

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

JURISDICTIONAL IMMUNITIES
OF THE STATE

(GERMANY *v.* ITALY)

APPLICATION BY THE HELLENIC REPUBLIC
FOR PERMISSION TO INTERVENE

ORDER OF 4 JULY 2011

2011

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

IMMUNITÉS JURIDICTIONNELLES
DE L'ÉTAT

(ALLEMAGNE *c.* ITALIE)

REQUÊTE DE LA RÉPUBLIQUE HELLÉNIQUE
À FIN D'INTERVENTION

ORDONNANCE DU 4 JUILLET 2011

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JURISDICTIONAL IMMUNITIES
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(GERMANY v. ITALY)

APPLICATION BY THE HELLENIC REPUBLIC
FOR PERMISSION TO INTERVENE

ORDER

Present: President OWADA; Vice-President TOMKA; Judges KOROMA, AL-KHASAWNEH, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CAÑADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE; Judge ad hoc GAJA; Registrar COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 48 and 62 of the Statute of the Court and to Articles 81, 83, 84 and 85 of the Rules of Court,

Having regard to the Application filed by the Federal Republic of Germany (hereinafter “Germany”) in the Registry of the Court on 23 December 2008 instituting proceedings against the Italian Republic (hereinafter “Italy”) in respect of a dispute originating in “violations of obligations under international law” allegedly committed by Italy through its judicial practice “in that it has failed to respect the jurisdictional immunity which . . . Germany enjoys under international law”,

Having regard to the Order of 29 April 2009, whereby the Court fixed the time-limits for the filing of the Memorial of Germany and the Counter-Memorial of Italy,

Having regard to the Memorial filed by Germany and the Counter-Memorial filed by Italy within the prescribed time-limits,

Having regard to the counter-claim submitted by Italy in its Counter-Memorial “with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich”,

Having regard to the Order of 6 July 2010, whereby the Court decided that the counter-claim presented by Italy was inadmissible as such under Article 80, paragraph 1, of the Rules of Court, authorized Germany to submit a Reply and Italy to submit a Rejoinder, and fixed the time-limits for the filing of those pleadings,

Having regard to the Reply filed by Germany and the Rejoinder filed by Italy within the prescribed time-limits,

Makes the following Order:

1. Whereas, by a letter dated 13 January 2011 and received in the Registry on the same day, the Ambassador of the Hellenic Republic to the Kingdom of the Netherlands, referring to Article 62 of the Statute of the Court, submitted an Application for permission to intervene in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy)*; whereas, by that same letter, he informed the Court that Mr. Stelios Perarakis had been appointed as Agent;

2. Whereas, in its Application, the Hellenic Republic (hereinafter “Greece”) states that “its intention is to solely intervene in the aspect of the procedure relating to judgments rendered by its own (domestic Greek) Tribunals and Courts on occurrences during World War II and enforced (*exequatur*) by the Italian Courts”; whereas Greece notes that the purpose of its intervention is to inform the Court of its legal rights and interests so that these may remain “unfettered and unaffected as the Court proceeds to address the questions of jurisdictional immunity and international responsibility of a State, as put before it by the Parties (litigants) to the case”;

3. Whereas, in its Application, Greece makes the following request: “Greece respectfully requests the Court to permit its intervention in the proceedings between Germany and Italy for the object and purpose specified above and to participate in those proceedings in accordance with Article 85 of the Rules of Court”;

4. Whereas, in accordance with Article 83, paragraph 1, of the Rules of Court, the Registrar, by letters dated 13 January 2011, transmitted certified copies of the Application for permission to intervene to the Government of Germany and the Government of Italy, which were informed that the Court had fixed 1 April 2011 as the time-limit for the submission of their written observations on that Application; and whereas, in accor-

dance with paragraph 2 of the same Article, the Registrar also transmitted a copy of the Application to the Secretary-General of the United Nations;

