Compensation Claims for Human Rights Breaches Committed by German Armed Forces Abroad During the Second World War: Federal Court of Justice Hands Down Decision in the *Distomo* Case

By Sabine Pittrof[*]

A. Introduction

In recent times, an increased awareness in public international law of the significance of human rights has given rise to the idea of direct access to compensation claims by individuals in the case of severe human rights breaches.[1] This development has led to a number of actions for compensation in various jurisdictions.[2] The *Bundesgerichtshof* (BGH – Federal Court of Justice) recently joined the series of decisions from higher courts addressing compensation claims for human rights breaches, handing down its landmark decision on compensation claims by Greek citizens whose parents were killed in a massacre in Distomo during the Second World War.[3]

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[1] See e.g. Steffen Wirth, *Staatenimmunität für internationale Verbrechen – das zweite Pinochet-Urteil des House of Lords*, Jura 2000, 70.

[2] See e.g. ECHR, *Al-Adsani v. United Kingdom*, Application no. 35763/97, Judgment of 21 November 2001, available at http://hudoc.echr.coe.int; Areopag, *Prefecture of Voiotia v. Federal Republic of Germany*, Case No 11/2000, Judgment of 4 May 2000; cf. also Markus Rau's review of the *Al-Adsani* - decision: *After* Pinochet*: Foreign Sovereign Immunity in Respect of Serious Human Rights Violations – The Decision of the European Court of Human Rights in the* Al-Adsani *Case* in 3 GERMAN L. J .6 (June 1, 2002) www.germanlawjournal.com. Another important example of this trend is the ever-increasing amount of litigation under the American Alien Tort Claims Act. The case involving Unocal Corporation and allegations of human rights violations in Myanmar has drawn world-wide attention. *See*, John Doe I v. Unocal Corp., 2002 WL 31063976 (9th Cir. 2002); John Doe I v. Unocal Corp., 2002 WL 31063976 (9th Cir. 2003) (rehearing en banc).

[3] BGH, decision of 26 June 2003, III ZR 245/98, published in NJW 2003, 3488 et seq.

B. The Court's Decision

I. Facts

The appellants – Greek nationals – brought an action against the Federal Republic of Germany for damages resulting from a massacre committed by the German army in the Greek village of Distomo during the German occupation of Greece in 1944.[4] On 10 June 1944, the appellants' parents were shot by an SS-unit integrated into the German armed forces.[5] The shooting, termed a "retribution measure,"[6] followed an armed conflict with partisans and involved 300 innocent inhabitants of the village.[7] The village itself was razed.[8]

The appellants claimed damages on behalf of their parents, whose claims had transferred to them by way of succession, with respect to the destruction of the parental home and business and in their own right with respect to damages to their health and disadvantages in their professional training and prospects.[9] The case was brought on appeal from the *Oberlandesgericht* (Higher Regional Court) of Cologne, which had dismissed the action.[10]

In 1997, the District Court of Livadeia in Greece had already awarded damages for the Distomo-massacre to, *inter alia*, the appellants.[11] This decision was upheld by the Greek Areopag in a judgment of 4 May 2000.[12] However, execution of the decision against assets of the Federal Republic of Germany located in Greece could not take place for lack of the necessary permission by the Greek government required

[4] BGH NJW 2003, 3488.

[5] Id.

[6] Id.

[7] Id.

[8] Id.

[9] Id.

[10] Id.

[11] District Court of Livadeia, *Prefecture of Voiotia v. Federal Republic of Germany*, Case No 137/1997, Judgment of 30 October 1997.

[12] Cf. supra note 1.

under local law.[13]

II. Findings

The Federal Court of Justice concluded that the claim for damages was without merit and the decision of the Cologne Higher Regional Court was upheld. Understanding the basis for the Court's judgment requires a detailed analysis of several issues on which the decision was based.

1. Res Judicata, the Recognition of Foreign Judgments and State Immunity

The first issue presented to the Court was the question whether a German court was able to deal with the claim in light of the fact that the same factual situation had already been assessed by a Greek court.[14] The Court resolved that it could because the principle of *res judicata* only prevented a German court from reviewing the decision (*révision au fond*) if the German courts were obligated to recognise the foreign decision.[15] However, neither the German-Greek Treaty on Mutual Recognition and Execution of Court Judgments, Settlements and Public Documents in Civil and Commercial Matters of 4 November 1961,[16] nor § 328 Zivilprozeßordnung (ZPO – German Civil Procedure Code) dealing with the recognition of foreign judgments, imposed an obligation on the German courts to recognise the Greek decision.[17] Both required the Greek court to have had jurisdiction.[18] But this prerequisite was not met because the principle of state immunity had been breached.[19]

According to the principle of sovereign immunity recognised in public international law, a sovereign state can claim immunity from another state's jurisdiction as

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[13] For a more detailed account of the procedural history in the Greek courts see Elisabeth Handl, Introductory Note to the German Federal Court of Justice's Judgment in the Distomo Massacre Case, 42 ILM 1027.

