

SEPARATE OPINION
OF JUDGE CAÑADO TRINDADE

TABLE OF CONTENTS

	<i>Paragraphs</i>
I. INTRODUCTION	1-2
II. GREECE'S APPLICATION FOR PERMISSION TO INTERVENE	3-5
III. THE LIMITS OF STATE CONSENT REVISITED	6-8
IV. <i>JUS GENTIUM</i> IN THE TWENTY-FIRST CENTURY: RIGHTS OF STATES AND RIGHTS OF INDIVIDUALS	9-54
1. States as <i>titulaires</i> of rights: Greek Courts decisions as Referred to by Germany	9-14
2. States as <i>titulaires</i> of rights: Summary of Greek Courts decisions	15-20
(a) Judgment of the First Instance Court of Livadia in the <i>Distomo Massacre</i> case (1997)	15
(b) Judgment of the Court of Cassation (<i>Areios Pagos</i>) in the <i>Distomo Massacre</i> case (2000)	16-18
(c) Judgment of the Greek Special Supreme Court in the <i>Margellos and Others</i> case (2002)	19-20
3. States as <i>titulaires</i> of rights: Approaches by Germany and Greece	21-24
4. Individuals as <i>titulaires</i> of rights: The legacy of the individual's subjectivity in the law of nations	25-29
5. Individuals as <i>titulaires</i> of rights: Their presence and participation in the international legal order	30-35
6. Individuals as <i>titulaires</i> of rights: The rescue of the individual as subject of international law	36-49
7. Individuals as <i>titulaires</i> of rights: The historical significance of the international subjectivity of the individual	50-52
8. General assessment	53-54
V. CONCLUDING OBSERVATIONS: THE <i>RESURRECTIO</i> OF INTERVENTION IN CONTEMPORARY INTERNATIONAL LITIGATION	55-61

*

I. INTRODUCTION

1. I have concurred with my vote to the adoption today, 4 July 2011, by the International Court of Justice, of the present Order whereby it grants to Greece permission to intervene in the case concerning the *Jurisdictional Immunities of the State*, opposing Germany to Italy. Given the importance that I ascribe to the matters dealt with by the Court in the present Order, and those underlying it, I feel obliged to leave on the records the foundations of my personal position on the matter, in all its aspects. The *dossier* of the present case, relating to the proceedings before the Court concerning Greece's Application for permission to intervene, is conformed by six documents, namely: two submitted to the Court by the applicant State, Greece¹, and two presented by each of the two Parties in the main case before the Court, Germany² and Italy³.

2. In the present separate opinion, I shall consider the matter at issue in dwelling upon the points developed hereunder, namely: (a) Greece's Application for permission to intervene; (b) the limits of State consent revisited; (c) *jus gentium* in the twenty-first century: rights of States and rights of individuals (as submitted by the contending Parties), including a review of relevant Greek Courts decisions (in the *Distomo Massacre* case and the *Margellos and Others* case), among other related aspects in historical perspective; and (d) the *resurrectio* of intervention in contemporary international litigation. Let me turn to those points, one by one, in a logical sequence.

II. GREECE'S APPLICATION FOR PERMISSION TO INTERVENE

3. In its Application for permission to intervene, of 13 January 2011, based on Article 62 of the ICJ Statute, the Hellenic Republic (hereinafter Greece) pointed out that it was not requesting to intervene as a party to the present case, and 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 Second World War, intended to be enforced by Italian Courts. In its observations on Greece's Application, of 23 March 2011, Germany submitted that it did not

¹ Greece's Application for permission to intervene, of 13 January 2011, pp. 1-17; Observations of Greece in Reply to the Written Observations of Germany and Italy, of 5 May 2011, pp. 1-3.

² Written Observations of the Federal Republic of Germany on the Application for Permission to Intervene Filed by Greece, of 23 March 2011, pp. 1-7; Additional Observations of Germany on Whether to Grant the Application for Permission to Intervene Filed by Greece, of 26 May 2011, pp. 1-4.

³ Written Observations of Italy on the Application for Permission to Intervene Filed by Greece, of 22 March 2011, p. 1; Additional Observations of Italy on Whether to Grant the Application for Permission to Intervene Filed by Greece, of 23 May 2011, p. 1.

formally object to it, but it *substantially* contradicted the grounds of Greece's purported intervention under Article 62 of the ICJ Statute (cf. *infra*). Italy, for its part, in a letter of 22 March 2011, plainly stated that it had no objection to Greece's aforementioned Application.

4. Greece's Application hinged on Italian Court decisions which *inter alia* rendered possible the enforcement in Italy of Greek Court decisions (cf. *infra*) 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 Second World War (cf. *infra*). Such Court decisions were denied enforcement in Greece, since under Greek law, execution of a judgment against a foreign State is subject to prior consent of the Minister of Justice, which was not given in the *cas d'espèce*⁴.

5. In view of failed attempts to enforce those Court decisions⁵, the Greek nationals concerned sought recognition and enforceability of those decisions in Italy. In its Application instituting proceedings before the ICJ, Germany seeks a determination by the ICJ of what it considers a breach by Italy of its jurisdictional immunity. At this stage of the proceedings of the present case, what is before the Court is solely the question of Greece's purported intervention on the ground of Article 62 of the Statute. Greece itself clarified, in its Application of 13 January 2011, that by requesting the Court permission to intervene it was "by no means asking the Court to resolve a dispute between Greece and the parties to the proceedings (. . .)"⁶.

III. THE LIMITS OF STATE CONSENT REVISITED

6. As to the consent of the Parties in the main case — which is not strictly or formally at issue in the present 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. As pointed out in a joint declaration in a recent Judgment of the Court (in the case of the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Honduras for Permission to Intervene, Judgment of 4 May 2011 (*I.C.J. Reports 2011 (II)*, p. 420)),

"In the present joint declaration, we wish to stress the non-existence of a 'requirement' of consent by the parties in the main

⁴ Cf. Greek Code of Civil Procedure, Article 923.

⁵ The Greek nationals concerned did not succeed to obtain relief from the European Court of Human Rights (ECHR), where their cause (*Kalogeropoulou and Others v. Greece and Germany* case, Judgment of 12 December 2002) was dismissed.

⁶ *Op. cit. supra* note 1, p. 6.

case, in relation to the requisites for applications for permission to intervene set forth in Article 62 of the ICJ Statute. In our view, such consent by the main parties to the proceedings is irrelevant to the assessment of an application for permission to intervene, and cannot be perceived as a requirement under Article 62 of the Statute of the Court. (. . .)

State consent also has its limits, in respect of applications for permission to intervene. (. . .)

Our understanding is in the sense that the consent of the parties to the main case is not, in any way, a condition for intervention as a non-party. The Court is, anyway, the master of its own jurisdiction, and does not need to concern itself with the search for State consent in deciding on an application for permission to intervene in international legal proceedings.

In effect, third party intervention under the Statute of the Court transcends individual State consent. What matters is the consent originally expressed by States in becoming parties to the Court's Statute, or in recognizing the Court's jurisdiction by other instrumentalities, such as compromissory clauses. The Court's Chamber itself rightly pointed out, in the Judgment of 1990 in the case concerning the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras (Application by Nicaragua for permission to intervene), that the competence of the Court, in the particular matter of intervention, 'is not, like its competence to hear and determine the dispute referred to it, derived from the consent of the parties to the case'.⁷

There is no need for the Court to keep on searching instinctively for individual State consent *in the course* of the international legal proceedings. After all, the consent of contending States is alien to the institution of intervention under Article 62 of the ICJ Statute. We trust that the point we make here, in the present joint declaration, regarding the irrelevance of State consent in the consideration by the Court of applications for permission to intervene, under Article 62 of the Court's Statute, may be helpful to elucidate the positions that the Court may take on the matter in its jurisprudential construction."⁸

7. In the *cas d'espèce*, anyway, there is no *formal* objection to Greece's Application for permission to intervene (*supra*); even if there were any such objection, it would have been immaterial for the purpose of the Court's assessment of the Application at issue for permission to intervene. State consent indeed has its limits; 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, as I sought to demonstrate in my extensive dissenting opinion (paras. 45-118, 136-144 and 156-214) in the Court's Judgment of 1 April 2011 in the case concerning

⁷ Footnote omitted.

