Between a Rock and a Hard Place: Italian Concerns Between Constitutional Rights and International Law

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Abstract *Sentenza* 238/2014 has led to a sharp dissonance between the international law of state immunity as interpreted by the International Court of Justice (ICJ) and Italian constitutional law as understood and applied by the *Corte Costituzionale*. While the interpretation and application by the Italian Constitutional Court (ItCC) of the access-to-courts provision in the Italian Constitution may not have been inevitable, this does not remove the need for finding a solution to the stalemate between international and domestic law. On the one hand, the easy solution, namely that the rejection of German state immunity from jurisdiction does not necessarily remove immunity from execution into German property, appears unlikely to be accepted by the ItCC because it would give stones rather than bread to the complainants and render court access a futile exercise. On the other hand, bringing *Sentenza* to its logical conclusion would result in Italy having to return to Germany what Italian courts took from her by requiring compensation—either by way of the general international law of *restitutio in integrum*, which the *Corte Costituzionale* has neither contemplated nor contradicted, or by way of the 1961 Treaty between Germany and Italy in which Italy promises to indemnify Germany against any further claims. Thus, a compromise would have to distinguish between full access to the Italian courts notwithstanding international immunity—as required by the ItCC—and substantive law, which could accept a more symbolical recognition of the suffering of the victims. That recognition could stem from a direct source other than the two states involved, such as a common fund, and address only the small group of immediate victims who were unjustly, if arguably legally, excluded from the previous compensation scheme of the 1960s. It is by no means certain, however, whether such an outcome would be acceptable to all sides—including the *Corte* itself. Thus, legal certainty would have to be established as quickly as possible so that the victims can still receive at least symbolic compensation.

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I. Introduction

Sentenza 238/2014 has created a sharp dissonance between the international law of state immunity as interpreted by the International Court of Justice (ICJ) on the one hand, and Italian constitutional law as understood and applied by the *Corte Costituzionale* on the other. To wit, while the ICJ maintained that a state is immune against any claim of civil damages for its acts *iure imperii*,[1] both present or past, the *Corte Costituzionale* held in *Sentenza* 238/2014 that the Italian Constitution demanded that Italian courts provide court access to parties requesting reparation for violations of basic fundamental rights—for acts both past and present.[2] Thereby, the Italian Constitutional Court (ItCC) went further than the European Court of Human Rights in cases regarding contemporary state torture[3] and reparations for expropriations committed by Germany during World War II (WWII) prior to the European Convention on Human Rights had entered into force.[4] By declaring Italian ratification of the UN Charter retroactively a violation of its Constitution, and thus limiting the internal purview of the most basic international treaty since WWII, the *Corte Costituzionale* took an unprecedented step not only in Italy but in the world at large.

II. The Stalemate Between International and Domestic Law

Reassuringly enough, Italy will not cease to be a member of the UN and will not try to 'bail out' of international law altogether. Indeed, and this is the good news, the ItCC explicitly confirmed the bindingness of international law on Italy, including the very immunity the *Corte Costituzionale* rejected in domestic law. It was only that Italy could not practically abide by the decision and deny court access for the claims

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[1]ICJ, *Jurisdictional Immunities of the State* (*Germany v Italy: Greece intervening*), Judgment of 3 February 2012, ICJ Reports 2012, 99, para 77.

[2]*Corte Costituzionale*, Judgment of 22 October 2014, No 238/2014, paras 5 et seq.

[3]See ECtHR, *Al-Adsani v The United Kingdom*, Grand Chamber Judgment of 21 November 2001, Application No 35763/97; see also ECtHR, *Nait-Liman v Switzerland*, Grand Chamber Judgment of 15 March 2018, Application No 51357/07 (no extra-territorial jurisdiction for adjudication of civil claims regarding compensation for torture, with a careful analysis of domestic case law in paras 67 et seq, concluding in paras 187–188 that such jurisdiction is an exception in domestic law and not warranted by international treaties); similarly ECtHR, *Jones and Others v The United Kingdom*, Judgment of 14 January 2014, Applications Nos 34356/06 and 43525/06, para 116 et passim (no violation of Art 6(1) ECHR by not recognizing universal jurisdiction for compensation claims); confirming UK House of Lords, *Jones v Saudi Arabia* [2006] UKHL 26.

