A Dialogical Epilogue

Joseph H. H. Weiler

Abstract In this Dialogical Epilogue, I address a series of both general and specific questions to some of the contributors of this volume. The intent is to seek clarification on or even contest one or more propositions presented in the various chapters. In the role of a “Consul of the Readers” I enter into a conversation with the book’s authors to discuss some of the fundamental questions to which *Sentenza* 238/2014 gives rise and that have, at best, received only indirect answers in the various chapters. I believe answering them will enhance the value of each contribution and of the book as a whole.

It is the nature of all law books, and edited books in particular—where authors are constrained by the space available to them—that oftentimes readers, if they could, would love to put a question, seek a clarification on, or even contest one or more propositions in what they read. My role here is to be a Consul of the Readers and to put such questions to some of the contributions to this excellent volume. The book is interesting in so many ways that go beyond the strict legal issues in question. For example: participation was limited to German and Italian nationals. (Oh, yes! I am a proud and patriotic Italian citizen). But the critical mood did not coincide (as is often the case in arbitrations or with national and ad hoc judges on the International Court of Justice (ICJ)) with nationality. Indeed, the most critical voices against the Italian Constitutional Court (ItCC) decision came from Italians and some of the most sympathetic voices to the real legal/moral dilemma it faces came from Germans.

Only a few, if any, were categorical in their conclusions; all understood that from an ethical perspective this was a tough issue—on the responsibility for which views differed—and almost all suggested various ways of squaring a circle.

In what follows I will be posing specific questions to some of the authors. In addition, there are two underlying fundamental questions to which the case gives rise and at best received only indirect answers in the various chapters. I believe these two

J. H. H. Weiler (✉)

New York University, School of Law, New York, NY, USA

e-mail: joseph.weiler@nyu.edu

© The Author(s) 2021

V. Volpe et al. (eds.), *Remedies against Immunity?*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 297,

https://doi.org/10.1007/978-3-662-62304-6_21

questions would be lurking in the minds of many readers working their way through the various contributions, and it is hoped that answering them will enhance the value of each contribution and of the book as a whole.

General Questions

JHHW: In what circumstances and under what conditions, if any, would you say that it would be justified or at least legitimate for a national court or tribunal, against whose decisions there is no judicial remedy, to defy a decision of the ICJ (or any other international tribunal), which under the rules of international law is binding on such a state? And, similarly, to give a decision which defies a rule of international law, clearly articulated by the ICJ or a relevant international tribunal, in some other case.

I want you to imagine that such a case is before a national court and one of the parties is making an impassioned plea that this is an instance where the national jurisdiction should disregard the ICJ (or a relevant international tribunal) in the two circumstances mentioned above. And imagine further that either of the parties before the national court is to use your brief and terse statement as giving guidance on how to resolve this critical issue.

I want to make two further pleas: kindly do not hide behind the ‘it all depends on the circumstances’ cop-out; and kindly make your statement relevant to any national court (it should not be Italo-German specific).

Finally, this is not an invitation to write a whole new chapter. Imagine that you are involved in litigation and the court in question requests a written submission limited to 500 words.

The second, related question, is as follows: in what circumstances and under what conditions, if any, would you consider it justified or legitimate for a national court or tribunal, against whose decisions there is no judicial remedy, to defy a clearly established rule of international law, or legal obligation deriving from a treaty—ie in this case I am not putting in question the authority of the ICJ or another relevant international tribunal. I am not interested in cases where the national court calls into question the specific interpretation of the rule, or its validity, but where it is squarely accepted by both parties before it, and then by the court itself, that there is a binding international obligation but is asked to defy it.

The three pleas above apply here too.

Paolo Palchetti

My answer relates to your second question. Let me start with the ‘if any’ option. It is difficult to accept that under no circumstances would a national court be correct in defying a clearly established rule of international law, or legal obligations deriving from international rules (including, eventually, from binding judgments of the ICJ).

Nor do I think that recourse by national judges to mechanisms such as those based on the assessment of the ‘equivalent protection’ or the respect for *controlimiti* should necessarily be regarded as an expression of a nationalistic attitude or an insufficient propensity to accept values originating from the international system. *Völkerrechtsfreundlichkeit* can coexist with a cautious attitude towards international law; it certainly does not require invariably bowing to the dictates of international law. There are indeed good reasons justifying a cautious attitude towards, and potentially defiance of, international law. First, international law has dramatically expanded its scope of application. To invariably treat it as the ‘higher law’ risks having the effect of progressively limiting the scope of application of fundamental principles of domestic law. Secondly, rule-making at the international level might be used by a government (or even by a parliamentary majority) to expand their legislative power at the domestic level, eventually circumventing any possibility of constitutional scrutiny by domestic courts. And finally, while it is crucial for international law to find support in domestic law, the impact of occasional discrepancies should not be exaggerated. International law has the means for coping with these challenges. A certain degree of tension between domestic law and international law is inevitable, and may even prove beneficial for the development of international law.

‘In what circumstances and under what conditions’? Unsurprisingly, the first condition is that the non-application of an international rule should be limited to cases involving a lack of consistency with a rule of internal law ‘of fundamental importance’. In this respect, the doctrine of *controlimiti* has much to be praised. In identifying and interpreting the fundamental rules and principles that act as *controlimiti*, national judges should adopt, as far as possible, an internationally oriented stance: the non-application of an international rule may prove to be more ‘acceptable’ if the domestic principle at stake protects a value that is shared by a plurality of other states. A second condition involves the lack of any alternative solution other than disregarding international law. This may be obvious, but I find it important to insist on it. Sometimes national judges prefer to sacrifice the application of an international rule even if alternative means would be available under domestic law to protect the interests of the affected individuals. Despite the tendency to simplify the terms of the debate (‘my values against your values’), it is not always an either/or situation; compromise solutions can and should be found. Finally, when defying an international rule, a judge must make every effort to clearly delimit the consequences and implications of its decision. The tension generated by the non-application of an international rule may be more easily defused if political organs can clearly identify the room-to-manoeuvre available to them.

Christian Tomuschat

It is immensely hazardous to speculate about imagined future cases the specific circumstances of which are obviously unknown. Additionally, any commentator must acknowledge that in Europe we live in an environment that has been shaped by fundamental principles: the rule of law and human rights, both at the domestic and

international level. Miscarriages of justice, which might possibly warrant departing from a binding decision of an international court or tribunal, can therefore occur only in exceptional circumstances.

First of all, a distinction should be drawn between the ICJ and 'any other international tribunal'. The ICJ is 'the principal judicial organ of the United Nations'. Its judges, all of them eminent lawyers, are selected through a careful process in which all the nations of the world participate. Thus, the ICJ is the voice of the international community regarding international law issues. No other international court or tribunal attains a similar level of authority. In particular, international arbitral bodies do not necessarily present the same guarantees of knowledge and expertise. In some instances, one may therefore be tempted to criticize them for having taken their decision with a somewhat light touch. By contrast, to charge the ICJ with ignoring or having ignored basic tenets of the international legal order is an act of extreme temerity.

What is a 'clearly established rule of international law'? In borderline cases the existence and scope of the determinative rule will invariably be controversial. In particular, serious doubts may creep into the legal debate through the concepts of *ius cogens* and obligations *erga omnes*. Moreover, distinctions are imperative. Treaties, customary law rules, and general principles are not of the same nature.

There is no doubt that treaties of all kinds are binding. However, treaties of the past may not fully correspond to the exigencies of the present. In such circumstances, a well-informed and knowledgeable interpreter may be required for a cautious *mise à jour*. Here, the identity of the relevant judicial body matters decisively. Errors are more likely to be committed by an *ad hoc* body than a well-established permanent court. On the other hand, multilateral treaties that have come into being under the auspices of the UN, particularly since the end of decolonization, generally deserve broad confidence. During the drafting stage, they are submitted to thousands of critical eyes. Regarding such contemporary treaties, it becomes fairly arrogant to take the position that their rules are defective and do not correspond to the exigencies of law and justice.

Where the ICJ, or any other international court, has applied a rule of general international law, things are different. Customary rules cannot be framed unilaterally by one state alone. They arise from practice and consensus among the members of the international community. Customary law follows societal developments, but never abruptly from one day to the next. This time factor of slowness affords it stability but may also be a feature that awakes criticism. The rules of general international law introduce the past into the present. What happened decades ago becomes the guideline for today in a world that has seen events and upheavals that have changed the face of the earth. In many instances the precedents of the past may seem outdated and even obsolete. However, on what authority should a national judge be entitled to question propositions accepted by the entire international community? In any event, the rebel judge has to shoulder a heavy burden of proof and discharge it diligently.

Alessandro Bufalini

There are several important reasons why it is not an easy task to answer such general and abstract questions. First, it is reasonable to presume that the normative (and in case judicial) conflict would impinge on certain fundamental norms, among which it is impossible to determine a clear hierarchy. Second, even when a primacy can be accorded to a certain rule (or value) above others, the potential sacrifice of other fundamental norms shall always be necessary and proportionate. Third, when applying the necessity and proportionality tests, one has to look at the substance of the case, to take into account the concrete and material outcomes of a certain solution. Fourth, the task of assessing the justifiability or legitimacy of a national act of defiance to an international decision (or other international obligations) implies, to a certain extent, an abandonment of the legal vocabulary in favour of the language of ethics and politics. Presumably, it is not a question here merely of solving a normative conflict but of determining who has the authority to decide on the prominence of certain societal values over others.

The legitimacy/authority issue is strictly related to the state of relations between the national and international judge (and legal order) and their degree of reliability and reputation at a given moment for a certain community. This means that the answer to the questions may depend on how the judicial organs involved in the conflict perceive their role and power and are perceived by local and global societies. Moreover, the judicial organs' perception of their own role and power may vary according to the nature of the dispute and the underlying legal determination (whether it concerns human rights protection or, for example, the interpretation of a commercial treaty). The picture is even more complex if one takes into account that political organs (at the national and international level) may be willing to have the last word on a decision that could determine the very essence of both the national and international legal order. The attitudes of political actors may also play a crucial role in tipping the balance one way or the other.

With these considerations in mind, it may be still possible to imagine a few circumstances under which a national court may legitimately defy an international decision or a state obligation stemming from a clearly established rule of customary law: (1) when the international decision denies the existence of a clearly established peremptory norm; (2) when the international decision has the effect of legitimizing a manifest abuse of power or an arbitrary act of a political organ; or (3) when the international decision (or the customary law obligation) has the effect of causing an unnecessary or disproportionate sacrifice of a fundamental value of the national legal order. In this latter scenario, two conditions need to be met: firstly, the state's failure to comply with the decision (or other international obligations) should not have the effect of unnecessarily or disproportionately sacrificing a fundamental value of the international legal order; and secondly, all attempts to explore the existence of alternative means of dispute settlement (or of reparation for the injury caused) have been made.

Giovanni Boggero and Karin Oellers-Frahm

A domestic court of last resort should be allowed to defy a decision by an international tribunal only as an exception to the rules. Ordinarily, domestic courts are required to abide by binding international decisions insofar as the jurisdiction of the international tribunal in question has been accepted by the state. However, exceptions ought to be considered on the basis of defiance. Yet, defiance of binding international judgments by domestic judges should be the outcome of a procedural endeavour and not of a straight application of the hierarchy-of-norms principle. In fact, as long as international law exists beyond the realm of states' domestic jurisdiction, an in-depth review of the circumstances and criteria according to which an international tribunal has bindingly applied it should be carried out first by domestic judges of last resort. Should it be detected that a conflict exists between an international legal rule—as interpreted by the international tribunal—and a state's constitutional domestic law that cannot be solved by means of an interpretation whereby the latter conforms with the former, the answer cannot be found on the simplistic basis of the higher rank of one source over another, regardless of whether we assume a monistic or a dualistic approach, whatever these categories might mean. Instead, domestic judges of last resort should be vested with the power of engaging in a *dialogue* with the corresponding international tribunal. The purpose of this dialogue should be to reconcile the two constitutional orders, that is, of triggering a valuable compromise that satisfies both authorities and thus safeguards the foundations of both legal orders. Therefore, even if a domestic judge of last resort has the upper hand to defy the international decision, she should ordinarily abstain from doing so at her pleasure, assuming the international tribunal is willing to make concessions towards the domestic judge or at least to explain in detail and in a plausible manner the reasons on which its decision is founded.

