Sentenza 238/2014: A Good Case for Law-Reform?

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Abstract *Sentenza* 238/2014 is an important judgment which does not only concern the concrete case at hand but also pushes for a change in the law of state immunity. However, such attempts at law-making by national courts may not always attain their goal but may exert adverse effects which are harmful for the international legal order. *Sentenza* 238/2014 may have an impact on three different yet related issues central to the future development of international law: the relationship between international and national law, exceptions to immunities, and individual reparations in cases of mass atrocities.

This chapter criticises law-making through non-compliance with international judicial decisions by national courts. Judges in democratic states under the rule of law who try to push for law-reform, by initiating non-compliance with decisions of international courts, should be aware that they may act in the company, and thereby in support of, courts in regimes with autocratic tendencies, such as the Russian Constitutional Court, which refuses to comply with judgments of the European Court of Human Rights. Furthermore, the chapter argues that immunity from jurisdiction and immunity from execution should be kept distinct and that human rights exceptions should not be applied to immunity from execution. Such a differentiation remains justified because measures of constraint against property used for government non-commercial purposes intrude even further onto sovereign rights than the institution of proceedings before courts in the forum state. It is particularly difficult for states to protect assets and other property situated in a foreign state. These assets may therefore be more susceptible to abusive enforcement measures while simultaneously forming an essential basis for the actual conduct of international relations.

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The chapter concludes by advocating a cautious approach to individual reparations in cases of mass atrocities. This more cautious approach observes the complexities of ending armed conflicts and negotiating peace deals. An individual right to monetary compensation based on civil claims processes does not allow for taking into account broader political considerations related to establishing a stable post-war order. Such a right is conducive to bilateral settlements between the state parties concerned, which might create new injustices towards other groups of victims. It might also overburden negotiations for a settlement to an ongoing armed conflict.

The chapter thereby starts from the assumption that the stability of the international legal order itself as guaranteed by concepts such as immunities or the respect for its judicial organs serves to protect human rights, albeit indirectly.

I. Introduction: A Case for Law-Reform?[1]

The German–Italian dispute over the scope of sovereign immunities and reparations claims for war crimes committed by German armed forces during World War II (WWII) in Italy is in many ways specific and historically contingent. At the same time, it touches upon a number of fundamental challenges which the international community has to address in the interest of furthering the international rule of law. For many observers the dispute represents the injustices and inconsistencies inherent in the international legal order and thus seems to contribute to that order's legitimacy deficits. They doubt that a legal order which hampers redress against serious human rights violations before national courts in the interest of an abstract legal concept, such as sovereign equality protected through state immunity, can be considered as just.[2] Moreover, they criticize a consistency deficit: if a ius cogens rule is violated this should also affect relevant procedural rules.[3] Such a perspective furthers the idea of lifting the dispute beyond the specific context and using it as a plea for changing the rules on state immunity. For other observers the case reflects the growing challenges which international law faces from unilateral acts of non-compliance by national courts in the interest of the protection of national constitutional law.[4]

[1]Parts of this chapter are based on Heike Krieger, 'Between Evolution and Stagnation: Immunities in a Globalized World', *Goettingen Journal of International Law* 6 (2014), 177-216 and Heike Krieger, 'Addressing the Accountability Gap in Peacekeeping: Law-making by Domestic Courts as a Way to Avoid UN Reform?', *Netherlands International Law Review* 62 (2015), 259-277.

[2]See Valerio Onida, chapter 'Moving beyond Judicial Conflict in the Name of the Pre-Eminence of Fundamental Human Rights', in this volume.

[3]Eg, Alexander Orakhelashvili, 'Jurisdictional Immunities of the State', *American Journal of International Law* 106 (2012), 609-616, at 614-615.

[4]Eg, Anne Peters, 'Let Not Triepel Triumph—How To Make the Best Out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order, *EJIL Talk*, (22 December 2014), available at www.ejiltalk.org/let-not-triepel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i/; Raffaela Kunz, 'The Italian Constitutional Court and "Constructive Contestation"—A Miscarried Attempt?', *Journal of International*

Brought together, both perspectives raise the question of whether and to what extent national courts can contribute in a balanced manner to changes of international law which they consider necessary. Thus, *Sentenza* 238/2014 raises the hope that it 'may also contribute to a desirable—and desired by many—evolution of international law itself'.[5] But is Judgment 238/2014 of the Italian Constitutional Court (ItCC) a good case for law-reform?

