Jus Cogens vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the *Kalogeropoulou et al. v. Greece and Germany* Decision

By Kerstin Bartsch and Björn Elberling

A. Introduction

On 12 December 2002, the European Court of Human Rights (ECHR) declared inadmissible an application filed against Greece and Germany by 257 victims and relatives of victims of Nazi war crimes committed in Greece in 1944.[1] This decision was not only the latest of a number of ECHR decisions concerning the judicial treatment of Nazi war crimes committed during the Second World War,[2] but it also marked the second time that the Court had to deal with the question of whether states may rely on sovereign immunity in cases concerning breaches of peremptory and non-derogable *jus cogens* norms.

The first time that this question had been dealt with was on 21 November 2001, in the case of *Al-Adsani v. United Kingdom*,[3] where the Grand Chamber of the Court decided that Kuwait could rely on state immunity against a claim brought in the United Kingdom concerning acts of torture allegedly committed by a member of the Kuwaiti government. That judgment had been reached by the narrowest possible majority of nine votes to eight, with several forceful dissents by the minority judges.[4] The reception in the literature, on the other hand, was largely positive.[5] In

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[1] Eur. Court H.R., *Kalogeropoulou et al. v. Greece and Germany*, Admissibility Decision of 12 December 2002, available at: http://hudoc.echr.coe.int.

[2] *Cf.*, *e.g.*, Eur. Court H.R., *Sawoniuk v. United Kingdom*, Admissibility Decision of 29 May 2001, *Papon v. France*, Judgment of 25 July 2002, *Priebke v. Italy*, Admissibility Decisions of 5 April 2001 and 7 March 2002, all available at: http://hudoc.echr.coe.int.

[3] Eur. Court H.R., *Al-Adsani v. United Kingdom*, Judgment of 21 November 2001, available at: http://hudoc.echr.coe.int.

[4] *Id.*, Dissenting Opinion of Judges *Rozakis* and *Caflisch*, Dissenting Opinion of Judge *Ferrari Bravo*, Dissenting Opinion of Judge *Loucaides*.

[5] Christian Maierhöfer, *Der EGMR als „Modernisierer" des Völkerrechts? – Staatenimmunität und ius cogens auf dem Prüfstand*, 29 EUROPÄISCHE GRUNDRECHTEZEITSCHRIFT 391 (2002); Christian J. Tams, *Schwierig-*

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the *Kalogeropoulou* admissibility decision of 12 December 2002, the First Section of the ECHR, again by majority, confirmed the *Al-Adsani* judgment, holding that Greece had not violated the applicants' right of access to court by allowing Germany to rely on state immunity against civil enforcement proceedings in Greece.[6] This article will give a short overview of the facts and the several decisions of Greek courts [B], followed by a summary of the ECHR decision [C]. After a discussion of the question at the heart of the case, namely whether states are barred from relying on state immunity in cases of alleged violations of *jus cogens* [D], the article will close with an outlook on cases still pending before German courts [E].

B. The Background of the European Court Decision

I. The Underlying Facts: The Distomo Massacre of 10 June 1944

On 10 June 1944, SS occupation forces surrounded the Greek village of Distomo in the Voiotia region.[7] Moving from house to house, they cruelly and brutally killed 218 villagers, including infants.[8] They raped women and girls, destroyed civilian property, plundered and burned down houses.[9] These atrocities were claimed to have been an act of atonement for a raid of Greek resistance fighters on German SS soldiers that had taken place nearby Distomo the same day.[10] Eighteen SS soldiers had died in that gun-fight.[11] Such acts of retaliation were quite common, other villages where massacres were committed include, *inter alia*, Oradour, Kalivrita, Kommeno, Kephalonia, Lyngiades and Skines.[12]

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keiten mit dem Ius Cogens, 40 ARCHIV DES VÖLKERRECHTS 331 (2002); Markus Rau, *After Pinochet: Sovereign Immunity in Respect of Serious Human Rights Violations – The Decision of the European Court of Human Rights in the Al-Adsani Case*, 3 GERMAN LAW JOURNAL (GLJ) No. 6 (2002), available at: http://www.germanlawjournal.com/past_issues.php?id=160.

[6] Kalogeropoulou decision (note 1), Part 1.D.1.a. under the heading "*En Droit*".

[7] The perpetrators of the Distomo massacre belonged to the *Zweite Kompanie des Siebten SS-Polizei Panzergrenadier-Regiments* (Second Company of the Seventh SS-Police Armored Infantry Regiment).

[8] Areios Pagos, *Prefecture of Voiotia v. Federal Republic of Germany*, Case No 11/2000, Decision of 4 May 2000, excerpts reprinted (in German) in: 32 KRITISCHE JUSTIZ (KJ) 472, 475 (2000). For a summary and discussion of this judgment in English, see Maria Gavouneli/Ilias Bantekas, 95 AJIL 198–204 (2001).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] See the several books on the topic written by Hermann Frank Meyer and presented on his homepage at: http://www.hfmeyer.com/.

