV
Legal Adviser
Department of State

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

MARK B. STERN
(202) 514-5089
SHARON SWINGLE
(202) 353-2689
Attorneys, Appellate Staff
Civil Division, Room 7250
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

---

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes:

Treaties:

Miscellaneous:

GLOSSARY

FSIA	Foreign Sovereign Immunities Act

CASE ARGUED ON DECEMBER 10, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-7169

HWANG GEUM JOO, et al.,
Appellants,

v.

JAPAN,
Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF ON REMAND FOR AMICUS CURIAE THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEE

This litigation was brought by Philippine, Korean, and Chinese "comfort women," who were forcibly abducted and subjected to rape and torture by the Japanese military during World War II. The United States does not in any way condone that abhorrent conduct, and has condemned it in the strongest possible terms. The United States has participated in this litigation as amicus curiae, however, to express our nation's foreign policy with respect to wartime claims against Japan.

The case returns to this Court following the Supreme Court's grant of certiorari, vacatur, and remand for further consideration in light of Republic of Austria v. Altmann, 124 S. Ct. 2240 (2004). In Altmann, the Supreme Court held that the

Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq. (FSIA), applies to all claims against foreign sovereigns brought after the statute's enactment. The Court did not decide whether the claims before it came within an FSIA exception to immunity; nor did it consider the propriety of exercising jurisdiction where the political branches have made a foreign policy determination that U.S. courts should not entertain certain claims. Here, the district court properly found that this nation's foreign policy interests preclude the exercise of jurisdiction and that, in any event, the plaintiffs' claims are barred by the FSIA's general rule of foreign sovereign immunity. Those conclusions remain sound under Altmann.

A. Introduction

As we described at length in our initial amicus brief to this Court, the Executive, with the advice and consent of the Senate, has made a foreign policy determination that all World War II-related claims against Japan should be resolved exclusively through intergovernmental agreements. That determination is reflected in the 1951 Treaty of Peace among the United States, 47 other Allied Powers, and Japan. The Treaty expressly waived all wartime claims by party countries and their nationals against Japan and Japanese nationals. See 1951 Treaty, Article 14(b), at J.A. 202. At the insistence of the United States, the Treaty also provided that the wartime claims of non-

party countries (including China and Korea) and their nationals were to be resolved through intergovernmental negotiations. The claims could not be expressly waived, because a treaty is binding only on nations that are parties to it.[1] Nonetheless, the Treaty provided that China and Korea would receive from Japan the same compensation that the Allied Powers had received, and required Japan to try to reach agreements to resolve the wartime claims of those countries and their nationals. Japan subsequently entered into agreements with Taiwan and the Republic of Korea.

In the district court, the United States submitted a statement of interest expressing the view that exercise of jurisdiction over plaintiffs' claims would be fundamentally at odds with the determination that wartime claims against Japan should be resolved exclusively through diplomacy. The United States also maintained that the court did not have jurisdiction. The district court held that plaintiffs' claims did not fall within any relevant FSIA exception and that, in the alternative, the court could not exercise jurisdiction consistent with the actions of the political branches and the political question doctrine. 172 F. Supp.2d 52 (D.D.C. 2001).

---

[1] There was no consensus among the Allies as to whether the People's Republic of China or the Republic of China (Taiwan) represented China; furthermore, Korea had fought as part of the Japanese empire and thus could not properly become a party to the Treaty.

This Court affirmed on the ground that the FSIA did not provide jurisdiction, reasoning that the commercial activity exception did not apply to pre-1952 conduct and that Japan's alleged violation of jus cogens norms did not impliedly waive immunity. 332 F.3d 679, 681-687 (D.C. Cir. 2003). The Court declined to consider whether plaintiffs' claims would be justiciable, although it recognized that "the Treaty 'embodies the foreign policy determination of the United States that all claims against Japan arising out of its prosecution of World War II are to be resolved through intergovernmental settlements[,]' * * * without involving the courts of the United States * * *." Id. at 682, 684-685. The Supreme Court subsequently granted certiorari, vacated, and remanded for consideration in light of Altmann. 124 S. Ct. 2835 (2004).

B. *Altmann* Does Not Bar A Court From Giving Effect To The Political Branches' Foreign Policy Determination That Wartime Claims Against Japan Should Not Be Litigated In U.S. Courts.

1. The foreign policy determination of the political branches that wartime claims against Japan should be resolved exclusively through government-to-government negotiations may properly be given full effect in accord with the Supreme Court's decision in Altmann and subsequent cases.[2] Although Altmann held

[2] Plaintiffs erroneously assert that this Court must consider whether the FSIA confers jurisdiction over their claims before considering the propriety of exercising jurisdiction.
(continued...)

that the FSIA's rules on foreign sovereign immunity apply in all cases brought after the statute's enactment, it did not hold that available legal doctrines could not preclude judicial consideration of a suit. Furthermore, it distinguished the case before it from one where the Executive expresses a view "on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct." Id. at 2255. The Court contrasted the Executive's views on a statutory construction question like retroactive application of the FSIA, which, while "of considerable interest to the Court, * * * merit no special deference," with the filing of a statement of interest as to the foreign affairs ramifications of exercising jurisdiction in an individual case, which "might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." Id. at 2255 (noting "President's vast share of responsibility for the conduct of our foreign relations").

Justice Breyer elaborated on the relevance of the political branches' view of foreign policy in his concurring opinion in

---

[2](...continued)
Justiciability is a threshold question, see, e.g., Franklin v. Massachusetts, 505 U.S. 788, 801 n.2 (1992); INS v. Chadha, 462 U.S. 919, 941-943 (1983); Stanton v. Stanton, 421 U.S. 7, 11 (1975), which may be decided at the outset. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 100 n.3 (1998) (court may decide to abstain before deciding whether jurisdiction would otherwise exist); Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584-585 (1999).

Altmann, emphasizing that the United States' statement of interest could "refer, not only to sovereign immunity, but also to other grounds for dismissal, such as the presence of superior alternative and exclusive remedies, or the nonjusticiable nature * * * of the matters at issue." Id. at 2262 (citations omitted). Notably, Justice Breyer cited this very case as one in which the United States counseled dismissal on justiciability grounds, noting that the district court had found that the claims "raise[d] political questions that were settled by international agreements." Ibid.

In Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004), the Supreme Court considered the significance of the government's foreign policy interests for the exercise of jurisdiction under the Alien Tort Statute, emphasizing limitations -- including "case-specific deference to the political branches" -- that could prevent private lawsuits from impinging on those interests. Id. at 2766. As the Court stressed, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view" as to the potential harm caused by litigation of particular claims in U.S. courts. Ibid.

2.a. More than 50 years ago, the Executive, with the advice and consent of the Senate, made a foreign policy determination that all wartime claims against Japan should be resolved exclusively by diplomacy. In waiving the claims of the nationals

of Allied Powers and "express[ing] a clear policy of resolving the claims of other nationals through government-to-government negotiation," the 1951 Treaty reflects the common understanding that Japan "would not be sued in the courts of the United States for actions it took during the prosecution of World War II." 332 F.3d at 685, 681. The ratified treaty is, as one court recently noted, "the ultimate formal expression of the federal executive and legislative branches in matters of foreign policy." Taiheiyo Cement Corp. v. Superior Court, 12 Cal. Rptr. 3d 32, 41 (Cal. Ct. App. 2004), petition for cert. filed, 73 USLW 3248 (Oct. 11, 2004).

The United States' foreign policy is reflected in Article 14 of the Treaty, which expressly waives the claims of party countries and their nationals for claims "arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." J.A. 202. The policy is also reflected in other provisions of the Treaty, including articles requiring Japan to renounce all interests in China and authorizing China to seize Japanese assets in its territory, see Art. 21, 10, 14(a)2, at J.A. 206, 196, 201; articles requiring Japan to recognize Korea's independence and to renounce all claims to Korea and, as construed by the United States, authorizing the seizure by Korean authorities of all Japanese assets in Korea, see Art. 21, 2, 4, 9, 12, at J.A. 206, 194-195, 199-200; and articles requiring

Japan to enter into bilateral agreements with Chinese and Korean representatives resolving wartime claims on terms similar to those accepted by party nations, see Art. 26, 4(a), at J.A. 208, 195.

As the Executive explained in the Statement of Interest filed in district court, the Treaty's comprehensive framework for resolving wartime claims against Japan has been the foundation for subsequent relations among the United States, Japan, and other countries, and deviation from that framework "would have serious repercussions." Statement at 1. "To question the policy decisions behind [the 1951 Treaty or bilateral agreements between Japan and China, Taiwan, or Korea] could disrupt relations with" those countries, and "could affect United States treaty relations globally by calling into question the finality of U.S. commitments." Statement at 4, 35. Litigation of plaintiffs' claims could also "have serious implications for stability in the region." Statement, at 35. Permitting litigation to go forward against Japan based on its wartime treatment of the nationals of North Korea, for example, could pose a significant risk of seriously disrupting international relations in East Asia at a time when such relations are already extremely sensitive. It remains the policy of the United States that the war-related claims of North Korea and its nationals against Japan and Japanese nationals should be resolved through government-to-

government negotiation and not through litigation in the courts of the United States. The availability of a U.S. forum to litigate wartime claims could reasonably be expected to impair discussions between Japan and North Korea regarding the normalization of relations, talks that have grown to encompass North Korea's nuclear weapons program.

Plaintiffs' invitation for the judiciary to second-guess the foreign policy of the United States, established by the Executive at the conclusion of World War II with the advice and consent of the Senate, and carried forward to this day in a treaty that remains in effect, cannot properly be accepted. Where a political determination has been made by the political branches on an issue plainly within their province, the courts should not second-guess that determination or impair the fulfillment of that policy. See Baker v. Carr, 369 U.S. 186, 211-213, 217 (1962).

b. As the Ninth Circuit recently held, the 1951 Treaty and the foreign policy of the United States that it reflects bar a U.S. court from entertaining claims brought by U.S. prisoners of war and other victims challenging wartime atrocities. Deutsch v. Turner Corp., 324 F.3d 692, 711-716 (9th Cir.), cert. denied, 540 U.S. 820 (2003). The Deutsch court explained that the Executive exercised "exclusive power" to resolve the war with Japan by entering into the 1951 Treaty, which did not provide for a private right of action against Japan or its nationals or

authorize States to create such a right. 324 F.3d at 712, 714. The court held that this resolution barred the claims of both U.S. nationals and also nationals of non-parties China and Korea, reasoning that "[w]hen the United States has been a party to a war, the resolution it establishes to that war is the resolution for the whole of the United States." Id. at 714 n.14; see also American Ins. Ass'n v. Garamendi, 539 U.S. 396, 420-427 (2003) (President's executive agreement with Germany, reflecting agreement of Germany and German companies to establish a fund to pay Holocaust-era claims, embodied foreign policy to encourage "volunt[ary] settlement funds in preference to litigation or coercive sanctions," and preempted state law imposing coercive sanctions and creating new cause of action for Holocaust survivors); Taiheiyo Cement, 12 Cal. Rptr. 3d at 35, 44 (state-law claims brought by Korean national against Japanese company based on forced slave labor during World War II were in conflict with foreign policy expressed in 1951 Treaty, and thus invalid); Mitsubishi Materials Corp. v. Superior Court, 6 Cal. Rptr. 3d 159, 175 (Cal. Ct. App. 2003) (wartime claims brought by U.S. prisoners of war against Japanese companies were in conflict with policy expressed in 1951 Treaty and thus invalid).

Plaintiffs argue that these cases are irrelevant because they involve preemption of inconsistent state law, "a federalism doctrine inapplicable to this case." Pl. Suppl. Br. 14; but see

In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig., ___ F. Supp.2d ___, 2004 WL 2311298 (S.D.N.Y. Oct. 14, 2004) (dismissing customary international law claims). What those cases establish, however, is that a court must give effect to the political branches' determination that all wartime claims against Japan should be resolved exclusively through diplomacy -- a policy that has been adhered to since enactment of the Treaty, that has never been contradicted by the political branches in a statute or otherwise, and that continues to be foreign policy of the United States. In such circumstances, a court's interpretation and application of federal law to override this policy would be no less improper than its interpretation and application of state law to achieve that effect.[3]

In this respect, Plaintiffs' argument that the Treaty does not explicitly divest the district court of jurisdiction fails to address the broader question before the Court: whether a foreign policy determination that wartime claims against Japan should not be entertained in U.S. courts renders such claims nonjusticiable.

---

[3] Plaintiffs also cannot defeat the policy of the United States as set forth in the 1951 Treaty by relying on international law for an alleged cause of action. It is well-established that a court may look to international law for a rule of decision only "where there is no treaty, and no controlling executive or legislative act or judicial decision." The Paquete Habana, 175 U.S. 677, 700 (1900). Here, there is a treaty, and its contemplation that claims will be resolved exclusively through intergovernmental negotiations precludes an international law cause of action.

Although the Treaty does not -- and, indeed, could not by its terms -- expressly extinguish claims brought by Korean and Chinese nationals, it nonetheless manifests the determination that such claims should not be heard.[4] Both Altmann and Sosa envision that such a determination may preclude the exercise of jurisdiction in an individual case under various legal doctrines. Faced with similar circumstances, courts have consistently held that dismissal is appropriate on political question, international comity, or other doctrinal grounds.

Thus, for example, the Eleventh Circuit recently invoked Altmann to affirm the dismissal of claims filed by a victim of the Nazi regime against two German banks that had allegedly stolen her family's property through the Nazi program of "Aryanization." Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227 (11th Cir. 2004). The United States had filed a statement of interest explaining that it would be in our foreign policy interests for "the exclusive forum and remedy" for Nazi-era claims against German companies to be a fund that was to be established by the German government and German companies. See

---

[4] The position of the United States is not that the interpretation of a treaty is inherently non-justiciable, but that the 1951 Treaty reflects the United States' foreign policy not to entertain wartime claims against Japan even if they were not extinguished by the Treaty itself. It is irrelevant whether the Treaty is self-executing, since a foreign policy need not be contained in a self-executing treaty in order to be binding on a U.S. court. See, e.g., Garamendi, 539 U.S. at 420-427 (interpreting executive agreement to bar conflicting state laws).

id. at 1234. The court held that this statement of interest was "entitled to deference" under Altmann, and dismissed the claims on international comity grounds. Id. at 1237-1240; cf. In re Nazi Era Cases Against German Defendants Litig., 334 F. Supp.2d 690, 692-696 (D.N.J. 2004) (holding that claims by a Holocaust survivor against a German corporation were nonjusticiable under the political question doctrine); Ye v. Zemin, 383 F.3d 620, 623 n.6, 626-627, 629 (7th Cir. 2004) (deferring to "official position of the Executive Branch" that head of state should be immune from suit, and that permitting service of process "would have a deleterious effect on the conduct of foreign affairs"). Here, too, the foreign policy determination regarding resolution of wartime claims against Japan, and the damage that would result from adjudicating claims in disregard of that policy, bar a U.S. court from entertaining plaintiffs' claims.[5]

---

[5] Indeed, nearly forty years ago, this Court dismissed a class action brought by victims of the Holocaust -- despite the absence of a clearly articulated foreign policy such as that presented here -- as being outside "the established scope of judicial authority." Kelberine v. Societe Internationale, Etc., 363 F.2d 989, 995 (D.C. Cir. 1965). As the Court held, "[t]he time is too long," "[t]he identity of the alleged tort feasors is too indefinite," and "[t]he procedure sought -- adjudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power -- is too complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed." Ibid.

C. Plaintiffs' Claims Do Not Fit Within The FSIA's Exceptions To Foreign Sovereign Immunity.

Even if the 1951 Treaty did not preclude the district court's exercise of jurisdiction over plaintiffs' claims, their claims still would be subject to dismissal because they do not fall within the FSIA exceptions to the general rule of foreign sovereign immunity. Plaintiffs appear to concede that the waiver exception does not apply to their claims. See U.S. Am. Br. 20-21. Nor, contrary to plaintiffs' arguments, do the claims fall under the commercial activity exception, 28 U.S.C. § 1605(a)(2).

The gravamen of plaintiffs' complaint is that the Japanese military forcibly enslaved foreign women and subjected them to mass rape and torture. That conduct is not "commercial activity" within the meaning of the FSIA -- i.e., "a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). It is immaterial whether trafficking in women is a worldwide problem today that generates revenue for criminal enterprises. As this Court has recognized, the purpose of the FSIA was to prevent foreign sovereigns from claiming immunity for "typical commercial activities, not to reach out to cover all sorts of alleged nefarious acts * * *." Cicippio v. Islamic Republic of Iran, 30 F.3d 164, 168 (D.C. Cir. 1994) (kidnapping of hostage, even if for ransom, not "commercial activity" under FSIA); see also, e.g., Saudi Arabia v. Nelson, 507 U.S. 349, 361-362 (1993) (wrongful arrest, imprisonment, and

torture of employee not "commercial activity" under FSIA). To accept plaintiffs' argument that conduct is commercial so long as it is carried out by a criminal enterprise would mean that virtually any type of wrongdoing "could be thought commercial including isolated acts of assassination, extortion, blackmail, and kidnapping." Cicippio, 30 F.3d at 168. "That can hardly be what Congress meant by commercial activity * * *." Ibid.[6]

Plaintiffs cite Globe Nuclear Services, Ltd. v. AO Techsnabexport, 376 F.3d 282 (4th Cir. 2004), in support of their assertion that Japan's conduct was "commercial activity." That case, however, emphasizes that the relevant question is whether a lawsuit is "based" on commercial activity -- i.e., that commercial activity is one of the "elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." Id. at 286 (quoting Nelson, 507 U.S. at 357). The plaintiffs' claims have nothing to do with commercial activity, and the fact that Japanese soldiers might have paid a fee to the "comfort stations" has no bearing on Japan's asserted liability for war crimes, crimes against humanity, violations of

---

[6] Plaintiffs rely on Commerce Clause cases as proof that sexual slavery and trafficking are "commercial" in nature (see Pl. Suppl. Br. 5-7), but those decisions are based on Congress' power to regulate the "channels" or "instrumentalities" of interstate commerce, not the commercial character of the conduct at issue. See, e.g., Cleveland v. United States, 329 U.S. 14, 19 (1946) (upholding conviction for interstate transportation of polygamous wives); see also L. Tribe, 1 American Constitutional Law 827-828 & n.10 (3d ed. 2000).

international law, intentional torts, the crime of rape, or sexual slavery.

Plaintiffs also suggest that Japan's conduct falls within the commercial activity exception because it was in connection with a commercial activity. However, they fail to identify any commercial activity that the conduct was in connection with, and have previously conceded that "the activity that is the basis of the suit and the activity that provides the basis for jurisdiction are one and the same," Motion at 5 n.1 -- i.e., the forcible abduction, rape, and torture that the district court has correctly found not to be commercial in nature. In any event, this Court has already held that forcible harm is not "in connection with" commercial activity within the meaning of the FSIA merely because it involves the payment of money. See Cicippio, 30 F.3d at 168. Accordingly, the district court lacked jurisdiction over plaintiffs' claims.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

Of Counsel:
WILLIAM H. TAFT, IV
Legal Adviser
Department of State
Washington, DC 20520

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

MARK B. STERN
(202) 514-5089
SHARON SWINGLE
(202) 353-2689
Attorneys, Appellate Staff
Civil Division, Room 7250
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

NOVEMBER 2004

CERTIFICATE OF COMPLIANCE

Counsel for amicus curiae the United States of America hereby certifies that the foregoing brief satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7) and District of Columbia Circuit Rule 32(a). The brief was prepared in Courier New font and the computer word count is 3666.

Sharon Swingle
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2004, two copies of the foregoing Supplemental Brief On Remand For Amicus Curiae The United States Of America In Support Of Appellee were served on the following counsel by hand delivery:

Michael D. Hausfeld
Richard A. Koffman
Agnieszka M. Fryszman
Cohen, Milstein, Hausfeld & Toll
1100 New York Avenue, NW
Suite 500, West Tower
Washington, DC 20005-3934
202-408-4600

Craig A. Hoover
Jonathan Franklin
Hogan & Hartson
555 13th Street, NW
Columbia Square
Washington, DC 20004-1109
202-637-5600

and on the following counsel by first-class mail, postage prepaid:

David A. Handzo
Jennifer S. Martinez
Jenner & Block
601 13th Street, NW
Suite 1200 South
Washington, DC 20005

Michael Edward Tigar
American University College of Law
4801 Massachusetts Avenue, NW
Washington, DC 20016-8084

Richard D. Heideman
The Heideman Law Group, P.C.
1714 N Street, NW
Washington, DC 20036-2907

Sharon Swingle
Attorney

Annex 31

United States Court of Appeals for the District of the Columbia Circuit

Hwang Geum Joo v. Japan, Minister Yohei Kono, Minister of Finance

28 June 2005

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 22, 2005 Decided June 28, 2005

No. 01-7169

HWANG GEUM JOO, ET AL.,
APPELLANTS

v.

JAPAN, MINISTER YOHEI KONO, MINISTER OF FOREIGN AFFAIRS,
APPELLEE

On Remand from the U.S. Supreme Court

Agnieszka M. Fryszman argued the cause for appellants. With her on the briefs were *Michael D. Hausfeld*, *Barry A. Fisher*, *David Grosz*, and *Bill Lann Lee*.

Jenny S. Martinez argued the cause for *amici curiae* Askin, et al. in support of appellants. With her on the brief were *David A. Handzo* and *Richard Heideman*.

Craig A. Hoover argued the cause for appellee. With him on the brief were *Jonathan S. Franklin* and *Lorane F. Hebert*.

Sharon Swingle, Attorney, U.S. Department of Justice, argued the cause for *amicus curiae* United States of America in

support of appellee. With her on the brief were *Peter D. Keisler*, Assistant Attorney General, *Kenneth L. Wainstein*, U.S. Attorney, and *Mark B. Stern*, Attorney.

Before: GINSBURG, *Chief Judge*, and SENTELLE and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* GINSBURG.

GINSBURG, *Chief Judge*: We again review the district court's dismissal of the appellants' complaint alleging Japanese soldiers "routinely raped, tortured ... [and] mutilated" them, along with thousands of other women, in occupied countries before and during World War II. *Hwang Geum Joo v. Japan*, 332 F.3d 679, 681 (D.C. Cir. 2003). The case returns to us now on remand from the Supreme Court. Having had the benefit of further briefing and argument, we affirm the judgment of the district court on the ground that the case presents a nonjusticiable political question, namely, whether the governments of the appellants' countries foreclosed the appellants' claims in the peace treaties they signed with Japan.

I. Background

The facts of this case are set forth in our previous opinion, *id.* at 680-81. In brief, the appellants are 15 women from China, Taiwan, South Korea, and the Philippines; in 2000 they sued Japan in the district court under the Alien Tort Statute, 28 U.S.C. § 1350, "seeking money damages for [allegedly] having been subjected to sexual slavery and torture before and during World War II," in violation of "both positive and customary international law." 332 F.3d at 680, 681.

The district court dismissed the appellants' complaint, *Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52, 63 (D.D.C.

2001), concluding first that Japan's alleged activities did not "arise in connection with a commercial activity" and therefore did not fall within the commercial activity exception in the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(2). Accordingly, the district court did not consider the second requirement for jurisdiction under that exception -- that "Japan's alleged conduct caused a 'direct effect' in the United States." 172 F. Supp. 2d at 64 n.8. The district court went on to hold in the alternative that the complaint presents a nonjusticiable political question, noting that "the series of treaties signed after the war was clearly aimed at resolving all war claims against Japan." *Id.* at 67.

We affirmed on the ground that Japan would have been afforded absolute immunity from suit in the United States at the time of the alleged activities, 332 F.3d at 685, and that the Congress did not manifest a clear intent for the commercial activity exception to apply retroactively to events prior to May 19, 1952, when the State Department first espoused the restrictive theory of immunity later codified in the FSIA, *id.* at 686. The Supreme Court, however, held in *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004), that the FSIA applies to all cases filed thereunder "regardless of when the underlying conduct occurred." Accordingly, the Court granted the appellants' petition for a writ of certiorari, vacated our judgment, and remanded the case to this court for further consideration in light of *Altmann*. *Hwang Geum Joo v. Japan*, 124 S. Ct. 2835 (2004).

II. Analysis

The appellants again urge this court to reverse the district court's holding that their claims are not "based upon ... act[s] ... in connection with a commercial activity," 28 U.S.C. § 1605(a)(2), and to remand the case to the district court for it to

decide in the first instance whether Japan's alleged actions "cause[d] a direct effect in the United States." *Id.* Japan, and the United States as amicus curiae, again argue that Japan enjoys sovereign immunity because its alleged activities were not commercial and, in any event, that the appellants' complaint presents a nonjusticiable political question.

As explained below, we agree with the latter argument and therefore do not address the issue of sovereign immunity. The appellants, however, citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), contend that "[b]efore reaching [the] political question [doctrine], this [c]ourt must establish jurisdiction" under the FSIA. We turn first to that issue.

A. The Order of Proceeding

As the Supreme Court stated in *Steel Co.*, "For a court to pronounce upon the meaning ... of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." 523 U.S. at 101-02. The court must therefore "address questions pertaining to its or a lower court's jurisdiction before proceeding to the merits." *Tenet v. Doe*, 125 S. Ct. 1230, 1235 n.4 (2005).

The appellants apparently assume, but point to no authority suggesting, a dismissal under the political question doctrine is an adjudication on the merits. That is not how the Supreme Court sees the matter:

> [T]he concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Art. III, embodies ... the ... political question doctrine[] .... [T]he presence of a political question [thus] suffices to prevent the power of

> the federal judiciary from being invoked by the complaining party.

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974).

Moreover, *Steel Co.* "does not dictate a sequencing of jurisdictional issues." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (within court's discretion to address personal jurisdiction before subject-matter jurisdiction); *see also Toca Producers v. FERC*, No. 04-1135, Slip. Op. at 5 (D.C. Cir. 2005) (addressing ripeness before standing). Rather, as this court held *In re Papandreou*, "a court that dismisses on other non-merits grounds such as *forum non conveniens* and personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles underlying ... *Steel Company*." 139 F.3d 247, 255 (1998). As the Supreme Court stated in *Tenet*, "application of the *Totten* rule of dismissal, [92 U.S. 105 (1876),] like the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), or the prudential standing doctrine, represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction." 125 S. Ct. at 1235 n.4. Likewise, we need not resolve the question of the district court's subject-matter jurisdiction under 28 U.S.C. § 1330 -- that is, whether Japan is entitled to sovereign immunity under the FSIA, *see Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118, 121 (D.C. Cir. 1999) (the FSIA "is the sole basis for obtaining jurisdiction over a foreign state in our courts") -- before considering whether the complaint presents a nonjusticiable political question, *see Ruhrgas*, 526 U.S. at 585 ("It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits").

B. The Political Question Doctrine

The War in the Pacific has been over for 60 years, and Japan has long since signed a peace treaty with each of the countries from which the appellants come. The appellants maintain those treaties preserved, and Japan maintains they extinguished, war claims made by citizens of those countries against Japan. As explained below, our Constitution does not vest the authority to resolve that dispute in the courts. Rather, we defer to the judgment of the Executive Branch of the United States Government, which represents, in a thorough and persuasive Statement of Interest, that judicial intrusion into the relations between Japan and other foreign governments would impinge upon the ability of the President to conduct the foreign relations of the United States.

Baker v. Carr, 369 U.S. 186 (1962), remains the starting point for analysis under the political question doctrine. There the Supreme Court explained that "[p]rominent on the surface of any case held to involve a political question is found" at least one of six factors, the first of which is "a textually demonstrable constitutional commitment of the issue to a coordinate political department ...." *Id.* at 217.* Of course, questions concerning foreign relations "frequently ... involve the exercise of a discretion demonstrably committed to the executive or

*Other factors that indicate a political question, the Court in *Baker* explained, are: "a lack of judicially discoverable and manageable standards for resol[ution]; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

legislature"; the Court cautioned, however, that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211. Courts are therefore to focus their analysis upon "the particular question posed, in terms of the history of its management by the political branches." *Id.*

The Supreme Court has recently given further direction more closely related to the legal and factual circumstances of this case: A policy of "case-specific deference to the political branches" may be appropriate in cases brought under the Alien Tort Statute. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766 n.21 (2004). In *Sosa*, the Court took note of certain class actions seeking damages for those injured by "the regime of apartheid that formerly controlled South Africa"; in each case the United States had filed a Statement of Interest counseling dismissal because prosecution of the case would interfere with South Africa's policy of "deliberately avoid[ing] a 'victors' justice' approach to the crimes of apartheid" in favor of "confession and absolution ... reconciliation, reconstruction, reparation and goodwill." *Id.* "In such cases," the Court explained, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Id.* Similarly, the Court in *Altmann* noted that a Statement of Interest concerning "the implications of exercising jurisdiction over [a] particular [foreign government] in connection with [its] alleged conduct ... might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." 541 U.S. at 702; see also *id.* at 714 (Breyer, J., concurring) (citing district court's opinion in this case).

With these principles in mind, we turn to "the particular question posed" in this case, *Baker*, 369 U.S. at 211, namely, whether the series of treaties Japan concluded in order to secure

the peace after World War II foreclosed the appellants' claims. As we explained in our previous opinion, Article 14 of the 1951 Treaty of Peace between Japan and the Allied Powers, 3 U.S.T. 3169, "expressly waives ... 'all claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war.'" 332 F.3d at 685.

The appellants from China, Taiwan, and South Korea argue that because their governments were not parties to the 1951 Treaty, the waiver of claims provision in Article 14 did not extinguish their claims. Neither, they argue, did the subsequent agreements between Japan and the governments of their countries. Although the appellants acknowledge that "it may seem anomalous that aliens may sue where similar claims of U.S. nationals are waived," they argue "that is precisely the result contemplated by ... the [Alien Tort Statute], 28 U.S.C. § 1350."*

"Anomalous" is an understatement. *See* Statement of Interest of the United States at 28 ("it manifestly was not the

---

* Despite the district court's having dismissed their complaint on the ground that "the series of treaties signed after the war was clearly aimed at resolving all war claims against Japan" and that a United States "court is not the appropriate forum in which plaintiffs may seek to reopen those discussions," 172 F. Supp. 2d at 67, the appellants argue for the first time in their post-remand Supplemental Reply Brief that because they allege injuries dating back to 1931, their claims did not arise solely from "the prosecution of the war," which in Article 8(a) of the 1951 Treaty is defined as having begun on September 1, 1939, the day Germany invaded Poland. This argument, raised for the first time in the appellants' fourth and final brief on appeal, comes far too late for the court to consider, *cf. Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) ("our caselaw makes clear that an argument first made in the reply comes too late").

intent of the President and Congress to preclude Americans from bringing their war-related claims against Japan ... while allowing federal or state courts to serve as a venue for the litigation of similar claims by non-U.S. nationals"). Even if we assume, however, as the appellants contend, that the 1951 Treaty does not of its own force deprive the courts of the United States of jurisdiction over their claims, it is pellucidly clear the Allied Powers intended that all war-related claims against Japan be resolved through government-to-government negotiations rather than through private tort suits. Indeed, Article 26 of the Treaty obligated Japan to enter "bilateral" peace treaties with non-Allied states "on the same or substantially the same terms as are provided for in the present treaty," which indicates the Allied Powers expected Japan to resolve other states' claims, like their own, through government-to-government agreement. To the extent the subsequent treaties between Japan and the governments of the appellants' countries resolved the claims of their respective nationals, the 1951 Treaty at a minimum obliges the courts of the United States not to disregard those bilateral resolutions.

First, the Republic of the Philippines, as an Allied Power, was a signatory to the 1951 Treaty itself and thus at least purported to waive the claims of its nationals. 136 U.N.T.S. at 137, ratified 260 U.N.T.S. 450. Then in 1952 Japan reached an agreement with the Republic of China (Taiwan), 138 U.N.T.S. 37, which did not expressly mention the settlement of individual claims but did state in Article XI that "[u]nless otherwise provided for in the present Treaty ... any problem arising between [the parties] as a result of the existence of a state of war shall be settled in accordance with the relevant provisions of the [1951] Treaty." In 1965 Japan and the Republic of Korea (South Korea) entered into an agreement providing that "the problem concerning property, rights, and interests of the two Contracting Parties and their nationals ... and concerning claims

between the Contracting Parties and their nationals ... is settled completely and finally." 583 U.N.T.S. 258, 260 (Art. II, § 1). Finally, in 1972 Japan and the People's Republic of China issued a Joint Communiqué in which China "renounce[d] its demand for war reparation from Japan," and in 1978 Japan and China affirmed in a formal treaty of peace that "the principles set out in [the Joint Communiqué] should be strictly observed." 1225 U.N.T.S. 269.

As evidenced by the 1951 Treaty itself, when negotiating peace treaties,

> governments have dealt with ... private claims as their own, treating them as national assets, and as counters, 'chips', in international bargaining. Settlement agreements have lumped, or linked, claims deriving from private debts with others that were intergovernmental in origin, and concessions in regard to one category of claims might be set off against concessions in the other, or against larger political considerations unrelated to debts.

Louis Henkin, *Foreign Affairs and the Constitution* 300 (2d edition 1996); *see Dames and Moore v. Regan*, 453 U.S. 654, 688 (1981) (upholding President's authority to settle claims of citizens as "a necessary incident to the resolution of a major foreign policy dispute between our country and another [at least] where ... Congress acquiesced in the President's action"); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424 (2003) (acknowledging "President's authority to provide for settling claims in winding up international hostilities").

The governments of the appellants' countries apparently had the authority -- at least the appellants do not contest the point -- to bargain away their private claims in negotiating a peace with Japan and, as we noted previously, it appears "in fact

[they] did." 332 F.3d at 685. Indeed, Professor Henkin reports that "except as an agreement might provide otherwise, international claim settlements generally wipe out the underlying private debt, terminating any recourse under domestic law as well." *Above* at 300. The Supreme Court first expressed the same understanding with respect to the Treaty of Paris ending the War of Independence, which expressly provided for the preservation of private claims. In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796), a case brought by a British subject to recover a debt confiscated by the Commonwealth of Virginia during the war, Justice Chase wrote:

> I apprehend that the treaty of peace abolishes the subject of the war, and that after peace is concluded, neither the matter in dispute, nor the conduct of either party, during the war, can ever be revived, or brought into contest again. All violencies, injuries, or damages sustained by the government, or people of either, during the war, are buried in oblivion; and all those things are implied by the very treaty of peace; and therefore not necessary to be expressed. Hence it follows, that the restitution of, or compensation for, British property confiscated, or extinguished, during the war, by any of the United States, could only be provided for by the treaty of peace; and *if there had been no provision, respecting these subjects, in the treaty*, they could not be agitated after the treaty, by the British government, much less by her subjects in courts of justice. (Emphasis supplied).

Contrary to that principle, the appellants insist the treaties between Japan and Taiwan, South Korea, and China preserved the claims of individuals by failing to mention them (a claim that would be untenable with respect to the Philippines). Japan does not agree, nor does the Department of State, which takes the position that "[t]he plaintiffs' governments ... chose to

resolve those claims through international agreements with Japan." Statement of Interest at 31. In order to adjudicate the plaintiffs' claims, the court would have to resolve their dispute with Japan over the meaning of the treaties between Japan and Taiwan, South Korea, and China, which, as the State Department notes in arguing this case is nonjusticiable, would require the court to determine "the effects of those agreements on the rights of their citizens with respect to events occurring outside the United States." *Id.*

The question whether the war-related claims of foreign nationals were extinguished when the governments of their countries entered into peace treaties with Japan is one that concerns the United States only with respect to her foreign relations, the authority for which is demonstrably committed by our Constitution not to the courts but to the political branches, with "the President [having] the 'lead role.'" *Garamendi*, 539 U.S. at 423 n.12. And with respect to that question, the history of management by the political branches, *Baker*, 369 U.S. at 211, is clear and consistent: Since the conclusion of World War II, it has been the foreign policy of the United States "to effect as complete and lasting a peace with Japan as possible by closing the door on the litigation of war-related claims, and instead effecting the resolution of those claims through political means." Statement of Interest at 29; *see also* S. Rep. No. 82-2, 82d Cong., 2d Sess. 12 (1952) ("Obviously insistence upon the payment of reparations in any proportion commensurate with the claims of the injured countries and their nationals would wreck Japan's economy, dissipate any credit that it may possess at present, destroy the initiative of its people, and create misery and chaos in which the seeds of discontent and communism would flourish"); *Aldrich v. Mitsui & Co. (USA)*, Case No. 87-912-Civ-J-12, Slip Op. at 3 (M.D. Fla. Jan. 20, 1988) (following State Department's recommendation to dismiss private claim as barred by 1951 Treaty); *In re World War II Era Japanese*

Forced Labor Litigation, 114 F. Supp. 2d 939, 946-48 (N. D. Cal. 2000) (same).

It is of course true, as the appellants point out, that in general "the courts have the authority to construe treaties and executive agreements," *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986); *see also Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1235-36 (11th Cir. 2004). At the same time, the Executive's interpretation of a treaty is ordinarily entitled to "great weight," *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982).

Here, however, the United States is not a party to the treaties the meaning of which is in dispute, and the Executive does not urge us to adopt a particular interpretation of those treaties. Rather, the Executive has persuasively demonstrated that adjudication by a domestic court not only "would undo" a settled foreign policy of state-to-state negotiation with Japan, but also could disrupt Japan's "delicate" relations with China and Korea, thereby creating "serious implications for stability in the region." Statement of Interest at 34-35. Consider: According to the appellants the Republic of Korea does not agree with Japan's understanding that the treaty between them extinguished the appellants' claims against Japan. *See* Reply Brief of Appellants at 15 n.14 (quoting Korean Foreign Minister as saying that "it is the government's position that the [Treaty of 1965] does not have any effect on individual rights to bring claims or lawsuits," Decl. of Prof. Chang Rok Kim, Pls.' Opp. Mot. Dismiss. Ex. 2 at 12). Is it the province of a court in the United States to decide whether Korea's or Japan's reading of the treaty between them is correct, when the Executive has determined that choosing between the interests of two foreign states in order to adjudicate a private claim against one of them would adversely affect the foreign relations of the United States? Decidedly not. The Executive's judgment that

adjudication by a domestic court would be inimical to the foreign policy interests of the United States is compelling and renders this case nonjusticiable under the political question doctrine.

III. Conclusion

We hold the appellants' complaint presents a nonjusticiable political question, namely, whether the governments of the appellants' countries resolved their claims in negotiating peace treaties with Japan. In so doing we defer to "the considered judgment of the Executive on [this] particular question of foreign policy." *Altmann*, 541 U.S. at 702; *Cf. Alperin v. Vatican Bank*, 405 F.3d 727, 755 (9th Cir. 2005) ("Condemning -- for its wartime actions -- a foreign government with which the United States was at war would require us to review an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been constitutionally committed"). For the court to disregard that judgment, to which the Executive has consistently adhered, and which it persuasively articulated in this case, would be imprudent to a degree beyond our power.

Accordingly, as we said when this case was previously before us, "much as we may feel for the plight of the appellants, the courts of the United States simply are not authorized to hear their case." 332 F.3d at 687. For the foregoing reasons, the judgment of the district court is

Affirmed.

Annex 32

Foreign State Immunity Law, 2008, Israel

Foreign States Immunity Law 5769-2008

Chapter One: Definitions

Definitions

1 . In this Law –

"central bank" includes any agency constituting the central monetary authority of a foreign state;

"separate entity" means a governmental authority of a foreign state having separate legal personality from that of the government of that state.

"foreign state" includes a political unit within a federal state, governmental agencies of a foreign state, official functionaries representing such a state in performing their function, and a separate entity.

"commercial asset" means any asset, excluding a diplomatic or consular asset, a military asset or an asset of a central bank which is held in Israel by a foreign state for a commercial purpose; in this matter, an asset held in Israel by a foreign state and not intended for a particular purpose shall be regarded as being held by that state for a commercial purpose, unless it is proved otherwise;

"military asset" means an asset used or intended for use in connection with military activity and which is of a military nature or is controlled by the military authorities;

"commercial transaction" means any transaction or activity within the sphere of private law which is of a commercial nature, including an agreement for the sale of goods or services, a loan or other transaction for finance, guarantee or indemnity, and which by its nature does not involve the exercise of governmental power.

Chapter Two: Immunity from Jurisdiction

Part One: Immunity of the Foreign State

Immunity of a foreign state from the jurisdiction

2. A foreign state shall have immunity from the jurisdiction of the courts in Israel, excluding jurisdiction in criminal matters (hereafter referred to as immunity from jurisdiction), subject to the provisions of this statute.

Part Two: Exceptions to Immunity

Commercial transactions

3. A foreign state shall not have immunity from jurisdiction where the cause of action is a commercial transaction

Contract of Employment

4. (a) A foreign state shall not have immunity from jurisdiction in an action by an employee or by an applicant for employment, where all the following conditions are fulfilled:

(1) the cause of action is within the exclusive jurisdiction of a Regional Labour Court, under any legal provision;

(2) the subject matter of the action is labour, all or a part of which has been performed, or is to be performed, in Israel

(3) when the cause of action arose, the employee or applicant for employment was an Israeli citizen or was habitually resident in Israel or in a region; in this context the term "region" shall be as defined in the Emergency Regulations (Extension of Validity) (Judea and Samaria – Adjudication of Offences and Legal Assistance) Law, 5728-1967.

(b) The provisions of this section shall not apply if the employee or applicant for employment was, at the commencement of the proceeding, a citizen of the foreign state and was not resident in Israel.

