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Views

Communication No. 1507/2006

Submitted by:	Panagiotis A. Sechremelis, Loukas G. Sechremelis and Angeliki widow of Ioannis Balagouras (represented by counsel, Evangelia I. Stamouli)
Alleged victims:	The authors
State party:	Greece
Date of communication:	25 April 2006 (initial submission)
Document references:	- Special Rapporteur's rule 97 decision, transmitted to the State party on 20 November 2006 (not issued in document form) - CCPR/C/94/D/1507/2006 – Decision on admissibility, adopted on 21 October 2008
Date of adoption of Views:	25 October 2010

* Made public by decision of the Human Rights Committee.

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Subject matter:	Enforcement of a judgement against another State
Procedural issues:	Non-exhaustion of domestic remedies; same matter examined under another procedure of international investigation or settlement; abuse of the right to submit a communication
Substantive issues:	Effective remedy; right to a fair hearing
Articles of the Covenant:	2, paragraph 3; 14, paragraph 1
Articles of the Optional Protocol:	3; 5, paragraph 2 (a); 5, paragraph 2 (b)

On 25 October 2010 the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1507/2006.

[Annex]

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (one hundredth session)

concerning

Communication No. 1507/2006**

Submitted by:	Panagiotis A. Sechremelis, Loukas G. Sechremelis and Angeliki widow of Ioannis Balagouras (represented by counsel, Evangelia I. Stamouli)
Alleged victims:	The authors
State party:	Greece
Date of communication:	25 April 2006 (initial submission)
Date of Admissibility decision:	21 October 2008

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 October 2010,

Having concluded its consideration of communication No. 1507/2006, submitted to the Human Rights Committee on behalf of Mr. Panagiotis A. Sechremelis, Mr. Loukas G. Sechremelis and Ms. Angeliki widow of Ioannis Balagouras, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli and Mr. Krister Thelin.

The text of an individual opinion signed by Committee member Mr. Ivan Shearer concerning admissibility decision adopted on 21 October 2008 is appended to the text of the present Views.

The text of an individual opinion signed by Committee members Mr. Lazhari Bouzid, Mr. Rajsoomer Lallah and Mr. Fabian Omar Salvioli concerning merits is appended to the text of the present Views.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication are Mr. Panagiotis A. Sechremelis, Mr. Loukas G. Sechremelis and Ms. Angeliki widow of Ioannis Balagouras, who are Greek nationals. They allege that they are victims of violations by Greece of article 2, paragraph 3, read together with article 14, paragraph 1, of the International Covenant on Civil and Political Rights. They are represented by counsel, Evangelia I. Stamouli. The Optional Protocol came into force for the State party on 5 August 1997.

1.2 On 4 April 2007, the Special Rapporteur on New Communications and Interim Measures, acting on behalf of the Committee, decided that the admissibility of the communication would be considered separately from the merits.

The facts as submitted by the authors

2.1 The authors are relatives of the victims of the massacre perpetrated by the German occupation forces in Distomo, Greece, on 10 June 1944. On 27 November 1995, the authors brought an action for damages against Germany before the Livadia Court of First Instance. In the absence of representatives of Germany, the court found for the applicants on 30 October 1997 and ordered Germany to pay them various sums in compensation for their pecuniary and non-pecuniary loss (Decision No. 137/1997), with interest payable from the day the action had been initiated, namely 16 January 1996.

2.2 The ruling was notified to the German State in accordance with the provisions of the German-Greek agreement of 11 May 1938 on mutual legal assistance in civil and commercial matters. On 24 July 1998, the defendant declined to oppose or appeal against the ruling handed down by default and, in a subsequent application to the Court of Cassation for judicial review of the case, called for the ruling by the Livadia Court of First Instance to be annulled. The application was rejected by the Court of Cassation on 4 May 2000 (Decision No. 11/2000). Accordingly, Decision No. 137/1997 became final.

2.3 On 26 May 2000 the applicants brought proceedings under the Code of Civil Procedure to recover their debt, and counsel served the prosecutor of the Livadia Court of First Instance with the first executory copy of the ruling and a claim for payment, according to which the German State was ordered to pay the legal costs awarded in addition to the claims of each of the authors. The Greek Consulate in Berlin, pursuant to the above-mentioned German-Greek agreement, informed the President of the Berlin Court of Major Jurisdiction of the terms of the ruling. Despite the service of the judgement and the order to pay, the German State did not comply with its obligations.

2.4 Counsel then transmitted the order to the Athens Court of Major Jurisdiction, which, in accordance with the terms of record 1069/11.7.2000, seized property located in Athens belonging to the German State. Following the seizure, the German State filed an objection with the Athens Court of First Instance on 25 July 2000 requesting annulment of the executory ruling issued against it, citing article 923 of the Greek Code of Civil Procedure, according to which "the prior consent of the Minister of Justice is a precondition for enforcing a decision against a foreign State". On 10 July 2001 the Court of First Instance (by decisions Nos. 3666 and 3667/2001) dismissed the objection on the grounds that article 923 was incompatible with article 2, paragraph 3, of the Covenant which, in conjunction with article 14, ensured the right to proceed with the enforcement of decisions relating to civil law, with the added proviso that under article 2 of the Covenant such provisions applied equally to persons acting in an official capacity. According to the court, article 923 of the Code of Civil Procedure was incompatible with these provisions and, since the Covenant was an integral part of Greek law, was therefore considered invalid.