Sentenza 238/2014 denied German immunity from civil jurisdiction against claims arising from war crimes committed by German armed forces during WWII. The ItCC argued that the customary international law rule of state immunity in such cases violated fundamental principles of the Italian Constitution. Therefore, the ItCC struck down Article 3 of the Italian Law No 5 of 14 January 2013, which had aimed to execute the 2012 International Court of Justice (ICJ) Judgment in the *Jurisdictional Immunities* case,[6] as well as the part of the law implementing the UN Charter which relates to Article 94 of the UN Charter and thus to the compliance with the 2012 ICJ Judgment.[7] In this judgment the ICJ had upheld the customary rule of jurisdictional immunities without any exceptions for claims arising from war crimes or crimes against humanity.

The creation of customary international law rules through judicial practice may be a means to overcome the opposition of a state's executive branch to further legal developments since judicial reliance on customary international law allows for a state's explicit consent to become less important. Court networks may, in horizontal and vertical dialogues, accelerate the development of customary international law rules even against the expressed intentions of the executive branch on the basis of the principle of judicial independence. Given its role in international relations, it is unsurprising that the executive branch in particular tends to be sceptical of restricting immunities even in cases of serious human rights violations. The frictions which have arisen between the executive and the judiciary in Italy are not as distinctive as they might first appear. Actually, in a number of states a split can be seen between both branches about how to deal with immunity exceptions in cases of serious violations of human rights. Comparable developments have emerged at least temporarily in Switzerland and the US. The executive may even try to stop horizontal dialogue between courts of different states by prompting the decision of an international court. Likewise, the executive—at least in a parliamentary democracy—may also hold back legal developments through instigating legislation.[8]

Criminal Justice 14 (2016) 621-627; Massimo Lando, 'Intimations of Unconstitutionality: The Supremacy of International Law and Judgment 238/2014 of the Italian Constitutional Court', *The Modern Law Review* 78 (2015), 1028-1041. See also Raffaela Kunz, chapter 'Teaching the World Court Makes a Bad Case', in this volume.

[5] *Corte Costituzionale*, Judgment of 22 October 2014, No 238/2014, para 3.3.

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

[7] Art 1 of the Italian Law 17 August 1957, No 848.

[8] Krieger, 'Between Evolution and Stagnation' 2014 (n 1), 194 et seq with further references.

The adverse impact of such uncoordinated efforts at prompting or retaining law-reform in a decentralized legal order have culminated in the *Jurisdictional Immunities* Judgment and *Sentenza* 238/2014 and point to the need for caution by all actors involved. Such adverse consequences may affect the state itself in so far as non-compliance by courts may incur state responsibility. Simultaneously, such symbolic cases of non-compliance risk undermining the authority of international judicial organs, such as the ICJ (sections II.1 and II.2). Thus, instead of promoting the legitimacy of international law, a court opposing findings of international judicial organs might be undermining the international rule of law. Unilateralist attempts to further legal developments should be aware of such adverse effects. Otherwise they may find themselves contributing to perceived legitimacy deficits of the international legal order by furthering certain double standards, advocating highly contested standards (section II.3), or creating expectations which international law might be unable to fulfil (section II.4). Instead, any such effort for law-reform should aim at advocating standards that are generalizable outside the specific context of the dispute at hand (section III). The chapter concludes by stressing that concepts such as immunities or the respect for judicial organs of the international order guarantee its stability and thereby serve to protect human rights, albeit indirectly (section IV).

II. Adverse Effects

The idea to promote legal developments through judicial dialogue is ambivalent. On the one hand, the creation of customary international law can be seen as an uncoordinated, bottom-up process entailing cases of non-compliance as a starting point for new legal rules. On the other hand, where constitutional courts contest recent findings of international courts and even choose non-compliance with a decision against 'their' respective state, they risk engaging their state's responsibility under international law even though they aim to further a specific perception of the adequate legal development.

1. Incurring State Responsibility

According to Article 94 of the UN Charter and Article 59 of the ICJ Statute, Italy has to comply with the findings of the 2012 ICJ Judgment. Article 94 of the UN Charter requires a state to realize the obligations which stem from the operative part of the ICJ's decision, including the ratio decidendi.[9] In view of Article 4 of the International Law Commission's Draft Articles on Responsibility of States for

[9]Karin Oellers-Frahm/Hermann Mosler, 'Art 94', in Bruno Simma et al (eds), *The Charter of the United Nations* (Oxford: OUP 3rd ed 2012), 1174-1179.