Concerning your second question, the rule should be one of abidance by international customary law or international treaty law with the aim of fostering good relationships among the contracting parties and within the international community. Ordinary domestic judges should only be allowed to question the applicability of a clearly established rule of international treaty law or customary law before a domestic court of last resort to the extent to which no interpretation in conformity with domestic constitutional law can be provided. To this end, ordinary domestic judges should give particular consideration to the existing international case-law, as well as to statements and reports from committees and treaty bodies and to the national case-law of other states confirming or defying such a rule. The domestic court of last resort should weigh the interpretation of the rule, as given in the international legal order and as checked by the ordinary domestic judge, against its own case-law. It should defy the international rule only if no judicial dialogue with the corresponding international judge or committee is available in order to check whether the adequacy or extent of the rule could (still) justify the required restriction of the constitutional domestic principle. However, in the event that a corresponding

international judge or committee has reaffirmed the existence and meaning of the international rule, the domestic courts should not defy its application.

Francesco Francioni

Thanks, Joseph, for raising these important and pertinent questions. As for the questions regarding the circumstances and conditions under which a national court could/should disregard a judgment of the ICJ or another international court or tribunal, or could/should decide to ‘violate’ an established rule of international law, my answer is the following: the concept and scope of international justice does not coincide with the concept and scope of national justice. The latter is essentially ‘individual’ justice, based largely on the assessment of rights and responsibility of individuals in their mutual relations and in their interaction with public authorities; the former is ‘inter-state’ justice involving rights of states and responsibilities of states (even in the field of human rights adjudication). This entails that there may be a ‘mismatch’ between the two spheres of justice and that a supreme court, or a constitutional court, may find it justifiable or even necessary, in the absence of alternative remedies, to defy a judicial decision of an international court or a norm of international law in a situation where some fundamental and inalienable rights guaranteed under the national constitution are ignored at the international level.

When the object of the disagreement is a norm of customary international law, the challenge posed by a national court may also be functional to the ‘virtuous’ renewal and progressive development of customary international law, provided that the initial ‘violation’ of the norm is followed by a widespread practice and a sense of obligation that such practice responds to a social necessity. In the case of treaty norms, the conflict between the national and the international levels should be resolved by the substantive and procedural rules of the Vienna Convention on the Law of Treaties, including Article 64 concerning the emergence of new rules of *ius cogens* and the procedures for the termination or suspension of operation of a treaty.

Specific Questions

Thank you for your illuminating chapters. My task here is to raise some questions that I think readers of your contributions may themselves wish to raise either by way of clarification or by way of objection.

To Paolo Palchetti

JHHW: *In the opening of your piece you write in a somewhat critical idiom:*

‘On the one side, there is a hyperactive judiciary, which appears determined to provide court access to victims through a controversial interpretation of international rules and, in the case of the ItCC, irrespective of the costs in terms of compliance with the international rule of law.’

I find this statement problematic in at least three ways, which I invite you to clarify.

1. Why ‘hyperactive’, when these courts seem to be operating in what they consider the interest of justice? If Italian courts followed a ‘non-controversial’ interpretation of international rules, could they not be accused, in the same vein, of ‘hyperpassively’ shutting their eyes to the perceived injustice of the international rule?
2. Is it a true representation of the ItCC to say that it decided irrespective of the costs in terms of compliance with the international rule of law? Surely it is a legitimate reading of its judgment to say that it is entirely based on the Court’s consideration of the cost—regarding important values, moral and constitutional—of compliance with the international rule?
3. Are you not begging the most important question underlying this decision: how should one understand what the ‘international rule of law’—indeed what the ‘rule of law’, international or otherwise—demands in a situation such as this?

I do not raise these issues simply as ‘debating points’ (got you!) but because of my belief that framing the issue correctly has an impact on how to understand it correctly.

Likewise, you write elsewhere:

‘While the main consequence of Judgment 238/2014 is that Germany is currently being denied jurisdictional immunity before Italian courts, the inflexible conception of the right of access to court[s] adopted by the Corte Costituzionale has a number of implications (...).’

Is it truly an ‘inflexible’ conception? Is it not precisely the opposite? Is not the Italian Constitutional Court acting against an inflexible position, which would accord blanket sovereign immunity, and introduce (just as they point out happened in an earlier epoch where an exception was introduced for commercial transactions by a state) some flexibility in the case of egregious violations of fundamental human rights in time of war?

PP: I answer these questions together because they prompted in me the same reaction: ‘was I as critical of the Italian Constitutional Court as Professor Weiler’s questions appear to suggest?’. To be clear: I am indeed critical of the ItCC. But I don’t criticize the fact that the Court reacted against the situation created by the lack of any political initiative coming from the Italian and German governments following the judgement of the International Court of Justice. To the contrary, as I have written, the Court has ‘the merit of forcefully raising the question of the rights of the

victims of grave breaches of human rights and of the way in which these rights are to be protected'. My criticism is directed at how the Court reacted, namely 'by focusing exclusively on individual access to justice and on the need to promote an evolution of the law of state immunity'. In sum, it is certainly true that I focus on the empty half of the glass. If I do so, it is also because I believe that a different solution was available, as I will explain below. But I do recognize that there is also another more positive half of the glass. I concede that if this does not come across from my chapter as clearly as it should, I should like to thank you for giving me the opportunity to clarify.

The use I have made of certain terms for defining the conduct of ItCC may not be very precise or require further explanations. The intent behind their use was not necessarily to criticize the Court.

The hyperbole in my describing the judiciary as 'hyperactive' was intended to emphasize the contrast between the attitude of the judiciary and the ('hyper-passive') political organs. You may be right in pointing out that Italian courts had their reasons for acting as they did. My only point, however, was simply to stress the difference in attitude. I concede that when I wrote 'irrespective of the costs in terms of compliance with the international rule of law', I may give the mistaken impression that the ItCC took lightly the decision to defy international law. This was not my intention, and I thank you for allowing me to be more precise on this. I simply intended to indicate that the Court accepted to defy international law in order to give full effect to the principle of judicial protection.

With regards to 'the inflexible conception of the right of access to court[s]', I don't think I have anywhere in my chapter contrasted the conception of the right of access to courts retained by the ItCC and the conception of the right of foreign states to immunity retained by the ICJ. If I use the term 'inflexible' it is simply because nowhere in its judgment did the ItCC allude to the possibility that, under certain circumstances, the right of access to courts might be sacrificed. As I have tried to show, this gives rise to a number of questions, which also touch the delicate issue of the compatibility with the Italian Constitution of alternative means of redress that Germany and Italy might put in place for the purpose of putting an end to their dispute.

Finally, I tentatively addressed your question regarding 'what the "rule of law", international or otherwise—demands in a situation such as this?' when responding to the second of your general questions.

JHHW: A very important section of your chapter concerns the distinction between 'immunity from jurisdiction' and 'immunity from execution'. You point out that even after Judgment 238/2014, Italian courts under Italian law will grant German authorities immunities from execution for any decision against them awarding damages to the victims. You also express dissatisfaction with this situation by rightly pointing to—also following the Greek saga where the victims of the German Distomo massacre were denied relief in Greece by virtue of immunity of execution—a decision upheld by the European Court of Human Rights (ECtHR) in

Strasbourg. What is the point, one may summarize your position, of a right recognized if it is not accompanied by an adequate remedy?

You also point out that the question of immunity of execution will surely return to the Italian Constitutional Court in the follow up to lower court decisions in the current ongoing imbroglio. But here, somewhat frustratingly, your analysis stops. You do not seem to get off the fence. The analysis is brilliant in showing the conflicting considerations, but finally what is your position as to the correct answer the Italian Constitutional Court should give when the immunity from execution is before it? All things considered, if you were a judge on the ItCC, how would you decide this issue? Taking into account that Sentenza 238/2014 has already occurred, it is against its background that you will have to decide the case.

PP: In my view, in order to reconcile compliance with international law and respect for the fundamental rights of victims, the ItCC should establish that, in line with the Italian Constitution, the Italian state is under an obligation to assume the burden of repairing the victims. This is what the ItCC could, and in my view should, have done in 2014. The idea that, in cases involving the application of the rule of immunity from execution, the Italian state could substitute itself for the foreign state was already alluded to by the Court, albeit for different purposes, in a past judgment (Judgment 329/1992). An answer of this kind has much to be praised from a legal, moral and political perspective. Legally, not only would it reconcile two conflicting values—the interest in complying with a rule of international law and the right of the individual to obtain redress—it would also have the effect of transferring onto the state the risk that any attempt to obtain redress from Germany through interstate negotiations may be unsuccessful. In other words, this kind of solution would not imply any waiver of the claim against Germany. It would simply change the main actors in the dispute: exit the individuals and domestic courts, enter the state and interstate negotiations, in line with the suggestion contained in the 2012 ICJ Judgment. Shifting the risk from the individual to the state responds also to a wider imperative: affected individuals should not be left alone in bearing the cost of complying with international law. If there is a state interest in complying with international law, the state should be associated with the affected individual in bearing the costs. From a political perspective, such a solution might hopefully facilitate the conclusion of an agreement between the two states. After Judgment 238/2014, the message sent to Germany was ‘we don’t comply with the ICJ’s judgment, but you should negotiate an agreement on reparation with us’. In this situation, the reputational damages for not engaging in negotiations are not necessarily high. They would be much higher if Germany would leave Italy alone in providing reparation to the victims. I am aware that imposing on Italian taxpayers the cost of paying for the crimes committed during World War II (WWII) is far from the perfect solution but, given the circumstances of the present case (and the historical background of this longstanding dispute), I consider it an acceptable compromise.

To Christian Tomuschat

JHHW: *You argue that the Italian Constitutional Court failed to show the existence of any individual reparation and omitted to assess the issue of war reparations owed by Germany in their broad complexity as reasons for rejecting its renegade decision. Imagine now that the ItCC had done exactly these things and (perhaps after remitting the case back to the lower court for further fact finding) that, after careful examination, the Court would have established the existence of some individual claims and, even in the broad complexity of the German–Italian war reparations saga, that very fundamental human rights had been violated without adequate remedy.*

In such hypothetical circumstances, would your appraisal of the action of the ItCC be different?

CT: This question attempts to lead me down an erroneous path. Of course, I did criticize the Italian Constitutional Court's failure to provide a solid foundation for its conclusion that any victim of a war crime must be a holder of an individual reparation claim. The ItCC avoids specifying in which legal order such a claim should be anchored. International law does not provide the requisite basis. If the ItCC had carried out any research, it would have found that in the past—before 1945—international armed conflicts had never been settled, in respect of their financial dimension, by granting the affected individuals the right to assert their own losses by way of individual claims. Recent instances have followed a different course—claims against Iraq on account of its aggression against Kuwait; reciprocal claims in the relationship between Eritrea and Ethiopia—but on the basis of special arrangements. The practice as it stood until 1945 is quite clear: violations of humanitarian law may lead to compensation claims at the interstate level in accordance with Article 3 of Hague Convention IV. This legal position cannot be altered or turned around by speculation.