[4]ECtHR, *Kalogeropoulou and Others v Greece and Germany*, Decision of 12 December 2002, Application No 59021/00 (*Distomo*); ECtHR, *Associazione Nazionale Reduci and 275 Others v Germany*, Decision of 4 September 2007, Application No 45563/04 (*Ferrini*), 12. See also ECtHR, *Prince Hans Adam II of Liechtenstein v Germany*, Judgment of 12 July 2001, Application No 42527/98, paras 59 et seq.

in question for reasons of internal law—even if its interpretation was quite singular in comparison to those of its foreign brethren in similar cases. While it is thus doubtful that the interpretation and application by the ItCC of the access-to-court provision in the Italian Constitution was doctrinally inevitable, this does not remove the need for a resolution in the resulting stalemate between international and domestic law.

On the one hand, the easy solution, according to which rejecting immunity from jurisdiction does not necessarily remove immunity from execution, appears unlikely to be accepted by the ItCC because it would render court access a futile exercise—the very access the Court had demanded so strongly in *Sentenza*.[5] On the other hand, bringing *Sentenza* 238/2014 to its logical conclusion leads to the equally awkward result that Italy would have to compensate Germany for the eventual losses suffered from a success of the victims' compensation claims before Italian courts. The reason for this counterintuitive result lies in the schism *Sentenza* created between international and domestic law when it—even only grudgingly—accepted the authority of the 2012 ICJ Judgment as to the state of contemporary international law, though the *Corte Costituzionale* all but invited the World Court to eventually reverse its judgment.[6] However, this does nothing to prevent Italy's international obligation to provide redress to Germany for any wrongful act it may have committed under international law. International law, in turn, in the judgment rendered by the ICJ, requires respect for Germany's immunity and provides, as a secondary remedy, *restitutio in integrum* for any violation of said immunity. In other words, the ICJ Judgment requires the re-establishing of the situation prior to an eventual violation of immunity:[7] including, after an eventual seizure of property to indemnify the victims of crimes committed by the *Wehrmacht* during WWII, its return to Germany or at least compensation for the lost property. This part of international law the ItCC has neither contemplated nor contradicted. But, even in the case that Italy would not recognize this seemingly inevitable result, which derived from customary international law as codified by the International Law Commission,[8] there remains the 1961 Agreement between Germany and Italy in which Italy explicitly promised to indemnify Germany against any further claims.[9] One may, of course, argue that this treaty

[5]See also the parallel treatment of adjudication and enforcement in ECtHR, *Distomo* (n 4).

[6]ItCC, Judgment 238/2014 (n 2), paras 4.1 et seq.

[7]Cf Arts 31(1), 32, 34, 35 of the ILC 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 (2001). Art 39 on Contribution of the injured State will not be of much help because it cannot be used to remove immunity through the backdoor.

[8]ILC, Art 36 ASR, 2001 (n 7).

[9]Agreement 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; see therein Art 2: '(1) The Italian Government declares all outstanding claims on the part of the Italian Republic or Italian natural or legal persons against the Federal Republic of Germany or German natural or legal persons

did not cover the damages in question, or that this treaty by itself amounted to a violation of ius cogens as Italy had argued before the World Court.[10] However, the *Corte Costituzionale*'s explicit acceptance of the ensuing judgment in international law—in the true spirit of Italian dualism—seems to close down this argument. Thus, on the basis of international law as recognized by *Sentenza* 238/2014, Italy would have to render under international law any property seized by way of domestic decisions. In the end, Italy, not Germany, would have to indemnify the victims.