(c) In an action by an employee or applicant for employment where the conditions specified in this section are not fulfilled, the foreign state shall not have immunity from jurisdiction, even where the cause of action is a commercial transaction as provided in section 3.

Actions in tort

5. A foreign state shall not have immunity from jurisdiction in an action in tort where personal injury or damage to tangible property has occurred, provided the tort was committed in Israel.

Property rights

6. A foreign state shall not have immunity from jurisdiction in an action or in proceedings as detailed below:

(1) an action concerning a right or other interest that the foreign state has in immovable property situated in Israel, an action concerning possession or use by a foreign state of immovable property situated in Israel or an action concerning the obligation of a foreign state deriving from such right, other interest or use;

(2) an action or proceedings concerning a right or other interest of the foreign state in assets situated in Israel to which it is entitled by way of succession, gift or as *bona vacantia*, or an action or proceedings concerning an obligation deriving from such right or other interest;

(3) proceedings concerning estates, property of persons under guardianship, proceedings for insolvency or administration of trusts;

Intellectual property

7. A foreign state shall not have immunity from jurisdiction in an action in matters of intellectual property as defined in section 40(4)of the Courts Law{Consolidated Version}, 5744-1984, which concerns -

(1) the right of the foreign state in intellectual property;

(2) allegation of a breach, in Israel, by the foreign state of a right in intellectual property;

Action against a ship or cargo

8. (a) A foreign state shall not have immunity from jurisdiction in an action against a ship which at the commencement of the proceeding was owned or operated by that foreign state, or in an action against a cargo of a ship, which cargo was owned by that foreign state at the commencement of the proceeding, provided that at the time the cause of action arose, the ship or the cargo, whichever is applicable, was being used for a commercial purpose.

(b) In this section, "ownership" of a ship or cargo includes possession, control or other proprietary connection of the foreign state to the ship or cargo.

Part Three: Waiver of Immunity

Waiver of immunity by agreement

9. (a) A foreign state shall not have immunity from jurisdiction where it has expressly waived such immunity in writing, or where it has waived it by written or oral notice to the court.

(b) A waiver under this section may be made generally or in respect of a particular matter, in advance or *ex post factum*, and may be limited by exceptions.

(c) The head of a diplomatic mission of a foreign state in Israel or any person acting in such capacity, is authorized to waive the immunity under this section, in the name of the foreign state, and in respect of immunity in a proceeding originating in a contract to which the foreign state is a party, any person who has contracted in the name of the foreign state shall also be so authorized; the provisions of this sub-section shall not derogate from an authority conferred on any other person to waive the immunity in the name of the foreign state.

Waiver of immunity by way of conduct

10. (a) A foreign state shall not have immunity from jurisdiction in a counterclaim or in third-party proceedings, where it was the foreign state that initiated the court proceeding or joined them, thereby becoming a party to the proceedings.

(b) The provisions of sub-section (a) shall not apply to a foreign state which joined the proceeding in one of the following circumstances:

(1) the foreign state pleads immunity from the jurisdiction;

(2) the object of the foreign state in adhering to the proceeding is to put before the court submissions regarding a right or other interest it has in assets involved in the proceeding or regarding any other right which may be affected by the proceeding.

(c) In this section, "counterclaim" means a counterclaim in a civil action having the same subject-matter, or where they both arise from the same circumstances or where the relief sought in the counterclaim is not different from and does not exceed the relief sought in the original action.

Arbitration

11. (a) Where a foreign state has agreed in writing to submit to arbitration a dispute which has arisen or is likely to arise in the future, the foreign state shall not have immunity from jurisdiction, in respect of court proceedings connected with the arbitration, unless it has been otherwise determined in the arbitration agreement.
(b) The provisions of this section shall not apply to an arbitration agreement between states to which the provisions of public international law apply, except such an agreement one of the parties to which is a separate entity, not being a central bank.

Time for raising plea of immunity

12. (a) A foreign state shall raise a plea of immunity from jurisdiction at the earliest opportunity, and no later than when it first submits its case regarding the substance of the action.
(b) Where the foreign state has not raised a plea of immunity from jurisdiction by the time limit specified in sub-section (a), it shall be regarded as having waived its immunity.
(c) Despite the provisions of sub-section (b), a foreign state shall not be regarded as having waived its immunity if it raised a plea of immunity immediately after the facts in respect of which it is entitled to immunity became known to it, and it did not know nor was it required to know those facts at the time specified in sub-section (a).

Part Four: Procedure

Service of documents on a foreign state

13 (a) An action brought against a foreign state with the object of commencing legal proceedings against it or a judgment given against it in default of defence shall be served, through the Ministry of Foreign Affairs, on the Foreign Office of the foreign state.
(b) Court documents in a proceeding to which the foreign

state is a party, not enumerated in sub-section (a), shall be served on that state through its attorney for that proceeding, but if this is not possible, they shall be served in the manner specified in sub-section (a).
(c) The response of the foreign state to the action brought against it or to a judgment in default of defence given against it shall be filed within 60 days from the day they were served on it; the court may however extend that period.
(d) This section shall not apply to service of documents on a separate entity.

Judgment in default of defence 14 Where an action has been brought against a foreign state, and that state has not submitted a defence in good time, the court shall only give judgment against it in default of defence if it is convinced that the foreign state does not have immunity from its jurisdiction under the provisions of this statute.

Chapter Three: Immunity from Execution Proceedings

Immunity of a foreign state from execution proceedings 15. (a) The assets of a foreign state shall have immunity from proceedings for execution of a judgment or other decision of a court in Israel.

(b) No fine or prison sentence shall be imposed on a foreign state or on a person acting in its name for non-compliance with a judgment or other decision of a court in Israel given against that state.
(c) The provisions of this section shall not apply to a judgment or other decision of a court in Israel in criminal matters.

Proviso to immunity 16. Notwithstanding the provisions of section 15(a), the assets of a foreign state detailed below shall not benefit from immunity under that section:

(1) commercial assets;
(2) assets situated in Israel to which the foreign state is entitled by way of succession, gift or as *bona vacantia*;
(3) immovables situated in Israel.

Waiver of immunity 17. (a) Assets of a foreign state shall not benefit from immunity under section 15 if the foreign state has expressly waived such immunity in writing, or by written or oral notice to the court.
(b) A waiver under this section may be made generally or in respect of a specific matter, in advance or *ex post factum*, and may be limited by exceptions, provided that waiver in respect of a diplomatic or consular asset or an asset of a central bank shall be made expressly.

(c) A waiver by a foreign state of its immunity from the jurisdiction given under sections 9 or 10 shall not be considered a waiver under this section.
(d) Waiver under this section shall not apply to a military asset.
(e) The head of a diplomatic mission of a foreign state in Israel or any person acting in such capacity, shall be authorized to waive the immunity under this section, in the name of the foreign state; the provisions of this sub-section shall not derogate from the authority conferred on any other person to waive the immunity in the name of the foreign state.

Execution against assets of a separate entity

18. Notwithstanding the provisions of section 15(a), the assets of a separate entity, excluding a central bank, shall not have immunity from execution of a judgment or other decision rendered by a court in Israel, except where the jurisdiction of the court originates in waiver of the jurisdiction, given under sections 9 or 10.

Chapter Four: Miscellaneous Provisions

Notice to the Attorney General

19. (a) Where a foreign state raises a plea of immunity under this statute, it shall give notice thereof to the Attorney General.

(b) Where a question of immunity of a foreign state under this statute arises in court, and no notice thereof has been given under sub-section (a), the court shall give notice thereof to the Attorney General.

Application of immunity to a political entity which is not a foreign state

20. The Minister of Foreign Affairs, in consultation with the Attorney General and with the approval of the Government and of the Constitution and Law Committee of the Knesset, may prescribe by order that a political entity shall have immunity under Chapters Two or Three of this statute, even though its international legal status does not amount to that of a state; an order under this section may be general, for certain types of matters or for a specific matter, and may be restricted to a certain period.

Diplomatic and consular immunity

21. This statute shall not derogate from diplomatic or consular immunity or any other immunity applicable in Israel, under any law or usage.

Status of foreign military forces

22. Notwithstanding the provisions of this statute, legal actions based on any act or omission committed by foreign military forces whose rights and status in Israel were determined by agreement between the State of Israel and the state to which

the foreign military forces belong shall be governed by that agreement.

Implementation and regulations

23. The Minister of Justice shall be in charge of implementing this statute, and he may, in consultation with Minister of Foreign Affairs, make regulations on any matter concerning its implementation.

Application

24. This statute shall also apply to proceedings brought before it came into force, provided that the hearing on those proceedings has not yet commenced.

Ehud Olmert
Prime Minister

Daniel Friedmann
Minister of Justice

Shimon Peres
President of the State

Dalia Itzik
Speaker of the Knesset

Annex 33

Corte di Cassazione, decision No. 530/2000

FILT-CGIL Trento and Others v. United States of America

3 August 2000; English translation: 128 ILR 644

Cass., sez. un., 03-08-2000, n. 530.

SVOLGIMENTO DEL PROCESSO

1) Con atto di citazione notificato il 13 luglio 1998 la Federazione Italiana Lavoratori Trasporto della Provincia di Trento - aderente alla Confederazione Generale Italiana del Lavoro - (in breve F.I.L.T.-C.G.I.L.-Trento) nonché Sergio Mattivi, Ferruccio Demadonna, Giorgio Santoni e Fulvio Flammini hanno convenuto in giudizio davanti al Tribunale di Trento, gli Stati Uniti d'America.
In quell'atto, gli attori hanno dedotto che in forza del Trattato del Nord Atlantico stipulato a Washington il 4 aprile 1949 (reso esecutivo in Italia con L. 1 agosto 1949 n. 465) e delle successive Convenzioni attuative, lo Stato convenuto ha il diritto di insediare nell'Italia del Nord propri contingenti armati, tra i quali velivoli da combattimento; che questi velivoli compiono voli di addestramento interessanti i cieli della Provincia Autonoma di Trento, con frequenza quasi quotidiana; che quei voli comportano il sorvolo - a quota prossima ai 100 metri di altezza - di centri abitati, zone turistiche, campagne, strade, impianti di trasporto su strada, a rotaia ed a fune; e che siffatti voli hanno già cagionato numerosi incidenti, anche mortali, e sono comunque idonei a porre in pericolo la vita, l'incolumità personale e la salute degli individui che prestano la (oro attività lavorativa nella Provincia di Trento.
Ciò premesso in fatto, gli attori hanno sostenuto che l'interesse dell'uomo alla vita, alla salute ed all'incolumità personale assurge al rango di un vero e proprio diritto della persona, inviolabile, indisponibile, imprescrittibile ed assoluto, il che comporta che la sua tutela prescinde dalla sussistenza di un fatto concretamente lesivo. Hanno soggiunto che tale costruzione giuridica trova il proprio fondamento positivo nella Dichiarazione Universale dei diritti dell'uomo approvata dalle Nazioni Unite il 10 dicembre 1948, nel Patto internazionale relativo ai diritti civili e politici aperto alla firma a New York il 19 dicembre 1966, ratificato e reso esecutivo in Italia con la L. 25 ottobre 1977 n. 881, e negli artt. 2 e 32 della Costituzione Italiana.
Ne hanno tratto, che in presenza di un siffatto ordinamento internazionale e nazionale, si deve necessariamente riconoscere, per un verso, il diritto dei singoli individui (e delle organizzazioni sindacali che di essi sono soggetti esponenziali) ad agire in giudizio al fine della tutela, anche in via preventiva, del diritto in questione; e per altro verso, la sussistenza della giurisdizione del giudice italiano in ordine alle relative azioni.
Pertanto, hanno chiesto al Tribunale adito: a) di accertare e dichiarare che "l'attività di addestramento svolta da velivoli da guerra appartenenti agli Stati Uniti d'America ed al loro Governo sopra il territorio della Provincia Autonoma di Trento reca grave pericolo alla vita, all'incolumità fisica ed alla salute"; b) di "condannare gli Stati Uniti d'America ed il loro Governo", in via principale, "a cessare del tutto e nel modo assoluto l'attività pericolosa accertata, evitando tra l'altro il sorvolo del territorio della Provincia Autonoma di Trento mediante velivoli da guerra"; in subordine, "a limitare il sorvolo del territorio della Provincia autonoma di Trento nei limiti che risulteranno in giudizio come necessari e sufficienti ad escludere ogni pericolo per la vita, l'integrità fisica e la salute degli attori e dei lavoratori addetti al settore dei trasporti in generale, ed agli impianti a fune in particolare".
Gli Stati Uniti d'America si sono costituiti in giudizio. In via pregiudiziale, hanno eccepito il difetto di giurisdizione del giudice adito. Nel merito, hanno contestato la fondatezza della domanda per plurime ragioni.
Nel giudizio sono poi intervenuti, con atto depositato presso la Cancelleria del Tribunale di Trento il 2 dicembre 1998, la Presidenza del Consiglio dei Ministri dello Stato Italiano ed il Ministero della Difesa, che hanno concluso per il rigetto delle domande sia perché inammissibili ed improponibili per motivi di giurisdizione e per carenza di interesse, e sia perché infondate.
2) Con ricorso notificato il 2 dicembre 1998, le Amministrazioni dello Stato Italiano intervenienti hanno proposto regolamento di giurisdizione al fine di fare dichiarare il difetto di giurisdizione dell'Autorità giudiziaria relativamente alle domande proposte dagli attori.
L'intimata F.I.L.T.-C.G.I.L. Trento ha resistito con controricorso.

Gli intimati Sergio Mattivi, Ferruccio Demadonna, Giorgio Santoni e Fulvio Flammini non hanno svolto attività difensiva.
Con ricorso notificato agli attori in data 3 giugno 1999 gli Stati Uniti d'America hanno proposto anch'essi regolamento preventivo di giurisdizione. In relazione a quest'ulteriore regolamento nessuno degli intimati ha svolto attività difensiva.
Le ricorrenti Amministrazioni dello Stato Italiano e la controricorrente F.I.L.T.-C.G.I.L. Trento hanno depositato memoria ai sensi dell'art. 378 Cod. proc. civ.

MOTIVI DELLA DECISIONE

1) I due regolamenti preventivi di giurisdizione proposti, uno dalla Presidenza del Consiglio dei Ministri e dal Ministero della Difesa e, l'altro, dagli Stati Uniti d'America, attengono ai medesimo giudizio pendente tra le parti davanti al Tribunale di Trento.
Perciò, se ne deve disporre, d'ufficio, la riunione a norma dell'art. 273 Cod. proc. civ., che trova applicazione anche davanti alla Corte di cassazione e pure nel ricorso per regolamento preventivo (cfr. Cass. S.U. 15 febbraio 1979 n. 982).
2) La Presidenza del Consiglio dei Ministri ed il Ministero della Difesa fondano l'eccepito difetto di giurisdizione del giudice italiano in ordine alla domanda proposta nei confronti degli Stati Uniti d'America sul principio consuetudinario internazionale imponente l'esenzione degli Stati stranieri convenuti dalla giurisdizione civile interna di altri Stati. Inoltre, sul rilievo che, nella specie, gli Stati Uniti d'America sono stati convenuti in giudizio davanti al giudice italiano in ordine ad un'attività, ad essi imputabile, che non può essere qualificata di diritto privato, essendo stata posta in essere in funzione dell'addestramento alla guerra delle proprie forze armate nell'ambito di una cooperazione internazionale per la difesa comune: dunque, in attuazione di un'attività che costituisce elemento immanente della sovranità di uno Stato.
Gli Stati Uniti d'America, dal loro canto, instano, in via principale, perché sia dichiarata "l'improponibilità della domanda per difetto assoluto di giurisdizione, essendo diretta contro un'attività svolta da uno Stato estero, di concerto con lo Stato italiano, nell'esercizio di un potere pubblicistico che deriva a [quegli] Stati dalle norme del Trattato del Nord Atlantico e da quelle delle altre Convenzioni che ad esso hanno dato attuazione, cui non si contrappone alcuna situazione tutelabile come diritto soggettivo"; in ogni caso, perché sia dichiarato il difetto della giurisdizione del giudice italiano per le medesime ragioni prospettate dalle ricorrenti Amministrazioni dello Stato italiano.
3) Il precetto dell'immunità dalla giurisdizione civile dello Stato estero è sancito da una norma consuetudinaria internazionale, attualmente in vigore nell'ordinamento italiano in virtù della norma di adeguamento automatico di cui all'art. 10 comma 1 della Carta costituzionale.
Come è unanimemente riconosciuto, esso precetto comporta, non già l'insussistenza di qualsiasi tutela giudiziaria nei confronti dello Stato estero, sebbene soltanto, ed unicamente, la preclusione a che i giudici di uno Stato diverso da quello convenuto (quand'anche quelli nazionali dell'attore e competenti secondo le convenzioni internazionali sulla materia oggetto del giudizio) conoscano di una domanda proposta nei confronti dello Stato estero convenuto: da ciò, appunto, l'usuale definizione della regola col broccardo "par in parem non habet iurisdictionem"
Ne consegue che nell'ambito del nostro ordinamento positivo, l'applicazione del principio determina il difetto della giurisdizione del giudice italiano in ordine ai giudizi civili proposti nei confronti di uno Stato estero, e non l'improponibilità nel merito della relativa domanda.
Quindi, nell'ordine logico-giuridico, l'esame della tematica relativa alla sussistenza di siffatta immunità assume carattere prioritario rispetto a quella sull'improponibilità della domanda per il c.d. difetto assoluto di giurisdizione. Infatti, la cognizione di quest'ultimo tema attiene al merito del giudizio e presuppone la sussistenza della giurisdizione del giudice adito.
4) La questione sull'immunità dalla giurisdizione civile degli Stati Uniti d'America deve essere risolta sulla base del criterio della c.d. immunità ristretta, per il quale

l'immunità può essere riconosciuta limitatamente alle attività degli Stati esteri che costituisca estrinsecazione immediata e diretta del loro "jure imperii".
Su questa conclusione le parti concordano.
Il loro dissenso verte, invece, in primo luogo, sulla ricostruzione della nozione di attività "jure imperii", e sulla sussumibilità in essa nozione delle attività quale è quella per cui è controversia; indi, sulla ricostruzione dei limiti di applicabilità della regola dell'immunità giurisdizionale, quanto meno nell'ambito dell'ordinamento italiano. Infatti, la controricorrente nega che possano assurgere al rango di attività "jure imperii" tutte quelle intrinsecamente idonee ad incidere - anche se involontariamente e senza colpa - su diritti fondamentali dell'uomo, ed in particolare sul diritto alla vita, all'incolumità personale ed alla salute. Tanto, vuoi perché colpiscono un individuo, e vuoi perché confliggono con diritti fondamentali della persona che, stante la loro natura, s'innalzano al di sopra d'ogni altro potere.
Sostiene, poi, che, comunque, pur ammessane la qualifica "jure imperii", in ordine a tali attività l'immunità rimane esclusa, quanto meno nell'ordinamento italiano, per tre distinte ragioni. Innanzitutto, per i medesimi rilievi prospettati a sostegno dell'impossibilità di qualificarla come estrinsecazione di un potere sovrano. Inoltre, perché l'art. 8 della Convenzione universale dei diritti dell'Uomo approvata nell'Assemblea generale delle Nazioni Unite tenutasi a New York il 10 dicembre 1948 ha introdotto una deroga alla portata del precetto consuetudinario, alla cui stregua l'esclusione dalla giurisdizione non opera rispetto alle azioni dirette alla tutela di diritti fondamentali dell'uomo. Infine, ed in ogni caso, perché l'automatico inserimento nel nostro ordinamento giuridico di qualsiasi norma internazionale comportante l'esclusione della giurisdizione del giudice italiano sulle attività, anche se "jure imperii", incidenti sui diritti fondamentali dell'uomo, è precluso dall'antinomia di un siffatta regola rispetto ai precetti fondamentali della nostra Carta costituzionale.
5) L'analisi della portata del principio consuetudinario internazionale dei quale si tratta, nonché dei limiti della sua applicabilità nell'ordinamento italiano, esclude la fondatezza e l'accoglibilità delle opzioni riduttive formulate dalla controricorrente; e determina il difetto della giurisdizione del giudice italiano in ordine alla domanda proposta davanti al Tribunale di Trento nei confronti degli Stati Uniti d'America.
6) La conclusione appena enunciata si sviluppa sulla base del rilievo che il giudizio pendente davanti al giudice italiano ha ad oggetto l'attività d'addestramento di velivoli alla guerra in funzione difensiva, che - secondo le previsioni del Trattato del Nord Atlantico stipulato a Washington il 4 aprile 1949 e reso esecutivo in Italia con L. 1 agosto 1949 n. 465 - gli Stati Uniti d'America effettuano nel territorio italiano, nell'interesse comune dei due Stati, oltre che degli altri aderenti alla N.A.T.O., ed a tutela della loro sovranità; si incentra sull'assunto che detta attività è idonea a pregiudicare l'incolumità fisica dei cittadini italiani residenti nelle zone sorvolate dagli aerei in addestramento; e mira ad una pronuncia che inibisca siffatta attività in modo radicale o, perlomeno, la riduca in misura idonea ad eliminare gli asseriti effetti pregiudizievoli.
Ora, l'attività d'addestramento alla guerra delle proprie forze armate in funzione difensiva realizza un fine pubblico essenziale ed indefettibile dello Stato: la difesa della propria sovranità e della propria integrità territoriale anche con la forza.
Dunque, un'attività indefettibilmente ed ontologicamente "jure imperii".
A questo principio, in realtà, queste Sezioni Unite sono costantemente pervenute allorché sono state chiamate a giudicare in tema di applicazione della regola dell'immunità giurisdizionale dello Stato estero dettata, in queste ipotesi pattiziamente, nelle Convenzioni N.A.T.O. In dettaglio, nei relativi arresti hanno affermato che l'attività militare in senso stretto svolta in Italia dagli organi della N.A..T.O. (alla quale, come è incontestato ed è opportuno sottolineare, devono ricondursi i voli per cui è controversia) è attuata ai fini della tutela della sovranità degli Stati aderenti al Patto; attiene alla sfera del diritto pubblico; si qualifica come "jure imperii," e determina il difetto della giurisdizione del giudice italiano rispetto ai giudizi che la investano in modo diretto ed immediato (v. Cass. S.U., 2 marzo 1964 n. 1467, 13 maggio 1963 n. 1178, 17 ottobre 1955 n. 3223).
Nel contempo, ad inficiare la conclusione, qui accolta, in ordine alla natura dell'attività per cui è controversia non può valere il dato costituito dalla potenziale

incidenza negativa del l'addestramento militare sul diritto alla vita, all'incolumità fisica e sulla salute degli individui.
In via assorbente, per ragioni di consequenzialità logica, dovendosi escludere, sul piano dialettico, che la caratteristica della pericolosità per l'uomo di un'attività possa assumere valore e portata discriminante in ordine alla sua riconducibilità alla sfera del diritto pubblico, ed alla sua idoneità alla realizzazione dei fini istituzionali dello Stato. Vale a dire che quel dato consente soltanto di affermare che si tratta di un'attività sovrana potenzialmente pericolosa per l'incolumità e la salute, ed introduce il distinto e diverso problema dei limiti e delle modalità del suo concreto esercizio; ma non consente affatto di escludere che si tratti di un'attività sovrana.
Inoltre, ed in ogni caso, perché ai fini del l'applicazione della regola dell'immunità ristretta, rileva esclusivamente la natura oggettiva dell'attività, del rapporto e della funzione dello Stato estero dedotta in giudizio, ossia l'essere stata posta in essere nell'esercizio ed in attuazione di poteri sovrani, e non assumono valore alcuno i suoi effetti ed i soggetti che ne sono destinatari (v. Cass. S.U., 6 giugno 1974 n. 1653 - che ha statuito che per la qualificazione come pubblica dell'attività dello Stato straniero rileva unicamente il carattere dell'attività stessa, e precisamente, la sua preordinazione all'attuazione dei fini pubblici dello Stato, ed è radicalmente irrilevante la natura del diritto o dei beni strumentali attraverso i quali la detta attività viene esplicata - nonché, tra le ultime, Cass. S.U. 20 aprile 1998 n. 4017).
7) Diversamente da quanto sostenuto dalla controricorrente nei suo secondo rilievo, nel precetto dettato dalla norma consuetudinaria internazionale, la regola dell'immunità dalla giurisdizione civile nei confronti dello Stato estero non trova alcuna limitazione in ordine all'attività d'addestramento alla guerra, neppure in connessione ed in presenza di suoi effetti e conseguenze atti a ledere o a porre in pericolo l'incolumità degli individui.
E' questa, una disciplina che, lungi dall'essere disattesa, trova puntuale conferma ed applicazione nelle Convenzioni tra gli Stati aventi ad oggetto la predisposizione di strumenti diretti alla comune difesa militare.
In proposito è emblematica la Convenzione tra gli Stati partecipanti al Trattato del Nord Atlantico sullo statuto delle forze armate della N.A.T.O, stipulata a Londra il 19 giugno 1951 e resa esecutiva in Italia con L. 30 novembre 1955 n. 1335. In essa, il regime fissato nei paragrafi VIII e IX della Convenzione esclude la giurisdizione dello Stato ospitante in ordine a tutte indistintamente le domande riguardanti attività di diritto pubblico aventi un nesso immediato con m'espletamento dei compiti propri degli organi del Patto Atlantico, ed "in primis" l'attività di addestramento militare, e la riconosce solo per le domande proposte nei confronti dello Stato estero riguardanti sue attività "iure privatorum" dalle quali esuli ogni aspetto di sovranità (v. Cass. S.U. 13 maggio 1963 n. 1178 e 2 marzo 1964 n. 467). Ebbene, dal regime così strutturato discende in modo immediato ed univoco come la deroga al principio della immunità dello Stato estero sia rigorosamente circoscritta e non si estenda alle attività di addestramento militare potenzialmente pericolose per la vita, l'incolumità personale e la salute dei cittadini dello Stato ospitante.
Non solo, ma la legittimità della disciplina pattizia dettata dalle Convenzioni Nato e da quelle omologhe, è comunemente ricondotta proprio alla vigenza di una norma consuetudinaria internazionale di identica portata.
Né, in contrario, può valere la previsione di cui all'art. 8 della Dichiarazione universale dei diritti dell'uomo approvata dall'Assemblea generale delle Nazioni Unite del 10 dicembre 1948, nella parte in cui riconosce il diritto di ognuno di ricorrere davanti ai competente giudice nazionale contro gli atti commessi in violazione dei diritti fondamentali riconosciuti dalla Costituzione e dalle leggi.
Ciò perché - anche a non tener conto che siffatta regola non ha valore precettivo immediato ed è rivolta agli Stati - certo è che la stessa mira a disciplinare soltanto i rapporti tra l'individuo e lo Stato del quale quegli è cittadino (nel senso che ogni Stato deve riconoscere ai propri cittadini la tutela giudiziaria dei loro diritti fondamentali) e non anche a regolare la diversa questione della riserva della giurisdizione di ciascuno Stato in ordine alle attività poste in essere in estrinsecazione della propria sovranità, né ad escludere o limitare il principio dell'immunità giurisdizionale rispetto agli atti "jure imperii".
8) La regola consuetudinaria così ricostruita preesisteva all'entrata in vigore della

Costituzione italiana, ed ha assunto valore cogente nel nostro ordinamento in virtù della clausola di adeguamento automatico alle norme del diritto internazionale generalmente riconosciute dettata dall'art. 10 comma 1 della Costituzione, e non (come assume la controricorrente nel suo ultimo rilievo) in forza di una norma avente efficacia di legge ordinaria.
Ne deriva che quella regola è stata recepita nel nostro ordinamento nella sua interezza; e che, rispetto ad essa, non si pone, né si può porre, la questione di compatibilità con il nostro sistema costituzionale.
Tanto alla stregua del principio, affermato dal giudice delle leggi nella sentenza 12 giugno 1979 n. 48, secondo cui per le norme di diritto internazionale generalmente riconosciute anteriori alla data d'entrata in vigore della Costituzione, la disposizione di cui al primo comma dell'art. 10 della Carta costituzionale ne determina l'automatica ricezione piena e senza limiti; ed il problema della coerenza delle omologhe norme con i principi fondamentali della Costituzione (con la conseguenza, in caso negativo, della preclusione all'operatività del meccanismo dell'adeguamento automatico) si pone solo per le norme che siano venute ad esistenza dopo quella data.
9) Ne consegue, in sintesi, la sussistenza dei presupposti per l'immunità degli Stati Uniti d'America dalla giurisdizione civile italiana rispetto alla domanda proposta nei suoi confronti nei giudizio pendente davanti al Tribunale di Trento; e la declaratoria del difetto di giurisdizione del giudice italiano.
Rimane precluso, allora, l'esame della questione inerente all'eccepita improponibilità della domanda per difetto assoluto di giurisdizione.
10) Sugli attori, soccombenti, devono gravare, in solido, le spese dell'intero giudizio.

PER QUESTI MOTIVI

La Corte Suprema di Cassazione a sezioni unite
- riunisce i ricorsi per regolamento preventivo di giurisdizione proposti dalla Presidenza del Consiglio e dai Ministero della difesa (n. 21895/98 R.A.C.) nonché dagli Stati. Uniti d'America (n. 11567/99 R.A.C.);
- dichiara il difetto della giurisdizione del giudice italiano;
- condanna, in solido, la Federazione Italiana Lavoratori Trasporti - Confederazione Generale Italiana del Lavoro della Provincia di Trento, Sergio Mattivi, Ferruccio Demadonna, Giorgio Santoni e Flavio Flammini a rimborsare ai ricorrenti le spese dell'intero giudizio che liquida:
a) in favore degli Stati Uniti d'America: a1) in ordine alla fase davanti al Tribunale di Trento, in complessive L. 16.450.000 delle quali, L. 15.000.000 per onorari d'avvocato, L. 1.200.000 per diritti di procuratore e L. 250.000 per spese; a2) in ordine alla fase del regolamento, in complessive L. 5.440.000 delle quali L. 5.000.000 per onorari e L. 440.000, per spese;
b) in favore della Presidenza del Consiglio dei Ministeri e del Ministero della Difesa: b1) in ordine alla fase davanti al Tribunale di Trento, in complessive L. 16.000.000 delle quali L. 15.000.000 per onorari d'avvocato, L. 1.000.000 per diritti di procuratore e L. = per spese, oltre quanto prenotato a debito; b2) in ordine alla fase del regolamento, in complessive L. 5.300.000 delle quali L. 5.000.000 per onorari e L. 300.000 per spese, oltre, quanto prenotato a debito.

--- Estremi documento ---
Archivio: Cassazione Civile
Vai a: massima, sentenza, Foro italiano, Repertorio
Voci: Giurisdizione civile [3330]
Giudicante: Cass., sez. un., 03-06-2000, n. 530
Magistrati: Pres. Vela, Est. Olla, P. M. Iannelli (conf.)
Parti: Pres. Cons. c. Federaz. it. lavoratori trasp. (Avv. Romanelli)
Giudizio precedente: Regolamento di giurisdizione

State immunity — Jurisdiction — United States forces stationed in Italy under NATO Treaty, 1949 — Low-flying military training flights — Whether constituting sovereign activity — Proceedings brought before national courts to restrict such flights on safety and human rights grounds following accidents involving loss of life — Whether United States entitled to jurisdictional immunity — Potential conflict between human rights protection and rule of jurisdictional immunity excluding recourse to courts — Immunity for acts performed *jure imperii*

Relationship of international law and municipal law — Customary international law — Jurisdictional immunity of foreign States for acts performed *jure imperii* — Whether constituting rule of customary international law automatically incorporated into municipal law — Italian Constitution, Article 10 — Whether such rule taking precedence over right to effective remedy before national courts — The law of Italy

FILT-CGIL TRENTO AND OTHERS *v.* UNITED STATES OF AMERICA

(Decision No 530/2000)

Italy, Court of Cassation (Plenary Session). 3 *August* 2000

(Vela, *President*; Olla, *Rapporteur*)

SUMMARY: *The facts*:—The plaintiffs, Italian citizens and a trade union, sought a declaration prohibiting or restricting low-flying training flights by fighter aircraft of the United States of America, which were based and operated in Italy pursuant to arrangements entered into under the NATO Treaty, 1949. They pointed to the fact that the flights in question had caused a number of fatal accidents and argued that they represented a continuing danger to the life, health and safety of individuals and, as such, violated their human rights as enshrined in international conventions and the Italian Constitution. The United States entered an appearance, arguing that it was entitled to jurisdictional immunity because the activity at issue was of a sovereign nature. The Italian Government intervened in the proceedings, asking for a preliminary ruling on the jurisdictional issue and supporting the position of the United States.

Held:—The United States was entitled to jurisdictional immunity.

(1) The military training of pilots of fighter aircraft for defensive purposes, within the framework of the NATO Treaty, constituted an essential public aim of the State, namely the defence of its sovereignty and territorial integrity, if necessary by the use of force. Consequently such an activity was unquestionably performed *jure imperii*.

(2) The potentially injurious effects of this activity on the human rights of individual citizens, because of the danger they constituted to their health and safety, could not alter its categorization as a sovereign activity. Equally, neither Article 8 of the Universal Declaration of Human Rights, 1948 nor the provisions on fundamental rights in the Italian Constitution, concerning the right to an effective remedy, could restrict or exclude the application of the principle of jurisdictional immunity in relation to acts performed *jure imperii*. This principle was a rule of customary international law which had existed prior to the entry into force of the Italian Constitution and had been automatically incorporated into municipal law by Article 10 of the Constitution. The question of a potential conflict with fundamental rights did not therefore arise.

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

Course of the Proceedings

1. By a summons issued on 13 July 1988, the Italian Federation of Workers in the Province of Trento (a member of the Italian General Labour Federation; FILT-CGIL Trento), together with Messrs Sergio Mattivi, Ferruccio Demadonna, Giorgio Santoni and Fulvio Fiammini, instituted proceedings against the Government of the United States of America before the Tribunal of Trento.

The written particulars of the claim are as follows: Pursuant to the North Atlantic Treaty, concluded in Washington on 4 April 1949 (implemented in Italy by Law No 465 of 1 August 1949), and subsequent Conventions, the Government of the United States of America is entitled to establish bases in Northern Italy for its armed forces, including fighter aircraft. Those fighters perform almost daily training flights in the sky over the Trento Province. These flights involve flying at a height of approximately 100 metres over residential areas, tourist sites, agricultural land, roads, railways and cable car installations. The flights in question have already caused several accidents, including fatalities, and they are liable to give rise to dangers to the life, personal safety and health of persons working in the Province of Trento.

In consideration of these premises, the plaintiffs contend that the interests in life, health and personal safety constitute an individual right which is inviolable, inalienable, absolute and not subject to any limitations. Consequently its protection requires that any action deliberately causing damage to this right of the individual shall be prohibited. They

contend that this interpretation finds support in the wording of the Universal Declaration of Human Rights, adopted by the United Nations on 10 December 1948, the International Covenant on Civil and Political Rights, opened for signature in New York on 9 December 1966 (ratified in Italy by Law No 881 of 25 October 1977), and Articles 2 and 32 of the Italian Constitution.

Consequently, according to the plaintiffs, in the presence of such an international and national system for protecting human rights, the right of individuals (and trade unions as their representatives) to institute court proceedings for the protection of those rights, as well as the jurisdiction of the Italian courts over such claims, must necessarily be acknowledged.

Accordingly, the plaintiffs ask this Court:

(a) To rule that "the training flights of fighter aircraft of the United States of America over the territory of the Province of Trento constitute a serious danger to the life, safety and health of individuals";

(b) To "order the United States of America and their Governments" "to completely cease the hazardous flights in question and, in particular, the flights of fighter aircraft over the territory of the Province of Trento" or, in the alternative, "to limit flights over the territory of the Province of Trento in such a manner as appears necessary and sufficient to exclude any danger of death, injury or damage to health of the plaintiffs and workers in the transport sector in general and cable cars in particular".

The United States of America has entered an appearance before the Court. The United States objects that the Italian courts lack jurisdiction and, on the merits, they argue that the claim is unfounded for a number of reasons.

The President of the Council of Ministers of the Republic of Italy and the Ministry of Defence have intervened in the proceedings, asking for the claims to be struck out as inadmissible for reasons of lack of jurisdiction and interest.

2. By a motion filed on 2 December 1998, the above-mentioned representative bodies of the Republic of Italy formally intervened in these proceedings, asking for a preliminary ruling on jurisdiction and arguing that the Italian court lacked jurisdiction over the claims at issue. The Italian General Labour Federation (FILT-CGIL) objected to the application . . . The United States of America, in a motion served on the plaintiffs on 3 June 1999, applied for a preliminary ruling on the question of jurisdiction . . .

Reasons for the Decision

1. The two applications for preliminary rulings on the question of jurisdiction brought, on the one hand, by the President of the Council of Ministers and the Minister of Defence and, on the other hand, by the United States of America, concern the same proceedings pending before the Court of Trento. Accordingly, they must be joined *ex officio*, pursuant to Article 273 of the Italian Code of Civil Procedure . . .

2. The President of the Council of Ministers and the Minister of Defence base their plea of lack of jurisdiction of the Italian courts over the claim against the United States on the principle of customary international law, which exempts foreign States from the civil jurisdiction of other States. Furthermore, they point out that, in the case at issue, the United States was summoned before an Italian court in relation to an activity performed by it which cannot be characterized as pertaining to private law since its purpose was for the military training of its armed forces within the framework of international cooperation for common defence and therefore pursuant to an activity which represents an inextricable element of the sovereignty of the State.

The United States insists primarily that the claim is inadmissible owing to complete lack of jurisdiction since it is directed against an activity performed by a foreign State by agreement with the Italian Government in the exercise of public law powers derived by the States in question from the provisions of the North Atlantic Treaty and other agreements implementing that Treaty . . . the United States also repeats grounds put forward by the Italian Government agencies in support of their plea of lack of jurisdiction of the Italian courts.

3. The rule of the immunity from civil jurisdiction of foreign States is enshrined as a rule of customary international law, in force in the Italian legal system pursuant to Article 10(1) of the Constitution, which provides for the automatic incorporation of rules of customary international law.

As universally acknowledged, the principle of jurisdictional immunity of foreign States does not mean that the legal protection of individuals in relation to foreign States is non-existent, but merely that the courts of the forum State are precluded from exercising jurisdiction over a foreign State in relation to the particular subject matter of the proceedings. Hence, the rule is usually defined by the maxim *par in parem non habet jurisdictionem.*

4. The issue concerning the immunity from civil jurisdiction of the United States must be settled on the basis of the criterion of so-called restrictive immunity, according to which immunity may be granted

but is limited to those activities of foreign States which represent an immediate and direct expression of their *jus imperii*.

The parties agree with the above conclusion but disagree as to whether the activity in this case can be regarded as falling within the exemption from jurisdiction for *jure imperii* activities . . .

FILT-CGIL Trento argue that all activities intrinsically liable to affect fundamental human rights, albeit involuntarily and without wilful misconduct, and in particular those activities liable to affect the right to life, personal safety and health, may not be included in the definition of *jure imperii* activities since they are in conflict with fundamental human rights which, due to their very nature, take precedence over any other right.

FILT-CGIL Trento further argue, in the alternative, that even if it is accepted that the activity in question is to be characterized as *jure imperii*, immunity is still excluded in relation to such activity, at least in the Italian legal system, for several reasons. First, Article 8 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in New York on 10 December 1948, introduced derogation from the rule of customary international law, according to which jurisdictional immunity does not apply in relation to acts violating fundamental rights. Secondly, the automatic incorporation of rules of customary international law excluding the jurisdiction of Italian courts for activities performed *jure imperii*, even where they affect fundamental human rights, is precluded by the conflict of such a rule with fundamental rights protected by the Italian Constitution.

5. This Court considers, however, that an examination of the extent of the rule of customary international law at issue, as applicable within the Italian system, leads to the denial of any possibility of a reduction in the scope of immunity as advocated by FILT-CGIL Trento and consequently to the conclusion that the Italian courts have no jurisdiction in relation to the claim brought before the Court of Trento against the United States of America.

6. This conclusion is based upon the proposition that the proceedings in this case relate to the military training of pilots of fighter aircraft for defensive purposes which, in accordance with the provisions of the North Atlantic Treaty concluded in Washington on 4 April 1949 (and implemented in Italy by Law No 465 of 1 August 1949), the United States performs on Italian territory in the common interest of the two countries as well as in the interest of other NATO States and for the protection of their sovereignty. This Court accepts the assumption that the activity in question may endanger the physical safety of Italian citizens residing in the areas over which the training flights

are made. These legal proceedings are aimed at obtaining a decision which would in essence prohibit such activity or, at the very least, reduce the activity in a manner suitable to avoid the prejudicial effects in question.

The military training of pilots of fighter aircraft for defensive purposes represents an essential and indisputably public aim of the State, namely the defence of its sovereignty and territorial integrity, if necessary by the use of force. Consequently, such an activity is undeniably and necessarily performed *jure imperii*.

In practice, the Plenary Session of this Court has consistently followed this principle, wherever it has been called upon to consider the application of the rule of jurisdictional immunity of foreign States in relation to the NATO Treaty. The Court has stated, in particular, that military activity performed in Italy by NATO entities (including, as is not disputed, the flights at issue) is performed for the purpose of protecting the sovereignty of the States Parties to the Treaty. Such activity therefore belongs to the sphere of public law and is characterized as performed *jure imperii*. This Court has therefore concluded that the Italian courts lack jurisdiction over proceedings relating to such activities (cf. Court of Cassation Decision No 1178/1963 of 13 May).