The legal rule reflected in Article 3 of Hague Convention IV is reasonable. But is it effective, and has it stood the test of time? The Italian jurisprudence has remained isolated apart from the Greek judgments that were also before the ICJ. In particular, how should a mass phenomenon like World War II be otherwise dealt with? For a judicial body, which is committed to specific fact-finding rules, it is simply impossible to clarify, in an unchallengeable manner, hostilities on the battle field, allegations of mistreatment in camps for prisoners of war or civilians, attacks against fleeing populations etc. Millions of people died during WWII, in many instances as a consequence of undeniable criminal acts or other forms of atrocious conduct contrary to humanitarian law. Fortunately, alleged perpetrators may be prosecuted before national or international criminal courts or tribunals. Prosecutorial wisdom will inevitably focus on persons that are believed to be the main responsible authors. However, in civil cases, where compensation is sought, anyone considering that they have suffered damage could initiate proceedings if the obstacle of immunity fell. Accordingly, not only thousands but millions of claims would have to be processed, at a tremendous cost. Lawyers looking for sources of income would inevitably make

use of such opportunities. A race for compensation would ensue according to the adage: first come, first served. Claimants with the best lawyers would have the best chances—to the detriment of those at the back of the line. Lastly, rights granted to Italian citizens would also have to be recognized to German victims of war crimes—of which there were millions. A revival of WWII at the legal level? The legal battles would go on for decades even after reconciliation has been attained in intergovernmental relations. What horrendous perspectives!

Therefore, the settlement of compensation claims by way of international agreements between the parties concerned is certainly the best solution. Germany paid a high price for global settlement, partly imposed by the victorious Allied Powers. In the future, as was done regarding the conflict between Iraq and Kuwait, the UN Security Council could, in similar instances, establish a just mechanism with equal chances for every victim.

JHHW: The danger of providing a pretext for ignoring decisions of the ICJ is very serious and must weigh heavily in assessing such a case. But, for example, in the Melloni saga, the German Federal Constitutional Court (FCC), having no doubt examined the complexity of all issues, handed down a decision protecting fundamental human rights guaranteed by the German Constitution in what to most would appear a clear contradiction with the jurisprudence of the European Court of Justice, thus creating a similar precedent. Are there no cases in your view where a national constitutional court is justified in defying an international jurisdiction?

CT: This question has an entirely different structure. In the case of war damage claims between Germany and Italy, one of the parties has arrogated to itself the right to assess the conduct of the other party, and therefore constitutes a departure from the principle of sovereign equality. It postulates for itself the right to the truth, brushing aside one of the basic premises of the international legal order, namely the rule that no state is superior to another. In the controversy about extradition on the basis of a judgment rendered in absentia, however, three high judicial bodies—the Spanish Constitutional Court, the FCC, and the Court of Justice of the European Union (CJEU)—were in competition with one another regarding their degree of human rights protection. This was not a case where the ultimate national decision inflicted harm to any other stakeholder.

JHHW: The law of sovereign immunity is still rooted in customary law, despite the relevant treaties in question. Is it not the case that progressive changes in customary law almost by necessity require some state actors at some point to go against lex lata in the hope of other states joining them and shifting the burden of general practice and opinio iuris? You might object that this case did not justify such action. But would you also argue that it is never justified?

CT: This question invites the commentator to deeper reflection. It is true that substantively not all rules of customary law are of the same importance for the good functioning of the international legal order. Some rules, since they arise out of practice, have a contingent origin. The law of the sea provides prominent examples in this regard. The traditional canon-shot rule evolved successively in consonance

with factual and legal developments within the framework of the UN. Similar adjustments to evolving circumstances regarding other customary rules are perfectly conceivable, and someone must then indeed take the lead in departing from the traditional pattern. However, sovereign equality and its complement, sovereign immunity, belong to the ground rules of international law and do not belong to the mass of other customary precepts that have sprung up from contingent occurrences. Whoever challenges the system of reparation for injury caused by armed hostilities would have to show that the present-day interstate model of compensation is insufficient and that the alternative, reparation by way of individual claims before the tribunals of the victim's state, is better suited to fulfil legitimate expectations. That demonstration cannot be made and was not done in the case before the ItCC—a particularly poor decision in respect of its legal reasoning where the interstate dimension was completely left aside.

To Heike Krieger

JHHW: *In section II of your chapter ('Adverse Effects') you rightly point out that a judicial rebellion (my term) risks engaging the international responsibility of the state that the 'rebellious' court belongs to. I entirely agree and find the analysis convincing. What I think is lacking is a full rehearsal of the counterarguments. Now, I do not mean that the counterarguments are necessarily stronger than the weighty arguments you put forward, but they are necessary in order for the reader to arrive at an informed position.*

1. *Customary law develops slowly, oftentimes in a community of states that does not reflect the current composition of the international community (eg the law of expropriation) and likewise against a set of public values crystallized into customary law at the time. The well known structural problem is that it is extremely difficult to change or mutate in order to reflect the more contemporary values of a changing international community. Sometimes this can happen through the negotiation of a broad multilateral treaty, but experience has taught us how difficult and time consuming (measured in decades) it is to negotiate and then ratify such treaties—and even then it is binding only on those ratifying states. The passage from a new treaty norm modifying earlier customs can take even more time and is inured to persistent objectors. The alternative is a mutation in customary law itself through a shift in general practice and opinio juris. This has happened quite regularly, for example the 200-mile Exclusive Economic Zone recalls the Iceland-UK trawler war. But for customary law to mutate in this way, it is inevitable that at first some actors would adopt positions in violation of extant international law (the New Haven school calls these 'proto-normative') claiming (and sometimes, lying through their teeth) that these reflect opinio juris in the hope of enlisting a change through silent acquiescence or imitation. Given the 'primitive' nature of international law—with the absence of*

a central legislator—could one not argue that without this process we would often be locked into a custom that is truly in need of change but for which no other mechanism exists? That sometimes there is even either a legal imperative (a national constitutional court in most systems owes its primary loyalty to its own constitution) or a moral one?

2. *It is true as you state that a decision by a national court may trigger the international responsibility of its own state. This is no different from a decision of the executive branch or the legislator that may trigger state responsibility. This happens not infrequently in international life, including by liberal democracies that generally follow the rule of law. To give but one recent example, the decision of the EU to retaliate against Donald Trump's tariffs based on national security (and not on the WTO safeguard regime) was in clear violation of Article 23 of the Dispute Settlement Understanding. Morally justified, legally violative. Would you not agree, however, that when it comes to issues of justice and fundamental rights, if state responsibility is to be triggered, it should be done by, or with the authority and agreement of, constitutional or supreme courts?*
3. *In the same section II you object, justifiably in my view, to the argument of the democratic character of the state. You ask rhetorically: Why would not be legitimate for Russia (in the Yukos case) what would be legitimate for Germany and Italy? But could you then comment on the decision of the German Federal Constitutional Court in the famous Constitutional Identity case where it defied (indirectly) the jurisprudence of the European Court of Justice and extant EU law in the name of fundamental rights protected by the German Basic Law, ironically in a case concerning Italy. Was this decision justified in your view? Should we assess it differently from Sentenza 238/2014?*

In section II.3 ('Change "desired by many"?'), you very convincingly show that there is far from consensus on the issue of human rights exceptions to sovereign immunity. But here, also, there are two structural issues on which I am sure your readers would value your comments.

1. *The first echoes my first structural comment. Could not the evidence you adduce for the lack of consensus operate, too, in the opposite direction? First, as a matter of legal doctrine, it becomes a demonstration that the condition for a stable custom—general practice accompanied by opinio juris—has been fractured. As a matter of policy, wouldn't there be even more incentive for those unhappy with the current state of custom to act accordingly, seeing that an alternative approach—even if not dominant—is no longer maverick? Again, how else would custom change?*
2. *Second, international law privileges states and, in reality, governments. But the whole human rights revolution (of the last half century) was to insist that individuals are to be regarded not simply as objects but as subjects and meaningful stakeholders in international governance. Governments and even courts are often oblivious or not sufficiently mindful of this and, moreover, governments are often driven by a self-interest not to find themselves in analogous situations where their own sovereign immunity will be challenged; self-protective instinct*

often spills over to courts. Courts are reluctant not to follow the lead of governments in matters involving foreign affairs and relations with other states. Should we not, from time to time, celebrate a court that, in the interest of protecting human rights, is willing to take a position which might embarrass its own government or which is based on a more holistic view of what international law is about?

HK: I take the liberty to answer your questions posed to me as well as the general question in one line of argument since the relevant considerations are closely interrelated.

Law reform is a deep-seated challenge for international law and there is indeed a wide-spread perception that its rules sometimes do not change quickly enough to meet certain moral imperatives or to react to urgent demands, for instance in relation to climate change. On the other hand, high hurdles for changing rules of customary international law contribute to locking-in acquired and consented standards and to protecting them against unilateral attempts of bringing about change, in particular by powerful states. Even where these states claim to act unilaterally in the name of common values shared by the international community, a (new) rule of customary law cannot be brought about without a uniform and widespread practice and a corresponding *opinio iuris*. This guarantees a broad consensus of states and may work to protect weaker states.

Take the example of the right to self-defence in relation to non-state actors. The ‘unable and unwilling test’, which is advocated by the US and some other predominantly western states, has gained traction in recent years, in particular in the context of the conflict with Daesh. States that are under a constant or recurring threat of military attacks by non-state actors may claim a legitimate interest in changing the right of self-defence. This may be prompted by consideration of their human rights duties to protect their citizens as much as the interests of the international community to prevent terrorism. However, for states of the Global South, this perspective might be less convincing since most of the military interventions justified by this standard will be directed against non-western, non-European states in the southern hemisphere. Moreover, there is considerable doubt that the standard fits with the *telos* of Article 51 of the UN Charter and thus many consider unilateral efforts to establish the ‘unwilling and unable test’ as contributing to an erosion of the prohibition on the use of force.

Eventually, lasting changes in relation to the interpretation of Article 51 of the UN Charter will depend on a finding of the ICJ. There is a strong presumption that due to its singular role under the UN Charter, its functions within the international legal order, its composition and its long-standing authority, the ICJ is the decisive institution for determining the existence and interpretation of rules of customary international law.

National courts may contribute to processes of creating and changing customary law but as organs of the rule of law they should be careful not to challenge the authority of the ICJ by acts of non-compliance. After all, according to the idea of a ‘*dédoublement fonctionnel*’ (Georges Scelle), international law needs to rely on

national organs, in particular national courts, for its implementation. Thus, a plea for a change to customary international law requires taking into account the international legal context and should be guided by the following three considerations:

1. A decision of a national court advocating a change of customary international law should not directly oppose a judgment of the ICJ in the very dispute in which the ICJ has only recently passed this judgment against the court's own state. Opposing a decision of the ICJ in such a case is first of all an incident of non-compliance in view of the judgment's binding effect on the parties. The plea for law reform has already been raised before the ICJ, which rejected it in its decision. Given the authority of the ICJ for determining rules of customary international law, the same applies where the ICJ has only recently determined a rule of customary international law in a case concerning other states. However, a national court may under certain circumstances and conditions argue in favour of a change of an otherwise clearly established rule of customary international law. This may either be the case where there is no international jurisprudence at all or where pertinent ICJ decisions date a long time back. The *Pinochet* case is a case in point where the House of Lords quite successfully pushed for law reform. In doing so, it did not directly oppose a decision of the ICJ.
2. In such a case, a court should base its reasoning not on the national constitution but on an interpretation of international law, thereby allowing other states or courts to engage in a legal discourse under international law. Refusing to comply with a judgment of the ICJ on the basis of national constitutional law does not provide legal arguments for further developing international law and thus is more a plea for (norm) conflict than for law reform. In the interpretative process, the court can indeed rely on a lack of consensus on the existence or content of a rule of customary international law as indication that the conditions for a stable custom have been fractured, which in turn legitimizes a deviation from the rule. Thus, by now a strong argument can be raised that the rules on the immunity of state officials are indeed changing. There are a number of judgments in diverse jurisdictions allowing for human rights-based exceptions for acting state officials. There was a split in the pertinent International Law Commission (ILC) debate leading to a vote where those in favour of human rights exceptions attained the majority. Likewise, there was a split in the 6th Committee. However, in the case of *Sentenza* 238/2014, I do not think that the international legal discourse in regard to state immunity would reflect such a type of dissent. Criticism is still predominantly literature based.
3. The different branches of government should agree about the necessity for changing customary international law. As the Italian case demonstrates, in particular democratic states under the rule of law face the dilemma that different organs may take different positions towards customary international law. For the purposes of international law, the ILC Conclusions on Identifying Customary International Law stressed that 'where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced.' Thus, it is preferable if these organs speak with one voice, in particular

where there is a risk of incurring state responsibility. However, I do not think that constitutional courts are per se more legitimate actors in this process, especially where they disagree with both of the other two branches. In comparison to the legislative branch, they have lesser democratic legitimacy. In comparison to the executive, they may sometimes give too little weight to diplomatic considerations. Such diplomatic considerations should not be mistaken for governmental self-interest. There are several legitimate rationales behind such considerations, which may range from functional reasons over concerns for legal stability to broad considerations of maintaining peace and security. While deference to the executive is today often seen negatively, I still think that it may be a useful tool for courts in balancing conflicting interests in foreign relations. After all, a more holistic view of international law is not necessarily one that is based on national fundamental rights concepts.