⁸ *Judgment, I.C.J. Reports 2011 (II)*; joint declaration of Judges Cançado Trindade and Yusuf, pp. 468-470, paras. 8, 10 and 13-15.

the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) (I.C.J. Reports 2011 (I))*, pp. 239-322); the ICJ is not an arbitral tribunal.

8. In its Application of 13 January 2011, Greece made it clear that its object was *to inform* the Court of the “nature” of its “legal rights and interests” that “could be affected” by the Court’s decision in the main case advanced by Germany before it (p. 10). The request by Greece being thus clearly circumscribed, and bearing in mind its own Court decisions, it is difficult to behold how the ICJ could in the main proceedings circumvent or avoid making a finding that would not affect Greece’s interest of a legal nature (under Article 62 of the Statute).

IV. *JUS GENTIUM* IN THE TWENTY-FIRST CENTURY: RIGHTS OF STATES AND RIGHTS OF INDIVIDUALS

1. *States as Titulaires of Rights:* *Greek Courts Decisions as Referred to by Germany*

9. In the proceedings before the Court (with a written phase only) concerning Greece’s Application for permission to intervene (*supra*), in its second round of submissions, Germany referred to three judgments of Greek Courts, in order to substantiate its argument that it would be “utterly” contradictory, in its view, that the enforcement of a Greek judgment in Italy could affect Greece’s legal interests, given that the same judgment was denied enforcement in Greece⁹. The relevant part of Germany’s additional observations read as follows:

“In the present case, the specific facts speak even more strongly against an interest of a legal nature which Greece could assert. In 2002, the Greek Special Supreme Court under Article 100 of the Constitution, which discharges the functions of a constitutional court, confirmed with the *Margellos* judgment the jurisdictional immunity of Germany by overruling the findings of the *Areios Pagos* in the *Distomo* case and thus rendering the decision of the regional court of Livadia unenforceable in Greece itself. Moreover, Greek legislation (Code of Civil Procedure, Art. 923) establishes that no judgment rendered against a foreign State may be enforced on Greek territory without an explicit authorization of the Greek Minister of Justice. Such authorization was denied by the Minister of Justice in respect of the judgment of the Court of Livadia the execution of which was later sought in Italy. The plaintiffs brought an application against that refusal before the European Court of Human Rights. In

⁹ Additional Observations of Germany on Whether to Grant the Application for Permission to Intervene Filed by Greece, of 26 May 2011, paras. 5-6.

Kalogeropoulou, the Strasbourg judges dismissed the application. Thus, the official position of Greece is that the Livadia judgment cannot, and should not, be executed in Greece. Accordingly, it must be considered as utterly contradictory that Greece should have an official interest in the enforcement of the same judgment in Italy.”¹⁰

10. The three Greek Court decisions cited by Germany, in order of judicial hierarchy, were: (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. It would be clarifying, at this stage, to summarize the legal proceedings in Greece, as referred to by Germany itself¹¹.

11. 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. The First Instance Court of Livadia held Germany liable to pay compensation to the relatives of the victims. Germany brought the case before the Court of Cassation (*Areios Pagos*) in Greece, claiming immunity, which was dismissed by the *Areios Pagos*.

12. Following the judgment by the Court of Cassation, the judgment of the First Instance Court of Livadia awarding compensation became final. As the German authorities did not comply with the latter judgment awarding compensation, the claimants sought to enforce the aforementioned judgment against German property in Greece. Yet, such enforcement against a foreign State required the consent of the Minister of Justice (Greek Code of Civil Procedure, Art. 923), which was not given in the *cas d'espèce*. The claimants then resorted to the European Court of Human Rights (ECHR)¹², against the refusal of Greece and Germany to comply with the decision of the First Instance Court of Livadia awarding compensation, but their application was dismissed by the ECHR.

13. Parallel to that, proceedings in a similar but yet *another case* (the *Margellos and Others* case) were also ongoing before Greek Courts. The Court of Cassation referred the *Margellos and Others* case to the Greek Special Supreme Court, asking essentially the following questions: (a) whether the exception to State immunity for torts committed *jure imperii* in the forum State constituted a generally recognized rule of cus-

¹⁰ Additional Observations of Germany on Whether to Grant the Application for Permission to Intervene Filed by Greece 26 May 2011, para. 5.

¹¹ *Ibid.*

¹² Invoking Article 6 (1) of the European Convention on Human Rights; ECHR, *Kalogeropoulou and Others v. Greece and Germany*, Judgment of 12 December 2002 (Application 59021/00).

tomary international law; (b) and if so, whether it covered torts committed during an armed conflict against non-combatants uninvolved in the conflict.

14. The Greek Special Supreme Court, by a majority of *six votes to five*, held, *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 case¹³.

2. *States as Titulaires of Rights:*
Summary of Greek Courts Decisions

(a) *Judgment of the First Instance Court of Livadia in the Distomo Massacre case (1997)*

15. On 25 September 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. This judgment became object of enforcement proceedings in Italy, which Germany referred to in its pleadings in the case before the Court¹⁴. In connection with *jus cogens*, the Court of Livadia expressly referred to the IV Hague Convention of 19 October 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*.

(b) *Judgment of the Court of Cassation (Areios Pagos) in the Distomo Massacre case (2000)*

16. Subsequently, Germany instituted proceedings, against the latter judgment, before the Greek Court of Cassation (*Areios Pagos*), claiming immunity from the jurisdiction of Greek Courts. On 4 May 2000, the First Chamber of the Court of Cassation found, by seven votes to four, in the *Distomo Massacre* case, that the Greek Courts were competent to exercise jurisdiction over the case. On the substantive law, the Court held

¹³ In the case, moved by Germany against the Prefecture of Voiotia, this latter represented 118 persons from the village of Distomo.

¹⁴ Cf. Annex 17 to Germany's Memorial and Observations of Greece in Reply to the Written Observations of Germany and Italy.

first that State immunity is a generally accepted rule of international law which, pursuant to Article 28 (1) of the Greek Constitution, is part of the Greek legal order. Secondly, the Court held that it is now accepted by European countries that State immunity is not absolute and applies only to sovereign acts performed *jure imperii*, and not to acts *jure gestionis* performed by the State in the same manner as private individuals.

17. The Court of Cassation further held that restrictive immunity was enshrined in the European Convention on State Immunity adopted in Basel on 16 May 1972 (the “Basel Convention”). While only eight European States (including Germany) ratified the Convention, all other European States accepted the doctrine of restrictive immunity. The Court of Cassation further found, in the same *Distomo Massacre* case, that there is a generally accepted rule of customary international law to the effect that States are competent to exercise jurisdiction over claims for damages against a foreign State, in relation to torts committed by its organs against persons or property on the territory of the forum State, even if the acts in question were performed *jure imperii*.

18. Moreover, 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*.

(c) *Judgment of the Greek Special Supreme Court in the Margellos and Others case (2002)*

19. In a case parallel to the aforementioned one, in respect of the question submitted to the Greek Special Supreme Court, this latter held, on 17 September 2002, by a majority of *six votes to five*, that, at the current stage of progressive development of international law, there does not exist a generally accepted rule that would allow, by exception ensuing from the principle of immunity, to prosecute lawfully a State before the Court of another State for compensation for offenses that took place on the territory of the forum State, wherein the armed forces of the defendant State were involved, irrespective of whether the actions at issue violated *jus cogens* norms.