2.5 The German State lodged an appeal against the ruling with the Athens Court of Appeal. On 14 September 2001, the Court of Appeal found that article 923 of the Code of Civil Procedure was compatible with the Covenant (decision No. 6848/2001). On 2 October 2001 the applicants filed an appeal for judicial review with the Court of Cassation challenging this decision. On 28 June 2002 the Court of Cassation, sitting in plenary, upheld decision No. 6848/2001 of the Athens Court of Appeal. The Court of Cassation considered that article 923 of the Code of Civil Procedure restricted the right of enforcement by making it subject to the prior authorization of the Minister (decision No. 37/2002). The Minister may refuse consent in the light of his assessment of circumstantial factors, including the maintenance of good relations with another State. Following this decision, the authors did not receive the sums in question, as the German State refused to pay them and the Minister of Justice refused to authorize enforcement.

2.6 The authors were also part of 257 complainants who brought the case before the European Court of Human Rights, which declared it inadmissible on 12 December 2002.[1]

The complaint

3. The authors accuse the State party of violating article 2, paragraph 3, of the Covenant on the grounds that article 923 of the Code of Civil Procedure was maintained in force and that the Minister of Justice refused to authorize enforcement. Furthermore, the authors consider that the State party is duty bound, under article 14 of the Covenant, to fulfil its obligation under article 2, paragraph 3, and to ensure proper enforcement of the ruling of the Livadia Court of First Instance and the ruling of the Court of Cassation dated 4 May 2000.

State party's observations on admissibility

4.1 On 19 January 2007, the State party challenged the admissibility of the communication. It recapitulated the facts and noted that, in response to a complaint filed by the authors, the Livadia Court of First Instance had issued its ruling No. 137/1997 by default. An appeal for legal review was subsequently brought by the German State against that ruling. According to the German State, the Greek courts were not competent to hear the case under customary international law because the German State enjoyed immunity. The Court of Cassation, in the light of international customary law and the provisions of international conventions concerning the principle of immunity, found that the Greek courts did have jurisdiction over the case. The authors therefore initiated proceedings seeking enforcement of the final decision of the Court of First Instance. The German State refused to pay the sums concerned.

4.2 Under article 923 of the Code of Civil Procedure, the enforcement of a decision against a foreign State requires the prior consent of the Minister of Justice. The authors applied for such consent from the Minister, who did not respond. Despite the lack of consent, the authors initiated enforcement proceedings against the German State and in particular concerning the property owned by the Goethe Institute in Greece.

4.3 On 17 July 2000 the German State filed a complaint with the Athens Court of First Instance requesting the annulment of the writ of attachment handed down against it, on the grounds that there had been no consent on the part of the Ministry of Justice. The Court of First Instance dismissed the complaint, on the grounds that article 923 of the Code of Civil Procedure was incompatible with article 6 of the European Convention on Human Rights and article 2, paragraph 3, of the Covenant. On appeal, the Athens Court of Appeal found

[1] *Kalogeropoulou and others* v. *Greece and Germany* (dec.), Application No. 59021/00, ECHR 2002-X.

that article 923 was not in breach of either the Covenant or the European Convention on Human Rights. Specifically, the Court of Appeal considered that the limitation imposed by article 923 pursued an aim that was in the public interest, namely to avoid disturbances in relations between States, and was proportionate to that aim. The Court also found that article 923 did not affect the right to effective legal protection, as it did not provide for an outright prohibition on the enforcement of decisions against a foreign State, but only acquired the prior consent of the Minister of Justice, and therefore of the Government, which bore sole responsibility for foreign policy. If a private individual could have a judicial decision enforced against a foreign State without that prior consent, the country's national interests could be compromised, as its foreign policy would be placed in the hands of individuals. In any event, the right to enforcement could be exercised at a later date or in another country.

4.4 The authors filed an application for judicial review against that ruling. The Court of Cassation, referring to the case law of the European Court of Human Rights,[2] held that the limitation arising from article 923 was compatible with article 6 of the European Convention and with article 1 of Protocol No. 1.

4.5 The authors filed a complaint with the European Court of Human Rights, which found the case inadmissible.[3] In particular, the European Court considered that the right of access to the courts was not absolute, but could be subject to limitations, adding that a limitation was compatible with article 6, paragraph 1, of the European Convention if it pursued a legitimate aim and if there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. In the case in question, the European Court considered that the restriction pursued a legitimate aim, since the immunity granted to sovereign States in civil proceedings was intended to comply with international law in order to promote comity and good relations between States. As for the proportionality of the measure, the European Court considered that the European Convention had to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969, which states in article 31, paragraph 3 (c), that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The European Convention should be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity. Furthermore, "it follows that measures taken by a High Contracting Party which reflect generally recognized rules of public international law on State immunity cannot generally be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in article 6, paragraph 1". Lastly, the European Court considered that "although the Greek courts ordered the German State to pay damages to the applicants, this did not necessarily oblige the Greek State to ensure that the applicants could recover their debt through enforcement proceedings in Greece. Referring to judgement No. 11/2000 of the Court of Cassation, the applicants appeared to be asserting that international law on crimes against humanity was so fundamental that it amounted to a rule of *jus cogens* that took precedence over all other principles of international law, including the principle of sovereign immunity. The Court does not find it established, however, that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity (see *Al-Adsani v. United Kingdom*, op. cit., para. 66). The Greek

[2] *Al-Adsani* v. *the United Kingdom* [GC], No. 35763/97, ECHR 2001-XI; *McElhinney* v. *Ireland* [GC], No. 31253/96, ECHR 2001-XI.