Furthermore, the potentially injurious effects of military training flights on the right to life, personal safety and health of individuals cannot invalidate the conclusion reached in this case, bearing in mind the nature of the activity at issue. The conclusion that this activity is potentially dangerous for the health and safety of individuals introduces a new and distinct problem in relation to possible limits to be placed upon the exercise of that activity, but it does not in any way alter its categorization as a sovereign activity.

In addition, it must be pointed out that, for the purpose of the application of the rule of restrictive immunity, it is solely the objective character of the activity performed by the foreign State, and specifically the question of whether the activity is performed in the exercise of sovereign powers, which is relevant. No significance is to be attached to the effects of that activity or the status of the persons suffering from those effects (cf. Court of Cassation Decision No 1653 of 6 June 1974). This decision established that, for an activity of a foreign State to be characterized as a public activity, it was solely the nature of the activity carried out by the State which was relevant, and specifically the question of whether the activity was intended to fulfil the public ends of the State, rather than the nature of the right or the property used to carry out that activity; cf. also the more recent decision of the Court of Cassation No 4017 of 20 April 1998.

7. Contrary to the argument put forward by FILT-CGIL Trento, the rule of customary international law concerning the immunity from civil jurisdiction of foreign governments is not restricted in any way by the fact that the claim relates to military training or even that the training involves a risk of damage or danger to the safety of individuals. This conclusion is confirmed by practice in relation to the application of international conventions between governments concluded for the purpose of common military defence.

In this connection, the Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty, concluded in London on 19 June 1951 and implemented in Italy by Law No 1335 of 30 November 1955, contains typical provisions. Articles VIII and IX exclude the jurisdiction of the receiving State in relation to all claims concerning public activities performed in the execution of duties in connection with the operation of the North Atlantic Treaty, which includes military training. The Court of Cassation has repeatedly held that jurisdiction is only granted in proceedings against foreign States in relation to activities performed *jure privatorum* whose object is in no way linked to the concept of sovereignty (Decisions Nos 1178 of 13 May 1963 and 467 of 2 March 1964). The fact that the exception to the principle of immunity of foreign States is strictly limited, and does not extend to military training which is potentially dangerous to the life, personal safety and health of individual citizens of the receiving State, is clearly to be derived from the manner in which these Treaty provisions are structured . . .

A contrary conclusion is not to be reached by recourse to Article 8 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948, which acknowledges that everyone has the right to an effective remedy in the competent national tribunal for acts violating the fundamental rights granted to them by the Constitution or by law.

The reason for this conclusion, in addition to the fact that the above-mentioned rule is not directly or immediately effective and is addressed to States, is that the provision in question is intended to govern only relationships between individuals and the State of which they are citizens (in the sense that each State is required to protect the fundamental rights of its own citizens) but it does not govern the different question of exemptions from national jurisdiction in relation to activities which constitute an expression of sovereignty nor does it restrict or exclude the application of the principle of jurisdictional immunity in relation to acts performed *jure imperii*.

8. The rule of customary international law (concerning jurisdictional immunity for acts performed *jure imperii*) existed prior to the coming into force of the Italian Constitution and became binding in the Italian legal order by virtue of the requirement contained in Article 10(1) of the Constitution for the automatic incorporation of rules of customary international law.

According to the principle affirmed by Court of Cassation Decision No 48 of 18 July 1979, generally recognized norms of international law which came into existence prior to the entry into force of the Italian Constitution are automatically fully incorporated into the municipal legal order pursuant to Article 10(1) of the Constitution. The question of the compatibility with the provisions of the Constitution (of a norm of customary international law) only arises where that norm came into existence subsequent to the entry into force of the Constitution and it violates fundamental principles of the Italian constitutional system.

9. It must therefore be concluded that the conditions exist for granting immunity to the United States of America from the civil jurisdiction of the Italian courts with respect to the claim brought against the United States in the proceedings pending before the Trento Tribunal. It must be declared that the Italian courts lack jurisdiction over that claim . . .

[Report: *RDI* 2000, p. 1155 (in Italian)]

Annex 34

Rechtbank s'-Gravenhage (Regional Court The Hague)
Judgment of 10 July 2008

LJN: BD6796, Rechtbank 's-Gravenhage , 295247 / HA ZA 07-2973 Judgment in the incidental proceedings

Datum uitspraak:	10-07-2008
Datum publicatie:	10-07-2008
Rechtsgebied:	Civiel overig
Soort procedure:	Eerste aanleg - meervoudig
Inhoudsindicatie:	Judgment in the incidental proceedings in the civil case brought by the Association 'Mothers of Srebrenica' and ten individual plaintiffs (the Association et al.) versus the State of the Netherlands and the United Nations (UN). At issue in these incidental proceedings is the question whether a Dutch court is competent to hear this civil action insofar as it pertains to the United Nations. Central to the issue of whether a Dutch court has jurisdiction in this case is the question whether this case offers grounds or reasons to make an exception to the immunity enjoyed by the UN under international law. This immunity is laid down in Article 105, subsection 1 of the UN Charter and detailed in article II, paragraph 2 of the Convention on the Privileges and Immunities of the United Nations (the Convention). In deciding the matter of whether or not the UN enjoys immunity in this case the court first considers how the immunity, enshrined in article 105, subsection 1 of the UN Charter and developed in article II, paragraph 2 of the Convention on the Privileges and Immunities of the United Nations is interpreted and applied to prevailing law in international practice. The court concludes that in international-law practice absolute immunity of the UN is the standard and is respected, and that the interpretation of article 105 of the UN Charter offers no basis for restriction of the immunity of the UN. Subsequently, the court considers whether the absolute immunity of the UN under international law is in conflict with other standards of international law, such as the standards of the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Genocide Convention. This does not lead to an exception to this immunity. The ancillary claim brought by the State that the court is incompetent in the case of the Association et al. versus the UN should therefore be allowed. The court declares it is incompetent to hear the action instituted against the UN.

Uitspraak

Judgment

District Court in The Hague

Civil law section

Case number / cause-list number: 295247 / HA ZA 07-2973

Judgment in the incidental proceedings, July 10, 2008

in the case of

1. [A],
living in [...], Bosnia-Herzegovina,
2. [B],
living in [...], Bosnia-Herzegovina,
3. [C],
living in [...], Bosnia-Herzegovina,
4. [D],
living in [...], Bosnia-Herzegovina,
5. [E],
living in [...], Bosnia-Herzegovina,
6. [F],
living in [...], Bosnia-Herzegovina,
7. [G],
living in [...], Bosnia-Herzegovina,
8. [H],

living in [...], Bosnia-Herzegovina,
9. [I],
living in [...], Bosnia-Herzegovina,
10. [J],
living in [...], Bosnia-Herzegovina,
11. the Association of Citizens MOTHERS OF SREBRENICA,
established in Amsterdam,
plaintiffs in the principal case,
respondents in the incident to determine the procedural issue whether the court has jurisdiction and in the incident to determine whether the State is allowed to intervene as third party or, alternatively, to join the United Nations in the principal case between the Association et al. and the United Nations,
procurator litis originally Mr. E.D. Drok, LL.M., now Mr. R.G. Snouckaert van Schauburg, LL.M.,
lawyers Messrs. M.R. Gerritsen, LL.M., A. Hagedorn, LL.M., J. Staab, LL.M. and S.A. van der Sluijs, LL.M., of Amsterdam

versus

1. THE STATE OF THE NETHERLANDS (Ministry of General Affairs), established in The Hague,
respondent in the principal case,
plaintiff in the incident to determine whether the court has jurisdiction and in the incident to determine whether the State is allowed to intervene as third party or, alternatively, to join the United Nations,
procurator litis Mr. G.J.H. Houtzagers, LL.M.,
lawyers Messrs. M. Dijkstra, LL.M. (substituted in court by his colleague Mr. A. van Blaukenstein, LL.M.) and Mr. G.J.H. Houtzagers, LL.M.,
2. the organization having legal personality
THE UNITED NATIONS,
established in New York, United States of America,
respondent in the principal case,
who failed to appear.

The plaintiffs in the principal case will be referred to hereinafter as the Association et al. (plural). The respondents in the principal case will be referred to hereinafter as the State respectively the UN (singular). The plaintiffs under 1 – 10 in the principal case will be referred to jointly as [A] et al.; the plaintiff under 11 in the principal case as the Association.

1. The proceedings

1.1. The course of the proceedings appears from:
- The writ of summons dated June 4, 2007;
- A letter from the State to the Court dated September 17, 2007 with attached to it a letter from the United Nations to the Permanent Representative of the Netherlands to the UN dated August 17, 2007;
- A letter from the Association et al. to the Court dated September 20, 2007;
- The official advisory opinion of the Public Prosecutions Department, delivered at the cause-list session of November 7, 2007;
- The leave to proceed in default of appearance, given November 7, 2007 against the UN who failed to appear;
- The motion by the State in interim proceedings on December 12, 2007 to (1) have the Court declare it has no jurisdiction in the actions against the UN and (2) to allow the State as intervening party, or alternatively, to allow the State to join the UN as a party in the principal proceedings;
- The statement of defence in the incidents of February 6, 2008 presented by the Association et al.;
- The memorandums of oral pleading of the parties appearing in the incidents and the verbal explanation by the Public Prosecutor in the Public Prosecutor's Office of The Hague as representative of the Public Prosecutions Department, rendered at the Court hearing of June 18, 2008.

1.2. In conclusion, judgment is given in the incidents.

2. The claim in the principal proceedings

2.1. The Association et al. move, in summary:
(1) that the Court rules that the UN and the State have failed imputably towards [A] et al. as well as the individuals whose interests are represented by the Association in the performance of their obligations, in the manner set forth in the writ;
(2) that the Court rules that the UN and the State have acted wrongfully towards [A] et al. as well as the individuals whose interests are represented by the Association, in the manner set forth in the writ;
(3) that the Court rules that the UN and the State have violated their obligations to prevent genocide as laid down in the Genocide Convention;

(4) that the Court orders the UN and the State, jointly and severally, to pay compensation for the loss suffered by [A] et al., to be assessed and settled in accordance with the law
(5) that the Court orders the UN and the State, jointly and severally, to pay an advance in the amount of € 10,000 [ten thousand Euros] each to [A] et al. on the compensation as referred to under (4);
(6) that the Court orders the UN and the State, jointly and severally, to pay the costs of these proceedings.

2.2. The Association et al. motivate this – in summary – as follows. In July 1995 the worst act of genocide in Europe since the Second World War was committed in the East Bosnian enclave of Srebrenica. The State (with the Netherlands UN battalion Dutchbat) and the UN are responsible for the fall of the enclave in which Dutchbat had its base, as well as for the consequences, namely the murder by Bosnian Serbs of 8,000 – 10,000 citizens of Bosnia-Herzegovina who had taken refuge within the enclave. The State and the UN's acts (and omissions) in the context of the implementation of various UN resolutions according to which the enclave Srebrenica was declared a "Safe area" are in violation of promises made and, even besides that, are wrongful towards Fejzi? et al. – all of whom are surviving relatives of men murdered by Bosnian Serbs – and towards the Association representing the interests of the victims' relatives.

3. The disputes in the incidents

3.1. The State moves in the incidental procedure to have the Court disqualified that the Court declares it has no jurisdiction in so far as the claims by the Association et al. pertain to the co-defendant, the UN.

3.2. The State moves in the incident to determine whether the State is allowed to intervene as third party or, alternatively, to join the United Nations in the principal case, that it, in so far as is required for the institution of the action referred to sub 3.1 re the Court's jurisdiction or for the putting forward of defences pertaining to this jurisdiction, is allowed as intervening party, or at least as party joining the action on the UN's side in the principal case between the Association et al. and the United Nations.

3.3. The State motivated the ancillary claims referred to in 3.1 and 3.2 – in summary – as follows. By virtue of article 105 of the UN Charter, in conjunction with article II paragraph 2 of the Convention on the Privileges and Immunities of the United Nations, to be referred to as the Convention, the UN enjoys immunity from legal process and with regard to implementation. The Court must grant this immunity ex officio. In any case the Court should follow the point of view expressed to it by the UN Secretary–General in the matter of the UN's immunity unless if there is an urgent reason not to. Such an urgent reason can only be, and this is not the case here, that the UN expressly waived its immunity.
Under international law the State has an interest of its own in (invoking) this immunity, which is laid down in article 3a of the Bailiffs Act. The seriousness of the facts put forward by the Association et al. and of the reproaches based on them towards the UN do not justify that this immunity is passed over in silence. The International Convention on Civil and Political Rights [hereafter: ICCPR] and the European Convention for the Protection of Human Rights and Fundamental Freedoms [hereafter: ECHR] do not provide with a statutory basis an infringement of the UN's immunity in this case.

3.4. The Association et al. contest the ancillary claims by the State. They move that the State has no cause of action in the incidents, or at least that the action be dismissed. Their point of view can be summarized as follows.
(1) Only the UN itself can, if it appeared, invoke its immunity, if the matter arises. Since it deliberately failed to appear, an assessment of the defence of lack of jurisdiction is out of order. The motions by the State are devious tricks, now that the State is expected to argue in the principal case that not the State but the UN is responsible for the events referred to in the principal case. Legally, humanly and morally this is unacceptable.
(2) The State has no further interest of its own in its motions, and in any case no relevant interest, for the Public Prosecutions Department when it delivered its official advisory opinion already expressed the UN's point of view on its immunity. Apart from that, the (Minister of Justice on behalf of the) State has not made use of the possibility of giving notice under article 3a of the Bailiffs Act.
(3) For awarding the incident whether the State is allowed to intervene as third party or, alternatively, to join the United Nations, the law, in casu article 217 of the Code of Civil Procedure, has no scope. Neither does the State have an interest of its own vis-à-vis the UN.
(4) The Court already addressed the matter of its jurisdiction by granting leave to proceed in default of appearance against the UN, for leave to proceed in default of appearance cannot be granted if the Court has no jurisdiction. If the Court assessed officially if it has jurisdiction to hear the actions against the UN, it has done so prior to granting leave to proceed in default of appearance.
(5) The UN does not enjoy immunity in this case. This follows from, amongst other things, the articles 14 ICCPR and 6 ECHR. Essential to this is that the UN, unlike a state, cannot be brought before its own (independent) court. There is no effective alternative legal course of proceedings open to the Association et al. – as required by article 6 ECHR – in order to submit their actions to a court of law. The immunity of a state or an international

organization is subordinated to an individual's rights, at least in case of violation of peremptory provisions of international law, which was the case here. In principle, the UN enjoys functional - and therefore limited - immunity, but in this case the acts objected to do not fall within the scope of that functional immunity. In any case, there is no functional need for immunity. Functional immunity has boundaries which have been overstepped here, for in this case the issue is violation of the highest standard of international law, belonging to ius cogens or peremptory law: the prohibition on (tolerating) genocide. Such violation cannot be "necessary" - as required for immunity in article 105 sub 1 of the UN Charter - for the
realization of the UN objectives. The importance of enforcement of this standard prevails over the interest pertaining to immunity.

3.5. What the parties appearing submitted further will be addressed if necessary for a decision on the State's ancillary claims.

4. Some relevant conventional-law and other provisions

4.1. The articles 31 and 32 of the Vienna Convention on the Law of Treaties (Bulletin of Treaties 1977, no. 169), hereinafter to be referred to as the Vienna Convention on Treaties, read as follows:

"Article 31
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable."

4.2. The articles 103 and 105 of the UN Charter, in so far as they are relevant here, read:
"Article 103
In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 105
1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
2. [...]
3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose."

4.3. Article II, paragraph 2 of the Convention on the Privileges and Immunities of the United Nations, based on article 105 subsection 3 of the UN Charter [hereinafter: the Convention] (Bulletin of Treaties 1948, no. 1 224) reads:
"Article 2, paragraph 2
The United Nations [...] shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. [...]"

4.4. Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide [hereinafter: the Genocide Convention] (see Bulletin of Treaties 1960, no. 32 amended by Bulletin of Treaties 1966, no. 179)

reads as follows:
"Article I: The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

4.5. Article 6 subsection 1 of the ECHR reads, in so far as relevant here:
"In the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing [...] by an independent and impartial tribunal established by law. [...]"

4.6. Article 13a of the General Provisions (Kingdom Legislation) Act, reads as follows:
"The jurisdiction of the Court and the enforceability of judicial decisions and of authentic deeds are restricted by exceptions recognized by international law."

4.7. Article 3a of the Bailiffs Act, in so far as relevant here, reads as follows:
"1. If a bailiff reasonably takes into account the possibility that the performance of an official act he is instructed to do is contrary to the international-law obligations of the State, he at once informs our Minister of the instructions received in the manner as provided for by the ministerial regulation.
2. Our Minister may notify a bailiff that an official act he is or will be instructed to perform, or that has already been performed by him is contrary to the international-law obligations of the State.
[...]"

5. The assessment

5.1. This judgment is strictly concerned with the Court's jurisdiction with regard to the action by the Association et al. against the UN, that is the Court's jurisdiction to hear this action and decide in the case. In compliance with the request by the parties appearing the Court will give an in this instance final decision in the present judgment.

5.2. The assertion by the Association et al. that the Court by its decision of November 7, 2007 to grant leave to proceed in default of appearance against the UN already rendered a decision about its jurisdiction in the case against the respondent is dismissed. Granting leave to proceed in default of appearance in itself just means that the Court has established that the non-appearing defendant was summoned in a legally valid manner. The question whether a non-appearing defendant is summoned in the manner prescribed by law logically precedes the assessment of the (international) jurisdiction of the Court with regard to the action against this defendant, for it is possible that the defendant wishes to submit his views on this to the Court, and then it must first be established whether he was summoned in accordance with the law if he failed to appear. A Court may render a decision about its jurisdiction at the same time as granting leave to proceed in default of appearance, but does not have to do so. In this case this was not done; on November 7, 2007 the Court just gave a decision on the leave to proceed in default of appearance as requested by the Association et al., but not on its own jurisdiction in the case against the UN. In the copy of the record of the cause-list session in question, of which the parties appearing are cognizant, no mention is made of (any assessment or any decision by the Court, ex officio or on application, concerning) the Court's jurisdiction or the UN's immunity.

5.3. Neither can any consequences regarding the jurisdiction of the Court be attached to the fact that the Minister of Justice (as an organ of State) made no use of the possibility by virtue of article 3a of the Bailiffs Act to notify the bailiff serving the writ of summons to the UN. As emerged during the June 18, 2008 hearing, the parties appearing agree that the bailiff in question failed to notify the Minister by virtue of article 3a subsection 1 of the Bailiffs Act. But even besides that, the application of article 3a of the Bailiffs Act or the omission thereof does not anticipate a Court's decision about its jurisdiction, nor negatively affects the right of the State as a party in the action to submit its view on it to the Court. This is supported by the legal history of article 3a of the Bailiffs Act (see Parliamentary documents II, 1992/93, 23 081, no. 3, p. 3-4).

5.4. The Court will now first of all decide in the matter of the incidental motion by the State that the Court has no jurisdiction with regard to the action against its co-defendant, the UN. To this end the Court will also take into consideration the advisory opinion of the Public Prosecutions Department. Considering this framework for assessment the Court may leave unanswered the question whether it has the power or is obliged, even, to assess ex officio whether the UN enjoys immunity, for in view of the discussion between the parties appearing the question of the Court's jurisdiction has been submitted to the Court in its entirety.

5.5. It should be noted that the defences put forward by the Association et al., summarized in 3.4 under (1) and (2) of this judgment, fail. The State has a judicially relevant interest of its own in its motion that the Court has no jurisdiction in the case against its co-defendant. This is without prejudice to the fact that the Public Prosecutions Department already drew the Court's attention to this matter of jurisdiction in its advisory opinion of November 7, 2007. Although the Public Prosecutions Department is an organ of State it must not be identified with the State. In the execution of its duties, the Public Prosecutions Department in this field too has a

certain degree of independence vis-à-vis the Minister of Justice, laid down in detail in the Judiciary (Organization) Act, as well as a responsibility of its own also laid down in other statutes. Apart from that the State, as a party to the proceedings, has a right of its own with further statutory powers attached to make use of procedural possibilities. The Public Prosecutions Department does not have the possibility to appeal if in a civil action it has given an advisory opinion by virtue of article 44 of the Code of Civil Procedure. In law, its opinion is just an advice of an authority that is not a party to the proceedings. To a party to the proceedings on the other hand, such as the State in this case, the remedy of appeal is usually available if an action instituted by it (in this case: the State) is dismissed.

5.6. The State's own interest in its ancillary claim follows particularly from its obligation under international law by virtue of article 105 subsection 1 of the UN Charter. Under this treaty the State has bound itself to warrant as much as possible the immunity laid down in the Charter, irrespective of how far it extends. Pleading the immunity in proceedings before a national court of law at least falls within the bounds of possibility. It is not important in this regard that the State itself is also a defendant, in this case alongside the UN. Now that the State is already a party to the proceedings in its own right, it does not need to follow the - in principle much more cumbersome - course of an ancillary claim of third-party intervention. Neither does the possibility of which the State now makes use prejudice the fact that in our system of law there are also other options for (organs of) the State to obtain a Court's opinion on its jurisdiction regarding a non-appearing defendant. All these options exist side by side and do not exclude each other. The diversity of the possibilities is an expression of the seriousness of the State's aforesaid obligation under international law rather than that it impairs it. In view of all this the Court does not adopt the assertion by the Association et al. that the State's adopted course of action in the ancillary claims is unacceptable. Neither can it be said that this course of action is humanly or morally unacceptable to such a degree that legal consequences should be attached.

5.7. In this incident the State's possible defence regarding the action brought against it is out of order. Anything the Association et al. argued or presumed in this respect therefore is now left undiscussed.

5.8. The assertion by the Association et al. that only the UN itself could have invoked immunity if it had appeared fails already by virtue of the State's own interest established here.

5.9. Then the principal question in this incident comes up for discussion: whether the UN enjoys immunity or not. The Court should first of all base itself at this stage - in which the UN has not given a substantive reaction to the claims by the Association et al. and the State has not responded yet - upon what, according to the writ of summons, the Association et al. founded themselves in their actions against the UN and the State. Essentially, they argue that in 1995 in the Bosnian enclave Srebrenica genocide was committed and that the UN in the execution of its peace-keeping mission in Bosnia-Herzegovina did not prevent or stop this genocide, which took place as it were right in front of it. In spite of promises made by the UN to the citizens in question concerning their protection and safety, the murders (also crimes under international law) did occur. Anticipating its defence in the principal case the State argued that the Bosnian Serbs did indeed commit genocide. The State acknowledges in itself the failure of the UN mission in question, which was based on Chapter VII of the UN Charter ("Action with respect to threats to peace, breaches of the peace and acts of aggression") and in which Dutchbat participated, Dutch troops who had been made available to the UN for this purpose. The State only holds the Bosnian Serbs responsible for the crimes committed under international law, however; according to the State neither the UN nor the State are at fault for it. They could not prevent or stop the genocide.

5.10. Point of departure in answering the principal question detailed in 5.9 is the rule of article 13a of the General Provisions (Kingdom Legislation) Act. In this civil action the Court will have to take into consideration the international-law exceptions to normal procedural rules, including article 7 of the Code of Civil Procedure. By virtue of the latter article the Court, if it has jurisdiction with regard to one of the defendants (in this case the State), also has jurisdiction with regard to another defendant involved in the same action (in this case the UN), if - as is not contradicted here – there exists such coherence between the actions against the separate defendants that reasons of efficiency warrant a joint hearing.

5.11. Applicable then, first of all, is the international-law rule of article 105, subsection 1 of the UN Charter, as detailed in article II, paragraph 2 of the Convention. For the interpretation and applicability of this and other international-law rules the Court bases itself upon prevailing law as it finds expression in, amongst other things, the international-law practice. At issue in this case is not a possible state immunity, but the immunity of an international organization, laid down in a treaty in so many words. Between these types of immunity, which are very dissimilar to each other, there is no hierarchical relationship; the one type does not extend "further", in general terms, and is not more "important" than the other. Decisive for the establishment of meaning of standards of immunity of international institutions is what the parties to the treaty agreed to in the founding treaty in question, having due regard to article 31 and 32 of the Vienna Convention on Treaties. With regard to the UN it is true that it is indisputably the most important international institution in the international community, with an almost universal membership among states.

5.12. The reproaches on which the Association et al. have based their actions against the UN relate to acts (and omissions) in the implementation of the peace-keeping mission in question, which is based on resolutions by the UN Security Council by virtue of the aforesaid Chapter VII of the UN Charter. The UN acts objected to fall within the functional scope of this organization. It is particularly for acts within this framework that immunity from legal process is intended.

5.13. Point of departure is that the UN itself, according to its letter to the Dutch Permanent Representative to the UN, referred to in 1.1 and dated August 17, 2007, expressly invokes its immunity. As far as the Court knows the UN to date has always invoked its immunity with regard to actions within the functional framework referred to just now, and no exceptions were ever made in practice. The Association et al. have not put forward anything from which the opposite follows. On the basis of this the Court concludes that in international-law practise the absolute immunity of the UN is the norm and is respected.

5.14. The Court dismisses the argument by the Association et al. that the immunity of the UN only exists in those instances in which the domestic court addressed - in this case, a court in the Netherlands – actually considers the acts and omissions the UN is blamed for as "necessary" by virtue of the restrictive subordinate clause "as are necessary for the fulfilment of its purposes". In view of, inter alia, the manner in which the norm of article 105, subsection 1 of the UN Charter was detailed in the Convention, it is in principle not at the discretion of a national court to give its opinion on the "necessity" of the UN actions within the functional framework described in 5.12. A testing on the merits or comprehensive testing is also contrary to the ratio of the immunity of the UN as enshrined in international law. The Court subscribes to the State's assertion that for this reason domestic courts should not assess the acts and omissions of UN bodies on missions such as the one in Bosnia-Herzegovina but with the greatest caution and restraint. It is very likely that more far-reaching testing will have huge consequences for the Security Council's decision-making on similar peace-keeping missions.

5.15. Neither does the available, but scant, jurisprudence about the scope of the standard of article 105, subsection 1 of the UN Charter afford grounds for the conclusion that a national court, if and insofar as it has scope for testing, can proceed in any other way than with the utmost reticence. In its advisory opinion of April 29, 1999 on the immunity of a UN worker the International Court of Justice ruled that wrongful acts possibly committed by the UN are not open to assessment by national courts, but should take place in the context of specific dispute settlement as provided for in article VIII, paragraph 29 of the Convention (Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999, p. 62, paragraph 66). There are no legal grounds for the assertion that the lack of an adequate provision within the meaning of article VIII, paragraph 29 warrants a infringement of the principal rule of article 105, subsection 1 of the UN Charter, even irrespective of (1) whether it is at issue in this case and of (2) the question what scope for testing the court would have.

5.16. Now that the interpretation of article 105 of the UN Charter does not offer grounds for restricting the immunity, the question arises whether other international-law standards - outside of the UN frame of reference - prompt a different opinion. This inquiry into conflicting standards is necessary because there are insufficient grounds for accepting a full and unconditional prevailing of international-law obligations of the State under the UN Charter over other international-law obligations of the State. The rule of article 103 of the UN Charter invoked by the State does not always and right away bring relief in the event of conflicting obligations of a peremptory nature (ius cogens) or conflicting human rights obligations of an international customary law nature.

5.17. According to the Association et al. article 105 subsection 1 of the UN Charter is incompatible with mandatory standards derived from, inter alia, international law on genocide (the Genocide Convention) and the articles 14 ICCPR and 6 ECHR.

5.18. The Genocide Convention comprises as principal rule the penalization of genocide. From article 1 of this Convention it is clear that the parties to the treaty, including the Netherlands, undertake to prevent genocide - and therefore not to commit the crime themselves - as well as to punish it.

5.19. Neither the text of the Genocide Convention or any other treaty, nor international customary law or the practice of states offer scope in this respect for the obligation of a Netherlands court to enforce the standards of the Genocide Convention by means of a civil action. The Contracting parties are obliged to punish all acts defined by this Convention as genocide within the boundaries set in article VI of the Convention. Also, as stated before, the states are bound to prevent genocide and therefore to refrain from committing it themselves. The states are also bound to clearly set out obligations on the extradition of suspects of genocide, but the Convention does not provide for (any obligation pertaining to) the enforcement of the standards of enforcing the prohibition on genocide via a civil law action. It should be noted here that the International Court of Justice expressed an opinion in 2007 about the substance of obligations of parties to the Genocide Convention and in that context omitted to discuss any obligation by states to enforce the Convention in civil law actions (ruling of February 26, 2007 on the application of the Convention on the Prevention and Punishment of the Crime of Genocide in the case of Bosnia

and Herzegovina v. Serbia and Montenegro, paragraphs 155-179).

5.20. In its judgment of November 21, 2001 the European Court for Human Rights ruled in the case of Al-Adsani v. the UK (no. 35763/97) that there is no scope for an infringement of the in principle existing immunity of a national state, in that case Kuwait, with regard to a civil action because of conflict with the prohibition on torture laid down in article 3 ECHR. As there is no evidence that later the European Court for Human Rights deviated from this line the Court concludes that there is no generally accepted standard in international-law practice on the basis of which current immunities allow exception within the framework of enforcement in civil law of the standards of ius cogens, like the prohibitions on genocide and torture. That the issue in this case was the relationship between state immunity and the prohibition on torture and not the relation between the immunity of international organizations and the prohibition on genocide does not lead to a different opinion in the present case. Just as little as there is any basis in law for a hierarchy between different types of immunity, there are no grounds for a hierarchy between different standards of ius cogens.

5.21. The Court concludes from what it related in 5.18 – 5.20 that from the Genocide Convention or similar mandatory international-law standards in line with it, such as the prohibition on torture, no grounds can be derived for an exception to the standard referred to above of the UN's absolute immunity. This means that the Court does not get to a prioritizing of conflicting international-law standards. For a weighing of interests such as advocated by the Association et al. there is no scope.

5.22. The Court arrives at the same conclusion with regard to the right of access to a court of law guaranteed in article 6 ECHR, a fundamental element of the right to a fair trial. The European Court of Human Rights jurisprudence offers insufficient grounds for an interpretation of article 6 ECHR in the sense that in this respect it prevails over international immunities. The right of access to a court of law is for its substance and purport largely dependent on existing international-law obligations. This applies in particular and in any case with respect to obligations towards the UN, as is evident from the judgments of the European Court of Human Rights dated May 31, 2007 in the cases against Behrami v. France (no. 71412/01) and Saramati v. France, Germany and Norway (no. 78166/01). In these cases the European Court of Human Rights ruled that the ECHR should not be an impediment to the effective implementation of duties by international missions in Kosovo under UN responsibility. By virtue of this, states cannot, according to the Court, be held liable for the actions of national troops they made available for international peace-keeping missions. The Court concludes that this same ratio implies that article 6 ECHR cannot be a ground for exception to the - as said before, absolute - immunity under international law of the UN itself. The UN therefore cannot be brought before a domestic court just on the grounds of the right to access to a court of law guaranteed in article 6 ECHR.

5.23. The Court is aware of the existence of, on the face of it, conflicting jurisprudence of the European Court of Human Rights in the judgments of February 18, 1999 in the cases of Beer and Regan v. Germany (no, 28934/95) and Waite and Kennedy v. Germany (no. 26083/94). In these judgments the Court expressed its concern that the foundation of international organizations and their corresponding immunities are only compatible with article 6 ECHR if the institutions involved offer a reasonable alternative for the protection of the rights under the ECHR. If this is not the case the ECHR prescribes that the international institution's immunities invoked are not respected.

5.24. Nevertheless, the Court does not consider it necessary in the light of this jurisprudence to investigate whether an alternative remedy is available at the UN to the Association et al. In this respect the Court considers as follows. The UN was founded before the ECHR came into force. There can be no question therefore of a restriction of the protection of human rights under the ECHR by transfer of powers to the UN. Moreover, the UN is an organization with, as said before, an almost universal membership. The international organization that the judgments of Beer and Regan v. Germany and Waite and Kennedy v. Germany related to, namely, the European Space Agency, was founded in 1980 and therefore some considerable time after the entering into force of the ECHR. This organization has a restricted - European - membership. The UN's position therefore is very dissimilar to it. The ECHR has actually taken the special position of the UN as a point of departure in the aforementioned cases of Behrami v. France and Saramati v. France, Germany and Norway. All this justifies the conclusion that the European Court of Human Rights' motivations in the cases of Beer and Regan v. Germany and Waite and Kennedy v. Germany do not apply to the UN. It deserves special mention that if this were the case under the ECHR primarily that state would be liable for not allowing access to a court of law as a result of the primacy of international-law immunities within whose territory the institution in question has its seat or the asserted wrongful act was committed. In the present case this is certainly not the Netherlands.

5.25. Testing against article 14 ICCPR does not lead to a different outcome.

5.26. The Court's inquiry into a possible conflict between the absolute immunity valid in international law of the UN and other standards of international law does not lead to an exception to this immunity.

5.27. On the basis of the above the State's ancillary claim to have the Court declare it has no jurisdiction in the case of the Association et al. against the UN should be allowed.

5.28. In view of this outcome the State's second ancillary claim to intervene as a third party or, alternatively, to join the defendant in the action of the Association et al. against the UN does not need to be taken into consideration.

5.29. The Association et al. should be ordered to pay the costs of this incident as the party against whom the judgment is given.

6. The judgment

The Court

in the incident to have the Court declare it has no jurisdiction

6.1. declares that it has no jurisdiction to hear the action against the United Nations;

6.2. orders the Association et al. to pay the costs of this incident, on the side of the State estimated up to this judgment at EUR 1,356 for the fees of the procurator litis plus statutory interest due fifteen days from today and at EUR nil for disbursements;

6.3. declares this order of the Court be provisionally enforceable as far as possible;

in the incident to be allowed to intervene as a third party, or alternatively, to join the defendant in the action

6.4. concludes that a decision in this incident need not be forthcoming;

in the principal case

6.5. refers the case to the cause-list of September 24, 2008 for statement of defence on the side of the State.

This judgment was given by Messrs H.F.M. Hofhuis, LL.M., D. Aarts, LL.M. and G.K. Sluiter, LL.M. and was pronounced in public on July 10, 2008.

Judgment in the incidental proceedings in the civil case brought by the Association 'Mothers of Srebrenica' and ten individual plaintiffs (the Association et al.) versus the State of the Netherlands and the United Nations (UN).

The Judgment is best accesable *via* <www.google.nl>:

Search for (in exact words): LJN: BD6796, Rechtbank 's-Gravenhage , 295247 / HA ZA 07-2973 Judgment in the incidental proceedings

Result: 1-1 (= the Judgment)

Annex 35

U.S. Department of State, Amicus Curiae brief in

Sampson v. Federal Republic of Germany

No. 97-3555

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Jacob SAMPSON
Plaintiff-Appellant,

v.

FEDERAL REPUBLIC OF GERMANY and
CLAIMS CONFERENCE ARTICLE 2 FUND
Defendants-Appellees.

BRIEF FOR AMICUS CURIAE THE UNITED STATES OF AMERICA

ON APPEAL FROM A FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, THE HONORABLE ANN CLAIRE WILLIAMS, JUDGE

LINDA JACOBSON
Assistant Legal Adviser

WYNN M. TEEL
Attorney-Adviser

OFFICE OF LEGAL ADVISER FOR
DIPLOMATIC LAW AND LITIGATION
U.S. Department of State
Washington, D.C. 20520

DAVID W. OGDEN
Assistant Attorney General

SCOTT R. LASSAR
United States Attorney

MARK B. STERN
(202) 514-5089
DOUGLAS HALLWARD-DRIEMEIER
(202) 514-5735
Attorneys, Appellate Staff
Civil Division, Room 9113
Department of Justice
Washington, D.C. 20530-0001
Attorneys for Amicus Curiae
the United States of America

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 97-3555

Jacob SAMPSON
Plaintiff-Appellant,

v.

FEDERAL REPUBLIC OF GERMANY and
CLAIMS CONFERENCE ARTICLE 2 FUND
Defendants-Appellees.

BRIEF FOR AMICUS CURIAE THE UNITED STATES OF AMERICA

ON APPEAL FROM A FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, THE HONORABLE ANN CLAIRE WILLIAMS, JUDGE

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the Federal Republic of Germany is immune from a claim for damages arising out of plaintiff-appellant's enslavement by the Nazi regime during World War II.

STATEMENT OF INTEREST OF THE UNITED STATES

The United States has a continuing interest in questions concerning the immunity from suit of foreign governments because of the foreign policy implications arising therefrom. See Millen Industries, Inc. v. Coordination Counsel For North American Affairs, 855 F.2d 879, 881 (D.C. Cir. 1988). The United States has a particular interest in this case, which involves claims against Germany for slave labor plaintiff was forced to perform during World War II. As we explain more fully below, the United States has recently entered into an executive agreement with the Federal Republic of Germany, which expresses the countries' support for a foundation recently established under German law as the preferred forum for resolving such claims. The

United States further promises in that agreement to take appropriate steps to oppose challenges to Germany's sovereign immunity involving World-War II era claims.

STATEMENT OF THE CASE[1]

1. Plaintiff pro se Jacob Sampson is a Holocaust survivor. During World War II, Sampson was enslaved by the Nazis in the concentration camp at Auschwitz, Poland, where the Nazis killed sixty members of Sampson's family. Sampson v. Federal Republic of Germany, 975 F. Supp. 1108, 1112-23 (N.D. Ill. 1997). Sampson sought compensation from Germany by filing a claim in 1948 with a council established in Germany and, in the 1980's, by filing claims with funds established by Germany in cooperation with the Conference on Jewish Material Claims Against Germany, Inc. (the "Claims Conference").[2] Id. at 1113. Sampson ultimately received, in February 1996, a payment from the "Article 2 Fund," established by Germany and the Claims Conference in 1990. Sampson received a one-time payment of DM 5000 and also receives monthly payments of DM 500. Ibid. The Claims Conference administers the fund according to terms established by Germany. Ibid.

2. In September 1996, Sampson brought suit in the Northern District of Illinois against the Federal Republic of Germany and the Claims Conference. As construed by the district court, Sampson's complaint alleged claims based both on his enslavement by the Nazis and on actions subsequent to the war by the Federal Republic of Germany and Claims Conference, who are alleged to have conspired to deprive Sampson of full compensation for his injuries. Id.

---

[1] For purposes of this appeal, the United States accepts as true the facts as alleged by Plaintiff in his Complaint.

[2] The Claims Conference is an international coalition of twenty-three Jewish nonprofit organizations that has, for more than forty years, worked with the Federal Republic of Germany to secure restitution for Jewish

at 1113-14, 1118. Sampson alleges that the defendants embezzled funds intended for Holocaust victims, breached a covenant with him (reflected in agreements between Germany and the Claims Conference), and discriminated against him. Id. at 1114.

The defendants moved to dismiss. Germany argued, inter alia, that it was immune from suit in United States courts and that the act of state doctrine precluded a United States court from judging the official acts of the German government. The Claims Conference argued that Sampson had no right to payment by the Claims Conference and thus lacked standing to sue it and that the act of state doctrine precluded suit against the Claims Conference based upon acts of the German government.

The district court granted the defendants' motions. The court held that the claims against Germany were barred both by the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-11, and by the act of state doctrine. The court reasoned that Sampson's claims did not fall within any of the exceptions to the FSIA's general grant of immunity to foreign sovereigns, Sampson, 975 F. Supp. at 1115-20, and that Germany's violations of international law during World War II did not imply a waiver of that immunity, id. at 1123. The court also held that, at least with respect to the creation and administration of the compensation funds, the act of state doctrine protected both defendants because the acts in question were the official acts of Germany taken within its territory. Id. at 1121-22.

On appeal, this Court appointed the dean of Marquette University Law School as amicus curiae ("Amicus") to argue on Sampson's behalf. Amicus does not challenge the district court's holdings with respect to Germany and the Claims Conference's post-World War II conduct in administering the

---

survivors of Nazi persecution. See Sampson, 975 F. Supp. at 1113. The Claims Conference is incorporated under New York law. Ibid.

compensation funds. (It would appear that these claims are barred under this Court's reasoning in Wolf v. Federal Republic of Germany, 95 F.3d 536 (7th Cir. 1996).) Rather, Amicus makes a more limited argument that Nazi Germany's violations of jus cogens - fundamental international norms of conduct - during World War II constitute an "implied waiver" of Germany's sovereign immunity. Amicus Br. at 9-17. Amicus also argues that the Court should defer to an April 13, 1949, Letter of Jack B. Tate, Acting Legal Advisor, Department of State (the "Bernstein letter"), which stated that U.S. courts should be "relieve[d] ... from any constraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." Id. at 17-19 (quoting Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954)).

3. On July 17, 2000, subsequent to the completion of briefing by Amicus and defendants, the governments of the United States and Germany signed an "Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning the Foundation 'Remembrance, Responsibility and the Future.'" ("Foundation Agreement" or "Agreement") (Attachment A). The Agreement came into force on October 19, 2000, upon the exchange of notes between the United States and Germany. Attachment B.