5. Whereas Germany and Italy each submitted written observations within the time-limits thus fixed; whereas the Registry transmitted to each Party a copy of the other's observations, and copies of the observations of both Parties to Greece; whereas Germany, while drawing the Court's attention to certain considerations which would indicate that Greece's Application for permission to intervene did not meet the criteria set out in Article 62, paragraph 1, of the Statute, expressly stated that it did not "formally object" to this Application being granted and that it left it to the Court to assess the admissibility thereof as it saw fit; and whereas Italy indicated that it did not object to the Application by Greece being granted and emphasized that it was for the Court to decide whether the requirements under Article 62, paragraph 1, of the Statute had been fulfilled;

6. Whereas, in light of Article 84, paragraph 2, of the Rules of Court, and taking into account the fact that neither Party filed an objection, the Court decided that it was not necessary to hold hearings on the question whether Greece's Application for permission to intervene should be granted; whereas the Court nevertheless decided that Greece should be given an opportunity to comment on the observations of the Parties and that the latter should be allowed to submit additional written observations on the question; whereas it fixed 6 May 2011 as the time-limit for the submission by Greece of its own written observations on those of the Parties, and 6 June 2011 as the time-limit for the submission by the Parties of additional observations on Greece's written observations; whereas the observations of Greece and the additional observations of the Parties were submitted within the time-limits thus fixed; and whereas the Registry transmitted to each Party a copy of the other's additional observations as well as the observations of Greece, and copies of the additional observations of both Parties to Greece;

* * *

7. Whereas Germany presented the following claims in its Application instituting proceedings against Italy:

"Germany prays the Court to adjudge and declare that the Italian Republic:

- (1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945, to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

- (2) by taking measures of constraint against ‘Villa Vigoni’, German State property used for government non-commercial purposes, also committed violations of Germany’s jurisdictional immunity;
- (3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany’s jurisdictional immunity.

Accordingly, the Federal Republic of Germany prays the Court to adjudge and declare that:

- (4) the Italian Republic’s international responsibility is engaged;
- (5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany’s sovereign immunity become unenforceable;
- (6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above”;

whereas, in its Memorial, Germany presented its submissions in the same form as the claims set out in its Application; whereas Germany confirmed its submissions in its Reply; and whereas Italy requested that “the Court adjudge and declare that all the claims of Germany are rejected”;

* * *

8. Whereas, at the outset, it is necessary briefly to describe the factual context relating to the Application of Greece for permission to intervene;

9. Whereas, on 10 June 1944, during the German occupation of Greece, German armed forces committed a massacre in the Greek village of Distomo, killing many civilians; whereas the Greek Court of First Instance (*Protodikeio*) of Livadia rendered a judgment in default on 25 September 1997 (and read out in court on 30 October 1997) against Germany and awarded damages to relatives of the victims of the massacre; whereas that judgment was later confirmed by the Hellenic Supreme Court (*Areios Pagos*) on 4 May 2000; whereas these judgments, however, could not be enforced in Greece because of the lack of authorization of the Greek Minister for Justice, which is required under Article 923 of the Greek Code of Civil Procedure in order to enforce a judgment against a foreign State;

10. Whereas the claimants in the *Distomo* case brought proceedings against Greece and Germany before the European Court of Human Rights alleging that Germany and Greece had violated Article 6, para-

graph 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol No. 1 to that Convention by refusing to comply with the decision of the Court of First Instance of Livadia dated 25 September 1997; whereas, in its decision of 12 December 2002, the European Court of Human Rights, referring to the principle of State immunity, held that the claimants' application was inadmissible;

