State Immunity, Individual Compensation for Victims of Human Rights Crimes, and Future Prospects

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Abstract This chapter first recapitulates the state of affairs as to the principle of state immunity and why exceptions from jurisdictional immunity for gross violations of human rights and humanitarian law are not recognized. It explores customary law and the global compensation treaty between Germany and Italy. Both indicate that Italy would be obligated to indemnify Germany from individual claims raised before Italian courts.

In a second step, the development towards individual rights in public international law will be taken up. It appears that human beings are increasingly recognized as holders of individual claims but, apart from human rights treaty systems, lack the capacity under international law to invoke their rights before courts. Instead, they depend on their home states, which have standing but are not entitled to waive the individual rights of their citizens.

In order to reconcile the seemingly antagonistic regimes of state immunity and claim settlement, prospects for a friendly solution of the present dilemma will be assessed. Against the background of cases pending before Italian courts, it will be examined whether the distinction between jurisdictional immunity and immunity from execution opens up a way out of the impasse, which the two states and private capital could pursue, and whether this solution would create a precedent for other similar constellations.

Lastly, some concluding remarks will address lessons to be learnt for future conflicts. They will deal with elements of a general regime of compensation, drawing from the experience of both past reparation schemes and the experience of reconciliation in post-totalitarian societies. Such elements could be a duty to seek bona fide settlements, possible consequences of violations for domestic court proceedings, methods of assessing damages inspired by mass claim processing, the categorization of claims according to the gravity of violations, rules on evaluating evidence, procedures to give victims a say, and appropriate forms of monetary and non-pecuniary compensation including the necessary institutional framework.

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I. Introduction

In *Sentenza* 238/2014, the Italian Constitutional Court (ItCC) ruled that it was unconstitutional for Italian courts to apply the customary principle of state immunity to war crimes and crimes against humanity.¹ In the same vein, the ItCC found that the domestic law implementing the UN Charter² did not form part of the Italian legal system, as far as it obliged Italian courts to abide by a decision of the International Court of Justice (ICJ) pursuant to Article 94(1) of the UN Charter, if such a judgment upholds state immunity for crimes under international law. The ItCC also quashed a statute that ordered Italian courts to implement the *Jurisdictional Immunities* Judgment.³ According to the ItCC, the fundamental rights of the Italian Constitution, and particularly the right of access to a court, were superior to obligations under international law. The Court thus transferred the *controlimiti* doctrine, which had been developed to allow for exceptions to the priority of EU law over domestic law, so as to allow for an exception to the obligation to abide by judgments of the World Court.⁴

Irrespective of how convincing this decision is, it points towards a gap between individual rights and the capacity to invoke these rights before domestic or international courts. This gap (and the concomitant inconsistencies) is cause for concern. While international law since World War II (WWII) has witnessed an increase in norms that aim at the protection of the individual, it remains the case that states alone have standing before courts to bring suits for violations of these rights. State immunity reflects this concept. Apart from international human rights protection schemes, where individuals may raise complaints if the respondent state has recognized pertinent jurisdiction, traditional law by virtue of state immunity places the respondent state on an equal level with the state that espouses the claim and bars the holders of these rights from proceedings on their own behalf. Thus, even though Italy and its courts have a point in stressing the human rights nature of the claims concerned, they engage the international responsibility of the Italian state for violation of state immunity by enforcing such claims.

The present chapter elaborates further on this contradictory legal situation and tries to develop a notion of how contemporary international law should respond. In a first step, the complex interplay between traditional patterns of reparation, state immunity, and human rights in the Italian compensation cases is analysed (section II). Subsequently, this chapter identifies some tendencies in international law that appear to depart from this classical model (section III). These tendencies point at possible ways to better integrate victims of war crimes and crimes against humanity into compensation schemes (section IV)—and show that a conciliatory solution to

¹*Corte Costituzionale*, Judgment of 22 October 2014, No 238/2014.

²Article 1 of the Italian Law 17 August 1957, No 848.

³ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment of 3 February 2012, ICJ Reports 2012, 99, para 136.

⁴See explicit reference in ItCC, Judgment 238/2014 (n 1), para 3.2.

the pending cases would comply better with the development through which international law has travelled in the past decades (section V).