Internationally Wrongful Acts (ASR),[10] the 2012 ICJ Judgment binds all state organs. Accordingly, the competent state organ has to follow the obligation established by the Court's Judgment. If it fails to do so, the state engages its responsibility.[11] As defined in the commentary to the ASR, 'the essence of an internationally wrongful act lies in the non-conformity of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation'.[12] The finding of the ItCC that Article 3 of the Law No 5/2013—which aims to implement the ICJ's decision—'has to be declared unconstitutional' constitutes such a non-conformity.[13] However, the findings of the ItCC may only establish conduct prior to a breach, so that the 'apprehended or imminent'[14] breach has yet to occur.[15] The commentary to the ASR does not formulate any general rule in this regard but highlights that the decision needs to take into account the primary obligation, the facts of the case, and the context. It suggests that 'preparatory conduct does not itself amount to a breach if it does not "predetermine the final decision to be taken"'.[16]

Thus, the question regarding whether Judgment 238/2014 violates Italy's obligations under the 2012 ICJ Judgment as based on Article 94 of the UN Charter depends on the effects that the decision entails within the Italian legal order for other Italian state organs in their international relations with Germany and on their actual behaviour. According to Article 136 of the Italian Constitution, a law which the ItCC has declared unconstitutional no longer has any effect from the day following the publication of the decision. As Karin Oellers-Frahm has demonstrated, because of *Sentenza* 238/2014 the law enacting the UN Charter—albeit merely in relation to Article 94 of the UN Charter and the law implementing the ICJ Judgment—no longer pertains to the Italian legal order; neither does the customary international law rule on state immunity insofar as it contradicts fundamental constitutional principles.[17] However, as long as the decision provides a certain leeway that allows other

[10]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.

[11]Oellers-Frahm/Mosler, 'Art 94' 2012 (n 9).

[12]James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: CUP 2002), 126 (Commentary to Art 12(3)).

[13]ItCC, Judgment 238/2014 (n 5), para 5.

[14]Crawford, *International Law* 2002 (n 12), 138 et seq (Commentary to Art 14(13)).

[15]ICJ, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, 51, para 79: 'Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act"'.

[16]Crawford, *International Law* 2002 (n 12), 138 et seq (Commentary to Art 14(13)).

[17]Karin Oellers-Frahm, 'A Never-Ending Story: The International Court of Justice—The Italian Constitutional Court—Italian Tribunals and the Question of Immunity', *Heidelberg Journal of International Law* 76 (2016), 193-202, at 196.

courts, the executive, and the legislative branch to comply with the 2012 ICJ Judgment in a manner compatible with international law, a breach will not yet have occurred.[18] After all, the ICJ in its 2012 Judgment gave Italy a certain amount of discretion in implementing the judgment when it found that 'the Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect'.[19] Thus, it is important to note that the Italian executive branch argued in the ensuing cases before Italian civil courts that the courts should grant Germany jurisdictional immunity.[20] Of course, in the case at hand these reflections are already theoretical because Italian courts have issued default judgments and decisions on the merits in the wake of *Sentenza* 238/2014.[21] These court proceedings do not only infringe the rules on state immunity but they also constitute a breach of Italy's legal obligation flowing from the findings of the 2012 ICJ Judgment.

In the academic literature, a number of voices suggest that the wrongfulness of such conduct should be precluded. A particularly far-reaching approach argues that wrongfulness could be precluded by invoking that a democratic state must respect the fundamental rights guaranteed in its constitution.[22] However, such approaches are not only irreconcilable with Article 27 of the Vienna Convention on the Law of Treaties, as well as Articles 4 and 32 ASR, but would also have adverse, long-term effects for the international legal order. Such a justification would undermine the sovereign equality of states and induce a hierarchy between states, necessarily distinguishing between democratic states and other (non-democratic) states. The question that would arise is whether even an international court or tribunal would be well advised to make any determination on the basis of such value- and policy-loaded criteria. Would the German and the Italian Constitutional Courts be justified

[18]Cf Crawford, *International Law* 2002 (n 12), 130 (Commentary to Art 12(12)); Christian Tomuschat, 'National and International Law in Italy: The End of an Idyll', *Italian Journal of Public Law* 6 (2014), 187-196, at 192 et seq.