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II. Proceedings before the Greek Courts on the Applicants' Claims against Germany

1. Proceedings before the Court of First Instance of Leivadia

The first lawsuit against the Federal Republic of Germany – as the state continuing the legal personality of the German Reich[13] – was brought before a Greek Court in November 1995. The prefect of Voiotia, Ioannis Stamoulis, the former minister of justice, Georgios Mangakis, and several survivors and relatives of victims brought an indemnification claim before the Court of First Instance of Leivadia, based on willful murder and destruction of private property. The claimants sought compensation for the material and mental damage suffered.

In its judgment of 30 October 1997, the court decided in favor of the claimants.[14] It declared that it had jurisdiction in the case against a foreign sovereign state. The court reasoned that only *acta jure imperii* in contrast to *acta jure gestionis* enjoyed the privileges of immunity and that, according to international law, the classification of such acts was reserved for the forum state.[15] Referring to the judgment of the International Military Tribunal at Nuremberg, the court further held that a state violating *jus cogens* norms could not invoke sovereign immunity before the courts of the forum state.[16] The court stressed that such *jus cogens* obligations arise out of the law of belligerent occupation.[17] Therefore, it concluded that the Federal Republic of Germany could no longer rely on state immunity before the Greek Courts, because the suit arose out of war crimes that had been committed. Thus, Germany was ordered, *in absentia*, to pay civil damages to the claimants in an amount corresponding to approximately 28 million Euro.[18] Germany appealed against the decision.

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[13] German Federal Constitutional Court, Decision of 31 July 1973, 36 Decisions of the Federal Constitutional Court (BVerfGE), 1, 15 (*Grundlagenvertrag* Decision), English translation available at: http://www.ucl.ac.uk/laws/global_law/cases/german/bverfg/bverfg_31july1973.html.

[14] Court of First Instance of Leivadia, *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 137/1997, Judgment of 30 October 1997, excerpts reprinted in: 50 Revue Hellenique de Droit International 595–602. For an English summary and short discussion of the judgment, see Ilias Bantekas, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW (AJIL) 765–768 (1998).

[15] Leivadia judgment (note 14), 598; Bantekas (note 14), 766.

[16] Leivadia judgment (note 14), 599–600. The main arguments mentioned for this opinion were that by violating jus cogens, a state had tacitly waived its immunity (*cf. infra*, note 21), and that a state would furthermore be estopped from claiming state immunity in cases of breaches of jus cogens.

[17] Leivadia judgment (note 14), 599; Bantekas (note 14), 766.

[18] Bantekas (note 14), 765.

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2. Proceedings before the Areios Pagos

On appeal the suit was heard by the Hellenic Supreme Court, the *Areios Pagos*. In its decision of 4 May 2000, it affirmed and upheld the judgment of the Leivadia court.[19] The *Areios Pagos* denied Germany the right to rely on immunity for acts *jure imperii* in violation of *jus cogens* norms.[20] It reasoned that torts in breach of rules of peremptory international law cannot be claimed to be acts *jure imperii,* concluding that Germany, by breaching *jus cogens,* had tacitly waived its immunity.[21] In contrast to this reasoning, a strong dissenting opinion asserted that no such customary rule restricting sovereign immunity existed.[22] Nevertheless, the majority affirmed the court's jurisdiction and again ordered Germany to pay the sum fixed by the Leivadia court.[23] Germany, however, refused to make any payment.

III. Civil Enforcement Proceedings in Greece

Given Germany's refusal to comply with the judgments of the Greek courts, the applicants sought civil enforcement of the judgment. Pursuant to Art. 923 of the Greek Code of Civil Procedure, the Greek minister of justice must consent to the seizure of assets of a foreign country situated in Greece as part of the fulfillment of the terms of a judgment. [24] Although the minister of justice refused to consent to a seizure of German property in this case, the applicants nevertheless instituted en-

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[19] Areios Pagos decision (note 8), 476; Gavouneli/Bantekas (note 8), 198. For a further discussion of this judgment, see Christoph Schminck-Gustavus, *Nemesis: Anmerkungen zum Urteil des Areopag zur Entschädigung griechischer Opfer von NS-Kriegsverbrechen*, 33 KJ 111–117 (2001).

[20] Areios Pagos decision (note 8), 475–476; Gavouneli/Bantekas (note 8), 198.