II. Compensation, Immunity and Human Rights

In its Judgment of 3 February 2012, the ICJ once again upheld state immunity from national jurisdiction, which applies as long as no specific treaty obligates a state to exert jurisdiction.⁵ More specifically, it found that Italian courts disregarded this principle by exercising jurisdiction over claims raised against the Federal Republic of Germany, by declaring Greek judgments against the German state enforceable, and by enforcing such judgments, which an Italian domestic court did by registering a legal charge on Villa Vigoni for the purpose of securing an acknowledged claim. After an analysis of state practice, the ICJ rejected the notion of exceptions to immunity from jurisdiction or from enforcement, including for war crimes and crimes against humanity.⁶ Accordingly, Italy was held responsible vis-à-vis Germany,⁷ even though the Court stressed that it did not rule on any individual claim for compensation under international law.⁸

Before reconstructing the rationale of this judgment (section II.2.), it appears useful to take a look at the legal framework for the compensation of Italian victims of persecution and crimes committed during WWII (section II.1.).

1. Compensation Agreements and German Compensation Law After World War II

According to Article 77(4) of the Italian Peace Treaty, Italy waived ‘on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939’.⁹ This waiver referred to ‘all claims for loss or damage arising during the war’.

⁵Cf ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment of 14 February 2002, ICJ Reports 2002, 3, para 51; ICJ, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment of 4 June 2008, ICJ Reports 2008, 177, para 170; ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012, 422: the obligation under Art 7 of the UN Convention against Torture implied that immunity, even though the issue was raised in the course of proceedings before domestic courts in Senegal (ibid, para 22), could not be invoked by the accused.

⁶ICJ, *Jurisdictional Immunities* (n 3), paras 80-97.

⁷Ibid, para 136.

⁸Ibid, para 108.

⁹Treaty of Peace with Italy, 10 February 1947, 49 UNTS 3.

This provision, theoretically, did not bar Italian war victims from presenting a claim under the German compensation law (*Bundesentschädigungsgesetz*). According to the statute's pertinent version of 1956, however, reparations depended on the qualification of the claimant as a victim of national-socialist persecution as well as a domicile or permanent residence in Germany until 31 December 1952.¹⁰ Claims had to be registered by 1 October 1957.

In 1961, Germany and Italy concluded two bilateral compensation agreements. The Agreement on the Compensation for Italian Nationals Subjected to National-Socialist Measures of Persecution, according to the official reasoning, was intended to include those Italian victims of persecution who did not qualify under the compensation law of 1956.¹¹ Germany agreed to pay DM (*Deutsche Mark*) 40 million 'for the benefit of Italian nationals who, on grounds of their race, faith or ideology were subjected to (...) measures of persecution and who, as a result of those persecution measures, suffered loss of liberty or damage to their health, and for the benefit of the dependents of those who died in consequence of such measures'. This agreement was, according to its Article 3, meant to 'constitute final settlement' between the two states. Germany has held ever since that victims of war crimes, including Italian Military Internees (IMIs) or people deported and subjected to forced labour, were beyond the ambit of the term 'victim of Nazi persecution'.

For all other types of claims the second agreement of 1961 is of interest, which concerns the 'settlement of certain property-related, economic and financial questions'.¹² Germany paid a further lump sum of DM 40 million for 'outstanding questions of an economic nature'. Italy, in turn, agreed to indemnify the Federal Republic of Germany 'for any possible judicial proceedings or other legal action by Italian natural or legal persons' in relation to claims 'based on rights and circumstances which arose' during WWII.¹³ Article 24 of this agreement states that Germany considered the settlement agreed therein as final. The accompanying exchange of notes between both sides make no mention of Article 24. As a consequence, Germany considers it to be the responsibility of the Italian state to compensate claims within the scope of this agreement, including victims of war crimes and persons deported and subjected to forced labour.¹⁴

¹⁰Third German Law Amending the Additional Federal Compensation Act of 29 June 1956, *Bundesgesetzblatt* I 29 June 1956, No 31, 559; the statute had retroactive effect as of 1 January 1953.

¹¹Agreement between the Federal Republic of Germany and Italy on the Compensation for Italian Nationals Subject to National-Socialist Measures of Persecution (Bonn, 2 June 1961), German and Italian version published in *Bundesgesetzblatt* II 5 July 1963, No 22, 791; official reasoning in *Bundestagsdrucksache* IV/438, 9.

