



INTERNATIONAL COURT OF JUSTICE

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Press Release

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Jurisdictional Immunities of the State **(Germany v. Italy)**

Application for permission to intervene submitted by Greece

The Court grants Greece permission to intervene **in the proceedings as a non-party**

THE HAGUE, 15 July 2011. By an Order dated 4 July 2011, the International Court of Justice (ICJ), the principal judicial organ of the United Nations, granted the Hellenic Republic (hereinafter “Greece”) permission to intervene as a non-party in the case concerning Jurisdictional Immunities of the State (Germany v. Italy).

Whilst drawing the Court’s attention to certain considerations which would indicate that Greece’s Application did not meet the criteria set out in Article 62, paragraph 1, of the Statute of the Court, Germany had expressly stated that it did not “formally object” to this Application being allowed. Italy, for its part, had indicated that it did not object to the Application being granted.

In its Order, the Court first briefly described the factual context of Greece’s Application for permission to intervene. It recalled that, on 10 June 1944, during the German occupation of Greece, German armed forces had committed a massacre in the Greek village of Distomo, killing many civilians. It noted that a Greek court of first instance had rendered a judgment in 1997 against Germany and awarded damages to relatives of the victims of the massacre, and that that judgment had later been confirmed by the Hellenic Supreme Court in the year 2000, but that it had not been possible to enforce those two judgments in Greece because the Greek Minister for Justice had not granted the authorization required in order to enforce a judgment against a foreign State. The Court also observed that the claimants in the Distomo case had subsequently brought proceedings against Greece and Germany before the European Court of Human Rights but that, in 2002, the latter, invoking the principle of State immunity, had held that the claimants’ application was inadmissible. The Court recalled that the Greek claimants had then sought to enforce the judgments of the Greek courts in Italy and that the Italian court had held that the first Greek judgment (delivered in 1997) was enforceable in Italy.

In its Order, the Court subsequently declared that, in the judgment that it will render in the case concerning Jurisdictional Immunities of the State (Germany v. Italy), it might find it necessary “to consider the decisions of Greek courts in the Distomo case, in light of the principle of State immunity, for the purposes of making findings with regard to the third request in Germany’s submissions”. The Court concluded that this was sufficient to indicate that Greece had an interest of a legal nature which might be affected by the judgment in the case between Germany and Italy.

It should be recalled that the third request in Germany's submissions reads as follows: "that the Italian Republic . . . (3) by declaring Greek judgments based on [violations of international humanitarian law by the German Reich during World War II] enforceable in Italy, committed a further breach of Germany's jurisdictional immunity".

The Court made clear that where it permits an intervention, it may limit the scope thereof and allow intervention for only one aspect of the subject-matter of the application which is before it. Taking account of its conclusions regarding Greece's legal interest in the present case, the Court found that Greece could be permitted to intervene as a non-party "in so far as this intervention is limited to the decisions of Greek courts [in the Distomo case]", as referred to above.

In concrete terms, intervening as a "non-party" in the case concerning Jurisdictional Immunities of the State (Germany v. Italy) allows Greece to have access to the Parties' written pleadings and "to inform the Court of the nature of [its] legal rights and interests . . . that could be affected by the Court's decision in light of the claims advanced by Germany" in the principal proceedings. To this end, by the same Order, the Court fixed 5 August 2011 as the time-limit for the filing of the written statement of Greece, and 5 September 2011 as the time-limit for the filing of the written observations of Germany and Italy on that statement. The subsequent procedure was reserved for further decision. Article 85 of the Rules of Court provides, *inter alia*, that "[t]he intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention".

It should be noted that its non-party status denies Greece the possibility of asserting rights of its own in the context of the principal proceedings between the Parties (Germany and Italy), and that the judgment that the Court will render on the merits of the case will not be binding on Greece, whereas it will have binding force and be without appeal for the Parties.

Composition of the Court

The Court was composed as follows: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue; Judge ad hoc Gaja; Registrar Couvreur.