In your questions you invite us to assume that the court is asked to defy an international legal obligation as a kind of last resort. But I already disagree with the assumption that it is inevitable that conflicts will arise. National jurisdictions have developed various techniques for mitigating norm conflicts by way of interpretation precisely in order to prevent such severe frictions from arising. Any state that faces a norm conflict between national and international law may have a bundle of further options available beyond mere non-compliance through court decisions or defying a binding international obligation. These options include parliamentary legislation, parliamentary decisions that aim to prompt the executive to pursue certain acts on the international level, diplomatic protection, issuing reservations or interpretative declarations, or even withdrawals. In deciding on the appropriate measures to be taken, state organs should act with mutual loyalty as well as with loyalty towards the international legal order, not least because of the idea of a '*dédoublement fonctionnel*'. Constitutional courts have to balance democracy and rule of law considerations against each other. In this process compliance with the international legal obligations of a state is an important element of the rule of law.

My concern is that constitutional courts may be increasingly inclined to claim that demands of constitutional identity require them to defy international law or EU law. And the decision of the German Federal Constitutional Court in the 2016 *Constitutional Identity* case is a case in point. The decision dealt with an extradition request by Italy on the basis of a European arrest warrant for a person who was sentenced to 30 years of imprisonment in absentia proceedings without legal representation in Italy. The FCC held—by means of the identity review—that in such a case an extradition would violate the right to human dignity. Thereby, it indirectly defied the *Melloni* judgment of the Court of Justice of the European Union which held that member states are not allowed 'to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution'.¹ In my view, there would have been other options for

¹CJEU, *Melloni*, Judgment of 26 February 2013, Case C-399/11, EU:C:2013:107, para 58.

the FCC to protect the applicant's human rights without relying on its concept of identity control. The Court could have either opted for a preliminary ruling by the CJEU or it could have chosen an interpretation preventing a norm conflict with EU Law. It is doubtful that the act in question had to be considered as an act of German public authority determined by Union Law. Interpreting the Framework Decision on the European Arrest Warrant in light of Article 47 and 48 of the Charter of Fundamental Rights, the Court could have concluded that EU law does not require extradition in cases of absentia proceedings. The decision of the Higher Regional Court was not determined by EU law. The part of the decision violating human dignity could have been considered exclusively as an act of German public authority, which the Court could have assessed on the basis of the German Constitution.²

Eventually, you may argue that I am evading the baseline of your argument, namely that in exceptional cases and for moral reasons a court should defy a rule of customary international law or a judgment of an international tribunal. But my worries are that such cases are not as exceptional as you suggest. In a multipolar world order characterized by increasing value contestations, arguments based on national identity as embodied in national constitutions are already being raised more frequently. Pertinent cases in recent years do not only refer to severe war crimes but they include cases on extradition, expropriation, or refugee relocation schemes. To define where there is sometimes a justified legal or moral imperative and where such imperatives are abusively claimed to protect all kinds of ostensible national values may become a slippery slope. With its reliance on human dignity in the *Constitutional Identity* case, the FCC may indeed have opened yet another door for widening national identity jurisprudence against international courts given that a human dignity core may well underlie all fundamental rights. In this light, I have always been sceptical about recourse to morality for creating instances of 'civil disobedience' between courts. In the end, international human rights protection exists precisely for those who get into conflict with national identities.

To Riccardo Pavoni

JHHW: *I think we are all in favour of peace, not least legal peace. And I think that your use of international comparative precedents makes a strong case for how this peace may be obtained in negotiations between the parties. But the proposed 'peace agreement' you advocate for does have legal ramifications for evaluating Sentenza 238/2014. Since, assuming I and your readers understand you correctly, it is*

²Dana Burchardt, 'Die Ausübung der Identitätskontrolle durch das Bundesverfassungsgericht - Zugleich Besprechung des Beschlusses 2 BvR 2735/14 des BVerfG vom 15.12.2015 ("Solange III"/"Europäischer Haftbefehl II")', *Heidelberg Journal of International Law*, 2 (2016), 527–551, at 549.

premised on the assumption that if adequate remedies for serious rights violations were not provided to victims, the parties have to negotiate such remedies.

But does that not at least implicitly vindicate the position taken by the ItCC? And had the ItCC not taken that principled position—which would lead to what you consider to be the necessary fair and equitable solution—what incentive would there be for the parties to engage in negotiations?

RP: I am very thankful for your question, Professor Weiler, as it gives me an opportunity to reiterate some of my thoughts on *Sentenza* 238/2014. Indeed, I believed it was more in line with the spirit and purpose of this volume to espouse a forward-looking approach in my chapter and accordingly enquire into the future prospects of the German–Italian dispute concerning outstanding compensation claims by victims of crimes committed during World War II. Yet a clarification on the interaction between my findings and *Sentenza* is certainly in order.

Yes, you do understand me correctly. The ‘legal peace’ I am advocating, preferably by way of an intergovernmental arrangement between the parties setting up meaningful compensatory procedures for uncompensated victims, is premised on the assumption that, *under international law*, victims of serious breaches of human rights and humanitarian law are entitled to adequate remedies and reparation. Pace the ICJ’s *Jurisdictional Immunities* Judgment, in my view—and that of a substantial number of scholars—this *international law* right to a remedy and reparation³ qualifies the rule of state immunity for international crimes: the immunity of the responsible state before the courts of other states may be denied if and when *effective alternative remedies* are unavailable to the victims. Thus, not only should the negotiation of ‘legal peace’ between the parties be regarded as a reflection of their obligation to secure such remedies and reparation, it would also be a means of protecting state immunity for *acta iure imperii*—admittedly a key tenet of the world order—against backlashes and challenges coming from turbulent domestic courts, as the ItCC in delivering *Sentenza* may be depicted.

However, only indirectly and implicitly (at best) do the foregoing observations vindicate the holdings of *Sentenza* 238/2014. Certainly, *Sentenza*, by declaring in essence the 2012 ICJ Judgment incompatible with the Italian Constitution, has provided a robust incentive for the parties to come back to the negotiating table. It is easy to assume that, in the absence of *Sentenza* 238/2014, the whole affair would be buried once and for all, both at the judicial and—a fortiori—governmental levels. This is probably the key message arising from the Judgment and a number of comparable domestic cases, notably in the US, where the denial (or threat of denial) of state immunity has given impulse to fresh diplomatic representations and negotiations for the sake of victims’ right to reparation for human rights violations. But this has little to do with the legal reasoning of the Constitutional Court. That reasoning lends itself to distinct layers of criticism.

³UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Annex, GA Res. 60/147, 16 December 2005.

First, the Constitutional Court was not crystal clear about the (domestic law) implications for state immunity stemming from the lack of alternative remedies for the victims. The decision may be interpreted as envisaging the commission of serious violations of human rights as the sole requirement for the loss of state immunity and, accordingly, as playing down the ‘alternative remedies’ test or merely using it as an *a fortiori* argument. This is the view expressed, for instance, by the late Benedetto Conforti in his commentary on *Sentenza* published in the *Revue générale de droit international public* and, in the judicial practice post-dating *Sentenza* 238/2014, by the Italian Court of Cassation in its 2015 *Opačić* decision involving and denying Serbia’s immunity for war crimes. If this view were correct, the principle upheld by *Sentenza* 238/2014 would be especially broad as it would justify a withdrawal of immunity in each and every case implicating serious breaches of human rights by foreign states. I would consider this principle unacceptable as it would not draw a reasonable balance between the competing values at stake.

Secondly, one may well take the opposite view and believe—as I do—that the *Sentenza* was a breakthrough vis-à-vis the previous Italian jurisprudence in this area, precisely because the absence of alternative remedies was a key reason for the holdings of the Constitutional Court. Yet, *Sentenza* did not recognize that it could be implemented via political negotiations yielding whatever intergovernmental agreement and compensatory mechanism open to the victims. The Constitutional Court repeatedly pointed out that, in order to fulfil the victims’ right to reparation, effective *judicial* remedies must be available. As the concerned Italian victims were denied such remedies in any other jurisdiction including before German courts, the only way forward was the repudiation of Germany’s immunity and the consequent endorsement of assertions of jurisdiction by Italian courts. In short, according to the Court, ‘legal peace’ should be pursued through the judicial route, not by means of administrative or political processes. Of course, this does not mean that diplomatic negotiations would be a waste of time, but it does at least mean that the putative arrangements devised by the governments concerned might well be scrutinized by the Italian Constitutional Court under the high threshold of effective judicial protection set by *Sentenza*. Although clearly arising from frustration about the decades-long unwillingness of the German and Italian governments to engage in meaningful negotiations, the unbending position of the Court should be rejected as once again not establishing a satisfactory balance between the competing interests at play.

Thirdly, and most fundamentally, I firmly disagree with the methodological stance taken by the Court in *Sentenza* 238/2014. The latter contains a sort of preliminary disclaimer where the Court, relying on a confusing version of the doctrine of consistent interpretation, stated that it would only assess the consistency of the customary rule of state immunity for international crimes within the Italian constitutional order, without questioning how that rule was interpreted by the ICJ in its *Jurisdictional Immunities* Judgment. I do not subscribe to this view and I am not at all vindicating it in my chapter. On the contrary, and this is a good occasion to answer—at least in part—the general questions put to the volume’s authors, I am unable to find any legal rule characterizing the decisions by the ICJ (or other

international courts) and the interpretations of international law offered therein as untouchable by domestic courts. Of course, this question must be kept distinct from the binding effect of such decisions. At any rate, the Constitutional Court did not justify its domestic law approach on account of that binding effect, which it explicitly rejected, and merely highlighted the ‘especially authoritative’ nature of the ICJ’s interpretations. The result was perverse: the ICJ’s decisions addressed to Italy may not be binding as a matter of Italian constitutional law, whereas the ICJ’s interpretations in those same decisions are binding under both international and domestic law. There was nothing in theory or precedent barring an autonomous review of the pertinent practice by the Constitutional Court, that might have paved the way for findings different from those of the ICJ yet still justified under *international* law. It is true that *Sentenza* 238/2014 includes a number of tacit critiques of the ICJ’s holdings, and it is also true that the Constitutional Court perceived itself as contributing to the progressive development of international law. But you cannot have your cake and eat it too! With its exclusive domestic law approach and associated disregard for its consistency with *international* practice and *opinio juris*, *Sentenza* rests on a fragile legal basis. This consideration may easily be relied upon to depict Judgment 238/2014 as a violation of international law *sic et simpliciter*, one which is liable to further engage the international responsibility of Italy arising from this affair. Full stop. Game over. The practical significance of the *Sentenza* may militate in favour of ‘legal peace’ and may be conducive to an evolution of international law in this area but not its legal reasoning.