11. Whereas the Greek claimants sought to enforce the above judgments of the Greek courts in Italy; whereas the Court of Appeal of Florence (*Corte di Appello di Firenze*) held in a decision dated 2 May 2005 (registered on 5 May 2005) that the order contained in the judgment of the Hellenic Supreme Court, imposing an obligation on Germany to reimburse the legal expenses for the judicial proceedings in Greece, was enforceable in Italy; whereas, in a decision dated 6 February 2007 (registered on 20 March 2007), the same Court rejected an appeal brought by the German Government against the decision of 2 May 2005; whereas the Italian Supreme Court (*Corte Suprema di Cassazione*), in a judgment dated 6 May 2008 (registered on 29 May 2008), confirmed the ruling of the Court of Appeal of Florence;

12. Whereas, concerning the question of reparations to be paid to Greek claimants by Germany, the Court of Appeal of Florence declared, by a decision dated 13 June 2006 (registered on 16 June 2006), that the judgment of the Court of First Instance of Livadia dated 25 September 1997 was enforceable in Italy; whereas, in a judgment dated 21 October 2008 (registered on 25 November 2008), the Court of Appeal of Florence rejected an appeal brought by the German Government against the decision of 13 June 2006; whereas the Italian Supreme Court, in a judgment dated 12 January 2011 (registered on 20 May 2011), confirmed the ruling of the Court of Appeal of Florence;

13. Whereas, on 7 June 2007, the Greek claimants, pursuant to the decision by the Court of Appeal of Florence of 13 June 2006, registered with the Como provincial office of the Italian Land Registry a legal charge (*ipoteca giudiziale*) over Villa Vigoni, a property of the German State near Lake Como; whereas the State Legal Service for the District of Milan (*Avvocatura Distrettuale dello Stato di Milano*), in a submission dated 6 June 2008 and made before the Court of Como (*Tribunale di Como*), maintained that the charge should be cancelled; whereas proceedings are currently pending;

14. Whereas, following the institution of proceedings in the *Distomo* case in 1995, another case was brought against Germany by Greek nationals before Greek courts — referred to as the *Margellos* case — involving claims for compensation for acts committed by German forces in the Greek village of Lidoriki in 1944; whereas, in 2001, the Hellenic Supreme Court referred that case to the Special Supreme Court (*Anotato Eidiko Dikastirio*), requesting it to decide whether the rules on State immunity covered acts referred to in the *Margellos* case; whereas, by a decision of 17 September 2002, the Special Supreme Court found that, in the present

state of development of international law, Germany was entitled to State immunity;

* * *

15. Whereas, in accordance with Article 81, paragraph 2 (a), of the Rules of Court, the State seeking to intervene under Article 62 of the Statute shall set out the interest of a legal nature which it considers may be affected by the decision in the case to which its Application relates;

* *

16. Whereas, in its Application, Greece states that its interest of a legal nature derives from the fact that Germany “has acquiesced to, if not recognized, its international responsibility vis-à-vis Greece” for all acts and omissions perpetrated by the Third Reich on Greek territory during the Second World War; whereas, however, in its written observations, Greece no longer relies on Germany’s purported recognition of its international responsibility vis-à-vis Greece to define its interest of a legal nature; whereas, in its Application, Greece refers to the claim made by Germany that Italy committed a breach of Germany’s jurisdictional immunity by declaring Greek judgments based on violations of international humanitarian law by the Third Reich during the Second World War enforceable in Italy; whereas Greece more generally underlines the importance of a decision of the Court on “State immunity” and “State responsibility”;

17. Whereas, in its written observations, in order to establish its interest of a legal nature, Greece states that the Court, in the decision that it will be called upon to render in the case between Germany and Italy, will rule on the question whether “a judgment handed down by a Greek court can be enforced on Italian territory (having regard to Germany’s jurisdictional immunity)”; whereas Greece, in this regard, refers to the judgment of the Court of First Instance of Livadia, a Greek judicial body, in the *Distomo* case; whereas Greece points out that “a Greek judicial body and Greek nationals lie at the heart of the Italian enforcement proceedings”; whereas, according to Greece, it follows that the decision of the Court as to whether Italian and Greek judgments may be enforced in Italy is directly and primarily of interest to Greece and could affect its interest of a legal nature;

18. Whereas, in its written observations, Greece also expresses its wish to inform the Court “on Greece’s approach to the issue of State immunity, and to developments in that regard in recent years”; and whereas Greece does not present this element as indicating the existence of an interest of a legal nature, but rather as providing context to its Application for intervention;

*

19. Whereas, in its written observations, Germany states that Greece “may not have succeeded” in demonstrating that it “has an interest of a legal nature which may be affected by the decision” in the present case; whereas, according to Germany, under Article 62, paragraph 1, of the Statute, only States which have a specific legal interest in the outcome of the proceedings are allowed to intervene in these proceedings, and therefore Greece cannot rely, as it does in the Application, on a general legal interest in the scope and meaning of State immunity under customary international law as a basis for intervention; whereas Germany contends that Greece cannot invoke as a legal interest Germany’s alleged responsibility for grave violations of international humanitarian law committed during the occupation of Greece by the Third Reich during the Second World War because these issues are unrelated to the present dispute between Germany and Italy, which “concerns exclusively the question of State immunity”, specifically, violations by Italy of Germany’s jurisdictional immunity; and whereas Germany states that successful private claimants in Greece “have certainly a legal interest” in the execution of these judgments “in Italy or in any other country where they may hope to get hold of assets of Germany” but that this is not an interest of the Greek State;

20. Whereas, in its additional written observations, Germany notes that Greece, in its written observations, has “particularized” the interest of a legal nature “which it believes to possess”; whereas Germany observes that Greece no longer claims that it has a general interest in the legal issues which the Court will have to address, nor does it submit that it wishes to place before the Court the occurrences of the Second World War; whereas Germany accordingly limits its comments as to the granting of the Greek Application to a consideration of the question whether a State can be deemed to have a legal interest in the enforceability, in foreign countries, of the judgments rendered by its courts; whereas Germany expounds its position according to which the execution of a judgment outside national boundaries “is entirely committed to the public authorities of the country where the planned measures of constraint are to be taken” and therefore does not affect the legal interests of the State whose courts handed down the relevant judicial decision; whereas Germany further emphasizes that the *Distomo* decision has in effect been overruled in Greece by the judgment rendered in the *Margellos* case, which upheld Germany’s jurisdictional immunity in a comparable situation; whereas Germany leaves it to the Court to assess the admissibility of the Greek Application as it sees fit;

*

21. Whereas Italy, in both sets of its observations, takes note that Greece claims to possess an interest of a legal nature which it contends may be affected by the Judgment of the Court in the case between Germany and Italy, in view of the fact that Germany, in its Application, requests the Court to find that Italy committed a breach of Germany's jurisdictional immunity by declaring the Greek judicial decision in the *Distomo* case to be enforceable in Italy;

* *

22. Whereas "[i]t is for the State seeking to intervene to identify the interest of a legal nature which it considers may be affected by the decision in the case, and to show in what way that interest may be affected" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 118, para. 61); whereas the State seeking to intervene "has only to show that its interest 'may' be affected, not that it will or must be affected" (*ibid.*, p. 117, para. 61); whereas, however, it is for the Court to decide, in accordance with Article 62, paragraph 2, of the Statute, on the request to intervene, and to determine the limits and scope of such intervention (*Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 358, para. 25; see also *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 433-434, para. 35);

23. Whereas, in its submissions in the main proceedings, Germany, *inter alia*, requests the Court to rule that, by declaring Greek judgments based on violations of international humanitarian law by the German Reich during the Second World War enforceable in Italy, the latter has violated its international legal obligations by failing to respect Germany's jurisdictional immunity under international law; whereas Greece, in its written observations, expressly identifies the interest of a legal nature which it considers may be affected by the decision in the main proceedings as pertaining to the said Greek judgments and Italy's recognition of their enforceable nature;

24. Whereas, for the purposes of Article 62, paragraph 1, of the Statute "[t]he State seeking to intervene as a non-party . . . does not have to establish that one of its rights may be affected; it is sufficient for that State to establish that its interest of a legal nature may be affected" (*Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 358, para. 26; *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 434, para. 37);

25. Whereas the Court, in the judgment that it will render in the main proceedings, 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, concerning the question whether Italy committed a further breach of Germany's jurisdictional immunity by declaring Greek judgments based on occurrences similar to those defined in the first request as enforceable in Italy; and whereas this is sufficient to indicate that Greece has an interest of a legal nature which may be affected by the judgment in the main proceedings;

26. Whereas the Court finds that Greece has sufficiently established that it has an interest of a legal nature which may be affected by the judgment that the Court will hand down in the main proceedings; and whereas such interest is limited as described in paragraph 25 above;

* *

27. Whereas, in accordance with Article 81, paragraph 2 (*b*), of the Rules of Court, the State seeking to intervene under Article 62 of the Statute shall set out "the precise object of the intervention";

*

28. Whereas, in its Application for permission to intervene, Greece states that the precise object of its intervention is "to inform the Court of the nature of the legal rights and interests of Greece that could be affected by the Court's decision in light of the claims advanced by Germany to the case before the Court";

* *

29. Whereas the Court notes that, in so far as the object of Greece's intervention is to inform the Court of its interest of a legal nature which may be affected, this object accords with the function of intervention (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Application by Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 360, para. 34);

* * *

30. Whereas, in accordance with Article 81, paragraph 2 (*c*), of the Rules of Court, the State seeking to intervene under Article 62 of the Statute shall set out "any basis of jurisdiction which is claimed to exist as between [it] and the parties to the case";

* *

31. Whereas the Court observes that it is not necessary to establish the existence of a basis of jurisdiction between the parties to the proceedings

and the State which is seeking to intervene as a non-party (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application to Intervene, Judgment, I.C.J. Reports 2001*, p. 589, para. 35; *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 361, para. 38); whereas since Greece has made clear that it seeks to intervene as a non-party, it is not necessary for such a basis of jurisdiction to be established in the present case;

* * *

32. Whereas, “[w]here the Court permits 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” (*Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 361, para. 42); whereas, in light of the scope of the intervention sought by Greece, as specified in its written observations, and of the conclusions which the Court has reached in paragraphs 25 and 26 above, the Court finds that Greece may be permitted to intervene as a non-party in so far as this intervention is limited to the decisions of Greek courts as referred to in paragraph 25 above;

* *

33. Whereas, in accordance with the provisions of Article 85, paragraph 1, of the Rules of Court, copies of the pleadings and documents annexed, as filed in the main proceedings, will be communicated to Greece and time-limits shall be fixed for the filing, respectively, of a written statement by Greece and of written observations by Germany and by Italy on that statement;

* * *

34. For these reasons,

THE COURT,

(1) By fifteen votes to one,

Decides that Greece is permitted to intervene as a non-party in the case, pursuant to Article 62 of the Statute, to the extent and for the purposes set out in paragraph 32 of this Order;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue;

AGAINST: *Judge ad hoc* Gaja;

(2) Unanimously,

Fixes the following time-limits for the filing of the written statement and the written observations referred to in Article 85, paragraph 1, of the Rules of Court:

5 August 2011 for the written statement of Greece;

5 September 2011 for the written observations of Germany and Italy;
and

Reserves the subsequent procedure for further decision.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this fourth day of July, two thousand and eleven, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Germany, the Government of the Italian Republic, and the Government of the Hellenic Republic, respectively.

(*Signed*) Hisashi OWADA,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

Judge CANÇADO TRINDADE appends a separate opinion to the Order of the Court; Judge *ad hoc* GAJA appends a declaration to the Order of the Court.

(*Initialled*) H.O.

(*Initialled*) Ph.C.