[14] BGH NJW 2003, pp. 3488-3489.

[15] Id.

[16] BGBl. II 1963, 109.

[17] BGH NJW 2003, pp.3488-3489; cf. §§ 328 I Nos. 1 and 4 ZPO and Art. 3 Nos. 1 and 3 German-Greek Treaty.

[18] The court initially also looked at the *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* of September 27, 1968, but decided that it was not applicable as compensation claims against a sovereign state for acts committed while exercising sovereign powers did not come under the definition of "civil and commercial matters" stipulated in the treaty.

[19] BGH NJW 2003, 3488.

long as *acta jure imperii* are concerned.[20] Being an act of the German armed forces, albeit illegal in all respects, this was to be classified as an act of sovereign power to which the principle of sovereign immunity applied.[21] While there had been a movement to restrict the application of this principle and exclude its applicability whenever mandatory rules (*ius cogens*) of public international law, such as human rights, are breached,[22] according to the prevailing opinion, this had not become a rule of current public international law.[23] Therefore the Greek court did not have jurisdiction to hear the case and, accordingly, the Greek decision was not to be recognised by the German courts.[24] This opened the door for the German courts to adjudicate the situation *de nouveau*.[25]

2. Role of the Federal Republic of Germany as the Respondent

The Federal Court of Justice went on to discuss, briefly, whether the compensation claim was an independent post-war liability of the Federal Republic of Germany or whether this was a claim for which the Federal Republic was liable under the principles of state succession.[26] It concluded that the lower courts were correct in deciding that specific post-war compensation legislation passed by the Federal Republic of Germany did not apply to this case.[27] Therefore it treated the claim as a liability of the German Empire rather than an original claim against the Federal Republic of Germany.[28]

3. Effects of the London Debt Agreement

Having established that the claims were originally claims against the German Empire, the Court considered the influence of the London Debt Agreement of

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[20] *See* e.g., Malcolm N. Shaw, International Law 494 (4th ed. 1997).

[21] BGH NJW 2003, 3488 at 3489.

[22] *See* e.g. Steffen Wirth's article referred to in Footnote 1.

[23] BGH NJW 2003, 3488 at 3489; for further reading, a selection of scholarly commentary on this topic can be found in the Court's decision at p. 3489.

[24] BGH NJW 2003, 3488.

[25] BGH, NJW 2003, 3488-3489.

[26] Ibid. pp. 3489-3490.

[27] Id. The controlling post-war compensation statute was the *Bundesentschädigungsgesetz* of September 1953, BGBl. I 1387.

[28] BGH NJW 2003, 3488 at pp. 3489-3490.

27 February 1953 on the case.[29] The Agreement served as a moratorium on reparation claims against Germany until a final peace agreement dealing with reparation claims was signed.[30] Therefore, claims resulting from the Second World War could not be finally adjudicated, whether they sought to award damages or dismiss the claim.[31] However, the Court went on to state that the so-called "Two-Plus-Four"Treaty (*Zwei-plus-Vier-Vertrag*) of 12 September 1990, paving the way for the unification of Germany, although not a conventional peace agreement, was to be seen as a final agreement with respect to Germany which had rendered the London Debt Agreement obsolete.[32]

4. Legal Basis for the Claims in the Law of 1944

In order to evaluate whether claims for damages existed against the German Empire for which the Federal Republic of Germany was liable, the Court then looked at whether the law as it was in 1944 provided a basis for the appellants' suit.[33] In doing so, the Court examined the issue of compensation for tort claims under public international law as well as the issue of state liability under domestic law, eventually holding that neither of them supported the appellants' case.[34]

Regarding the first question, the Court emphasised that while public international law may be changing gradually, certainly in 1944, the principle that public international law did not award direct protection to individuals as opposed to states still

[29] BGH NJW 2003, 3488 at 3490. The treaty was published at BGBl. II 1953, 336.