To Filippo Fontanelli

JHHW: *You suggest a mutually agreed reparations scheme. If the two parties agree, this might indeed solve the problem. But one can understand German reticence to indicate their willingness to reopen settled agreements with multiple countries that fell victim to German WWII atrocities. How do you prevent such a settlement from destabilizing such agreements with claims of a differing nature surfacing from many quarters?*

Be that as it may, you sidestep the question of whether Sentenza was justified. Was it?

FF: Indeed, my chapter does not speak about *Sentenza* 238/2014, let alone assess it. The omission is deliberate: reparation schemes derive in all or in part from the states’ agreements, so their establishment is possible also (and precisely) when there is no underlying obligation to set up one or when the obligation is contested. Incidentally, I do not think *Sentenza* is justified under international or Italian law, and I find it ethically dubious. Being righteous with another’s money is a cheap method of virtue-signalling at best, and at worst a way to pass the buck and redirect away the claims of victims. This is why the proposed Reparation Scheme would call Italy’s bluff and force it to put its money where its constitutional mouth is. The

proposal would require each state to fund the Scheme in equal parts, creating an 'Amazon-doubles-your-donation' effect whereby Germany's liability would not be measured upon an alleged duty of reparation but would spur from a (presumed) urgency to match Italy's contribution and save its Teutonic face.

Perhaps I should explain why I presume that German authorities would feel such urgency. There is something vaguely shameful in the idea that Italy, having in vain exhausted all avenues of legal redress for the IMIs, would openly pay out reparations for Nazi crimes while Germany just idly watched. I think Italy should reverse the paradigm and engage Germany in a race to the top, not the bottom: instead of a fight for responsibility, it should launch a decency challenge. Consider what happened between South Korea and Japan in the case of reparations for comfort women. Korean public opinion expressed affront at Japan's stance and Korea decided to replace the Japanese payments with its own resources. The move was a PR catastrophe for Japan: its conduct was held to be so despicable that its money was not worth taking. To publicly accept liability for the wrongdoing of others is doubling down on the injustice. Japan now has to reckon with an even greater stigma. If Italy is determined to go through with its part of the deal, Germany's refusal to participate would be hard to watch irrespective of one's views on its original responsibility vis-à-vis IMIs. If there is any force to hunger strikes, it is not that they are convincing; it is that they are compelling.

The *ex gratia* and Telethon-like aspects of the Reparation Scheme would also make it unfit as a precedent and an encouragement for other claims. To be sure, differential treatment triggers discontent and incites demands from those treated less favourably; ask the vineyard workers hired at dawn or the brother of the prodigal son. However, the Reparation Scheme escapes easy analogies.

First, in sidestepping the issue of responsibility, it would signal the ad hoc voluntary origin of the mechanism. Other claimants might think themselves and IMIs to be in 'like circumstances' and claim discrimination. However, absent an acknowledgment of responsibility, the simple fact that Germany would accept Italy's proposal to join the Reparation Scheme would alone differentiate the circumstances and justify differential treatment: Germany's act of goodwill would concern only certain recipients. Hence why custom does not build on practice alone: favours, donations, and graceful payments do not count. It is hard to demand for oneself the effect of generosity that benefitted others. After all, the existence of several reparation schemes managed by Germany and other states in favour of other groups of beneficiaries have so far not given any traction to the IMIs' claims, so past practice does not support the fear of snowballing. Indeed, precedents do not carry much weight: if anything, it was *Sentenza* that advanced the IMIs' hopes for reparation (more on this below).

Second, any hypothetical copycat claim would not fly without overcoming a gateway condition, that is, to have secured 50% of its own payment. If the Reparation Scheme would serve as a precedent (it would not), it would only do so with respect to joint payments. It is hard to imagine many claims coming out of the woodwork that could count on a 50% promise of payment by the *home* government.

Ultimately, it is possible that the Reparation Scheme could incite other claims. I am not sure that this should be opposed altogether, as indeed it might be desirable that Germany address those too, just as now it is desirable that it provide reparation to IMIs. However, I estimate this scenario to be unlikely and such potential claims to gain little mileage from the operation of the Reparation Scheme. Germany, in other words, could not escape the embarrassment of declining Italy's proposal by hiding behind an improbable snowball effect.

JHHW: *If a scheme such as yours is adopted, would you not agree that it is only because the ItCC took its controversial decision? Is this a good lesson? A bad lesson?*

FF: Yes, I would share that impression. In fact, there are only two imaginable scenarios: either a reparation scheme is finally established (in the wake of the hullabaloo caused by *Sentenza*) or it is not (in spite of *Sentenza*). The likelihood of the scheme arising is still quite low, but without Judgment 238/2014 it would be non-existent.

I have not reflected nearly enough on civil disobedience to have a view on the appropriateness, in general, of illegalities producing public goods. The bad lesson would be the encouragement of acts of legal disobedience motivated by the apparent success of one such act. If the Russian Constitutional Court wants to avoid Strasbourg decisions, *Sentenza* 238/2014 is a handy crutch to lean on. Even more worrisome would be imitation by diligent and well-intentioned courts attracted by the Italian take-away.

However, I suggest a change in perspective. If the Reparation Scheme is a desirable outcome—and I believe it is—its desirability does not depend on its chances of realization and, in turn, by the circumstance that increased them (*Sentenza*). *Sentenza* worked as an act of public shaming, itself a practice that walks the line between advocacy and abuse. Public shaming can occasion virtuous results. Something similar happened in *Kadi* before the CJEU. Two frankly debatable judgments by the CJEU undoubtedly caused the UN to improve its practices. I would hesitate to call *Kadi* a good lesson, but I also believe that a few isolated 'bad lessons' can be tolerated if they improve the world.

I also believe that there is no evident risk of a 'school for cheaters' developing. Italy taking on half of the financial burden of the Scheme, and its *ex gratia* nature, would tip the balance towards the 'good lesson' verdict and minimize the generalizations (ie 'international law must be observed unless it is convenient not to'). Should an agreed Scheme arise, *Sentenza*—for all its awkwardness—would have proved to be the catalyst for the development recommended by the ICJ to happen, namely that there be 'further negotiation involving the two States concerned, with a view to resolving the issue'. Is it fair to reward a prodigal court, which strayed away from orthodoxy? I cannot answer this question in general, but I can suggest that in this case the reward (the Scheme) is not a fattened calf. The Scheme would not benefit the Constitutional Court, nor would it clearly benefit Italy altogether (in fact, Italy would have to pay for half of it).

In a certain sense, *Sentenza* might prove to be a smart trolling device: it created a controversy where the law warranted none; in so doing, it damaged both Italy and Germany. Concurrently, by creating a dispute it inevitably made its settlement desirable, and thus valuable. It created out of thin (and stagnant) air novel incentives for both states. The Reparation Scheme would constitute the reasonable solution: Italy would pay for the harm caused by trolling at the edges of the law, and Germany would pay for the trolling to stop. Both payments would go to charity (to IMIs).

To Alessandro Bufalini

JHHW: *The solution that you seem to advocate would perhaps bring closure to this particular dispute. But, arguendo, the importance of Sentenza 238/2014 was not simply in pressing for a specific solution to the particular case before it but to rethink the question of sovereign immunity in cases where the state claiming immunity is responsible for grave human rights violations, some of which at least would qualify as ius cogens.*

You will have noted that in its decision, the ICJ gave considerable importance to the decisions of national courts. The decision of the Italian court could be a contribution towards a new jurisprudence and could eventually lead to an adjustment of the current law, as was the case a century ago when absolute immunity was removed in relation to commercial and other acts. It is a fact of international law that customary law often changes through initially proto-normative actions—and a decision of a court is almost by definition proto-normative—which contradict lex lata.

Would not your solution squelch this potentially important development by the Italian government, itself contradicting the principled general thrust of its own constitutional court even if complying the particularistic dimension?

AB: Thank you for your thought-provoking questions as they allow me to better clarify my views.

As a premise I think it is important to emphasize that if the aim of *Sentenza* 238/2014 was to question customary law on state immunity, as identified by the ICJ, the ItCC could have followed a different approach. The strong dualistic approach of the decision seems, in fact, to end up recognizing and confirming current law at the international level, as opposed to the fundamental principles of the Italian Constitution. A stronger claim for an adjustment of the current law would have been to critically respond to the ICJ, both underlying the existence of decisions by national courts supporting the evolution of customary law and arguing against the contradiction inherent in preventing a reparation for a breach of *ius cogens* rules by applying a customary norm on immunity.

That said, the crucial issue here is whether a ‘political solution’, namely the involvement of the Italian government, would somehow arrest the potential

development of customary law on state immunity. In this regard, while it is certainly true that changes in customary international law may often happen through violations of current law, the latter is not always the best way to pursue a change. In particular, these violations might be successful when changing forces are strong enough to cause the breach of the rule to become the rule itself. As regards state immunity, one is currently faced with a clear-cut ICJ judgment and a multitude of national governments (including, perhaps, the Italian government) and domestic courts that do not seem to be disposed to let the change happen. Other paths, however, are available for a development of international law. National judges may have called on the Italian government to grant reparation to victims, and thus engaging in the affirmation (or consolidation) of the existence of an individual right to reparation for gross violations of international human rights and humanitarian law. At the end of the day, while *Sentenza* 238/2014 might be a potential element of support for the current law on state immunity, the call for a necessary and urgent intervention of the Italian government could have been an important step towards the recognition of an individual right to reparation at the international level.

To Christian J. Tams

JHHW: *I think that your critique that the Italian Constitutional Court did not integrate international legal norms and sensibilities into its reasoning on Italian constitutional law is powerful. That was, inter alia, part of the critique faced by the majority of the Court by the minority (see, for example, Sabino Cassese's chapter in this volume).*

Is it true? Did not the ItCC address the process of change of international law in relation to sovereign immunity and ius gestionis?

CJT: This is an important question and I hope that I can clarify and situate points that my chapter attempted to make in my reading of Judgment 238/2014. Was there not, you ask, in the judgment some openness towards international law? My short response would be 'perhaps some, but not enough'.

I remain concerned with how marginal international legal rules governing immunity were to the ItCC's reasoning in Judgment 238/2014. As you noted in your question (and as I probably should have noted in my chapter), the ItCC did reflect on changes in the scope of sovereign immunity and as an example mentioned the move towards the restrictive doctrine: this is described as a 'progressive definition of the content of the international norm [on immunity, which] (...) originated in the national jurisprudence' of a number of states (paragraph 3.3). However, this reference to developments in the law of sovereign immunity serves to make a fairly basic point, namely to illustrate that change in international law is possible, and that domestic courts can be agents of change. That in itself is not controversial. But it did not help with the real question on which Judgment 238/2014 turned: whether 'the international norm [on immunity]', insofar as it mattered in Judgment 238/2014,

had been ‘progressive[ly] defin[ed]’ so to exclude immunity for grave breaches, or to require immunity to yield to remedial claims based on human rights (paragraph 3.3).

It mattered so little, in fact, that the arguments about changes in international law all but disappear from the relevant parts of the ItCC’s reasoning. As we will discuss below, in engaging with international law, the ItCC accepts the construction by the ICJ as binding: rules of international law reach into the Italian legal order ‘as interpreted in the international legal order’, that is by the ICJ. On the ItCC’s home turf of Italian constitutional law, changes in international law do not matter either. The balancing is between two constitutional values—the right to remedy and respect for human rights on the one hand, and respect for international law on the other—and the outcome is the result of a constitutional assessment: ‘insofar as the law of immunity from jurisdiction of States conflicts with (...) fundamental principles [of the Constitution protecting human rights and the right to a remedy], it has not entered the Italian legal order and, therefore, does not have any effect therein’ (paragraph 3.5). On the key questions that mattered, domestic law controlled.

