INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

JURISDICTIONAL IMMUNITIES OF THE STATE

(GERMANY V. ITALY)

APPLICATION BY GREECE FOR PERMISSION TO INTERVENE

GERMANY'S RESPONSE

23 MARCH 2011

Outline of Argument

I. Preliminary Observations

1. Germany has duly taken note of the Greek Government's Application for permission to intervene in the *Case concerning Jurisdictional Immunities of the State (Germany v. Italy)*, currently pending before the Court. The Application was submitted at a fairly late stage of the proceedings on 13 January 2011, just one day before the end of their written phase: in fact, the Court had set 14 January 2011 as the deadline for the filing of the Rejoinder of the Respondent. According to Article 81(1) of the Rules of Court, such an application "shall be filed as soon as possible". It should be recalled that Germany submitted its Application against Italy on 23 December 2008. Since all newly instituted proceedings are immediately brought to the knowledge of all States Members of the United Nations (Rules of Court, Article 42), Greece must have been aware of the dispute for more than two years before submitting its request to the Court.

2. However, Germany does not claim that the Greek Application must be rejected as being out of time. According to the language of Article 81(1) of the Rules of Court, the requirement of early submission of an application for permission to intervene is still satisfied if the application reaches the Court "not later than the closure of the written proceedings". In an earlier dispute, the *Case concerning the Continental Shelf (Libya/Malta)*,[1] Italy submitted its application for permission to intervene on 24 October 1983, two days before the countermemorials of the two principal parties to the dispute were required to be filed (26 October 1983). On that occasion, the Court did not object to the late submission of the application – which was rejected on different grounds.[2] The Court has also shown in other cases a high degree of flexibility regarding time limits, refraining from applying any formalistic standards.[3] Accordingly, Germany accepts that in the instant

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1 Final judgment of 3 June 1985, ICJ Reports 1985, 13.

2 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, ICJ Reports* 1984, 3, at 8, para. 10.

3 *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia(Malaysia), Application for Permission to Intervene, ICJ Reports* 2001, 575, at 583-586, paras. 19-26.

case the Greek Application, although it came as a sudden and unexpected surprise, fulfils *ratione temporis* the requirements of Article 81(1) of the Rules of Court.

3. Germany wishes, however, to draw the attention of the Court to a number of factors that would appear to lead to the conclusion that the Greek Application does not meet the criteria established in Article 62(1) of the Statute. Pursuant to this provision, a State may request the Court to permit it to intervene if it considers that it has an "interest of a legal nature which may be affected by the decision in the case". In Germany's view, Greece may not have succeeded in showing that it possesses such an interest. In any event, it will be necessary to study with great attention whether the Greek request meets the requirements of a legitimate intervention as they are laid down in Article 62(1) of the Statute, in particular in respect of an interest of a legal nature. In the following, consideration will be given to these issues.

4. As it results from the cautious language used in the preceding paragraph, Germany deliberately refrains from raising an objection under the terms of Article 84(2) of the Rules of Court. It is aware of the consequences entailed by the filing of a formal objection. According to its view, it suffices to bring to the cognizance of the Court the considerations which militate against the admissibility of the Greek Application. Hence, the following observations have no other objective than simply to inform the Court about the legal position as perceived by Germany. Germany trusts that the Court will find the right decision, and it refrains from making any submissions as to the way in which the Court should handle the Greek Application. No oral hearing is necessary in order to assemble the elements permitting a conclusive assessment of the Application. Greece has clearly and succinctly stated the reasons allegedly justifying its attempt to participate in the pending proceedings between Germany and Italy as an intervener. In sum, in the interest of the good administration of justice

Germany leaves it to the Court to assess the admissibility of the Greek Application as it sees fit.

II. The Greek Application in the Light of Article 62 of the Statute

5. Article 62(1) of the Statute sets out two requirements which a request for authorization to intervene must cumulatively fulfil. First, a legal interest of the applicant State must be present. At the stage of filing the application, it suffices to claim that such an interest exists ("Should a State consider …"). However, the applicant State must then identify that interest "with particular clarity", bearing the corresponding burden of proof.[4] Second, it must be shown that that interest may be affected by the future decision in the relevant case. The Greek Application would appear to fail on both points. Germany acknowledges, however, that in respect of one of the three principal approaches chosen by Greece a different view might be held.

6. Reading the Application, one may indeed identify three different lines of reasoning.

1) The First Approach

7. The first line of reasoning appears in several places of the Application. Greece contends that it has a general interest in the legal issues which the Court will have to address in adjudicating Germany's demands. Thus, for instance, at p. 5 the following is stated:

> "Greece intends to stress and uphold the principle of legal security; it will try to eliminate the existing uncertainty; it takes into serious consideration certain ambiguities besetting issues of 'Jurisdictional Immunities of a State'".

This approach is reiterated and emphasized several times. At p. 8 under point (f), one can read that Greece has an interest in the

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[4] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, ICJ Reports* 2001, 575, at 598, paras. 58, 59.

> "nature and essential character of the legal principles, which will determine the claims presented by Germany".

Similar observations can be found at p. 9 under points (g), (j) and (k). Some kind of concluding statement to that effect appears at p. 10 where the Application reads:

> " ... the interests – even if only indirect – of a legal nature of Greece that may be affected by a Judgment of the Court are the sovereign rights and jurisdiction enjoyed by Greece under general international law".

8. None of these statements establishes any kind of relationship with the case at hand. Greece confines itself to specifying that it has a general interest in the scope and meaning of State immunity under customary or general international law. It may have good grounds to wish to be able to participate in the debate, taking place before the Court, on the legitimate function of State immunity in the international legal order of the last century and of the contemporary world. But such an abstract interest does not correspond to the requirements of Article 62(1) of the Statute. Only States that have a specific interest in the outcome of the proceedings in which they wish to intervene are allowed to do so. Article 62(1) cannot be conceived of as an open clause that permits any State to introduce itself into any proceedings that raise legal issues it deems to be interesting in respect of any other pending or predictable disputes in which it may be involved. Greece's first approach would allow all members of the United Nations indiscriminately to invoke Article 62(1). Regarding the instant case, it is clear that every State has a natural interest in knowing exactly what its legal position is should it be sued before the civil courts of another State.

9. Under the Statute, such a general, non-specific interest is solely and exclusively satisfied by Article 63. If the outcome of a proceeding depends on the construction of a clause of a multilateral treaty, every other State party may intervene in order to submit to the Court its views as to the correct construction of that clause. No specific, individualized interest must

be shown by the intervener. Pursuant to Article 63, every State is deemed to have a legitimate interest in the interpretation of the provisions of a treaty by which it is bound. By contrast, no such sweeping interest *ratione conventionis* is recognized by the Statute with regard to customary international law or, more broadly, to general international law.[5] The reluctance shown by the Statute in this regard is fully justified and deserves to be respected unreservedly. A provision of that kind would allow any State to intervene in any proceeding inasmuch as every proceeding before the ICJ raises inevitably some issues of general international law. Grave inconveniences for the proper administration of justice would follow from such a broad opening of legal proceedings for third States. Mostly, intervention delays the resolution of a case.

10. Germany relies in this connection on the jurisprudence of the Court which, in a number of cases, has authoritatively ruled that an abstract interest in legal principles likely to be applied in the case at hand is not enough.[6] Such an abstract interest provides no standing under Article 62(1) of the Statute. The instant case provides no grounds that might justify departing from that jurisprudence. Accordingly, the first approach embarked upon by Greece does not open up the gates of Article 62(1) of the Statute.

2) The Second Approach

11. The second line of reasoning of Greece is founded on the historical fact of the occupation of the country by German armed forces during World War II. At p. 7 of the Application, Greece speaks of the responsibility of Germany vis-à-vis Greece

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[5] See C. Chinkin, comments on Article 63, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice* (Oxford: Oxford University Press, 2006) 1379, margin note 23.

[6] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, ICJ Reports* 1981, 3, at 17, para. 30; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, ICJ Reports* 1990, 92, at 124, para. 76; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, ICJ Reports* 2001, 575, at 597, para. 52.

> "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".

It identifies the origin of Germany's responsibility

> "in atrocities and other inhumane acts committed by or on behalf of the German Armed Forces and other parts of the Nazi government against Greek nationals."

Further statements to the same effect are to be found at p. 8 of the Application (points (c), (d) and (e)). Under point (d), Greece explicitly refers to the Distomo massacre.[7] Thus, apparently Greece feels that the unjustifiable actions of the German armed forces, which constituted grave breaches of international humanitarian law, should be looked into by the Court "at the margins" of the instant case.

12. It stands to reason that through these observations Greece intends to introduce a new dispute into the pending proceedings, to wit a dispute between Greece and Germany about the reparation of damages resulting from World War II. This holds true notwithstanding the explicit statement by Greece (p. 5) that it is

> "by no means asking the Court to resolve a dispute between Greece and parties to the proceedings without the Parties' consent".

Greece reiterates this disclaimer at a later page of its Application (p. 12):

> "By choice, Greece has not yet introduced its international claims against Germany. Greece states that it does not intend to do so within the framework of this proceedings and the pending case."

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[7] On the *Distomo* case see German Memorial, para. 65.

However, these statements stand in stark contrast to the wording of the Application itself.[8] The simple fact is that Greece does focus on its own losses and injuries during World War II and wishes them to be reviewed by the Court. The complaints raised by Greece in this connection are unrelated to the present dispute between Germany and Italy, which concerns exclusively the question of state immunity.

13. In its order of 6 July 2010 (para. 30), the Court ruled that the occurrences of World War II from which Italy derived the claims asserted in its counter-claim lie *ratione temporis* outside its jurisdiction. The same must then apply *a fortiori* for the claims Greece seeks to introduce under its second approach.

14. It should be added that while between Germany and Italy there exists a jurisdictional link on the basis of the European Convention for the Pacific Settlement of Disputes of 29 April 1957, no such link is present between Greece and Germany.[9] Greece is not a party to the European Convention and Germany's recent declaration under Article 36(2) of the Statute (30 April 2008) has no retrospective effect. Accordingly, the complex issue of reparation for the injuries suffered by Greece during World War II does not come within the purview of the jurisdiction of the Court and cannot be brought before the Court incidentally by using the mechanism of intervention under Article 62(1) of the Statute of the Court.[10]

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[8] A similar situation was also present in the case *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, ICJ Reports* 1984, 3, at 20, para. 31, where the Court regarded such a disclaimer as "immaterial".

[9] Germany is aware of the fact that for a genuine case of intervention in accordance with Article 62(1) of the Statute no jurisdictional link is required, see *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, ICJ Reports* 1990, 92, at 135, para. 100.

[10] See ICJ, *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, ICJ Reports* 1984, 3, 22-25, paras. 35-41; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, ICJ Reports* 1990, 92, 133-4, para. 97; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, ICJ Reports* 2001, 575, at 598, para. 60.

3) The Third Approach

16. The third approach defined by Greece in its Application would appear to be better related to the instant case. At p. 5 of the Application Greece states that

> "its intention is to solely intervene in the aspects of the procedure relating to judgments rendered by its own (domestic – Greek) Tribunals and Courts on occurrences during Wold War II and enforced (*exequatur*) by the Italian Courts".

In this connection, Greece refers to Germany's submissions. One of these submissions (No. 3) requests the Court to find that Italy committed a breach of Germany's jurisdictional immunity "by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy".

17. It is not easy to conclude that at least this last attempted justification of the request for permission to intervene meets the requirements of Article 62(1) of the Statute. The private claimants who were successful in the *Distomo* case have certainly a legal interest in seeing the judgments of the responsible trial judges (Court of first instance of Livadia), confirmed by the Areios Pagos,[11] 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. Generally, the legal interests of a State are confined to its area of jurisdiction, in particular its territory. What will have to be discussed in the present proceedings between Germany and Italy, however, is the allegation, advanced by Germany, that 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,[12] cannot be executed in Greece itself. The very subject-matter of the Court's findings will be, solely and exclusively, Italy's conduct.

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[11] Judgment of 4 May 2000, 129 ILR 726.

[12] Judgment of 17 September 2002, 129 ILR 526.

18. The Court will pronounce on nothing else than the decisions and measures taken within the Italian legal system permitting the execution of the Greek judgments. *Res judicata* will remain confined to the relationship between the two litigant parties, Germany and Italy (Article 59 of the Statute), and Greece will only be affected in the same way as any other country by the clarification of the legal position.

III. Concluding Observations

21. As pointed out several times already, Germany does not formally object to the admissibility of the Greek Application. It has taken care, in the preceding sections, to give an account of the legal issues which that Application gives rise to. On the basis of its analysis, it has come to the conclusion that none of the three approaches relied upon by Greece meets the criteria set out in Article 62(1) of the Statute. Approaches one and two are clearly unable to open up the gates of Article 62(1). Regarding the third approach, a legal assessment is fraught with greater complexities. Germany deems the third approach unsuitable as well but it defers in that respect essentially to the judgment of the Court.

22. As far as the substance of the matter is concerned, namely the scope and meaning of the jurisdictional immunity of Germany in the instant proceedings, Germany sees no reason why a brief by Greece purporting to clarify the legal position might compromise its own stance. Germany is fully convinced that the arguments put forward by it in its briefs have provided a comprehensive picture of the current legal regime of State immunity as barring any suit that relates to acts *jure imperii* to be brought against a State before the civil courts of another State. This rule stands and has not been displaced by any new rule of customary international law in respect of instances where a breach of a *jus cogens* rule is in issue.

23. Germany expects that Greece will support it in maintaining this legal stance. In fact, the last and determinative word on the issue was spoken in Greece for the purposes of the domestic legal order by the Special

Supreme Court in the *Margellos* case,[13] a case the underlying facts of which concerned again a deplorable and criminal breach of international humanitarian law by the armed forces of the *Third Reich* at the time of their withdrawal from Greece. The Special Supreme Court departed from the line taken by the Areios Pagos in the *Distomo* case. Although the relevant passage of the *Margellos* judgment was already reproduced in Germany's Memorial (para. 65), it would appear useful to provide the quotation once again in the present context:

> "Since there is no specific text or act formulating a rule providing for an exception to immunity in the case of a claim to establish State liability in tort arising from armed conflict, this Court cannot itself formulate such a rule or confirm its existence in the absence of clear evidence from international practice. Nor can the Court extrapolate such a rule from the principle that States are liable to pay compensation for violations of the laws of war on land."

This holding is clear and requires no comment. Germany proceeds from the assumption that, in drafting the submission it wishes to make, Greece would follow the views of its highest court if admitted to the present proceedings in accordance with Article 62(1) of the Statute.

24. Greece may furthermore wish to see the stand taken by its Minister of Justice in the *Distomo* case confirmed. It is a matter of common knowledge that the Minister denied its authorization for the enforcement of the controversial *Distomo* judgments against Germany. This refusal was first challenged before the competent Greek courts and thereafter before the European Court of Human Rights. The contention of the claimants was that denial of enforcement amounted to a violation of the right of access to justice under Article 6 of the European Convention on Human Rights. However, both the Greek courts seized with the matter as well as the European Court of Human Rights rejected the actions, holding that the general rules on State immunity restricted the right of access to justice.[14]

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[13] Judgment of 17 September 2002, 129 ILR 526.

[14] See European Court of Human Rights, *Kalogeropoulou and Others v. Greece and Germany*, Application No. 59021/00, 12 December 2002.

25. In any event, any submissions which Greece might be authorized to file will have to remain strictly within the scope *ratione materiae* covered by Article 62(1) of the Statute. They might comment on any interest of a legal nature affected by the present proceedings. In particular, however, they would be debarred from discussing any issues that Greece has sought to introduce under its second approach.

IV. Submissions

26. As already pointed out, Germany refrains from submitting to the Court any specific demands. It confines itself to praying the Court to examine the Greek Application for permission to intervene in light of the considerations set out above.

Berlin, 23 March 2011

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