quaderni di

SIDIBlog

il blog della Società italiana di Diritto internazionale e di Diritto dell'Unione europea

Volume 1 • 2014

ISSN 2465-0927

L'Ucraina perde la Crimea • Gaza e il diritto internazionale • Il programma «OMT» della Banca centrale europea • Verso una codificazione europea del diritto internazionale privato? • Il parere della Corte di Giustizia dell'Unione europea sull'adesione dell'UE alla CEDU • Ordinamento italiano e consuetudine internazionale nella sentenza 238/2014 della Corte costituzionale • Il reato di negazionismo in Italia

editoriale scientifica

The European Court of Human Rights, Judicial Dialogue and General International Law in *Cyprus* v. *Turkey (Just Satisfaction)*

CESARE PITEA (*)

On 12 May 2014 the Strasbourg Court, sitting as a Grand Chamber, delivered the judgment on just satisfaction in *Cyprus* v. *Turkey*, the first of this kind in inter-State proceedings under Art. 33 of the European Convention on Human Rights. The Court awarded to the applicant State a substantial sum to compensate the material and moral damages suffered by two categories of Greek-Cypriot individual victims of violations of the Convention, i.e. the heirs of the forcibly disappeared and the enclaved inhabitants of Karpas peninsula. One may recall that in the judgment on the merits of 2001 the Grand Chamber had found several violations of the Convention by Turkey, arising out of the military occupation of northern Cyprus in 1974, the continuing division of the territory of Cyprus and the activities of the (still unrecognised) Turkish Republic of Northern Cyprus (TRNC). The finding that the lump sums awarded to Cyprus (€ 30.000.000 and € 60.000.000 € for the first and second group respectively) shall be distributed to the affected population (Judgment, para. 58) breaks a ground, indeed prepared by some precedents, and constitutes the most important, but not the only, contribution of the judgment to the development of general international law.

More generally, the judgment may be placed in a pattern of cases

(*) Università di Parma.

in which the Court draws extensively from general international law, relying heavily on the International Court of Justice (ICJ)'s jurisprudence to ascertain its content (see, recently, *Stichting Mothers of Srebrenica and Others* v. *the Netherlands*, especially at para. 158, and *Jones and others* v. *United Kingdom*, especially at para. 198). This dynamic is a key feature of the European Court's reasoning in the consideration of two questions of general relevance that are, at least to some extent, new.

The first, that I will only mention in passing, is of a procedural nature. The question is whether the Convention requires a timely submission of compensation claims, in view of the fact that more than 9 years elapsed between the judgment on the merits and the request of Cyprus for an award of damages. In answering to this argument, the Court looks at general international law as expressed by the ICJ in the *Phosphates in Nauru* case (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, Preliminary Objections, para. 31). This ICJ precedent is treated as evidence of a rule of general international law requiring timely judicial action by States. Nevertheless, the Court finds that Turkey (on which the burden of proof lay) failed to demonstrate that «the resumption of the examination of the applicant Government's claims would be prejudicial to their legitimate interests, as they should have reasonably expected this matter to come back before the Court at some point» (Judgment, para. 26), thus framing the inadmissibility for excessive delay within the broader concepts of reliance, acquiescence, and estoppel (see also the Concurring Opinion of judges Pinto de Albuquerque and Vučinić, para. 6).

The second issue is at the core of the Court's judgment and the specific focus of this comment. It addresses some fundamental questions about customary law on State responsibility, including reparation for the violation of *erga omnes partes* obligations owed to individuals in the field of human rights.

The Court had first to determine whether art. 41 ECHR on just satisfaction is applicable in inter-State cases. Here again, the Court evokes general international law. Although the Court warns that art. 41 is «*lex specialis* in relation to the general rules and principles of international law» (para. 42), it states that, as shown by the *travaux préparatoires*, the provision was intended to reflect «the principles of public international law relating to State liability» (*rectius* «responsibility») and that it «has to be construed in this context» (para. 40). Such principles are found in the jurisprudence of the World Court (*Factory at Chorzów*, p. 21; *Gabčikovo-Nagymaros Pro-*

ject (Hungary v. *Slovakia)*, para. 152; and *Fisheries Jurisdiction Case (Federal Republic of Germany* v. *Iceland)*, paras. 71-76, all cited by the Court at para. 41 of the judgment). On these premises, the finding that Art. 41 is indeed applicable in inter-State cases is based, taking into account the "specific nature" of the provision, on a thin textual element: the use of the expression «injured party» with a small «p», meaning any party to the actual proceedings before the Court. This element is, in the Court's view, sufficient to override the argument that Turkey inferred from the text of Rule 60 of the Rules of Court (see, Judgment, para. 38), a lower source in the hierarchy established by the Convention (*ibidem*, para. 42). As observed by two concurring judges, in this case «the teleological interpretation of the Convention reinforces the conclusion already imposed by the textual, historical and systemic construction of both the Convention and the Rules of Court» (Concurring Opinion of Judge Pinto De Albuquerque, joined by Judge Vučinić, para. 5).

Whether the abstract applicability of art. 41 ECHR may lead or not to an award of just satisfaction depends on the nature of the claim(s) brought by the applicant State (Judgment, para. 43).

If the Contracting Party complains *in abstracto* of a general failure by another Party to comply with the Convention, just satisfaction «may not be appropriate» (*ibidem*, para. 42), since in this case «the primary goal of the applicant Government is that of vindicating the public order of Europe within the framework of collective responsibility under the Convention» (para. 44, emphasis added).