Judge Cançado Trindade appended a separate opinion to the Order of the Court; Judge ad hoc Gaja appended a declaration to the Order of the Court. Summaries of that opinion and that declaration are published below, as an annex to this press release.

Note: The Court's press releases do not constitute official documents. This press release is a concise summary of the decision taken by the Court, for information purposes only.

The history of the proceedings and a brief description of the factual context of Greece's Application for permission to intervene can be found in paragraphs 1 to 14 of the Order, the full text of which can be found in the "Cases" section of the website.

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. It was established by the United Nations Charter in June 1945 and began its activities in April 1946. The seat of the Court is at the Peace Palace in The Hague (Netherlands). Of the six principal organs of the United Nations, it is the only one not located in New York. The Court has a twofold role: first, to settle, in accordance with international law, legal disputes submitted to it by States (its judgments have binding force and are without appeal for the Parties concerned); and, second, to give advisory opinions on legal questions referred to it by duly authorized United Nations organs and agencies of the system. The Court is composed of 15 judges elected for a nine-year term by the General Assembly and the Security Council of the United Nations. It is assisted by the Registry, its international secretariat, whose activities are both judicial and diplomatic, as well as administrative. The official languages of the Court are French and English.

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Separate opinion of Judge Cançado Trindade

1. Judge Cançado Trindade, in his Separate Opinion, composed of five parts, begins by pointing out that, given the importance that he ascribes to the matters dealt with by the Court in the present Order, and those underlying it, he feels obliged to leave on the records his own examination of, and personal position on, the issues raised — as he perceives them — in the six documents relating to the proceedings before the Court concerning Greece's Application for permission to intervene (two submitted by the applicant State, Greece, and two presented by each of the two Parties in the main case before the Court, Germany and Italy — part I).

2. He next points out, as to Greece's Application for Permission to Intervene (part II), that, although Germany submitted that it did not formally object to it, it in fact substantially contradicted the grounds of Greece's purported intervention under Article 62 of the ICJ Statute. Italy, in turn, plainly stated that it had no objection to Greece's aforementioned Application. Greece made clear that it was not requesting to intervene as a party to the present case, but that it had in mind only clearly circumscribed aspects of the procedure, concerning decisions of its own domestic courts on claims pertaining to occurrences during the II World War, intended to be enforced by Italian Courts.

3. Greece's Application hinged on Italian Court decisions which inter alia rendered possible the enforcement in Italy of Greek Court decisions that had granted civil claim damages against Germany, pertaining to grave violations of human rights and international humanitarian law perpetrated by German troops in Greece, particularly in the Greek village of Distomo, during the II World War. Given the difficulties faced in Greece, the Greek nationals concerned sought recognition and enforceability of those decisions in Italy. Germany, for its part, is seeking, in the main case, a determination by the ICJ of what it considers a breach by Italy of its jurisdictional immunity.

4. Judge Cançado Trindade observes that the consent of the parties in the main case was not strictly or formally at issue in the cas d'espèce, and, in any case, such consent does not play a role in the proceedings conducive to the Court's decision whether or not to grant permission to intervene (part III). He upholds that State consent has its limits, and that the ICJ is not always restrained by State consent, in relation not only to intervention, but also in respect of other aspects of the procedure before the Court; the ICJ is not an arbitral tribunal.

5. Judge Cançado Trindade then proceeds to the more extensive part of his Separate Opinion, concerning the co-existence of rights of States and rights of individuals in the jus gentium of the XXIst century (part IV). As to the States' titularity of rights, he first reviews the decisions of Greek Courts, as referred to by Germany, namely: a) the judgment of 1997 of the First Instance Court of Livadia in the Distomo Massacre case; b) the judgment of 2000 of the Court of Cassation (Areios Pagos) in the same Distomo Massacre case; and c) the judgment of 2002 of the Greek Special Supreme Court in the Margellos and Others case.