This Agreement recognizes the creation, under German law, of the Foundation "Remembrance, Responsibility and the Future" ("Foundation") as an instrumentality of the German government and German companies to make payments to those who suffered as slave or forced laborers under the Nazis as well as to certain individuals who suffered personal injury or property loss at the hands of German companies. See Foundation Agreement, Annex A ¶¶ 4, 6, 7. The Foundation is to be funded with DM 10 billion, contributed in part by the German government and in part by German corporations. In the Foundation

Agreement, the American and German governments recognize the creation of the Foundation and "agree that the Foundation ... covers, and that it would be in their interests for the Foundation to be the exclusive remedy and forum for the resolution of, all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II." Foundation Agreement, Art. 1(1). The Foundation covers claims by prisoners, such as Sampson, forced to perform slave labor at the Auschwitz concentration camp.

The Agreement does not itself purport to preclude private claims against the German government. However, in the Agreement the United States promises to "take appropriate steps to oppose any challenge to the sovereign immunity of the Federal Republic of Germany with respect to any claim ... concerning the consequences of the National Socialist era and World War II." Art. 3(4).

SUMMARY OF ARGUMENT

The horror of plaintiff's ordeal can scarcely be stated. Nevertheless, the issue of law before the court is clear: as a matter of law, the Federal Republic of Germany is not amenable to suit on plaintiff's claims in the courts of the United States. Because the Federal Republic of Germany's immunity is a jurisdictional bar to suit, the United States does not address the other issues raised in the Brief of Amicus Curiae.

A preliminary question in this case is whether Germany's assertion of immunity should be analyzed under the provisions of the FSIA or the more absolute theory of foreign governmental immunity that prevailed in the 1940's when Sampson's claims arose. Although the parties have cast their arguments principally in terms of the FSIA, the United States has previously argued and two courts of appeals have held that the FSIA does not apply to conduct that

took place during the period when the United States adhered to the absolute theory of sovereign immunity.

The Court need not resolve the question of the FSIA's retroactive application in this case. Whether Germany's assertion of immunity is assessed under the FSIA or the law existing at the time of the conduct complained of, Germany's assertion of immunity must be upheld.[3]

Prior to 1952, foreign states enjoyed virtually "absolute" immunity from suit absent their consent. The courts looked to the views of the Executive Branch, which supported immunity in almost all cases. Under these principles, Germany would be entitled to immunity. Amicus has not identified any authority that suggests a U.S. court applying pre-1952 law would have exercised jurisdiction over plaintiff's claims. Moreover, the policy of the Executive Branch, reflected in the Foundation Agreement, is to oppose challenges to Germany's immunity for claims arising out of the World War II era. Thus, to the extent pre-1952 law governs, Germany is entitled to immunity in U.S. courts from Sampson's claims.

Assuming, on the other hand, that the FSIA governs the Court's inquiry, Germany would not be amenable to suit under its provisions either. Contrary to the arguments of Amicus, violations of jus cogens, fundamental norms of international law, do not constitute an implicit "waiver" of immunity from suit in U.S. courts. Nothing in the language of the FSIA creates an exception to immunity for violations of international law generally or jus cogens in particular, and there is no suggestion in the legislative history

---

[3] It bears note that the present democratic government of the Federal Republic of Germany, one of our chief European allies, cannot be compared to the Nazi regime. However, for purposes of this appeal, our immunity analysis assumes that the present German government could, if jurisdictional and other objections were overcome, be held liable for the wrongs of the Nazi government. See Guaranty Trust Co. v. United States, 304 U.S. 126, 137

that would support such a broad reading of the implied waiver exception. The courts of appeals have ruled unanimously that the implied waiver provision must be narrowly construed, and there is no warrant for departing from this well-settled construction.

Moreover, Amicus's arguments are flawed as a matter of both logic and policy. Amicus assumes that violations of certain substantive norms, jus cogens, require a particular procedural remedy. This assumption has no support in international law. In addition, as a matter of policy, Amicus's expansive interpretation of the implied waiver provision should be rejected because it would require the courts to identify jus cogens principles and new exceptions to immunity before they have been recognized by the political branches, which are more appropriately entrusted with assessing the impact of such changes on the conduct of the nation's foreign affairs.

ARGUMENT

THE FEDERAL REPUBLIC OF GERMANY IS IMMUNE FROM THE JURISDICTION OF THE UNITED STATES COURTS IN THIS CASE.

A. Background Of U.S. Sovereign Immunity Practice.

Some background into the United States' practice concerning foreign sovereign immunity is useful to the analysis of this case. The United States has approached the question of foreign sovereign immunity in three distinct periods. In the first period (from about 1812 to 1952), the United States granted foreign sovereigns virtually "absolute" immunity from suit in United States courts. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983) (citing The Schooner Exchange v. M'Fadden, 11 U.S. (7 Cranch) 116, 136-37 (1812)). During this first period of sovereign immunity law, the courts deferred to the views of the Executive Branch on whether to exercise

---

(1938) ("the rights of a sovereign state are vested in the state rather than in any particular government which may purport to represent it").

jurisdiction, and the State Department "ordinarily requested immunity in all actions against friendly foreign sovereigns." Id. at 486.

In 1952, United States practice concerning foreign sovereign immunity entered a second phase when the Executive Branch formally adopted the "restrictive" theory of immunity in the "Tate letter." See Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711-15 (1976) (copy of the "Tate letter"). In that letter, the State Department announced that henceforth it would recommend to United States courts, as a matter of policy, that foreign states be granted immunity only for their sovereign or public acts (jure imperii), and not for their commercial acts (jure gestionis). See Verlinden B.V., 461 U.S. at 486-87. As explained in the Tate letter, the adoption of the restrictive theory reflected the increasing acceptance of that theory by foreign states, as well as the need for a judicial forum to resolve disputes stemming from the "widespread and increasing practice on the part of governments of engaging in commercial activities." Alfred Dunhill of London, 425 U.S. at 714.

Foreign sovereign immunity practice entered its third (and current) phase when Congress enacted the FSIA, which became effective in January, 1977. Pub. L. No. 94-583, 90 Stat. 2891 (1976) codified at 28 U.S.C. §§ 1330, 1602, et seq. The FSIA, "[f]or the most part, codifies, as a matter of federal law, the restrictive theory of sovereign immunity." Verlinden B.V., 461 U.S. at 488. It contains a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities," Ibid. The FSIA sets forth a general rule of foreign state immunity, 28 U.S.C. § 1604, and provides for specific exceptions to that immunity rule, id. §§ 1605-07. If the FSIA applies, it controls, since the Supreme Court has made unequivocally clear that the FSIA "'provides the sole basis for obtaining jurisdiction over

a foreign state in the courts of this country.'" Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993) (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989)).

B. Under The Law Applicable At The Time Of The Challenged Conduct, Germany Is Entitled To Immunity From Suit.

The conduct at issue in this appeal occurred between 1939 and 1945. Under the principles of sovereign immunity then in force, Germany is entitled to immunity from suit.

Although Amicus's arguments address the provisions of the FSIA, the FSIA was not enacted until 1976. Pub. L. No. 94-583, 90 Stat. 2891 (1976). Therefore, there is an antecedent question whether the FSIA applies "retroactively" to govern a foreign state's claim of immunity concerning conduct occurring prior to its date of enactment.

The United States has previously argued and two courts of appeals have held that the FSIA does not apply to conduct preceding the adoption of the restrictive theory of immunity. See Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics, 841 F.2d 26, 27 (2d Cir.); Jackson v. People's Republic of China, 794 F.2d 1490, 1497-98 (11th Cir. 1986). But cf. Princz v. Federal Republic of Germany, 26 F.3d 1166, 1170-71 (D.C. Cir. 1994) (questioning, without deciding, whether application of FSIA to pre-1952 conduct would be impermissibly retroactive).[4] Both the Second and Eleventh Circuits concluded that the FSIA affects the "substantive rights and liabilities" of foreign states by authorizing suits against foreign states that could not have been brought earlier. See Jackson, 794 F.2d at 1497-98 ("to give the Act retrospective application to pre-1952 events would

---

[4] As Amicus acknowledges, Amicus Br. at 9 n.6, this Court's decision in Wolf v. Federal Republic of Germany, 95 F.3d 536 (7th Cir. 1996), did not address the question of the FSIA's retroactive application because, as

interfere with antecedent rights of other sovereigns"); Carl Marks, 841 F.2d at 27 (same). See also H.R. Rep. No. 94-1487, 94th Cong. 2d Sess, at 33, reprinted in 1976 U.S. Code Cong. & Ad. News 6604, 6632 (noting that ninety-day delay in the FSIA's effective date was "necessary in order to give adequate notice of the act and its detailed provisions to all foreign states").

If, as the Second and Eleventh Circuits have concluded, this case is governed by the principles of sovereign immunity that prevailed during the 1940's, Germany is immune from suit. As explained above, prior to 1952, the government of the United States and the federal judiciary took the position that "foreign sovereigns and their public property are ... not ... amenable to suit in our courts without their consent." Guaranty Trust Co. v. United States, 304 U.S. 126, 134 (1938). See also Alfred Dunhill of London, 425 U.S. at 712 (Tate Letter, noting that the United States had previously followed the "classical or virtually absolute theory of sovereign immunity"). Amicus does not argue that under the absolute theory of sovereign immunity a foreign state would be subject to suit in U.S. courts for claims such as plaintiff's.

Moreover, the foreign policy of the Executive Branch does not support the exercise of jurisdiction over plaintiff's claims against Germany. The Court is not, in this case, left to its own devices to surmise the views of the Executive. Cf. Verlinden B.V., 461 U.S. at 487-88 (noting that, prior to the FSIA, courts were required to discern the likely policy of the Executive Branch in cases in which the State Department made no filing). In the Foundation Agreement, the United States clearly stated that it would "take appropriate steps to oppose any challenge to the sovereign immunity of the

---

described by the Court, the claims asserted in Wolf concerned only conduct that post-dated 1952. See id. at 540.

Federal Republic of Germany with respect to any claim ... concerning the consequences of the National Socialist era and World War II." Art. 3(4). The United States hereby affirmatively states, by way of this filing, that it opposes the assertion of jurisdiction by United States courts over claims against the Federal Republic of Germany concerning the consequences of the National Socialist era and World War II.[5]

For the foregoing reasons, under the absolute theory of sovereign immunity that prevailed at the time of Germany's challenged conduct, the district court lacked jurisdiction to hear plaintiff's claims against the Federal Republic of Germany.

C. Under The Applicable Provisions Of The FSIA, The German Government Is Immune From Suit On Plaintiff's Claims In United States Courts.

Assuming that the FSIA provides the proper basis for assessing the district court's jurisdiction, the Federal Republic of Germany is immune from this suit.

As explained above, the general rule of the FSIA is that "a foreign state shall be immune from the jurisdiction of the courts of the United States." 28 U.S.C. § 1604. The FSIA also provides various exceptions to that rule. 28 U.S.C. § 1605. Absent an exception, U.S. courts lack

---

[5] There is nothing inconsistent between the position here stated and the policy expressed in the Bernstein Letter, cited by Amicus, at pages 17-19, in its discussion of the act of state doctrine. The Bernstein case, Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954), concerned claims against private German parties, rather than the German government. Moreover, the quotation relied upon by Amicus contains a statement specifically limiting its application to claims for "the restitution of identifiable property (or compensation in lieu thereof)." Id. In any event, to the extent that there might exist any conflict, it is the present policy of the Executive Branch that should govern. The policy of courts deferring to the Executive Branch in questions of sovereign immunity stemmed from the recognition that foreign sovereign immunity was a matter of comity among nations. See Verlinden B.V., 461 U.S. at 486. The Executive Branch must, therefore, be able to adapt its policy to changes in the country's foreign relations.

jurisdiction over the suit. Saudi Arabia v. Nelson, 507 U.S. at 355; Amerada Hess, 488 U.S. at 443. Amicus relies upon the "waiver" exception, 28 U.S.C. § 1605(a)(1), arguing that the Nazi regime's violations of jus cogens constituted a waiver by implication of Germany's sovereign immunity. See Amicus Br. at 10-17. That argument has been rejected by each of the courts of appeals that has considered it and should be rejected here as well.

1. Neither The Language Nor The Legislative History of The FSIA Supports An Expansive Construction Of The Implied Waiver Exception To The Statute.

The FSIA provides that

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. 1604. The exceptions in sections 1605 through 1607 focus on waiver, commercial activities, U.S. property rights, torts occurring in the United States (subject to exceptions), arbitration, a limited class of acts of international terrorism and certain maritime claims. There is no general exception to immunity for violations of international law. The exceptions to immunity in the FSIA are clear and specific, suggesting that a theory of constructive waiver based on violation of international law would be inconsistent with the intent of the statute to recognize immunity except in certain limited and identifiable situations.

The Supreme Court in Amerada Hess adopted this narrow construction of the exceptions to immunity. The Court observed that "Congress had violations of international law by foreign states in mind when it enacted the FSIA," 488 U.S. at 435, citing in particular section 1605(a)(3)'s denial of immunity when property rights are taken in violation of international law. The Court concluded that "[f]rom Congress' decision to deny immunity to foreign states in the class of cases just mentioned, we draw the plain implication that

immunity is granted in those involving alleged violations of international law that do not come within one of the FSIA's exceptions." Id. at 436.[6] See also Saudi Arabia v. Nelson, 507 U.S. at 355.

The Supreme Court's narrow interpretation is further supported by a subsequent amendment to the FSIA in which Congress abrogated foreign states' immunity for specific acts of international terrorism. In 1996, Congress amended the FSIA to create an exception to sovereign immunity for torture, extrajudicial killing, aircraft sabotage and hostage taking, but limited the exception to suits brought by U.S. citizens against foreign governments identified by the Executive Branch as state sponsors of terrorism. Pub. L. No. 104-132, Title II, Subtitle B., § 221(a)(1), 110 Stat. 1214, 1241-42 (1996), adding 28 U.S.C. § 1605(a)(7).[7] Like § 1605(a)(3)'s limited removal of immunity for violations of international law respecting property rights, § 1605(a)(7)'s limited exception for certain acts of international terrorism counsels strongly against a broad interpretation of § 1605(a)(1) under which all violations of jus cogens are construed, ipso facto, as implied waivers of immunity. See Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 244 (2d Cir. 1997) (noting that § 1605(a)(7) is "a carefully crafted provision that abolishes the defense [of sovereign immunity] only in precisely defined circumstances" and that this is "evidence that Congress is not necessarily averse to permitting some violations of jus cogens to be

---

[6] The Supreme Court also observed that in passing the FSIA Congress had invoked its power to punish "Offenses against the Law of Nations," Amerada Hess, 488 U.S. at 436 (citing U.S. Const. Art. I, § 8, cl. 10). The Court took this as further indication that the omission of a general exception for violations of international law was intentional. See ibid.

[7] In amending the FSIA to permit suit for certain enumerated torts abroad by designated state sponsors of terrorism, Congress expressly declined to adopt a broader approach, originally passed by the House. See 142 Cong. Rec. 4570, 4586, 4591-93 (March 13, 1996) (§ 803 of H.R. 2703, as amended); 142 Cong. Rec. 4814-15, 4836, 4846 (March 14, 1996).

redressed through channels other than suits against foreign states in United States courts").

This Court and others have frequently observed that the implied waiver provision of § 1605(a)(1) in particular must be construed narrowly. See Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 377 (7th Cir. 1985); Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 243 (2d Cir. 1997); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 444 (D.C. Cir. 1990); Joseph v. Office of the Consulate General of Nigeria, 830 F.2d 1018, 1022 (9th Cir. 1987). In support of this conclusion, the courts have cited the narrow list of examples given by Congress in the legislative history of the implied waiver provision. Congress specifically referred to three circumstances that would constitute implied waivers - "where a foreign state has agreed to arbitration in another country," "where a foreign state has agreed that the law of a particular country should govern a contract," and "where a foreign state has filed a responsive pleading without raising the defense of sovereign immunity." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. at 18, reprinted in 1976 U.S.C.C.A.N. 6604, 6617. Although these examples are not exclusive, "courts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity." Frolova, 761 F.2d at 377; Princz v. Federal Republic of Germany, 26 F.3d 1166, 1174 (D.C. Cir. 1994) (quoting same).

More particularly, as this Court noted in Frolova, the examples listed by Congress reflect that an implied waiver should not be found "without strong evidence that this is what the foreign state intended." 761 F.2d at 377. See also id. at 378 ("waiver would not be found absent a conscious decision to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so" (emphasis added)); Princz, 26 F.3d

at 1174 ("the amici's jus cogens theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1)"); Drexel Burnham Lambert v. Committee of Receivers for Galadari, 12 F.3d 317, 326 (2d Cir. 1993) (waiver must be "unmistakable" and "unambiguous"). Amicus's arguments in this case are inconsistent with the intentionality requirement of the implied waiver provision. Indeed, Amicus does not argue that a nation intentionally waives its immunity from suit when it violates jus cogens principles. Rather, Amicus argues that by engaging in such conduct a nation should be deemed to have forfeited its right to assert sovereign immunity. Whatever the attraction of that argument, Congress has not created such an exception. Whereas Congress has declared that a foreign state forfeits its immunity when it engages in certain classes of conduct,[8] Congress has not adopted a broad forfeiture of immunity for violations of jus cogens. It is not the role of the courts to do so.

In light of the above, it is not surprising that each of the three courts of appeals that have addressed the relationship of jus cogens to sovereign immunity has rejected the idea that conduct by a sovereign nation in violation of jus cogens norms constitutes an implied waiver of immunity. See Smith, 101 F.3d at 242-45; Princz, 26 F.3d at 1173-74; Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 718-19 (9th Cir. 1992). In each case, the court concluded that it is up to the political branches, and not the judicial branch, to determine that jus cogens violations should give rise

---

[8] A foreign state forfeits its immunity, for example, with respect to commercial activity, 28 U.S.C. § 1605(a)(2), the seizure of property in violation of international law, id. § 1605(a)(3), tortious acts committed in the United States, id. § 1605(a)(5), and acts of international terrorism by states designated by the Executive Branch, id. § 1605(a)(7).

to exceptions to foreign sovereign immunity. See Smith, 101 F.3d at 242; Princz, 26 F.3d at 1174-1175, n.1; Siderman, 965 F.2d at 719.[9]

2. The Jus Cogens Doctrine Does Not Address, And Would Be A Highly Uncertain Guide To, Resolving Sovereign Immunity Issues.

The arguments advanced by Amicus are also flawed as a matter of both logic and policy. As a matter of logic, Amicus conflates the substantive norms of conduct and the methods by which violations of those norms should be redressed. As a matter of policy, Amicus's argument would require the courts to engage in the difficult and politically sensitive task of determining what rules of conduct constitute "jus cogens," a determination that is better left to the branches of government assigned responsibility for conducting the nation's foreign affairs.

Amicus argues, relying upon the dissenting opinion in Princz, that jus cogens norms rank higher than other principles of international law including the doctrine of sovereign immunity and that, in order to maintain consistency with international law, the FSIA should be interpreted to encompass violations of jus cogens among those claims for which foreign states have implicitly waived their immunity from suit in U.S. courts. See Amicus Br. at 13-17; Princz, 26 F.3d at 1183 (Wald, J., dissenting) ("the only way to reconcile the FSIA's presumption of foreign sovereign immunity with international law is to interpret § 1605(a)(1) of the Act as encompassing the

---

[9] Amicus relies heavily on Siderman as its chief example of an application of the implied waiver provision to circumstances beyond those listed by Congress. See Amicus Br. at 12. Siderman held that a foreign sovereign's affirmative invocation of the jurisdiction of U.S. courts could be construed as an implied waiver of immunity from suit on related claims. 965 F.2d at 720-23. This holding, which has itself been criticized, see Cabiri v. Republic of Ghana, 165 F.3d 193, 202 (2d Cir. 1999), is at least far closer than this case to the examples identified by Congress, all of which "share a close relationship to the litigation process," Smith, 101 F.3d at 243. Significantly, Siderman specifically rejected the broader argument, urged here by Amicus, that the FSIA incorporates an exception for violations

principle that a foreign state implicitly waives its right to sovereign immunity in United States courts by violating jus cogens norms"). Amicus further argues that violations of jus cogens are not sovereign acts and thus not entitled to immunity. See Amicus Br. at 17.

However well-intentioned, these arguments are based upon a conceptual confusion between substantive and procedural principles of international law. Although jus cogens principles, unlike ordinary customary international law, are described as non-derogable (both as a matter of state practice generally and in the formation of treaties in particular), that description does not resolve how such principles are to be enforced. Even if all states are bound to respect jus cogens principles, they are not required to open their domestic courts to private litigation to resolve alleged jus cogens violations by other states. See Reimann, A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz, 16 Mich. J. Int'l L. 403, 421 (1995).

We have found no support for the proposition that the international consensus required to generate a principle of jus cogens necessarily implies a similar consensus that local judicial remedies for their violation are either appropriate or mandatory. Indeed, given that, to our knowledge, no state has recognized such an exception to sovereign immunity, plaintiffs' theory requires the untenable premise that there can be a principle of customary international law that no state supports.

Characterizing violations of jus cogens as "non-sovereign" acts similarly fails to resolve how jus cogens principles are to be enforced. Even if a state violates jus cogens, it is still clearly acting as a sovereign state. The key question for purposes of this case is whether the

---

of jus cogens. See 965 F.2d at 718-19 ("The fact that there has been a violation of jus cogens does not confer jurisdiction under the FSIA.").

political branches in enacting the FSIA have chosen to deny immunity for this particular category of activity by sovereign states. To label that activity "sovereign" or "non-sovereign" for purposes of sovereign immunity is to state a conclusion rather than to provide the necessary analysis.

Indeed, there is an internal inconsistency in Amicus's argument. On the one hand, Amicus argues that the courts may assert jurisdiction over Sampson's claims because the challenged acts of the Nazi government were not the sovereign acts of the German state. Yet, Sampson's attempt to hold the present democratic government of the Federal Republic of Germany liable for the wrongs of the Nazi regime rests on the theory that the Federal Republic of Germany is the legal successor to the Nazi regime as the sovereign authority in Germany. See note 3 supra. Plaintiff cannot have it both ways.

A further problem in Amicus's argument is that jus cogens would provide a highly uncertain guide to implementing the FSIA's implied waiver exception. While in some cases, the political branches may affirmatively have recognized a principle as jus cogens, that would not be true of every case in which a jus cogens violation is asserted. As stated in one of the leading treatises on international law, jus cogens "is a comparatively recent development and there is no general agreement as to which rules have this character." See Oppenheim's International Law, ed. by R. Jennings and A. Watts, 9th ed. (1992), p. 7.

After World War II (and, in part, as a result of the Nuremberg proceedings), international law scholars began to develop a theory that peremptory legal norms might be binding upon all states and in all circumstances. In the view of these scholars, the key characteristic of such norms was that treaty provisions authorizing violations of jus cogens would therefore be considered void. See E. Schwelb, Some Aspects of International Jus Cogens As Formulated By The International Law Commission, 61 Am. J. Int'l

L. 946, 949-963 (1967). This concept was accepted by the U.N. International Law Commission in the development of what became the Vienna Convention on the Law of Treaties.[10] See Restatement (Third) of the Law of Foreign Relations ("Restatement"), § 331 (1987); Zimmermann, Sovereign Immunity and Violations Of International Jus Cogens -- Some Critical Remarks, 16 Mich. J. Int'l L. 433, 437-438 (1995). That text, however, does not establish the content of jus cogens, which remains highly uncertain. See Restatement § 331, comment e (doctrine of jus cogens is of such "uncertain scope" that a "domestic court should not on its own authority refuse to give effect to an agreement on the ground that it violates a peremptory norm"). Moreover, neither the International Law Commission nor the Vienna Convention suggests that jus cogens has any bearing on principles of sovereign immunity.

There is no practice in the United States or abroad clarifying the precise content of jus cogens. Case law in the United States discussing jus cogens is sparse and inconsistent, and commentators frequently note that the content of jus cogens is not agreed. See Restatement, § 102, Reporters Note 6.[11] In many cases, the political branches will not have pronounced on the issue whether a certain principle has attained jus cogens status. And, since no other country has adopted a jus cogens exception to sovereign immunity,

---

[10] The United States has never ratified the Vienna Convention.

[11] Because of its lack of definition, the concept of jus cogens lends itself to exorbitant claims such as a right not to be "locally deported" (removed from the city limits). See Klock v. Cain, 813 F. Supp. 1430 (C.D. Cal. 1993). See also Xuncax v. Gramajo, 886 F. Supp. 162, 189 (D. Mass. 1995) (court was reluctant to stretch asserted jus cogens norm against cruel and inhuman or degrading treatment to encompass constructive expulsion); Sablan v. Superior Court of the Commonwealth of the Northern Mariana Islands, 1991 WL 258344, 2 N.M.I. 165 (N. Mariana Islands, 1991) (dissenting opinion) (right of self-government is so fundamental that it constitutes a peremptory norm); see also Sablan v. Iginoef, 1990 WL 291893, 1 N.M.I. 146 (N. Mariana Islands, 1990) (concurring opinion) (same); Borja v. Goodman, 1990 WL 291854, 1 N.M.I. 63 (N. Mariana Islands, 1990) (same).

there would be little if any international practice on which to rely. In these circumstances it is particularly doubtful that Congress silently intended the FSIA's implied waiver exception to incorporate violations of jus cogens, with no legislative guidance on how to apply that doctrine. The determination of what violations of international law will subject a foreign state to the domestic courts of the United States is a foreign policy question that must be reserved for the political branches of government, to which the Constitution entrusts the conduct of the nation's foreign affairs. See Princz, 26 F.3d at 1174-75, n.1.[12]

---

[12] In Princz, the court correctly observed:

> We think something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of § 1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government would have normal relations with the government of the day - unless disrupted by our courts, that is.

26 F.3d at 1174-1175, n.1.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing the complaint should be affirmed.

Respectfully submitted,

LINDA JACOBSON
Assistant Legal Adviser

WYNN M. TEEL
Attorney-Adviser

OFFICE OF LEGAL ADVISER FOR
DIPLOMATIC LAW AND LITIGATION
U.S. Department of State
Washington, D.C. 20520

DAVID W. OGDEN
Assistant Attorney General

SCOTT R. LASSAR
United States Attorney

MARK B. STERN
(202) 514-5089
DOUGLAS HALLWARD-DRIEMEIER
(202) 514-5735
Attorneys, Appellate Staff
Civil Division, Room 9113
Department of Justice
Washington, D.C. 20530-0001

Attorneys for Amicus Curiae the United States of America

CERTIFICATION OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

I hereby certify that this Brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as follows: the type face is Courier New, monospaced, twelve-point font (ten characters per inch), and the number of words in this Brief is 6284.

Douglas Hallward-Driemeier

CERTIFICATION OF SERVICE

I hereby certify that this 26th day of October, 2000, I dispatched via first-class mail, postage pre-paid fifteen (15) paper copies and one electronic copy of the Brief for Amicus Curiae the United States of America to:

Mr. Gino J. Agnello
Clerk, United States Court of Appeals
for the Seventh Circuit
U.S. Courthouse and Federal Office Bldg., Room 2722
219 S. Dearborn St.
Chicago, IL 60604-1874

I hereby certify that I have this 26th day of October, 2000, served two (2) true and correct paper copies and one (1) electronic copy of the foregoing Brief for Amicus Curiae the United States of America via Federal Express, next day delivery, and properly addressed to the following:

Jacob Sampson
6138 N. Clark Street
Chicago, IL 60660-2410

Michael D. McCormick
Stein, Ray, & Conway
222 W. Adams, Suite 1800
Chicago, IL 60606

Peter Heidenberger
Thomas G. Corcoran, Jr.
Berliner, Corcoran & Rowe
1101 Seventeenth Street, N.W.
Washington, D.C. 20036

Paul J. Cherner
Daniel A. Kaufman
Sara L. Thomas
Michael Brest & Friedrich
77 West Wacker Drive, Suite 4300
Chicago, IL 60601

Howard B. Eisenberg
Joseph D. Kearney
Marquette University Law School
1103 West Wisconsin Ave.
Milwaukee, WI 53233

_____ Douglas Hallward-Driemeier

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Constitution:

Statutes:

Legislative Materials:

Miscellaneous:

Annex 36

Thilo Rensmann, 'Impact on the Immunity of States and their Officials', in :
The Impact of Human Rights Law on General International Law (Oxford 2009), pp. 151-170

8

Impact on the Immunity of States and their Officials

*Thilo Rensmann**

1. The Resilience of the Traditional Rules

The *Pinochet* decision of the House of Lords, which held that the former Chilean head of state *Augusto Pinochet* did not enjoy immunity from criminal prosecution in Britain,[1] was hailed by many as a landmark case paving the way for the acceptance of a general 'human rights exception' to the traditional immunities granted to foreign states and their officials. Ten years later, the promise of a 'humanized'[2] immunity regime, which would enable national courts to prosecute and punish foreign state officials for severe human rights violations and to grant compensation to their victims, does not, however, seem to have been realized.

The venerable principle of *par in parem non habet imperium*[3] proved to be surprisingly resilient to claims that the traditional rules on the immunity of states and their officials should yield to the dictates of a new 'humanized' international legal order. The European Court of Human Rights in the *Al-Adsani* case, albeit by a very narrow majority, refused to extend the 'human rights exception' to tort proceedings against foreign states.[4] The International Court of Justice in its *Arrest Warrant* decision maintained that the *Pinochet* holding was strictly limited to former heads of state and that, accordingly, incumbent heads of state, heads of government and foreign ministers remained immune from criminal proceedings

* Dr. iur. habil. (University of Bonn); LL.M. (University of Virginia); Associate Professor of Law (Privatdozent) at the University of Bonn; Visiting Professor at the Ludwig-Maximilians-University, Munich.

[1] *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 1)* [1998] 3 WLR 1456; *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)* [1999] 2 WLR 827.

[2] On the notion of 'humanization' see T. Meron, *The Humanization of International Law* (Martinus Nijhoff, Leiden/Boston 2006).

[3] Bartolus, *Tractatus Repressalium*, Question I/3, para. 10 (1354).

[4] *Al-Adsani v. United Kingdom* (App. No. 35763/97), ECtHR, Judgment of 21 November 2001, (2002) 34 EHRR 11, ECHR 2001-XI; see also *Kalogeropoulou v. Greece and Germany* (App. No. 50021/00), ECtHR, Judgment of 12 December 2002, ECHR 2002-X.

abroad even if they were accused of having perpetrated war crimes and crimes against humanity.[5] National courts in Canada,[6] France,[7] Germany,[8] and Greece[9] showed a similar reluctance towards any extension of the *Pinochet* holding beyond the specific circumstances of that case. Recent decisions in the United States similarly upheld the immunity of states and their officials despite the *jus cogens* nature of the human rights alleged to have been violated.[10] It was finally the House of Lords itself which in *Jones v. Saudi Arabia* delivered the latest blow to the high hopes and expectations raised by the *Pinochet* precedent when it unequivocally endorsed the *Al-Adsani* decision and insisted that state immunity barred British courts from hearing tort claims against foreign states and their officials.[11]

It cannot, however, be considered as finally settled whether the 'humanization' of the traditional rules on the immunity of states and their officials will in the long run remain limited to the specific constellation of the *Pinochet* case or whether the ambit of the 'human rights exception' will gradually be extended to other immunity claims. In this context it has to be borne in mind that the *Al-Adsani* case was decided by the narrowest possible majority of nine to eight, that the categorical holding of the *Arrest Warrant* judgment was significantly qualified by a host of separate and dissenting opinions,[12] and that national courts have to date also not

[5] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, 2002 ICJ Reports 3.

[6] Canada, Court of Appeal of Ontario, *Bouzari v. Islamic Republic of Iran* [2004] 243 OR (4th) 406; see also Canada, Superior Court of Ontario, *Arar v. Syrian Arab Republic* [2005] OJ No. 752.

[7] French Court of Cassation (*Cour de Cassation*), Judgment of 13 March 2001, Clunet 2001, 804 (*Gaddafi* case). A complaint lodged against the decision before the European Court of Human Rights was struck off the list, see *Association SOS Attentats and de Boery v. France* (App. No. 76642/01), ECtHR, Decision of 4 October 2006.

[8] German Supreme Court (*Bundesgerichtshof*), *Greek Citizens v. Federal Republic of Germany* (2003) 42 ILM 1030; German Federal Constitutional Court (*Bundesverfassungsgericht*), 2 BvR 1476/03, Decision of 15 February 2006, para. 18, available at <http://www.bverfg.de>.

[9] Greek Special Supreme Court (Ανώτατο Ειδικό Δικαστήριο), *Margellos v. Federal Republic of Germany* (2007) 129 ILR 525. A complaint filed against the decision of the Greek Court of Cassation before the ECtHR was declared inadmissible, *Kalegoropoulou v. Greece and Germany* (App. No. 50021/00), ECtHR, Judgment of 12 December 2002 . See also ECJ, Case C-292/05 *Lechouritou, V. Karkoulias, G. Pavlopoulos, P. Bratsikas, D. Sotiropoulos, G. Dimopoulos v. Dimosio tis Omospondiakis Dimokratias tis Germanias* [2007] ECR I-1519 holding that the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968), [1978] OJ L 304/36 was not applicable to the proceedings before Greek courts.

[10] See with regard to civil proceedings against foreign states *Princz v. Federal Republic of Germany* 26 F 3d (DC Cir 1994); *Sampson v. Federal Republic of Germany* 250 F 3d 1145 (7th Cir 2001); with regard to civil proceedings against foreign state officials *Matar v. Dichter* 2007 WL 1276960 (SDNY 2 May 2007) (former director of Israel's General Security Service); *Yousuf v. Samantar* 2007 US Dist LEXIS 56227 (ED Va 1 August 2007) (former Somali Prime Minister and Minister of Defence); *Belhas v. Ya'alon*, No. 07–7009 (DC Cir, 15 February 2008) (former Israeli Head of Army Intelligence); with regard to tort actions against incumbent heads of state *Tachiona v. United States*, 386 F 3d 205 (2d Cir 2004); *Wei Ye v. Jiang Zemin*, 383 F.3d 620 (7th Cir 2004).

[11] *Jones v. Ministry of the Interior of Saudi Arabia* [2007] 1 AC 270.

[12] See also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (Jurisdiction and Admissibility) Judgment of 3 February 2006, 2006 ICJ Reports 6, Separate Opinion Dugard, paras. 11–12 arguing that the Court should reconsider the *Arrest Warrant* decision in the light of the fact that it had now for the first time given express

spoken in a single voice on this issue. Most notably the Italian *Corte di Cassazione* in a tort case brought by victims of war crimes committed by German troops during World War II refused to pay allegiance to the prevailing restrictive approach and considered any claims to immunity by the Federal Republic of Germany to be overridden by the *jus cogens* nature of the crimes at issue.[13] In a similar vein, the UN Committee Against Torture[14] in its concluding observations on Canada's periodic report—with obvious reference to the *Bouzari* case in which Canadian courts had denied compensation claims of torture victims against Iran on account of state immunity[15]—urged Canada to reconsider its position in the light of its obligations under Article 14 of the UN Torture Convention.[16]

The 2004 UN Convention on Jurisdictional Immunities of States and their Property,[17] which has not yet entered into force but may nevertheless *cum grano salis* be considered the most authoritative restatement of current customary law on state immunity, has left the issue undecided.[18] Upon ratification, Norway explicitly added the understanding that 'the Convention is without prejudice to any future international development in the protection of human rights'.[19] In fact, the International Law Commission has recently embarked upon a project of codifying the 'immunity of State state officials from foreign criminal jurisdiction'[20] with the intention of making 'a contribution to ensuring a proper balance'

recognition to the concept of *jus cogens*. Such an opportunity might present itself to the Court in the case concerning *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, see order of 17 June 2003 (Provisional Measures), 2003 ICJ Reports 102. On 18 April 2007 Rwanda filed an application with the Court in a dispute with France concerning arrest warrants issued by French authorities against three Rwandan officials; see ICJ Press Release 2007/11.

[13] Italian Court of Cassation (*Corte di Cassazione*), *Ferrini v. Federal Republic of Germany*, Judgment of 11 March 2004, (2005) 99 AJIL 242, (2006) 128 ILR 658. A similar line of reasoning was followed by the Greek Court of Cassation in *Prefecture of Voiotia v. Federal Republic of Germany* (Case No. 11/2000) (2007) 129 ILR 513 which was, however, later overruled by a special chamber of the Greek Supreme Court, see *Margellos v. Germany* (2007) 129 ILR 525.

[14] CAT, Conclusions and Recommendations of the Committee against Torture: Canada, 7 July 2005, CAT/C/CR/34/CAN, para. 5 (f). See also the Committee's decision in *Guengueng v. Senegal*, 19 May 2006, CAT/C/36/D/181/2001, which held that Senegal had violated its obligations under Art. 5 para. 2 and Art. 7 of the UN Torture Convention by failing to prosecute the former President of Chad Hissène Habré for alleged acts of torture. Note, however, that the Senegal Court of Cassation in its decision of 20 March 2001, (2004) 125 ILR 569, had based the dismissal of the charges against Habré on the lack of universal jurisdiction under the law of Senegal rather than on considerations of immunity.

[15] *Bouzari* [2004] 243 OR (4th) 406.

[16] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85.

[17] United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted by the UN General Assembly on 2 December 2004) UNGA Res. 59/38 annex.

[18] See Report of the Working Group on Jurisdictional Immunities of States and Their Property, in ILC, Report of the ILC on the Work of its 51st Session, UN Doc. A/54/10 (1999), Annex, 171–172.

[19] Declaration made by Norway upon ratification (27 March 2006), in UN Office of Legal Affairs, Status of Multilateral Treaties Deposited with the Secretary General, Part 1, Chapter III, No. 13, available at <http://untreaty.un.org>.

[20] See GA Res. 62/66 of 6 December 2007, para. 7 and ILC, Report of the ILC on the Work of its 59th Session, UN Doc. A/62/10 (2007), para. 376.

between the fight against impunity and the need for stable and predictable inter-state relations.[21]

While international human rights law has not yet effectuated a general immunity exception with regard to serious human rights violations it should not be forgotten that human rights played a significant catalytic role in the gradual transformation from an absolute to today's restrictive understanding of immunity.[22] International human rights law continues to exert pressure on the international legal system to constantly review the extent to which the interest of preserving the stability of international relations may justify perpetrators of human rights violations going unpunished and their victims remaining without redress. This is not only witnessed by the incessant flow of court cases in which judges are faced with the argument that the traditional immunity rules have to give way to the imperatives of human rights, but also by recent initiatives to introduce a 'human rights exception' into international and domestic instruments on state immunity. The Secretary-General of the Council of Europe recently called for a 'Council of Europe instrument on State immunity and serious human rights violations' with a view to ensuring that '[t]orturers and perpetrators of other serious human rights violations . . . [will no longer] be able to hide behind the veil of immunity.'[23] In the aftermath of the *Jones* decision a bill was introduced in the House of Lords in February 2008 (Torture (Damages) Bill) which would add a specific caveat to the British State Immunity Act[24] in order to allow torture victims access to British courts.[25] Similar proposals are under consideration in Canada.[26]

2. A 'Human Rights Exception' to the Traditional Rules?

If one were to limit the present enquiry to assessing the *lex lata* in the light of the traditional sources of international law the analysis would not need to be taken a lot further. As yet there is insufficient state practice to support a general 'human

[21] See the preliminary study by the rapporteur Roman A. Kolodkin in ILC, Report of the ILC on the Work of its 58th Session, UN Doc. A/61/10 (2006), Annex A, paras. 1, 17, 18.

[22] See R. van Alebeek, *The Immunities of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press, Oxford 2008), 47, 308; H. Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 BYIL 220, 235.

[23] Council of Europe, Follow-up to the Secretary General's report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies, Proposals made by the Secretary General, 30 June 2006, SG (2006) 01, paras. 17, 19. For a similar proposal with regard to the UN Convention on State Immunity (n. 617) see C. Hall, 'UN Convention on State Immunity: The Need for a Human Rights Protocol' (2006) 55 ICLQ 411.

[24] State Immunity Act 1978 (c 33).

[25] Torture (Damages) HL Bill (2007–08) 30.

[26] See D. Black, 'A Canadian Law That Helps Outlaws', *Toronto Star* (Toronto 10 February 2008), available at <http://www.thestar.com>; N.B. Novogrodsky, 'Immunity for Torture: Lessons From *Bouzari v. Iran*' (2007) 18 EJIL 939, 948–952.

rights exception'. The majority of the Law Lords in the final and decisive *Pinochet* judgment rested their argument on the narrow ground that with regard to criminal prosecution for acts of torture the immunity of former heads of state must be considered to have been waived by virtue of the UN Torture Convention.[27] Beyond the *Pinochet* precedent human rights violations can only serve as a justification for disregarding immunity if one of the traditional immunity exceptions applies.[28] Specific exceptions for human rights violations amounting to crimes against humanity or war crimes only exist with regard to criminal proceedings before certain international and internationalized criminal tribunals.[29]

While the *Pinochet* precedent has hence not brought about a general 'human rights exception', it has still had a considerable impact on the discourse about the immunity of states and their officials. National and international judges have since constantly been faced with the challenge that the traditional ambit of immunities should be restricted in view of the progressive development of international human rights law.[30] This judicial discourse thus provides a valuable case study on the interaction between international human rights law and general international law. In particular it sheds light on the conditioning factors that determine the receptiveness of general international law to the charms of international human rights. Understanding why the immunities granted to states and their officials have, to date, proved so resilient to the impact of human rights will help both to provide a basis for predicting the future development of the law of immunity and offer a conceptual framework for devising realistic strategies for overcoming the obstacles that traditional immunities pose to the effective realization of human rights.