On the other hand, if the application alleges tangible violations infringing on (conventional) rights of one or more individuals (who would also be entitled to file an individual application under Art. 34 ECHR), the function of the State's right to application under Art. 33 ECHR is described by the Court as being akin to the exercise of diplomatic protection (defined after the 2006 ILC Draft Articles on Diplomatic Protection, Art. 1, and the ICJ judgment in the case of *Ahmadou Sadio Diallo (Guinea* v. *Democratic Republic of the Congo)*, para. 39): an award of just satisfaction may thus be appropriate, «having regard to the particular circumstances of the case» (Judgment, para. 45) and provided that the claim relates to «sufficiently precise and objectively identifiable groups of people» (para. 47).

The reference to general international law resurfaces in the Court's reasoning concerning the determination of the beneficiaries of reparation. The Court states that «if just satisfaction is afforded in an inter-State case, it should always be done for the benefit of individual victims» (para. 46) and finds that the sum awarded «are to be

distributed by the applicant Government to the individual victims of the violations found in the principal judgment» (para. 58). This finding is based mainly on the object and purpose of the Convention. In fact, «according to the very nature of the Convention, it is the individual, and not the State, who is directly or indirectly harmed and primarily "injured" by a violation of one or several Convention rights» (*ibidem*). However, this innovative position reflects and strengthen a recent development of which the Court duly takes note, by referring to the recommendation that the injured State «[t]ransfer to the injured person any compensation obtained for the injury from the responsible State» (ILC Draft Articles on Diplomatic Protection, Art. 19) and to the *dictum* of the ICJ in the compensation judgment in the *Diallo* case, according to which «the sum awarded to [the applicant State] in the exercise of diplomatic protection of Mr. Diallo is intended to provide reparation for the latter's injury» (*Diallo (Guinea* v. *Democratic Republic of the Congo)*, para. 57). General international law is again used by the Court to provide a background and a sound basis for a finding taken on the basis of a "specificity" of the Convention. However, by entering in a line of successive authorities stating the same innovative principle, the Court's judgment may contribute to its further development, if not to its crystallisation.

The application of this principle is not immune from legal and practical challenges. At least three controversial issues may be identified. The first relates to the characterisation of a given claim as falling within either category. Indeed, the analogy with diplomatic protection of the claims relating to missing persons and inhabitants of the Karpas peninsula is not uncontroversial, as highlighted by some individual opinions (see, e.g., Dissenting Opinion Judge Karakaş and Partly Concurring and Partly Dissenting Opinion of Judge Casadevall). The second theme is the actual determination of the amount of just satisfaction and its function. Art. 41 ECHR provides that «just satisfaction» awarded by the Court must compensate lack of full «reparation» at the national level, thus implying that its amount is to be determined – on equitable basis – in relation to the actual pecuniary and non-pecuniary damage suffered by the victim (*Varnava and others* v. *Turkey*, para. 224). However, Judge Pinto de Albuquerque in his concurring opinion (paras. 12-19) extensively argues – with approval – that the compensation awarded in this specific case is in the nature of «punitive damages». Finally, the Court characterises the obligation to distribute the sums awarded as an obligation of result, leaving a great deal of discretion to the applicant State

as to the way of achieving it. This discretion is not however unfettered. In fact the obligation is to be discharged by putting in place an «effective mechanism», within a set time frame (18 months or the another appropriate delay established by the Committee of Ministers), and under the supervision of the Committee of Ministers (Judgment, para. 59).

So far I have tried to single out the general relevance of the judgment for what it says explicitly. However, the Judgment has also a more general bearing on the notion and functioning of *erga omnes (partes)* obligations. The Court seems to endorse a view of the action by Cyprus as not aimed at vindicating a violation of its own rights. This follows both from the classification of the claims – to which I have referred earlier –, as well as from the absence of reparation (e.g. in the form of satisfaction) to the possible damage suffered by Cyprus itself as a consequence of the violation. In turn, this circumstance may be considered a relevant element of practice in depicting the legal structure of obligations *erga omnes partes*, especially in the framework of human rights protection. In fact, the Court frames inter-State applications as aimed either at preserving the "collective interest" in compliance by any other Party with the contracted human rights obligations, or at exposing the violations suffered by identifiable individuals of their own rights under the Convention. In neither case the applicant State may claim compensation on its own. Human rights norms binding on a given State do not seem to be conceived as establishing obligations owed to each and every other contracting party individually. The possibility to invoke the responsibility of the wrongdoing State by other parties may thus be considered as founded in the recognition of a *legally protected interest* in ensuring compliance, rather than in the violation of a right of the complaining Party. This construction is in line with the approach taken by the ILC in Arts. 42 and 48 of the (final) Draft Articles on State Responsibility of 2001, as well as by the ICJ in the 2012 judgment in the *Habré* case (*Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, para. 68). The decision seems also to support the view that the State of nationality of the victim of a human rights violation may not be considered as «injured» in its own right as a specially affected State under Art. 42(b)(i) of the ILC Draft Articles on State Responsibility. Also with regard to the concept of *erga omnes* obligations the judgment of the Court, albeit not explicitly, consolidates a trend in the development of general international law in the field of State responsibility.

To sum up, the judgment is bound to become a very relevant

piece of international judicial practice in identifying the role played by general international law within the European human rights protection system. It confirms, if there was still any doubt, that the Convention, although providing for special rules on State responsibility in case of breach, cannot be regarded as a self-contained regime. It also highlights the continuing relevance of the European Court of Human Rights as a key judicial actor in developing general international law, notwithstanding the fact that the Court increasingly tends to identify general international with what the ICJ says it is.

26 May 2014