6. He recalls, in this connection, that, in 1995, over 250 relatives of the victims of the massacre (of 1944) in the village of Distomo instituted proceedings against Germany before Greek Courts, claiming compensation for loss of life and property for acts perpetrated in June 1944 by German occupation forces (under the Third Reich) in Greece. On 25.09.1997, the First Instance

Court of Livadia found that a State cannot rely on immunity when the act attributed to it was perpetrated in breach of norms of jus cogens, and affirmed that a State committing such a breach had indirectly waived immunity. Accordingly, the Court of Livadia held Germany liable and ordered it to pay compensation to the relatives of the victims of the massacre of Distomo.

7. This judgment became object of enforcement proceedings in Italy, which Germany referred to in its pleadings in the case before the Court. In connection with jus cogens, the Court of Livadia expressly referred to the IV Hague Convention of 19.10.1907, Article 46 of the Regulations on the Laws and Customs of War annexed thereto, as well as to customary international law, and to the general principle of law ex injuria jus non oritur. Germany then brought the case before the Court of Cassation (Areios Pagos) in Greece, claiming immunity from the jurisdiction of Greek Courts. On 04.05.2000, the Court of Cassation found, in the Distomo Massacre case, that the Greek Courts were competent to exercise jurisdiction over the case.

8. On the substantive law, the Court held first that State immunity is a generally accepted rule of international law, and is part of the Greek legal order. The Court of Cassation held that immunity is tacitly waived whenever the acts at issue are performed in violation of jus cogens norms (again referring to Article 46 of the Regulations on the Laws and Customs of War Annexed to the IV Hague Convention of 1907). The Areios Pagos also held, in the Distomo Massacre case, that an exception to the immunity rule should apply when the acts for which compensation was sought (especially crimes against humanity) had targeted individuals in a given place who were neither directly nor indirectly connected with the military operations; moreover, immunity was tacitly waived whenever such acts, as already indicated, were in breach of jus cogens.

9. Parallel to that, proceedings in a similar but yet another case (the Margellos and Others case) were also on-going before Greek courts. The Court of Cassation referred the Margellos and Others case to the Greek Special Supreme Court, which, by a majority of six votes to five, held, on 17.09.2002, inter alia, that, under customary international law, a foreign State continued to enjoy sovereign immunity in respect of a tort committed in the forum State irrespective of whether the conduct at issue violated jus cogens norms or whether the armed forces were participating in an armed conflict. As a result of that, the effect of the latter Special Supreme Court judgment in the Margellos case, was essentially to overrule the judgment of the First Instance Court of Livadia awarding compensation to the plaintiffs, as confirmed by the Court of Cassation in the same case.

10. Still dwelling on the question of States as titulaires of rights, the approaches by Germany and Greece are next reviewed by Judge Cançado Trindade, who upholds the view that it could hardly be denied that the question of the enforceability of judgments of a State's Judiciary, which is part and parcel of the State concerned, conforms an interest of a legal nature of that State, for the purposes of its purported intervention in international litigation. This is so, even if the ultimate beneficiaries of the enforcement of those judgments are individuals, human beings, nationals of that State. An interest relating to the enforcement (abroad) of judicial decisions can only be qualified as an interest of a legal nature, and not of another kind or of a distinct nature.

11. Judge Cançado Trindade then moves on to his considerations as to the individuals' titularity of rights, — an issue raised in the present proceedings by Germany itself. In this respect, he regrets that Italy's counter-claim in the present case was dismissed by the Court (in its Order of 06.07.2010), with his Dissenting Opinion. His understanding is that claims as to rights which are

inherent to human beings (such as, in the ambit of that counter-claim, the right to personal integrity, not to be subjected to forced labour) cannot be waived by States by means of inter-State agreements; there can be no tacit or express waiver in that respect, as the rights at stake are not rights of States, but of human beings.