[30] For more information on the Agreement *see*, for instance, Edda Henrike Dolzer, *International Treaties After World War II*, *in* NS-FORCED LABOR: REMEMBRANCE AND RESPONSIBILITY 157 (Peer Zumbansen ed., Nomos 2002); Libby Adler and Peer Zumbansen, The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich, in: 39 Harv. J. Leg. 1 (2002), (reprinted also in: NS-Forced Labor: Remembrance and Responsibility 333 (Peer Zumbansen ed., Nomos 2002).

[31] Art. 5 II London Debt Agreement; cf. also BGH NJW 1955, 631; NJW 1955, 1437; NJW 1973, 1549 at 1552.

[32] BGH NJW 2003, 3488 at 3490. The Two-Plus-Four Treaty can be found at BGBl. II 1990, 1318. For further reading, a selection of scholarly commentary on this topic can be found in the Court's decision at 3490; *see* also, Dozer, supra note 30; Adler and Zumbansen, supra note 30.

[33] According to the Court, the legal basis for this is to be found in Art. 135a I No 1 Grundgesetz (GG-German Basic Law); cf. Bundesverfassungsgericht (Federal Constitutional Court) BVerfGE 15,126 at 145. Evidently, traces of Nazi - ideology to be found in the law of the time were not to be taken into account. BGH NJW 2003, 3488 at 3491.

[34] BGH NJW 2003, 3488 at 3491.

held true, even in the case of a severe human rights infringement.[35] Therefore only states or parties to a war could claim compensation.[36] The Convention Respecting the Laws and Customs of War on Land (Hague IV) of 18 October 1907 also sustained this interpretation in its Articles 2 and 3.[37]

With respect to the second issue, liability pursuant to domestic state liability provisions was also ruled out.[38] While the requirements under the respective provisions would have been met literally, it was the general understanding at the time of the massacre that acts of war committed on foreign soil were excluded from domestic state liability.[39]

C. Conclusion

The decision is of interest for several reasons. Most obviously, it will likely act as a deterrent to other potential plaintiffs lodging further actions. While it would be desirable for the individuals who suffered directly or indirectly from this or other atrocities committed by German armed forces during the Second World War to be awarded damages, the effect of the Court's approach may, in fact, guarantee more legal certainty by ensuring that issues of this kind are resolved in a public international law forum.

Furthermore, the decision also deals with important issues of public international law, especially the principle of state immunity. While its reasoning is of course not binding in public international law,[40] it confirms the line taken by courts of other jurisdictions that the principle of state immunity has not been amended to exclude immunity from compensation claims for human rights abuses and crimes against humanity. Thus, it adds certainty as to the German position with respect to this issue. [41]

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[35] BGH NJW 2003, 3488 at 3491.

[36] Id.

[37] The Hague IV Convention can found at RGBl. 1910, 107 or Martens, NRG (troisième série), Vol.3, 461.

[38] BGH NJW 2003, 3488 at pp. 3491-3493.

[39] Id.

[40] Though it certainly can serve as evidence of customary international law.

[41] Reinhold Geimer, *Völkerrrechtliche Staatenimmunität gegenüber Amtshaftungsansprüchen ausländischer Opfer von Kriegsexzessen*, LMK 2003, 215 concludes that state immunity also serves as a guarantee for peace between the states (p. 216).

The decision also makes a clear statement with respect to the prerequisites for recognition of foreign judgments. It emphasises that recognition is only possible if jurisdictional requirements have been met. Especially when advising foreign clients, recognition and enforcement of foreign decisions in Germany is very topical as Bettina Friedrich eloquently pointed out in her article "Federal Constitutional Court Grants Interim Legal Protection Against Service of a Writ of Punitive Damages Suit".[42] Therefore, practitioners will also welcome this decision.

Finally, its elaboration on German state liability law also sheds more light on issues arising in this area, although the Court specifically left unanswered the question of whether its analysis is transferable to state liability law as it stands today. Admittedly, this was not an issue in this case, and it must be hoped that the Federal Republic of Germany will not commit crimes against humanity. Nevertheless, the general question of whether and how far current domestic law must take into account new developments in public international law which have not yet been recognised as a general rule will be an interesting one to deal with in future cases.

[42] Bettina Friedrich, *Federal Constitutional Court Grants Interim Legal Protection Against Service of a Writ of Punitive Damages Suit*, 4 GERMAN L. J. 12, § 5 (December 1, 2003) www.germanlawjournal.com