20. Furthermore, the Greek Special Supreme Court ruled that Article 31 of the 1972 Basel Convention, which provided for immunity in

respect of the acts of armed forces, was formulated in absolute terms. The five minority judges, in their joint dissenting opinion, contrariwise, sustained that the prohibition of war crimes has the status of a peremptory norm of international law (*jus cogens*), and that the provisions contained in the IV Hague Convention of 1907 on the Laws and Customs of War on Land are now generally recognized as peremptory norms of customary international law (*jus cogens*).

3. *States as Titulaires of Rights:*
Approaches by Germany and Greece

21. In its Application of 13 January 2011 for permission to intervene, Greece also referred specifically to Germany's Application instituting proceedings (of 23 December 2008) in the main case¹⁵, and submitted that:

“The legal interest of Greece 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 between 6 April 1941, when Germany invaded Greece, and the unconditional surrender of Germany on 8 May 1945.” (P. 6).

Greece further asserted, in its Application for permission to intervene, its rights and jurisdiction under general international law, relating to the judgments delivered by its domestic courts (cf. *supra*) and enforceable by Italian Courts (pp. 4 and 8).

22. In its Response, of 23 March 2011, Germany retorted that Greece's approach could hardly demonstrate its “legal interest”. Germany distinguished the interests of the individuals concerned from those of the Greek State. Referring to the *interests of the individuals* in relation to the *Distomo Massacre* case, it stated:

“The private claimants who were successful in the *Distomo* case have certainly a legal interest in seeing the judgments of the responsible trial judgments (Court of First Instance of Livadia), confirmed by the *Areios Pagos*, executed, be it in Greece, in Italy or in any other country where they may hope to get hold of assets of Germany. But this is not a legal interest of the Greek State. (. . .) Italy overstepped the limits of its legitimate sovereign power by lending a hand for the execution of Greek judgments that, after the binding decision of the Special Supreme Court in the *Margellos* case, cannot be executed in Greece itself. The very subject-matter of the Court's findings will be, solely and exclusively, Italy's conduct.”¹⁶

¹⁵ Under item 3, and its paragraph 10.

¹⁶ Written Observations of Germany on Whether to Grant the Application for Permission to Intervene Filed by Greece, of 26 May 2011, para. 17.

23. For its part, Italy, in a new letter of 23 May 2011, once again plainly stated, in confirmation of its position, that it had no objection to Greece's Application for permission to intervene. In turn, in its more recent submission, of 5 May 2011, Greece contended that the elements in the *cas d'espèce* revolved around the enforcement of decisions of the *Greek Judiciary*¹⁷. In its view, both

“a Greek judicial body and Greek nationals lie at the heart of the Italian enforcement proceedings and of the conflict between enforcement and immunity.

In consequence, the Court's decision as to whether judgments — Italian and Greek — may be enforced in Italy is directly and primarily of interest to Greece and could affect the interests of a legal nature, in particular regarding persons of Greek nationality, enjoyed by Greece under general international law.”¹⁸

24. In my understanding, 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.

4. *Individuals as Titulaires of Rights: The Legacy of the Individual's Subjectivity in the Law of Nations*

25. In the present proceedings concerning the Greek Application for permission to intervene, curiously Germany saw it fit to bring to the fore the position of individuals as *titulaires* of rights — an issue which was, in my perception, central in the recent consideration of the Italian counter-claim, which led to, *data venia*, a regrettable decision by the Court, in its Order of 6 July 2010 in the present case of the *Jurisdictional Immunities of the State*, whereby it dismissed that counter-claim. I felt obliged to leave on the records my firm dissenting opinion (*I.C.J. Reports 2010 (I)*, pp. 329-397, paras. 1-179) on that decision of the Court, wherein I upheld, *inter alia*, that claims as to rights which are inherent to human beings (such as, in the ambit of the 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

¹⁷ Observations of Greece in Reply to the Written Observations of Germany and Italy, of 5 May 2011, para. 6.

¹⁸ *Ibid.*, para. 6.

human beings. As I sustained, *inter alia*, in my aforementioned dissenting opinion,

“States may, if they so wish, waive claims as to *their own* rights. But they cannot waive claims for reparation of serious breaches of rights that *are not* theirs, rights that are inherent to the human person. Any purported waiver to this effect runs against the international *ordre public*; is in breach of *jus cogens*. This broader outlook, in a higher scale of *values*, is in line with the vision of the so-called ‘founding fathers’ of the law of nations (the *droit des gens*, the *jus gentium*), and with what I regard as the most lucid trend of contemporary international legal thinking.

One cannot build (and try to maintain) an international legal order over the suffering of human beings, over the silence of the innocent destined to oblivion. At the time of mass deportation of civilians, sent to forced labour along the *two* World Wars (in 1916-1918 and in 1943-1945) of the twentieth century (and not only the Second World War), everyone already knew that that was a *wrongful* act, an atrocity, a serious violation of human rights and of international humanitarian law, which came to be reckoned as amounting also to a war crime and a crime against humanity. Above the will stands conscience, which is, after all, what moves the law ahead, as its ultimate *material* source, removing manifest injustice.” (*I.C.J. Reports 2010 (I)*, pp. 396-397, paras. 178-179.)

26. The question of individual rights is again brought to the fore now, in the present case, this time in respect of the Greek Application for permission to intervene (cf. *supra*). Likewise I deem it fit to lay on the records my reflections on the matter. The first point to recall herein is the legacy of the individual’s subjectivity in the law of nations. The notorious importance attributed to the matter by the so-called “founding fathers” of the discipline should not be forgotten in our times. As early as throughout the sixteenth century, the conception of Francisco de Vitoria (author of the renowned *Relecciones Teológicas*, 1538-1539) flourished, whereby the law of nations regulates an international community (*totus orbis*) constituted of human beings organized socially in States and co-extensive with humanity itself; the reparation of breaches of (human) rights reflects an international necessity fulfilled by the law of nations, with the same principles of justice applying both to States and to individuals and peoples who form them. On his turn, Alberico Gentili (author of *De Jure Belli*, 1598) sustained, by the end of the sixteenth century, that law governs the relationships between the members of the universal *societas gentium*.

27. In the seventeenth century, in the outlook advanced by Francisco Suárez (author of the treaty *De Legibus ac Deo Legislatore*, 1612), the law

of nations discloses the unity and universality of humankind, and regulates the States in their relations as members of the universal society. Shortly afterwards, the conception elaborated by Hugo Grotius (*De Jure Belli ac Pacis*, 1625) sustained that *societas gentium* comprises the whole of humankind, and the international community cannot pretend to base itself on the *voluntas* of each State individually; human beings — occupying a central position in international relations — have rights *vis-à-vis* the sovereign State, which cannot demand obedience of their citizens in an absolute way (the imperative of the common good), as the so-called “*raison d’Etat*” has its limits, and cannot prescind from law. In this line of reasoning, in the seventeenth century, Samuel Pufendorf (*De Jure Naturae et Gentium*, 1672) sustained as well the subjection of the legislator to reason, while Christian Wolff (*Jus Gentium Methodo Scientifica Pertractatum*, 1749) pondered that, just as individuals ought to — in their association in the State — promote the common good, the State on its turn has the correlative duty to seek its perfection¹⁹.

28. The subsequent personification of the all-powerful State, inspired mainly in the philosophy of law of Hegel, had a harmful influence in the evolution of international law by the end of the nineteenth century and in the first decades of the twentieth century. This doctrinal trend resisted as much as it could to the ideal of emancipation of the human being from the absolute control of the State, and to the recognition of the individual as subject of international law. But the individual’s submission to the “will” of the State was never convincing to all, and it soon became openly challenged by the more lucid doctrine. The idea of absolute State sovereignty — which led to the irresponsibility and the alleged omnipotence of the State, not impeding the successive atrocities committed by it (or in its name) against human beings — appeared with the passing of time entirely unfounded.

29. The massacre of Distomo (1944), brought before the Greek Courts (cf. *supra*), is but one of such numerous State atrocities perpetrated throughout the last century. Much has been written on it; the facts are of public and notorious knowledge, and are not disputed. In one of the historical accounts of that massacre, its facts have been so summed up:

“On the morning of June 10, 1944, in the village of Distomo, in the Prefecture of Voiotia, Greece, Nazi soldiers posed as merchants and passed through Distomo, looking for Greek resistance fighters said to be in the area. Because Distomo was not a part of the resistance movement, no guerrillas were found in the village. The soldiers moved on to the town of Delphi. After leaving Delphi, on their way to the town of Steiri, the Greek resistance fighters attacked the Germans and killed eighteen German soldiers. The surviving Nazi soldiers then

¹⁹ A. A. Cançado Trindade, “A Personalidade e a Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional”, *Jornadas de Derecho Internacional* [of the OAS] (Mexico City, December 2001), Washington D.C., Under-Secretariat for Legal Affairs of the OAS, 2002, pp. 311-347.

turned around, marched back past Delphi to Distomo, and began a reign of terror that ended in the brutal massacre of 218 men, women and children.

The soldiers stormed the village and ordered all residents indoors. They went on a two-hour, door-to-door rampage, bayoneting babies in their cribs, tearing fetuses from pregnant women, and beheading the village priest. The only survivors were those who were able to escape to the mountains, but they have never fully recovered from the horror of that day. In memory of the dead, the entire village was dressed in black for years and the relatives of the Distomo victims mourn their dead to this day. This mass killing has been labeled as one of the most savage civilian, non-Jewish massacres of World War II.”²⁰

5. *Individuals as Titulaires of Rights:
Their Presence and Participation
in the International Legal Order*

30. Not surprisingly, human conscience has reacted against State atrocities of the kind. The State — it is nowadays reckoned — is responsible for all its acts — both *jure gestionis* and *jure imperii* — as well as for all its omissions, amounting to grave breaches of the rights of the human person (human rights and international humanitarian law). In case of violation of human rights, the *direct access* of the individual to national and international jurisdictions is thus fully justified to vindicate such rights (even against his own State)²¹. The necessity of the *legitimatío ad causam* of individuals in international law is in our times widely acknowledged²². After all, individuals have marked their presence and participation in the international legal order already for a long time.

31. The individual has, in fact, constantly remained in contact, directly or indirectly, with the international legal order. He is subject of both domestic and international law²³. In the inter-war period, the experiments

²⁰ E. Vournas, “*Prefecture of Voiotia v. Federal Republic of Germany: Sovereign Immunity and the Exception for Jus Cogens Violations*”, 21 *New York Law School Journal of International and Comparative Law* (2002), pp. 635-636.

²¹ S. Glaser, “Les droits de l’homme à la lumière du droit international positif”, *Mélanges offerts à H. Rolin — Problèmes de droit des gens*, Paris, Pedone, 1964, pp. 117-118, and cf. pp. 105-106 and 114-116.

²² Cf. note 34 *infra*.

²³ On the historical evolution of the legal personality in the law of nations, cf. H. Mosler, “Réflexions sur la personnalité juridique en droit international public”, *Mélanges offerts à H. Rolin — Problèmes de droit des gens*, Paris, Pedone, 1964, pp. 228-251; G. Arangio-Ruiz, *Diritto Internazionale e Personalità Giuridica*, Bologna, Coop. Libr. Univ., 1972, pp. 9-268; G. Scelle, “Some Reflections on Juridical Personality in International Law”, *Law and Politics in the World Community* (ed. G. A. Lipsky), Berkeley/Los Angeles, University of California Press, 1953, pp. 49-58 and 336; J. A. Barberis, “Nouvelles questions concernant la personnalité juridique internationale”, 179 *Recueil des cours de l’Académie de droit international de La Haye (RCADI)* (1983), pp. 157-238.

of the *minorities*²⁴ and *mandates*²⁵ systems under the League of Nations, for example, bear witness thereof²⁶. They were followed, in that regard, by the *trusteeship system*²⁷ under the United Nations era, parallel to the development under this latter, along the years, of the multiple mechanisms — conventional and extraconventional — of international protection of human rights. Those early experiments in the twentieth century were of relevance for subsequent developments in the international safeguard of the rights of the human person²⁸.

32. To that effect of evidencing and reasserting the constant contact of the individual with the international legal order, the considerable evolution in the last decades not only of the international law of human rights, but likewise of international humanitarian law, has contributed decisively. This latter likewise considers the protected persons not only as simple object of regulation that they establish, but rather as true subjects of international law²⁹. In effect, the impact of the norms of the former has, in turn, been having already for a long time repercussions in the *corpus juris* and application of international humanitarian law. This latter, in the light of the principle of humanity, gradually frees itself from a purely inter-State obsolete outlook, placing an increasingly greater emphasis on

²⁴ Cf., e.g., P. de Azcárate, *League of Nations and National Minorities: An Experiment*, Washington, Carnegie Endowment for International Peace, 1945, pp. 123-130; J. Stone, *International Guarantees of Minorities Rights*, Oxford University Press, 1932, p. 56; A. N. Mandelstam, "La protection des minorités", 1 *RCADI* (1923), pp. 363-519.

²⁵ Cf., e.g., G. Diena, "Les mandats internationaux", 5 *RCADI* (1924), pp. 246-261; N. Bentwich, *The Mandates System*, London, Longmans, 1930, p. 114; Quincy Wright, *Mandates under the League of Nations*, Chicago University Press, 1930, pp. 169-172.

²⁶ C. A. Norgaard, *The Position of the Individual in International Law*, Copenhagen, Munksgaard, 1962, pp. 109-131; A. A. Cançado Trindade, "Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century", 24 *Netherlands International Law Review/Nederlands Tijdschrift voor internationale Recht* (1977), pp. 373-392.

²⁷ Cf., e.g., C. E. Toussaint, *The Trusteeship System of the United Nations*, London, Stevens, 1956, pp. 39, 47 and 249-250; J. Beauté, *Le droit de pétition dans les territoires sous tutelle*, Paris, LGDJ, 1962, pp. 48-136; G. Vedovato, "Les accords de tutelle", 76 *RCADI* (1950), pp. 613-694.

²⁸ Cf., e.g., C. Th. Eustathiades, "Une nouvelle expérience en droit international — Les recours individuels à la Commission des droits de l'homme", *Grundprobleme des internationalen Rechts — Festschrift für J. Spiropoulos*, Bonn, Schimmlbusch, 1957, pp. 111-137, esp. pp. 77 and 121, note 32.

²⁹ It is what ensues, e.g., from the position of the four Geneva Conventions on International Humanitarian Law of 1949, erected as from the rights of the protected persons (III Convention, Articles 14 and 78; IV Convention, Article 27). This is what, furthermore, clearly ensues from the fact that the four Geneva Conventions plainly prohibit the States parties to derogate — by special agreements — from the rules enunciated in them and in particular to restrict the rights of the persons protected set forth in them (I, II and III Geneva Conventions, Article 6; and IV Geneva Convention, Article 7). In fact, as early as in the passage from the nineteenth to the twentieth century, the first Conventions on international humanitarian law expressed concern for the fate of human beings in armed conflicts, thus recognizing the individual as direct beneficiary of the international conventional obligations.

the protected persons and on the responsibility for the violation of their rights³⁰.

33. The attempts of the past to deny to individuals the condition of subjects of international law, for not being recognized to them some of the capacities which States have (such as, e.g., that of treaty-making), are definitively devoid of any meaning³¹. Besides unsustainable, that conception appears contaminated by an ominous ideological dogmatism, which had as the main consequence to alienate the individual from the international legal order³². In the brief historical period in which that statist conception prevailed, in the light — or, more precisely, in the darkness — of legal positivism, successive atrocities were committed against the human being, on a scale without precedent. This is evidenced, in the factual context of the present proceedings before this Court, by the massacre of Distomo, of 10 June 1944.

34. No one with sane conscience would today dare to deny 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. 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 the case of human beings, who have thus fostered and strengthened their direct contact — without intermediaries — with the international legal order³³.

35. In sum, the very process of formation and application of the norms of international law ceases to be a monopoly of the States. Furthermore, beyond the individual's presence and participation in the international legal order, to the recognition of his rights, as subject of international

³⁰ On the historical roots of this development, cf. E. W. Petit de Gabriel, *Las Exigencias de Humanidad en el Derecho Internacional Tradicional (1789-1939)*, Madrid, Tecnos, 2003, pp. 149, 171 and 210.

³¹ Nor at domestic law level, not all individuals participate, directly or indirectly, in the law-making process, and they do not thereby cease to be subjects of law. That doctrinal trend, attempting to insist on such a rigid definition of international subjectivity, conditioning this latter to the very formation of international norms and compliance with them, simply does not sustain itself, not even at the level of domestic law, in which it is not required — it has never been —, from all individuals to participate in the creation and application of the legal norms in order to be subjects (*titulaires*) of rights, and to be bound by the duties, emanated from such norms.

³² It is surprising — if not astonishing —, besides regrettable, to see that conception repeated mechanically and *ad nauseam* by a doctrinal trend, apparently trying to make believe that the intermediary of the State, between the individuals and the international legal order, would be something inevitable and permanent. Nothing could be more fallacious.

³³ The international movement in favour of human rights, launched by the Universal Declaration of Human Rights of 1948, came to disauthorize the aforementioned false analogies, and to overcome traditional distinctions (e.g., on the basis of nationality): subjects of law are all human beings as members of the “universal society”; R. Cassin, “L’homme, sujet de droit international et la protection des droits de l’homme dans la société universelle”, *La technique et les principes du droit public — Etudes en l’honneur de G. Scelle*, Vol. I, Paris, LGDJ, 1950, pp. 81-82.

law, ought to correspond the procedural capacity to vindicate them at international level. It is by means of the consolidation of the full international procedural capacity of individuals that the international protection of human rights becomes reality³⁴.

6. *Individuals as Titulaires of Rights:*
The Rescue of the Individual as Subject of International Law

36. Although the contemporary international scenario is entirely distinct from that of the epoch of the so-called “founding fathers” of international law (no one would deny it), who propounded a *civitas maxima gentium* ruled by the law of nations, there is a recurrent human aspiration, transmitted from one generation to another, along the last centuries, to the effect of the construction of an international legal order applicable both to States (and international organizations) and to individuals, pursuant to certain universal standards of justice. Hence the importance which, in this new *corpus juris* of protection, the international legal personality of the individual assumes, as subject of both domestic and international law.

37. The individual, as subject of international law on his own right, was certainly distinguishable from his own State, and a wrong done to him was a breach of classical *jus gentium*, as universal minimal law³⁵. The whole new *corpus juris* of the international law of human rights has been constructed on the basis of the imperatives of protection and the superior interests of the human being, irrespective of his link of nationality or of his political statute, or any other situation or circumstance. Hence the importance assumed, in this new law of protection, by the legal personality of the individual, as the subject (not mere “actor”) of both domestic and international law³⁶.

³⁴ Cf. A. A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 17-96. Even if, by the circumstances of life, certain individuals (e.g., children, the mentally ill, aged persons, among others) cannot fully exercise their capacity (e.g., in civil law), this does not mean that they cease to be *titulaires* of rights, opposable even to the State. Irrespective of the circumstances, the individual is subject *jure suo* of international law, as sustained by the more lucid doctrine, since the writings of the so-called founding fathers of the discipline; P. N. Drost, *Human Rights as Legal Rights*, Leyden, Sijthoff, 1965, pp. 226-227, and cf. pp. 215 and 223. Human rights were conceived as *inherent* to every human being, independently of any circumstances.

³⁵ C. Parry, “Some Considerations upon the Protection of Individuals in International Law”, 90 *RCADI* (1956), pp. 686-688 and 697-698.

³⁶ The application and expansion of the international law of human rights, in turn, has had sensible repercussions, not surprisingly, in the trends of contemporary public international law; cf. A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. I, 2nd ed., Porto Alegre/Brazil, S. A. Fabris Ed., 2003, pp. 33-50, and Vol. II, 1999, pp. 23-194; A. A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, Santiago, Editorial Jurídica de Chile, 2001, pp. 15-58 and 375-427.

38. In fact, already in the first decades of the twentieth century, one recognized the manifest inconveniences of the protection of individuals by the intermediary of their respective States of nationality, that is, by the exercise of discretionary diplomatic protection, which rendered the “complaining” States at a time “judges and parties”³⁷. In a monograph of 1931, André Mandelstam warned as to the necessity of the recognition of a *juridical minimum* — with the primacy of international law and of human rights over the State legal order — below which the international community should not allow the State to fall. In his vision, the “horrible experience of our time” demonstrated the urgency of the necessary acknowledgement of this *juridical minimum*, to put an end to the “unlimited power” of the State over the life and the freedom of its citizens, and to the “complete impunity” of the State in breach of the “most sacred rights of the individual”³⁸.

39. In his “*célèbre*” *Précis* of 1932-1934, Georges Scelle criticized the fiction of the contraposition of an “inter-State society” to a (national) society of individuals: one and the other — he pondered — are formed by individuals, subjects of domestic law and of international law, whether they are individuals moved by private interests, or else endowed with public functions (rulers and public officials) in charge of looking after the interests of national and international collectivities. G. Scelle then identified “the movement of extension of the legal personality of individuals”, by means of the emergence of the right of individual petition at international level, which led him to conclude that “individuals are subjects of law both of national communities and the worldwide international community: they are *directly* subjects of the law of national”³⁹.

40. Also in the American continent, in the twentieth century, even before the adoption of the American and Universal Declarations of Human Rights of 1948, doctrinal manifestations flourished in favour of the international juridical personality of the individuals, such as those which are found, for example, in the writings of Alejandro Alvarez⁴⁰ and Hildebrando Accioly⁴¹. And Philip Jessup, in 1948, pondered that the old conception of State sovereignty was not consistent with the higher inter-

³⁷ One started, as a consequence, to overcome such inconveniences, to nourish the idea of the *direct access* of the individuals to the international jurisdiction, under certain conditions, to vindicate their rights against States — a theme which came to be effectively considered by the Institut de droit international in its sessions of 1927 and 1929.

³⁸ A. N. Mandelstam, *Les droits internationaux de l'homme*, Paris, Editions internationales, 1931, pp. 95-96 and 138, and cf. p. 103.

³⁹ G. Scelle, *Précis de droit des gens — Principes et systématique*, Part I, Paris, Sirey, 1932 (CNRS reprint, 1984), pp. 42-44, and cf. p. 48.

⁴⁰ A. Alvarez, *La Reconstrucción del Derecho de Gentes — El Nuevo Orden y la Renovación Social*, Santiago de Chile, Ed. Nascimento, 1944, pp. 46-47 and 457-463, and cf. pp. 81, 91 and 499-500.

⁴¹ H. Accioly, *Tratado de Direito Internacional Público*, Vol. I, 1st ed., Rio de Janeiro, Imprensa Nacional, 1933, pp. 71-75.

ests of the international community and the *status* of the individual as subject of international law⁴².

41. In Europe, in a celebrated book of 1950, Hersch Lauterpacht asserted that “the individual is the final subject of all law”, there being nothing inherent to international law impeding him to become subject of the law of nations and to become a party in proceedings before international tribunals⁴³. On his turn, in a perspicacious essay, also of 1950, Maurice Bourquin pondered that the growing concern of the international law of the epoch with the problems which affected directly the human being revealed the overcoming of the old exclusively inter-State vision of the international legal order⁴⁴.

42. In his course delivered at the Hague Academy of International Law, three years later, in 1953, Constantin Eustathiades linked the international subjectivity of the individuals to the broad theme of the international responsibility (of them, parallel to that of the States)⁴⁵. This development heralded the emancipation of the individual from the tutelage of his own State, and the individual’s condition of subject of international law⁴⁶. The same conclusion was reached by Paul Guggenheim, in a course delivered also at the Hague Academy, one year earlier, in 1952: as the individual is “subject of duties” at international law level, one cannot deny his international legal personality, recognized also in fact by *customary* international law itself⁴⁷.

⁴² Ph. C. Jessup, *A Modern Law of Nations — An Introduction*, New York, MacMillan Co., 1948, p. 41.

⁴³ H. Lauterpacht, *International Law and Human Rights*, London, Stevens, 1950, pp. 51, 61 and 69, and cf. p. 70. Such recognition of the individual as subject of rights also at international law level brought about a clear rejection of the old positivist dogmas, discredited and unsustainable, of the dualism of subjects in the domestic and international orders, and of the “will” of States as exclusive “source” of international law; cf. *ibid.*, pp. 8-9. On the “natural right” of petition of individuals, exercised also in the general interest, cf. *ibid.*, pp. 247-251, and cf. pp. 286-291 and 337.

⁴⁴ M. Bourquin, “L’humanisation du droit des gens”, *La technique et les principes du droit public . . .*, op. cit. *supra* note 33, Vol. I, pp. 21-54.

⁴⁵ As a reaction of the universal juridical conscience, the recognition of the rights and duties of the individual at international level, and his capacity to act in order to defend his rights, are linked to his capacity to commit an international delict; international responsibility thus comprises, in his vision, both the protection of human rights as well as the punishment of war criminals (forming a whole); C. Th. Eustathiades, “Les sujets du droit international et la responsabilité internationale — Nouvelles tendances”, 84 *RCADI* (1953), pp. 402, 412-413, 424, 586-589, 601 and 612.

⁴⁶ *Ibid.*, pp. 426-427, 547, 586-587, 608 and 610-611. Although not endorsing the theory of Duguit and Scelle (of the individuals as the sole subjects of international law) — regarded as expression of the “sociological school” of international law in France —, Eustathiades recognized in it the great merit of reacting to the traditional doctrine which visualized States as the sole subjects of international law; the recognition of the international subjectivity of individuals, parallel to that of States, came to transform the structure of international law and to foster the spirit of international solidarity; *ibid.*, pp. 604-610.

⁴⁷ P. Guggenheim, “Les principes de droit international public”, 80 *RCADI* (1952), pp. 116, and cf. pp. 117-118.

43. Still in the mid-twentieth century, in the first years of application of the European Convention on Human Rights, there was support for the view that the individuals had become “*titulaires* of legitimate international interests”, as, in international law, a process of emancipation of the individuals from the “exclusive tutelage of the State agents” had already started⁴⁸. In the legal doctrine of that time, the recognition of the expansion of the protection of individuals at the international legal order became evident⁴⁹. In the lucid words of B. V. A. Röling, the over-coming of legal positivism was reassuring, as the individual, bearer of international rights and duties, was no longer at the mercy of his State, and

“Humanity of today instinctively turns to this natural law, for the function of law is to serve the well-being of man, whereas present positive international law tends to his destruction.”⁵⁰

44. This view was in keeping with the posture upheld by the Judge Kotaro Tanaka, in his opinions in cases before the ICJ in that epoch, that is an international law transcending the limitations of legal positivism⁵¹, and thus capable of responding effectively to the needs and aspirations of the international community as a whole⁵². In the late sixties, the pressing need was pointed out of protecting internationally the human person both individually and *in groups*⁵³, for unless such international protection was secured to individuals and groups of them, “the

⁴⁸ G. Sperduti, “L’individu et le droit international”, 90 *RCADI* (1956), pp. 824, 821 and 764. The juridical experience itself of the epoch contradicted categorically the unfounded theory according to which the individuals were simple *objects* of the international legal order, and destructed other prejudices of State positivism; *ibid.*, pp. 821-822; and cf. also G. Sperduti, *L’Individuo nel Diritto Internazionale*, Milan, Giuffrè Ed., 1950, pp. 104-107.

⁴⁹ C. Parry, “Some Considerations . . .”, *op. cit. supra* note 35, p. 722; B. V. A. Röling, *International Law in an Expanded World*, Amsterdam, Djambatan, 1960, pp. XXII and 1-2.

⁵⁰ B. V. A. Röling, *op. cit. supra* note 49, p. 2.

⁵¹ Cf. Y. Saito, “Judge Tanaka, Natural Law and the Principle of Equality”, *The Living Law of Nations — Essays in Memory of A. Grahl-Madsen* (eds. G. Alfredsson and P. Macalister-Smith), Kehl/Strasbourg, N. P. Engel Publ., 1996, pp. 401-402 and 405-408; K. Tanaka wanted law to be wholly liberated from both the State (“as asserted by Hegel and his followers”) and from the nation (*Völk* — as asserted by Savigny and Puchta, and other jurists of the “historical school”); *ibid.*, p. 402.

⁵² Cf. V. Gowlland-Debbas, “Judicial Insights into Fundamental Values and Interests of the International Community”, *The International Court of Justice: Its Future Role after Fifty Years* (eds. A. S. Muller *et al.*), The Hague, Kluwer, 1997, pp. 344-346.

⁵³ As acknowledged, e.g., by the 1994 Framework Convention for the Protection of National Minorities of the Council of Europe (in force as from February 1998). For earlier general studies, cf., e.g., P. Thornberry, *International Law and the Rights of Minorities*, Oxford, Clarendon Press, 1992 (reprint), pp. 38-54; F. Ermacorà, “The Protection of Minorities before the United Nations”, 182 *RCADI* (1983), pp. 257-347.

fate of the individual” would be “at the mercy of some *Staatsrecht*”⁵⁴. In an essay published in 1967, René Cassin, who had participated in the preparatory process of the elaboration of the Universal Declaration of Human Rights of 1948⁵⁵, stressed the advance represented by the access of individuals to international instances of protection, secured by many human rights treaties⁵⁶.

45. To Paul Reuter,

“Individuals become subjects of international law when two basic conditions are fulfilled, namely, when they are *titulaires* of rights established directly by international law, which they can exercise, and are bearers of obligations sanctioned directly by international law.”⁵⁷

A similar view was upheld by Eduardo Jiménez de Aréchaga, to whom “there is nothing inherent to the structure of the international legal order” which impedes the recognition to the individuals of rights that emanate directly from international law, as well as international remedies for the protection of those rights⁵⁸. Also in this line of reasoning, Julio Barberis pondered in 1983 that, for individuals to be subjects of law, it is necessary that the legal order at issue attributes to them rights or obligations (as is the case of international law)⁵⁹.

⁵⁴ J. J. Lador-Lederer, *International Group Protection*, Leyden, Sijthoff, 1968, p. 19.

⁵⁵ As *rapporteur* of the Working Group of the former United Nations Commission on Human Rights, entrusted with the preparation of the Draft Declaration (from May 1947 to June 1948).

⁵⁶ In his own thoughtful words,

“if there still subsist on earth great zones where millions of men and women, resigned to their destiny, do not dare to utter the least complaint nor even to conceive that any remedy whatsoever is made possible, those territories diminish day after day. The awakening of conscience that an emancipation is possible, becomes increasingly more general . . . The first condition of all justice, namely, the possibility of cornering the powerful so as to subject them to . . . public control, is nowadays fulfilled much more often than in the past . . . The fact that the resignation without hope, that the wall of silence and that the absence of any remedy are in the process of reduction or disappearance, opens to moving humanity encouraging perspectives . . .” (R. Cassin, “Vingt ans après la Déclaration universelle”, 8 *Revue de la Commission internationale de juristes* (1967), No. 2, pp. 9-10, and cf. pp. 11-17.)

⁵⁷ Thus, as from the moment when the individual is granted a remedy before an organ of international protection (access to international jurisdiction) and can thus initiate the procedure of protection, he becomes subject of international law (P. Reuter, *Droit international public*, 7th. ed., Paris, PUF, 1993, pp. 235 and 238, and cf. p. 106).

⁵⁸ E. Jiménez de Aréchaga, *El Derecho Internacional Contemporáneo*, Madrid, Tecnos, 1980, pp. 207-208.

⁵⁹ The subjects of law are, thus, heterogeneous — he added — and theoreticians who beheld only States as such to be subjects simply distorted reality, failing to take into account the transformations undergone by the international community, which came to admit that non-State actors also possess international legal personality (J. A. Barberis, “Nouvelles questions concernant la personnalité juridique...”, *op. cit. supra* note 23, pp. 161, 169-172, 178 and 181).

46. In fact, successive studies of instruments of international protection came to emphasize precisely the historical importance of the recognition of the international legal personality of individuals as complaining party before international organs⁶⁰. In my own thematic course delivered at the Hague Academy of International Law in 1987, I pondered that the continuous expansion of international law is also reflected in the multiple contemporary mechanisms of international protection of human rights, the operation of which cannot be dissociated from the new values acknowledged by the international community. Individuals were at last enabled “to exercise rights emanating directly from international law (*droit des gens*)”. And I added:

“In this connection, the insight and conception of Vitoria developed in his manuscripts of 1532 (made public in 1538-1539) can be properly recalled in 1987, four-and-a-half centuries later: it was a conception of a universal law of nations, of individuals socially organized in States and also composing humanity (. . .); redress of violations of (human) rights, in fulfilment of an international need, owed its existence to the law of nations, with the same principles of justice applying to both States and individuals or peoples forming them.

.....

There is a growing and generalized acknowledgement that human rights, rather than deriving from the State (or from the will of individuals composing the State), all inhere in the human person, in whom they find their ultimate point of convergence. (. . .) The non-observance of human rights entails the international responsibility of States for treatment of the human person.”⁶¹

47. The international subjectivity of the human being (whether a child, an elderly person, a person with a disability, a stateless person, or any other) emerged with all vigour in the international legal thinking of the

⁶⁰ Cf., e.g., A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge University Press, 1983, pp. 1-445; A. Z. Drzemczewski, *European Human Rights Convention in Domestic Law*, Oxford, Clarendon Press, 1983, pp. 20-34 and 341; F. Matscher, “La Posizione Processuale dell’Individuo come Ricorrente dinanzi agli Organi della Convenzione Europea dei Diritti dell’Uomo”, *Studi in Onore di G. Sperduti*, Milan, Giuffrè Ed., 1984, pp. 601-620; J. A. Carrillo Salcedo, *Dignidad frente a Barbarie — La Declaración Universal de Derechos Humanos, Cincuenta Años Después*, Madrid, Ed. Trotta, 1999, pp. 27-145; E.-I. A. Daes (*rapporteur spécial*), *La condition de l’individu et le droit international contemporain*, United Nations doc. E/CN.4/Sub.2/1988/33, of 18 July 1988, pp. 1-92; R. A. Mullerson, “Human Rights and the Individual as Subject of International Law: A Soviet View”, 1 *European Journal of International Law* (1990), pp. 33-43.

⁶¹ A. A. Cançado Trindade, “Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)”, 202 *RCADI* (1987), pp. 411-412, and cf. pp. 32-33.

twentieth century, as a reaction of the universal juridical conscience against the successive atrocities committed against the humankind. By the time that subjectivity so emerged, sovereign immunity had already been erected, pursuant to an inter-State static outlook, placing States outside the reach of law. What was meant to be an exception (immunity) showed itself as the rule, in the name of “absolute” sovereignty.

48. The advent of the juridical category of the international legal personality of individuals came to fulfill 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. Nowadays, if one has, on the one hand, a domestic court decision such as that of the Greek Special Supreme Court in the *Margellos and Others* case (2002), one also has, on the other hand, domestic court decisions such as those of the Greek Court of Cassation (*Areios Pagos*) in the *Distomo Massacre* case (2000), and of the Italian Court of Cassation in the *Ferrini v. Federal Republic of Germany* case (2004)⁶².

49. 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*. Furthermore, to the international legal doctrine of the second half of the twentieth century, it did not pass unnoticed that individuals, besides being *titulaires* of rights at international level, also have duties which are attributed to them by international law itself. The consolidation of the international legal personality of individuals, as active as well as passive subjects of international law, enhances accountability in international law for abuses perpetrated against human beings. Thus, individuals are also bearers of duties under international law, and this reflects the consolidation of their international legal personality⁶³.

7. *Individuals as Titulaires of Rights: The Historical Significance of the International Subjectivity of the Individual*

50. Ultimately, all law exists for the human being, and the law of nations is no exception to that, guaranteeing to the individual his rights

⁶² Decision of 11 March 2004, which held that an Italian national, deported to Germany for forced labour in 1944, was entitled to compensation for such war crime, as Germany could not claim State immunity in such a case of violation of a preemptory norm of international law (*jus cogens*).

⁶³ Developments in international legal personality and international accountability go hand in hand, and this whole evolution bears witness of the formation of the *opinio juris communis* to the effect that the gravity of certain violations of fundamental rights of the human person affects directly basic values of the international community as a whole.

and the respect for his personality⁶⁴. The respect for the individual's personality at international level is instrumentalized by the international right of individual petition. Human rights do assert themselves against all forms of domination or arbitrary power. The human being emerges, at last, even in the most adverse conditions, as the ultimate subject of law, domestically as well as internationally.

51. The international juridical subjectivity of the human being, as foreseen by the so-called founders of international law (the *droit des gens*), is nowadays a reality. At this beginning of the twenty-first century, this highly significant conquest can be appreciated within the framework of the historical process of *humanization* of international law, attentive to fundamental values and the realization of superior common goals. On the basis of the right of individual petition is erected the juridical mechanism of emancipation of the human being *vis-à-vis* his own State for the protection of his rights in the ambit of the international law of human rights — an emancipation which comes at last to give an ethical content to the norms of both domestic public law and international law⁶⁵.

52. No one with sane conscience would deny that individuals effectively possess rights and have duties which derive directly from international law, with which they are thus in direct contact. This evolution — contributing ultimately to the rule of law at national and international levels — is to be appreciated in a wider dimension⁶⁶. The expansion of international legal personality, nowadays encompassing that of individuals as active and passive subjects of international law, goes *pari passu* with the acknowledgement of accountability in international law. The universal juridical conscience — as the ultimate *material source* of all law — seems to have awakened to the realization of justice at national and international levels. International law has gradually liberated itself from the chains of statism, and has again met with the conception of a true, and new, *jus gentium*.

⁶⁴ F. A. von der Heydte, "L'individu et les tribunaux internationaux", 107 *RCADI* (1962), p. 301; cf. also, in this respect, e.g., E. M. Borchard, "The Access of Individuals to International Courts", 24 *American Journal of International Law* (1930), pp. 359-365.

⁶⁵ This is, furthermore, a logical development, as it does not seem reasonable to conceive rights at international level without the corresponding procedural capacity to vindicate them. The recognition of the direct access of the individuals to the international justice reveals the new primacy, in our days, of the *raison de l'humanité* over the *raison d'Etat*, inspiring the current historical process of *humanization* of international law (A. A. Cançado Trindade, *A Humanização do Direito Internacional*, Belo Horizonte/Brazil, Ed. Del Rey, 2006, pp. 3-409).

⁶⁶ The subjects of international law have, already for a long time, ceased to be reduced to territorial entities. More than six decades ago, as acknowledged in the celebrated Advisory Opinion of the International Court of Justice on *Reparations for Damages Injuries Suffered in the Service of the United Nations* (1949), the advent of international organizations had put an end to the States' monopoly of the international legal personality and capacity, with all the juridical consequences which ensued therefrom.

8. *General Assessment*

53. From all the aforementioned it can be seen, in the factual context of the present case concerning the *Jurisdictional Immunities of the State*, that the individuals concerned (private claimants) have had *formal* access to domestic courts (in Greece and Italy) as well as to an international tribunal (the European Court of Human Rights); yet, they do not seem to feel that they have found justice to date (*material* access to justice), and they keep on seeking compensation for the wrongs suffered in the past. As for the States concerned, they have had access to this Court — the contending Parties in the main case (Germany and Italy), as well as the intervening State (Greece).

54. The Court has now before 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. 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.

V. CONCLUDING OBSERVATIONS : THE *RESURRECTIO* OF INTERVENTION IN CONTEMPORARY INTERNATIONAL LITIGATION

55. Germany, a Party to the main case, has asked the Court to pronounce on Italy's conduct also in respect of judgments delivered by Greek Courts (seeking the upholding of jurisdictional immunities). Whichever Judgment the Court comes to deliver in the present case, it is bound to have a direct effect on Greece. It is bound to affect third States. It is hard to see how Greece could not claim to have an interest of a legal nature in such circumstances. An interest in the enforceability in a foreign State of judgments of a State's own judiciary appears to fall squarely within the concept of an interest of a legal nature of the would-be intervening State. In sum, in my perception, Greece has demonstrated that it has an interest of a legal nature that may indeed be affected by the Court's Judgment in the present case concerning the *Jurisdictional Immunities of the State*, opposing Germany to Italy.

56. In the ambit of the circumstances of the present case, intervention has at last seen the light of the day. In a very recent case wherein it was likewise requested, but not granted, concern was expressed, within the Court, as to the need of a more proactive attitude of the ICJ as to the institution of intervention (under Article 62 of the ICJ Statute) in inter-

national litigation⁶⁷. The same hope has been expressed in expert writing in recent years as to the need for a more liberal attitude of the ICJ in relation to aspects of intervention⁶⁸. In the history of the ICJ, intervention has never died, though it lay dormant in the Peace Palace for most of the time of the Court's history.

57. Twice before, permission to intervene was granted by the ICJ: by its Chamber, in the case concerning the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras (Application by Nicaragua for permission to intervene, Judgment of 13 September 1990) (*I.C.J. Reports 1990*, p. 92), and by the full Court itself, in the case concerning the *Land and Maritime Boundary* between Cameroon and Nigeria, wherein, by its Order of 21 October 1999 (*I.C.J. Reports 1999 (II)*, p. 1029), it authorized Equatorial Guinea to intervene. Both cases concerned land and maritime boundaries. This time, with the Order it adopts today, 4 July 2011, the ICJ grants to Greece permission to intervene in the case concerning the *Jurisdictional Immunities of the State*, a domain of great importance in and for the development of contemporary inter-

⁶⁷ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica for Permission to Intervene, Judgment, *I.C.J. Reports 2011 (II)*; joint dissenting opinion of Judges Cançado Trindade and Yusuf, pp. 401-413, paras. 1-29.

⁶⁸ Cf., e.g., S. Rosenne, *Intervention in the International Court of Justice*, Dordrecht, Nijhoff, 1993, pp. 79 and 104 (as to consent and to jurisdictional link); J. M. Ruda, "Intervention before the International Court of Justice", *Fifty Years of the International Court of Justice — Essays in Honour of R. Jennings* (eds. V. Lowe and M. Fitzmaurice), Cambridge University Press, 1996, p. 495 (no need of additional consent); K. Mbaye, "L'intérêt pour agir devant la Cour internationale de Justice", 209 *RCADI* (1988), pp. 340-341 (beyond consent); S. Torres Bernárdez, "L'intervention dans la procédure de la Cour internationale de Justice", 256 *RCADI* (1995), pp. 213-214, 223, 230-233, 252, 259 and 437; S. Rosenne, "Some Reflections on Intervention in the International Court of Justice", 34 *Netherlands International Law Review* (1987), p. 89; E. Decaux, "La juridiction internationale permanente — L'intervention", *La juridiction internationale permanente* (SFDI — Colloque de Lyon), Paris, Pedone, 1987, pp. 219, 223, 229 and 255; A. J. J. de Hoogh, "Intervention under Article 62 of the Statute and the Quest for Incidental Jurisdiction without the Consent of the Principal Parties", 6 *Leiden Journal of International Law* (1993), pp. 17-46; R. St. J. Macdonald and V. Hughes, "Intervention before the International Court of Justice", 5 *African Journal of International and Comparative Law* (1993), p. 33; D. W. Greig, "Third Party Rights and Intervention before the International Court", 32 *Virginia Journal of International Law* (1992), pp. 289, 334, 352 and 367; J. G. Starke, "Locus Standi of a Third State to Intervene in Contentious Proceedings before the International Court of Justice", 58 *Australian Law Journal* (1984), p. 358 (as to "jurisdictional links"); P. Palchetti, "Opening the International Court of Justice to Third States: Intervention and Beyond", 6 *Max Planck Yearbook of United Nations Law* (2002), pp. 158, 160 and 180-181; C. Chinkin, "Third-Party Intervention before the International Court of Justice", 80 *American Journal of International Law* (1986), pp. 500-502, 515, 519 and 525; G. Sperduti, "L'intervention de l'Etat tiers dans le procès international: une nouvelle orientation", 31 *Annuaire français de droit international* (1985), pp. 288-290 and 293; T. Licari, "Intervention under Article 62 of the Statute of the ICJ", 8 *Brooklyn Journal of International Law* (1982), pp. 286-287; G. Morelli, "Note sull'Intervento nel Processo Internazionale", 65 *Rivista di Diritto Internazionale* (1982), pp. 805-806, 808, 811 and 814 (widening dispute-settlement).

national law. The Court has so decided at the height of its responsibilities as the principal judicial organ of the United Nations (Article 92 of the UN Charter).

58. Unlike land and maritime delimitation cases, or other cases concerning predominantly bilateralized issues, the present case is of interest to third States — such as Greece — other than the two contending Parties before the Court. The subject-matter 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 my perception, pointing towards an evolution into a true *universal* international law.

59. The Court has found, in resolutory point (1) of the *dispositif*, and the corresponding reasoning of the present Order, that this is a clear case for intervention as a non-party under Article 62 of the ICJ Statute. In sum, Greece's Application for permission to intervene fits squarely within the requisites for intervention set forth under Article 62 of the Court's Statute. By granting to Greece permission to intervene, the present Order of the Court gives a proper expression to the principle of *la bonne administration de la justice* in the context of the *cas d'espèce*.

60. The present case also leaves as a lesson that we 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 been given to States as *titulaires* of rights, as well as to individuals as *titulaires* of rights. Even in a recent, individualized case, such as that of *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Judgment of 30 November 2010), the facts underlying that dispute before the ICJ concerned ultimately the treatment dispensed to an individual, the rights of an individual, as I pointed out in my lengthy separate opinion (*I.C.J. Reports 2010 (II)*), p. 729-811, paras. 1-245) in that case.

61. States, as well as individuals, are subjects of international law. The outcome of the Court's decision in the present Order in the case concerning the *Jurisdictional Immunities of the State*, of historical importance, shows that intervention in contemporary international litigation is alive and well: it has at last seen the light of the day. What we behold today, here at the Peace Palace, is a true *resurrectio* of intervention in present-day international litigation; its *resurgere* from its long sleep 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.

(Signed) Antônio Augusto CANÇADO TRINDADE.