[21] Gavouneli/Bantekas (note 8), 200. This argument was first brought up by Adam C. Belsky *et al.*, *Comment: Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CALIFORNIA LAW REVIEW 365 (1989). Although it has gained some support among American judges, it does not seem to be a very convincing argument for the limitation of state immunity in cases such as this one: While it is generally accepted that states may waive their immunity, the circumstances must be such that an implied waiver can be clearly inferred from the state's behavior. It would be far-fetched to claim that a state had implicitly waived its immunity in a case where it was obviously of great value for the state not to be sued before a foreign court. For a critique of the waiver argument, see also Matthias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v. Federal Republic of Germany*, 16 MICHIGAN JOURNAL OF INTERNATIONAL LAW (MICH. JIL) 403, 409, 414–415 (1995), Magdalini Karagiannakis, *State Immunity and Fundamental Human Rights*, 11 LEIDEN JOURNAL OF INTERNATIONAL LAW 9, 20–21 (1998).

[22] *Cf.* Gavouneli/Bantekas (note 8), 200.

[23] Areios Pagos decision (note 8), 476; Gavouneli/Bantekas (note 8), 198.

[24] *Kalogeropoulou* decision (note 1), under the heading "*En Fait*".

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forcement procedures. On 11 July 2000, a bailiff, after gaining access to the German Goethe Institute, began assessing the German property there.[25]

On 17 July 2000, Germany filed an objection to the enforcement proceeding before the District Court of Athens and applied for the suspension of the procedure. The District Court of Athens dismissed the objection; however, in further instances, both the Athens Court of Appeal and, on 28 July 2002, the *Areios Pagos* decided in favor of Germany.[26] Both courts held that the refusal to authorize the seizure of German property situated in Greece was lawful, not being an unjustified restriction of the victims' and relatives' right of access to court as secured by Art. 6 para.1 of the European Convention on Human Rights[27] and of the right of respect for their property established by Art. 1 of Additional Protocol No. 1 to the European Convention.[28] Already on 13 July 2000, 257 victims and relatives had brought an action concerning the enforcement proceedings before the European Court of Human Rights against the Federal Republic of Germany and against Greece.

IV. Final Judgment of the Greek Special Highest Court on the Applicant's Claims

On 17 September 2002, while the proceedings concerning the civil enforcement were still going on in Strasbourg, the Greek Special Highest Court, seized of the matter according to Art. 100 para. 1 lit. f of the Greek Constitution,[29] issued a final judgment on the merits of the applicant's claims against Germany.[30] By six votes to five, the Court decided that Germany enjoyed immunity without any restrictions or exceptions and therefore could not be sued before any Greek Civil Court for torts committed.[31] The Special Highest Court asserted a general norm of customary international law that rendered inadmissible any claim against a foreign state for torts committed by its armed forces.[32] After a discussion of relevant state practice and

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[25] *Id.*

[26] *Id.*

[27] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222 (hereinafter: European Convention).

[28] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS No. 9 (hereinafter: Additional Protocol).

[29] The Constitution of Greece of 1974, available at: http://www.hri.org/docs/syntagma/syntagma.html.

[30] Special Highest Court of Greece, *Federal Republic of Germany v. Miltiadis Margellos*, Case 6/17-9-2002, Decision of 17 September 2002, German translation on file with the authors.

[31] *Id.*, para. 14.

[32] *Id.*, para. 15.

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judgments of international courts, including the *Al-Adsani* judgment of the ECHR[33] and the *Arrest Warrant* judgment of the ICJ,[34] the Special Highest Court concluded, contrary to the assertions of the lower courts, that a norm of customary international law excluding certain acts from the law of state immunity does not (yet) exist.[35] A minority of five judges of the Court, also relying on state practice,[36] including the opinion of the minority in *Al-Adsani*,[37] held that such an exception did exist under customary law.[38] Nevertheless, the Court decided, according to the majority opinion, that there was no exception from jurisdiction under customary law.[39] This decision of the Special Highest Court is final and binding.

C. The Decision of the European Court of Human Rights of 12 December 2002

On 12 December 2002, the ECHR decided on the claims of the 257 applicants against Germany and Greece. In their suit against Greece the applicants claimed that the refusal of the minister of justice constituted an undue infringement of their right of access to court, as laid down in Art. 6 para. 1 of the European Convention, and their right to property established by Art. 1 of the Additional Protocol to the Convention. Furthermore, the applicants complained that their case concerning the enforcement proceedings had been examined, *inter alia,* by the president of the Court of Cassation who had previously considered the case in the course of the action for damages, thereby injecting impermissible partiality into the proceedings on appeal.[40] The applicants further claimed that Germany, by relying on state immunity, had also violated their right of access to court.[41]

[33] *Al-Adsani* judgment (note 3), paras. 60–66.

[34] ICJ, Case concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium), Judgment of 14 February 2002, para. 58, available at: http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm.

[35] Judgment of the Special Highest Court (note 30), para. 14.