JHHW: *Be that as it may, there seems to be an assumption in your critique that if only the Italian Court had integrated international legal elements the decision would (necessarily) be different. This I think is questionable. Grant me at least that a non-specious case could be made that a combination of the robust development of human rights law in the last decades as well as a better understanding of ius cogens could call into question extant positive international law. Could you at least point out some internal contradictions that might suggest the necessity for rethinking and change?*

The argument that positive law on the whole has not shown signs of welcoming a reconsideration of sovereign immunity in the face of grave violations is correct, but your argument would make it remain such, since the deep logic of your argument is that if positive law is x, not least in the area of customary law, then it must remain x. How will it ever change if any attempt to push for change is met by your kind of argument? Do you not accept that there have been many examples where progressive developments of customary law were initiated by actions that at the time went against positive law? Consider Solange I by the German Federal Constitutional Court, which was clearly in defiance of the established jurisprudence of the European Court of Justice. But, without that defiance, it is not clear if the CJEU would have rethought its prior ‘positive law’ position and developed a new jurisprudence that gave just weight to... human rights. Is there not some kind of lesson here in the relationship between international tribunals and constitutional courts?

Even if you do not accept this argument, imagine now that in its decision the ItCC had in fact taken into account international legal norms and come to the conclusion that it reached. Would you appraise Sentenza 238/2014 any differently? And if not, why? In assessing international legal norms, should the Court necessarily adopt your own view on how that law should impact their decision?

CJT: This set of questions addresses issues that to me seem closely related. They go to the heart of the debate triggered by Judgment 238/2014 and identify tensions in my discussion of it. They also suggest that I may not have been entirely clear in

setting out my position; perhaps, while chiding the ItCC for its ‘Lutheran’ approach, I was in fact sounding a bit Lutheran myself. Be that as it may, I appreciate this opportunity to reclaim my inner agnostic. I do so in three steps that seek to respond to this set of questions.

1. I proceed from two points of agreement. We both consider that at present international law does not recognize a grave-breaches exception to sovereign immunity. In your words, ‘positive [international] law on the whole has not shown signs of welcoming a reconsideration of sovereign immunity in the face of grave violations’. I put matters more firmly in the second part of my chapter because I wanted to emphasize that the international law case for such an exception—‘ha[ving] been made in dozens of settings, and almost inevitably rejected’—is at present fairly weak. But that difference (to which I will come back shortly) may be a matter of style or degree. In any event (and this is the second point of agreement), neither you nor I think the current state of the law is set in stone. Of course, it can change, of course arguments for an exception remain plausible, but the question is whether in the future those involved in the process of international law-making will be persuaded.⁴

2. In such a discourse about future directions of the law, disobedience with international law—or with ICJ decisions—is one possible strategy. Domestic courts can be powerful agents of legal development, and there are, as you rightly stated, ‘many examples where progressive developments of customary law were initiated by actions that at the time went against positive law’.⁵

I have no principled concerns with that. In the on-going process of affirming, adjusting, and developing customary international law, disobedience has a role. It is not so uncommon, and in cases pitting human rights against sovereign immunity, domestic courts voicing disobedience are likely to do so with the approval of groups on whose support international law counts: from NGOs, human rights lawyers, and the media to the wider public. This is why I purposefully ended my chapter with a call for argumentative disarmament, suggesting we move beyond scandalizing Judgment 238/2014. Judging from your questions, I should have put this more clearly and I hope to have done so now.

3. While not so much concerned about domestic court disobedience as such, my chapter contrasted two strategies for voicing such disobedience. I emphasized that Judgment 238/2014 marked a change of tack: rather than arguing that *international*

⁴My chapter looked at the present state of the law: Joseph Weiler considers it to be based on a ‘deep logic’ of continuity: ‘the deep logic of your [the CJT’s] argument is that if positive law is x (. . .) it must remain x ’. However, my main point was (meant to be) more limited: the argument for a grave-breaches exception under international law in my assessment had *so far* simply not persuaded states, international organizations, or the majority of international and domestic courts. As part of the constant evolution and adjustment of custom, this may well change (as noted on page 245); arguments in favour of a grave-breaches exception ‘remain plausible, and who knows, they might one day find greater acceptance’.

⁵As an aside, there may be more examples of regressive development initiated by domestic court disobedience, but who could authoritatively say which changes are progressive and which regressive? It does not seem obvious to me that the recognition of a grave-breaches exception would illustrate the progress of international law.

law recognized a grave-breaches exception, the ItCC took the debate to the home turf of constitutional law and refused to give effect to sovereign immunity as ‘defined’ by the ICJ. I took this to be a conscious move, reflecting the ItCC’s acceptance that under contemporary international law, the argument for a grave-breaches exception to sovereign immunity was weak. This view, which of course may be wrong, makes it difficult for me to respond properly to this set of questions. Is it really ‘questionable’ that if the ItCC had argued on the basis of international law, Judgment 238/2014 would have been decided differently? My reading is that the ItCC—unlike the Italian Supreme Court in *Ferrini*—conceded the international law argument. Rather than seeking to rehearse the debates about immunity exceptions under international law, it took the debate to the home turf of constitutional law. By the same token, as regards your third question, I do not mean to suggest that the ItCC ‘should adopt [my] own view’ of the scope of sovereign immunity, but it seems to me that Judgment 238/2014 is in fact based on the view that international law does not at present recognize a grave-breaches exception to sovereign immunity. This is how I read the ItCC’s reference to ‘the interpretation by the ICJ of the customary law of immunity of States from the civil jurisdiction of other States’, which did ‘not allow further examination by national governments and/or judicial authorities, including this Court’ (paragraph 3.1). Judgment 238/2014 is intriguing because it takes the debate to a different level.

JHHW: *Your analysis is acute in pointing out the retreat to domestic constitutional law. But can you dismiss such a retreat in all cases and all circumstances? Are there not cases where you would consider this the best way? The only way?*

CJT: This different level is the constitutional law provisions regulating the impact of international law within the domestic legal order: the foreign relations law of Italy. Rereading the chapter, I do not think I articulated my position as clearly as I should have, and you press me on this, with good reason, in your question. In response, let me offer three clarifications. First, in the aforementioned spirit of argumentative disarmament, there is nothing wrong as such with relying on foreign relations law to limit the impact of international legal rules. Domestic courts have done this frequently and often successfully. (You mention *Solange I*, I referred to *Görgülü*, *Medellin*, and *Kadi*). Judgment 238/2014 is not the first ‘Triepehian’ domestic court decision. Second, domestic foreign relations law will often be an effective line of defence: state responsibility is the price to pay, but international law does not rule out constitutional overrides. In cases such as the present one, it may be perhaps not the only but the most obvious way of avoiding the implications of international law. Third, is it the ‘best way’, you ask? I would say it is a high-risk strategy, and this is where I felt that the ItCC was on a dangerous course, and not sufficiently aware of the implications of its change of tack. High-risk because a domestic court refusing to give effect to intrusive, undesired rules of international law—and doing so by reference to constitutional law provisions—uses a very broad argument that is open to all courts in all jurisdictions and no longer limited to the field of immunity. (If Italian courts rely on the Italian Constitution to justify Italy’s non-compliance with an undesired ICJ decision, what stops courts elsewhere from invoking their

constitutional principles to justify non-compliance with other undesired decisions?) In Judgment 238/2014, the ItCC seemed to ignore these dangers. Unlike German courts under the *Solange* approach, it does not threaten disobedience but orders it—the judgment is not a shot across the bow but one that hits home. Unlike many other domestic courts, it does not present disobedience as an *ultima ratio*; nothing in the judgment suggests that, even on the home turf of constitutional law, respect for international law should be the norm. Perhaps most importantly, Judgment 238/2014 does not accept that international law should guide the interpretation of domestic values, at least in the normal run of events. In short, while a ‘retreat to domestic constitutional law’ (to use your words again) is a plausible strategy, domestic courts should in my view use it with care, exceptionally, and within clearly articulated limits. The absence of these limitations is my main concern with Judgment 238/2014.

To Raffaella Kunz

JHHW: *It is difficult to argue with your informative, thoughtful, and realistic analysis of the interaction of domestic and international tribunals.*

There will, I think, remain among your readers possible doubts.

First, why do you seem to suggest, at least implicitly—and I am happy to stand corrected if proved wrong—that in some ways Sentenza is worse than several other cases where we have witnessed direct or indirect defiance? No one has gone to the gallows here, as indeed was the case when the American Supreme Court committed its acts of defiance. Is there anything structurally different in this case?

RK: Thank you, Professor Weiler, for your thought-provoking question. It is an honour for me to enter into this dialogue with you, all the more because my own chapter deals with dialogue in a broad sense, namely with judicial dialogue between courts of different legal orders.

Indeed, is there a structural difference between this case of defiance of an international court decision and, let’s say, *Medellín*, the case in which the US Supreme Court decided not to implement the ICJ judgment in the *Avena* case? Let me retrace the facts of this case. The ICJ found that the US had violated the Vienna Convention on Consular Rights, but the main issue regarded the consequences this would have for the concerned individuals who were all waiting on death row in American prisons. *Medellín* tried to enforce the international judgment before the US Supreme Court and to reach the review and reconsideration of his case. This case is thus not just a typical inter-state dispute; it fundamentally touched upon individual rights and in fact dealt with life and death questions.

When I make the point that there is a difference between the ItCC’s judgment and that of the US Supreme Court, my aim is thus not to judge the outcome, or to say one was worse than the other. As I just tried to show, the *Medellín* judgment had very serious consequences. In fact, I think that the Supreme Court should have

implemented *Avena*, but this is another question. My point about the difference between *Medellín* and *Sentenza* is structural and concerns the changed quality or tone the two judgments have. I believe that something has really changed since *Medellín*, which was issued in 2008. But let me explain.

In *Medellín* the defiance was somehow indirect. The US Supreme Court argued that the judgment was not directly applicable and thus phrased the issue as one of a separation of powers—it was up to the parliament and not the judiciary to implement the judgment. Of course, this can be—and has been—seen as an ‘avoidance strategy’ by the Supreme Court, but the difference of this line of reasoning to judgments where domestic courts declare international judgments to be altogether unconstitutional is that technically the judgments could still be implemented, (which in the case of the complainant in *Medellín* is not entirely true given that the death sentence against him has been executed).

The judgment of the ItCC, on the other hand, stands for a more recent type of jurisprudence, one in which domestic courts do not shy away from openly contradicting international courts. The ItCC’s defiance of the ICJ is not an isolated example, as I argue in my chapter, and there are a number of examples by other domestic courts taking a similar stance. To come back to the *Medellín* comparison, today it seems that domestic courts are more confrontational and direct in their defiance. Thus, it could be said that *Sentenza* 238/2014 stands for a new self-perception of domestic courts. This goes in the direction of what you called the ‘third wave’ of judicial review.

I think that the change of this self-perception has to do with the proliferation of international courts and the fact that the interplay between legal orders has become even more complex.

JHHW: *A second, more substantive and substantial doubt is the following.*

Your analysis is premised on the assumption that national courts are attempting to ‘cushion’ the domestic impact of international decisions. This might be true in some or even all of the cases you mention. But it might not be the only explanation or justification for the behaviour of domestic courts. You seem to argue that ensuring compliance with decisions of international tribunals is the supreme value. You call this compliance partners. I agree that this is an important part of a well-functioning international legal system. But there is a ‘but’.