[27] *Pinochet (No. 3)* [1999] 2 WLR 827, 859 (per Lord Goff), 881 (per Lord Hope), 902 (per Lord Saville), 906–7 (per Lord Millet), 924 (per Lord Phillips).

[28] See below notes 46–49.

[29] See Art. 7, para. 2 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/25704, annex (1993) reprinted in (1993) 32 ILM 1192; Art. 6, para. 2 of the Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, annex (1994), reprinted in (1994) 333 ILM 1602; Art. 27, para. 2 of the Rome Statute of the International Criminal Court, 17 uly 1998, (1998) 37 ILM 1002; Art. 6, para. 2 of the Statute of the Special Court for Sierra Leone, 16 January 2002 available at <http://www.sc-sl.org/Documents/scsl-statute.html>. Note, however, that the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, SC Res. 1757 (2007), Annex, reprinted in (2007) 46 ILM 989, does not contain any comparable immunity exception. On the issue of immunity before international and internationalized Tribunals see also Special Court for Sierra Leone (Appeals Chamber), *Prosecutor v. Charles Taylor*, Case No. SCSL-2003, Decision on Immunity from Jurisdiction, 31 May 2004, (2007) 128 ILR 239; *Arrest Warrant* Case 2002 ICJ Reports 3, para. 61. As to the disputed foundation and extent of immunities before international courts see Van Alebeek, *The Immunity of States and Their Officials* (2008) 275–295; D. Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 AJIL 407; K. Schmalenbach, 'Immunität von Staatsoberhäuptern und anderen Staatsorganen' (2006) 61 *Zeitschrift für öffentliches Recht* 397, 427–429; T. Stein, 'Limits of International Law Immunities for Senior State Officials in Criminal Procedure' in C. Tomuschat and J-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order* (Martinus Nijhoff, Leiden/Boston 2006) 249, 251–254.

[30] See above notes 4–13.

In reviewing the case law since the *Pinochet* decision of the British House of Lords, there appear to be two main conditioning factors defining the impact of human rights on the immunity of states and their officials: firstly the forum and the perspective from which the problem is addressed and secondly the methodology employed.

3. The Perspective of the Forum

3.1 International courts

The International Court of Justice in the *Arrest Warrant* case approaches the issue from the perspective of general international law. After having established that an incumbent foreign minister when abroad enjoys 'full immunity from criminal jurisdiction',[31] the Court holds that current state practice does not support any exemption from immunity on account of the seriousness of the alleged human rights violations.[32] Human rights are thus not considered as principles and rules in their own right which, in a given case, have to be reconciled with the traditional immunities of states and their officials. Rather they become only relevant if referred to in an immunity exception recognized under customary international law.[33]

In contrast, the specific mandate of the European Court of Human Rights requires the Strasbourg judges to take human rights as their point of departure.[34] Rather than asking whether there is a 'human rights exception' to state immunity the Strasbourg Court sets out to establish whether there is a 'general international law exception' to the right of access to a court (Article 6(1) of the Convention).[35] Any restriction imposed on this right would in principle only be justified if it pursued a legitimate aim and were proportionate to that aim.[36] The Court has to date, however, refrained from subjecting the rules on state immunity to such a balancing test.[37] Instead it assumes the right of access to a court (Article 6(1) of the Convention) to be inherently limited by general international law[38] and considers compliance with general international law *per se* a legitimate and proportionate limitation of the Convention guarantees.[39] Consequently, the Strasbourg court restricts its role to establishing the *status quo* of immunity law and in this sense switches back to the International Court of Justice's general international law perspective.

Whether the European Court of Human Rights would be prepared to assert a residual power to intervene if compliance with general international law were

[31] *Arrest Warrant*, 2002 ICJ Reports 3, para. 54.
[32] Ibid., para. 58.
[33] As to the underlying methodological assumptions see below.
[34] *Al-Adsani* (App. No. 35763/97) ECHR 2001-XI, paras. 35–67.
[35] Ibid., paras. 52–56. [36] See ibid., paras. 53–54.
[37] A strict balancing approach is favoured by Judge Loucaidis, see ibid. (diss. op. Loucaidis).
[38] Ibid., para. 56. [39] Ibid., paras. 54, 56.

severely to compromise the very essence of the Convention guarantees[40] remains to be seen. The extreme self-restraint the Court recently exercised in the *Behrami* decision, which in effect appears to give the Security Council *carte blanche* to brush away all human rights restraints laid down in the European Convention on Human Rights,[41] seems rather to raise the spectre of a non-reviewable 'general international law exception'.[42]

3.2 National courts

Due to their very nature questions of immunity are most frequently argued before national courts. National court decisions therefore constitute an extremely important source for ascertaining the extent to which customary international law shields states and their officials from subjection to foreign jurisdiction.[43]

The willingness of national courts to allow the traditional immunities of states and their officials to be set aside in cases of severe human rights violations depends both on the legal basis on which immunity is granted and on the status accorded to human rights under the domestic legal order in question. In jurisdictions such as the United Kingdom, the United States and Canada, in which the law of state immunity has been codified by an act of Parliament,[44] the approach to this question is largely determined by the domestic immunity statute.

Since such statutes typically do not provide for a specific 'human rights exception' immunity may only be disregarded if the violation of human rights fits one of the exceptions enumerated in the statute.[45] Typically, however, none of these exceptions apply. Efforts to argue that human rights violations can be qualified as commercial acts,[46] go beyond the official capacity of state

[40] See ibid., para. 53 ('the Court ... must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired') and para. 56 ('It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on state immunity cannot *in principle* be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1.' [Emphasis provided]).
[41] *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* (App. No. 71412/01 and 78166/01), ECtHR, Decision of 2 May 2007. See in this context also the opinion delivered by A.G. Maduro in C-402/05, *Kadi v. Council and Commission* (16 January 2008).
[42] See also Judge Ress's criticism of the Court's self-restraint in European Court of Human Rights (Grand Chamber), *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland* (App. No. 45036/98), ECtHR, Judgment of 30 June 2005, ECHR 2005-VI, Concurring opinion of Judge Ress, para. 5.
[43] See R. Higgins *Problems & Process: International Law and How We Use It* (Clarendon Press, Oxford 1994) 81.
[44] See (British) State Immunity Act (1978); (US) Foreign Sovereign Immunities Act, 28 USC §§ 1602–1611; (Canadian) State Immunity Act, RSC 1985, c S-18.
[45] *Bouzari* [2004] 243 OR (4th) 406, paras. 57–58; *Jones* [2007] 1 AC 270, para. 13 (per Lord Bingham), paras. 39, 64 (per Lord Hoffmann); *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).
[46] Rejected in *Bouzari* [2004] 243 OR (4th) 406 , paras. 48–55; *Saudi Arabia v. Nelson* 507 U.S. 349, 355 (1993) 356–363.

officials,[47] constitute an implied waiver,[48] or fall under the tort exception[49] have for the most part failed. To date only the United States of America[50] has enacted a specific immunity exception allowing tort actions against foreign states responsible for (or complicit in) certain serious human rights violations (torture, extrajudicial killing, aircraft sabotage, or hostage taking).[51] This exception is, however, only applicable if the plaintiff is a US citizen and the respondent state has been designated by the State Department as a 'sponsor of terrorism'.[52]

Both in Italy and in Greece, where the highest courts have assumed that state immunity cannot be invoked in tort proceedings involving alleged war crimes and crimes against humanity,[53] the judges are not confined by the straitjacket of a domestic immunity statute but are rather free to determine the reach of immunities with direct reference to customary international law. The absence of domestic codification allows a more activist approach which opens up the possibility of taking note of the progressive development of international human rights law and of the international legal order at large, in particular with regard to the legal consequences attached to breaches of *jus cogens*.[54] In contrast, those common law courts which must adjudicate on the basis of a domestic immunity statute are often effectively insulated from such new developments at the international level.[55] Since the limits of statutory interpretation hinder such courts from responding to the progressive 'humanization' of international law their jurisprudence cannot contribute to the state practice necessary to support an emerging 'human rights exception'. Domestic immunity statutes thus exercise a considerable 'ossifying' effect on customary international law.

[47] Rejected in *Jones* [2007] 1 AC 270, paras. 72–97 (per Lord Hoffmann); *Matar v. Dichter* 2007 WL 1276960 (SDNY 2 May 2007); *Samantar* 2007 US Dist LEXIS 56227 (ED Va 1 August 2007); *Belhas* (n. 10).

[48] Rejected in *Princz* 26 F 3d (DC Cir 1994) 1173; *Sampson* 250 F 3d 1145 (7th Cir 2001) 1156.

[49] Rejected in *Bouzari* [2004] 243 OR (4th) 406, paras. 45–47; *Al-Adsani v. Government of Kuwait* (1996) 107 ILR 536 CA.

[50] Note, however, that Iran and Cuba, which have both been branded 'State sponsors of terrorism' by the United States Government appear to have enacted similar legislation with a view to permitting civil actions against the United States as a reaction to the 1996 amendment of the Foreign Sovereign Immunities Act, see Congressional Research Service (J. Elsea), Suits Against Terrorist States By Victims of Terrorism, RL 31258 (17 December 2007), 53–54.

[51] 28 USC § 1605 (a)(7).

[52] See 28 USC § 1605 (a)(7)(B). For references to the case law based on this exception and subsequent legislation aimed at enabling the plaintiffs to enforce the awarded compensation see Congressional Research Service (Elsea) RL 31258 (17 December 2007). Currently the list of 'State sponsors of terrorism' includes Cuba, Iran, North Korea, Sudan, and Syria. Iraq and Libya have been struck off the list, see 22 CFR §126.1(a) (2002).

[53] *Ferrini* (2006) 128 ILR 658; *Prefecture of Voiotia* (Case No. 11/2000) (2007) 129 ILR 513, later overruled by *Margellos* (2007) 129 ILR 525.

[54] See e.g. the reference in *Ferrini* (2006) 128 ILR 658, para. 9, to Arts. 40 and 41 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN GA Res. 56/83 Annex (12 December 2001).

[55] *Bouzari* [2004] 243 OR (4th) 406, para. 67: 'Even if Canada's international law obligations required that Canada permit a civil remedy for torture abroad by a foreign state, Canada has legislated in a way that does not do so. . . . Canada has clearly legislated so as not to create this exception to state immunity whether it has an international law obligation to do so or not.'

The status of human rights within the domestic legal order provides another important conditioning factor. Courts, such as the Italian courts in the *Ferrini* case, which are familiar with arguments based on human rights values[56] and corresponding protective duties will be particularly receptive to the argument that immunity claims must be balanced against the countervailing interests of the international community to avoid impunity and provide redress to the victims of serious human rights violations.[57]

It is interesting to observe that since the Human Rights Act[58] entered into force in 2000, British courts have also displayed a more dynamic approach to ascertaining the proper balance between state immunity and human rights. A case in point is *Jones v. Saudi Arabia*.[59] The Human Rights Act, by virtue of which the United Kingdom incorporated the European Convention on Human Rights into domestic law, requires British courts to interpret statutes as far as possible in the light of the Convention rights.[60] In consequence, the State Immunity Act must now be construed in the light of international human rights as they have been incorporated by the Human Rights Act. In this sense, human rights—regardless of whether they are *jus cogens* or not—are accorded *de facto* a hierarchically superior position in relation to state immunity. By virtue of this elevated status British courts must take into account human rights standards when determining the ambit of the (national) rules on state immunity.

This was precisely the conceptual starting point adopted by the Court of Appeal in the *Jones* case.[61] Whereas the Court felt compelled by the Human Rights Act[62] to follow the *Al-Adsani* precedent in granting Saudi Arabia immunity from jurisdiction, it held that the State Immunity Act did not extend immunity to the acting state officials, a constellation which, to date, has not been explicitly covered by the jurisprudence of the Strasbourg court. The fact that the House of Lords later overruled the Court of Appeal on this point[63] does not detract from the more general observation that the domestic incorporation of human rights has enticed British judges to break the mould of traditional statutory interpretation

[56] On the role of human rights values and protective duties in Italian law see T. Rensmann, *Wertordnung und Verfassung* (Mohr Siebeck 2007) 171–173, 295–298.

[57] The activist approach followed by the Italian *Corte di Cassazione* in *Ferrini* (2006) 128 ILR 658 is in stark contrast to the judicial self-restraint exercised by British and Canadian courts, see *Bouzari* [2004] 243 OR (4th) 406, para. 95 ('In future perhaps as the international human rights movement gathers greater force, this balance [between the condemnation of torture and the principle that states must treat each other as equals] may change, either through domestic legislation of states or by international treaty. . . . this is not a change to be effected by a domestic court.'); *Jones* [2007] 1 AC 270, para. 63 (per Lord Hoffmann) ('It is not for a national court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.').

[58] Human Rights Act 1998 (c 42).

[59] Infra, n. 61.

[60] Section 3 Human Rights Act (1998).

[61] *Jones v. Ministry of Interior of Saudi Arabia* [2005] QB 699.

[62] See Section 2(1)(a) Human Rights Act (1998).

[63] *Jones* [2007] 1 AC 270, paras. 29–34 (per Lord Bingham), paras. 65–101 (per Lord Hoffmann).

and to explore the impact of human rights on the immunity of states and their officials beyond the confines of a narrow reading of the State Immunity Act. Had it not been for the *Al-Adsani* precedent of the European Court of Human Rights, which must be taken into account by virtue of the Human Rights Act,[64] British courts might have even been more daring in adjusting the immunities of states and their officials to the demands of today's 'humanized' international legal order.

4. Methodology

The quest for a 'human rights exception' to the immunity of states and their officials pits the time-honoured principle of *par in parem non habet imperium*, one of the most immediate expressions of the sovereign equality of states, against the fledgling normative aspiration of the international community to fight the impunity of perpetrators of serious human rights violations[65] and to ensure that their victims are adequately compensated.[66] In this sense we are apparently faced with a head-on collision between classical state-oriented international law based on the axiom of state sovereignty and the modern 'humanized' international law which seeks to protect the 'dignity and worth of the human person'.[67] Due to the fundamental nature of this conflict which forces the decision-maker to reveal his basic assumptions about the dogmatic foundations of modern international law, the substantive conflict between immunity and human rights goes hand in hand with a methodological dispute as to the sources and the proper rules of interpretation in international law. The inevitability of having to reveal and defend one's methodological creed accounts for the intensity and passion with which the judicial and academic discourse about the propriety of a 'human rights exception' is conducted.

While the traditionalists set out to ascertain the will of the sovereign states with the dowsing rod of Article 38(1) of the ICJ Statue[68] and resolve any *non liquet* in favour of immunity, the (self-appointed) methodological avant-garde instead conjures up the new anthropocentric values of the international community and postulates their precedence over the 'old' state-centred immunity rules. Between these outer methodological poles various 'intermediate' approaches can be discerned which share the conviction that the traditional immunities must be

[64] Section 2(1)(a) Human Rights Act (1998).

[65] See Updated Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1, Addendum.

[66] United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res. 60/147, 16 December 2005.

[67] Charter of the United Nations, Preamble, para. 2.

[68] Statute of the International Court of Justice, 24 October 1945, 961 UNTS 183, 280.

carefully adapted to the emergence of human rights as 'constitutional values' in modern international law.

The following analysis will attempt to review the current discourse on the impact of international human rights law on immunity of states and their officials through the lens of these three basic methodological approaches (the 'traditional', the value-driven 'hierarchical', and the 'intermediate' approach). The primary aim of this exercise is to gain some general insights into the mutual relationship between methodology and the integration of human rights values into general international law. At the same time an attempt will be made to identify the dangers and opportunities which each of the three methodological 'ideal-types' entails for the further development of international law.

At the outset it is important to note that the case law under review is concerned with a number of different constellations to which the body of traditional international law has responded with different sets of rules in order to accommodate the interests involved in each of these specific situations.[69] Hence civil proceedings[70] need to be distinguished from criminal proceedings;[71] court actions against states from those against state officials. If state officials are involved the extent of the immunities enjoyed depends on their respective functions since special immunity regimes have evolved for diplomats,[72] heads of state, heads of government, and certain cabinet members.[73] Acting state officials[74] may be entitled to more extensive immunities than former state officials.[75] Finally, different considerations apply depending on whether the case is heard before a national or an international court.[76]

In each of the cases under review it was argued by at least one of the parties that in the event of the violation of certain human rights, the human rights values at issue should trump the traditional immunity rules regardless of the nature of the proceedings. If this argument were followed, the new anthropocentric values would brush aside in one fell swoop all the sophisticated distinctions traditional international law has developed with regard to the immunity of states and their officials.[77] Whereas the emergence of the international

[69] As to the importance of these distinctions in assessing the influence of international human rights law on the immunities enjoyed by states and their officials see the in-depth study of Van Alebeek, *The Immunity of States and Their Officials* (2008).

[70] See e.g., *Al- Adsani* (n. 4); *Bouzari* [2004] 243 OR (4th) 406; *Ferrini* (2006) 128 ILR 658; *Jones* [2007] 1 AC 270.

[71] See e.g., *Arrest Warrant*, 2002 ICJ Reports 3; *Pinochet* [1999] 2 WLR 827.

[72] Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95.

[73] *Arrest Warrant*, 2002 ICJ Reports 3; Institut de Droit International, Immunities from Jurisdiction and Execution of Heads of State and of Governments in International Law, 26 August 2001, available at <http://www.idi-iil.org/idiE/resolutionsE/2001_van_02_en.PDF>.

[74] See *Arrest Warrant*, 2002 ICJ Reports 3; *Tachiona v. United States* (n. 10); *Wei Ye v. Jiang Zemin* (n 627).

[75] *Pinochet* [1999] 2 WLR 827.

[76] See above n. 29.

[77] See e.g., *Al-Adsani* (App. No. 35763/97), ECHR 2001-XI, Dissenting opinion Rozakis and Caflisch joined by Wildhaber, Costa, Cabral Barreto, and Vajić: '[T]he distinction made by the

community's interest in protecting 'the worth and value of the human person'[78] may indeed require the adjustment of these rules, careful consideration must be given to whether the 'humanization' of international law should indeed go as far as to reverse Oliver Wendell Holmes's famous observation that '[t]he life of the law has not been logic' but rather 'experience'.[79] Should the experience encapsulated in traditional international law really have to yield unremittingly to the 'logic of values'?[80]

4.1 The traditional approach

Before looking more closely at the radical value-driven approach, it is, however, necessary to assess the mainstream methodology on this issue. The traditional approach is based on the assumption that the detection of the relevant rules of immunity is essentially an empirical exercise of identifying the collective will of the international community of states as it has crystallized in the traditional sources of international law spelled out in Article 38(1) of the ICJ Statute.[81] In this sense the traditional methodology is indeed 'formalistic'.[82] The case law on the interaction between immunity and human rights which proclaims to adhere to this approach reveals, however, that the mainstream, despite its formalistic creed, is in the last analysis also value-driven.

With the exception of diplomatic immunities, the immunity of states and their officials rests largely on customary international law. The UN Convention on Jurisdictional Immunities of States and Their Property[83] is not yet in force and the European Convention on State Immunity[84] has only been ratified by eight states. Typically, the assessment of whether international law provides for a 'human rights exception' to state immunity hinges, therefore, on establishing

majority between civil and criminal proceedings, concerning the effect of the rule of the prohibition of torture, is not consonant with the very essence of the operation of the *jus cogens* rules. It is not the nature of the proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule. The prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere. The criminal or civil nature of the domestic proceedings is immaterial.'

[78] See above n. 67.

[79] Oliver Wendell Holmes, *The Common Law* (1881) 1.

[80] On the 'logic of values' see C. Schmitt, 'Die Tyrannei der Werte' in S. Buve (ed.), *Säkularisation und Utopie, Erbracher Studien, Ernst Forsthoff zum 65 Geburtstag* (Kohlhammer, Stuttgart 1967) 37, 60.

[81] This traditional approach is followed by the courts in *Arrest Warrant*, 2002 ICJ Reports 3; *Al-Adsani* (App. No. 35763/97) ECHR 2001-XI; *Bouzari* [2004] 243 OR (4th) 406; *Jones* [2007] 1 AC 270.

[82] *Al-Adsani* (App. No. 35763/97) ECHR 2001-XI (diss. op. Ferrari Bravo); *Arrest Warrant*, 2002 ICJ Reports 3, Dissenting opinion Van den Wyngaert, para. 28.

[83] See above n. 17.

[84] European Convention on State Immunity, 16 May 1972, ETS No. 74.

sufficient state practice to this effect which, in turn, needs to be supported by a corresponding *opinio juris*.[85]

Whereas in tort cases the rule of immunity finds a solid basis in state practice, the *Arrest Warrant* case demonstrates that in other instances it may be difficult, if not impossible, to corroborate the postulated immunity rule by sufficient state practice. The contention of the International Court of Justice that an incumbent foreign minister enjoys absolute immunity in criminal proceedings could not be bolstered by any significant state practice.[86] The Court instead relied on a functional analogy to recognize diplomatic immunities.[87] The lack of state practice was thus compensated for by relying on the value judgment of the international community in favour of the stability and smooth functioning of international relations. The realization of this value was in the further course of the Court's reasoning 'optimized'[88] by following a functional approach in determining the extent of the foreign minister's immunities: the foreign minister was considered to enjoy such immunities as are necessary for the effective fulfilment of his functions. Due to the special role international law accords to him by virtue of his portfolio, the Court considered a foreign minister to enjoy absolute immunity during his term of office.[89]

Significantly, however, the International Court of Justice did not follow this functional, value-oriented approach to customary international law when assessing the question as to whether an incumbent foreign minister would also enjoy immunity in the event of serious human rights violations amounting to crimes against humanity. The acceptance of a 'human rights exception' faltered due to the lack of supporting state practice.[90] At this stage in the analysis the Court suddenly lost its receptiveness to functional, value-oriented reasoning as a means to filling gaps in state practice. The majority declined to attach any normative significance to the firm commitment of the international community to a core of fundamental human rights. In the last analysis this selective reliance on values in the process of ascertaining the applicable rules of general international law amounts to the same syllogistic hierarchical reasoning as that advocated by some proponents of an all-encompassing 'human rights exception'.

4.2 The 'hierarchical' approach

Both from the bench and in academia, reliance is increasingly placed on the argument that states and their officials may not claim immunity in civil or criminal

[85] Art. 38(1)(b) ICJ Statute (1945).

[86] *Arrest Warrant*, 2002 ICJ Reports 3, paras. 51–53.

[87] Ibid., paras. 53–54.

[88] On the 'optimizing function' of principles see R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press, Oxford 2002).

[89] *Arrest Warrant*, 2002 ICJ Reports 3, para. 54.

[90] Ibid., para. 58.

proceedings in which the violation of *jus cogens* is at issue.[91] This line of reasoning found its classical expression in the dissenting opinion by Judges Rozakis and Caflisch in the *Al-Adsani* case. In the eyes of the dissenters, the *jus cogens* nature of the prohibition of torture, for the violation of which Suleiman Al-Adsani had sought damages before British courts, provided the key to dismissing the validity of Kuwait's claim to immunity:

> The acceptance... of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions. In the circumstances of this case, Kuwait cannot validly hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction; and the courts of that jurisdiction (the United Kingdom) cannot accept a plea of immunity, or invoke it *ex officio*, to refuse an applicant adjudication of a torture case. Due to the interplay of the *jus cogens* rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect. In the same vein, national law which is designed to give domestic effect to the international rules on State immunity cannot be invoked as creating a jurisdictional bar, but must be interpreted in accordance with and in the light of the imperative precepts of *jus cogens*.[92]

Despite its seemingly logical rigour, the argument is seriously flawed because neither the alleged normative conflict nor the presumed hierarchy between human rights and state immunity can be demonstrated to exist.

4.2.1 The lack of normative conflict

The rules on state immunity forbid the *forum* state from exercising its jurisdiction over foreign states and their officials. A normative collision could accordingly only be assumed if the prohibition of torture (or any other *jus cogens* rule) implied the *duty* to establish jurisdiction over foreign states and their officials in order to provide compensation to the victims (or to initiate criminal proceedings against the responsible state officials).[93]

As international law stands today such a general duty to establish criminal or civil jurisdiction with a view to providing judicial remedies for the violation of fundamental human rights endowed with the status of *jus cogens* (*mandatory* universal jurisdiction) only exists in exceptional circumstances.

[91] See e.g., *Ferrini* (2006) 128 ILR 658; *Al-Adsani* (App. No. 35763/97) ECHR 2001-XI, Dissenting opinion Rozakis *et al. Arrest Warrant*, 2002 ICJ Reports 3, Dissenting opinion Van den Wyngaert), paras. 24–28; A. Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong' (2007) 18 EJIL 955.

[92] *Al-Adsani* (App. No. 35763/97) ECHR 2001-XI, dissenting opinion Rozakis *et al.*, para. 3.

[93] See *Jones* [2007] 1 AC 270, paras. 43–45. As to the opposite view which criticizes the 'formalistic' distinction between *jus cogens* as 'substantive' and 'procedural' rules see L. McGregor, 'Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty' (2007) 18 EJIL 903, 906–907; Orakhelashvili, (2007) 18 EJIL 955, 964.

The positive obligations laid down in regional and international human rights treaties in principle only require the states parties to provide judicial remedies for human rights violations which have been committed within their jurisdiction.[94]

Under customary international law there is no rule of *mandatory* universal jurisdiction with regard to criminal or tort proceedings. Even in relation to crimes against humanity, customary international law merely allows criminal prosecution (*permissive* universal jurisdiction) but does not make it obligatory.[95]

Such mandatory universal jurisdiction cannot be read into the positive obligation which the ILC Draft Articles on State Responsibility[96] provide for in Article 41(1) in the event of a serious violation of peremptory rules of international law. Even if it were assumed that such a protective duty could already be considered *lex lata* it merely requires states to 'cooperate'. This cannot reasonably be understood to encompass a duty unilaterally to establish jurisdiction.[97] Equally the negative duty not to recognize as lawful the consequences of a *jus cogens* violation set forth in Article 41(2) of the ILC Draft cannot be construed as establishing a positive duty to exercise jurisdiction.[98]

Treaties which lay down obligatory universal jurisdiction to prosecute or extradite (*aut dedere aut iudicare/prosequi*)[99] do not necessarily displace the traditional immunity rules. The intention of the contracting parties to this effect cannot simply be assumed but would have to be established by ordinary means of treaty interpretation. The UN Torture Convention provides such an exceptional case because, according to the Convention, torture can only be committed by state officials or individuals acting in an official capacity.[100] The *aut dedere aut iudicare* obligation would accordingly be rendered meaningless if such officials or agents were granted immunity from criminal jurisdiction. The House of Lords in the *Pinochet* case therefore considered the UN Torture Convention as an implied waiver of immunity in criminal proceedings relating to torture.[101]

The House of Lords in the *Jones* case convincingly argued that having regard to the wording and the *travaux préparatoires*, Article 14 of the UN Torture Convention does not provide for mandatory universal tort jurisdiction.[102]

[94] *Al-Adsani* (App. No. 35763/97) ECHR 2001-XI, para. 37 *et seq.*

[95] See C. Tomuschat, 'The Duty to Prosecute International Crimes Committed by Individuals' in H. J. Cremer et al. (eds.), *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger* (Springer, Berlin 2002) 315, 327 *et seq.*

[96] See above n. 54.

[97] Schmalenbach (2006) 61 *Zeitschrift für öffentliches Recht* 397, 415–416. *Contra Ferrini* (2006) 128 ILR 658, para. 9; A. Orakhelashvili, 'State Immunity and International Public Order Revisited' (2007) 50 GYIL 327, 358–363; id. (2007) 18 EJIL 955, 968–971.

[98] T. Giegerich, 'Do Damages Claims Arising from *Jus Cogens* Violations Override State Immunity from the Jurisdiction of Foreign Courts?' in Tomuschat/Thouvenin (2006) 203, 235.

[99] See e.g., Art. 7(1) of the UN Torture Convention.

[100] Art. 1 of the UN Torture Convention.

[101] See above n. 27.

[102] *Jones* [2007] 1 AC 270, paras. 25 (per Lord Bingham), paras. 46, 56–57 (per Lord Hoffmann). See also *Bouzari* [2004] 243 OR (4th) 406, paras. 69–83. *Contra* Committee Against Torture,

Even if one were to assume that certain human rights treaties provided for the obligation to exercise universal civil or criminal jurisdiction such an obligation would not (necessarily) have *jus cogens* quality.[103] The conflict between the treaty norm demanding, and the immunity rule forbidding, the exercise of jurisdiction would therefore in principle have to be resolved in accordance with the established rules of international law for accommodating conflicting normative commands (*lex posterior derogat legi priori, lex specialis derogat legi generali,* etc.).[104]

4.2.2 The lack of hierarchical relationship between the rules

The *jus cogens* approach advocated by the dissenters in the *Al-Adsani* case presupposes that the immunity of states and their officials does not have the same intrinsic value for the international legal order as certain human rights. However, what Judges Higgins, Kooijmans, and Buergenthal in their separate opinion in the *Arrest Warrant case* state with regard to the immunities of high state officials applies *mutatis mutandis* to the general rules on state immunity:

> Immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system.[105]

The rules on the immunity of states and their officials hence have a 'constitutional' quality in the sense that they are considered indispensable for the proper functioning of the international legal order. Lightly sacrificing such a decisive pre-condition for the effectiveness of the network of international cooperation to allegedly superior values would attain merely a Pyrrhic victory for human rights.[106] Human rights violations, in particular, if they are committed on a large scale, cannot exclusively be remedied, let alone prevented, through judicial proceedings (be it at national or international level). Interstate cooperation through political and diplomatic dialogue plays an important role in the prevention, but also in the remedying of human rights violations (e.g. by means of a negotiated lump sum settlement). In this sense the conflict between state immunity and

CAT/C/CR/34/CAN; C.K. Hall, 'The Duty of States Parties to the Convention Against Torture to Provide Procedures Permitting Victims to Recover Reparations For Torture Committed Abroad' (2007) 18 EJIL 921.

[103] See *Jones* [2007] 1 AC 270, para. 45 (per Lord Hoffmann).

[104] See Conclusions of the Work of the Study Group on the Fragmentation of International Law—Difficulties Arising from the Diversification and Expansion of International Law, in: ILC, Report of the ILC on the Work of its 58th session, UN Doc. A/61/10 (2006), 407.

[105] *Arrest Warrant*, 2002 ICJ Reports 3, Separate opinion Higgins, Kooijmans, and Buergenthal, para. 75. See also International Court of Justice, *United States Diplomatic and Consular Staff in Tehran (Tehran Hostages Case) (United States v. Iran)*, Judgment of 24 May 1980, 1980 ICJ Reports 3, 43, with regard to diplomatic immunities: 'There is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout the history nations of all creeds and cultures have observed reciprocal obligations for that purpose.'

[106] *Al-Adsani* (App. No. 35763/97) ECHR 2001-XI, concurring opinion Pellonpää and Bratza.

human rights is really about finding the most effective *method* of human rights protection. This is indeed the most serious flaw of the *jus cogens* approach: it loses sight of the fact that we are not faced with a battle between human rights and immunity but that, in reality, human rights are on both sides of equation.

4.3 The intermediate approach

Having discarded both the traditional consent-based methodology and the self-proclaimed methodological avant-garde, which seeks reassurance in a static model of value hierarchies, the right way forward in adapting international law to the challenges of a 'humanized' international legal order must lie in an intermediate approach.

Such a balanced methodology was applied by Judges Higgins, Kooijmans, and Buergenthal in their separate opinion in the *Arrest Warrant* decision.[107] Their approach is based on the assumption that, in the conflict between immunity and human rights, none of the underlying principles or values deserves priority *per se*.[108] This contention is, on the one hand, directed against the traditional approach, which assumes that immunity is the rule and that the interest of avoiding impunity and providing redress to victims of serious human rights violations are an exception to that rule requiring a high threshold of proven state practice. That this assumption is not unassailable becomes evident if one does not view the immunity of states and state officials as a 'special regime' but rather in the wider context of the entire international legal system: immunity then suddenly becomes an exception to the rule of jurisdiction.[109] On the other hand, Higgins, Kooijmans, and Buergenthal also reject the humanitarian 'logic of values' which indiscriminately sacrifices the traditional immunities of states and their officials on the altar of *jus cogens*:

> [I]mmunities serve... purposes which have their own intrinsic value... International law seeks the accommodation of this value with the fight against impunity, and not the triumph of one norm over the other.[110]

This insight does not, however, mean that judges and other decision-makers in a 'humanized' international legal order should have an unfettered mandate to balance competing values of the international community without paying regard to the traditional sources of law.[111] In this sense Lord Hoffman's observation in the *Jones* case is certainly true that in applying international law, national and international judges must be less 'activist' than when adjudicating domestic law:

> As Professor Dworkin demonstrated in *Law's Empire*... the ordering of competing principles according to the importance of the values which they embody is a basic technique

[107] *Arrest Warrant*, 2002 ICJ Reports 3, separate opinion Higgins *et al.*, paras. 70–85.

[108] Ibid., para. 79. [109] Ibid., para. 71. [110] Ibid., para. 79.

[111] See also *Armed Activities on the Territory of the Congo*, 2006 ICJ Reports 1, Separate opinion of Judge ad hoc Dugard, para. 12.

of adjudication. But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.[112]

Lord Hoffman's comment needs to be qualified, however, since he establishes an artificial wall of separation between 'values' and the 'common consent of nations'. Ronald Dworkin's observation that every legal system is made up of both rules and principles (or values) and that principles play a decisive role in the creation and identification of specific rules[113] also applies to the international legal order. Therefore, as long as rules and principles find a firm basis in the 'common consent of nations', they will both have to be applied by the judge in adjudicating questions of international law.[114] This is also the main contention of the proponents of the 'constitutionalization' of international law: According to the constitutional approach international law is considered to be based on a number of foundational principles or values 'accepted and recognized by the international community of States as a whole'[115] which (in a substantive sense) form the constitution of the international community.[116]

As Higgins, Kooijmans, and Buergenthal demonstrate in their separate opinion, the task of the judge in ascertaining the will of the sovereign states relates to both rules and principles (values). It is first and foremost the prerogative of the states to accommodate conflicting values by formulating specific rules in treaties or through their state practice. The judicial function of interpreting those rules and filling possible gaps requires, however, the identification of the basic value judgments or principles which underpin those rules.[117] In those areas in which the international community has not yet formulated rules specific enough to resolve value conflicts the role of accommodating these values is, so to speak, passed on to the judge. In the *Arrest Warrant* case such points of entry for a genuine judicial mandate to balance competing values was, for example, provided for by the lack of state practice with regard to the immunities of an incumbent foreign minister.[118] Higgins, Kooijmans, and Buergenthal argued that the functional test, which was employed by the Court majority to compensate for the lack of state practice, would have to take into account both the value of the proper functioning of international relations and the value of avoiding impunity.[119] Whereas they agreed with the majority that a foreign minister needs to enjoy absolute immunity on

[112] *Jones* [2007] 1 AC 270, para. 63 (per Lord Hoffmann).
[113] See R. Dworkin, *Taking Rights Seriously* (Duckworth, London 1977) 14–45, 46–86.
[114] See also *Armed Activities on the Territory of the Congo*, 2006 ICJ Reports 1, Separate opinion of Judge ad hoc Dugard, paras. 9–10.
[115] Art. 53 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.
[116] See Rensmann, *Wertordnung und Verfassung* (2007) 360–405.
[117] See *Armed Activities on the Territory of the Congo*, 2006 ICJ Reports 1, Separate opinion of Judge ad hoc Dugard, paras. 9–10, 12.
[118] See above n. 86.
[119] *Arrest Warrant*, 2002 ICJ Reports 3, Separate opinion of Judge Higgins *et al.*, para. 79.

official missions, they appeared to suggest that, in view of the important conflicting values at stake, such immunities could be restricted while undertaking private journeys during his term of office.[120] The decisive lever, however, in order to give effect to the human rights consideration of avoiding impunity, is the limitation of a foreign minister's immunities once he has left office. Higgins, Kooijmans, and Buergenthal adopted the view held by certain national courts[121] that the 'official functions' to which the immunities of former high state officials are restricted do not encompass the commission of crimes against humanity.[122] The indeterminate notion 'official' is hence filled with substantive content which takes account of the values of the international community.[123] This approach is in keeping with the increasing tendency in international law to define normative standards of legitimacy for the exercise of governmental power.[124]

5. Conclusion

It seems that only now, a decade after the seminal judgments of the House of Lords in the *Pinochet* case, we are beginning to fully understand the wisdom of the Law Lords' reasoning. In their wisdom the Law Lords were, however, assisted by the 'cunning of reason' which forced them to set aside and reconsider their first judgment in order to base *Pinochet*'s exemption from immunity on a far more narrowly tailored argument than the blanket immunity exception for serious human rights violations which they initially favoured.

In the case law that has sprung from the House of Lord's precedent, the initial misunderstanding that *Pinochet* marked the victory of human rights over traditional immunities is gradually giving way to a more sophisticated approach that attempts to balance, in each individual case, the need for stable inter-state relations on the one hand and the interest of fighting impunity and of providing redress for the victims of serious human rights violations on the other. This complex task of finding the right balance between these fundamental interests of the international community will also in future primarily lie with the judiciary, since it is not to be expected that recent initiatives to codify a 'human rights exception' in national statutes or international treaties[125] will be successful.

[120] Ibid., paras. 83–84.
[121] See e.g., Israel Supreme Court, *Eichmann* case, (1962) 36 ILR 312; *Pinochet No. 1* [1998] 3 WLR 1456 (per Lord Hutton and Lord Phillips); *Pinochet No. 3* [1999] 2 WLR 827 (per Lord Steyn and Lord Nicholls); Court of Appeal of Amsterdam, *Bouterse* case, (2001) 51 Nederlandse Jurisprudentie 302.
[122] *Arrest Warrant*, 2002 ICJ Reports 3, Separate opinion of Judge Higgins *et al.*, para. 85.
[123] For a similar approach see Van Alebeek, *The Immunities of States and Their Officials* (2008) 222–265.
[124] See e.g., G. Fox and B. Roth (eds.), *Democratic Governance and International Law* (Cambridge University Press, London 2000).
[125] See above notes 23, 25, 26.

In his separate opinion in the *Congo v. Rwanda* case, John Dugard pointed to the fact that judges are, however, ill-equipped for this task:

> In national law there is a wealth of literature on judicial lawmaking and the nature of the judicial process. International law, on the other hand, is characterised by a dearth of literature on this subject. . . . This explains why little attention has been paid to the place of *jus cogens* in the judicial process despite the pivotal role that it could---and should---play.[126]

In the intense judicial discourse in the aftermath of the House of Lords' *Pinochet* decision, the first contours of such a theory of judicial law-making in the age of *jus cogens* have emerged. *Pinochet*'s legacy for the next ten years should be to provide national and international judges with more solid methodological guideposts which will enable them, when applying general international law, to give due effect to international human rights law and its underlying values.

[126] *Armed Activities on the Territory of the Congo*, 2006 ICJ Reports 1, Separate opinion of Judge ad hoc Dugard, para. 9.

Annex 37

[French] Ministère public, submissions in *Bucheron* before Cour de cassation of 26 April 2002/25 June 2002

PARQUET
de la
COUR D'APPEL
de PARIS

RG APPEL N° 02/32457

OBSERVATIONS DU MINISTERE PUBLIC

Audience du 25 juin 2002
à 13 h 30
18ème chambre D

Affaire Monsieur Roland BUCHERON
c/
l'Etat allemand représenté par son excellence
M. l'Ambassadeur d'Allemagne

L'Etat Allemand
pris en la personne de son Chancelier

et
Le Ministère Public

Monsieur Roland BUCHERON a saisi le conseil de prud'hommes de Fontainebleau d'une action tendant à voir reconnaître l'existence d'un contrat de travail forcé au profit de l'Etat Allemand pendant les évènements de la guerre franco-allemande de 1935-1945 et a demandé l'allocation de sommes à titre de rappel de salaires et de dommages-intérêts.

Par lettres transmises au greffe du conseil les 2 octobre et 13 novembre 2001, l'Ambassade d'Allemagne en France a invoqué l'immunité s'attachant aux représentations diplomatiques et invoqué, au nom de la République Fédérale d'Allemagne, l'immunité de juridiction et d'exécution des Etats étrangers.

Le parquet du tribunal de grande instance de Fontainebleau, après avoir soulevé la question de la régularité de la convocation de l'Etat allemand, a invoqué des exceptions de procédure tenant tant à la compétence territoriale qu'à la compétence d'attribution du conseil de prud'hommes, relevé l'acquisition de la prescription quinquenale en ce qui concerne la demande de rappel de salaires, et de celle, trentenaire, concernant les demandes de dommages-intérêts, et enfin soulevé l'immunité de juridiction établie par la coutume internationale en faveur des Etats étrangers en ce qui concerne les actes établis au titre de leur activité de puissance publique ou dans l'intérêt de leur service public.

Par jugement réputé contradictoire en date du 5 février 2002, le conseil de prud'hommes a déclaré recevable la demande, a déclaré régulière la convocation de l'Etat allemand, a écarté les fins de non-recevoir et exceptions de procédures précitées et

.../...

a condamné l'Etat allemand à payer à M. BUCHERON diverses sommes à titre de rappel de salaires et de dommages-intérêts.

*
* *

Il est à cet égard souligné que la 18ème chambre C de la Cour de céans est saisie d'un litige identique, pour lequel le conseil de prud'hommes de Paris avait déclaré irrecevable, conformément aux réquisitions développées par le parquet, une demande similaire formée par d'autres déportés du travail. L'arrêt à intervenir est en délibéré au 6 juin 2002.

*
* *

A ce stade, sans méconnaître les aspects humains tout à fait particuliers de cette affaire, le parquet général, qui se détermine en fonction des principes de droit applicables, se doit, comme l'avait déjà fait le parquet en première instance, de souligner que l'action du demandeur est irrecevable à plusieurs titres.

*
* *

Le procureur de la République de Fontainebleau a, par démarche au greffe, régulièrement relevé appel dans les délais légaux du jugement précité.

Par lettre recommandée en date du 5 mars 2002 et reçue le 6 mars au greffe du conseil, l'Etat allemand a également régulièrement relevé appel de cette décision.

*
* *

Lesdits appels sont tous deux recevables, étant observé que si le ministère public était partie jointe devant le conseil de prud'hommes, en application de l'article 424 du nouveau Code de procédure civile, l'appel du parquet est recevable dès lors que l'ordre public est en cause. (Cass. civ. 1ère. 11 février 1986 - Gaz. Pal. 1986. Somm. 415 - Obs. Croz et Morel - cv. 2ème 14 déc. 1988 JCP 89, II, 21268 Obs Cadet - Cass. Com. 20 janvier. 1998 : Bull. Civ IV, n° 330. Il en est ainsi en l'espèce dès lors que le parquet intervient pour requérir le respect de l'ordre public international lié à la mise en oeuvre de l'immunité de juridiction des Etats étrangers.

*
* *

Au niveau de la saisine de la juridiction prud'homale, les actes de convocation adressée à l'Ambassade de la République Fédérale d'Allemagne à Paris ont été retournés par celle-ci qui, comme en première instance, a invoqué à ce titre ses privilèges et immunités en tant que mission diplomatique de même qu'en première instance, elle avait également invoqué le bénéfice de l'immunité de juridiction des Etats

étrangers. Elle ajoute que tout dossier individuel relatif au travail forcé doit être traité par l'organisation internationale pour la migration (OIM - programme allemand de dédommagement du travail forcé, 17 rue des Morillons - CP 71 - CH 1211 - GENEVE 19 SUISSE).

Cette position signifie que l'Allemagne n'entend pas renoncer à son immunité de juridiction, étant observé qu'une mission diplomatique n'a pas de personnalité juridique propre, celle-ci se confondant avec celle de l'Etat qu'elle représente dans le pays où est établi son siège.

La validité de la procédure -en amont même de sa recevabilité et de son bien fondé- suppose à ce stade que soit rapportée la preuve que la République Fédérale d'Allemagne en tant que telle a bien été destinataire d'une convocation établie selon les formes prescrites pour les notifications internationales.

Il est à relever à cet égard que, depuis le 31 mai 2001, sont entrées en vigueur de nouvelles règles impératives de signification et de notification ds actes judiciaires et extra-judiciaires en matière civile et commerciale, dans les Etats membres de l'Union Européenne. Celles-ci sont établies par le règlement n° 1348/2000 du 29 mai 2000 pris par le Conseil de l'Union (J.O.C.E. n° L 160, 30 juin 2000 p. 37 et suivantes) qui suppriment notamment ce qu'il était convenu d'appeler le "*parquet diplomatique*".

Il apparaît ressortir des pièces de la procédure qu'une convocation à destination internationale a été établie par le greffe de la Cour à l'intention de " l'Etat allemand pris en la personne de son chancelier". Cependant, en l'état des pièces du dossier, rien n'établit par contre que son destinataire ait reçu cette notification.

M. BUCHERON a par ailleurs cité directement devant la Cour l'Etat allemand et son Ambassade en France, actes d'assignation dont il conviendra d'apprécier la validité au regard des principes sus-rappelés.

*
* *

A supposer même que l'Etat allemand ait été valablement mis en cause au plan procédural, l'action du demandeur serait de toute manière irrecevable au regard des principes gouvernant l'immunité de juridiction et d'exécution des Etats étrangers.

En application de cette règle, un Etat est soustrait, s'agissant de ses actes de puissance publique, aux juridictions d'un autre Etat.

Cette immunité s'analyse comme une fin de non-recevoir conduisant le cas échéant à l'irrecevabilité de la demande et peut être soulevée d'office par la juridiction ou par les parties, en tout état de la procédure .

A cet égard, il ressort, on l'a vu, des documents émanant de l'Ambassade de la République Fédérale d'Allemagne figurant à la procédure que le bénéfice de cette immunité est expressément invoqué.

Ainsi que l'avait déjà conclu le ministère public devant le conseil de prud'hommes, le parquet général près cette Cour considère que le bénéfice de l'immunité de juridiction est acquis à la République Fédérale d'Allemagne, compte tenu des principes régissant ladite immunité.

Ceux-ci sont les suivants :

Il n'existe pas à proprement parler de texte légal relatif à l'immunité de juridiction et d'exécution des Etats étrangers.

L'admission de ce principe a pour fondement la coutume internationale et est le fruit d'une construction jurisprudentielle ayant pour origine l'arrêt de la cour de cassation, "Gouvernement espagnol contre Lambès et Pujol" (D.P. 1849. I, 5).

Dans le domaine des textes internationaux, figure la Convention de Vienne du 18 avril 1961, mais elle concerne les immunités reconnues aux agents (personnes physiques) diplomatiques et consulaires.

Il convient d'y ajouter la Convention européenne du 16 mai 1972, expressément invoquée par l'Allemagne dans ses écritures, et qui a pour objet de définir et protéger les immunités des Etats étrangers. Cependant, cette convention ne saurait être appliquée par les juridictions françaises dans la mesure où la France ne l'a pas ratifiée.

En l'état du droit positif français, l'immunité de juridiction des Etats étrangers repose donc sur la seule coutume internationale avalisée par la jurisprudence.

Le moyen tiré de l'immunité de juridiction des Etats étrangers est d'ordre public et peut, et même doit, être relevé d'office par la juridiction saisie. Ce moyen se rattache en effet au pouvoir juridictionnel, dont est dépourvu une juridiction étatique vis-à-vis d'un Etat étranger pour les actes de puissance publique ou se rattachant à son service public.

Pour que l'immunité soit prise en considération, il faut que les actes censés être couverts par l'immunité soient des actes de puissance publique ou aient été accomplis dans l'intérêt du service public de l'Etat demandeur. (cf. Civ. 1er et 2 mai 1990 : RCDIP p. 141).

Il s'agit là de l'application du principe d'immunité restreinte progressivement adopté par les juridictions depuis la fin du XIXème siècle et qui s'impose aujourd'hui.

En d'autres termes, les actes de gestion privée accomplis par l'Etat étranger échappent au domaine d'application de l'immunité et les tribunaux français sont certainement aptes à les juger.

Ces actes de gestion privée concernent au premier chef les actes de commerce, mais également tous les autres actes juridiques ressortant essentiellement au droit civil, dans lesquels l'Etat étranger se comporte en quelque sorte comme un particulier pour la satisfaction de besoins privés sans lien avec l'activité publique d'une nation souveraine.

Dans le secteur du droit du travail, la jurisprudence dominante, après avoir été favorable à une interprétation extensive du principe d'immunité, a marqué depuis quelques années les signes d'un net retour à une conception stricte de l'immunité restreinte.

Ainsi ont été considérés comme des actes de gestion évinçant le principe d'immunité :

- l'emploi d'un adjoint au service de presse de l'ambassade d'Argentine. Son licenciement par l'Etat argentin constitue un acte de gestion dont la juridiction prud'homale peut connaître (Soc. 2 avril 1996. Alberto COCO).

La même solution a été donnée pour :

- le surveillant des locaux de l'ambassade du JAPON. (Cass. 1ère civile - 11 février 1997, Alphonse SAIGNIE).

- une infirmière secrétaire médicale de l'ambassade des USA (Soc. 10 novembre 1998. Sylvie BARRANDON).

Dans la présente espèce, la question qui est posée est de savoir si le fait pour l'Etat allemand d'arrêter et de déporter en Allemagne des travailleurs afin de les faire travailler pour le compte de la puissance occupante constitue ou non un acte de gestion.

Une analyse superficielle de leur situation peut laisser à penser qu'à l'instar des exemples qui viennent d'être étudiés, ils se sont trouvés dans une relation de travail de pur droit privé, l'Etat allemand se comportant en l'espèce comme un employeur ordinaire.

Un examen plus approfondi des données de fait permet d'analyser autrement la situation.

Il apparait en effet que les travailleurs concernés ont été soumis à un travail forcé dans le cadre de l'économie de guerre mise en place par la puissance publique occupante dans le but de servir ses desseins offensifs.

Par ailleurs, l'opération a été réalisée au moyen de procédés de puissance publique (arrestation et déportation par l'autorité militaire ou de police).

Il s'en déduit que tant par les moyens mis en oeuvre que par la finalité poursuivie, les opérations critiquées ont été entreprises par l'Etat allemand dans le cadre de ses prérogatives de puissance publique et dans l'intérêt de son service public (quel que puisse être par ailleurs le jugement à porter au plan moral sur la légitimité d'une telle action).

C'est donc à bon droit que l'immunité de juridiction et d'exécution a été invoquée.

Cette immunité a pour conséquence le défaut de pouvoir juridictionnel du juge pour statuer sur la demande dirigée contre l'Etat étranger et se traduit par l'irrecevabilité de la demande formulée à l'encontre de cet Etat.

*
* *

Ce n'est que pour faire reste de droit qu'il sera enfin observé que, à la supposer recevable (ce qui n'est pas le cas), l'action serait de toute façon portée devant une juridiction territorialement incompétente puisque elle ne satisfait à aucun des critères fixés par l'article R. 517-1 du Code du travail (à savoir le lieu de travail, l'engagement, le domicile de l'employeur et celui des demandeurs).

L'action engagée par les demandeurs n'entre pas non plus dans le champ de la compétence d'attribution dévolue à la juridiction prud'homale par l'article L. 511-1 du Code du travail.

La mise à la disposition -sous la contrainte- de personnes déportées dans des usines d'un Etat étranger pour y exécuter un travail forcé ne peut être générateur d'un contrat de travail qui suppose l'existence d'un échange de consentements.

L'action en rappel de salaires engagée par les demandeurs serait en outre atteinte par la prescription quinquenale, tandis que l'action indemnitaire se heurte à l'acquisition de la prescription trentenaire.

Faisant siennes pour le surplus l'ensemble des observations présentées par le ministère public en première instance, le Parquet Général invite donc la Cour à constater l'applicabilité en la cause de l'immunité de juridiction et d'exécution des Etats étrangers, fin de non-recevoir qui -tiré du défaut de pouvoir de juger de la juridiction saisie- est préalable à l'examen des autres exceptions et fin de non-recevoir, et à déclarer en conséquence irrecevable l'action du demandeur et, à titre infiniment subsidiaire, à déclarer la juridiction prud'homale incompétente pour connaître du litige.

AU PARQUET GENERAL,
A Paris, le 26 avril 2002

P/LE PROCUREUR GÉNÉRAL

Ph. BONNET
Substitut Général

Ph. Bonnet

Annex 38

Cour d'appel de Paris, judgment of 9 September 2002, *Bucheron*

COUR D'APPEL DE PARIS (10e CH., SECT. D)
9 SEPTEMBRE 2002
PRÉSIDENCE DE M. LINDEN

1) PRUD'HOMMES

Procédure – Conciliation – Préliminaire obligatoire – Convocation des parties – Régularité – Défendeur – République fédérale d'Allemagne – Notification à un État étranger – Signification des actes – Convention de La Haye du 15 novembre 1965 – Convocation n'ayant pas observé les dispositions de l'article 688 du nouveau Code de procédure civile – Nullité de la procédure

2) ÉTRANGERS

États étrangers – a) Incompétence des tribunaux français à l'égard des États et souverains étrangers – Immunités de juridiction – Action d'un déporté du travail contre l'État allemand – Action non recevable – b) Responsabilité de l'État allemand – Faculté pour la victime de saisir la juridiction compétente de cet État

1 – Aux termes de l'article L. 511-1, alinéa 1er du Code du travail, les conseils de prud'hommes, juridictions électives et paritaires, règlent par voie de conciliation les différends qui peuvent s'élever à l'occasion de tout contrat de travail soumis aux dispositions du présent Code entre les employeurs ou leurs représentants, et les salariés qu'ils emploient. Ils jugent les différends à l'égard desquels la conciliation n'a pas abouti ; aux termes de l'article R. 516-13, le bureau de conciliation entend les parties en leurs explications et s'efforce de les concilier.

La conciliation étant un préliminaire obligatoire de l'instance prud'homale, la République fédérale d'Allemagne devait être régulièrement appelée pour l'audience du bureau de conciliation du 12 décembre 2000.

En vertu de l'article 688 du nouveau Code de procédure civile, l'acte destiné à être notifié à un État étranger est notifié au parquet et transmis par l'intermédiaire du ministre de la Justice, à moins qu'en vertu d'un Traité la transmission puisse être faite par une autre voie.

La Convention de La Haye du 15 novembre 1965, relative à la signification et à la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile et commerciale à laquelle ont adhéré la France et l'Allemagne, alors applicable – le règlement n° 1348/2000 du conseil, relatif à la signification et à la notification dans les États membres, des actes judiciaires et extrajudiciaires en matière civile et commerciale, n'étant entré en vigueur que le 31 mai 2001 – ne comporte pas de dispositions particulières concernant la notification d'un acte à un État étranger ; en vertu de l'article 9 de cette convention, chaque État contractant a la faculté d'utiliser la voie consulaire pour transmettre des actes judiciaires aux autorités d'un autre État contractant que celui-ci a désignées ou, si des circonstances exceptionnelles l'exigent, la voie diplomatique.

Par suite, la convocation adressée par le greffe du Conseil de prud'hommes à l'ambassade d'Allemagne à Paris est irrégulière et donc dépourvue d'effet ; au surplus, il ne ressort pas des pièces de la procédure que la notification établie à l'intention de « l'État allemand pris en la personne de son chancelier » soit parvenue à son destinataire ; or, en vertu de l'article 14 du nouveau Code de procédure civile, nulle partie ne peut être jugée sans avoir été appelée ou entendue.

2 – Les États étrangers bénéficient de l'immunité de juridiction lorsque l'acte qui donne lieu au litige constitue un acte de puissance publique ou a été accompli dans l'intérêt d'un service public.

Le requérant, arrêté, incarcéré, puis déporté, a été astreint à un travail forcé dans le cadre de l'économie de guerre mise en place par la puissance publique occupante dans le but de servir ses desseins offensifs, un contrat général ayant été passé entre l'administration centrale S.S. et les firmes utilisatrices de main-d'œuvre détenue.

Ainsi, tant par les moyens mis en œuvre que par la finalité poursuivie, les faits dont le requérant a été la victime s'intègrent dans un ensemble d'opérations entreprises par l'État allemand dans le cadre de ses prérogatives de puissance publique.

En l'état du droit international, ces faits, quelle qu'en soit la gravité, ne sont pas, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, de nature à faire échec au principe de l'immunité de juridiction des États étrangers.

Il convient d'observer que la mise en œuvre du principe de l'immunité de juridiction des États étrangers n'a pas pour effet de créer un régime d'irresponsabilité de la puissance publique de l'État allemand, le requérant ayant toujours conservé la faculté de saisir la juridiction compétente de cet État ; celui-ci rappelle d'ailleurs qu'en tant que successeur juridique du « Troisième Reich », il ne conteste pas sa responsabilité au titre des actes illégitimes dont ont été victimes notamment les travailleurs forcés, un fonds d'indemnisation ayant été institué par une loi du 6 juillet 2000.

Les demandes du requérant seront en conséquence déclarées irrecevables.

République fédérale d'Allemagne c. R. B.

OBSERVATIONS DU MINISTÈRE PUBLIC
M. Philippe Bonnet

M. R. B. a saisi le Conseil de prud'hommes de Fontainebleau d'une action tendant à voir reconnaître l'existence d'un contrat de travail forcé au profit de l'État Allemand pendant les événements de la guerre franco-allemande de 1935-1945 et a demandé l'allocation de sommes à titre de rappel de salaires et de dommages-intérêts.

Par lettres transmises au greffe du conseil, les 2 octobre et 13 novembre 2001, l'ambassade d'Allemagne en France a invoqué l'immunité s'attachant aux représentations diplomatiques et invoqué, au nom de la république fédérale d'Allemagne, l'immunité de juridiction et d'exécution des États étrangers.

Le parquet du Tribunal de grande instance de Fontainebleau, après avoir soulevé la question de la régularité de la convocation de l'État allemand, a invoqué des exceptions de procédure tenant tant à la compétence territoriale qu'à la compétence d'attribution du Conseil de prud'hommes, relevé l'acquisition de la prescription quinquennale en ce qui concerne la demande de rappel de salaires, et de celle, trentenaire, concernant les demandes de dommages-intérêts, et enfin soulevé l'immunité de juridiction établie par la coutume internationale en faveur des États étrangers en ce qui concerne les actes établis au titre de leur activité de puissance publique ou dans l'intérêt de leur service public.

Par jugement réputé contradictoire en date du 5 février 2002, le Conseil de prud'hommes a déclaré recevable la demande, a déclaré régulière la convocation de l'État allemand, a écarté les fins de non-recevoir et exceptions de procédures précitées et a condamné l'État allemand à payer à M. B. diverses sommes à titre de rappel de salaires et de dommages-intérêts.

Il est à cet égard souligné que la 18e chambre C de la Cour de céans est saisie d'un litige identique, pour lequel le Conseil de prud'hommes de Paris avait déclaré irrecevable, conformément aux réquisitions développées par le parquet, une demande similaire formée par d'autres déportés du travail. L'arrêt à intervenir est en délibéré au 6 juin 2002.

À ce stade, sans méconnaître les aspects humains tout à fait particuliers de cette affaire, le parquet général, qui se détermine en fonction des principes de droit applicables, se doit, comme l'avait déjà fait le parquet en première instance, de souligner que l'action du demandeur est irrecevable à plusieurs titres.

Le procureur de la République de Fontainebleau a, par démarche au greffe, régulièrement relevé appel dans les délais légaux du jugement précité.

Par lettre recommandée en date du 5 mars 2002 et reçue le 6 mars au greffe du conseil, l'État allemand a également régulièrement relevé appel de cette décision.

Lesdits appels sont tous deux recevables, étant observé que si le ministère public était partie jointe devant le Conseil de prud'hommes, en application de l'article 424 du nouveau Code de procédure civile, l'appel du parquet est recevable dès lors que l'ordre public est en cause. (Cass. 1re civ., 11 février 1986, Gaz. Pal. 1986, somm. 415, obs. Croz et Morel ; Cass. 2e civ, 14 décembre 1988, J.C.P. 89., II. 21268, obs. Cadet ; Cass. com., 20 janvier 1988, Bull. civ. IV, n° 330). Il en est ainsi en l'espèce dès lors que le parquet intervient pour requérir le respect de l'ordre public international lié à la mise en œuvre de l'immunité de juridiction des États étrangers.

Au niveau de la saisine de la juridiction prud'homale, les actes de convocation adressés à l'Ambassade de la République Fédérale d'Allemagne à Paris ont été retournés par celle-ci qui, comme en première instance, a invoqué à ce titre ses privilèges et immunités en tant que mission diplomatique de même qu'en première instance, elle avait également invoqué le bénéfice de l'immunité de juridiction des États étrangers. Elle ajoute que tout dossier individuel relatif au travail forcé doit être traité par l'organisation internationale pour la migration (O.I.M., programme allemand de dédommagement du travail forcé, 17 rue des Morillons, C.P. 71 – C.H. 1211, Genève 19 Suisse).

Cette position signifie que l'Allemagne n'entend pas renoncer à son immunité de juridiction, étant observé qu'une mission diplomatique n'a pas de personnalité juridique propre, celle-ci se confondant avec celle de l'État qu'elle représente dans le pays où est établi son siège.

La validité de la procédure – en amont même de sa recevabilité et de son bien fondé – suppose à ce stade que soit rapportée la preuve que la République fédérale d'Allemagne en tant que telle a bien été destinataire d'une convocation établie selon les formes prescrites pour les notifications internationales.

Il est à relever à cet égard que, depuis le 31 mai 2001, sont entrées en vigueur de nouvelles règles impératives de signification et de notification des actes judiciaires et extra-judiciaires en matière civile et commerciale, dans les États membres de l'Union européenne. Celles-ci sont établies par le règlement n° 1348/2000 du 29 mai 2000 pris par le Conseil de l'Union (J.O.C.E. n° L. 160, 30 juin 2000, p. 37 et s.) qui suppriment notamment ce qu'il était convenu d'appeler le « parquet diplomatique ».

Il apparaît ressortir des pièces de la procédure qu'une convocation à destination internationale a été établie par le greffe de la Cour à l'intention de « l'État allemand pris en la personne de son chancelier ». Cependant, en l'état des pièces du dossier, rien n'établit par contre que son destinataire ait reçu cette notification.

M. B. a par ailleurs cité directement devant la Cour l'État allemand et son Ambassade en France, actes d'assignation dont il conviendra d'apprécier la validité au regard des principes sus-rappelés.

À supposer même que l'État allemand ait été valablement mis en cause au plan procédural, l'action

du demandeur serait de toute manière irrecevable au regard des principes gouvernant l'immunité de juridiction et d'exécution des États étrangers.

En application de cette règle, un État est soustrait, s'agissant de ses actes de puissance publique, aux juridictions d'un autre État.

Cette immunité s'analyse comme une fin de non-recevoir conduisant le cas échéant à l'irrecevabilité de la demande et peut être soulevée d'office par la juridiction ou par les parties, en tout état de la procédure.

À cet égard, il ressort, on l'a vu, des documents émanant de l'Ambassade de la République Fédérale d'Allemagne figurant à la procédure que le bénéfice de cette immunité est expressément invoqué.

Ainsi que l'avait déjà conclu le ministère public devant le Conseil de prud'hommes, le parquet général près cette Cour considère que le bénéfice de l'immunité de juridiction est acquis à la République Fédérale d'Allemagne, compte tenu des principes régissant ladite immunité.

Ceux-ci sont les suivants :

Il n'existe pas à proprement parler de texte légal relatif à l'immunité de juridiction et d'exécution des États étrangers.

L'admission de ce principe a pour fondement la coutume internationale et est le fruit d'une construction jurisprudentielle ayant pour origine l'arrêt de la Cour de cassation (Gouvernement espagnol contre Lambès et Pujol, D.P. 1849, I, 5).

Dans le domaine des textes internationaux, figure la Convention de Vienne du 18 avril 1961, mais elle concerne les immunités reconnues aux agents (personnes physiques) diplomatiques et consulaires.

Il convient d'y ajouter la Convention européenne du 16 mai 1972, expressément invoquée par l'Allemagne dans ses écritures, et qui a pour objet de définir et protéger les immunités des États étrangers. Cependant, cette convention ne saurait être appliquée par les juridictions françaises dans la mesure où la France ne l'a pas ratifiée.

En l'état du droit positif français, l'immunité de juridiction des États étrangers repose donc sur la seule coutume internationale avalisée par la jurisprudence.

Le moyen tiré de l'immunité de juridiction des États étrangers est d'ordre public et peut, et même doit, être relevé d'office par la juridiction saisie. Ce moyen se rattache en effet au pouvoir juridictionnel, dont est dépourvu une juridiction étatique vis-à-vis d'un État étranger pour les actes de puissance publique ou se rattachant à son service public.

Pour que l'immunité soit prise en considération, il faut que les actes censés être couverts par l'immunité soient des actes de puissance publique ou aient été accomplis dans l'intérêt du service public de l'État demandeur. (cf. Cass. 1re civ. et 2 mai 1990, R.C.D.I.P., p. 141).

Il s'agit là de l'application du principe d'immunité restreinte progressivement adopté par les juridictions depuis la fin du XIXe siècle et qui s'impose aujourd'hui.

En d'autres termes, les actes de gestion privée accomplis par l'État étranger échappent au domaine d'application de l'immunité et les Tribunaux français sont certainement aptes à les juger.

Ces actes de gestion privée concernent au premier chef les actes de commerce, mais également tous les autres actes juridiques ressortant essentiellement au droit civil, dans lesquels l'État étranger se comporte en quelque sorte comme un particulier pour la satisfaction de besoins privés sans lien avec l'activité publique d'une nation souveraine.

Dans le secteur du droit du travail, la jurisprudence dominante, après avoir été favorable à une interprétation extensive du principe d'immunité, a marqué depuis quelques années les signes d'un net retour à une conception stricte de l'immunité restreinte.

Ainsi ont été considérés comme des actes de gestion évinçant le principe d'immunité :

- l'emploi d'un adjoint au service de presse de l'ambassade d'Argentine. Son licenciement par l'État argentin constitue un acte de gestion dont la juridiction prud'homale peut connaître (Cass. soc., 2 avril 1996, Alberto Coco).

La même solution a été donnée pour :

- le surveillant des locaux de l'ambassade du Japon. (Cass. 1re civ., 11 février 1997, Alphonse S.) ;

- une infirmière secrétaire médicale de l'ambassade des U.S.A. (Cass. soc., 10 novembre 1998, Sylvie B.).

Dans la présente espèce, la question qui est posée est de savoir si le fait pour l'État allemand d'arrêter et de déporter en Allemagne des travailleurs afin de les faire travailler pour le compte de la puissance occupante constitue ou non un acte de gestion.

Une analyse superficielle de leur situation peut laisser à penser qu'à l'instar des exemples qui viennent d'être étudiés, ils se sont trouvés dans une relation de travail de pur droit privé, l'État allemand se comportant en l'espèce comme un employeur ordinaire.

Un examen plus approfondi des données de fait permet d'analyser autrement la situation.

Il apparaît en effet que les travailleurs concernés ont été soumis à un travail forcé dans le cadre de l'économie de guerre mise en place par la puissance publique occupante dans le but de servir ses desseins offensifs.

Par ailleurs, l'opération a été réalisée au moyen de procédés de puissance publique (arrestation et déportation par l'autorité militaire ou de police).

Il s'en déduit que tant par les moyens mis en œuvre que par la finalité poursuivie, les opérations critiquées ont été entreprises par l'État allemand dans

le cadre de ses prérogatives de puissance publique et dans l'intérêt de son service public (quel que puisse être par ailleurs le jugement à porter au plan moral sur la légitimité d'une telle action).

C'est donc à bon droit que l'immunité de juridiction et d'exécution a été invoquée.

Cette immunité a pour conséquence le défaut de pouvoir juridictionnel du juge pour statuer sur la demande dirigée contre l'État étranger et se traduit par l'irrecevabilité de la demande formulée à l'encontre de cet État.

Ce n'est que pour faire reste de droit qu'il sera enfin observé que, à la supposer recevable (ce qui n'est pas le cas), l'action serait de toute façon portée devant une juridiction territorialement incompétente puisque elle ne satisfait à aucun des critères fixés par l'article R. 517-1 du Code du travail (à savoir le lieu de travail, l'engagement, le domicile de l'employeur et celui des demandeurs).

L'action engagée par les demandeurs n'entre pas non plus dans le champ de la compétence d'attribution dévolue à la juridiction prud'homale par l'article L. 511-1 du Code du travail.

La mise à la disposition – sous la contrainte – de personnes déportées dans des usines d'un État étranger pour y exécuter un travail forcé ne peut être générateur d'un contrat de travail qui suppose l'existence d'un échange de consentements.

L'action en rappel de salaires engagée par les demandeurs serait en outre atteinte par la prescription quinquenale, tandis que l'action indemnitaire se heurte à l'acquisition de la prescription trentenaire.

Faisant siennes pour le surplus l'ensemble des observations présentées par le ministère public en première instance, le parquet général invite donc la Cour à constater l'applicabilité en la cause de l'immunité de juridiction et d'exécution des États étrangers, fin de non-recevoir qui – tiré du défaut de pouvoir de juger de la juridiction saisie – est préalable à l'examen des autres exceptions et fin de non-recevoir, et à déclarer en conséquence irrecevable l'action du demandeur et, à titre infiniment subsidiaire, à déclarer la juridiction prud'homale incompétente pour connaître du litige.

C9465

La Cour,

Faits et procédure

M. B. a été arrêté le 8 juin 1944 à Egreville (77) par la gendarmerie, remis par la Gestapo au commissariat de police de Melun, puis incarcéré à Paris ; le 15 juin 1944, il a été embarqué de force, gare de l'Est, dans un train à destination de l'Allemagne, où l'administration allemande l'a affecté dans une usine, située à Stöken, dans laquelle il a travaillé en qualité de manutentionnaire jusqu'au 30 avril 1945, sans percevoir ni salaire, ni indemnité.

M. B. a saisi le 13 octobre 2000 le Conseil de prud'hommes de Fontainebleau en faisant délivrer, par lettre recommandée avec avis de réception, une citation à l'État allemand en la personne de son ambassadeur en France, devant le bureau de conciliation, pour l'audience du 12 décembre 2000, en vue d'obtenir la reconnaissance de l'existence d'un « contrat de travail forcé » au profit de l'État allemand du 15 juin 1944 au 30 avril 1945, à raison de 80 heures par semaine, et la condamnation de cet État au paiement de salaires et de dommages-intérêts.

La République fédérale d'Allemagne n'a pas comparu devant le bureau de conciliation.

M. B. a fait citer l'État allemand le 23 janvier 2001 par lettre recommandée avec avis de réception et par voie de signification à Parquet pour l'audience du bureau de jugement.

L'audience du bureau de jugement prévue pour le 20 mars 2001 ayant été annulée, l'affaire a été renvoyée au 24 avril 2001 ; à cette audience, la République fédérale d'Allemagne n'a pas comparu ; l'affaire a été mise en délibéré, puis a fait l'objet d'une réouverture des débats au 4 décembre 2001 ; convoquée à cette audience par lettre recommandée adressée par le greffe le 18 octobre 2001 à son ambassade à Paris, la République fédérale d'Allemagne n'a pas comparu.

Le ministère public est intervenu à l'instance devant la juridiction prud'homale en qualité de partie jointe.

Par jugement réputé contradictoire du 5 février 2002, le Conseil de prud'hommes a :

– déclaré recevable la demande de M. B. ;

– dit que la République fédérale d'Allemagne avait été régulièrement convoquée ;

– retenu sa compétence ;

– dit qu'il y avait eu contrat de travail sans paiement ;

– dit que la prescription ne pouvait s'appliquer en l'espèce ;

– dit que l'immunité n'était pas opérante dans ce cas ;

– condamné la République fédérale d'Allemagne à payer à M. B. :

• 15.244,90 € à titre de salaire ;

• 76.000 € à titre de dommages-intérêts pour le préjudice subi ;

• 3.000 € au titre de l'article 700 du nouveau Code de procédure civile.

La République fédérale d'Allemagne représentée par le ministère fédéral des affaires Étrangères, lui-même représenté par l'ambassadeur de la R.F.A. en France, a interjeté appel par la voie de son conseil.

Le ministère public a également interjeté appel.

La République fédérale d'Allemagne sollicite l'annulation du jugement déféré pour irrégularité de la citation devant la juridiction prud'homale ; elle invoque la fin de non-recevoir tirée de l'immunité de juridiction des États étrangers, subsidiairement, la prescription et l'incompétence tant matérielle que territoriale du Conseil de prud'hommes de Fontainebleau.

Le ministère public conclut à l'irrecevabilité des demandes sur le fondement de l'immunité de juridiction des États étrangers.

M. B. invoque l'irrecevabilité de l'appel du ministère public et la nullité de l'acte d'appel de la République fédérale d'Allemagne ; subsidiairement, il estime la citation délivrée à celle-ci régulière ; il sollicite la confirmation du jugement déféré et le paiement d'une indemnité de procédure.

La Cour se réfère aux conclusions des parties, visées par le greffier, du 25 juin 2002.

Motivation

Sur la validité de l'acte d'appel de la République fédérale d'Allemagne

M. B. fait valoir qu'aucune délégation ad hoc *n'est produite autorisant le « Ministre fédéral des Affaires extérieures » allemand à interjeter appel du jugement du Conseil de prud'hommes de Fontainebleau pour le compte du chancelier, qui représente selon lui l'État allemand, mais il résulte de la combinaison des articles R. 517-7, R. 517-9 du Code du travail et 931 du nouveau Code de procédure civile que l'acte d'appel peut être formé par tout mandataire, l'avocat n'étant pas tenu de justifier d'un pouvoir spécial.*

L'acte d'appel de la République fédérale d'Allemagne, formé par un avocat, est donc régulier.

Sur la régularité de la citation adressée à la République fédérale d'Allemagne

Aux termes de l'article L. 511-1, alinéa 1er, du Code du travail, les Conseils de prud'hommes, juridictions électives et paritaires, règlent par voie de conciliation les différends qui peuvent s'élever à l'occasion de tout contrat de travail soumis aux dispositions du présent Code entre les employeurs ou leurs représentants, et les salariés qu'ils emploient. Ils jugent les différends à l'égard desquels la conciliation n'a pas abouti ; aux termes de l'article R. 516-13, le bureau de conciliation entend les parties en leurs explications et s'efforce de les concilier.

La conciliation étant un préliminaire obligatoire de l'instance prud'homale, la République fédérale d'Allemagne devait être régulièrement appelée pour l'audience du bureau de conciliation du 12 décembre 2000.

En vertu de l'article 688 du nouveau Code de procédure civile, l'acte destiné à être notifié à un État étranger est notifié au parquet et transmis par l'intermédiaire du ministre de la Justice à moins qu'en vertu d'un traité la transmission puisse être faite par une autre voie.

La Convention de La Haye du 15 novembre 1965, relative à la signification et à la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile et commerciale, à laquelle ont adhéré la France et l'Allemagne, alors applicable – le règlement n° 1348/2000 du conseil, relatif à la signification et à la notification, dans les États membres, des actes judiciaires et extrajudiciaires en matière civile et commerciale, n'étant entré en vigueur que le 31 mai 2001 – ne comporte pas de dispositions particulières concernant la notification d'un acte à un État étranger ; en vertu de l'article 9 de cette convention, chaque État contractant a la faculté d'utiliser la voie consulaire pour transmettre des actes judiciaires aux autorités d'un autre État contractant que celui-ci a désignées ou, si des circonstances exceptionnelles l'exigent la voie diplomatique.

Par suite, la convocation adressée par le greffe du Conseil de prud'hommes à l'ambassade d'Allemagne à Paris est irrégulière et donc dépourvue d'effet ; au surplus, il ne ressort pas des pièces de la procédure que la notification établie à l'intention de « l'État allemand pris en la personne de son chancelier » soit parvenue à son destinataire ; or, en vertu de l'article 14 du nouveau Code de procédure civile, nulle partie ne peut être jugée sans avoir été appelée ou entendue.

Ces dispositions d'ordre public n'ayant pas été respectées par le Conseil de prud'hommes, le jugement déféré est nul.

La République fédérale d'Allemagne ayant conclu sur le fond, la Cour est saisie par l'effet dévolutif de l'appel.

Sur la fin de non-recevoir tirée de l'immunité de juridiction :

Les États étrangers bénéficient de l'immunité de juridiction lorsque l'acte qui donne lieu au litige constitue un acte de puissance publique ou a été accompli dans l'intérêt d'un service public.

M. B. fait valoir que l'usine dans laquelle il a travaillé n'était pas nationalisée, mais avait un statut d'entreprise libérale sans subordination étatique, que sa production, à savoir des batteries pour les automobiles et des piles, n'était pas destinée principalement à l'État allemand ; il en déduit que celui-ci s'est comporté comme un prestataire de service de placement de main-d'œuvre.

Mais M. B., arrêté incarcéré, puis déporté, a été astreint à un travail forcé dans le cadre de l'économie de guerre mise en place par la puissance publique occupante dans le but de servir ses desseins offensifs, un contrat général ayant été passé entre l'administration centrale S.S. et les firmes utilisatrices de main-d'œuvre détenue.

Ainsi, tant par les moyens mis en œuvre que par la finalité poursuivie, les faits dont M. B. a été la victime s'intègrent dans un ensemble d'opérations entreprises par l'État allemand dans le cadre de ses prérogatives de puissance publique.

En l'état du droit international, ces faits, quelle qu'en soit la gravité, ne sont pas, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, de nature à faire échec au principe de l'immunité de juridiction des États étrangers.

M. B. fait valoir que, par arrêt du 12 avril 2002, le Conseil d'État a retenu que les dispositions de l'article 3 de l'ordonnance du 9 août 1944 relative au rétablissement de la légalité républicaine sur le territoire continental ne sauraient avoir pour effet de créer un régime d'irresponsabilité de la puissance publique à raison des faits ou agissements commis par l'administration française entre le 16 juin 1940 et le rétablissement de la légalité républicaine sur le territoire continental, mais l'État français n'étant pas partie à l'instance, cette argumentation est dépourvue de portée sur le présent litige.

Il convient d'observer que la mise en œuvre du principe de l'immunité de juridiction des États étrangers n'a pas pour effet de créer un régime d'irresponsabilité de la puissance publique de l'État allemand, M. B. ayant toujours conservé la faculté de saisir la juridiction compétente de cet État ; celui-ci rappelle d'ailleurs qu'en tant que successeur juridique du « Troisième Reich », il ne conteste pas sa responsabilité au titre des actes illégitimes dont ont été victimes notamment les travailleurs forcés, un fonds d'indemnisation ayant été institué par une loi du 6 juillet 2000.

Les demandes de M. Bucheron seront en conséquence déclarées irrecevables.

Sur la recevabilité de l'appel du ministère public

En application de l'article 423 du nouveau Code de procédure civile, le ministère public est recevable à interjeter appel d'un jugement dont les dispositions portent atteinte à l'ordre public.

La solution du problème relatif à la recevabilité de l'appel du ministère public à l'encontre du jugement déféré dépend donc des questions concernant la régularité de la citation adressée à la République fédérale d'Allemagne et l'immunité de juridiction.

En condamnant un État étranger, non comparant, en violation des droits de la défense et du principe de l'immunité de juridiction des États étrangers, le Conseil de prud'hommes de Fontainebleau a porté atteinte à l'ordre public, de sorte que l'appel du ministère public est recevable.

Par ces motifs :

La Cour, statuant publiquement, par arrêt contradictoire ;

Déclare l'acte d'appel de la République fédérale d'Allemagne valide ;

Déclare l'appel du ministère public recevable ;

Déclare nul le jugement du Conseil de prud'hommes de Fontainebleau du 5 février 2002 ;

Déclare les demandes de M. B. irrecevables ;

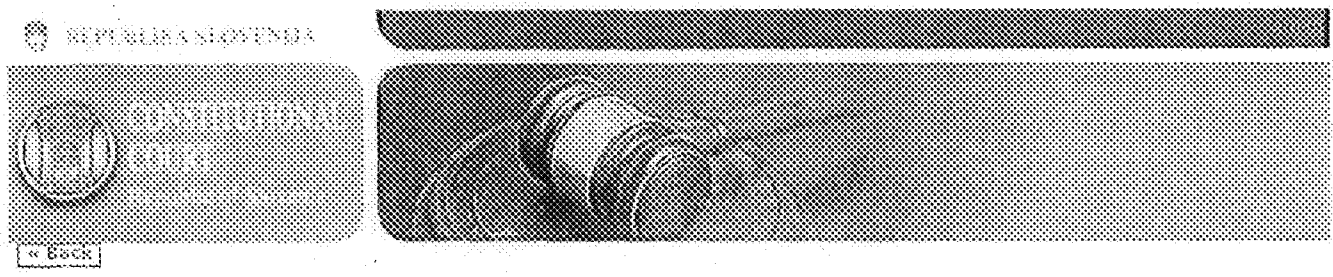
Dit que M. B. supportera les dépens.

M. Rosello, M^me^ Patte, cons. ; M. Daniel Ludet, av. gén. ; M^es^ Sterzing et Ludot du barreau de Reims, av.

NOTE V. les conclusions de M. l'avocat général Bonnet publiées ci-avant.

Annex 39

Constitutional Court of Slovenia, judgment of 8 March 2001, English translation



« Back

Case number:	**Up-13/99**
Challenged act:	Constitutional complaint of A. A. against Supreme Court ruling No. II Ips 55/98 dated 9 September 1998 in connection with High Court Celje ruling No. Cp 780/97 dated 1 October 1997 and District Court Celje ruling No. P 1209/95 dated 3 July 1997
Operative provisions:	The constitutional complaint of A. A. against Supreme Court ruling No. II Ips 55/98, dated 9 September 1998, in connection with High Court Celje ruling No. Cp 780/97, dated 1 October 1997, and District Court Celje ruling No. P 1209/95, dated 3 July 1997, is dismissed.
Abstract:	Since there is demonstrated a rational link between the complainant's case - the action for compensation for the damage caused during the Second World War (for the period of time spent in a concentration camp, for mental anguish due to the death of his parents and destroying happiness in his life and for the property destroyed by the occupier's authorities) - and the Republic of Slovenia, the exclusion of judicial protection before a Slovenian court would entail an interference with the right to judicial protection (Art. 23 of the Constitution). The rejection of the action against the Federal Republic of Germany due to the activities performed during the Second World War by its armed forces is an allowed interference with the right to judicial protection.
Thesaurus:	Constitutional complaint, limits of a review by the Constitutional Court. Principle of the conformity of legal acts. Right to judicial protection. Right to legal remedies. Court jurisdiction (judicial immunity of a foreign state). International law (judicial immunity of a foreign state). Equal protection of rights. General legal principles recognized by civilized nations. International customary law. Principle of proportionality. Exercise and limitation of rights. Fundamental values common to Europe (EKČP). War, victims of war violence.
Legal basis:	Constitution, Arts. 15, 22, 23, 25, 153 Civil Procedure Act (ZPP-77), Art. 26 European Convention on State Immunity (EKID), Art. 11 Constitutional Court Act (ZUstS), Arts. 50, 59.1
Notes:	FULL TEXT :

Up-13/99-24

8 March 2001

D E C I S I O N

At a session held on 8 March 2001 in proceedings to decide on the constitutional complaint of A. A. of Ž., represented by B. B., lawyer in Z., the Constitutional Court

d e c i d e d a s f o l l o w s:

The constitutional complaint of A. A. against Supreme Court ruling No. II Ips 55/98, dated 9 September 1998, in connection with High Court Celje ruling No. Cp 780/97, dated 1 October 1997, and District Court Celje ruling No. P 1209/95, dated 3 July 1997, is dismissed.