[36] *Inter alia*, the minority referred to Arts. 11 and 31 of the European Convention on State Immunity of 16 May 1972, ETS No. 74, available at: http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm.

[37] *Cf.*, *supra*, note 4.

[38] Judgment of the Special Highest Court (note 30), para. 14 lit. [a] – [e].

[39] *Id.*, operative part.

[40] The consideration of this complaint is beyond the scope of this article. The ECHR decided that the applicants' fears were not objectively justified, accordingly it dismissed this complaint: *Kalogeropoulou* decision (note 1), Part 2.A. under the heading "*En Droit*".

[41] *Id.*, under the heading "*Griefs*", and Part 1.C. under the heading "*En Droit*".

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The Court found the applicants' claims to be manifestly ill-founded.[42] While the refusal of the Greek state to allow the applicants to enforce the *Areios Pagos* decision of 4 May 2000 was a restriction on their right of access to court, it was justified because it pursued the legitimate aim of observing international law in the interest of good relations between states through respect of other states' sovereignty.[43] Regarding the proportionality of the restriction, the court interpreted Art. 6 in light of other relevant norms of international law on state immunity. Referring to its own *Al-Adsani* judgment,[44] the Court declared that it was not yet established in international law that states may not invoke state immunity in cases concerning alleged violations of *jus cogens*.[45] Therefore, the Court held that the restriction of the applicants' right was in conformity with general international law, thus proportional and justified.[46] The claim based on Art. 1 of the Additional Protocol to the Convention was dismissed on similar reasoning.[47]

Finally, the Court stated that Germany had been in the position of a party in civil enforcement proceedings; it had not been in any position to juridically influence the decisions of the Greek courts.[48] Thus, Germany's reliance on state immunity before the Greek courts did not suffice to bring the applicants "within the jurisdiction" of the German state as required by Art. 1 of the European Convention.[49]

D. The Problem Revisited: On the Conflict between *Jus Cogens* Norms and State Immunity

As the summaries of the various court decisions show, the main legal question in this case was that of the relationship between state immunity on the one hand and *jus cogens* on the other. As stated above, this question had already been decided in favor of state immunity in the 2001 *Al-Adsani* decision, which, although it had produced a split in the Court, was subject to an almost unanimously positive reception

[42] *Id.*, Part 1.D.1.a. under the heading "*En Droit*".

[43] *Id.*

[44] *Al-Adsani* judgment (note 3), paras. 52–56, 66.

[45] *Kalogeropoulou* decision (note 1), Part 1.D.1.a. under the heading "*En Droit*".

[46] *Id.*

[47] *Id.*, Part 1.D.1.b. under the heading "*En Droit*".

[48] This does not, of course, mean that Germany had not been in a position to influence the Greek authorities through political means.

[49] *Id.*, Part 1.D.2. under the heading "*En Droit*".

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in the scholarly commentary.[50] This might be surprising at first, given the definition of *jus cogens* as norms from which no derogation is permitted and which, in a conflict of rules, trump every other rule of international law not of the same superior status.[51] It is generally accepted that the prohibition of certain war crimes, including the prohibition of murder against civilians, forms part of *jus cogens*.[52] Given that state immunity is not absolute but limited to certain acts of the state and that it may be derogated from in a variety of circumstances,[53] the logical conclusion seems to be that state immunity may *not* serve to bar the judicial enforcement of the *jus cogens* norm prohibiting certain war crimes. The supporters of the *Al-Adsani* decision put forward two main arguments enabling them to hold that state immunity is still not barred in such cases.

According to the first argument, there is no actual conflict of rules between the *jus cogens* norm allegedly violated and the reliance of states on state immunity before the courts. In international law, which knows no central law-making and law-executing authority, one must always distinguish between material rules and the ways in which these rules are enforced.[54] Thus, if a *jus cogens* rule prohibits a certain conduct, *e.g.* war crimes, this same rule still does not bar states from relying on state immunity before national courts in cases concerning war crimes, since state immunity only concerns the enforcement, not the material content of the *jus cogens* rule. As Professor Zimmermann explained: "[I]t seems to be more appropriate to consider both issues as involving two different sets of rules which do not interact with each other."[55]

The second argument, which had also been mentioned by one of the majority judges in *Al-Adsani*,[56] is of a largely political rather than legal character. It is feared that any denial of state immunity could potentially result in judicial chaos: States would potentially be subject to a very large number of civil claims for conduct that

[50] *Cf.*, *supra*, note 5. On the earlier decision of an American court in the *Princz* case, see Andreas Zimmermann, *Sovereign Immunity and Violations of International Jus cogens – Some Critical Remarks*, 16 MICH. JIL 433, 438 (1995). For a critical view of the *Al-Adsani* decision, see Alexander Orakhelashvili, *State Immunity and International Public Order*, 45 GERMAN YEARBOOK OF INTERNATIONAL LAW 227 (2002).