With the much-discussed proliferation of international tribunals—sometimes (and this is hugely important to my question) with contradictory jurisprudence, and with many of them operating as courts of first and last instance in the same case (namely lacking the possibility of appeal)—the system does not perhaps provide for appeal and review of such decisions by many of these tribunals, including the ICJ. The European Court of Human Rights has a laudable system of chambers and the Grand Chamber. But absent such mechanisms, would you not agree that it might by necessity fall to national constitutional courts to act in such role? With prudence, with caution and all other good advice you give, but see themselves also acting in such a role? Would it not be better if there was actually a mechanism for dialogue between the national constitutional court and the international tribunal so that the

latter can be informed by the sensibility of the former? Should not the Taricco saga in which, in the face of such a dialogue by the Italian Constitutional Court, the European Court of Justice climbed down from the high branch it had perched itself? But absent such a mechanism?

RK: There is no doubt that in times of global governance, there are tensions and even clashes between legal orders, and that these pose challenges to courts. With regard to international judgments, it is of course unsatisfying that they are commonly first and last instance at the same time, and I agree that domestic courts can to a certain extent step in and make up for this gap. In other words, there might be legitimate reasons for domestic courts not to follow an international judgment—this has been called ‘constructive contestation’. This highlights the productive side that this ‘dialectic’ interplay between different legal orders can have, which arguably in the end leads to better—and in this case especially more legitimate—results. (I prefer not to use the term ‘judicial dialogue’ for cases of actual defiance).

The more cautious stance of domestic courts that we see today may also have a positive consequence. And in any case, is it not something that has always been present but only recently become more explicit? Is open defiance not more honest than hiding behind ‘avoidance doctrines’? To some extent yes, but there is a ‘but’, and this is the point I try to make: I think that there is a real risk that courts go too far. It is true that international courts are powerful players today, but they nonetheless remain vulnerable and dependent on the cooperation of their domestic counterparts. Even though today it is widely recognized that the superiority of international law in the sense of a strict monism is neither realistic nor even desirable, a very dualist approach, according to which international judgments systematically have to pass a domestic (constitutional) law test before being followed domestically, cannot be the answer to our complex legal reality either. This neglects the interest in an overall functioning system of adjudication across systems and levels.

What then might be a middle-ground solution? We cannot deny that the application of international law can have problematic consequences, and at the same time it remains true that in times of global governance there is no way around international law. Rather than secluding ourselves behind a dualist vision of the world, we need to face reality and productively think about how to best cope with the challenges of our times.

In my opinion, this is done most convincingly by pluralist thinkers such as Paul Schiff Berman or Nico Krisch. They recognize on a descriptive level the complex, maybe even ‘messy’ legal reality; but rather than trying to bring order into it, they try to work productively with it. What does this entail for our constellation? My reading is that under such a pluralist vision, rather than defining clear criteria about how to solve different types of norm conflicts, what is required is a flexible approach, one that allows the circumstances of each case to be considered. The different legal claims and interests at play should be balanced according to their importance and weight rather than their provenance from the domestic or international sphere. Rather than big theories, we need solutions for those complex cases of clashing normative claims.

It is probably quite self-explanatory why *Sentenza* 238/2014 does not fulfil this pluralist ideal. In my view, the justices, seeking to find simple answers to complex problems, fell into the ‘dualist trap’. I do not want to delve deeper into this again—my position is already stated in the chapter. But let me highlight once more that, while acknowledging that there can be cases where ‘defiance’ is necessary and ‘resistance’ against international institutions has a productive and constructive side, I do not think that *Sentenza* 238/2014 is an exemplary case of legitimate resistance against a wrong or unjust international judgment. And I do not think that we should use it as a blueprint for judicial interactions.

To illustrate my point, and delving a bit deeper into your more general question about justified or legitimate cases of defiance, allow me to name an example of a court that in my view did a better job at respecting the overall interest of a functioning system of adjudication when it refused to follow an international judgment.

The example is the judgment of the Argentinian Supreme Court following the ruling of the Inter-American Court of Human Rights (IACtHR) in the case of *Bueno Alvez*, in 2007. In this case, the complainant was accused of having mistreated an arrested man by beating him and refusing him his medicine. The IACtHR had qualified these acts as torture and ordered an investigation into the allegations. In Argentina, however, the case had already been closed through final judgement, as the court in charge found the offense to be time-barred.

Even though the Argentinian Supreme Court usually follows the IACtHR and indeed for many years was said to be one of its strongest allies, on this occasion it refused to do so, arguing that this would violate basic rule-of-law standards, namely the procedural rights of the accused in the sensitive area of criminal law, enshrined both in the Argentinian Constitution and the American Convention on Human Rights (ACHR). The Supreme Court in this case, always highlighting its general loyalty towards the IACtHR and careful not to make a principled case, comprehensively described the norm conflict and stressed that the implementation of the order would not only violate the Argentinian Constitution but also the ACHR itself. At the same time, it distinguished the case from other cases, namely cases involving crimes against humanity. The reason not to follow the Court—even though it later changed its position—was thus that in this case the domestic court considered the interest to uphold the due process rights of the concerned individual higher than the interest to implement the international judgment. Let me conclude by stating that interestingly, this is one of the few reported cases in which the IACtHR indeed seems to have listened to a domestic court disagreeing with it and subsequently adjusted its position.

To Giovanni Boggero and Karin Oellers-Frahm

JHHW: *One cannot argue with the first set of considerations that you meticulously raise, and which would need to be resolved in operationalizing Sentenza 238/2014.*

But I do not think that you are suggesting that these inevitable dilemmas should have meant that the Italian Constitutional Court should have refrained from taking the decision it did. It could, as you suggest, give more guidance, draw more lines, but do you question the principled aspects of the decision against immunity in this case?

GB/KOF: Professor Weiler's question concerns a central aspect of our argument. We are pleased to have the opportunity to explain our line of reasoning and yet, at the same time, we are afraid that our answer will not be positively accepted. But this is exactly the value of judicial dialogue, especially at a time when the role of states and state-related legal norms as compared to individual rules/human rights is declining. The problem of state immunity in cases of grave violations of human rights is a developing field and where a limitation of all-over immunity is challenged with good reason.

The question of Professor Weiler concerns our argument that *Sentenza* raises a lot of problems for Italian courts and tribunals, and this question is, moreover, directly related to Professor Weiler's first general question regarding the reaction of national courts to ICJ decisions, in particular the defiance of an ICJ judgment. Professor Weiler says that 'one *cannot* argue' as we did without giving reasons for such a categorical statement concerning a well-pondered scientific opinion. However, our argument is based on an analysis of the decisions of Italian courts or tribunals directly following *Sentenza* 238/2014 which are facing a dilemma: by abiding by *Sentenza* they are violating international law; by not abiding by *Sentenza* they would be in violation of national law. Professor Weiler supposes that these 'inevitable dilemmas' would not result in us believing that 'the Constitutional Court should have refrained from taking the decision'. But this is exactly what we meant and the reasons underlying our opinion have been elaborated and further explained in a number of publications, some of them cited in our chapter. There might be situations where it may be justified to disregard a judgment of an international court—although such situations appear to be rare exceptions—but the 2012 ICJ Judgment, as well as a judgment of the European Court of Human Rights in the same vein, is not such a judgment. The main reasons may be summarized shortly in the following points. The ICJ was asked to find out whether state immunity before the judiciary of states is still a rule of customary international law even if acts of grave human rights violations are at stake. Thus, the question was whether the customary law rule had changed—a possibility that exists but requires, as the coming into existence of a new customary law rule, *opinio iuris* and general practice. As such the ECtHR and the ICJ came to the conclusion that this was not yet the case. On the basis of this finding, the ICJ did not have to answer the question of the retroactivity of such a new rule, as the acts committed dated back more than 70 years, or whether such a rule would also be applicable to war related crimes where reparation agreements had been concluded as usual in order to come to peaceful terms between former enemies.

According to Article 59 of the ICJ Statute, the 2012 ICJ Judgment was binding upon Italy and, by becoming a party to the UN Charter, Italy had 'undertake(n) to comply with the decision of the ICJ' (Article 94 (1) of the UN Charter). This fact had led the Italian Parliament—the representative of the people, the sovereign—to adopt Law No 5/2013 obliging the national judiciary to comply with the ICJ Judgment.

Despite not only the existence of treaty obligations under the most important treaty, short of a universal constitution (the UN Charter), but also the national law representing the intent of the Italian sovereign, the Constitutional Court decided that the national law was unconstitutional and, with regard to the UN Charter, the law ratifying it was also unconstitutional, but only with regard to Article 94(1) and the Court's *Jurisdictional Immunities* Judgment. For the rest, Italy considered itself to be a party to the UN Charter.

With regard to the limited space accorded to our answers, it may be sufficient to mention here only that it seems evident that the reasoning of the Italian Constitutional Court is unacceptable as it disregards the basic principle of international law, namely the principle of *pacta sunt servanda*, thus leaving it to the discretion of states to pick and choose which of the accepted obligations shall be honoured or not, and whether they shall be honoured permanently or only for a period—or even single moment—defined by the state. The implications of this approach undermine the validity and security of international law as such, which requires that states comply with their international obligations and with the decisions of courts whose jurisdiction they have voluntarily accepted. Disregard of international judgments may be justified in the extremely hypothetical case of a judgment gravely violating basic/peremptory rules of international law, but in such cases other means (for example the involvement of the UN Security Council) should first be sought because defying decisions of international courts and tribunals risks generating unforeseeable implications for the whole system of international law.

As to the additional questions of Professor Weiler in this context, in our view a change of customary international law usually starts by non-application of the 'old' rule by states. This is an unavoidable implication of the development of international law. However, in the event that an international court has been asked explicitly to discover whether that particular rule of customary law has changed or not, the decision found by the court has to be complied with. As international courts are composed of judges from different regions of the world, and as the ICJ in particular represents the main forms of civilization and of the principal legal systems of the world (Article 9 ICJ Statute), they are best qualified to assess whether *opinio iuris* and general state practice are present. To comply only with court decisions supporting the view of the claimant would undermine the ideal of settling disputes peacefully. The alternative of not complying with international law and international judgments reminds us of the old reservation of 'vital state interests' dating as far back as the beginnings of international arbitration. This reservation was always under discussion because it leaves the assessment of what are the vital interests to the concerned state; it therefore allows the state to escape from its general submission to the jurisdiction of an international court rendering such a submission unreliable.

Besides the concerns it raises with regard to general international law, *Sentenza* 238/2014 left it to the ordinary judiciary to decide on basic questions, such as the time-limit for bringing claims—are 'only' claims from World War II admissible or also claims dating back to World War I, or for that matter any war?—as well as the definition of who may bring claims (family members of which generation?),

guidelines for reparation/compensation issues, the requirement of a territorial link and lastly, the question of execution. It thus risked opening the floodgates for an unforeseeable number of claims leading to inconsistent decisions with regard to questions that would have required a framework predetermined by the Italian Constitutional Court if not probably by the parliament.

JHHW: *You raise a floodgate argument, or rather two: one macro and another micro. The first is that other courts in other jurisdictions would follow a similar line of jurisprudence in the face of sovereign immunity claims in cases of grave violations of human rights. Would you consider that this, should it happen, might be a positive development: unsettling the extant law in favour of a new rule on sovereign immunity that would not allow states to shield themselves behind sovereign immunity when they are the authors of grave human rights violations and in the absence of other effective remedies?*

You also seem to suggest that the floodgates would open with claimants from other jurisdictions, like the Greek plaintiffs in this case, and would therefore flood Italian courts with similar claims. Floodgate arguments are difficult to predict. But do not Italian courts and the Italian legal system have adequate mechanisms to squelch such a flood: with doctrines of the family of forum non conveniens, rules of standing and the like? How realistic is this fear of an avalanche of cases?