III. You Cannot Have Your Cake and Eat It

This result shows how complicated the relationship between international and domestic law is, and how difficult it is to bridge a gap between these two systems of law. While states regularly can and do violate international rules of behaviour, and Louis Henkin's famous phrase that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'[11] may turn out to be wishful thinking in the age of Donald Trump, gaps between international and domestic law lead to confusion and paradox, not to legal certainty and the rule of law. It is one thing to maintain that states are only bound by the rules they have explicitly (treaties) or implicitly accepted, or at least acquiesced to (custom or general principles),[12] so that new rules may not be held against them; it is quite another thing to deny the validity of generally accepted rules and principles that an international court has explicitly declared valid and applicable to the case at hand.

To use domestic law as an excuse to not implement an international court ruling would amount to nothing less than a contradiction of the Italian insistence on the legal nullity of treaties in violation of ius cogens. In other words, Italy cannot have

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to be settled to the extent that they are based on rights and circumstances which arose during the period from 1 September 1939 to 8 May 1945. (2) The Italian Government shall indemnify the Federal Republic of Germany and German natural or legal persons for any possible judicial proceedings or other legal action by Italian natural or legal persons in relation to the above-mentioned claims.' Germany agreed to pay Italy DM (*Deutsche Mark*) 40 million in another Agreement (concluded on the same day) between the Federal Republic of Germany and Italy on the Compensation for Italian Nationals Subjected to National-Socialist Measures of Persecution (Bonn, 2 June 1961), German and Italian version published in Bundesgesetzblatt II 5 July 1963 No 22, 791.

[10]See Counter-Memorial of Italy, *Jurisdictional Immunities of the State* (*Germany v Italy*), 22 December 2009, paras 5.46 et seq. See also Francesco Francioni, 'Access to Justice and Its Pitfalls: Reparation for War Crimes and the Italian Constitutional Court', *Journal of International Criminal Justice* 14 (2016), 629–636; see also Werner Wilmanns, 'Die Forderungen der Verbündeten des Deutschen Reiches gegen deutsche Schuldner nach dem Londoner Schuldenabkommen', *Der Betriebs-Berater* 10 (1955), 820–821.

[11]Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press 2nd ed 1979), 47.

[12]Cf Art 38(1) ICJ Statute.

her cake and eat it, that is, she cannot on the one hand present herself as the true standard bearer of the highest values of the international community of states as embodied in ius cogens, and on the other flout international law as enshrined in customs and treaties for avoiding to indemnify the victims herself. This may indicate an important lesson from the present case, namely that relying on domestic law to flout the execution of international decisions carries the risk of international responsibility. Of course, states have the power to reject international law—either in general or in specific cases. But in this instance, they will have to suffer the consequences.

IV. Conclusion

How then to solve this stalemate? Mere waiting will not do because at some point Italian courts will have to make a decision in the cases now before them, including whether to confiscate German property such as Villa Vigoni—with the added irony that this precious centre of German–Italian friendship would thereby risk to be transformed into its opposite. Thus, a practical solution is needed: a compromise that does not rely so much on the application of hard and fast legal rules but rather on the distinction between full access to the courts notwithstanding international immunity—as required by the ItCC's interpretation of Italian constitutional law—and substantive law, which does not require reparations for every singular claim but accepts lump sum payments of a compensatory nature leaving open the question of legal obligation as a form of reparations (of war claims in general), not reparation (of each individual wrong separately).[13] Indeed, such a solution already exists in the 1961 Agreement between Germany and Italy, but has left gaps regarding coverage of Italian Military Internees and other victims.[14] The ICJ itself has explicitly expressed regret for this gap, and thus considered further negotiations.[15]

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[14]Cf ICJ, *Jurisdictional Immunities* (n 1), para 99; ECtHR, *Ferrini* (n 4), 13–14.

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