¹²Agreement between the Federal Republic of Germany and Italy on the Settlement of Certain Property-Related, Economic and Financial Questions (Bonn, 2 June 1961), German and Italian version published in *Bundesgesetzblatt* II 26 June 1963, No 19, 668.

¹³Original in German and Italian; English translation taken from ICJ, *Jurisdictional Immunities* (n 3), para 24.

¹⁴Cf ICJ, *Jurisdictional Immunities* (n 3), para 102.

This, however, did not happen. With the German Law of 2 August 2000 establishing the Foundation ‘Remembrance, Responsibility and Future’ (*Erinnerung, Verantwortung und Zukunft*), a further effort was made¹⁵ with the intention to cover damages for people who had not been compensated under the laws enacted or agreements concluded previously. However, it did not encompass prisoners of war (POW) for whom the allied forces had already set up a compensation scheme shortly after the war. The fact that the German *Reich* denied POW status to IMIs did not prevent German authorities from placing forced workers under that category. The ICJ noted that it was ‘a matter of surprise—and regret—that Germany decided to deny compensation’ for that reason.¹⁶

2. Immunity As a Part of the System

The ICJ cited ample state practice, particularly judgments of domestic courts, to support its conclusion that there is no exception from immunity even for particularly grave violations of international law.¹⁷ This is in line with the jurisprudence of the European Court of Human Rights (ECtHR), which has repeatedly held that no violation of the European Convention on Human Rights (ECHR) would ensue were courts to grant immunity from jurisdiction, including for claims against a state whose agents were accused to have committed human rights crimes such as torture and crimes against humanity.¹⁸ The rationale behind this reasoning has two aspects: a reciprocity and a policy argument.

The reciprocity argument refers to the traditional concept of state immunity. It derives from the principle of the sovereign equality of states, which implies that no state’s institutions may sit as judges over the conduct of other states.¹⁹ The historical motive to exempt the monarch from the jurisdiction of courts has ceded over time to the rationale of guaranteeing the exclusive competence of the respondent state to determine its policies.²⁰ Once an exception to the rule is made, the concern is that this would open the door for retaliation of a similar kind before other states’ courts and for a politicization in the administration of justice.²¹ This concept seems all the

¹⁵German Law Instituting the Foundation ‘Remembrance, Responsibility and Future’ (*Erinnerung, Verantwortung und Zukunft*) of 2 August 2000, *Bundesgesetzblatt* I 11 August 2000 No 38, 1263.

¹⁶ICJ, *Jurisdictional Immunities* (n 3), para 99.

¹⁷*Ibid*, paras 81–97.

¹⁸ECtHR, *Al-Adsani v The United Kingdom*, Judgment of 21 November 2001, Application No 35763/97; ECtHR, *McElhinney v Ireland*, Grand Chamber Judgment of 21 November 2001, Application No 31253/96; ECtHR, *Kalogeropoulou and Others v Greece and Germany*, Decision of 12 December 2002, Application No 59021/00.

¹⁹ICJ, *Jurisdictional Immunities* (n 3), para 57.

²⁰Hazel Fox/Philippa Webb, *The Law of State Immunity* (Oxford: OUP 3rd ed 2013), 26–28.

²¹Burkhard Hess, ‘Kriegsentschädigungen aus kollisionsrechtlicher und rechtsvergleichender Sicht’, *Berichte der Deutschen Gesellschaft für Völkerrecht* 40 (2003), 107–212, at 189.

more difficult to accept when the conduct in question amounts more clearly to serious and large-scale human rights crimes.²²

The policy argument addresses the possible consequences of exceptions to immunity. With respect to reparation after war and other types of conflict, opening the path to domestic courts has a potentially detrimental effect on the incentive to arrive at an agreement through compromise, because victims would prefer to go to court and seek full compensation.²³ Court judgments would discourage negotiated compensation schemes, which are typically accompanied by lump sum and final settlement clauses. If obtaining such judgments is a realistic option, then state parties would be even more hesitant than they currently are to engage in such treaties. Moreover, forum-shopping might be an unwanted consequence.