[51] *Cf.* Arts. 53 and 64 of the Vienna Convention on the Law of Treaties, 23 May 1969, 8 ILM 679 (1969).

[52] Stefan Kadelbach, ZWINGENDES VÖLKERRECHT 286, 307 (1992).

[53] Ian Brownlie, PRINCIPLES OF INTERNATIONAL LAW 343–344 (5th ed. 1998); Orakhelashvili (note 50), 234–241. See also Helmut Steinberger, *State Immunity*, in: Rudolf Bernhard (ed.), ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 428 *et seq.*, especially 429 (Installment 10, 1989).

[54] Maierhöfer (note 5), 397; Rau (note 5), para. 13; Zimmermann (note 50), 437–438.

[55] Zimmermann (note 50 438.

[56] *Al-Adsani* judgment (note 3), Concurring Opinion of Judge Pellonpää.

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had happened long ago;[57] in the end, one might fear, this might lead to a situation where the whole history of humanity would be unrolled before national courts. Even worse, such trials could take place before the courts of states not inclined to decide fairly with regard to the defendant state. In the words of Professor Maierhöfer: "An international order in which the judges of developing states sit in judgment over industrialized states or Arab judges over Israel – and *vice versa* –, enforcing their notion on the observance of international law – or at least of *jus cogens* –, hardly seems desirable."[58]

As will be discussed below, neither argument is fully convincing.

I. Conflict of Rules between Jus Cogens and State Immunity

The argument that there is no conflict of rules between *jus cogens* rules and state immunity hinges on the assertion that the relevant *jus cogens* norms contain *only* a material rule and do not concern themselves with the procedural enforcement of that material rule. This conception of *jus cogens* norms may not, however, simply be taken for granted. In fact, a procedural *jus cogens* rule could have evolved in one of two ways.

1. Separate Evolution of a Procedural Rule of Jus Cogens Character

First, even if traditional *jus cogens* norms like the prohibition of severe war crimes did not contain a procedural element, such a procedural enforcement rule could still have risen to *jus cogens* status on its own. This implies a two-step development. In a first step, states would have reached a consensus that, in order to guard fundamental interests of the international community, the prohibition in question must be considered non-derogable. In a second step, in order to better enforce these fundamental interests, they might have reached another consensus according to which state immunity may not be relied upon in some or all cases of violations of these prohibitive rules. As can be derived from Art. 53 of the Vienna Convention on the Law of Treaties (VCLT), the evolution of a *jus cogens* rule, which in general is of customary character, presupposes, apart from the elements of state practice and *opinio juris*, the conviction of the large majority of states that the rule concerned is of fundamental importance and that it may thus not be derogated from (*opinio juris cogentis*).[59]

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[57] Karl Doehring, *Staatenimmunität dient dem Rechtsfrieden*, FRANKFURTER ALLGEMEINE ZEITUNG of 11 September 2001, 10.

[58] Maierhöfer (note 5, 398 (translation by the authors).

[59] Peter Malanczuk, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 58 (7th ed. 1997).

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Much has been written in the literature to prove that, at least concerning civil proceedings, there is no such separate peremptory rule on the procedural enforcement of *jus cogens*,[60] and this is probably true. Although there have, in recent years, been several developments towards the acceptance by the international community that there can be no immunity against claims based on *jus cogens,* most of these developments have concerned the sphere of criminal trials.[61] In civil proceedings, however, there is no evidence of sufficient state practice or *opinio juris* for the procedural rule to have reached *jus cogens* character *on its own*.[62]

2. Procedural Jus Cogens Rule Contained in Material Jus Cogens Rule

However, there is another basis for holding that such a procedural *jus cogens* rule nevertheless exists. In the view of the present authors, it can be deduced in a straightforward manner from the very concept of *jus cogens* that the existence of a *jus cogens* rule on procedural enforcement follows from the peremptory character of the substantial rule. In other words: every *jus cogens* rule contains or presupposes a procedural rule which guarantees its judicial enforcement. This concept of *jus cogens* norms can actually be based on the very fact that is used as an argument against it by the prevailing view in the literature, namely the fact that there is no central authority watching over the execution and enforcement of international law.[63] It is this lack of a centralized enforcement mechanism that has led to the evolution of the concept of obligations *erga omnes,* a concept which is based on the notion that there are certain obligations "the violation of which is deemed to be an offence […] against all members of the international community."[64] This notion led to the establishment of a right of all states to take action against breaches of *erga omnes* rules, including the right to use reprisals.[65] This entails a departure from the general rule that only the state directly affected by the violation of an obligation may use reprisals – a rule which was set up to guard the sovereign equality of states and which runs parallel to the prohibition of intervention in the internal affairs of another state as laid down, *inter alia,* in the 1970 Friendly Relations Declara-

[60] See, among others, Tams (note 5, 345–348; Rau (note 5, paras. 15–16. This was also discussed broadly in the *Al-Adsani* judgment (note 3), paras. 60–66.