[3] *Kalogeropoulou and others* v. *Greece and Germany*, *cit.*. The State party also points out that the European Court of Human Rights followed this case law in other cases (*Treska* v. *Albania and Italy* (dec.), Application No. 26937/04, ECHR 2006; *Manoilescu and Dobrescu* v. *Romania* (dec.), Application No. 60861/00, ECHR 2005).

Government cannot therefore be required to override the rule of State immunity against their will. This is true at least as regards the current rule of public international law, as the Court found in the aforementioned case of Al-Adsani, but does not preclude a development in customary international law in the future. Accordingly, the Minister of Justice's refusal to give the applicants leave to apply for expropriation of certain German property situated in Greece cannot be regarded as an unjustified interference with their right of access to a tribunal, particularly as it was examined by the domestic courts and confirmed by a judgement of the Greek Court of Cassation".

4.6 As for the authors' allegation that their right to peaceful enjoyment of their possessions has been violated, the European Court considered that "the Greek courts' refusal to authorize the enforcement proceedings which could have secured the recovery of the applicants' debt did not upset the relevant balance that should be struck between the protection of the individual's right to peaceful enjoyment of his or her possessions and the requirements of the general interest". The European Court also found that "the Minister of Justice's refusal to authorize enforcement proceedings did not amount to a disproportionate interference with the applicants' right of access to a tribunal", and that "the Greek Government could not be required to override the principle of State immunity against their will and compromise their good international relations in order to allow the applicants to enforce a judicial decision delivered at the end of civil proceedings". The European Court therefore dismissed the complaint as being manifestly ill-founded.

4.7 The European Court also considered that "the applicants could not have been unaware of the risk they were taking in bringing enforcement proceedings against the German State without first obtaining the consent of the Minister of Justice. Having regard to the relevant applicable legislation, namely, article 923 of the Code of Civil Procedure, their only realistic hope was that Germany would pay the amounts determined by the Livadia Court of First Instance of its own accord. In other words, by instituting enforcement proceedings, the applicants must have known that, without the prior consent of the Minister of Justice, their application was bound to fail. The situation could not therefore reasonably have founded any legitimate expectation on their part of being able to recover their debt". Lastly, the Court considered that "they might be able to enforce it later, at a more appropriate time, or in another country, such as Germany".

4.8 The State party points out that the communication should be seen against the more general background of complaints and requests for the payment of damages submitted by Greek citizens whose families suffered as a result of the invasion by German troops during the Second World War. The Greek courts had heard other similar cases: in one such case the Special Supreme Court (by decision No. 6/2002) had found that "*in cases of execution of unarmed population during wars, State immunity is not set aside for the State whose military forces violate* jus cogens *rules*".[4] Furthermore, the Supreme Court had considered that the Greek courts did not hold jurisdiction over the matter. The Council of State had had occasion to issue a ruling in a similar case submitted by the same authors. In respect of the authors' application for the Minister of Justice's refusal to be overturned, the Council of State considered that such refusal constituted a governmental act and that the matter fell outside its jurisdiction (decision No. 3669/2006). The Council of State considered in particular that the Minister's intervention depended entirely on his appraisal of the situation and the wish to avoid any disturbance in good relations between States. Such decisions were taken in the light of the consequences they might have on relations between countries, which lay within the domain of the executive.

[4] English translation by the State party.

4.9 A similar case had been brought before the Court of Justice of the European Communities (case C-292/05) by other persons,[5] represented by the same counsel as was acting for the authors of the present communication, relating to the actions of German troops in another part of Greece. In that case the Court of First Instance had held that it was not competent in view of the immunity enjoyed by the German State, and the Court of Appeal had applied for a preliminary ruling by the Court of Justice of the European Communities. The State party notes that according to the Advocate General's conclusions, sovereign acts performed by the State (*acta jure imperii*), in this case military action in wartime, fall outside the scope of the 1968 Brussels Convention.[6]

4.10 Concerning the admissibility of the communication, the State party notes that the act (or omission) in question is the refusal by the Ministry of Justice to issue an authorization for enforcement proceedings against the German State. It considers that this refusal is a governmental act, subject to the application of the rules of international law and to an appraisal of the requirements of foreign policy and the need to maintain good relations between States, and not an act of a civil nature. The State party considers that the refusal does not fall within the scope of the Covenant. Furthermore, the communication is incompatible with the principles of international customary law and the international obligations of the State party. Lastly, the same matter has been and is currently being examined under another procedure of international investigation or settlement. Not only has the same case been presented to and ruled upon by the European Court of Human Rights, but a practically identical case has been brought before the Court of Justice of the European Communities.[7]

4.11 The State party also notes that the authors submitted their communication to the Committee five years after the last decision was issued by a domestic court and four years after the decision was handed down by the European Court of Human Rights. The authors are aware that the same complaint has just been filed again with the Greek courts, and that the Supreme Court has considered that State immunity cannot be waived for acts committed by States in time of war (decision No. 6/2002). The authors are also aware that a similar case has been brought before the Court of Justice of the European Communities. Lastly, the State party addresses only the allegation of the violation of article 2, paragraph 3, of the Covenant. It rejects counsel's reference to article 14, paragraph 1, of the Covenant and contends that insofar as the authors complain of violations of other articles of the Covenant, domestic remedies have not been exhausted because such violations have not yet been raised before any courts.