3. A Human Rights Perspective on *Sentenza* 238/2014

It should not go unmentioned that the solution defended by the ItCC in *Sentenza* 238/2014 also raises serious concerns of a more general nature. To compromise the normativity of international law and even the UN Charter at the discretion of domestic courts comes as an invitation to actors in systems that do not primarily honour the protection of individual rights. In adapting the approach the European Court of Justice (ECJ) developed in the *Kadi* case,²⁴ in which the ECJ subjected sanctions by the UN Security Council to its judicial review,²⁵ the ItCC on the face of it made an effort to align with European fundamental rights standards. However, a similar approach was also followed with regard to the ECtHR,²⁶ so that the ItCC has aligned with other constitutional courts that formulate caveats to the implementation of ECtHR judgments. In an environment less prone to fundamental rights, the Russian Constitutional Court cited such jurisprudence with approval when it held that compliance with ECtHR judgments could be made conditional on a decree of

²²Jürgen Bröhmer, *State Immunity and the Violation of Human Rights* (The Hague: Nijhoff 1997), 189–215; Fox/Webb, *State Immunity* 2013 (n 20), 44–48.

²³The opinion that compensation treaties implicitly exclude individual claims before national courts per se, as held by German authorities for some time, however, was rejected by the German Federal Constitutional Court in the forced workers claims case, Order of 13 May 1996, 2 BvL 33/93, BVerfGE 94, 315, at 328–334.

²⁴Cited in ItCC, Judgment 238/2014 (n 1), para 3.4.

²⁵Cf CJEU, *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Judgment of 3 September 2008, Joined Cases Nos C-402/05 P and C-415/05 P, paras 316; 320–326.

²⁶*Corte Costituzionale*, Judgments of 22 October 2007, Nos 348 and 349/2007, para 6.1; for a similar approach to the ECtHR, see the judgment of the German Federal Constitutional Court in the *Görgülü* case: *Bundesverfassungsgericht*, Judgment of 14 October 2004, 2 BvR 1481/04, BVerfGE 111, 307, at 329.

the President of the Russian Federation.²⁷ Thus, probably against its own intentions, the ItCC has contributed to a dwindling fidelity to international law, of which human rights form an essential part.

In sum, also from a human rights perspective, albeit not in an obvious way, *Sentenza* 238/2014 entails ambivalent consequences. To conclude from this observation that fundamental rights are best served if the lines drawn by traditional international law were further followed, however, would drive the point too far. In a way, *Sentenza* 238/2014 goes in the direction of another trend in international law, namely the progressive development towards individualization.²⁸ In order to better understand the dilemma of the ItCC and to put forward an informed suggestion for possible future arrangements, it should be asked what that trend means for the compensation of victims of war crimes and crimes against humanity.

III. The Individualization of Claims Under International Law

The *Jurisdictional Immunities* Judgment reaffirms a distinction between substantive and procedural law,²⁹ which is also visible in the emancipation of individual rights from mediatization by state interests in post-war compensation systems. In the law governing injuries against aliens, the violation of the rights of an individual foreign national was considered ‘in reality’ an infringement on the said individual’s home state to assert its own rights.³⁰ This so-called Vattelien fiction,³¹ however, has been modified. In those crucial areas of international law in which the individual is at the centre—that is in human rights law, international criminal law and in international humanitarian law—compensatory schemes for violations of the individual’s rights form part of the regimes.

²⁷Russian Constitutional Court, Judgment of 14 July 2015, No 21-II/2015 on request of *State Duma deputies*, translation by Maria Smirnova, available at <http://transnational-constitution.blogspot.com/2015/08/russian-constitutional-court-decision.html>. See also Heike Krieger, chapter ‘*Sentenza* 238/2014: A Good Case for Law-Reform?’, in this volume.

²⁸Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge: CUP 2016); see also Anne Peters, ‘Immune against Constitutionalization?’, in Anne Peters/Evelyn Lagrange/Stefan Oeter/Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Leiden: Brill 2015), 1–19.

²⁹For a critique, see, among others, Jerzy Kranz, ‘L’affaire *Allemagne contre Italie* ou les dilemmes du droit et de la justice’, in Peters, *Immunities* 2015 (n 28), 116–127; Andrea Gattini, ‘Immunité et souveraineté dans l’arrêt de la Cour Internationale de Justice dans l’affaire *Immunités juridictionnelles de l’État*’, *ibid.*, 223–235; Robert Uerpman-Witzack, ‘Serious Human Rights Violations as Potential Exceptions to Immunity: Conceptual Challenges’, *ibid.*, 236–243.

³⁰PCIJ, *Mavrommatis Palestine Concessions (Greece v UK)*, Judgment of 30 August 1924, PCIJ Reports Series A, No 2, 12.

³¹ILC, Draft Articles on Diplomatic Protection with Commentaries, adopted by the Commission at its fifty-eighth session in 2006, UN Doc A/61/10, Art 1, commentary, para 3.

In international human rights law, the 1984 UN Convention against Torture demands that member states provide an individual right to compensation invocable by victims before domestic courts; this right must include means for comprehensive rehabilitation.³² In other protection systems such an obligation of redress is framed in more general terms. Regional human rights courts use different powers to decide on reparations. The wording of Article 41 ECHR aims at pecuniary compensation, but it is the obligation to comply with ECtHR judgments (Article 46 ECHR) which is read to encompass non-pecuniary consequences, such as the duty to halt violations and, if necessary, to amend statute law or to reopen judicial and administrative proceedings.³³ The language of Article 63 of the American Convention on Human Rights goes further than Article 41 of the ECHR in spelling out that a breach of rights 'be remedied and that fair compensation is made'.³⁴ The African Court of Human and Peoples' Rights may 'make appropriate orders to remedy the violation, including the payment of fair compensation and reparation'.³⁵ The reach of these Conventions coincides with the 'jurisdiction' of the respondent state party, which is understood to refer to its territory and also covers extraterritorial acts if the state exercises control, for example through an army in occupied territory.³⁶

The central compensation clause in international criminal law is Article 75 of the Rome Statute.³⁷ The International Criminal Court can develop guidelines for reparation and may order compensation for victims to be paid either by the perpetrator or by a trust fund that the state parties can establish (Article 79 Rome Statute). Victims have no right, as a party to the proceedings, to direct a claim against the accused. However, they may file an application with the registrar of the court which has the power to order pecuniary reparation if the accused is convicted.³⁸

In humanitarian law, Article 91 of the first Additional Protocol to the Geneva Conventions of 1949 declares that states that violate the Conventions are liable for

³²Art 14 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, in force 26 June 1987, 1465 UNTS, 85.

³³International Law Association, Johannesburg Conference, International Human Rights Committee, 'Final Report International Human Rights Law and the International Court of Justice (ICJ): The Domestic Implementation of Judgments/Decisions of Courts and Other International Bodies that Involve International Human Rights Law', Part Two, (2016), para 15.

³⁴American Convention on Human Rights of 22 November 1969, UNTS 1144, 123.

³⁵Art 27 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights of 9 June 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT III; a similar formula is used in Art 45 of the Protocol on the Statute of the African Court of Justice and Human Rights of 1 July 2008, reprinted ILM 48 (2009), 334, though not yet in force.

³⁶ECtHR, *Ilascu v Moldova and Russia*, Judgment of 8 July 2004, Application No 48787/99, paras 387-394; ECtHR, *Al-Skeini and Others v UK*, Judgment of 7 July 2011, Application No 55721/07, paras 138-142; for acts outside occupied territory, see ECtHR, *Bankovic and Others v Belgium and Others*, Decision of 12 December 2001, Application No 52220/99, paras 67-73.

³⁷Rome Statute of the International Criminal Court of 17 July 1998, UNTS 2187, 3.

³⁸William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: OUP 2010), 879-882.

damages.³⁹ The official commentary of the International Committee of the Red Cross is sympathetic to a reading that this provision presupposes a claim of the individual and to reparation, but the matter remains disputed. At least there is a tendency in customary law to recognize standing of individuals to invoke these rights before courts.⁴⁰ Even though it appears that domestic courts, at least in Germany, are still reluctant to accept the individual orientation of humanitarian law when it comes to its being integrated into the domestic concept of state responsibility,⁴¹ they rarely rule out this possibility.⁴² At any rate, as of now the standing of the individual before courts to invoke these rights is not yet generally recognized. All that humanitarian law explicitly prescribes is that neither protected persons nor their home states may waive the rights guaranteed in the Geneva Conventions.⁴³

A development towards individualization can also be observed in the processing of mass claims. In the administration of damages after the invasion of Kuwait by Iraq, the United Nations Compensation Commission (UNCC) dealt with different categories of individual claims.⁴⁴ Eligibility for compensation included any direct loss and damage arising from this incident, which could have been a breach of humanitarian law. The home states were not regarded as holders of these claims but as agents of their nationals (and stateless persons which they represented). The UNCC also monitored payments to the claimants made by the recipient states that had an obligation to report.