[61] The most important judgment in this respect was probably that of the British House of Lords, *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)*, Judgment of 24 March 1999, [2000] AC 147.

[62] *Supra*, note 60. See also *Al-Adsani* judgment (note 3), paras. 61–66.

[63] Malanczuk (note 59), 59.

[64] *Id.*

[65] *Id.*, 58 – 59.

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tion.[66] *Erga omnes* norms, accordingly, are subject to superior means of enforcement, which by necessity leads to a limitation of the sovereign equality of states.

The parallels to the case at hand are clear. Like the limitation of the right to use reprisals and the prohibition on intervention, state immunity serves the goal of securing the sovereign equality of states. *Jus cogens* norms, on the other hand, lay down prohibitions that are of fundamental importance for the state community as a whole. In fact, according to the prevailing view, all norms of *jus cogens* character also lay down obligations effective *erga omnes*.[67] This leads to the logical conclusion that the *jus cogens* character of a norm presupposes superior means of enforcement.[68] In other words: The material *jus cogens* rule also contains a procedural *jus cogens* rule prohibiting certain limits to its enforcement.[69] Accordingly, no state may rely on state immunity in cases concerning violations of *jus cogens* norms.[70]

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[66] GA Res. 2625 (XXV) of 24 October 1970.

[67] André de Hoogh, *The Relationship Between Ius Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective*, 42 AUSTRIAN JOURNAL OF PUBLIC INTERNATIONAL LAW 183, 193 (1989), referring to *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), Second Phase, ICJ Reports 1970, 3, para. 33.

[68] In a similar vein, Reimann (note 21), 421, proposing an amendment to the US Foreign Sovereign Immunities Act denying immunity for *jus cogens* violations, holds that violations of basic human rights are no longer a strictly internal matter of the state concerned and that a state, when violating *jus cogens*, "steps outside the boundaries drawn by the international community […]. It thus forfeits the privileges accorded to all members," including respect for its sovereign immunity. Similar also Orakhelashvili (note 50), 255–256.

[69] It should be clarified here that, of course, not every limit to the judicial enforcement of a *jus cogens* norm can be prohibited under this concept. Limits resulting from the very nature of a court trial, like *e.g.* requirements concerning the manner and the time in which parties have to present their case, *etc.*, would of course still be valid. State immunity, however, does not represent such a necessary limitation following from the nature of a court trial.

This can be confirmed by reference to the parallel case of reprisals against a violator of an obligation *erga omnes:* A third state wanting to use reprisals against the violating state, although not barred from doing so, would still have to abide by the procedural constraints of the law of reprisals, *i.e.* it would have to announce the reprisal in beforehand and would only be allowed to use measures proportional to the original violation.

[70] Another question relevant to the case at hand, due to the intertemporal character of international law, is whether the concept of *jus cogens* was already known in 1944 and whether the relevant prohibitions of war crimes were accepted as forming part of *jus cogens*. On this question, *cf.* on the one hand Zimmermann ((note 50), 437), according to whom the notion of *jus cogens* has only developed after the end of World War II, on the other hand Norman Paech (*Der Juristische Schatten der Wehrmachtsverbrechen in Griechenland*, Part 5.2, available at: http://www.hwp-hamburg.de/fach/fg_jura/dozentinnen/paech.htm), according to whom the Distomo massacer was a violation of prohibitions enshrined in the Hague Regulations of 1907, which already by that time were of underogable character, even though they were not yet given the designation of "*jus cogens*".

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The result that every *jus cogens* rule *ipso facto* contains a procedural element is further supported by parallels in the "multilateralization"[71] of state responsibility during the work of the International Law Commission (ILC). During the course of its work on the law of state responsibility, the ILC partly transformed this body of law.[72] Cumulative to the old bilateral concept of state responsibility, concerned only with relations between sovereign states, it introduced, first in 1979 under the title of "international crime", a multilateral dimension concerned with breaches of international law that concern the international community as a whole.[73] This concept, albeit under a different name, can still be found in the Final Version of the Draft Articles adopted in 2001.[74] And while under the 2001 Draft Articles, breaches of "peremptory norms"[75] or of "obligation[s] .. owed to the international community as a whole"[76] might not as such lead to any obligations of the violating state not already contained in the regular regime of state responsibility,[77] they do in fact lead to an expansion of the rights – and duties[78] – of other states to take action against the breach.[79] This shows that, also in the law of state responsibility, *jus cogens* norms are afforded superior means of enforcement.

II. On the Fear of "Judicial Chaos"

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[71] Linos-Alexander Sicilianos, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW (EJIL) 1127 (2002).