12. As to Greece's Application for permission to intervene, he recalls: a) the legacy of the individual's subjectivity in the law of nations; b) the individual's presence and participation in the international legal order; c) the rescue of the individual as subject of international law; and d) the historical significance of the international subjectivity of the individual. Judge Cançado Trindade sustains that human beings effectively possess rights and obligations which emanate directly from International Law, with which they find themselves in direct contact. There is nothing intrinsic to International Law that impedes or renders such direct contact impossible.

13. To him, it is perfectly possible to conceptualize as subject of International Law any person or entity, titulaire of rights and bearer of obligations, which emanate directly from norms of International Law. Such is, in his understanding, the case of human beings, who have thus fostered and strengthened their direct contact — without intermediaries — with the international legal order. The reassuring expansion of both international legal personality and accountability ensue therefrom. The idea of absolute State sovereignty, — which led to the irresponsibility and the alleged omnipotence of the State, not impeding successive atrocities against human beings (such as the massacre of Distomo, of 10.06.1944), — appeared with the passing of time entirely unfounded.

14. Judge Cançado Trindade adds that the advent of the juridical category of the international legal personality of individuals, — bearing witness of the historical process of humanization of international law, — came to fulfil one of the necessities of the international community, precisely one which appeared with prominence, namely, that of providing protection to the human beings who compose it, in particular those who find themselves in a situation of special vulnerability. It has lately become clear that State immunity is not a static concept, tied up immutably to its historical origins, but that it also readjusts itself within the evolving conceptual universe of contemporary jus gentium.

15. This evolution, — contributing ultimately to the rule of law at national and international levels, — is to be appreciated in a wider dimension. In Judge Cançado Trindade's outlook, the Court has now before itself a case concerning the jurisdictional immunities of the State, with repercussions to all titulaires of rights, States and individuals alike. This is a case which has a direct bearing on the evolution of International Law in our times. In his view, there is no reason for keeping on overworking the rights of States while at the same time overlooking the rights of individuals. One and the other are meant to develop pari passu in our days, attentive to superior common values. State immunity and the fundamental rights of the human person are not to exclude each other, as that would make immunity unacceptably tantamount to impunity.

16. Part V of the Separate Opinion of Judge Cançado Trindade is devoted to the resurrectio of intervention in contemporary international litigation. He notes that in the ambit of the circumstances of the present case, intervention has at last seen the light of the day. This is reassuring, — he adds, — as the subject-matter of the cas d'espèce is closely related to the evolution of International Law itself in our times, being of relevance, ultimately, to all States, to the international community as a whole, and, in his perception, pointing towards an evolution into a true universal international law. In his view, the Court's decision, in the present Order, to grant to Greece permission to intervene, gives a proper expression to the principle of the sound administration of justice (la bonne administration de la justice) in the context of the cas d'espèce.

17. Judge Cançado Trindade concludes that one cannot approach a matter like that of the jurisdictional immunities of the State, in circumstances such as the present ones (having as factual origin grave breaches of human rights and international humanitarian law), from a strictly inter-State dimension. In the present proceedings before the Court, consideration has duly been given to States as titulaires of rights, as well as to individuals as titulaires of rights. The resurrectio of intervention in such circumstances may come to satisfy the needs not only of the States concerned, but of the individuals concerned as well, and ultimately of the international community as a whole, in the conceptual universe of the new jus gentium of our times.

Declaration of Judge ad hoc Gaja

One can well understand the Greek Government's wish to be involved in a discussion on the jurisdictional immunity of foreign States with regard to claims by individuals who suffered from infringements of international humanitarian law during belligerent occupation. However, the only opportunity provided by the Statute and Rules for a State which is not a party to the proceedings to express its views is to intervene. The State is required by the Statute to have an interest of a legal nature which may be affected by the decision in the case. The interest in question must exist according to international law. In the absence of any rule of international law providing for the enforcement of the relevant Greek judgments in Italy, Greece cannot be said to have an interest of a legal nature in seeing the Greek judgments enforced in Italy. The question whether, by making the Greek judgments enforceable in Italy under its domestic law, Italy breached an obligation towards Germany is a matter which concerns only Germany and Italy.