Authors' comments on the State party's observations on admissibility

5.1 On 4 June 2007 counsel maintained that the grounds for inadmissibility put forward by the State party had no legal foundation. In reply to the State party's argument that the decision by the Minister of Justice does not fall within the scope of the Covenant, counsel contends that in respect of the incriminated acts of the German forces, the German State is not covered by immunity from legal proceedings under article 11 of the European

[5] *Eir. Lechouritou, V. Karkoulias, G. Pavlopoulos, P. Brátsikas, D. Sotiropoulos, G. Dimopoulos v. Dimosio tis Omospondiakis Dimokratias tis Germanias*, reference for a preliminary ruling submitted by Efeteio Patron (Greece).

[6] Convention of 27 September 1968 concerning judicial competence and the execution of decisions in civil and commercial matters.

[7] The State party points out that the matters before the Court of Justice of the European Communities concern not only the application of the 1968 Convention, but also the issues of State immunity and the right of States not to accept liability for sovereign acts (*acta jure imperii*) before the courts of other States.

Convention on State Immunity, signed in Basel on 16 May 1972[8] (even though the case concerns *jure imperii* acts, here the killing of civilians). The incriminated acts constitute a violation of human rights provisions that take precedence over any rules of treaty law or customary law. Those provisions do not allow States against which action for compensation has been brought to plead immunity from legal proceedings.

5.2 The debt owed to the authors is a civil debt according to the judgement handed down by the European Court of Human Rights, which qualified the case as a civil one.[9] Hence the Minister's refusal to authorize enforcement proceedings against the German State arises in the context of civil litigation and cannot constitute a governmental act. The Minister's refusal is based on a provision of the Code of Civil Procedure (art. 923), which comes in the chapter dealing with the enforcement of the decisions of civil courts and therefore falls within the scope of the Covenant.

5.3 As for the State party's contention that the matter is being or has been considered by other international bodies, the rule to which the State party refers requires "that the same matter is not being examined" (not that it has not been examined) "under another procedure of international investigation or settlement" (rule 96 of the Committee's rules of procedure). The fact is that the matter before the Committee is not currently being examined under another international procedure. The Court of Justice of the European Communities issued its judgement on 15 February 2007,[10] following a reference for preliminary ruling on the interpretation of the 1968 Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters, and not on the Minister's refusal, which is the subject of the present complaint. Furthermore, the procedures under which the case was examined were judicial and not related to international investigation or settlement.

Decision of the Committee on admissibility

6.1 At its ninety-fourth session, on 21 October 2008, the Committee considered the admissibility of the communication.

6.2 Without needing to determine whether the "same matter" has been examined under another procedure of international investigation or settlement, the Committee rejected the State party's inadmissibility plea based on the argument that the Committee was not competent because the present communication had already been examined by the European Court of Human Rights and the Court of Justice of the European Communities. On the one hand, article 5, paragraph 2 (a), of the Optional Protocol applied only when the same matter as that raised in a communication is "being examined" under another procedure of international investigation or settlement. On the other, Greece had entered no reservation to article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee took note of the arguments of the State party whereby the authors filed their communication with the Committee five years after the last decision had been issued domestically and four years after the decision of the European Court of Human Rights. The State party appeared to allege that the communication should be considered inadmissible insofar as it amounted to an abuse of the right to submit communications

[8] "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."

[9] *Kalogeropoulou and others v. Greece and Germany, cit.*

[10] Case C-292/05, *Lechouritou et al.*, judgement of 15 February 2007.

under article 3 of the Optional Protocol, in view of the time that had elapsed between the last domestic ruling and the decision by the European Court and the submission to the Committee The Committee observed that the Optional Protocol does not establish any deadline for the submission of communications, and that the period of time elapsing before such a submission does not of itself constitute an abuse of the right to submit a communication, other than in exceptional cases. Neither had the State party duly substantiated why it considered that a delay of more than five years would be excessive in this case. The Committee considered that in the present case, having regard to its particular circumstances, and considering that the authors had in the meantime lodged other complaints, namely with the Council of State it was not possible to consider that so much time had elapsed prior to the filing of the communication as to make the complaint an abuse of the right of submission.

6.4 Regarding the scope of the Covenant, the Committee noted the State party's argument that the Minister's refusal was a governmental act, not an act of a civil nature, and thus fell outside the scope of the Covenant. The Committee recalled its general comment No. 32 (90),[11] and reaffirmed that the concept of the determination of rights and obligations in a suit at law was formulated differently in the various languages of the Covenant that, according to article 53 of the Covenant, were equally authentic. The concept was based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights.[12] The concept was a broad one, and encompassed not only judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, but also equivalent notions in the area of administrative law. It might also cover other procedures which had to be assessed on a case-by-case basis in the light of the nature of the right in question.

6.5 In any event, in the view of the Committee the determination of rights and obligations in a suit at law, as protected under article 14, paragraph 1 of the Covenant, would be meaningless if the law of a State party permitted a judicial determination in favour of a victim to become unenforceable, especially given the State party's further obligations under paragraph 3 (a) and (c) of article 2 of the Covenant to ensure, in the first place, that any person whose Covenant rights are violated shall have an effective remedy and, secondly, that when such a remedy is granted it shall be enforced. [13]

6.6 The Committee noted that the State party did not challenge the exhaustion of remedies in respect of the violation of article 2, paragraph 3, but that it considered the communication to be inadmissible on the grounds that domestic remedies had not been exhausted in respect of article 14, paragraph 1, of the Covenant. However, it also noted that the Court of Cassation considered the authors' grievances (see decision No. 37/2002), including in the light of article 14 of the Covenant. The Committee therefore concluded that

[11] CCPR/C/GC/31, para. 16.

[12] Communication No. 112/1981, *Y.L.* v. *Canada*, inadmissibility decision adopted on 8 April 1986, paras. 9.1 and 9.2; communication No. 441/1990, *Casanovas* v. *France*, Views adopted on 19 July 1994, para. 5.2; communication No. 1030/2001, *Dimitrov* v. *Bulgaria*, decision on admissibility adopted on 28 October 2005, para. 8.3.

[13] See communication No. 1320/2004, *Pimentel et al.* v. *Philippines*, Views adopted on 19 March 2007, referring to the enforcement in the Philippines of a judgement obtained in the United States, considered in the light of article 14 and article 2, paragraph 3, of the Covenant. Furthermore, according to the translation of Court of Cassation decision No. 37/2002 submitted by counsel, the Court found that the enforcement of court decisions in a suit at law is expressly guaranteed by the Contracting States by virtue of article 2, paragraph 3 (c), and article 14 of the Covenant.

domestic remedies had been exhausted in that regard and that the claim alleging the violation of article 14 was admissible.

7. The Committee therefore decided that the communication was admissible insofar as it raised issues with respect to article 2, paragraph 3, read together with article 14, paragraph 1, of the Covenant.

State party's observations on the merits

8.1 On 30 April 2009, the State party submitted observations on the merits. It recalls the decision of the Athens Court of Appeal which considered that article 923 of the Code of Civil Procedure under which the prior consent of the Minister of Justice is a precondition for enforcing a decision against a foreign state, was not contrary to article 2, paragraph 3 of the Covenant.[14] It adds that the findings of the national courts are neither arbitrary nor unsubstantiated and cannot be considered as contrary to any provision of the Covenant or the Optional Protocol.

8.2 The right to a fair trial, although of paramount importance for every democratic society, is not absolute in every aspect. Certain limitations can be imposed and tolerated since, by implication, the right of effective judicial protection, by its very nature, calls for regulation by the state. To this extent, the contracting states enjoy a certain margin of appreciation. Still, it has to be secured that any limitation applied does not restrict or reduce the judicial protection left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, any limitation imposed has to pursue a legitimate aim and keep a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

8.3 In the instant case, should the State's refusal to allow the authors to bring enforcement proceedings against Germany be considered as a restriction to their right to an effective remedy and to their right to enforcement of a judgment, this restriction pursued a legitimate aim and was proportionate to the aim pursued. First of all, the Covenant has to be interpreted in the light of the rules set out in the Vienna Convention of 1969 on the Law of Treaties, article 31, paragraph 3 (c) of which indicates that account is to be taken of any relevant rules of international law applicable in the relations between the parties. The Covenant, including articles 2, paragraph 1 and 14, paragraph 1, cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law, including those relating to State immunity. Apart from immunity of jurisdiction, immunity from execution is also recognised, that is the lack of ability to institute measures of execution against the property (all property, or at least property that is intended for diplomatic or military use, that forms part of cultural heritage, etc.) of a foreign state.

8.4 All international legal documents governing State immunity set forth the general principle that, subject to certain strictly delimited exceptions, foreign States enjoy immunity from execution in the territory of the forum State. For example, article 5 of the resolution of the Institute of International Law on immunity of foreign States in relation to questions of jurisdiction and enforcement (1954) indicates that no measures of constraint or preventive attachment may be carried out in respect of property which belongs to a foreign State and is used for the performance of government activities not connected with any form of economic exploitation. Furthermore, article 22 of the Vienna Convention on Diplomatic Relations stresses that the premises of missions are immune from search, requisition, attachment or execution. Similar provisions are to be found in the European Convention on State Immunity, article 23 of which states that no measures of execution or preventive

[14] See paragraph 4.3 above.

measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented to the measures in writing.

8.5 It is also to be noted that article 19 of the United Nations Convention on Jurisdictional Immunities of States and their Property provides that no post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with proceedings before a court of another State unless and except to the extent that the State has expressly consented or it has been established that the property is specifically in use or intended for use by the State for other than non-commercial government purposes. Finally, provisions establishing immunity from execution are included in all legal texts of the States that have laws dealing with state immunity.

8.6 The State party considers that the grant or in any case the regulation of immunity from execution in proceedings instituted against a foreign state constitutes a well established rule of international customary law and therefore pursues the legitimate aim of complying with international law, in order to promote comity and good relations between States, through the respect of another State's sovereignty. It is thus obvious that the Greek authorities refused to give permission to the authors to execute the judgment against the German state's property on "public interest" grounds directly linked to observance of the principle of State immunity.

8.7 The State party recalls the jurisprudence of the European Court of Human Rights according to which measures taken by a State which reflect generally recognized rules of international law on State immunity cannot generally be regarded as imposing a disproportionate restriction on the right to a fair trial, as embodied in article 6, paragraph 1 of the European Convention of Human Rights. The Court is also of the view that, just as the right of access to a court is an inherent part of the fair-trial guarantee in that article, so some restrictions on access and generally on the right to a fair trial must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity. The Court has repeatedly rendered that it does not find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity. The State party considers that there is nothing in the present communication to warrant departing from this view. Accordingly, neither the Minister's refusal to grant the author permission to take measures of constraint with regard to the property occupied by the German State in Greece, nor the courts' decisions that upheld this refusal can be regarded as an unjustified restriction on the author's rights.

8.8 The State party indicates that the abovementioned limitation does not impair the very essence of the authors' right to an effective judicial protection. It cannot be ruled out that the national court's decision may be enforced at a later date, for example if the foreign State enjoying immunity from execution gave its consent to the taking of measures of constraint by the authorities of the forum State, thereby voluntarily waiving the application of the international provisions in its favour, a possibility expressly provided for by the relevant provisions of international law. In this connection, the State party reiterates its arguments referred to in paragraph 4.5 above.

8.9 As to the authors' submission that they had no effective remedy at their disposal, the State party argues that, since it was established that the authors did not have an "arguable claim" to be the victims of a violation of the Covenant (i.e. of their right to enforcement of a judgment) there is no applicability of the relevant provisions. In any case, the authors, in all the procedures that took place before the national courts, had the benefit of adversarial proceedings conducted in public, were represented by a lawyer of their choosing, put before

the courts without obstruction all their arguments, claims and objections, presented evidence, refuted the arguments of the opposing party and generally enjoyed all guarantees of a fair and effective trial.

Authors' comments on the State party's observations on merits

9. In a letter dated 28 June 2009, the authors referred to their previous submissions on the case, where all relevant issues had been fully addressed. They indicated that no further comments on the State party's observations were necessary.

Issues and proceedings before the Committee

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

10.2 At the origin of the present communication is Decision No. 137/1997, by which the Livadia Court of First Instance ordered Germany to pay compensation to the relatives of the victims of the massacre perpetrated by the German occupation forces in Distomo on 10 June 1944. On 4 May 2000, the Court of Cassation rejected an application for judicial review and, therefore, the Decision became final. On 26 May 2000, the authors initiated proceedings under the Code of Civil Procedure to execute the Decision. On 17 July 2000, Germany filed a complaint with the Athens Court of First Instance alleging that, under article 923 of the Code of Civil Procedure, the prior consent of the Minister of Justice is a precondition for enforcing a decision against a foreign State and that such consent had not been given. The Court dismissed the complaint on the grounds that article 923 was incompatible with article 6 of the European Convention on Human Rights and article 2, paragraph 3 of the Covenant. However, on appeal, the Athens Court of Appeal found that article 923 was not in breach of the European Convention or the Covenant. The Court held that the limitation imposed by this provision did not provide for an outright prohibition on the enforcement of decisions against a foreign State; that it pursued an aim that was in the public interest, namely to avoid disturbances in relations between States; that it did not affect the right to effective legal protection; and that the right to enforcement could be exercised at a later date or in another country. On 28 June 2002, the Court of Cassation upheld the decision of the Athens Court of Appeal, following which Germany refused the payment and the Minister of Justice refused to authorize enforcement.

10.3 The issue before the Committee is whether the refusal of the Minister of Justice to authorize enforcement of Decision 137/1997, on the basis of article 923 of the Code of Civil Procedure, constitutes a breach of the right to effective remedy as provided under article 2, paragraph 3, with reference to the right to a fair hearing enshrined in article 14, paragraph 1 of the Covenant.

10.4 The Committee considers that the protection guaranteed by article 2, paragraph 3 and article 14, paragraph 1 of the Covenant would not be complete if it did not extend to the enforcement of decisions adopted by courts in full respect of the conditions set up in article 14. In the instant case, the Committee notes that article 923 of the Code of Civil Procedure, by requiring the prior consent of the Minister of Justice for the Greek authorities to enforce Decision 137/1997, imposes a limitation to the rights to a fair hearing and to effective remedy. The question is whether this limitation is justified.

10.5 The Committee notes the State party's reference to relevant international law on State immunity as well as the Vienna Convention of 1969 on the Law of Treaties. It also notes the State party's statement that the limitation does not impair the very essence of the authors' right to an effective judicial protection; that it cannot be ruled out that the national court's decision may be enforced at a later date, for example if the foreign State enjoying

immunity from execution gave its consent to the taking of measures of constraint by the Greek authorities, thereby voluntarily waiving the application of the international provisions in its favour; and that this is a possibility expressly provided for by the relevant provisions of international law. The Committee also notes the authors' contention that Germany is not covered by immunity from legal proceedings. In the particular circumstances of the present case, without prejudice to future developments of international law as well as those developments that may have occurred since the massacre perpetrated on 10 June 1944, the Committee considers that the refusal of the Minister of Justice to give consent to enforcement measures, based on article 923 of the Code of Civil Procedure, does not constitute a breach of article 2, paragraph 3 read together with article 14, paragraph 1 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Appendix A

Individual opinion on the Committee's decision on admissibility

Individual opinion by Committee member Mr. Ivan Shearer (dissenting)

In my opinion this communication should have been declared inadmissible by the Committee. The Committee has confined its decision to declare this communication admissible to a rejection of the formal grounds of inadmissibility invoked by the State party. However, the Committee has overlooked the more general ground of inadmissibility implicit in the State party's recounting of the proceedings in the Greek courts and the considerations of state immunity which impelled the Minister of Justice to refuse consent to the enforcement of the decision against the German State. Faced with such a clear rule of customary international law, the Minister could not have acted otherwise. Further proceedings would be futile. It would be more appropriate, in my view, if the Committee had the express power, like the European Court of Human Rights, to declare a communication to be "manifestly ill-founded". However, it is possible for the Committee, even at the stage of admissibility, to declare a communication unsubstantiated under article 2 of the Optional Protocol in order to achieve the same result. In that sense I believe this communication to be unsubstantiated and thus inadmissible.