[19]ICJ, *Jurisdictional Immunities* (n 6), para 139.

[20]Oellers-Frahm, 'A Never-Ending Story' 2016 (n 17), 195 et seq. See also Paolo Palchetti, chapter 'Right of Access to (Italian) Courts *über alles*?', in this volume.

[21]Oellers-Frahm, 'A Never-Ending Story' 2016 (n 17), 193 et seq; for decisions on the merits, see *Tribunale di Firenze*, Order of 23 March 2015, Case No 2012/1300 and Judgment of 6 July 2015, No 2468/2015; *Tribunale di Piacenza*, Judgment of 25 September 2015, No 723/2015. For an English analysis of these three decisions, see Oellers-Frahm, 'A Never-Ending Story' 2016 (n 17), 197 et seq.

[22]For this approach, albeit critically, Massimo Iovane, 'The Italian Constitutional Court Judgment No. 238 and the Myth of the "Constitutionalization" of International Law', *Journal of International Criminal Justice* 14 (2016), 595-605, at 604; with reference to Benedetto Conforti, *Diritto Internazionale* (Naples: Editoriale Scientifica 10th ed 2014), 402 et seq.

in refusing compliance with judgments of the European Court of Human Rights (ECtHR) on the basis of their reasoning in the *Görgülü* case[23] or in *Sentenza* 238/2014 because both Germany and Italy are genuine constitutional democracies while the Russian Constitutional Court would not be justified to do so in the *Yukos* case?[24]

2. Preserving Judicial Authority Through Legitimizing Strategies?

Acting against traditional standards of the rule of law, national courts which choose non-compliance exceed the limits of judicial dialogue and thus challenge the authority of international judicial organs. Therefore, these courts will have to rely on additional considerations of legitimacy in order to make a tenable case to their domestic audiences and the international community. While the ItCC seems to have been aware of such dilemmas, it has not succeeded in mitigating them through its legitimizing strategy.

In its self-perception, *Sentenza* 238/2014 pressures for a progressive evolution of international law and aims to gain legitimacy by referring to two precedents: (1) the role of national courts in the early twentieth century, which enabled law-reform by establishing the distinction between *acta iure imperii* and *acta iure gestionis*,[25] and (2) the *Kadi* case[26] of the European Court of Justice (ECJ).[27] Regarding the former, *Sentenza* 238/2014 stresses the historically important role Italian courts played in the process of establishing the differentiation between *acta iure gestionis* and *acta iure imperii*.[28] However, the historical comparison cannot sufficiently legitimize the

[23] *Bundesverfassungsgericht*, Order of 14 October 2004, 2 BvR 1481/04, BVerfGE 111, 307 (*Görgülü*).

[24] Constitutional Court of the Russian Federation, Judgment of 19 January 2017, No 1-П, regarding the constitutionality of execution of the ECtHR Judgment of 31 July 2014 in the case *OAO Neftyanaya Kompaniya YUKOS v Russia*, Judgments of 20 September 2011 and 31 July 2014, Application No 14902/04; for an analysis of the Russian Constitutional Court's approach, see Matthias Hartwig, 'Vom Dialog zum Disput? Verfassungsrecht vs. Europäische Menschenrechtskonvention—Der Fall der Russländischen Föderation', *Europäische Grundrechte-Zeitschrift* 44 (2017), 1-22.

[25] ItCC, Judgment 238/2014 (n 5), para 3.3.

[26] 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.

[27] ItCC, Judgment 238/2014 (n 5), para 3.4.

[28] ItCC, Judgment 238/2014 (n 5), para 3.3: 'The customary international norm of immunity of States from the civil jurisdiction of other States was originally absolute, since it included all state behaviors. More recently, namely in the first half of the last century, this norm undertook a progressive evolution by virtue of national jurisprudence, in the majority of States, up until the identification of acta jure gestionis (an easily understandable expression) as the relevant limit. And

ItCC's approach once we consider differences in context. In the early twentieth century, the international legal order was even more decentralized than it is today. Italian and Belgian courts acted neither in non-compliance with the judgments of the central judicial organ of the international community nor in the immediate wake of the pronouncements of said organ's decisions. