European Court of Human Rights
Council of Europe

F-67075 Strassbourg - Cedex

28.8.2011 Az.: 1442/03MK

Sfountouris a. o. /. Germany
File number: 24120/06
Decision of 31 May 2011

Request for referral to the Grand Chamber

Dear Ladies and Gentlemen,

in the name of my clients, I request

to refer the above mentioned case to the Grand Chamber.

With the decision of 31 May 2011, the court rejected the appeal of 7 June 2006 as inadmissible. This decision is not accepted by the Applicants.

There are concerns about the impartiality of the court. Moreover, this decision has significant errors in fact and law. The decision has furthermore a great general significance that goes far beyond the case decided here.

1. The request to refer the case to the Grand Chamber is admissible.

According to Article 43 paragraph 1 of the ECHR, any party may apply within three months

from the date of the ruling referring the case to the Grand Chamber. The Applicants make use of this right.

This possibility of a referral request is given in the present case although the court's decision is not named a “verdict”. Article 43, p. 1 of the Convention must be interpreted in such a way that other decisions can also be refferable to the Grand Chamber.

Such an exeption is to be applied at least in this case. The court has not rejected the complaint because time limits or other formal admissibility requirements were not met. The court has made a substantive decision about whether the present-challenged decisions of German courts are a violation of provisions of the Convention or not. The fact that the violation was ultimately denied, would not necessarily lead to a decision on admissibility, but on the merits.

The Court itself has not declared that it considers the complaint under Article 35 paragraph 3 of manifestly unfounded or an abuse of rights. Therefore, it should not have dismissed the complaint as inadmissible, but at most in considering their lack of merits.

Indeed, the Court has indicated by its order dated 31 March 2009, that an intense legal scrutiny is considered necessary, taking into account the views of both parties. Otherwise it would not have been necessary, to offer the opportunity to the Applicants and explain their views referring to the objections of the supplement to the Federal Republic of Germany once more and more detailed. These facts speak clearly and unambiguously therefore, that the Applicants issue and the factual grounds for the violation of Convention rights which have been presented, required a detailed review and assessment in material terms. The argument of the Applicants can not be obviously unfounded or even to the extent legally be misused. It is not comprehensible, that a court finally after five years of examination finds the result that a complaint is inadmissible.

The court should have passed a verdict, the passing of a decision was not lawful. It is not permissible to deprive the complainants from the opportunity to appeal to the Grand Chamber, by not deciding trough a verdict without any reasoning.

2. Doubts about the impartiality of the court

Doubts about the impartiality of the court result primarily from the following circumstances:

The court's decision on the alleged inadmissibility of the appeal was obviously passed at 31 May 2011. The undersigned received it on 14 June 2011. On 22 June 2011 the undersigned received a notice from the Secretary of the Court, that the court on 31 May 2011 had decided to reject a connection of this case with the case No. 37937/07 (Lechouritou etc.). The request for consolidation had already been asked by the complainants on 10 October 2009.

The alleged decision of the Court dated 31 May 2011 so far did not reach the undersigned at all. The mere fact that a judicial decision is not even sent in the Original, but that the courts secretary delivers explanations about it, is astonishing. Decisions have to be sent in original by the court and not by a mere communication that such a resolution was adopted. Otherwise, a violation of a fundamental principle of a fair procedure would be given. The fact that one chamber of the European Court of Human Rights commits a violation of such basic procedural rules is of greatest concern.

The complainants have a right to learn, on what grounds the application for connection was rejected. However they still know nothing at all. This circumstance is a violation of the principle of a fair trial.
The undersigned then applied in writing to the court to send the file to his office. Then the secretary of the Chamber called the office of the undersigned saying that the file would not be sent out and could only be viewed on site. Furthermore it was said that the file contained only those documents the court hat already delivered.

From this point it must be concluded that a judicial decision on the application for the connection of the cases does not exist. Otherwise it had to be located in the file so that the undersigned had access to the documents at least through viewing the file.

3. Factual and legal errors of the Court

The court has established in its decision dated 9 June 2011 following erroneous postulates:

a. "The Court recalls that the convention imposes no specific obligation to the contracting states, to compensate wrong or damage caused by its predecessor state."

It is not clear why the court takes this approach to justify its decision. There is obviously no specific reference to this case.

The complainants have explicitly made clear that the base of their legal claims is substantive law, which already in 1944 had validity. They have based their claims on international law (Article 3 of the Hague Convention), and German law (Amtshaftung). The complainants demand no reparations, but rather individual compensation.

The reason for the liability of the Federal Republic of Germany is not merely the fact that the murder of the inhabitants Distomos and the destruction of their livelihoods (houses, shops, cattle) is an injustice in a moral sense. The reason is that German soldiers on 10 June 1944 have committed a war crime under the Hague Convention, which draws a mandatory obligation of such compensation.

The Military Tribunal of Nuremberg had in the case of the massacre of Distomo already established by order of 02/19/1948:

"This, too, was impeccable, calculated murder."

The condemnation of the accused Felmy was e.g. based on its responsibility for the massacre comitted in Distomo. It is inconceivable that the findings by the Court of Nuremberg are in question in this case.

It's not about the present case also, that the Federal Republic of Germany shall make compensation for damage caused by a predecessor State. All debts of the “Deutsches Reich” are debts of the Federal Republic of Germany. The Federal Republic of Germany itself never questioned this. It is totally inexplicable why the court could have even the slightest doubt of this fact.

By Article 5 paragraph 2 London Debt Agreement, which has also obtained approval for Greece (see notice v. 04.07.1956, BGBl II, p. 864) was

“an examination of claims arising from the Second World War, from states, which were at war with Germany or whose territory was occupied by Germany, and by nationals of these countries against the Reich and agencies acting on behalf of the Reich or persons ... until the final settlement of the reparations set aside. "

With this latest agreement, the Federal Republic of Germany had recognized that it is liable for all debts of the “Deutsches Reich”. Otherwise no grant to delay the payment would have been required.

In addition, the Federal Republic of Germany is not only seen as a legal successor of the “Deutsches Reich”, but always has claimed for itself "identity" or "partial identity". According to this the dominant view in the Federal Republic of Germany, the “Deutsches Reich” has never gone down in legal terms, but persisted even after the founding of the Federal Republic of Germany and the German Democratic Republic. These considerations need no elaboration here, however, because a transition of the debt of the “Deutsches Reich” to the Federal Republic of Germany was never in question by any West German government.

The postulate quoted by the court is not only wrong in every conceivable respect. It also shows the lack of impartiality of the court which obviously wants to absolve the offending state in any case of a liability, although Germany itself has not even put forward such an untenable argument.

Next, the Court explained:

b. "Taking into account all information available to it, the Court is of the opinion that it can not be claimed that the application and interpretation of national and international law on the part of the german judiciary is impaired by unreasonable and arbitrary considerations. The compensation claim of the applicants is based not on legal provisions, which proceed forth from the national or international law or from a court decision. The court concludes that the Applicants could have no legitimate expectation that they will receive compensation for damage suffered. "

This statement of the court is also incorrect. The ruling of the Court lacks a substantive debate with the contention of the complainants at this point.

The Respondent has violated the property rights of the Applicants under Article 1 of the first Additional Protocol of the ECHR. Property in the meaning of Article 1 of the Protocol are all subjective property rights, this also includes civil claims. The Applicants are entitled to civil claims against the Respondent. There is a secure legal base for these claims.

Due to the aformementioned events on 10 June 1944 in Distomo the applicants are entitled to damages and compensation from the Federal Republic of Germany on various legal aspects. The claims in question include claims arising from unlawful action as defined in international law, as well as claims arising from national law, on the basis of state liability pursuant to § 839 German Civil Code in conjunction with Art. 131 Weimar Constitution, on the basis of *enteig-*

nungsgleicher Eingriff (quasi-expropriation) and rights arising from *Aufopferung* (sacrificial encroachment in the narrow sense*)*.

The Applicants had a justified expectation that their rights vis-à-vis the Respondent, which had existed since 10th June 1944, would be upheld by German courts. The court argues that there cannot be a violation of property rights, as the German courts have not recognised the Applicants' claim for compensation. Here the court has fallen prey to an inadmissible circular argument. The violation of the law exists precisely in the fact that the German courts have dismissed the Applicants' lawsuits and denied their existing rights with scant regard for human rights provisions. The role of the Court is to correct such interpretations of the law by national courts as would breach human rights provisions. The Court has sovereignty in interpreting the EHRC, not the German courts.

Greek courts in the same case of Distomo had come to the conclusion that there are individual claims. The District Court of Levadia in the case 137/1997 in the verdict dated 30 october 1997 (Annex 26) has recognized claims for damages in the case of Distomo to the grounds and partly to the amount. It bases this decision on Article 3 of the Hague Convention and on Article 46 of the Hague Regulations (p. 13, 14 of the submitted translation here). Thus, the District Court of Levadia stresses that the claims can legitimately be brought to court by the concerned individuals and not only by the state whose citizens they are, as this right is not excluded through any rule of international law. This ruling was confirmed by the Areopagus, which held the decion upright after the revision of the Federal Republic of Germany.

As far as the Applicants rely on entitlements under international law, it is the same basic claim, which had already been recognized by the district court of Levadia. This circumstance refutes the premise of the Court, the applicants had no legitimate expectation of compensation. If Greek courts are fixing such claims, then how can German courts in the same situation come to different results?

The Federal Republic of Germany is legally obliged to ensure such claims and their enforcement within its territory in accordance with article 17 paragraph 3 a and section 4c in conjunction with Article 5 of the London Debt Agreement. This would have obliged the German courts to decide in the same way as it had been done by the Greek courts.

The Court has also ruled in contradiction to his own earlier decision of 12 december 2002 (case IV M - 4 C 69 / 2001 9470 / 2 - - 4 E (2077)). The court in that procedure, in which also the case of Distomo was concerned, had denied an ultimate violation of the Convention, but only on the admissibility of the restriction of the enforcement measures from the decision of the District Court of Levadia /Greece. But the terms of the Levadia verdict, according to which the Federal Republic of Germany has to pay compensation to the victims of the massacre in Distomo and their dependents, the court expressly did not question. In that decision the court (p. 11) says rather:

"It is not disputed that the applicants with the ruling of the District Court of Levadia (Az 137/1997) against the Federal Republic of Germany have aquired a final and private law claim required by the "concept of property" within the meaning of Article 1 of the first Additional Protocol ... "

Other questions on the existence of an interference with Article 1 of the first Additional Proto-

col and its proportionality, the Court then made statements on, would have been superfluous, if it wouldn´t have considered the Distomo verdict to be lawful. Herein lies an implicit recognition of an individual claim and its enforceability, which was found by the District Court of Levadia.

Finally, the court should have recognized that the decisions of German courts, including the Federal Court and the Federal Constitutional Court can be described as arbitrary. Unfortunately it seems the court has not given the evidence and arguments of the applicants no importance. We summarize these as follows:

The German courts did not only err in the final outcome of the rulings on individual rights of action. In particular the judgement by the German Federal Supreme Court (Annex 25, pp. 20-22) shows that this question was simply not addressed seriously. The Federal Court's examination of an individual right of action was limited to merely reproducing one single judgement from the German Federal Constitutional Court along with one single opinion from the literature on the subject. There was no analysis of the Hague Convention nor of the RLCW. The court did not consider the history of the Convention's development, the systematic approach underpinning it nor the intent and purpose of the Convention. This should have been evaluated in the light of all jurisprudence and literature on this issue, not just in Germany but worldwide.

Instead of doing this, the German Federal Supreme Court postulated without any evidence whatsoever that the alleged international law principle of an exclusive state entitlement to bring an action also applied to violation of human rights in the period 1943 to 1945. The Applicants did not have a right to insist that a court should address every argument. However the way in which the ruling was worded demonstrated that the German Federal Supreme Court had simply not considered the legal situation. The German Federal Supreme Court had allowed itself to be guided exclusively by the desired outcome. This in itself justifies the charge that the judgement was arbitrary.

In the light of the current understanding of the law, that means it has become inconceivable to continue to deny the existence of an individual claim pursuant to Art. 3 of the Hague Convention in conjunction with the provisions of RLCW. The German courts should also have applied this contemporary understanding of the law to the instant proceedings. The question of the right of action is solely a procedural matter, and thus current developments in the law can and must be incorporated into considerations *ipso iure*. It was an arbitrary application of the law in respect of the Applicants that the German courts did not do this and is hence in breach of human rights provisions.

The Applicants are also entitled to claims arising from German national legislation. **The Applicants can found their claims to rights arising from liability of the state on § 839 German Civil Code in conjunction with Art. 131 Weimar Constitution/Art. 34 Basic Law; these claims arose vis-à-vis the German Reich and the Federal Republic of Germany must assume responsibility for these as its legal successor.** The German Federal Supreme Court has also recognised as a general principle that the substantive preconditions of this foundation for claims are satisfied.

For the first time – in the instant Distomo proceedings – the German Federal Supreme Court has been seduced by the idea of declaring war an exclusionary ground generally in the context

of state liability. The German Federal Supreme Court thus arbitrarily applied law it had created itself and placed itself in the position of the legislator. In doing this, the German Federal Supreme Court infringed Art. 20 Sub-section 3 Basic Law by breaching the principle of the separation of powers. **The German Federal Supreme Court based its position on the legal views of the unconstitutional National Socialist state and thereby ignored the human rights order that exists in Europe today.**

The German Federal Supreme Court categorised the war as exceptional circumstances under international law, which according to the understanding of the law in 1944 to a large extent suspended the legal order applicable in peacetime. However, the form of words "the understanding of the law in 1944" reveals the attitude underlying this. Of course those in power in Nazi Germany did not wish to accept liability for their actions in keeping with the principle of state liability. They certainly could not have imagined that people they viewed as inferior would conceive of bringing an action against them for compensation. To that extent it is possible to concur with the German Federal Supreme Court's assumption.

It is however incomprehensible that a German court could imagine that the legal view adopted by Nazi Germany should be the yardstick for applying the law in 2003. Whatever the German authorities and the terror-based judicial system thought or wanted in 1944 should not merely be disregarded by courts in a democratically constituted state – the courts should distance themselves from such positions in every respect. However the German Federal Supreme Court and courts at all other levels of the system do not appear to be aware of the consequences of their line of argument. **The German courts have granted the Nazis posthumous authority to interpret the law concerning their crimes. The murderers may decide whether compensation will be granted to their victims.** This is the core of the scandal of the German Federal Supreme Court judgement, and this is what constitutes its arbitrary nature.

The understanding of the law in 1944 was so perverted in the Deutsches Reich that it would be a disgrace for any state governed by the rule of law if the supreme civil law court were to invoke this. The German Federal Supreme Court should therefore on no account have based its argument on the understanding of the law in 1944, but instead on the understanding of the law in 2003. The fact that it nevertheless took the 1944 legal view as its basis makes its judgement arbitrary and a breach of human rights.

§ 7 Reich Law on Liability of Civil Servants, quoted by the German Federal Supreme Court and the German Federal Constitutional Court, does not apply in cases of injustice contravening international law (c.f. LG Bonn, 1 U 134/92, ruling of 5.11.97, pp. 21 f); the general rules of international law take precedence, as applied in German law via Art. 25 Basic Law. The rule under Art. 3 Hague Convention takes precedence over domestic law pursuant to Art. 25 Basic Law, as this provision supersedes domestic law that stands in contradiction to it. Statutory law is subordinate to general provisions under international law (c.f. BVerfGE 23, 288 (316); 46, 342 (363)).

If from the outset a state such as the German Reich in the period 1933-1945 did not intend to comply with any international agreement or other provisions in international law for the protection of nationals of foreign states, then it may also not invoke the argument that its nationals are not protected from attacks by other states. There cannot be any arguments that justify protecting the criminal National Socialist state from claims invoked by victims of its policy of annihilation. The Federal Republic of Germany as successor state is also bound by this consideration.

International humanitarian law takes precedence over provisions such as the provision of § 7 RBHG. This also follows from the London Debt Agreement. It states:

"The Federal Republic of Germany will adopt legislation and take administrative measures necessary for the implementation of this Agreement and its annexes required, it will also change or repeal the legislation and administrative measures, which are incompatible with this Agreement and its annexes."

Thus it is clear that § 7 RBHG would have to be abolished and the courts are no longer allowed to apply this rule. Its subsequent application is a severe violation against the requirements of the London Debt Agreement, and thus of international law.

However in the contested judgement the German Federal Constitutional Court explained:

“The provision should not protect the German Reich against claims arising from specifically National Socialist injustice. There is no need here for a judgement on whether another yardstick should apply in addressing facts rooted in arbitrary considerations stemming from racial ideology. The events in Distomo should be qualified as subject-matter formally governed by provisions in international law on the conduct of war, and as subject-matter that does not arise from specifically National Socialist injustice and should therefore not be characterised as falling within the ambit of the separate provisions on compensation for National Socialist injustice. The nature and extent of retaliatory measures were often also contrary to international law in terms of the legal understanding at the time, but during the Second World War were also deemed even by the Allies to be fundamentally authorised. The inadmissible excess in retaliatory measures cannot therefore be categorised automatically as specifically National Socialist injustice, unless specific circumstances of racial ideology were the decisive factor. In the instant proceedings however there were no such particular circumstances that would constitute a sufficiently close connection between the violation of human rights suffered by the Applicants and NS ideology.”

The German Federal Constitutional Court did not explain what it believed constituted the excess. In its judgement it disregarded all the insights and legal principles developed in Nuremberg and in so doing also disregarded the attempt to make a new start after a period of barbarism unprecedented in human history. Given the extent of the atrocities in occupied Greece, referring in the Distomo case to an excessive form of a measure that was per se acceptable, is inadmissible given what was already known in 1948 in the civilised world.

So-called “atonement measures”, such as the Distomo massacre, were not directed specifically at people of a particular ethnic background or religion. However the massacre was carried out within the context of a policy towards the Greek population ordered by Hitler and his military commanders, which consciously disregarded legal provisions in general, not just international law. The massacres conducted across Europe with the same contempt for human life (e.g. also on 10th June 1944 in Oradour sur Glane in France or exactly two years earlier on 10th June 1942 in Lidice in Czechoslovakia) were a hallmark of the German Wehrmacht as it pillaged and murdered its way across Europe.

Keitel, head of the High Command of the Armed Forces, demanded in his “Order on combating bands” that no constraints be placed upon the German forces in killing people and destroying

property, emphasising that the most brutal means must be deployed and that all soldiers should be guaranteed general impunity and that it should be denounced as a “crime against the German people” if soldiers did not display the requisite ruthlessness in their actions (Annex 4).

The Distomo massacre was therefore no one-off gaffe by soldiers who had got out of control, but instead the consequence of a policy of military repression whilst occupying Greece. Systematic murder of the civilian populace was an integral component of the National Socialist occupation regime. It is misleading to attempt to draw finely nuanced distinctions between general contempt for human life expressed in the conduct of war by the National Socialists and race persecution. Both were inextricably linked to each other by the desire to annihilate of the German occupiers.

Be noted that the obligation to pay damages according to London Debt Agreement is not limited to typical Nazi crimes.

In the light of this, the German judiciary’s insistence on applying a provision that has long lapsed is a clear indication of the arbitrariness of its judgements. The German Federal Supreme Court and the German Constitutional Court have obviously been searching explicitly for any possible way out in order to avoid the liability that would exist if the letter of the law were applied. In this search they stumbled across § 7 Reich Law on Liability of Civil Servants. The German Federal Supreme Court was inventing war as an exclusionary ground suspending the german law of compensation and the international obligations towards compensation.

Retroactively applying the provisions of § 7 Reich Law on Liability of Civil Servants, which have long been repealed, to a case whose origins lay in the Second World War, runs contrary to international law and respect for human rights. It is in any event arbitrary that precisely this provision was purportedly not suspended during the war, whilst in the view of the German Federal Supreme Court all the other provisions of liability law were suspended.

This applies of course more so as Distomo is not the classic case of state responsibility for its officials misconduct. Rather, the crimes committed in Distomo were part of the German government and the High Command of the Armed Forces ordered occupation policy. It was therefore not an individual crime, but a state crime, which must draw a direct liability of the state by itself. A provision establishing an exception for indirect liability for state employees may not apply if the governance is the author of the crime. The result is a rather direct state liability.

It is in any event obvious that the German courts were guided exclusively by the political expectations of the Respondent in their rulings and not by the yardstick of the law.

4. Fundamental importance of the case

The case of Distomo and thus the pending proceedings are of fundamental importance here. This decision will determine whether foreign victims of Nazi crimes in the Federal Republic can sue Germany individually for compensation or not. As long as the court does not state that the decisions of German courts include a violation of the convention, victims are left without compensation.

A court ruling can only be in conformity with Human rights according to current standards if

the victims of crimes against humanity achieve the opportunity to individual action and the recognition of their respective claims for individual compensation in principle. The European Court of Human Rights therefore must recognize and enforce this principle based on the Hague Convention.

Martin Klingner
Lawyer

(in cooperation with Joachim Lau, Lawyer in Florence/Italy)