R e a s o n i n g

A.

1. The [district] court decided in its later challenged first- instance ruling that Slovenian courts had no jurisdiction to decide on the dispute and rejected the complainant's action. The appeal and the

review [by the Supreme Court] were dismissed. The complainant had filed the action against the Federal Republic of Germany, in which he claimed damages for the activities the defendant had allegedly performed during the Second World War.

During the Second World War he had allegedly been - together with many others - forcibly taken away from his parents and transported to Germany in order to be Germanized. He claimed damages for the period spent in the concentration camp, for mental anguish (due to the death of his parents and for destroying happiness in his life) and for the property destroyed by the occupier's authorities in 1942. The complainant challenged in his constitutional complaint the position taken in the challenged rulings according to which the defendant is granted immunity in proceedings before the courts of another state. The first instance court allegedly substantiated the judicial immunity of a foreign state by the rules of customary law without stating them. The second instance court allegedly substantiated its decision by the erroneous understanding of the principle par in parem non habet iurisdictionem, which has already been superseded long ago. The complainant asserted that judicial immunity is not an absolute right so a case in which iure imperii activities, which violate ius cogens, are concerned, should also be considered an exception. The complainant does not know a case in which judicial immunity was granted to a state which had acted contrary to the fundamental principles of civilized nations. In granting judicial immunity there is allegedly no difference between international and state courts. The N?rnberg International Court allegedly confirmed the position that in the case of a violation of the mandatory rules of international law a state cannot claim immunity. The position of the Supreme Court that international law principles have precedence over statutes was allegedly also disputed. In interpreting the European Convention on State Immunity (hereinafter EKID)1 the court allegedly did not answer the question of whether Convention provisions referred to iure imperii activities. The position that Convention provisions are not part of customary law was allegedly erroneous. The complainant also rejected the absolute applicability of the rule pacta tertiis nec nocent nec prosunt. The obligation of international law subjects to submit to the rules and general principles of international customary law did not allegedly depend only on their will but on the rules adopted by the international community. The complainant's right to judicial protection (Art. 23 of the Constitution and Art. 6, Para. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette RS, No. 33/94, IT, No. 7/94 - hereinafter EKČP) was allegedly violated due to the erroneous decision on the existence of procedural requirements for the consideration of the action.

The right to legal remedies (Art. 25 of the Constitution) was allegedly violated since not enough precise reasons were stated in the challenged rulings. Since although universal human values recognized by civilized nations are also a source of law, the courts did not give consideration to them in the framework of the review, the provision of Art. 153 of the Constitution was allegedly violated. The complainant suggested that the Constitutional Court annul ab initio the challenged rulings and decide that the courts of the Republic of Slovenia have jurisdiction to decide on his claim.

2. The panel of the Constitutional Court accepted the constitutional complaint for consideration by a ruling dated 30 May 2000.

3. The Supreme Court did not reply to the constitutional complaint.

4. The Federal Republic of Germany issued a declaration on the constitutional complaint. It claimed that state immunity is a recognized principle within international customary law. The principle allegedly derives from the principle of the sovereign equality of states in mutual relations. The principle allegedly contributes to the prevention of legal and political conflicts by means of the fact that disputes are not resolved in one state but at an international level. The principle of state immunity allegedly in particular applies to the acts of so-called authoritative activities. The activities of the occupier's forces or military units in connection with war events were allegedly - independent of the question whether they were legal or not - such authoritative state activities. Thus, they could not allegedly be the subject of an action filed before the courts of another state. The enforcement of individuals' claims for damages against a foreign state to compensate for their property and personal loss before a court of their own state would lead to unforeseeable consequences for international legal coexistence. The Federal Republic of Germany enclosed with the described position a reasoned document on state immunity which summarizes the rules of international public law.

5. The Ministry of Foreign Affairs also submitted within the proceedings information on state immunity.

B.

6. All the three courts grounded their decisions on Art. 26 of the Civil Procedure Act (Official Gazette SFRY, No. 4/77 and following - hereinafter ZPP77), pursuant to which the rules of international law apply to the trial of foreign states in the Republic of Slovenia.

The first instance court stated in the challenged ruling that a foreign state enjoys immunity as a sovereign state, but not also in cases in which it is a party as a holder of civil rights and obligations. Since the complainant's case concerned the first example, it rejected the action. The second instance court dismissed the appeal and added in the reasoning that foreign states always enjoy judicial immunity in accordance with the rules of international law formed on the basis of treaties, customs and judicial practice and in conformity with the principle par in parem non habert iurisdictionem, when the matter concerns activities performed in the framework of iure imperii. The Supreme Court confirmed the positions of the first instance and second instance courts and dismissed the arguments of the review. It stated that the principle par in parem non habet iurisdictionem has been to a great extent superseded, however not so far that a foreign state could not claim judicial immunity in cases in which it is sued for reason of activities performed in the framework of iure imperii. Judicial state immunity has developed on the basis of state practice to become international customary law.

Subsequent conventions have proceeded from that rule, and limited the extent of immunity by their provisions (e.g. EKID; the same also occurred in the case of the draft rules on the judicial immunity of states and their property prepared by the United Nations International Law Commission). Art. 11 of EKID, which determines among the exceptions from immunity certain damaging activities, is allegedly not part of domestic internal law nor part of international customary law, thus it is not important whether it also applies to activities performed in the framework of iure imperii. The Vienna Convention on Civil Liability for Nuclear Damage (Official Gazette SFRY, IT, No. 9/77), the Convention on International Liability for Damages Caused by Space Objects (Official Gazette SFRY, IT, No. 9/77) and the International Convention on Civil Liability for Damage Caused by Oil Pollution (Official Gazette SFRY, IT, No. 7/77), which in the complainant's opinion "exceed" the judicial immunity rule, regulate state activities performed in the framework of iure gestionis. The judgement of a Greek court, which the complainant enclosed with the review and which has not yet become final, also cannot be considered part of international customary law. Cases in which foreign states or individuals were tried before an international court are not equal to cases in which a foreign state is tried within proceedings before a court of another state. Furthermore, substantive provisions on liability for damages should not be mixed with the question of judicial immunity. Also, non-legal, ethical aspects of state activities do not influence the review of the existence of judicial immunity. Finally, plaintiffs are not deprived of judicial protection since they have the opportunity to claim damages before German courts.

7. Violations of [provisions on] human rights and fundamental freedoms can be asserted by constitutional complaints. Art. 153 of the Constitution, which determines the hierarchy of legal acts, does not contain such provisions. The reason by which the complainant substantiates the violation of Art. 153 of the Constitution will be considered in the framework of the review of the violation of the right to judicial protection.

8. Evidently the matter does not concern a violation of the right to legal remedies (Art. 25 of the Constitution). The basic legal reason for the rejections of the complainant's action is the same in all three challenged judgements. By replying, supported by arguments, to all the objections of the complainant the Supreme Court remedied the possible violation of the right to legal remedies at lower levels.

9. Regarding the right to judicial protection guaranteed in Art. 23 of the Constitution and Art. 6, Para. 1 of EKČP, the petitioner challenged the following: (1) the position of the courts that a foreign state in cases in which it is sued before a court of another state can, for reason of its activities performed within the framework of iure imperii, successfully claim judicial immunity, and (2) the finding of the courts that the described position is a rule of international law which was, pursuant to Art. 26 of ZPP77, applied in the case in which a foreign state was sued before a Slovenian court.

10. The Constitutional Court cannot within the framework of constitutional-complaint proceedings review the substantive-law correctness of the challenged decisions and the weighing of evidence by the courts. In conformity with Art. 50 of the Constitutional Court Act (Official Gazette RS, No. 15/94

- hereinafter ZUstS), while examining a constitutional complaint, it is limited to the review of whether the disputed decision is based on a certain legal position unacceptable from the view of the protection of human rights, or whether it is so erroneous and without sound legal reasoning that it can be considered arbitrary or self-willed (see, e.g., ruling No. Up-103/97 dated 26 February 1998 - DecCC VII, 118).

11. The petitioner asserted the incorrect application of the law by challenging the findings of the courts on what was the rule of substantive international law concerning court jurisdiction in cases in which a foreign state was sued before a Slovenian court. Such assertion could lead to the annulment of the challenged rulings only if it is demonstrated that the findings of the courts are not only erroneous but so evidently erroneous and without sound legal reasoning that they can be considered arbitrary or self-willed. As is substantiated in the continuation of this decision, the findings of the courts that a foreign state can successfully claim judicial immunity when it is sued before a court of another state for reason of activities performed in the framework of iure imperii are not such.

12. Pursuant to Art. 26 of ZPP77, which applied at the time of deciding on the complainant's case,2 international law rules applied to the trial of foreign states in the Republic of Slovenia. Treaties, international customary law (as an expression of general practice adopted as the law) and general legal principles recognized by civilized nations are sources of international law. Judicial decisions and the positions of distinguished international-law experts are considered auxiliary means for recognizing the law (Art. 38 of the Charter of the Hague International Tribunal).

13. There is no such treaty which would oblige the Republic of Slovenia in this case. Furthermore, there exists no general convention which would regulate the question of state immunity.

The practice of states is developing from omitting the rule of absolute immunity to accepting the rule of relative or limited immunity. Furthermore, the circle of cases in which a state is not granted any immunity is growing. Such development reflects changes concerning the function of a state: while it appeared in the nineteenth century predominantly as sovereign, in particular after the Second World War it began to participate in the economic field. Theory states that a majority of states have abandoned the rule of absolute immunity, however that in the framework of established state practice immunity still exists as a general rule. As regards exceptions there are (partial) differences between states and individual legal circles. The differentiation between state activities as a sovereign (acta iure imperii), for which immunity is granted, and activities of private-law or of a commercial character (acta iure gestionis), for which immunity is not granted, is widely accepted. Somewhere there are other criteria added to these with the intention to narrow the exceptions.3 The technique of determining a rule and especially stated exceptions are established in legal acts due to the difficulties in differentiating between both types of activities. EIKD, adopted in the framework of the Council of Europe, and the Draft Articles on Judicial Immunities of States and their Property, adopted by the United Nations International Law Commission at its forty-third session in 1991 (hereinafter Draft Articles), are such examples.4 Theory agrees that EKID defines the actually existing practice adopted unanimously in European states.5 Both EIKD and the Draft Articles also determine among exceptions from immunity the claiming of damages for reason of a physical injury or the death of a person or for reason of damage to personal movable property which was caused on the territory of the state where the person claims damages while the person who caused the damage was present on the territory of this state at the moment when the damage was caused (Art. 11 of EKID and Art. 12 of the Draft Articles). The exception reflects a widely accepted rule of general tort law, according to which the injured party may sue to recover damages not only before the court with jurisdiction on the basis of the place of the defendant's residence, but also in connection with the place of the damaging event. This was determined in the interest of the protection of an injured party. It is possible to conclude both from the explanation of Art. 11 of EKID and Art. 12 of the Draft Articles that the provision was in the first place intended to protect claims for damages from insured risks. However, the texts of the provisions do not support such a narrow interpretation. It is even explicitly stated in the commentary to Art. 12 of the Draft Articles that the provision does not differentiate between activities performed in the framework of iure gestionis on the one hand and iure imperii on the other hand.6 In any case, these two documents do not support the conclusion that this rule as an international customary law rule would be applicable in the complainant's case. EKID explicitly determines that exceptions from immunity determined by the Convention are not applied to the activities of the armed forces of a certain state on the territory of another state (Art. 31). The Draft Articles, which do not (yet) belong to the rules of international public law, are also not applied to proceedings commenced before their taking effect.

14. The presented theoretical positions from the field of international law, efforts to codify such and

adopted conventions substantiate the conclusion that the Supreme Court positions according to which states may claim immunity before the courts of another state for activities performed within the framework of iure imperii cannot be evaluated as arbitrary or self-willed. The complainant's statements cannot rebut this conclusion. An answer to the question whether EKID, in particular in Art. 11, refers to activities performed in the framework of ius imperii, is not important since the Convention also includes a specific provision on the exclusion of its application to military activities (Art. 31). Also, the argument on the incorrectness of the finding of the Supreme Court that EKID is not a document on the rules of international customary law is not relevant. It is not impossible to infer a different state of international customary law from the Greek court judgement, nor from the article in which the author strives to introduce the rule that violations of the compulsory norms of international law (ius cogens) represent exceptions from immunity.7 The UN International Law Commission, which has been studying the Draft Articles with the view to modernize them, points in the report from its fifty-first session8 to the latest trend of strengthening the position of not granting judicial immunity to foreign states in the case of death or personal damage due to violations of the cogent norms of international law on human rights, in particular the prohibition against torture. The mentioned civil disputes before domestic courts fall within this context. In connection with such, the report establishes that domestic courts were in certain cases inclined to the above- mentioned arguments, however in a majority of cases the objection of states requesting judicial immunity was nevertheless upheld.

The 1996 report mentioned an amended act adopted by the United States on judicial state immunity which additionally included among existing exceptions from immunity, monetary compensation for personal damage or death due to torture, out-of-court executions, plane hijackings or hostage situations. Thus, the Constitutional Court concludes that the mentioned cases show a trend in the future development of international law towards the limitation of judicial state immunity before foreign courts. In any case the above-mentioned cases cannot serve as a proof of general state practice recognized as a law and thus as the creation of a rule of international customary law, which would in the case of violations of the cogent norms of international law in the area of human rights protection as a consequence of state activities in the framework of iure imperii (concerning which also the forcible migration of children of a certain ethnic community during the war can be included) allow Slovenian courts to try foreign states in such cases.

15. Furthermore, the assertion that concerning the granting of immunity there is no difference between international and state courts is not substantiated. Judicial immunity is granted exactly for the reason that a state is not sued before another subject of international law equal to it. A state was not sued before the N?rnberg court for reason of the payment of war damages but so that the court could decide on the criminal responsibility of its representatives. The correctness of the position of the reviewing court that international law principles have precedence over statutes is not essential for the decision on the case. The courts applied the statutory provision which otherwise refers to international law rules, however it still remains a statutory norm. Also, the correctness of the position of the reviewing court that the activities defined in the Convention on International Liability for Damages Caused by Space Objects were performed in the framework of iure gestionis is also not essential for the decision on the case. The agreement contains the explicit provision that an action may be filed before a court of the liable state either by the injured state or by the injured natural person (Arts. X and XI).

16. Having found that the decision of the courts on what was the rule of international law concerning judicial immunity in cases in which a foreign state is sued before a Slovenian court was not arbitrary and thus not inconsistent with the guarantee of the equal protection of rights (Art. 22 of the Constitution), it is necessary to review the first complainant's objection summarized in Point 9 of the reasoning of this decision. The complainant asserted that the position of the courts according to which a foreign state may claim judicial immunity when it is sued before a court of another state due to the activities performed within the framework of iure imperii was contrary to the right to judicial protection ensured in Art. 23 of the Constitution and Art. 6, Para. 1 of EKČP.

17. Pursuant to Art. 23 of the Constitution, everyone has the right to have any decision regarding his rights, duties and any charges brought against him made without undue delay by an independent, impartial court constituted by law. From the view necessary for the considered case, the constitutional provision guarantees the right to a meritorious decision on an individual right.

18. The extent of the right to judicial protection ensured in Art. 6, Para. 1 of EKČP is similar. Also, the European Court of Human Rights (hereinafter ESČP) considers the right of access to courts a composite part of the right to judicial protection. The right is not absolute but the state in regulating

this right may determine limitations in conformity with the needs and abilities of groups and individuals. Limitations are admissible if they do not interfere with the essence of the right, if they pursue a legitimate goal and if there exists a rational relation between the applied means and the pursued goal.9 Thus, ESČP in the case of Waite and Kennedy v. Germany judged10 hat decisions of German courts by which actions against the European Space Agency (hereinafter ESA) were rejected for reason of judicial immunity interfered with the right of access to courts (Art. 6, Para. 1 of EKČP), however that such interferences were permissible. The courts applied in the challenged decisions a statutory provision similar to Art. 26 of ZPP77 and a provision of the Agreement on the Establishment of ESA, in which the judicial immunity of this international organization before a court of the state on the territory of which it operates is determined. ESČP adjudicated that (1) the challenged judgements were not arbitrary; (2) they pursued a legitimate goal (in accordance with the position of ESČP, the judicial immunity of international organizations is an essential means for ensuring the normal activities of such organization independent of unilateral interferences by individual states) and (3) the complainants had rational alternative means at their disposal for the effective protection of their Convention rights (the complainants could have appealed to the appellate body with ESA, which is independent from the Agency and competent to decide on disputes in connection with Agency decisions and deriving from the relation between it and employees. In addition, they allegedly had the opportunity to request reimbursement from the companies which had fired them.).

19. Pursuant to a general rule in damage suits, a court of the Republic of Slovenia is not competent only in cases in which the defendant permanently resides on the territory of the Republic of Slovenia but also when the damaging activity was performed on the territory of the Republic of Slovenia or a detrimental consequence occurred on the territory of the Republic of Slovenia (See Art. 55 of the Private International Law and Procedure Act, Official Gazette RS, No. 56/99 - ZMZPP). Such connection with the Republic of Slovenia is demonstrated in the complainant's case. Since a rational relation between the complainant's case and the Republic of Slovenia is demonstrated, the exclusion of judicial protection before Slovenian courts entails an interference with the right to judicial protection.

20. An interference with the right to judicial protection is allowed if it is in conformity with the principle of proportionality. This means that a limitation must be needed and necessary for reaching a pursued constitutionally legitimate goal and in proportion to the importance of this goal (Art. 15, Para. 3 of the Constitution). The considered interference is not impermissible for the reasons stated in the continuation of this decision.

21. Judicial immunity reflects the principle of the equality of states and thereby respect for the independence and integrity of another state. The rule par in parem non habet jurisdictionem, according to which legal entities with the same positions cannot leave a decision in a dispute to the court of one of them, derives from this principle.11 This goal is constitutionally legitimate and the exclusion of judicial protection is needed and necessary for achieving this goal. The goal can only be achieved by the exclusion of court jurisdiction in another state. The exclusion of judicial protection in the Republic of Slovenia is also proportionate to the importance of the pursued goal. Respect for the principle of sovereign equality is necessary for preserving international cooperation and cohesion between the states. On the other hand, the complainant is not deprived by the challenged rulings of all judicial protection, but only of such before domestic courts. According to general rules on jurisdiction (actor sequitur forum rei), the complainant may sue the Federal Republic of Germany before its courts, where an argument in favor of judicial state immunity has no value. The Constitutional Court also considered in reviewing proportionality in the narrow sense that the matter concerned the state in which general standards on human rights protection and the principles of a state governed by the rule of law have been adopted in the framework of the Council of Europe, and that the decisions of its courts are subject to review by institutions

which operate at the level of this international organization.

22. Accordingly, the argument on the violation of the right to judicial protection (Art. 23 of the Constitution and Art. 6, Para. 1 of EKČP) is not substantiated. Therefore, the Constitutional Court dismissed the constitutional complaint.

C.

23. The Constitutional Court reached this decision on the basis of Art. 59, Para. 1 of ZUstS, composed of: Franc Testen, President, and Judges: Dr. Janez Čebulj, Dr. Zvonko Fišer, Lojze Janko,

Milojka Modrijan, Dr. Ciril Ribičič, Dr. Lojze Ude and Dr. Dragica Wedam Lukić. The decision was reached unanimously.

Deputy President:

Dr. Lojze Ude

Notes:

1European Convention on State Immunity, signed in Basel on 16 May 1972.

2The new Civil Procedure Act (Official Gazette RS, No. 26/99 - ZPP) preserves practically the same provision (see Art. 28). 3Jennings, Watts, Oppenheim's International Law, Volume 1, Introduction and Part I, Longman, 1992, pp. 341-363; Verdross, Simma, Universelles V?lkerrecht, Duncker & Humblot, Berlin, 1984, pp. 761-774; Brownlie, Principles of Public International Law, Clarendon Press, Oxford, 1990, pp. 322-345; Shaw, International Law, Cambridge University Press, 1997, pp. 491-521; Combacau, Sur, Droit International Public, Montchrestien, Pariz, 1997, p. 241 and following.

4Draft Articles on Jurisdictional Immunities of States and their Property, Yearbook of the International Law Commission, 1991, Volume II, Part 2, pp. 13-62.

5See, e.g., Jennings, Watts, op. cit., p. 343; Sucharitkul, Immunities of Foreign States before National Authorities, RdC 1976/1; Dinh, Daillier, Pellet, Droit International Public, L. G. D. J, Paris, 1992, pp. 429-433.

6Draft Articles on Jurisdictional Immunities of States and their Property, op. cit., p. 45.

7The Greek court judgement which the complainant enclosed with the constitutional complaint refers to the article of Richman, Siderman de Blake v. Republic of Argentina: Can the FSIA grant immunity for violations of jus cogens norms?, Brook Journal of International Law, Vol. XIX, 1993, pp. 967-1008.

8International Law Commission, Report of the work of its fifty- first session (3 May - 23 July 1999), General Assembly, Official Records, Fifty-fourth session, Supplement No. 10 (A/54/10), UN, New York 1999, pp. 414-415.

9See Fayed v. the United Kingdom, judgement dated 21 September 1994, Publ. ECHR, Ser. A, Vol. 294-B, pp. 49-50, ž 65, and Waite and Kennedy v. Germany, judgement dated 18 February 1999, ž 59 available at the web site www.dhcour.coe.fr.

10The decision is cited in the previous footnote.

11Jennings, Watts, op. cit., pp. 341-342; Shaw, op. cit., pp. 491- 492, Verdross, Simma, op. cit., p. 763.

Full text:

Type of document:	constitutional complaint
Type of act:	individual act
Applicant:	
Date of application:	02/08/1999
Date of decision:	03/08/2001
Type of judgement:	decision
Type of resolution:	dismissal

Published: Official Gazette RS, No. 28/01

Document: AN02273

PDF format:

« Back

Annex 40

Rechtbank (Regional Court) of Gent (Belgium)

Judgment of 18 February 2000

12e Kamer F° 4
OPENBARE TERECHTZITTING VAN 18 FEBRUARI 2000.

Tab. nr: 2000/
2532

AR 97/3229/A - In de zaak van :

Jacques BOTELBERGHE (volgens besluiten Botelberge), gepensioneerde, thans wonende te 9050 Gent, Braemstraat nr. 129,

EISER, in persoon verschijnende en bijgestaan door de advocaten Mr Michael Verstraeten, met kantoor te 9000 Gent, Oude Houtlei nr. 2 en Mr Luc F.M. Boxstaele, met kantoor te 9000 Gent, Recollettenlei nr. 35,

TEGEN :

De DUITSE STAAT, (volgens besluiten De Bondsrepubliek Duitsland) vertegenwoordigd door het Ministerie van Buitenlandse Zaken, wiens burelen gevestigd zijn in Duitsland, te 53113 Bonn, Adenauerallee 99-103 (Bundesministerium von das Auswärtiges Ambt),

VERWEERSTER, vertegenwoordigd door advocaat Mr Eric J.H. Moons, Brand Whitlocklaan nr. 158 bus 6 te 1200 Brussel,

EN :

AR 99/3684/A - In de zaak van :

Jacques BOTELBERGE, gepensioneerde, wonende te 9050 Gent, Braemstraat nr. 129,

EISER, in persoon verschijnende en bijgestaan door de advocaten Mr Michael Verstraeten, met kantoor te 9000 Gent, Oude Houtlei nr. 2 en Mr Luc F.M. Boxstaele, met kantoor te 9000 Gent, Recollettenlei nr. 35,

12e Kamer F°5
OPENBARE TERECHTZITTING VAN 18 FEBRUARI 2000.

TEGEN :

DE DUITSE STAAT, vertegenwoordigd door de Minister van Buitelandse Zaken, met burelen te Duitsland, 53113 Bonn, Adenauerallee 99-103 (Bundesministerium von das Auswärtiges Ambt),

VERWEERSTER, vertegenwoordigd door advocaat Mr Eric J.H. Moons, Brand Whitlocklaan nr. 158 bus 6, te 1200 Brussel,

Vonnist de rechtbank als volgt:

De partijen werden gehoord in hun middelen en conclusies in openbare terechtzitting.

De processtukken en de overgelegde stavingsstukken werden ingezien.

1. De vordering in de zaak A.R. 97/3229/A werd ingeleid bij dagvaarding dd. 30.04.1997, deze in de zaak A.R. 99/3684/A bij dagvaarding dd. 23.12.1999.

   De vorderingen in beide zaken beogen identiek hetzelfde doel.

   Met name strekken zij ertoe de verweerder te doen veroordelen om aan de eiser schadevergoeding te betalen voor de letsels die hij heeft opgelopen en het leed dat hij heeft ondergaan ingevolge zijn gevangenneming en mishandelingen in België en Duitsland tijdens de tweede wereldoorlog.

   Ook de cijfermatige begroting van de schade is identiek.

   Met het oog op een goede rechtsbedeling komt het dan ook passend voor de zaken samen te voegen en door één en hetzelfde vonnis te beslechten.

2. De eiser begroot zijn schade als volgt:
   - Tijdelijke werkonbekwaamheid: 1.135.200,-F
   - Blijvende werkonbekwaamheid: 3.000.000,-F
   - Morele schade wegens onvruchtbaarheid: 1.000.000,-F
   - Esthetische schade: 80.000,-F

alle bedragen vermeerderd met de vergoedende intresten, zoals in de dagvaarding nader gespecificeerd, de gerechtelijke intresten en de kosten.

3. Ten aanzien van de dagvaarding dd. 30.04.1997 concludeert de verweerder:

- dat de rechtbank ratione materiae onbevoegd is om kennis te nemen van de vordering, gelet op de jurisdictionele immuniteit van de vreemde soevereine Staat, verbonden aan de "acta jure imperii";

- ondergeschikt, dat de dagvaarding niet langs diplomatieke weg werd betekend conform het vigerende ius gentium en dienvolgens nietig is;

- uiterst ondergeschikt dat de rechtbank territoriaal onbevoegd is om kennis te nemen van de vordering.

Hij behoudt zich het recht voor om, ingeval de door hem ingeroepen excepties ongegrond zouden worden bevonden, nader ten gronde te concluderen.

Betreffende de dagvaarding dd. 23.12.1999 concludeert hij tot de nietigheid daarvan:

- wegens het niet naleven van de termijnen voorgeschreven door art. 55 Ger.W.

- wegens miskenning van het principe "non bis in idem", nu de eiser middels een nieuwe dagvaarding dezelfde vordering stelt als deze die aanhangig is ingevolge de dagvaarding dd. 30.04.1997, zonder afstand te doen van de eerste dagvaarding.

- omdat zij een ongeoorloofd doel nastreeft, namelijk het omzeilen van de bepalingen van art. 747 §2 Ger.W., door na het verstrijken van de vastgestelde conclusietermijnen in de zaak A.R. 97/3229/A, alsnog nieuwe middelen aan te voeren of te antwoorden op de conclusie van de verweer-

4. De eiser houdt staande dat de dagvaarding van 30.04.1997 voldoet aan de wettelijke vormvereisten en conform de terzake geldende regels betreffende de betekening en de kennisgeving in het buitenland werd betekend.

Verder stelt hij dat de verweerder zich niet op zijn staatsimmuniteit kan beroepen nu de feiten waarop de vordering gesteund is geen "acta jure imperii" zijn, maar "acta jure gestionis".

Nu het terzake gaat om schadeverwekkende feiten of daden die zich hebben voorgedaan, minstens zijn begonnen op Belgisch grondgebied en meer bepaald te Gent, is hij van oordeel dat de rechtbank wel degelijk bevoegd is om kennis te nemen van de vordering.

Op de betwistingen door de verweerder aangevoerd met betrekking tot de dagvaarding van 23.12.1999 wordt door de eiser niet ingegaan.

5. Beoordeling:

5.1. Alvorens kan worden onderzocht of de rechtbank enige rechtsmacht of bevoegdheid heeft om kennis te nemen van de vordering dient te worden nagegaan of zij rechtsgeldig werd gevat.

5.2. De exceptie van nietigheid zoals door de verweerder opgeworpen ten aanzien van de dagvaarding van 30.04.1997, heeft enkel betrekking op de wijze van betekening.

De op straffe van nietigheid voorgeschreven vermeldingen of termijnen staan niet ter discussie.

De betwisting gaat alleen over de vraag of de betekening om rechtsgeldig te zijn, al dan niet langs diplomatieke weg diende te gebeuren.

De betekening en kennisgeving in het buitenland van gerechtelijke en buitengerechtelijke stukken in burgerlijke en handelszaken wordt geregeld door het verdrag van 's Gravenhage van 15.11.1965.

België en de Duitse Bondsrepubliek hebben dit verdrag bekrachtigd.

Artikel 1 van het verdrag bepaalt dat het van toepassing is op alle gevallen waarin in burgerlijke of in handelszaken een gerechtelijk of buitengerechtelijk stuk ter betekening of kennisgeving naar het buitenland moet worden gezonden.

Door geen enkele bepaling van het verdrag wordt de mogelijkheid uitgesloten om op de tussen de verdragsluitende Staten overeengekomen wijze betekeningen te doen aan buitenlandse publiekrechtelijke rechtspersonen of Staten zelf.

Door art. 13 van het verdrag wordt bepaald dat de aangezochte Staat de aanvraag om betekening kan weigeren indien hij oordeelt dat hierdoor een inbreuk zou worden gemaakt op zijn soevereiniteit of veiligheid.

Hieruit moet a contrario worden besloten dat de betekening van gerechtelijke stukken aan een door het verdrag verbonden Staat zelf, dient te gebeuren of minstens kan gebeuren volgens de door het verdrag bepaalde regels.

Ook de Nederlandse Hoge Raad besliste reeds dat, om de Verenigde Staten in Nederland te dagvaarden, uitvoering dient gegeven aan de bepalingen van het Verdrag van 's Gravenhage van 15.11.1965 (cfr. Hoge Raad Ned. 03.10.1997, NIPR 1998, 133).

Daarbij moet worden opgemerkt dat de Duitse Bondsrepubliek bij de neerlegging van haar bekrachtigingsoorkonde (27.06.1979) in overeenstemming met art. 21, tweede lid, littera a) van het verdrag, bezwaar heeft gemaakt tegen de wijze van toezending voorzien in o.m. art. 8, en gesteld

heeft dat voor haar de betekening of kennisgeving door de zorg van diplomatieke of consulaire ambtenaren slechts toelaatbaar is indien het voor betekening of kennisgeving toegezonden stuk bestemd is voor een onderdaan van de Staat van wie het stuk uitgaat.

Naar de bewoordingen van art. 24 van het verdrag worden de overeenkomsten die door de verdragsluitende Staten werden gesloten in aansluiting met het verdrag van 's Gravenhage van 01.03.1954 betreffende de burgerlijke rechtsvordering, geacht van toepassing te zijn op het verdrag, tenzij de betrokken staten anders zijn overeengekomen.

Terzake geldt de overeenkomst tussen België en de Duitse Bondsrepubliek van 25.04.1959.

In het onderhavig geval werd de betekening overeenkomstig de bepalingen van deze overeenkomst gedaan, meer bepaald door toezending van de stukken door de procureur des Konings aan de voorzitter van het Landgericht te Bonn.

Dienvolgens is de betekening gebeurd op het ogenblik dat de voorzitter van het Landgericht de stukken heeft ontvangen.

Dat de stukken via de ambassade van de Duitse Bondsrepubliek werden teruggestuurd kan geen afbreuk doen aan de rechtsgeldigheid van de akte die beantwoordt aan de wettelijke vormvoorschriften noch van de betekening ervan, die gedaan werd overeenkomstig het geldende verdragsrecht.

Ten overvloede dient daarbij te worden overwogen dat, voor zover er sprake zou kunnen zijn van enig verzuim of onregelmatigheid met betrekking tot de dagvaarding, uit de gedingstukken blijkt dat de akte het doel heeft bereikt dat de wet ermee beoogt, nu toch de verweerder is verschenen en het tegensprekelijk debat heeft aanvaard.

Gelet op het hogerstaande kan de opgeworpen exceptie van nietigheid niet worden aanvaard.

Nu de dagvaarding van 30.04.1997 rechtsgeldig wordt bevonden dient vastgesteld dat deze van 23.12.1999, die hetzelfde doel beoogt, zonder voorwerp is, zodat de excepties tegen deze akte opgeworpen niet verder dienen te worden onderzocht.

*
* *

5.3. De gelijkheid en soevereiniteit van de Staten en de daarop gebaseerde jurisdictionele immuniteit zijn fundamentele principes van het volkenrechtelijk gewoonterecht.

Dit houdt principieel in dat geen enkele Staat jurisdictionele bevoegdheid kan uitoefenen over een andere soevereine Staat (par in parem non habet jurisdictionem) en dat geen enkele Staat gezag kan uitoefenen over een andere, zonder wederzijdse toestemming.

De partijen twisten over de toepasselijkheid van de restricties die in de loop der jaren op dit principe werden aangebracht, zowel door internationale verdragen, door rechtsleer als door rechtspraak.

De eiser beroept zich op het onderscheid tussen wat genoemd wordt de "acta de jure imperii" en "acta de jure gestionis", de eerste zijnde daden die door de Staat gesteld worden in de uitoefening van zijn macht of gezag als soevereine Staat, waarvoor de immuniteit buiten elke betwisting staat, de tweede zijnde daden die door de Staat gesteld worden als "privaat persoon", voor welke daden geen immuniteit zou bestaan.

Hij houdt voor dat de feiten waarop zijn vordering gesteund is misdaden tegen de mensheid zijn, die onmogelijk als acta de jure imperii kunnen worden aanvaard.

De verweerder houdt voor dat, zelfs in dit geval enkel de eventuele immuniteit van de individuele dader, maar niet deze van de Staat zelf ter discussie kan staan.

Het theoretisch onderscheid tussen de "acta de jure imperii" en de "acta de jure gestionis" hoewel in bepaalde gevallen bruikbaar, heeft zijn eigen gebrekkigheid bewezen, niet alleen doordat het tot op heden afhankelijk blijft van de bereidheid van elke Staat afzonderlijk om het te erkennen, maar ook omdat er geen eensgezindheid bestaat omtrent de criteria voor de afbakening van de grenzen tussen beide.

Dit heeft tot gevolg dat in het internationaal verdragsrecht dit onderscheid niet als regel gehanteerd wordt, maar telkens concrete materies of duidelijk omschreven gevallen worden bepaald waarin de verdragsluitende Staten de afstand of beperking van hun immuniteit aanvaarden.

De beide partijen zoeken steun voor hun respectieve stelling in het verdrag van Bazel van 16.05.1972, inzake de immuniteit van Staten, hoewel zij erkennen dat dit verdrag niet van toepassing is op het huidige geschil.

Uitgaande van het hierboven aangehaalde fundamentele principe van de jurisdictionele immuniteit van de Staten, waarvan niet kan afgeweken worden tenzij met wederzijdse instemming, kunnen uit dit verdrag evenwel nuttige beoordelingscriteria voor het huidige geschil worden afgeleid.

De eiser verwijst naar art. 11 van dit verdrag dat bepaalt dat geen beroep kan worden gedaan op immuniteit van rechtsmacht indien het geding betrekking heeft op vergoeding voor lichamelijke letsels voortvloeiende uit een gebeurtenis die zich heeft voorgedaan op het grondgebied van de Staat van het forum, en indien de veroorzaker van dat letsel of de schade zich op dat grondgebied bevond op het tijdstip waarop die gebeurtenis zich heeft voorgedaan.

Art. 31 van dit verdrag bepaalt dat de bepalingen ervan onverlet laten "*de immuniteiten en voorrechten die een overeenkomstsluitende Staat geniet met betrekking tot elke handeling of nalatigheid begaan door of in verband met zijn strijdkrachten wanneer deze zich bevinden op het grondgebied van een andere overeenkomstsluitende staat*".

Art.35.3 bepaalt: "*Geen bepaling in deze overeenkomst is van toepassing op gedingen en vonnissen die handelingen, nalatigheden en feiten tot onderwerp hebben die zijn begaan of nagelaten vóór de datum van de openstelling voor ondertekening van deze overeenkomst*".

Uit de bewoordingen van de artikelen 31 en 35.3 blijkt dat de verdragsluitende Staten hun immuniteit voor de daden van hun strijdkrachten op het grondgebied van een andere verdragsluitende Staat niet alleen als een vaststaand gegeven beschouwen, maar deze ook niet wensen te onderwerpen aan de in het verdrag overeengekomen beperkingen, en dat zij evenmin afbreuk wensen te doen aan hun immuniteit voor handelingen, nalatigheden of feiten die werden begaan vóór de datum van openstelling voor ondertekening van dit verdrag.

Dit moet noodzakelijk tot het besluit leiden dat de beperking van de immuniteit enkel en alleen aanvaard wordt voor de gevallen die in dit verdrag uitdrukkelijk en concreet zijn vermeld.

Aldus kan zonder twijfel worden gesteld dat het principe van de jurisdictionele immuniteit van de vreemde Staat onverkort van toepassing blijft, behoudens in de gevallen waarin er door een verdrag of internationale overeenkomst met wederzijdse instemming van wordt afgeweken.

De eiser toont niet aan dat de verweerder door de toetreding tot enig verdrag afstand zou gedaan hebben van zijn jurisdictionele immuniteit voor de feiten waarop zijn vordering gesteund is.

12e Kamer F° 13

OPENBARE TERECHTZITTING VAN 18 FEBRUARI 2000.

OP DIE GRONDEN,
DE RECHTBANK, op tegenspraak,
Met inachtneming van de artikelen 2, 24, 30, 34, 37 en 41 van de wet van 15.06.1935,

Voegt de zaken A.R. 97/3229/A en 99/3684/A samen;

Zegt voor recht dat de dagvaarding dd. 30.04.1997 rechtsgeldig werd betekend;

Stelt vast dat de dagvaarding dd. 23.12.1999 en de erin gestelde vordering zonder voorwerp is;

Stelt vast dat zij geen rechtsmacht heeft om te oordelen over de vordering van de eiser.

Veroordeelt de eiser in de kosten van het geding en begroot deze als volgt:

- Aan de zijde van de eiser:
  - dagvaarding dd. 30.04.1997: 19.962,-F
  - dagvaarding dd.23.12.1999: 20.257,-F
  - rechtsplegingsvergoeding: 12.600,-F
- Aan de zijde van de verweerder:
  - rechtsplegingsvergoeding: 12.600,-F

Aldus gewezen en uitgesproken, in tegenwoordigheid van griffier Michel Verloove, op de openbare terechtzitting van 18 februari 2000 van de twaalfde kamer van de rechtbank van eerste aanleg te Gent, door Herman D'hoe, toegevoegd rechter, voorzitter van deze kamer, Bart Wylleman, rechter, en Alexander Forrier, rechter, bij bevelschrift dd. 18 februari 2000 van de heer voorzitter van deze rechtbank aangewezen om rechter Alexander Deene te vervangen, die wettig verhinderd is de uitspraak bij te wonen van dit vonnis waarover hij mede beraadslaagd heeft overeenkomstig artikel 778 Ger. Wb.

M. Verloove A. Forrier B. Wylleman H. D'hoe

Translation

12th Chamber
Public hearing of 18 February 2000

Role no. 2000/2532 AR 97/3229/A – In the case of

Jacques BOTELBERGHE (according to decisions: Botelberge), pensioner, currently resident in 9050 Ghent, Braemstraat 129,

PLAINTIFF, appeared in person and was represented by Mr Michael Verstraeten, office address 9000 Ghent, Oude Houtlei 2, and Mr Luc F.M. Boxstaele, office in 9000 Ghent, Recollettenlei 35, lawyers,

VERSUS:

THE GERMAN STATE (according to decisions: The Federal Republic of Germany), represented by the Federal Foreign Office in 53113 Bonn, Adenauerallee 99-103,

DEFENDANT, represented by Mr Eric J.H. Moons, Brand Whitlocklaan 158/6 in 1200 Brussels, lawyer,

AND:

AR 99/3684/A – in the case of:

Jacques BOTELBERGE, pensioner, resident in 9050 Ghent, Braemstraat 129,

PLAINTIFF, appeared in person and was represented by Mr Michael Verstraeten, office address 9000 Ghent, Oude Houtlei 2, and Mr Luc F.M. Boxstaele, office in 9000 Ghent, Recollettenlei 35, lawyers,

VERSUS:

THE GERMAN STATE, represented by the Federal Minister for Foreign Affairs, based in Germany, 53113 Bonn, Adenauerallee 99-103,

DEFENDANT, represented by Mr Eric J.H. Moons, Brand Whitlocklaan 158/6 in 1200 Brussels, lawyer,

the court finds as follows:

[...]