GB/KOF: These questions can be succinctly answered. The macro floodgate argument, namely that other jurisdictions might follow the Italian approach, may, although starting from a breach of international law, contribute to the development or change of the international customary law rule on state immunity. Such a development may be considered positive, especially if an evolution towards denial of state immunity becomes part of an accepted custom shared by an increasing number of governments. As to the micro floodgate argument, namely that even victims lacking a territorial link to Italy, as in this case the Greek plaintiffs, could and would bring their claims before Italian courts, Professor Weiler objects that Italian jurisdiction could itself limit the flood by using the legal mechanisms foreseen in the Italian legal order. This might be true, but there remains the question, which cannot be answered definitively, whether Italian courts and tribunals would be willing to 'squelch' such a flood, which in our opinion seems rather questionable with regard to the previous practice.

To Andreas von Arnould

JHHW: *You are commendably forthright and intellectually honest in accepting that Germany, like Italy, holds to the doctrine that it is the duty of the judiciary—not least of the Constitutional Court—to disregard international obligations if they are incompatible with fundamental rights (and perhaps other fundamental principles such as 'constitutional identity') guaranteed by the national constitution. The German Federal Constitutional Court asserted this principle even against*

European Union norms—which in the eyes of many, including the European Court of Justice, constitute a much ‘tighter’ legal order compared to general international law. You raise this as a reason to dissuade a second ‘appeal’ to the ICJ even though you claim that Germany has as strong a position under international law ‘as one could wish for’.

I wish to probe this interesting dialectical position a bit further.

Imagine a second appeal or even the original trial before the ICJ. Imagine a very direct question to the Counsel for Germany: is it the German position that a national constitutional court has to comply with international norms, or even a decision of the ICJ itself, in a case where said national constitutional court would consider that such compliance would violate its most fundamental constitutional principles?

1. *Would you agree that under international law the answer must be ‘Yes’—under the equally fundamental principle of international law that a violation cannot be excused by reference to domestic municipal law?*
2. *Would you agree, that if asked in such a direct manner, the Counsel for Germany could only respond in one of two ways: ‘Yes, but the German legal order does not accept such compulsion’; or ‘No, we believe that under international law in such a case a state would be justified in not applying the international norm or the decision of the ICJ (or any other international tribunal)’?*
3. *The first answer (Yes, but the German legal order does not accept such compulsion) is not so uncommon. It occurs in dualist systems in the face of non-incorporated treaties—the situation of British courts, for example. It could still be the case that the answer is ‘Yes, but the internal constitutional order simply does not allow national judges to comply with the state obligations under international law with the result that state responsibility would be engaged’. Be this as it may, does not another general principle of international law, reciprocity, entail that Germany cannot demand of Italy compliance in a situation where analogously it would not offer compliance itself? (The French Constitution famously enshrines this principle of reciprocity in its Article 55). If this is the case, maybe the German position in international law is not quite as strong as one may wish for.*

AvA: Concerning this first set of questions, the Counsel for Germany would most probably agree that, according to its own standards, a violation of international law can never be justified by reference to municipal law, even though she would have to concede that the German legal order is based on dualism and that it gives precedence to the Basic Law in case of an otherwise unresolvable conflict between international obligations and constitutional principles. If she is worth her salt, however, the Counsel for Germany would stress that this does not affect the present dispute. Reciprocity might be an underlying concept of international law but has no binding force in itself. Estoppel might turn the concept into a norm of procedural international law. But for Germany to be estopped from bringing claims, there would have to be an inherent connection between the present dispute and a similar violation of its international legal obligations towards Italy by Germany. Since this is not the case, Germany maintains its formally strong position under international law.

If she is more audacious, the Counsel for Germany might argue that well-founded disobedience can sometimes, though not in the case at hand, be beneficial for the international legal system itself (and I would follow her here). International institutions might sometimes be at fault. Notwithstanding the general obligation to obey international law and binding decisions by international institutions, there should also be room for contestation within the international legal system. This is basically the *Kadi* problem where the CJEU challenged with good reasons the Security Council's binding decisions. To avoid a deadlock, however, such acts of disobedience should be framed as an offer to engage in a discourse about the law, not as a mere act of refusal. This is why, firstly, the reference should (also) be to shared norms and principles not (only) to domestic law. Compare the Court of First Instance's original approach to *Kadi*, though it only referred to international *ius cogens* and eventually shied back from finding the obvious violation. Secondly, there should be space for compromise as a way out. Paradigmatically, this is the *Solange* strategy, which communicates a willingness to give in as soon as certain standards are met. Such forms of constructive dissent could be seen as an exercise in 'compensatory constitutionalisation' (Anne Peters) bottom-up.

JHHW: *I find interesting, constructive and morally commendable your willingness to pierce the intertemporal rule—especially with your very important caveat that it must be based on moral principles prevailing as part of the law at the time—a matter for empirical analysis. The consequence of your analysis would be to trigger an obligatio de negotiando. Would you, however, be willing to take the reader one step further. Given the decision of the Italian Constitutional Court, the hands of the Italian negotiators would be tied—they could not accept a solution that their own Court indicated would violate the Italian Constitution. (A German government would be in a similar situation if the shoe were on the other foot.) So, let's imagine that the negotiations reach an impasse—not an impossible possibility. (And to take the hard case so as not to make life easy for ourselves, let's further imagine that it is clear that both parties negotiated in good faith, as sometimes even good faith negotiations result in an impasse.) Having acknowledged that the intermingling of the dry positive law and the ethical principles are sufficient to breach the principle of intertemporality. What then?*

AvA: I would like to swerve away from your question by providing a rather pragmatic answer. Given that the issue of German wartime reparations has been pushed by the Italian judiciary, and has only reluctantly been taken up by Italian governments so far, I am more optimistic about reaching an agreement in those tripartite negotiations, at least as far as both governments are concerned. Of course, there is no guarantee here, and of course it is possible that on the side of the victims some will not agree with a proposed solution. So, the matter could be referred back to the Italian courts. In such a scenario my hope would be that a scheme redressing the past wrongs, and supported by a sound majority in the negotiations, will prove a game-changer. After all, it was the perceived lack of engagement on the German side, government and courts alike, that prompted Italian judges to 'step in' (compare the references to the denial of 'any possibility of judicial examination' and the

‘absolute sacrifice of the right to judicial protection’). Once a widely agreed solution has been found, the *Corte Costituzionale* might give up its principled opposition—alongside the lines I sketched out in my answer to your first question.

I understand that you want to push me further, though. A procedural obligation is always a sly suggestion—assuming that the procedure works. If negotiations reach an impasse, don’t we then need a decision based on substantive legal principles? I think that there are inherent problems in applying this kind of decisionist logic to historical events. Courts can ascertain facts (even ‘historical’ facts) to be applied to legal norms. They cannot solve, however, the underlying historical conflict; that issue can only be addressed discursively. As far as court proceedings offer a *forum* ‘to tell one’s story’ (even to a reluctant opponent), they contribute to this purpose; judicial decisions that create winners and losers do not. Where there are binding legal norms in force, we accept this ‘jurispathic’ (Robert Cover) office of judges. In our case, however, the principles of intertemporality still weigh in (although I have attempted to loosen them up a bit). So, in case of an impasse and *Sentenza* 238/2014 still being upheld, the ICJ in a second judgment should ‘pepper up’ paragraphs 99 and 104 of its previous judgment and admonish the parties to sit down again and come up with an equitable solution.

JHHW: *Imagine, finally, that the Italian government expropriates, say, Villa Vigoni, in compliance with the decision of their constitutional court. What should be the reaction of the German government in light of your own progressive and moderate position?*

AvA: If this were to happen, Germany should protest against this violation of international law and should consider another judgment from the ICJ, including a request for provisional measures to halt the expropriation proceedings. As much as I am in favour of relaxing the strict rules of intertemporality in certain cases to ‘bring the parties to the table’, I am highly sceptical of a deconstruction of state immunity before foreign domestic courts. Allowing charges against a foreign state is ever more prone to abuse when ‘lawfaring’ states are attempting to impress their own ideas on others by excessive claims of jurisdiction. In my perception, as mentioned earlier, the Italian judiciary opposed the ICJ’s decision on jurisdictional immunity as it perceived a lack of engagement from the German side. Its aim was thus to create a judicial forum for bringing (and eventually deciding) such claims. In *Sentenza* 238/2014, the Court was wise enough not to touch upon the issue of immunity from execution (which, by the way, is less intrinsically connected to the right to judicial protection, at least regarding its core guarantee). Thus, whether such an expropriation of Villa Vigoni would really be ‘in compliance with’ the Court’s decision might be open for discussion.

To Francesco Francioni

JHHW: *I find myself in agreement with all the important points you make—the voice of reason and I say this with no irony. But I also find myself somewhat unclear in regard to where you position yourself on the hard legal issues.*

You make an important point regarding Article 25 of the 1961 Italo-German Agreement and the failings of Italy in that respect. You make the equally important point of what would appear to be not only the discriminatory position of the German government vis-à-vis different groups of victims but also the legally incoherent position regarding the status of the Italian victims as prisoners of war. And you are of course right that, as time passes, biology is taking care of the immediate problem; although I should add that compensation to the families (as would be the case in a situation of wrongful death) will survive, at least as a moral right, the death of the victims themselves. So, yes, let's try and negotiate a satisfactory solution as soon as possible.

But assuming failed negotiations (even good faith negotiations can fail), where do you come out on the hard legal issues? Given all the circumstances to be taken into account, do you think the ItCC was right—for the reasons it gave or for other reasons—to take the position it took, under Italian Constitutional Law and, more intriguingly in light of your evocative comments on sovereign equality and immunity, in light of international law itself?

Accepting, arguendo, your seductive suggestion of the functionality of these two principles to ensure a peaceful international order, should one not add also that this functionality should serve not only a peaceful but also a just international order, which seems to me more germane in this case.

FF: Thanks, Joseph, for raising these thoughtful questions. You ask whether the Italian Constitutional Court was right in applying the 'counterlimits' doctrine to the Italian statutory enactment implementing the ICJ's *Jurisdictional Immunities* Judgment. My answer to this question is negative. This clearly transpires from my contribution. But here I can further articulate the reasons for my negative opinion.

First, I think that the judgment of the ItCC was wrong in its using of Article 24 of the Italian Constitution—access to justice—as a parameter for declaring illegitimate the domestic law implementing the judgment of the ICJ. The cases involving the responsibility of German armed forces for mass atrocities committed in Italy, and against Italians during the period of Nazi occupation of the country, called for the recognition of a *right to compensation* for the harm suffered by the victims, not a right of access to justice.

Second, as a right to compensation under the Constitution was at stake, the ItCC had good reasons to consider the question of constitutionality not 'ripe' for adjudication, both because the avenue of diplomatic protection was still open and because alternative remedies were still available, such as Article 25 of the 1961 Italo-German Agreement.

Third, even without considering the above reasons, the judgment of the ItCC is wrong from the point of view of judicial policy. It is a missed opportunity to bring an

innovative impulse to international practice in the field of immunity. If the Court was so convinced of the incompatibility between the rule of immunity and the respect of the inalienable right of victims of mass atrocities to obtain compensation, why did it not state explicitly that it wanted to vindicate such a right at the international level and contribute to the consolidation of the ‘territorial tort exception’, an exception that still remains in a sort of limbo of international practice? Instead it paid a perfunctory homage to the authority of the ICJ and retrenched itself behind the argument of constitutional identity and the doctrine of the ‘duality’ of legal orders.

Finally, my argument regarding the functionality of the rule of immunity to serve a peaceful international legal order was meant to underscore that immunity is not a value in itself. It is only an instrument to safeguard other substantive values: the sovereign equality of states and the orderly conduct of international relations. These values often trump the value of individual justice, as sadly witnessed by the *Jurisdictional Immunities* Judgment. My chapter suggests that there are valid alternative remedies—executive action with negotiation, diplomatic protection, and legislative measures—to the constitutional doctrine of ‘counterlimits’ and to the hubris of judicial activism.

Open Access This chapter is licensed under the terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>), which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.