[*Signed*] Ivan Shearer

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Appendix B

Individual opinion on the Committee's decision on the merits

Individual opinion by Committee members Mr. Rajsoomer Lallah, Mr. Lazhari Bouzid, and Mr. Fabian Salvioli (dissenting)

1. The Minister of Justice of the State party, relying on Article 923 of its Code of Civil Procedure, had refused to give his consent to the execution of the decision of the Livadia Court of First Instance (decision No.137/97). The Court had granted damages to the authors. The decision of the Court had become final, following the Court of Cassation's refusal to annul the decision (See paragraphs 2.1and 2.2 of the Views).

2. The issue before the Committee is, as properly stated in the majority opinion at paragraph 10.3 of the Views, whether the refusal of the State Party, through its Minister of Justice, to authorise the enforcement of the Court decision constitutes a violation of the right of the authors of the communication to an effective remedy as provided in articles 2 (3) and article 14 (1) of the Covenant.

3. We are unable to agree with the opinion of the majority that the refusal of the State party does not constitute a violation of those provisions of the Covenant.

4. We note that, when considering the admissibility of the complaint of the authors, the Committee had correctly analysed the significant obligations assumed by a State party under articles 14 (1) and 2 (3) of the Covenant. The Committee, relying on previous case law, then gave its view that *the determination of rights and obligations in a suit at law, as protected under article 14 paragraph 1 of the Covenant, would be meaningless if the law of a State party permitted a judicial determination in favour of a victim to become unenforceable, especially given the State party's further obligation under paragraph 3 (a) and (c) of Article 2 of the Covenant to ensure, in the first place, that any person whose Covenant rights are violated shall have an effective remedy and, secondly, that when such a remedy is granted it shall be enforced* (paragraph 6.5 of the Views).

5. Indeed, in paragraph 10.4 of its Views, the majority confirms that the protection guaranteed under those articles of the Covenant *would not be complete if it did not extend to the enforcement of decisions adopted by courts in full respect of the conditions set up in article 14.* However, the majority then goes on to consider that article 923 of the Greek Code of Civil Procedure does impose what it qualifies as a *limitation* on the protection thus guaranteed and proceeds to consider whether that *limitation* is justified.

6. The reasoning of the majority, as is evident from paragraph 10.5 of the Views, that the *limitation* is justified would appear largely to coincide with that of the State party and to be based on three main grounds which, in substance, are the following:

- Customary international law on *State immunity*, as interpreted in accordance with the provisions of the Vienna Convention on the Law of Treaties, supersedes in its effects the relevant provisions of the Covenant and requires a *limitation* on the provisions of Article 14 (1) of the Covenant.

- Future developments of international law as well as *those developments that **may** have occurred since the massacre perpetrated on 10 June 1944* may have an impact on the precedence or otherwise of State immunity over Covenant provisions.

- The *limitation* rendered necessary by a foreign State's immunity does not, in any event, impair the very essence of the authors` right to effective judicial protection as the foreign State against which damages had been awarded by the Court to the victims may waive its immunity.

7. It seems to us that all of the three grounds are misconceived. We begin with the last ground.

8. The term *limitation* is somewhat of a euphemism in the context of the obligations assumed by the State party under the mandatory provisions of Articles 14 and 2 of the Covenant in relation to individual victims. *Negation* might more correctly describe the effect of the power exercised by the State party under article 923 of its Code of Civil Procedure, in its present form, since its effect is to transform those obligations of the State party under the Covenant into a mere exercise of discretionary good will over a timeless period, not anymore by the State party which had assumed obligations under the Covenant, but by a foreign state to which the obligations of these two provisions do not apply in the communication directed by the authors against the State party under the Optional Protocol.

9. Nor can a remedy required under the Covenant be considered to be effective or prompt when it is suggested that the victims may possibly enforce their remedy elsewhere or at some indeterminate time in the future by the unilateral and discretionary good will of a foreign State. A remedy is not a real remedy when it depends on the unilateral discretion of a third party. Such a suggestion also does violence to the true aims of article 14, which prescribes that trials must be prompt and which inherently requires that, when remedies are given, they should be promptly satisfied. The popular aphorism *justice delayed is justice denied* cannot be elevated to a practice permissible under the Covenant.

10. The first two grounds relied upon by the majority are closely related and they are best considered together. Two observations may be made before considering how, in cases where a foreign State's immunity poses an apparent obstacle to the direct enforcement of the judgment of the judicial authorities of a State party, the State party may nevertheless provide a remedy to victims in the discharge of its own obligations under articles 14 and 2 of the Covenant.

11. Our first observation is that it is evident that the object and purpose of a foreign State's immunity is a matter of public interest, both nationally and internationally, in that it avoids disturbances in relations between states. The Vienna Convention on the Law of Treaties evidently does have its relevance in this regard with a view to ascertaining whether, given its object and purpose, another generally accepted rule of international law, whether customary or treaty based, has an impact, if any, on other international instruments.