5.3 The equality and sovereignty of states, as well as the jurisdictional immunity based thereon, are fundamental principles of customary international law.

In principle, this means that no state may exercise jurisdiction over another sovereign state (par in parem non habet jurisdictionem) and no state may exercise authority over another without its consent.

The parties are in disagreement over the applicability of the limits placed on this principle in the course of the years by international treaties, legal theory and case law.

The plaintiff invokes the difference between what is known as "acta jure imperii" and "acta jure gestionis". The former refers to actions by a state in the exercise of its powers as a sovereign state, for which immunity is beyond doubt; the latter refers to actions in which the state is regarded as a private person for whose actions there would be no immunity.

The plaintiff argues that the actions on which his claim is based are crimes against humanity which cannot under any circumstances be accepted as "acta jure imperii".

The defendant points out that even in such a case only the possible immunity of the individual perpetrator and not that of the state could be called into doubt.

Although the theoretical difference between "acta jure imperii" and "acta jure gestionis" is useful in some cases, its inadequacy is demonstrated not only by the fact that to this very day it depends on the readiness of each individual state to recognize it but also by the fact that there is no consensus on the criteria for distinguishing between the two types of act.

Consequently, in international treaties this difference is not treated as the rule but, rather, concrete subjects or clearly defined cases are identified in which the Contracting States accept the renunciation or limitation of their immunity.

Both parties seek to support their arguments with the Basle Convention on State Immunity of 16 May 1972, although they recognize that this Convention does not apply to the present case.

Based on the principle of the jurisdictional immunity of states described above, which can only be deviated from by mutual consent, useful criteria for the present case can, however, be derived from this Convention.

The plaintiff refers to Article 11 of the Convention, which provides that a Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the state of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

Article 31 of the Convention stipulates that nothing in this Convention shall affect *"any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State"*.

Article 35 (3) states: *"Nothing in this Convention shall apply to proceedings arising out of, or judgements based on, acts, omissions or facts prior to the date on which the present Convention is opened for signature."*

It is clear from the wording of Articles 31 and 35 (3) that the Contracting States not only regard immunity for the actions of their armed forces on the territory of another Contracting State as an established fact but, what is more, that they are not prepared to accept the limitations on this immunity agreed upon in the Convention and that they are equally reluctant to see their immunity compromised for acts, omissions or facts occurring prior to the date on which the Convention was opened for signature.

This inevitably leads to the conclusion that the limitation of immunity is accepted only in the cases expressly referred to in this Convention in concrete terms.

It can therefore be assumed beyond any doubt that the principle of the jurisdictional immunity of the foreign state continues to apply without restriction except in cases where the parties deviate from this by mutual agreement on the basis of a bilateral or multilateral treaty.

The plaintiff has not presented any evidence that the defendant has waived its jurisdictional immunity for the facts on which the plaintiff's claim is based by acceding to any given treaty.

FOR THESE REASONS,
THE COURT, in this contentious case,
In accordance with Articles 2, 24, 30, 34, 37 and 41 of the Act of 15 June 1935,

Combining the cases A.R. 97/3229/A and 99/3684/A;

Finds that the summons of 30 April 1997 was served in conformity with the law;

Finds that the summons of 23 December 1999 and the claim it contains is without substance;

Declares it does not have the jurisdiction to rule on the plaintiff's claim.

Orders the plaintiff to bear the costs of the action and determines them as follows:

- On the part of the plaintiff:
  - summons of 30 April 1997 BEF 19,962
  - summons of 23 December 1999 BEF 20,257
  - litigation costs BEF 12,600

- On the part of the defendant:
  - litigation costs BEF 12,600

This judgement was passed and pronounced in the presence of the clerk of the court, Michel Verloove, in a public hearing on 18 February 2000 of the 12th Chamber of the Court of First Instance in Ghent by Herman D'hoe, associate judge, President of this Chamber; Bart Wylleman, judge, and Alexander Forrier, judge, charged on 18 February 2000 by the President of the Court with standing in for Judge Alexander Deene, who was excused pursuant to Article 778 of the Judicial Code from being present at the pronouncement of the judgement, in which he played a part in reaching.

(sgd) M. Verloove (sgd) A. Forrier (sgd) B. Wylleman (sgd) H. D'hoe

Annex 41

Tribunal of first instance Leskovac (Serbia)

Judgment of 1 November 2001

П. бр. 3468/01

ОПШТИНСКИ СУД У ЛЕСКОВЦУ, по судији Ранки Јакшић, као председнику већа, у правној ствари тужиоца Удружење ратова 2. Светског рата и потомака Јабланичког округа, кога заступају овлашћени правни заступник адв. Драган Новковић, из Новог Лазара, ул. Реве Крилатице бр. 53, и Младеновић Славица, из Брагујевца, ул. Цара Лазара бр. 3, против туженика САВЕЗНЕ РЕПУБЛИКЕ НЕМАЧКЕ са седиштем амбасаде у Београду, ул. Кнеза Михаила бр. 74-76, из Београда, ради утврђења и накнаде штете, вредност спора 100.000 динара, је у фази поступног испитивања тужбе, зан припремног рочишта и главне расправе, дана 1. 11. 01. године, донео следећу

Р Е Ш Е Њ Е

ОПШТИНСКИ СУД У ЛЕСКОВЦУ, ОГЛАШАВА СЕ апсолутно ненадлежним за поступање у овом спору па се тужба тужиоца ОДБАЦУЈЕ.

О б р а з л о ж е њ е

Тужилац је у тужби преко својих овлашћених заступника тражио да се према туженику Савезној Републици Немачкој, са седиштем амбасаде у Београду, ул. Кнеза Михаила бр. 74-76, утврди постојање односно непостојање неког права, и штета причињена од стране војске туженика у 2. Светском рату грађанима са територије Јабланичког округа и то према сваком страдалом грађанину, грађанину одведеном у заробљеништво за сваког војног заробљеника, дете или члана удружења које је због тога трпело или трпи материјалну штету, остало без издржавања, грађанина који је страдао од дејстава ратног или заостатка ратног материјала те туженика обавезе на име накнаде штете била у истакнутим појединачним износима у тужби односно у износу и висини који би био утврђен и прецизиран у току парнице са одговарајућом законском каматом од дана доношења судске одлуке па до исплате, као и обавезе на исплату свих трошкова поступка колико они буду износили а све у року од 15 дана по правноснажности пресуде до потпуног намирења а све са разлога и навода у тужиоца близе истакнутих у реферату поднете тужбе.

У фази предходног испитивања тужбе према одредби члана 26 Закона о парничном поступку предвиђено је у погледу надлежности Југословенских судова а за субјекте странцима који уживају имунитет у Савезној Републици Југославији, затим за субјекте страним државама и међународним организацијама да важе правила МЕЂУНАРОДНОГ ПРАВА. То значи да се на њих не може примењивати Закон о парничном поступку већ, како је наведено, само правила међународног права садржана у међународним уговорима и обичајима.

Пошто је суд, у смислу члана 10 ЗПП-а а у вези поменутог члана 26 истог Закона, у току свог целог поступка, по службеној дужности, да ли ревизија спора спада у судску надлежност и пошто је дакле утврдио да за решавање овог спора није надлежан Југословенски суд, се са ових разлога огласио ненадлежним за поступање по захтеву тужиоца у овој правној ствари а поднету тужбу тужиоца због тога, на основу наведених прописа, одбацио и одлучио као у изреци овог решења.

ОПШТИНСКИ СУД У ЛЕСКОВЦУ, дана 1. 11. 01. године.

ПОУКА: Рок за жалбу је 15 дана,
по пријему решења, преко овог
Суда за Окружни суд у Лесковцу.

ДОСТАВИТИ: Странкама и пуномоћницима тужиоца

С У Д И Ј А ,
Ранки Јакшић,с.р.

За тачност отправка,

Translation

Case no.3468/01

In the case brought by the plaintiff, the Association of World War II Victims and their Descendents in the District of Jablanicki Okrug, represented by the duly authorized attorneys Dragan Novovic of Novi Pazar, ul. Relje Krilatice 53, and Slavisa Mrdakovic of Kragujevac, ul. Cara Lazara 3,
against the defendant, the Federal Republic of Germany, based at its Embassy in Belgrade, Kneza Milosa 74-76, Belgrade,
for the determination of and payment of compensation for damage, value of dispute 100,000 dinar,
the Local Court of Leskovac, represented by Justice Zikica Nesic as Presiding Judge, has, upon examination of the application during the preliminary and main hearings, ruled on 1 November 2001 as follows:

THE LOCAL COURT IN LESKOVAC DECLARES THAT IT LACKS JURISDICTION TO HEAR THIS CASE AND HEREWITH DISMISSES THE CLAIM.

Reasons:

In the action entered by his duly authorized legal counsel, the plaintiff applies for – vis-à-vis the defendant, the Federal Republic of Germany, based at its Embassy in Belgrade, Kneza Milosa 74-76, – the determination of the existence or non-existence of any rights and/or of any damage that was inflicted by the defendant's army in World War II upon the citizens of the district of Jablanicki okrug, namely every person shot dead, every citizen deported to a prisoner camp, every military internee, every child or member of the Association who suffered material damage or was deprived of maintenance because of these actions, every citizen who has suffered damage because of the consequence of war or abandoned war materiel,
and that the defendant be obliged, on the basis of the reasons and facts set out in more detail in the plaintiff's action, to pay, within 15 days of the judgement becoming final and until full payment of all outstanding sums, compensation to the amount set out in each instance in the action or determined or specified in the course of the proceedings, together with the applicable statutory interest from the date of the proclamation of the judgement until the date of payment, and to assume the full costs of the suit.

Whilst examining the action it emerged that, pursuant to Article 26 of the Code of Civil Procedure regarding the jurisdiction of the Yugoslav Courts over foreign citizens who enjoy immunity in the Federal Republic of Yugoslavia and over foreign states and international organizations, international law applies, i.e., the Code of Civil Procedure may not be applied to them, but rather, as just stated, the provisions of international law contained in international treaties and customs.

The Court has thus of its motion, in accordance with Articles 16 and 26 of the Code of Civil Procedure, in the course of the entire proceedings regarding the question of whether the case falls under its jurisdiction, come to the conclusion that the Yugoslav courts do not have jurisdiction to hear or adjudicate the case submitted by the plaintiff and has for this reason declared itself not competent on the basis of the aforementioned provisions to hear the case submitted by the plaintiff, has dismissed the action and decided as stated above.

The Local Court in Leskovac, on 1 November 2001

Presiding Judge
Zikica Nesic, signed in his own hand

Means of redress: An appeal against this decision may be lodged within 15 days of receipt thereof with the Local Court in Leskovac at that court.

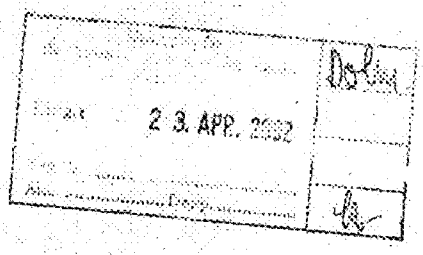
Served on the parties and the authorized representatives of the plaintiff.

Annex 42

Legal opinion of the Yugoslav Federal Ministry of Justice of 24 April 2002

Кр. 1617

САВЕЗНА РЕПУБЛИКА ЈУГОСЛАВИЈА
САВЕЗНО МИНИСТАРСТВО ПРАВДЕ
Број: 3-82/4-01-02
20. IV 2001 године
БЕОГРАД



ОПШТИНСКИ СУД У КРАГУЈЕВЦУ

К Р А Г У Ј Е В А Ц

В е з и: Ваш акт бр. Р-XVII-894/20001
од 13.06.2001. године

У вези са вашим актом под горњим бројем и датумом којим сте се поводом тужбе Удружења бивших ратних заробљеника, интернираца и депортираца из Крагујевца, против СР Немачке, а ради накнаде штете причињене у Другом светском рату, обратили Савезном министарству правде, указујемо на следеће:

Сагласно начелу независности судова у правном систему СРЈ, суд пред којим се води спор са међународним елементом самостално примењујући и тумачећи прописе одлучује о заснивању своје надлежности за вођење поступка, о праву које као меродавно треба применити, као и о другим питањима која се током поступка појаве. Савезно министарство правде, као савезни орган управе није овлашћено да судовима даје мишљења и објашњења о наведеним и другим питањима, осим у случајевима изричито предвиђеним законом.

Што се тиче питања имунитета странедржаве, у конкретном случају дужено СР Немачке сагласно ставу 2. члана 26. Закона о парничном поступку ("Службени лист СФРЈ", бр. 4/77 и др.) ово савезно министарство на захтев суда даје објашњење о постојању и обиму тог имунитета.

Питање имунитета стране државе у правном систему СР Југославије није ближе уређено ни међународним конвенцијама ни домаћим прописима. Стога код утврђивања имунитета стране државе треба поћи од постојећих правила међународног права која преовлађују у савременој правној теорији и међународној пракси, према којима за акта која је страна држава, као у конкретном случају СР Немачка, предузела као носилац суверенитета и јавне власти, има претпостављени имунитет.

Међутим, према нашим неформалним сазнањима немачке власти су водиле наменска средства за обештећење живих логораша, терпираца и других оштећених, а немачки судови према најновијим одлукама дозвољавају подношење тужби појединаца против државе Немачке за учињену штету у Другом светском рату.

С обзиром на то, било би упутно да уколико суд у конкретном случају применом релевантних законских одредби а посебно чл. 27. и 52. ЗПП и члана 54. Закона о сукобу закона са прописима других земаља ("Службени лист СФРЈ", бр. 43/82 и 72/82 и "Службени лист СРЈ", бр. 46/96), утврди своју надлежност, достави туженој СР Немачкој тужбу на одговор. Уколико би се СР Немачка изричито одрекла имунитета суд би могао наставити поступак, а уколико се пак не би изјаснила, или би се позвала на имунитет морао би сагласно правилима о претпостављеном имунитету поступак обуставити.

ПОМОЋНИК
САВЕЗНОГ МИНИСТРА

др Небојша Шаркић

...ПИНСКИ СУД У КРАГУЈЕВЦУ
Примљено непосредно
23. 08. 2001
рубрика
Р. 6799

Translation

[Opinion of the Yugoslav Federal Justice Ministry
of 20 August 2001]

[.....]

[from paragraph 3 onward:]
As regards the question of state immunity, in the concrete case [of] the defendant the Federal Republic of Germany, this Federal Ministry hereby provides upon request, in accordance with Article 26 paragraph 2 of the Code of Civil Procedure ("Službeni list SFRJ" No. 4/77 etc.), its comments on the existence and scope of such immunity.

The question of state immunity is not incorporated in any detail into the legal system of the Federal Republic of Yugoslavia, neither through international conventions nor under national law. Therefore, a determination of state immunity must rely on the existing international legal norms as they prevail in modern legal theory and international practice, according to which the alleged immunity does exist for acts performed by a foreign state, in the present case the Federal Republic of Germany, in the exercise of its sovereign or public authority.

However, the German authorities have, according to our informal sources, made available allocations for the compensation of surviving camp inmates, internees and other injured persons. According to the most recent opinions, the German courts permit individuals to bring actions against the German state for damage arising in World War II.

With respect thereto, it would be appropriate and advantageous if the Court were to serve the statement of claim on and require a reply from the defendant, the Federal Republic of Germany, should the Court determine that it has jurisdiction in the present case in accordance with the relevant statutory provisions and in particular Articles 27 and 52 of the Code of Civil Procedure and Article 54 of the Law on Collision of Norms with the Legislation of other Countries ("Službeni list SFRJ" No. 43/82 and 72/82 and Službeni list SRJ No. 46/96). If the Federal Republic of Germany explicitly waives its immunity, the court may continue the proceedings. If, however, Germany does not respond or invokes its immunity, the court must discontinue the proceedings in accordance with the rule on the state's alleged immunity.

Annex 43

Court of Appeal of Gdansk (Poland)

Judgement of 13 May 2008

Odpis postanowienia

Sygn. akt I ACz 595/08

P O S T A N O W I E N I E

Dnia 13 maja 2008 r.

Sąd Apelacyjny w Gdańsku Wydział I Cywilny w składzie następującym:

Przewodniczący: SSA Michał Kopeć (spr.)
Sędziowie: SA Monika Koba
SA Andrzej Lewandowski

po rozpoznaniu w dniu 13 maja 2008 r.
na posiedzeniu niejawnym
sprawy z powództwa Winicjusza Natoniewskiego
przeciwko Republice Federalnej Niemiec - Federalnemu Urzędowi Kanclerskiemu w Berlinie
o zapłatę
na skutek zażalenia powoda
od postanowienia Sądu Okręgowego w Gdańsku z dnia 08 listopada 2007 r., sygn. akt IC 1203/07

p o s t a n a w i a:

oddalić zażalenie.

Na oryginale właściwe podpisy

Sygn. akt I ACz 595/08

U Z A S A D N I E N I E

W dniu 29 października 2007 r. powód Winicjusz Natoniewski złożył pozew przeciwko Republice Federalnej Niemiec - Federalnemu Urzędowi Kanclerskiemu w Berlinie o zapłatę kwoty 1,000.000 zł, tytułem zadośćuczynienia za doznaną krzywdę. Podstawą żądania powoda był czyn niedozwolony popełniony przez siły zbrojne państwa pozwanego w trakcie pacyfikacji wsi Szczecyn w województwie lubelskim w dniu 2 lutego 1944r. Niemieckie siły zbrojne w czasie II wojny światowej dokonywały akcji wojskowych skierowanych na ludność cywilną. Przykładem takiej akcji była napaść jaka miała miejsce na wieś Szczecyn przez niemieckie siły zbrojne. Akcja ta była połączona z niszczeniem mienia i dobytku ludności cywilnej a także z podpalaniem domów mieszkańców wsi. Powód ukrył się przed tą akcją w dole kartoflanym wraz ze swoim dziadkiem Aleksandrem Rogala. Dół ten zajął się ogniem od palącego się domu mieszkalnego. W następstwie tego zdarzenia powód doznał szeregu rozległych poparzeń ciała. Mimo późniejszych zabiegów chirurgicznych na ciele powoda pozostały szpecące go blizny - szczególnie na twarzy. Na dłoniach pozostały zniekształcenia powodujące trwałe zmiany znacznie ograniczające funkcje obu kończyn. Powoduje to upośledzenie powoda ze względu na wielką wrażliwość skóry na kończynach górnych oraz skóry twarzy. Jest ona wrażliwa na promienie słoneczne oraz wiatr.

Według powoda pozwane państwo Republika Federalna Niemiec jako następca prawny państwa niemieckiego z

czasów II wojny światowej ponosi odpowiedzialność za sprzeczne z prawem działania swoich sił zbrojnych - przeprowadzanie pacyfikacji, które kierowane były przeciwko wyłącznie ludności cywilnej nieuzbrojonej i stanowiły jaskrawy przykład naruszenia zasad obowiązujących w trakcie prowadzenia wojny.

Zdaniem powoda pozwany jako państwo nie może powoływać się na przysługujący państwom immunitet jurysdykcyjny - wolność państwa od możliwości bycia pozywanym przed sąd innego państwa, gdyż rozwój prawa międzynarodowego szczególnie po II wojnie światowej spowodował ograniczenie immunitetu jurysdykcyjnego państw. Zdaniem powoda państwo nie może powoływać się na swój immunitet, jeżeli w sposób oczywisty łamie normy prawa międzynarodowego. Wówczas działań takich nie można traktować jako wykonywanie praw suwerennych państwa. Jako przykład podał art. 11 Europejskiej Konwencji o Immunitecie Państwa zgodnie z którą umawiające się państwo nie może powoływać się na immunitet od jurysdykcji sądu innego umawiającego się państwa w postępowaniu o zadośćuczynienie za uszkodzenie ciała lub naprawienie szkody wyrządzonej w mieniu materialnym, jeżeli fakty powodujące owo uszkodzenie lub szkodę miały miejsce na terytorium państwa sądu orzekającego oraz jeżeli sprawca uszkodzenia lub szkody był obecny na tym terytorium w czasie gdy fakty miały miejsce.

Powód wskazywał na art. 5 ust. 3 rozporządzenia rady (WE) 44/2001 z dnia 22 grudnia 2000 r. o jurysdykcji oraz uznawaniu i wykonywaniu orzeczeń w sprawach cywilnych i handlowych jako podstawę prawną decydującą o jurysdykcji sądu polskiego do rozpoznania niniejszej sprawy. Zdaniem powoda sprawa niniejsza

jest sprawą cywilną w rozumieniu art. 1 tego rozporządzenia, zaś zgodnie z cytowanym już art. 5 ust. 3 strony mające miejsce zamieszkania na terytorium państwa członkowskiego Wspólnot Europejskich mogą być pozywane przed sąd innego państwa wspólnot - przed sąd miejsca zdarzenia wywołującego szkodę w przypadku dochodzenia odszkodowania na podstawie deliktu cywilnego. Zdaniem powoda szkoda wyrządzona mu poprzez działanie niemieckich sił zbrojnych w dniu 2 lutego 1944 r. jest deliktem cywilnym w rozumieniu art. 415 kc jako działanie bezprawne państwa pozwanego. Sprawa posiada więc charakter sprawy cywilnej i tym samym podlega jurysdykcji krajowej sądu polskiego.

Zaskarżonym postanowieniem Sąd Okręgowy w Gdańsku odrzucił pozew. Podstawą rozstrzygnięcia były następujące rozważania:

Polski sąd krajowy posiada swoją jurysdykcję (zdolność do orzekania w sprawie) w przypadkach wskazanych w przepisach kodeksu postępowania cywilnego oraz w przypadkach wskazanych przez normy prawa międzynarodowego - gdy zezwalają na to konwencje, których Polska jest stroną. Rzeczypospolita Polska jako członek od 1 maja 2004 r. Wspólnot Europejskich podlega systemowi prawa wspólnotowego od tego czasu obowiązującego w Polsce obok krajowego systemu prawa. Przykładem takiego aktu prawa wspólnotowego obowiązującego na terenie Rzeczypospolitej Polskiej jest rozporządzenie Rady Unii Europejskiej (WE) nr 44/2001 r. z dnia 22 grudnia 2000 r. o jurysdykcji oraz uznawaniu i wykonywaniu orzeczeń w sprawach

cywilnych i handlowych. Zgodnie z art. 1 niniejszego rozporządzenia ma ono zastosowanie w sprawach cywilnych i handlowych niezależnie od rodzaju sądu. Zatem niniejsza sprawa może być rozpoznawana przez sąd polski w wypadku, gdy ma charakter sprawy cywilnej. W przeciwnym razie rozporządzenie to w ogóle nie znajduje zastosowania.

Wskazał Sąd, że kwestia podobna była przedmiotem rozpoznania Europejskiego Trybunału Sprawiedliwości w formie pytania prejudycjalnego postawionego w trybie art. 234 TWE czyli dokonania wiążącej wykładni aktów prawa wspólnotowego. Przyczyną rozpoznawania sprawy przez ETS w trybie pytania prejudycjalnego był pozew złożony pierwotnie przez obywateli greckich Irini Lekhoritou, V. Karkoulias, G, Pavlopulos, P. Bratsikas, D. Sotiropoulus, G, Dimopoulos przeciwko Republice Federalnej Niemiec o odszkodowanie przed sądem krajowym w Grecji. Sprawa dotyczyła odszkodowania za akcję niemieckich sił zbrojnych w dniu 13 grudnia 1943r., w której ofiarami było 676 cywilnych mieszkańców gminy Kolvan'ta w Grecji. Zatem stan faktyczny tej sprawy jest analogiczny do stanu faktycznego przedstawionego przez powoda Winicjusza Natoniewskiego. W sprawie greckiej w roku 1998 sąd krajowy (Polymeles Protodikeio Kalvariton) odrzucił pozew powołując się na istnienie immunitetu sądowego państwa, który uniemożliwia pozywanie państwa obcego przed sądem krajowym innego państwa. W styczniu 1999r. powodowie odwołali się od wyroku do instancji wyższej. W efekcie zostało postawione pytanie prawne dotyczące interpretacji art. 1 konwencji brukselskiej z dnia 27 listopada 1968r. dotyczącej jurysdykcji oraz

wykonywania orzeczeń w sprawach cywilnych i handlowych. Pytanie to dotyczy stosowania konwencji brukselskiej na tym samym polu, co obecnie istniejące rozporządzenie Rady (WE) nr 44/2001. Konwencja brukselska była bowiem aktem prawnym regulującym jurysdykcję sądów krajowych państw członków Unii Europejskiej przed wejściem w życie rozporządzenia Rady (WE) nr 44/2001, które zastąpiło stosowanie konwencji brukselskiej na polu jurysdykcji w sprawach cywilnych i handlowych. Poza tym postanowienia tej konwencji odnośnie zakresu jej zastosowania są identycznie sformułowane jak obecnie w postanowieniach rozporządzenia Rady nr 44/2001 r.

Zdaniem Sądu stanowisko Europejskiego Trybunału Sprawiedliwości w tym przedmiocie znajduje również zastosowanie w przedmiotowej sprawie. Dotyczy to zarówno podobieństwa stanu faktycznego jak i rodzaju problemu rozpoznawanego przez ETS. W wyroku z dnia 15 lutego 2007 r. Europejski Trybunał Sprawiedliwości orzekł na podstawie przedstawionego wyżej stanu faktycznego, że pozew osoby fizycznej złożony przed sądem krajowym jednego państwa przeciwko drugiemu państwu nie ma charakteru sprawy cywilnej w rozumieniu art. 1 konwencji z dnia 27 listopada 1968 w sprawie jurysdykcji oraz uznawania orzeczeń sądowych. Nie ma charakteru sprawy cywilnej w rozumieniu art. 1 tej konwencji zatem pozew dotyczący wynagrodzenia szkód doznanych przez ofiary działań sił zbrojnych podczas operacji wojennych na terytorium tego państwa. Europejski Trybunał Sprawiedliwości wskazał w szczególności w motywach swojego rozstrzygnięcia, że pojęcie sprawa cywilna jest pojęciem autonomicznym w

prawie wspólnotowym i nie można utożsamiać pojęcia sprawy cywilnej rozumianej według ustawodawstw wewnętrznych państw członkowskich z rozumieniem zaprezentowanym przez art. 1 konwencji. Trybunał wskazał również, że działalność sił zbrojnych jednego państwa w trakcie prowadzenia działań wojennych na terytorium drugiego państwa jest elementem wykonywania czynności iuri imperii związanej z działaniem państwa w sferze publicznoprawnej. Działania tego typu nie są działaniami w sferze prawa prywatnego lecz publicznego rodzące konsekwencje przewidziane w tym prawie. Tego typu działania nie stanowią przypadku popełnienia przez państwo deliktu cywilnego i nie może rodzić cywilnej odpowiedzialności odszkodowawczej wobec jednostki. W ocenie Sądu I instancji należy przyjąć, że skoro sprawy z powództwa osoby fizycznej przeciwko państwu z tytułu odszkodowania za szkody wywołane przez działania sił zbrojnych pozwanego państwa w sytuacji gdy szkodę tą poniosła ludność cywilna nie zaangażowana w działania wojenne, nie są sprawami cywilnymi w rozumieniu art. 1 konwencji brukselskiej z dnia 27 listopada 1968 r. to nie są też sprawami cywilnymi tego typu sprawy na podstawie art. 1 rozporządzenia Rady nr 44/2001. Rozporządzenie to bowiem powtórzyło dokładnie brzmienie postanowienia art. 1 konwencji brukselskiej zaś zostało ono wydane w celu ułatwienia dostępu do wymiaru sprawiedliwości obywatelom Unii Europejskiej. Nastąpił tutaj zabieg przeniesienia spraw z zakresu współpracy sądowej w sprawach cywilnych z dziedzin regulowanych dotychczas umowami międzynarodowymi do obszaru prawa wspólnotowego. Tak więc z powodzeniem wykładnię zastosowaną przez Europejski Trybunał Sprawiedliwości

odnośnie art. 1 konwencji brukselskiej można odnieść do art. 1 rozporządzenia Rady (WE) 44/2001 o jurysdykcji oraz uznawaniu i wykonywaniu orzeczeń w sprawach cywilnych i handlowych.

Reasumując wskazał Sąd Okręgowy, że podstawą stwierdzenia jurysdykcji krajowej sądu polskiego w przypadku, gdy jedna ze stron nie posiada miejsca zamieszkania lub siedziby na obszarze Rzeczypospolitej Polskiej może być konwencja międzynarodowa lub bezpośrednio obowiązująca norma prawa wspólnotowego, jeżeli sprawa dotyczy państw członków Unii Europejskiej, tymczasem w sprawie nie znajduje zastosowania ani konwencja brukselska ani rozporządzenie Rady nr 44/2001, wobec czego brak również podstaw do stwierdzenia właściwości miejscowej Sądu Okręgowego w Gdańsku.

Jako podstawę rozstrzygnięcia Sąd wskazał art. 1099 kpc.

Powyższe postanowienie zaskarżył w całości powód, zarzucając:

1) naruszenie przepisu prawa procesowego w postaci art. 1 w zw. z art. 5 ust. 3 rozporządzenia Rady Unii Europejskiej (WE) nr 44/2001 z dnia 22 grudnia 2000r. o jurysdykcji oraz uznawaniu i wykonywaniu orzeczeń w sprawach cywilnych i handlowych, które miały istotny wpływ na wynik sprawy - polegające na przyjęciu, iż sprawa z powództwa osoby fizycznej przeciwko państwu z tytułu zadośćuczynienia za krzywdę wywołaną bezprawnym działaniem państwa lub jego organu, nie ma charakteru cywilnego

2) naruszenie przepisów prawa procesowego w postaci art. 1099 kpc w zw. z art. 1103 pkt 3 kpc, które miało istotny wpływ na wynik sprawy, polegające na błędnym odrzuceniu pozwu z powodu braku jurysdykcji krajowej, podczas gdy roszczenie powoda wynika z czynu niedozwolonego, które zarówno powstało jak i ma być wykonane w Polsce, zaś na wypadek nieuwzględnienia powyższych zarzutów,

3) naruszenie przepisu prawa procesowego, które miało istotny wpływ na wynik sprawy w postaci art. 1096 kpc a contrario - poprzez pominięcie tego, iż przepisy kodeksu postępowania cywilnego nie mają zastosowania wyłącznie w sytuacji, gdy umowa międzynarodowa, której Polska jest stroną, stanowi inaczej, podczas gdy w przedmiotowej sprawie brak jest takiej umowy międzynarodowej.

Sąd Apelacyjny zważył, co następuje:

Zażalenie powoda nie zasługuje na uwzględnienie.

Ostatni łącznik wymieniony w art. 1103 pkt 3 kpc „zobowiązanie, które powstało albo ma być wykonane w Polsce" - na który powołuje się skarżący - istotnie odnosi się m.in. do takich sytuacji jak miejsce zawarcia umowy, miejsce wykonania zobowiązania oraz miejsce popełnienia czynu niedozwolonego.

Rzecz w tym, że art. 1103 pkt 3 kpc podaje łączniki nie związane z osobą pozwanego, ze sformułowania tego przepisu wynika, że poddanie jurysdykcji krajowej wymienionych w nim spraw nastąpiło wyłącznie na podstawie kryteriów przedmiotowych (cech zobowiązania).

Nie ma racji skarżący wskazując na brak umowy międzynarodowej wyłączającej zastosowanie w niniejszej sprawie przepisów kodeksu postępowania cywilnego. Z dniem 1 maja 2004r. tj. z chwilą formalnego przystąpienia Polski do Unii Europejskiej bezpośrednie zastosowanie mają przepisy rozporządzeń Rady Europejskiej zgodnie z regułą pierwszeństwa prawa wspólnotowego przed prawem krajowym. W zakresie objętym treścią art. 1096 kpc w stosunkach z państwami członkowskimi Unii Europejskiej (z wyjątkiem Danii) wyłączają one odpowiednio przepisy części III kpc - w szczególności wbrew wywodom skarżącego skutek taki wywiera rozporządzenie Rady (WE) nr 44/2001 z dnia 22 grudnia 2000r. o jurysdykcji oraz uznawaniu i wykonywaniu orzeczeń w sprawach cywilnych i handlowych. Utrwaloną już zasadą jest, że postanowienia umów międzynarodowych powinny być stosowne przez sądy zarówno wówczas, gdy normują kwestie nie uregulowane przepisami kodeksu postępowania cywilnego lub ustaw szczególnych jak i wtedy, gdy regulują daną materię w sposób odmienny niż czynią to przepisy kodeksu bądź ustaw szczególnych. W razie sprzeczności między przepisami ustawy a postanowieniami umowy międzynarodowej bezwzględne pierwszeństwa mają przepisy umowy - a w obecnej sytuacji przepisy prawa wspólnotowego.

Istota sporu o charakter niniejszej sprawy sprowadza się do oceny charakteru działania państwa, z którym powód wiąże żądanie zadośćuczynienia. Za autorami komentarza do części trzeciej kpc (T.Ereciński, J.Ciszewski wyd. prawnicze „Lexis Nexis" W-wa 2004 s. 118) wskazać należy, iż w prawie polskim brak jest normatywnego uregulowania problematyki

immunitetu jurysdykcyjnego państw obcych i ich organów w postępowaniu przed sądami polskimi (przepisy art. 1111-1116 kpc dotyczą nie państw obcych lecz wymienionych osób korzystających z immunitetu dyplomatycznego lub konsularnego). Według postanowienia Sądu Najwyższego z 11 stycznia 2000r. (I PKN 562/99 OSNAPiUS 2000r., nr 19, poz. 723) kodeks postępowania cywilnego (art. 1111 § 1 pkt 1) nie reguluje immunitetu jurysdykcyjnego państw obcych, według doktryny podstawy takiego immunitetu nie stanowi też art. 31 Konwencji Wiedeńskiej. W kwestii zakresu immunitetu jurysdykcyjnego Sąd Najwyższy ostatecznie uznał, że dotyczyć on może tylko działań państwa obcego w wykonaniu aktów władzy publicznej, określonych jako władcze.

Zdaniem A. Wyrozumskiej o objęciu immunitetem bądź o jego wyłączeniu decyduje istota aktu a nie jego motywy lub cel. W cytowanym pokrótce stanowisku Sąd Najwyższy immunitet jurysdykcyjny państwa obcego wywodził z zasady równości państw, nie wskazując wyraźnie, zarówno tej kwestii jak i w odniesieniu do zakresu immunitetu na to, że podstawą w tym zakresie jest międzynarodowe prawo zwyczajowe. Za autorami cyt. komentarza wskazać należy, że tylko to prawo zwyczajowe może być taką podstawą wobec uzasadnionego poglądu Sądu Najwyższego, że podstawą w tym zakresie nie jest kodeks postępowania cywilnego.

Immunitet państwa obcego wywodzony z zasady równości państw wyłączającej sprawowanie władzy nad innym państwem, jest zatem materią należącą do dziedziny prawa międzynarodowego publicznego. (W.Czapliński, A.Wyrozumska, Prawo międzynarodowe publiczne zagadnienia systemowe, W-wa 1999 s.196).

Sąd Apelacyjny mając powyższe zasady na uwadze w pełni podziela i przyjmuje za swoje stanowisko Sądu I instancji oparte na wiążącej wykładni prawa wspólnotowego dokonanej przez Europejski Trybunał Sprawiedliwości w wyroku z dnia 15 lutego 2007 r. w analogicznej sprawie z powództwa obywateli greckich Irini Lekhpritou, V.Karkoulias, G. Pavlopulos, D.Sotiropoulus i G.Dimopoulos przeciwko Republice Federalnej Niemiec o odszkodowanie.

Przedstawiana argumentacja ETS pozwala wbrew stanowisku skarżącego przyjąć, że sprawy z powództwa osoby fizycznej przeciwko państwu obcemu o odszkodowanie za szkody wywołane działaniem sił zbrojnych tego państwa także w sytuacji gdy szkody poniosła ludność cywilna nie zaangażowana w działania wojenne - nie są sprawami cywilnymi ani w rozumieniu art. 1 konwencji brukselskiej z dnia 27 listopada 1968 r., ani według art. 1 rozporządzenia Rady nr 44/2001.

W tym stanie rzeczy nie znajduje podstaw zarzut niewłaściwej wykładni i zastosowanie art. 1099 w zw. z art. 1103 pkt. 3 kpc.

Z tych przyczyn na mocy art. 385 w zw. z art. 397 § 2 kpc Sąd Apelacyjny oddalił zażalenie powoda jako niezasadne.

SĄD APELACYJNY W GDAŃSKU

Na oryginale właściwe podpisy
Za zgodność:
Kierownik Sekretariatu
Ewa Przybyła
Ewa Przybyła

Translation

COPY OF THE RULING

Case number: I ACz 595/08

RULING

13 May 2008

The First Civil Division of the Court of Appeal in Gdansk,
constituted as follows:

President:	Michał Kopeć, Judge at the Court of Appeal (Reporting Judge)
Judges:	Monika Koba, Judge at the Court of Appeal
	Andrzej Lewandowski, Judge at the Court of Appeal,

upon examination in camera on 13 May 2008 of the appeal lodged by the plaintiff Winicjusz Natoniewski against the ruling of the District Court in Gdansk of 8 November 2007, case number I C 1203/07,
in the matter of his action for damages against the Federal Republic of Germany – Federal Chancellery in Berlin,
hereby dismisses the plaintiff's appeal.

[Authentic signatures on the original]

Case number: I ACz 595/08

GROUNDS

On 29 October 2007, the plaintiff Winicjusz Natoniewski filed an action against the Federal Republic of Germany – Federal Chancellery in Berlin for damages for injury to the amount of 1,000,000 PLN. The plaintiff's claim was based on the tortious act committed by the armed forces of the defendant state during the "pacification" of the village Szczecyn in Lublin Voivodship on 2 February 1944. During the Second World War, German armed forces undertook military operations against the civilian population. One example of such an operation was the attack by German forces on Szczecyn. In the course of this operation the goods and chattels of the civilian population were destroyed and their houses set on fire. The plaintiff hid from this operation with his grandfather Aleksander Rogala in a potato pit.

The fire spread from his house to the potato pit. As a result of this, the plaintiff received a number of large burns. Despite subsequent operations, the plaintiff's body and in particular his face remains marked by disfiguring scars. His hands were deformed in such a way that permanent damage was caused, leading to a substantial impairment of the functionality of both arms. The plaintiff is thus handicapped by the extreme sensitivity of the skin on his arms and face, which reacts badly to the sun and wind.

In the plaintiff's opinion, the defendant state, the Federal Republic of Germany, bears responsibility as legal successor to the German state during the Second World War for the illegal acts committed by its armed forces – namely "pacification" actions conducted exclusively against an unarmed civilian population, a glaring example of a breach of the rules of war.

In the opinion of the plaintiff, the defendant state cannot invoke the immunity from jurisdiction enjoyed by states – pursuant to which one state is exempt from the jurisdiction of another – because developments in international law, especially since the Second World War, have imposed limits on states' immunity from jurisdiction. In the plaintiff's view, a state cannot invoke immunity if it has blatantly violated international law norms. In such instances, its acts are not to be treated as an exercise of the sovereign rights of a state. By way of example, he referred to Article 11 of the European Convention on State Immunity, which provides that a Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory

of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

. . .

The Court of Appeal rules as follows:
The plaintiff's appeal cannot be allowed.

. . .

The difference of opinion regarding the character of the present matter is at heart a dispute about the character attributed to the act of the state on which the plaintiff's claim for compensation is based. As stated by the authors of the commentary on the third part of the [Polish] Code of Civil Procedure (T. Erecinski, J. Ciszewski, publisher "Lexis Nexis", Warsaw, 2004, p. 118), it must be noted that Polish law contains no normative provisions on the immunity from jurisdiction of foreign states and their organs in cases before the Polish courts. (Articles 1111-1116 of the Code of Civil Procedure do not relate to foreign states but to the persons specified therein who enjoy diplomatic or consular immunity.) Pursuant to the Supreme Court decision of 11 January 2000 (1 PKN 562/99 OSNAPiUS 2000, No. 19, position 723), the Code of Civil Procedure (Art. 1111 (1), indent 1) does not govern the immunity from jurisdiction of foreign states, and legal theory stipulates that Article 31 of the Vienna Convention does not provide a basis for such immunity either. As regards the scope of immunity from jurisdiction, the Supreme Court ultimately held that it can only cover those acts of a foreign state undertaken in exercise of public authority that constitute sovereign acts.

According to A. Wyrozumska, it is the character of the act, not its motive or objective, that determines whether immunity applies or is to be excluded.

In the opinion cited above, the Supreme Court derived the immunity from jurisdiction of the foreign state from the principle of the equality of states, without clearly stating that, both with regard to this issue and with regard to the scope of such immunity, the proper basis is to be found in customary international law. As noted by the authors of the commentary, it must be said that only this customary law can be the basis of state immunity, especially since the Supreme Court is of the well-founded opinion that the Code of Civil Procedure does not provide any such basis.

The immunity of foreign states, which is derived from the principle of the equality of states that rules out the exercise of authority over another state, is thus a matter that falls under international public law (W. Czaplinski, A Wyrozumska, Prawo międzynarodowe publiczne zagadnienia systemowe, [Public international law, systemic issues] Warsaw, 1999, p. 196).