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“And now for something completely different” – Greece vs. Germany

Don't mention the war!

ANDREAS KULICK — 29 April, 2015



A response to [Ioannis Kalpouzos](#)

After sticking fingers – [fake, real or fake fake](#) – the latest chapter in the story between Germany and Greece recently has seen Greece [requesting the staggering amount of 278.7 billion EUR](#) of reparations for German perpetrations during World War II. As Ioannis Kalpouzos has pointed out in his [blogpost](#), there are basically two kind – the reparations for suffering inflicted on individuals, such as the massacre in Distomo, and the forced loan Germany (and Italy) extracted from the Bank of Greece during occupation in 1942. Accidentally – or not so accidentally – the total amount of the sum requested equals [more or less the entirety of the Greek national debt](#).

The reactions of the German government to Greece's constant requests over the years, in particular to pay back the forced loan, have always been similar: Don't mention the war! While we recognize the atrocities Germany committed during World War II, what you should do is focus on the present – your present problems and, not to forget, your present faults – and reform your country instead of lingering in the past. The context of the current haggling between the new Greek government and Greece's creditors over some kind of relief from the austerity measures the country has been subjected to since 2010 has prompted German Economy Minister and Vice-Chancellor Sigmar Gabriel to call the latest Greek requests nothing else but [“stupid”](#).

Indeed, in the current situation the Greek insistence on Germany's financial obligations stemming from WWII appears both calculated and ill-advised from a political point of view. However, Germany has constantly underestimated the Greek sensibilities with regard to suffering during WWII, with regard to infringing on Greek sovereignty by dictating austerity and reforms and with regard to the emotional amalgamation of these two dark chapters of Greek history. Like it or not, the [frequent Nazi comparisons in Greek media](#) are more than just the usual stupid (!) references pulled out by foreign tabloids at random occasions such as football matches. Rather, they also illustrate how much more the victims of World War II remember German atrocities than it is remembered here and how many parallels Greeks draw between Germany dictating terms in 1942 and having no choice but to adopt austerity measures seventy years later as

requested most prominently by the German government. Whether or not there are similarities with respect to German behavior during WWII and during the Eurozone crisis, the German government must take the blame for not being mindful enough of sensibilities any proud nation would have (including most certainly Germany).

"The Germans are disputing it!"

Looking at the battle of legal arguments over outstanding German reparations, one feels a bit like watching [Monty Python's Philosophers' Football match](#): After a long phase of contemplating on both sides, the Greeks hit the ball and score a goal, whereupon the Germans dispute reality based on philosophical concepts.

Similarly, Germany has not shied away from employing partly very questionable legal arguments to fend off Greek requests regarding the forced loan, on which I want to focus in this blogpost. In particular, the government argued that the [Agreement between Greece and Germany of March 18, 1960](#), whereby Germany agreed to pay the lump sum of 115 million Deutschmarks for acts of persecution committed against Greek citizens during World War II, dissolved with any further German obligations. This contention has apparently been dropped; and for good reason, since the Agreement is only concerned with perpetrations against individuals and not against the Greek state *per se*.

Another and more elaborate assertion pertains to the [2+4 Treaty](#). Here, the argument runs that this treaty was intended to constitute "the final settlement with respect to Germany" (preamble, 13th recital and also the official title of the treaty – "Treaty on the Final Settlement with Respect to Germany"), i.e. including reparations stemming from World War II that had been deferred pursuant to Article 5(2) of the [London Debt Agreement of February 27, 1953](#) (LDA). According to Germany, Greece consented to such "final settlement" by noting the 2+4 Treaty with "great satisfaction" in the [Charter of Paris for a New Europe of November 21, 1990](#). As is well-known and as I have argued [elsewhere](#), the *pacta tertiis* rule, which is established custom, generally prevents obligations being imposed on third states without their consent (Article 34 of the [Vienna Convention on the Law of Treaties](#), VCLT). As per Article 35 VCLT, such consent must be express and in writing. Obviously, the Charter of Paris constitutes a written text, but the signatories express their "great satisfaction" with respect to "the fact that the German people have united to become one State" by way of concluding the 2+4 Treaty. The term "final settlement" in the title and the preamble is indeed ambiguous and appears in the text of the Treaty without any further explanation or reference to the LDA or the issue of reparations in general. It is quite a stretch to assume that Greece, as a signatory of such a long and general statement such as the Charter of Paris, in one paragraph of a 29-pages document, by way of merely a reference to another treaty that itself only refers to the term "final settlement" without any further explanation, deliberately agrees to abandon all its claims deferred since 1953.

