

INTERVENTION BEFORE THE INTERNATIONAL COURT OF JUSTICE – A CRITICAL EXAMINATION OF THE COURT’S RECENT DECISION IN GERMANY V. ITALY

*Deepak Raju & Blerina Jasari**

The International Court of Justice, in the Jurisdictional Immunities of the State: Germany v. Italy, had an opportunity to elaborate upon what qualified as an ‘interest of a legal nature’ to permit intervention in a proceeding before the Court. The argument put forth by the party seeking permission to intervene, i.e., Greece, was that a judgment favouring German claims may potentially affect its legal interests and rights. Greece was granted the permission to intervene. Yet, the Court omitted to answer what qualifies as a legal interest, and has left the participants in the international legal order in the dark regarding the preconditions to intervention before the Court.

I. INTRODUCTION

The Federal Republic of Germany (‘Germany’) filed an application against the Italian Republic (‘Italy’) before the International Court of Justice (‘the Court’), claiming that its jurisdictional immunity warranted by international law has been violated. The proceedings were instituted after Italian courts had awarded damages to victims of Nazi war crimes committed by Germany, during its occupation of Italy between 1943 and 1945. Comparatively, Greek courts had awarded damages to Greek nationals who were victims of Nazi war crimes in the Hellenic Republic (‘Greece’). Due to a Greek procedural restriction, the Greek judgment was not enforced by Greek courts, and was enforced instead by Italian courts. In the case before the Court, Greece, therefore, filed an application for permission to intervene, claiming that it has a legal interest in the matter at hand. The Court accepted Greece as a non-party to the case. With regard to the dispute the Court rendered its judgment¹ on February 3, 2012. It ruled in favour of Germany, thereby rejecting Italy’s demand for an exception to state immunity in civil cases based on claims of grave human rights violations. This paper focuses on Greece’s application

* Deepak Raju is an L.L.M. candidate in international law at the University of Cambridge and an alumnus of NUJS, Kolkata, India. Blerina Jasari completed her LL.M. from Université de Cergy Pontoise, Paris and works as a student assistant at Ruhr University of Bochum, Germany.

¹ ICJ, Jurisdictional Immunities of the State: Germany v. Italy: Greece Intervening, February 3, 2012.

to intervene and elaborates on the legal interests set out by Greece. After a thorough exposition of the facts of the case as well as Greece's arguments, we will elucidate on the decision made by the Court with regard to the application, and make an assessment on the distinction between the concepts of 'rights' and 'interests'. By evaluating this case and other cases before the Court, we will show that this distinction is important when deciding whether a party can or cannot intervene in a case.

II. FACTUAL BACKGROUND

During World War II, Nazi forces arrested, deported, and massacred civilians as well as military personnel in Italy and Greece. After the war ended, the victims or their relatives and descendants sought reparation from Germany. In 1947, the Allied Powers and Italy signed a peace treaty.² According to Article 77(4) of this treaty,³ Italy agreed to waive all claims against Germany, except those arising out of contracts and other obligations entered into, and with rights acquired, before September 1, 1939. However, this clause affected the German-Italian relationship. On June 2, 1961, Italy and Germany concluded two agreements: the first agreement concerned the 'Settlement of certain property-related, economic, and financial questions' and the second agreement concerned the 'Compensation for Italian nationals subjected to National-Socialist measures of persecution'.⁴ Germany made certain specific and limited commitments with regard to Italy therein.

In recent years, especially during the 1990s, Germany has had to face a growing number of disputes brought before Italian courts.⁵ Italian nationals tried to enforce their reparation claims against Germany. Additionally, in 1997, Greek nationals tried to enforce their reparation claims. The first case, tried before Greek courts, was that of *Prefecture of Voiotia v. Federal Republic of Germany* ('Distomo Massacre case').⁶ It was based on a massacre perpetrated by German armed forces in the Greek village of Distomo, on June 10, 1944. The District Court of Livadia⁷ and later the Greek Court of Cassation⁸ ruled in favour of the plaintiffs. Germany was sentenced to pay approximately □ 28 million plus interest to the plaintiffs. This judgment, however, was never

² See *Id.*, 13 (For excerpts from the treaty).

³ *Id.*

⁴ See ICJ, *Jurisdictional Immunities of the State: Germany v. Italy: Greece Intervening*, February 3, 2012, 14-15.

⁵ *Id.*, 16-17.

⁶ Case No. 11/2000 (ILR, Vol. 129, 513), May 4, 2011.

⁷ *Livadia, Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 137/1997, September 25, 1997.

⁸ *Areopag, Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 11/2000, May 4, 2000.

enforced in Greece. Article 923 of the Greek Code of Civil Procedure⁹ does not allow enforcement without the agreement of the Minister of Justice, who at the time denied his consent. The Distomo victims later successfully enforced their judgment before Italian courts, after the Florence Court of Appeal on May 2, 2005 declared that the judgment of the District Court of Livadia was enforceable in Italian territory.¹⁰ In each of these cases, Germany invoked its jurisdictional immunity, insisting on the inadmissibility of the claims. The Italian courts disregarded this plea. In a similar decision in *Ferrini v. Federal Republic of Germany* ('Ferrini case'),¹¹ the Italian Court of Cassation declared that Italy had jurisdiction with regard to a claim on behalf of a person who had been deported during World War II to Germany, to perform forced labour in the armaments industry. Furthermore, Italy took measures of constraint against 'Villa Vigoni', a German state property, in order to enforce their judgments.