The International Law Commission's (ILC) Articles on State Responsibility likewise recognize the possibility of individual rights to reparation. Their Article 33(2) states that the rules on the content of responsibility are 'without prejudice to any right, arising from the international responsibility of a state, which may accrue

³⁹First Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, UNTS 1125, 3.

⁴⁰Jean de Preux, 'Article 91—Responsibility', in Claude Pilloud et al, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* in Yves Sandoz/Christophe Swinarski/Bruno Zimmermann (eds), (Geneva: Nijhoff 1987), 1053-1058, at 1056-1057; Jean-Marie Henckaerts/Louise Doswald-Beck, *Customary International Humanitarian Law (Volume I: Rules)*, (Cambridge: CUP 2005a), 541-545.

⁴¹*Bundesverfassungsgericht*, Order of 13 August 2013, 2 BvR 2260/06 (*Bridge of Varvarin*); *Bundesgerichtshof*, Judgment of 6 October 2016, III ZR 140/15, NJW 2016, 3656 (*Kunduz*).

⁴²See reference in Jean-Marie Henckaerts/Louise Doswald-Beck, *Customary International Humanitarian Law (Volume II: Practice)*, (Cambridge: CUP 2005b), 3560-3609.

⁴³Cf Arts 7 and 8 of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, UNTS 75, 135; Arts 7 and 8 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, UNTS 75, 287.

⁴⁴Cf Stefan Kadelbach, 'Staatenverantwortlichkeit für Angriffskriege und Verbrechen gegen die Menschlichkeit', *Berichte der Deutschen Gesellschaft für Völkerrecht* 40 (2003), 63-105, at 90-92. See also Christian Tomuschat, chapter 'The Illusion of Perfect Justice', and Filippo Fontanelli, chapter 'Sketches for a Reparation Scheme', in this volume.

directly to any person or entity other than a state'.⁴⁵ According to the ILC commentary thereto 'the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights'.⁴⁶

Thus, the traditional concept of state responsibility appears to be ceding to a model of split entitlement: the victims are recognized as holders of the claims, but the procedural right to espouse these claims on their behalf is still in the hands of the states. This notion is also taken up in the work of the ILC project on diplomatic protection, which recognizes that a state in presenting such a claim "in reality" (...) also asserts the rights of its injured national'.⁴⁷

IV. Prospects for Future Regimes of Compensation and Reconciliation

What would a compensation regime have to look like in order to absorb the developments sketched out in the preceding section? There can be no doubt that such a scheme would be based on the concept that individuals are the holders of claims to restitution, compensation, and satisfaction. The question is how these claims can be administered in a way that recognizes them without discouraging other efforts to reach a constructive settlement.

The central issue is who may present such claims. It is still the practice that states act on behalf of their nationals or other persons for whom they are responsible. The power of the UNCC to monitor the transfer of compensation by the victim's home state pays tribute to the fact that this state does not espouse its own claim and may serve as a model solution to the problem that victims frequently do not receive any payment. The need to concentrate the process and to administer it effectively advocates in favour of maintaining the mechanism of diplomatic protection in principle. The question is whether this model should as a matter of policy⁴⁸ prevent individuals from bringing suits before domestic courts. As far as treaty systems address this point, they provide for the exclusiveness of the established scheme, such as the peace treaty between Ethiopia and Eritrea of 2000.⁴⁹ Another path would be

⁴⁵ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome), UN Doc A/56/10, 43, UN Doc A/RES/56/83, Annex, UN Doc A/CN.4/L.602/Rev.1, GAOR 56th Session Supp 10, 43.

⁴⁶Ibid.

⁴⁷ILC, Draft Articles on Diplomatic Protection, 2006 (n 31), Art 1, commentary, para 3; cf also Peters, *Beyond Human Rights* 2016 (n 28), 161-164; 389-407.

⁴⁸Compensation agreements are not a *legal* obstacle; see FCC, Order of 13 May 1996 (n 23).

⁴⁹Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia for the resettlement of displaced persons, as well as rehabilitation and peacebuilding in both countries (*Algiers Agreement*), 12 December 2000, 2138 UNTS 93, Art 5 (8).

mutual exclusion such that the registration of a claim requires that no other proceedings are pending.⁵⁰

A second crucial point is whether there can be an upper ceiling to the total amount of compensation, as it is one of the rationales of a lump sum agreement. Examples in history to the contrary seem discouraging and atypical. They include past generations of peace treaties, but also the compensation obligations Iraq incurred following its invasion of Kuwait. In that case reparation was not mutually agreed but one-sidedly imposed and financed by the sequestered proceeds of the Iraqi oil production.⁵¹ These examples notwithstanding, however, contemporary human rights law points at a distinction between damages resulting from serious crimes against life, integrity and personal liberty on the one hand, and other types of claims on the other hand. Whereas claims of the latter kind may still be negotiable, there is little space for limiting claims for serious human rights violations. It is widely recognized that serious crimes must entail investigations and, where the proceedings yield pertinent evidence, the indictment of the persons responsible.⁵² It would contravene the strict stance human rights law takes in this respect to exclude claims altogether, be it only by limiting the funds at a court's disposal.

However, it seems possible to provide for time limits for the registration of claims, if these limitations are not unduly short and made public in a way that the entitled can come to know of their rights. Recent models of mass claim processing are therefore compatible with the need to provide adequate reparation. They have the advantage of accelerating the procedure and of establishing unified methods for evaluating evidence. For that reason, the UNCC distinguished between different types of claims and typified the outcomes in the form of fixed amounts. There have also been inbuilt time constraints, in that deadlines for registration were set and an end to the proceedings was envisaged as a predefined point in time. In more complex proceedings one might also think of fixed time limits for every step in the procedure, as is the practice before some arbitral tribunals. Such efforts to speed up the procedure would be one lesson from past lump sum settlements, as it can take decades between the taking up of the claim and payment to the injured person.

For the financing of reparation claims, funds have been created or are foreseen which are administered by claims commissions, arbitral tribunals, or courts. Examples are national foundations in Austria and Germany and the victims trust fund mentioned in Article 79 of the Statute of the International Criminal Court.

Finally, remedies other than financial compensation, which are covered by the concept of satisfaction, may help to overcome serious human rights violations. One

⁵⁰Cf Hess, 'Kriegsentschädigungen' 2003 (n 21), 163.

⁵¹See Kadelbach, 'Staatenverantwortlichkeit' 2003 (n 44).

⁵²IACtHR, *Barrios Altos v Peru*, Judgment of 14 March 2001, Ser C 75, operative para 4; IACtHR, *Almonacid Arellano et al v Chile*, Judgment of 26 September 2006, Ser C 154, para 119; ECtHR, *Mocanu and Others v Romania*, Judgment of 17 September 2014, Applications Nos 10865/09, 45886/07 and 32431/08, para 321.

might profit from the experience of national reconciliation efforts⁵³ but also from the jurisprudence of the Inter-American Court of Human Rights, which has ordered official apologies, memorials, the naming of streets and other measures of that kind.⁵⁴

V. Conclusions

If there is an inter-temporal dimension to the case, it does not show primarily in the fact that the law of compensation was different at the time of WWII compared to the present. Rather, it is to be seen in the antagonism between subject matter and procedural law: whereas we are witnessing an increasing empowerment of the individual with respect to his or her rights in international law, the modes of implementing these rights are still strictly consensual. The individual has no standing before international courts or national courts of a foreign state unless states are willing to grant it, be it by agreement or by the waiver of immunity. Two different layers in the ‘geology of international law’⁵⁵ overlap, with the result that the ICJ has made it clear that immunity is still an obstacle to domestic jurisdiction for individual compensation claims. Therefore, Italy is under an obligation to indemnify Germany, both by virtue of this judgment and the bilateral compensation agreement of 1961, in case a domestic court should grant an order of execution.

This outcome is counter-intuitive and raises the concern of how convincing political statements embracing human rights really are. It is therefore necessary to find a conciliatory solution as it is also suggested in the obiter dictum to the ICJ judgment, which stresses that claims by Italian victims of war crimes whose entitlements to reparation have not yet been recognized ‘could be the subject of further negotiations between the two States concerned with a view to resolving the issue’.⁵⁶

The state of proceedings in Italy appears to open a window of opportunity. Some interpret *Sentenza* 238/2014 as abstract in nature, without entailing cogent consequences for pending and future cases. In particular, the distinction was stressed between immunity from jurisdiction and immunity from enforcement. The fact that the ICJ held that the latter ‘goes further than the jurisdictional immunity’⁵⁷ should be

⁵³See also the Agreement between the Government of Canada and the National Association of Japanese Canadians of 22 September 1988, reported by Henckaerts/Doswald Beck, *CIHL Rules* (n 40) 542 and *CIHL Practice* (n 42), 3602.

⁵⁴Cf, inter alia, IACtHR, *González et al v Mexico*, Judgment of 16 November 2009, Ser C 205, para 471 (*Cotton Field*).

⁵⁵To borrow a term used by Joseph H H Weiler, ‘The Geology of International Law: Governance, Democracy and Legitimacy’, *Heidelberg Journal of International Law* 64 (2004), 547-562.

⁵⁶ICJ, *Jurisdictional Immunities* (n 3), para 103.

⁵⁷*Ibid*, para 113.

a reason for Italian courts to reflect on the matter and halt procedures.⁵⁸ The two governments, in turn, might use the period of suspension to engage in a conciliatory solution.

How could the issue be resolved? One suggestion has been to create a fund in which both states take a share.⁵⁹ Germany for obvious reasons and Italy because it failed to identify victims and take care of their fate. Companies which profited from forced labour and other private donors could be encouraged to participate. The total amount available should be dependent on the number of victims still alive; claims could be restricted to direct victims and their spouses. Payment should be made directly to the entitled persons. The total sum of money to be paid out in the end would certainly not be high, considering the shrinking number of claimants, the more so if compared to other expenditures that figure prominently in state budgets. If experience with past settlement procedures and reconciliation commissions is representative, the pecuniary aspect is not even the most important. Perhaps more relevant are the ways to provide some form of recognition of the injuries suffered and the consequences they had on the lives of victims and their next of kin.

Since the affected persons' lives are approaching their end, both structure and procedure must be organized in such a way as to allow for speedy processing. This consideration points in favour of a commission rather than an arbitral tribunal, composed of representatives from both states or even independent experts who are familiar with such procedures, as they may be found, for example, in the International Organization for Migration. Procedures could follow the experience with mass claim proceedings as far as the categorization of claims and evidence are concerned. To lower the threshold, the constitutive agreement could stress that the solution found would constitute no prejudice for claims raised by other states and would not imply the recognition of a legal commitment beyond the immanent logic of the system created.

VI. Epilogue

It is only a ten-minutes' drive away from Frankfurt University, where this chapter has been written, to the cemetery of Westhausen. A section of this cemetery is known as the *Cimitero di Guerra Italiano*, where 4,788 Italian men, women and

⁵⁸For pertinent jurisprudence, see Karin Oellers-Frahm, 'A Never-Ending Story: The Italian Court of Justice—The Italian Constitutional Court—Italian Tribunals and the Question of Immunity', *Heidelberg Journal of International Law* 76 (2016), 193–202, at 197–198; Giovanni Boggero, 'The Legal Implications of *Sentenza* No. 238/2014 by Italy's Constitutional Court for Italian Municipal Judges: Is Overcoming the "Triepelian Approach" Possible?' *Heidelberg Journal of International Law* 76 (2016), 203–224, at 219–221. See also Giovanni Boggero/Karin Oellers-Frahm, chapter 'Between Cynicism and Idealism', in this volume.

⁵⁹See Francesco Francioni, chapter 'Overcoming the Judicial Conundrum', in this volume. See also Andreas von Arnould, chapter 'Deadlocked in Dualism', in this volume.

children were buried. They died between 1943 and 1945, either from illness, starvation, exhaustion, or during hostilities and air raids. A number of them had come to Germany in the 1930s as workers and were interned for forced labour in 1943 after Italy had changed sides in the war; many were soldiers, and had been captured as IMIs, others were partisans, political prisoners or victims of deportation. It still happens that a family discovers the name of a grandfather, a sister or a cousin who had been missing for decades. If they wish, the Italian Consulate General organizes for the remains to be transferred back home. A plate with the inscription ‘*rimpatriato*’ is then attached to the tombstone.

The conviction that the horrors of the past must be overcome has inspired many ambitious projects, a common and unified Europe being amongst the most important. Germany and Italy have contributed to this European success for more than 60 years. To continue to do so is an obligation that goes beyond positive law.

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