Moreover, it has been argued that, even if Greece did not consent to the 2+4 Treaty, this is of no matter as this treaty constitutes an objective regime, a "status treaty", whereby obligations can be created for third states. Of note, the [German Wikipedia page on the 2+4 Treaty](#) asserts that this treaty has precisely such effect. Since Arnold McNair (see [here](#) in particular and also in his earlier writings), the objective regime theory has always played a role in scholarly writings. However, practice supporting this notion – arguably with the exception of the [Åland Islands case](#) – is scarce to non-existent. Also, the practice that purportedly exists pertains to the specific status of a territory *per se*, which is not the case with regard to the 2+4 Treaty. Some authors even posit this specific link to territory as a constitutive element of a "status treaty" (e.g. E. Klein, *Statusverträge im*

Völkerrecht (Springer, 1980), p. 48). And Sir Humphrey Waldock's proposal ([ILC Yearbook 1964, Vol. II, pp. 32-33](#)) to include a reference to objective regimes in the Vienna Convention draft of the International Law Commission (ILC) did not make it in the final text – not least because eventually, as the vast majority of the ILC members noted in the subsequent deliberations on Waldock's draft Article 63 on objective regimes, it was entirely based on consent and thus superfluous in addition to the text of what became Articles 34 and 35 VCLT ([ILC Yearbook 1964, Vol. I, pp. 99 et seq. and 108](#)).

Further, with respect to extinctive prescription as also argued by the German government it would be hard to convince any court or arbitral tribunal that Greece has left the matter sitting for ages and now pulls it out of its hat. Rather the opposite is true, considering constant reminders of the Greek government, before and after 1990, that the issue of reparations, including the forced loan, remains an open issue, as [Ioannis](#) has mentioned.

Of course, all of this does not mean that Germany must pay Greece right away, lest that Greece can seize German assets to pursue its claims. First of all, if we are not convinced by the German line of argument the consequence is hardly an immediate payment obligation but rather that Article 5(2) of the London Debt Agreement is still ruling, as [Jasper Finke](#) has noted. In other words, the claims are still deferred and the parties still have to reach a "final settlement" concerning the forced loan. Secondly and a separate issue, Germany enjoys immunity from enforcement, unless the assets seized are used for commercial purposes only (which certainly is not the case with respect to the [Goethe Institute in Athens which is one prospect of seizure](#)). The recent [ICJ judgment in Germany v. Italy](#) is unequivocal in this regard (paras. 109-120) and, so I think, for good reason.

Don't mention – the law!

Hence, the solution eventually might be: Don't mention – the law! Of course, this is somewhat of a misnomer because law will continue to be mentioned quite extensively as a bargaining chip in the process of reaching an agreement. However, Germany and Greece will need to broker out a "final settlement" which can only be reached by a political agreement and not by a legal battle (and blame game). As long as Germany does not adequately acknowledge Greek suffering (in the past and – by way of acknowledging the suffering of the past – also the present suffering), this will be a never-ending story. This is not the right place to sketch out what such "final settlement" should look like but I contend it necessarily presupposes concessions and good will from both sides – which requires Greece to avoid any suspicion that it exploits such settlement to alleviate its present obligations.

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