12. The Covenant, however, is also a multilateral treaty and equally has its own object and purpose, thus attracting in its turn the interpretative guidance of the Vienna Convention. It seems to us that, where two equally binding treaties or provisions of international law apparently conflict with each other, some endeavour has to be made in the search for the most appropriate measures to give effect to their respective objects and purposes, with a view to preserving the essential integrity of both. In our view, there is no indication in the majority opinion to suggest that such an endeavour has been embarked upon. Customary law is not sacrosanct and can, as does treaty based international law, also evolve. Which brings us to the second observation.

13. Our second observation is that, in paragraph 10.5 of its Views, the majority does not rule out the possible effects of developments in international law but does not go on to ascertain whether, in relation to the possible precedence of State immunity over articles 2 and 14 of the Covenant, there have been any such developments. In this regard, the majority simply refers to *those developments that **may** have occurred*, without mentioning or analysing any of them in particular.

14. Clearly, it is the primary function of the Committee itself under the Covenant (and not simply that of other fora or jurisdictions) to interpret and apply the Covenant. It is of some significance that, when faced with the stand of Israel that its obligations under Article 2 of the Covenant is limited to its own territory, the International Court of Justice[15], in support of its own interpretation of that article, referred with approval to the interpretation given to that article by the Human Rights Committee and the jurisprudence it had developed by its constant practice as evidenced by its case law[16] and its concluding observations on the periodic report of Israel in 1998[17]. It would be odd if the Committee were to seek to delegate this primary responsibility elsewhere and wait for other jurisdictions to effect developments in the universality and effective protection of Covenant rights, when it is the Committee itself which has primary responsibility, at least for questions which are expressly mandated to it under the Covenant and the Optional Protocol.

15. It is perhaps necessary, therefore, to mention what developments have in fact taken place since 1944, which the majority could possibly have considered. Indeed, developments of considerable significance have occurred over the latter half of the last century regarding the universality of the obligations of States to protect and promote the basic rights of individual human beings. Among those developments that may be, briefly, mentioned are the following **:**

- The adoption of the Charter of the United Nations itself, with particular reference to the second paragraph of its preamble and its Articles 1 (3) and 55 (c);

- The adoption of the Universal Declaration on Human Rights, followed by a large number of implementing multilateral binding human rights treaties, including the Covenant to which not less than 165 States are now parties;

- The creation of regional human rights mechanisms with adjudicating functions in the case of individual victims and, lastly,

- The increasing number of States which have given entrenched status to human rights in their Constitutions or other basic laws, for better protection by their judicial authorities.

16. Be that as it may, in our view, articles 2 (3) and 14 (1) of the Covenant, as we interpret them and without affecting the operation of any other treaty or international or bilateral obligation arising from international law, constitute a core principle which the Covenant has, as one of its central objects and purposes, obligated States parties to implement**:** that principle is the establishment of the Rule of Law in the determination of Covenant rights by independent and impartial judicial authorities, to provide an effective remedy in the case of violations and to ensure its enforcement.

17. There is no *limitation* or other derogation, either express or implied, detracting from the efficacy of those provisions for the purpose of ensuring a foreign State's immunity. Were it otherwise, State immunity would, in substance and effect, virtually become State impunity, exercisable according to the will of another State. The question of any tension between State immunity and articles 2 (3) (c) and 14 (1) of the Covenant simply does not really arise. The reason is simple enough**:** there is nothing in international law on the immunity of a foreign State preventing a State Party to the Covenant and the Optional

[15] Advisory Opinion on The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Reports 2004, at paragraphs 109 and 110.

[16] Communications No. 52/1979, *Lopez Burgos v Uruguay*, Views adopted on 29 July 1981; No.56/1997, *Celiberti de Casariego v Uruguay*, Views adopted on 29 July 1981; No. 106/1981, Pereira Montero v. Uruguay, Views adopted on 31 March 1983.

[17] CCPR/CO/78/ISR, paragraph 11.

Protocol from itself satisfying the judgment of its judicial authorities and seeking compensatory reparation from the foreign State, in circumstances where the foreign State resists enforcement.

18. The exercise of power under Article 923 of the Code of Civil Procedure, in its inadequate present form, by the State party in the discharge of its obligations under international law towards another State cannot be at the expense of the victims of violations of their rights under a different set of obligations assumed by the State party towards human beings under its own protection and jurisdiction. The latter obligations are as much part of public interest as are its other international obligations. Article 923 of the Code of Civil Procedure contains no countervailing provisions requiring the State party itself to satisfy the remedy decided upon by its judicial authorities and to seek reparation from the relevant foreign State.

19. In our view, article 4 (2) of the Optional Protocol does contain provision enabling the Committee to ascertain whether a State party has provided a remedy with regard to the violations complained of in a communication directed against it by a victim. It is within the competence of the Committee to determine whether any remedy provided by the State party compensates, in a given set of circumstances, the violation of a victim's Covenant rights.

20. For the above reasons, it is clear to us that the State party has provided no effective remedy to the authors. Nor has it provided for a countervailing remedy in either Article 923 of its Code of Civil Procedure or elsewhere in its laws. Consequently, in our view, the State party has violated its obligations under Articles 14 (1) and 2(3) (c) of the Covenant towards the authors.

[*signed*] Mr. Rajsoomer Lallah

[*signed*] Mr. Lazhari Bouzid

[*signed*] Mr. Fabian Salvioli

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]