On December 23, 2008, Germany instituted proceedings against Italy before the Court on the grounds that Italy had repeatedly disregarded the jurisdictional immunity of Germany as a sovereign state.¹² On January 13, 2011, Greece applied for permission to intervene in the case under Article 62 of the ICJ Statute.¹³ It requested to intervene and participate in the proceedings, in accordance with Article 85 of the Rules of the Court.¹⁴ In its application, Greece pointed out its sole intention to intervene, and explicitly did not seek to become a party to the dispute.¹⁵ On July 4, 2011, the Court granted permission to intervene on the grounds that Greece has a legal interest in the case and,

⁹ Code of Civil Procedure (Greece), (as amended by Law 2331/1995), Art. 923: "the prior consent of the Minister of Justice is a precondition for enforcing a decision against a foreign State".

¹⁰ *Foro italiano*, Vol. 133, 2008, I, 1308.

¹¹ Italian Court of Cassation, Case No. 5044/04, March 11, 2004.

¹² ICJ, Jurisdictional Immunities of the State: Germany v. Italy: Greece Intervening, February 3, 2012, Application of Germany, December 23, 2008.

¹³ ICJ, Jurisdictional Immunities of the State: Germany v. Italy: Greece Intervening, Application by Greece to Intervene, January 13, 2011; *See* Statute of the International Court of Justice, Art. 62:

1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

2. It shall be for the Court to decide upon this request.

¹⁴ *Id.*; *See* Rules of the Court, 1978, Art. 85:

1. If an application for permission to intervene under Article 62 of the Statute is granted, the intervening State shall be supplied with copies of the pleadings and documents annexed and shall be entitled to submit a written statement within a time-limit to be fixed by the Court. A further time-limit shall be fixed within which the parties may, if they so desire, furnish their written observations on that statement prior to the oral proceedings. If the Court is not sitting, these time-limits shall be fixed by the President. 2. The time-limits fixed according to the preceding paragraph shall, so far as possible, coincide with those already fixed for the pleadings in the case. 3. The intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention.

¹⁵ ICJ, Jurisdictional Immunities of the State: Germany v. Italy: Greece Intervening, February 3, 2012, Application by Greece to Intervene, January 13.

that neither Germany nor Italy objected to the application for permission to intervene as a non-party.¹⁶ The Court pointed out that Greece as a non-party has no possibility of asserting rights of its own and that the judgment will not be binding on Greece.¹⁷

III. ARGUMENTS PUT FORTH BY GREECE

Greece's intention was solely to intervene in the aspects of the procedure relating to judgments rendered by its own tribunals and courts, being enforced by the Italian courts.¹⁸

A. APPLICATION FOR PERMISSION TO INTERVENE

In its application, Greece set out that its legal interests which may be affected by a judgment of the Court are the sovereign rights and jurisdiction that it enjoys under international law. It was its purpose to present and demonstrate its legal rights and interests and to constitute how Germany's claims may or may not affect them. Greece stated that Germany has acquiesced to its international responsibility *vis-à-vis* Greece for all acts and omissions perpetrated by the Third Reich on Greek territory.¹⁹ The legal interest of Greece is derived from this fact. Greece then continued to set out the precise object of its proposition.²⁰ *Firstly*, Greece sought to protect and preserve its legal rights by all legal means available. *Secondly*, Greece intended to inform the Court of the nature of its legal rights and interests that could be affected by the Court's decision. The first object includes, *inter alia*, the legal rights that emanated from disputes by particular acts and the general practice of the Third Reich and the ones enjoyed under international law, especially with respect to jurisdiction and state responsibility. By achieving the second object Greece wanted to ensure that the determinations of the Court do not have a negative impact on Greece in case it is not granted intervention.

B. WRITTEN STATEMENT

On August 3, 2011, Greece submitted its written statement to the Court. After a brief introduction and a background of Greece's application to intervene, Greece continued to define the position of the Greek courts on state immunity with respect to reparation for grave violations of humanitarian law. It set out the judgments in the Distomo Massacre case and *Margellos v. Federal*

¹⁶ ICJ, Order of July 4, 2011, Application by Greece for Permission to Intervene, ¶¶ 5, 24, 34.

¹⁷ *Id.*, ¶ 31.

¹⁸ ICJ, Jurisdictional Immunities of the State: Germany v. Italy: Greece Intervening, February 3, 2012, 4.

¹⁹ *Id.*, 6.

²⁰ *Id.*, 10.

Republic of Germany ('Margellos case')²¹ and subsequently demonstrated the Greek courts' approach in the context of evolving international law.

1. Judgment in the Distomo Massacre Case

In the Distomo Massacre case, the Court of Livadia ruled in favour of the Greek claimants and therefore against Germany. Germany refused to be represented in the proceedings and invoked its jurisdictional immunity. In Greece there is no specific legislation on state immunity.²² Article 3(1) of the Greek Code of Civil Procedure merely stipulates that foreigners enjoy immunity before the Greek courts.²³ The term 'foreigners' is interpreted to include states as well.²⁴ The Livadia judges examined whether Germany enjoys jurisdictional immunity or not. During this examination, they took into account the distinction between acts *jure imperii* and acts *jure gestionis*.²⁵ They decided that Germany has no jurisdictional immunity in this case as the acts perpetrated by the members of its armed forces breached international rules of *jus cogens*.²⁶ This conclusion was based on the obligation incumbent upon the occupying power, under the regulations annexed to the Fourth Hague Convention of 1907 (Article 46) to respect, *inter alia*, the right to life and the right to property.²⁷ This obligation was considered to be part of *jus cogens*. Thus, the Court of Livadia concluded that when a state violates the peremptory norms of international law, it waives its right to jurisdictional immunity by implication.²⁸ Furthermore, the Court of Livadia found that the claimants had *locus standi* to bring a claim for compensation.²⁹ It found that the London Debt Agreement,³⁰ to which Greece became a party in 1956, does not preclude such claims. The terms of the London Debt Agreement state that consideration of claims with respect to Germany's activities during World War II was suspended until the question of reparation was settled by means of a peace treaty.³¹ The Court of

²¹ Greek Special Supreme Court, Case No. 6/2002, ILR, Vol. 129, 525, September 17, 2002.

²² Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, American Journal of International Law, available at <http://www.asil.org/ajil/caplan.pdf> (Last visited on May 7, 2013).

²³ See INTERNATIONAL AGENCY AND DISTRIBUTION LAW II 191 (Dennis Campbell ed., 2007).

²⁴ Written Statement of Greece, August 3, 2011, ¶ 22.

²⁵ Strictly sovereign acts of a state are termed '*jure imperii*' while acts of a state which do not meet that description are termed '*jure gestionis*'.

²⁶ *Id.*, ¶ 24.

²⁷ Fourth Hague Convention, October 18, 1907, Art. 46, available at <http://www.icrc.org/ihl/WebART/195-200056> (Last visited on May 7, 2013)(Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated).

²⁸ Jurisdictional Immunities of the State (Germany v. Italy), available at <http://www.dipublico.com.ar/cij/doc/188e.pdf> (Last visited on May 7, 2013).

²⁹ Written Statement, *supra* note 24, ¶ 25.

³⁰ London Agreement on German External Debts, February 27, 1953.

³¹ *Id.*, Appendix A.

Livadia holds this suspension to have been lifted by the Moscow Treaty,³² in 1990.³³

The judgment of the Court in Livadia was upheld by the Greek Court of Cassation.³⁴ It made clear that the principle of state immunity was applicable only in the case of acts *jure imperii*.³⁵ The distinction between acts *jure imperii* and *jure gestionis* is made on the basis of the law of the forum State, with regard to the nature of the act in question.³⁶ The Greek Court of Cassation affirmed that those rules, codified by the European Convention on State Immunity,³⁷ had achieved the status of customary international law. According to the Greek Court of Cassation, this exception from state immunity is confirmed by state practice and can be found in a variety of national legislation, such as in the national legislations of the United States of America,³⁸ the United Kingdom,³⁹ Canada,⁴⁰ Australia⁴¹ or Singapore.⁴² The Greek Court of Cassation also cited the International Law Commission's draft articles on Jurisdictional Immunities of the State and their Property.⁴³ Additionally, it cited the jurisprudence of United States courts supporting its argument.⁴⁴

2. Judgment in The Margellos case

The Margellos case⁴⁵ was based on events similar to those in the Distomo Massacre case, which took place in Lidoriki. The Special Supreme Court was asked to determine whether the rules on state immunity covered the acts referred to in the Margellos case. Under Article 100 of the Greek Constitution of 1975,⁴⁶ the Special Supreme Court has a dual role. On the one hand, it can review the validity of a rule of law in case the country's highest courts disagree. On the other hand, it can declare the applicability of a generally accepted rule of international law. On September 17, 2002, the Special Supreme

³² Treaty on the Final Settlement with Respect to Germany, September 12, 1990.

³³ Written Statement, *supra* note 24, ¶ 26.

³⁴ Written Statement of the Hellenic Republic, Case Concerning Jurisdictional Immunities of the State (Germany v. Italy): Greece Intervening, August 3, 2011, available at <http://www.icj-cij.org/docket/files/143/16658.pdf> (Last visited on May 7, 2013).

³⁵ ICJ, Jurisdictional Immunities of the State: Germany v. Italy: Greece Intervening, February 3, 2012, ¶ 61.

³⁶ ICJ, Jurisdictional Immunities of the State: Germany v. Italy: Greece Intervening, February 3, 2012, ¶ 59.

³⁷ European Convention on State Immunity, May 5, 1972, Art. 11.

³⁸ Foreign Sovereign Immunities Act, 1976 (U.S.), § 1605 (a) (5).

³⁹ State Immunity Act, 1978 (U.K.), § 5 (a), (b).

⁴⁰ State Immunity Act, 1985 (Canada), § 6 (a), (b).

⁴¹ Foreign States Immunities Act, 1985 (Australia), § 13 (a), (b).

⁴² State Immunity Act, 1979 (Singapore), § 7 (a), (b).

⁴³ ILC Draft Articles on Jurisdictional Immunities of States and Their Property, 1991, Art. 12.

⁴⁴ *Letelier v. Republic of Chile*, 1980; *Liu v. Republic of China*, 1986.

⁴⁵ Greek Special Supreme Court, *Margellos v. Federal Republic of Germany*, Case No. 6/2002, ILLR, Vol. 129, 525, September 17, 2002.

⁴⁶ The Constitution of Greece, 1975, Art. 100.

Court decided that Germany was entitled to state immunity.⁴⁷ However, Greece pointed out that the judgment was rendered by a majority of six to five and that the Special Supreme Court concluded that a trend to an exception of state immunity in the event of crimes perpetrated in an armed conflict was emerging, but that the Court was not in a position to confirm the existence of that exception.⁴⁸

3. Legal Rights under International Law

The legal context in which, the analysis of the Greek Court of Cassation and the Court of Livadia was undertaken, is that of the development of international law with respect to state immunity. The Greek courts tried to spell out clearly that this development is marked particularly by the role of individuals in the international legal order.⁴⁹ Through claims brought by individuals, jurisprudence was produced that no longer corresponds to the idea of state immunity which exists today. Furthermore, the Greek courts referred to the Security Council that has demonstrated this development,⁵⁰ particularly with regard to the protection against violations of human rights and humanitarian law.⁵¹ Greece continues to present evidence of this global legal structure⁵² that could be seen in international criminal law and in the new international criminal courts and tribunals.⁵³ Furthermore, Greece pointed out that at a regional level, both the Inter-American Court of Human Rights and the European Court of Human Rights have awarded reparation to victims of human rights violations, which were also violations of international humanitarian law ('IHL'). Some individuals have also received reparations directly through various procedures, in particular mechanisms established by the Security Council, inter-state agreements and unilateral acts.⁵⁴

This development leads to the fundamental position of the Greek courts that recognise individual rights to reparations in the event of grave

⁴⁷ Greek Special Supreme Court, *Margellos v. Federal Republic of Germany*, Case No. 6/2002, ILR, Vol. 129, 525, September 17, 2002.

⁴⁸ Written Statement, *supra* note 24, ¶ 59.

⁴⁹ *Id.*, ¶ 32; See also, E. ROUCOUNAS, *FACTEURS PRIVÉS ET DROIT INTERNATIONAL PUBLIC*, RCADI, Vol. 299 (2002); C. Basiouni, *International Recognition of Victims' Rights*, Human Rights Law Review, 2006, 203-279; A. Orakhelashvili, *The Position of the Individual in International Law*, California Western International Law Journal, Vol. 31, 2001, 241, 245.

⁵⁰ S.C. Res. 1265, U.N. Doc. S/RES/1265 (September 17, 1999); S.C. Res. 1296, U.N. Doc. S/RES/1296 (April 17, 2000); Principle of the "Responsibility to Protect" in the 2005 World Summit Outcome Document (60/1), UN A/RES/60/1, ¶¶ 138-140.

⁵¹ Written Statement, *supra* note 24, ¶31 f.

⁵² T. MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* (2006); T. MERON, *INTERNATIONAL LAW IN THE AGE OF HUMAN RIGHTS*, RCADI, Vol. 301, 9-490 (2004).

⁵³ See e.g., Statute of the International Criminal Court, Art. 75.

⁵⁴ United Nations Compensation Commission, created by Security Council Resolutions 687 (1991) and 692 (1991); F. Woolridge & Olufemi Elias, *Humanitarian Considerations in the Work of the United Nations Compensation Commission*, International Review of the Red Cross, Vol. 85, Sept. 2003, 555-581.

violations of IHL. Under customary international law, states have an obligation to remedy the effects of any violations of IHL which they have committed.⁵⁵ What is lacking is an express provision indicating who the beneficiary of that right to reparation is. IHL is aimed at protecting the individual and his or her rights. Therefore, the right to reparation must confer direct rights on individuals which are opposable to states. This notion is illustrated in numerous IHL provisions,⁵⁶ and is derived directly from Article 3 of the Fourth Hague Convention of 1907,⁵⁷ even though it is not explicitly stated. However, according to Article 31 of the Vienna Convention on the Law of Treaties, the terms of a treaty must be interpreted in accordance with their ordinary meaning.⁵⁸ Furthermore, the *travaux préparatoires* for that Convention confirm that the respective Article concerns cases of individual claims against states for unlawful acts committed during an armed conflict or a belligerent occupation.⁵⁹ In contrast to accepted international jurisprudence, the German Federal Constitutional Court recognised that individuals are beneficiaries of rights under IHL, but it did not accept that Article 3 entails an individual right.⁶⁰ In 1952, however, the German Administrative Court of Appeal of Münster concluded that Article 3 provided for an individual right to reparation.⁶¹ Additionally, various other national courts have concluded the same, such as the *Gerechthof*

⁵⁵ P. Klein, *Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and UN Law*, European Journal of International Law (EJIL), Vol. 13, 2002, 1241-1255.

⁵⁶ Particularly Art. 7 of the First Geneva Convention; Articles 6 and 7 of the Second Geneva Convention; Articles 7, 14, 84, 105 and 130 of the Third Geneva Convention; Articles 5, 7, 8, 27, 38, 80 and 146 of the Fourth Geneva Convention; Articles 44(5), 45(3), 75 and 85(4) of the First Additional Protocol of 1977; and Art. 6(2) of the Second Additional Protocol.

⁵⁷ Fourth Hague Convention, October 18, 1907, Art. 3: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation It shall be responsible for all acts committed by persons forming part of its armed forces".

⁵⁸ Vienna Convention on the Law of Treaties, May 23, 1969, Art.31:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - 12(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

⁵⁹ Second Hague Convention, Actes et Documents, Vol. 3, 142.

⁶⁰ BVerfG, 2 BvR 1379/01, June 28, 2004, available at http://www.bverfg.de/entscheidungen/rk20040628_2bvr137901.html (Last visited on May 7, 2013).

⁶¹ Germany, Administrative Court of Appeal of Münster, ILR, Vol. 19 (1952), 632-634.

Amsterdam (Amsterdam Court of Appeal),⁶² The Hague Court of Appeal on Srebrenica,⁶³ and the Italian Supreme Court of Cassation in the Ferrini case⁶⁴.

C. ORAL ARGUMENTS

The hearings were held at the Great Hall of Justice in the Peace Palace in The Hague, from September 12 - 16, 2011. Greece was represented by its agent, Stelios Perrakis, and by the counsel and advocate, Antonis Bredimas. On September 14, 2011, Greece presented its oral submissions. After several introductory remarks about the significance of the case in terms of an examination of state immunity, Mr. Perrakis presented the factual background of the case as well as Greece's intervention. Mr. Bredimas then continued with a clarification of the judgment in the Distomo Massacre case. That was followed by Mr. Perrakis with a statement on the judgments of other Greek courts. Finally, he concluded with a general assessment and closing remarks on the legal and practical consequences that the Court's judgment would have on pending and future cases similar to the present case.

In his final remarks, Mr. Perrakis was critical of the fact that the content of individual rights cannot in fact be given prominence or even practical shape. He maintained that the international community and its members should be responsible to redress violations of international humanitarian law and compensate its victims. However, the sense and extent of this right are dependent upon its enforcement by the courts, and its practical implementation is barred on the procedural level. There is a notion on a national and international scale that demonstrates the demand for change in state immunity, and Greece's agent calls for the Court's authority and wisdom to give an authoritative answer.

It is pertinent to note that neither Mr. Perrakis nor Mr. Bredimas presented Greece's legal interest to intervene in the case. They only gave arguments pertaining to why an exception to state immunity in cases like this should be accepted. The implication of not elaborating on Greece's legal interest was that, Greece argued in favour of Italy without explaining why it had a right to do so. Consequently, the distinction between the concept of 'rights' and that of 'interests' remains unclear even after the hearings.

⁶² Gerechtshof Amsterdam, Vierde meervoudige burgerlijkekamer, *Dedovic v. Kok et al.*, July 6, 2000.

⁶³ The Hague Court of Appeal, July 5, 2011, available at http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR0132&u_ljn=BR0132 (Last visited on May 7, 2013).

⁶⁴ Italian Court of Cassation, *Ferrini v. Federal Republic of Germany*, Case No. 5044/04, March 11, 2004, 540.

IV. THE DECISION OF THE COURT

On February 3, 2012, the International Court of Justice held by a majority of twelve to three judges that Germany's right to state immunity had been violated by the decisions of Italian courts.⁶⁵ The majority opinion of the Court is illustrative of three key points. *Firstly*, the Court proclaims the importance of state immunity as a principle of international law.⁶⁶ The Court considered that it must examine and apply the law on state immunity as it existed at the time of the Italian proceedings, and not the law on state immunity that existed in 1943-1945. Therefore, the applicable law is essentially procedural in nature, and is distinct from substantive law that determines whether the conduct is lawful or unlawful.⁶⁷ Additionally, the majority opinion recognises that present international law distinguishes acts *jure imperii* from acts *jure gestionis*. *Secondly*, the Court scrutinises whether there is an exception from state immunity in the case of grave human rights violations in the forum State. Taking Italy and Greece's arguments into consideration that an exception from state immunity in cases of grave human rights violations in the forum State exists, the Court reviewed the state practice and *opinio juris*. Except for the Italian and Greek judgments, the Court could not find other cases in order for customary international law to be reflected. And *thirdly*, the Court raises the issue of whether the violation of *jus cogens* demands an exception from state immunity. The Court distinguishes between state immunity as a procedural defence and violations of international law that belong to the merits. A new rule deriving from customary international law that assumes an exception cannot be found by the Court.⁶⁸ A conflict of the rules of *jus cogens* and state immunity does not exist as both rules address different matters – procedure and merits.

V. DID GREECE HAVE AN INTEREST OF A LEGAL NATURE?

The Court, by a majority of fifteen votes to one permitted the intervention by Greece. The decision was accompanied by a dissent of Judge *ad hoc* Gaja and a separate opinion from Judge Cançado Trindade. In the following paragraphs, we will attempt to highlight the rationale of the Court's decision, as well as the issues wherein the separate and dissenting opinions are divergent from the majority opinion.

⁶⁵ ICJ, Jurisdictional Immunities of the State: Germany v. Italy: Greece Intervening, February 3, 2012, ¶ 139.

⁶⁶ *Id.*, ¶ 58.

⁶⁷ ICJ, Arrest Warrant: Democratic Republic of Congo v. Belgium, ICJ Reports February 14, 2002, ¶ 60.

⁶⁸ Max Planck Encyclopedia of Public International Law, *Customary International Law*, November 2006, available at http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e1393& (Last visited on May 12, 2013).

Before we commence with examining the decision of the Court on the application of Greece to intervene in the matter, it is necessary to bring to light the language of Article 62 of the Statute of the ICJ, which permits such interventions. The text of the said provision reads:

1. Should a state consider that it has **an interest of a legal nature which may be** affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
2. It shall be for the Court to decide upon this request.⁶⁹

From the above language, it is clear that the criteria for the test to be satisfied by a state seeking to intervene in a matter is two-fold – *first*, whether it has an interest of a legal nature; *second*, whether that interest is likely to be affected by the decision in the case.

As is aforementioned, the Greek submission was that Greece held a legal interest in the matter, as the Court’s adjudication of the matter at hand would incidentally answer the question “whether ‘a judgment handed down by a Greek court can be enforced on Italian territory (having regard to Germany’s jurisdictional immunity)’”.⁷⁰

A. THE DECISION OF THE COURT

1. Majority decision of the Court

Having summarised the positions taken by the parties involved, the Court proceeded to briefly summarise the legal position it has developed in the past on interventions by third States in the following words:

“It is for the State seeking to intervene to identify the interest of a legal nature which it considers may be affected by the decision in the case, and to show in what way that interest may be affected (Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990, 118, ¶ 61); whereas the State seeking to intervene “has only to show that its interest ‘may’ be affected, not that it will or must be affected” (Id., 117, ¶ 61); whereas, however, it is for the Court to decide, in accordance with Article 62, ¶ 2, of the Statute, on the request

⁶⁹ Jurisdictional Immunities of the State: Germany v. Italy: Greece Intervening, Application by Greece to Intervene, January 13, 2011.

⁷⁰ John Economides, *Letter to the Registrar from the Agent of the Hellenic Republic*, May 4, 2011, available at <http://www.icj-cij.org/docket/files/143/16666.pdf> (Last visited on May 8, 2013).

to intervene, and to determine the limits and scope of such intervention (Territorial and Maritime Dispute (Nicaragua v. Colombia), Application to Intervene by Costa Rica, Judgment of 4 May 2011, ¶ 25; see also Territorial and Maritime Dispute (Nicaragua v. Colombia), Application to Intervene by Honduras, Judgment of 4 May 2011, ¶ 35).⁷¹

Thereafter, the Court went on to state that for an intervention to be permissible, what is to be demonstrated is not a legal right, but a legal interest. Subsequently, the Court proceeded to state that Greece has a legal interest in the matter as Germany has called upon the Court to determine if Italy has violated international law by declaring certain Greek judgments to be enforceable.

2. The separate opinion of Judge Trindade

In his separate opinion, Judge Cançado Trindade concurred with the majority categorically stating:

“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.”⁷²

Unfortunately, the remaining part of this opinion revolves around the emergence of the individual as a holder of rights in international law, a question that did not have a direct bearing on the issue that the Court was called upon to decide through the present order, that is, whether Greece could be allowed to intervene in the matter. In some places, the declaration treads dangerously close to deciding on the merits of the dispute before the parties have even exhausted their rights to place their submissions before the Court. For instance, statements like, “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*”,⁷³ and “State immunity and the fundamental rights of the human person are not to

⁷¹ ICJ, Jurisdictional Immunities of the State: Germany v. Italy: Greece Intervening, February 3, 2012, ¶22.

⁷² Jurisdictional Immunities of the State: Germany v. Italy: Greece Intervening, February 3, 2012, ¶ 24.

⁷³ *Id.*, ¶ 49.

exclude each other, as that would make immunity unacceptably tantamount to impunity⁷⁴,⁷⁴ would give a legal realist enough material to predict what stance Judge Cançado Trindade will take in the merits stage.

3. The dissenting opinion of Judge Gaja

“A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”⁷⁵

The following is the foundation for Judge Gaja’s dissent:

“In the absence, both under international law and under EU law (see judgment of the European Court of Justice in *Lechouritou*, Case C-292/05, ECJ Reports 2007, p. I-1519), of any obligation for Italy to enforce the Greek judgments in question, Italy is free in its relations with Greece to apply its domestic legislation on the recognition and enforcement of foreign judgments and to grant or refuse enforcement for reasons of its own choice. Greece cannot be said to have any interest of a legal nature in seeing the Greek judgements enforced in Italy.”⁷⁶

Judge Gaja here comes very close to stating that the expression ‘interest of a legal nature’ should be understood to mean a claim predicated on norms of international law. However, the value of his dissent as guidance for future Court decisions is reduced by his omission to say so in express terms. In an attempt to keep his dissent brief, he has greatly sacrificed clarity of expression of his reasoning. The above statement may be read to interpret the phrase ‘interest of a legal nature’ in two different ways – *first*, the meaning aforementioned which we will substantially elaborate upon later in this paper; *second*, to mean a ‘right’, which construction has been rejected by the Court repeatedly.

B. THE UNANSWERED QUESTIONS

As discussed above, fifteen of the sixteen judges vehemently assert that Greece has an interest of a legal nature that may be affected by the

⁷⁴ *Id.*, ¶ 54.

⁷⁵ CHARLES EVAN HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928), as quoted in *INTERNATIONAL LAW IN THE POST-COLD WAR WORLD-ESSAYS IN MEMORY OF LI HAOPEI* 479 (Sienho Yee, Wang Tieya ed. 2001).

⁷⁶ Giorgio Gaja, *Declaration of Judge ad hoc Gaja*, available at <http://www.icj-cij.org/docket/files/143/16560.pdf> (Last visited on May 8, 2013).

decision of the Court in the dispute between Germany and Italy. One Judge on the other hand staunchly opposes this position. However, none of the judgments makes an attempt to reason out, beyond mere assertions, why Greece did or did not have a legal interest. Consequently, the following are pertinent questions that remain unanswered:

- (i) What is an interest and how is it conceptually different from a right?
- (ii) What interests can be said to be ‘of a legal nature’?
- (iii) How specific does the interest of a legal nature have to be for an intervention to be allowed?

It is these questions that we attempt to answer, in the remainder of this paper, by examining past decisions of the Court on intervention applications filed by states. The Court’s decision that Greece had a right to intervene in the matter, was based on the fact that certain actions of Italy that have been challenged by Germany, were undertaken in furtherance of the enforcement of judgments of Greek courts and tribunals.⁷⁷ Without defining the key phrase ‘interest of a legal nature’, and without elaborating on any rule of international law which postulates that a state has an interest of a legal nature in enforcement of the judgments of its courts and tribunals in foreign countries, the Court went on to hold that the interest of Greece in this case was sufficient. Judge Gaja, in his declaration attached to the judgment, disagreed with this reasoning.

The Court has, on several occasions, drawn a distinction between the concept of ‘rights’ and that of ‘interests’.⁷⁸ While the Court has held that the demonstration of an ‘interest’ requires a lower threshold than that of a ‘right’,⁷⁹ the Court has never defined the term. Hence, in determining what amounts to an ‘interest of a legal nature’ one is compelled to draw an inference from past decisions in this regard, and discern the way in which an ‘interest’ has been deemed to exist or not exist in those cases.

Most of the cases before the Court, where an application for intervention was made, concerned territorial or maritime disputes. In these cases, third party states argued that the Court’s determination of the boundary line between the two disputing states could prejudice the interest of the third party state, given that the third party state had an overlapping territorial or maritime claim against one or the other of the disputing states.

⁷⁷ ICJ, Jurisdictional Immunities of the State: Germany v. Italy: Greece Intervening, February 3, 2012, ¶ 6.

⁷⁸ See, e.g. ICJ, Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium/Spain), ICJ Reports, February 5, 1970, ¶ 46.

⁷⁹ ICJ, Territorial and Maritime Dispute: Nicaragua v. Colombia, Application to Intervene by Costa Rica, May 4, 2011, ¶ 26; ICJ, Territorial and Maritime Dispute: Nicaragua v. Colombia, Application to Intervene by Honduras, May 4, 2011, ¶ 37.

In the *Tunisia v. Libya Continental Shelf* case,⁸⁰ Malta claimed a right to intervene. Malta based its arguments on its location *vis-à-vis* the parties to the dispute and stated that at some point in time, the borders of its own continental shelf against those of the disputing parties would have to be adjudicated and the principles laid down by the Court in the dispute could affect its interests in such a scenario. However, the Court held that Malta could not be said to have an interest of a legal nature, merely on account of its concern with the rules of international law which could be discussed in the dispute.

In *Case Concerning Land, Island and Maritime Frontier Dispute: El Salvador v. Honduras*,⁸¹ Nicaragua claimed a right to intervene on the ground that the decision of the Court would impact its own claims of sovereignty in the islands and maritime spaces. The Chamber drew a distinction between Nicaragua's purported interests in the islands and those in the maritime spaces. With respect to certain Islands, the Chamber held that Nicaragua's coastlines may be considered by the Chamber as a geographical fact and this alone did not warrant Nicaragua's intervention in the case. However, the Court accepted a right to intervene only with respect to maritime areas where there were competing claims involving the disputing parties and Nicaragua.

In *Case Concerning Land and Maritime Boundary between Cameroon and Nigeria: Cameroon v. Nigeria*,⁸² between Nigeria and Cameroon, the permission granted by the Court to Equatorial Guinea to intervene was based on its application in which its sovereign rights and jurisdiction as its interest of a legal nature that could be affected was identified by the median line between Equatorial Guinea and Nigeria on the one hand, and between Equatorial Guinea and Cameroon on the other.

In the *Sovereignty over Pulau Ligitan and Pulau Sipadan: Indonesia v. Malaysia*,⁸³ Philippines sought to intervene based on its claims with respect to North Borneo. The Court held that this interest did not have a direct nexus with the dispute before the Court, and hence permission to intervene could not be granted.

In the *Territorial and Maritime Dispute between Nicaragua and Colombia*,⁸⁴ Costa Rica applied for permission to intervene stating that it

⁸⁰ ICJ, Case concerning the Continental Shelf: *Tunisia v. Libyan Arab Jamahiriya*, Application for Permission to Intervene, ICJ Reports, April 14, 1981, 3, 13-14.

⁸¹ ICJ, Case Concerning Land, Island and Maritime Frontier Dispute: *El Salvador v. Honduras*, ICJ Reports, September 13, 1990, 92.

⁸² ICJ, Case Concerning Land and Maritime Boundary between Cameroon and Nigeria: *Cameroon v. Nigeria*, ICJ Reports, June 11, 1998.

⁸³ ICJ, *Sovereignty over Pulau Ligitan and Pulau Sipadan: Indonesia v. Malaysia*, Application for Permission to Intervene, ICJ Reports, October 23, 2001, 630.

⁸⁴ ICJ, *Territorial and Maritime Dispute: Nicaragua v. Colombia*, Application for Permission to Intervene, ICJ Reports, May 4, 2011.

wished to intervene for the “purpose of informing the Court of the nature of Costa Rica’s legal rights and interests and of seeking to ensure that the Court’s decision regarding the maritime boundary between Nicaragua and Colombia does not affect those rights and interests”. While the Court found that Costa Rica had an interest of a legal nature, this interest would not be affected by the Court’s determination of the boundary line between Nicaragua and Colombia. Further, the Court noted that Article 59 of the Statute of the Court granted adequate protection to third party states including Costa Rica. A similar finding was made in the same case on an application for permission to intervene made by Honduras.⁸⁵

From the above analysis, an important point emerges - in the instances when the Court has granted permission to intervene, the ‘interest’ in question could be characterised as a ‘claim’. In a broad sense, all states are ‘interested’ in most international disputes as the Court may state its views on norms of international law which are of general application. However, such ‘interests’ are protected by Article 59 of the Statute⁸⁶ of the Court which renders a decision inapplicable except between the parties to the dispute. The mechanism of intervention under Article 62 seeks to protect more specific interests – interests which are of a legal nature.⁸⁷ In the *Case concerning the Northern Cameroons: Cameroon v. United Kingdom*, the Court defined a legal dispute as a dispute where parties adopted contradicting positions in international law.⁸⁸ Similarly, an interest of a legal nature must be understood as an interest whose existence is asserted with reference to norms of international law, in other words, a claim in international law. This construction would explain the presence of Article 62, in addition to the protection afforded by Article 59 of the Statute.

In the present case, Greece sought to establish that it had an ‘interest of a legal nature’ based on the fact that the enforceability of the judgments of its courts and tribunals were in question. However, Greece did not even attempt to demonstrate how this was an interest of a legal nature or how it had a claim in international law to have its judgments enforced in foreign territories. State practice demonstrates that in the absence of specific agreements between two states, the enforcement of a foreign judgment is subject to rules of the enforcing state and no claims in this regard exist in favour of the state whose courts issue the judgment. As Judge Gaja rightly pointed out, Greece has not demonstrated that its judgments are generally enforceable in Italy as a matter of international law or European law. Moreover, the question before

⁸⁵ *Id.*

⁸⁶ Statute of the International Court of Justice, Art. 59: “The decision of the Court has no binding force except between the parties and in respect of that particular case”.

⁸⁷ ICJ, *Jurisdictional Immunities of the State: Germany v. Italy: Greece Intervening*, Application by Greece to Intervene, January 13, 2011.

⁸⁸ ICJ, *Case concerning the Northern Cameroons: Cameroon v. United Kingdom*, ICJ Reports, December 2, 1963.

the Court is solely whether Italy has incurred liability towards Germany in enforcing the judgments, not whether the judgments are enforceable in general. Consequently, the application of Greece was at variance with the other applications which have been accepted by the Court in the past.

While the Court is at liberty to interpret Article 62 of the Statute unhindered by the doctrine of precedent, such a departure from past practice called for an elaborate reasoning, which is unfortunately absent in the order. Albeit Greece faltered in concretely establishing the presence of a legal interest, the departure undertaken by the Court gravely prejudices the cause of consistency and predictability in international law.

VI. CONCLUSION

The right of third party states to intervene in proceedings before the Court is a very important safeguard against the negative externalities of a strictly consent based system of international adjudication. It is well established that no obligation or liability shall be cast upon a third party state and no right of a third party state should be prejudiced in a proceeding to which that third party state has no access. While the *Case of the Monetary Gold Removed from Rome in 1943: Italy v. France*,⁸⁹ and several cases that follow the principle laid down therein afford protection to third party state rights, this could have resulted in several disputes being rendered incapable of adjudication if there was no meaningful channel through which third party interests could be placed before the Court. In light of this potential remediless scenario, the mechanism under Article 62 holds a pivotal role in the fabric of international dispute resolution and intricately balances the consensual nature of international adjudication on the one hand and against the interest of third party states on the other.

Given this, it is imperative that the norms governing access to the Court for third states is well defined in a manner befitting the need for consistency and predictability in international law. Sadly, it appears from our analysis above that despite several opportunities having presented themselves, the Court has refrained from clarifying what constitutes an ‘interest of a legal nature’ so as to permit intervention. This leaves the matter to a case to case adjudication, failing to give any reliable indications to states as to what circumstances would entitle an intervention by them, and requiring them to adopt a trial and error approach to intervention.

Upon close inspection of the previous cases, in which the Court has permitted intervention, we have concluded that the expression ‘interest of a legal nature’ in the present context has been used synonymously with the word

⁸⁹ ICJ, *Case of the Monetary Gold Removed from Rome in 1943: Italy v. France*, ICJ Reports, 15 June, 1954.

'claim'. However, the decision in the present matter is a clear and abrupt departure from this understanding, which unfortunately has not been supported by reason.