[72] The various steps on the road from bilateralism to multilateralism are retraced in the article by Marina Spinedi, *From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility*, 13 EJIL 1099–1125 (2002).

[73] *Id.*, 1115–1118.

[74] According to Eric Wyler, there has not been much of a substantial change between the concept of "crime" as contained in Art. 19 of the 1979 Draft Articles, and "serious breaches of obligations under peremptory norms of international law" as now contained in Art. 40: Eric Wyler, *From 'State Crime' to Responsibility for 'Serious Breaches of Obligations under Peremptory Norms of International Law'*, 13 EJIL 1147, 1159 (2002).

[75] Draft Articles on Responsibility of States for internationally wrongful acts, REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION, UN Doc. A/56/10, 43 (2001), Art. 40.

[76] *Id.*, Art. 48.

[77] Christian J. Tams, *Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State ?*, 13 EJIL 1161–1180 (2002).

[78] *Cf.* Draft Articles (note 75), Art. 41 paras. 1 and 2.

[79] Pierre-Marie Dupuy, *A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility*, 13 EJIL 1053, 1066 – 1081.

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As regards the fear of "judicial chaos", even if one accepts the basic principle that fundamental considerations of humanity should not be given more weight than rather theoretical considerations of *Realpolitik,* several counter-arguments come to mind. Concerning the fear that the courts of certain states could be used for frivolous cases against other states, this is not a very convincing argument against the proposed restriction of state immunity. First of all, the very concept of *jus cogens* presupposes a wide consensus of states that there may be no derogation from the rule concerned. Thus, no state may unilaterally declare that a certain rule forms part of *jus cogens.* This concept alone makes frivolous court cases hard to imagine. And in cases where a lack of consensus is not enough to keep states from adjudicating over other states, *i.e.* where the court case rests on political rather than legal reasons, the result of the case will hardly depend on what concept other states follow with regard to the procedural content of *jus cogens*. Secondly, judgments based on such a subjective and false understanding of *jus cogens* would not be enforceable in any other state of the world.[80]

The fear that states will never be able to "lay the past to rest" can be quieted in other ways than by cutting off court cases through the use of state immunity; namely through material rules on compensation for past injustices. Nothing bars states from entering into treaties granting certain amounts as effective reparations for damages done, in exchange for an agreement that further claims can only be brought if they are not covered by the relevant treaties.[81] Such agreements would also constitute an admission of responsibility for wrong-doing as well as an – albeit limited – compensation for the victims of *jus cogens* violations. Thus, with regard to achieving a state of affairs where the past can be "put behind us," such treaties would actually contribute far more than the simple blocking, through state immunity, of all efforts to gain restitution.

In the case of Germany and Greece, however, such a treaty does not exist. The German-Greek Treaty of 18 March 1960, according to which Germany was to pay the sum of 115 million DM to Greece as reparations for Nazi injustice, only covered victims of persecution for racial, religious or political reasons, but did not concern itself with the reparation for war damages.[82] This was confirmed by the German

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[80] Reimann (note 21), 423–425, also dismisses political arguments against a *jus cogens* exception as unconvincing.

[81] Following the Agreement on Reparation concluded between the Allied Powers at the Paris Conference on Reparation in 1946, the amount of compensation to be paid to Greece was fixed at 7.5 billion US$. *Cf.* Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, Paris, 14 January 1946, 555 UNTS 73.

[82] Bernhard Kempen, *Der Fall Distomo: griechische Reparationsforderungen gegen die Bundesrepublik Deutschland*, in TRADITION UND WELTOFFENHEIT DES RECHTS – FESTSCHRIFT FÜR HELMUT STEINBERGER 179, 188

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Foreign Ministry as recently as 1995, when a Distomo victim was advised that compensation of massacre victims did not fall under the heading of restitution for Nazi injustice, but under the heading of reparations.[83]

The question of reparations, which had been postponed until the formal entering into force of a peace treaty with Germany, is not finally solved. A formal peace treaty could be seen in the 1990 Treaty of Moscow, the so-called 2+4 Treaty.[84] However, this treaty did not regulate the question of reparations, at least not with regard to Greece. First of all, the question of reparations was not mentioned at all. Secondly, the 2+4 Treaty was only signed by the two German states and the four former Allied States, *i.e.* the Soviet Union[85], the United States, the United Kingdom and France. According to the *pacta tertiis* rule laid down in Art. 34 VCLT, the signatories could not settle the question of reparations with binding force for third states.[86] Therefore, since the question of reparations is not finally settled, there is nothing that could keep Greek (or other) victims of Nazi war crimes from seeking reparations in national courts.[87]

E. Conclusion and Outlook

This article has shown that one can reasonably hold, contrary to the prevailing opinion in the legal literature, that legal or political reasons do not call for allowing

footnote 35 (Hans-Joachim Cremer/Thomas Giegerich/Dagmar Richter/Andreas Zimmermann eds., 2002).

[83] Letter from the German Embassy in Athens to Argyris N. Sfountouris, 23 January 1995, as cited by Paech (note 70), text accompanying footnote 46.

[84] Treaty on the Final Regulation concerning Germany, Moscow, 12 September 1990, 29 ILM 1186 (1990), also available at: http://www.usembassy.de/usa/2plusfour8994e.htm.

[85] The treaty now applies to the Russian Federation as successor state of the Soviet Union.

[86] On the question of whether such claims may be barred due to *estoppel* because of the long time that has passed since the atrocities were committed or because Greece did not raise complaints after it gained knowledge of the content of the 2+4 Treaty, see Paech (note 70), Parts 4.1–4.2.

[87] In fact, before the passing of the German law creating the compensation foundation "Responsibility, Remembrance and Future," several victims of NS forced labor had pursued (and some are still pursuing) class action lawsuits against German firms before American courts. More information on this issue can be found in the various articles in Peer Zumbansen (ed.), NS-FORCED LABOR. REMEMBRANCE AND RESPONSIBILITY. LEGAL AND HISTORICAL OBSERVATIONS (2002). *Cf.* also GERMAN LAW JOURNAL CO-EDITOR, DR. PEER ZUMBANSEN, LEADS TRANS-ATLANTIC SEMINAR ON NAZI SLAVE LABOR COMPENSATION AT UNIVERSITY OF FRANKFURT, 2 GLJ No. 1 (2001), available at: http://www.germanlawjournal.com/past_issues.php?id=48.

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state immunity to bar claims concerning the violation of *jus cogens* norms.[88] The courts, however, remain divided on the issue. Like the Special Highest Court of Greece, which only decided in favor of state immunity by six votes to five, the European Court of Human Rights, while confirming the *Al-Adsani* judgment (itself a sharply divided decision), only did so by majority. This shows that there is a certain potential for a welcome change in the jurisprudence of the Strasbourg court. In Germany, the Federal Court of Justice will soon decide on the civil claims brought before German courts by several Greek war-crime victims.[89] The deliberation of the FCJ had been postponed in order to await the judgment of the Special Highest Court; now that the Greek court has decided in favor of state immunity, it is to be expected that the FCJ will decide against the claimants as well.

Meanwhile, members of the Mountaineers Division of the German *Wehrmacht* responsible for a large number of war crimes (not only in Greece) might, after aborted attempts in the 1970s, finally face criminal prosecution. After investigations into Nazi war crimes conducted by the Association of Victims of Prosecution by the Nazi-Regime[90] and other civil groups,[91] German authorities are considering reopening criminal investigations against several members of the division.[92] The Mountaineers division, which was integrated into the German *Bundeswehr* and whose "circle of companions"[93] includes Bavarian prime minister (and the Union Parties' 2002 Chancellor candidate) Edmund Stoiber, still meets every year near the Bavarian town of Mittenwald to conduct the "unassailable maintenance of its tradition."[94]

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[88] According to Tams (note 5), 331, the "idealistic concept" of *jus cogens* as proposed in this article, while preferable on a conceptual basis, does not fit the current legal practice; one should therefore follow the "pragmatic concept" of the ECHR majority.

[89] The oral hearing in the case III ZR 245/98 will be on 12 June 2003, *cf.* Bundesgerichtshof, Press Release 6/2003, Vorschau auf Entscheidungen des Bundesgerichtshofs in den nächsten Monaten des Jahres 2003, available at: http://www.bundesgerichtshof.de/

[90] Vereinigung der Verfolgten des Nazi-Regimes. The homepage of the VVN is available at: http://www.vvn-bda.de.

[91] *Cg., e.g.*, the proposal for a hearing under the title "*Angreifbare Traditionspflege*" to take part in June 2003, available at: http://www.nrw.vvn-bda.de/texte/hearing_angreifbare_tradpflege.htm.

[92] Ulrich Sander, *Nimmt Stoiber endlich die Hinweise der VVN-BdA ernst?*, ANTIFASCHISTISCHE NACHRICHTEN No. 24/2002, available at: http://www.antifaschistische-nachrichten.de/2002/24/sander.php.

[93] *Kameradenkreis*.

[94] The term „*unangreifbare Traditionspflege*" was coined by Stoiber himself, *cf.* http://www.wehrpolitik.com/noframe/onlineausgabe/rede_mp_abschl_app_1GD.html. *Cf.* also VVN-BdA, *Deckt Stoiber NS-Kriegsverbrecher?*, *Dokumentation*, available at: http://www.vvn-bda.de/bund/stoiber.htm.

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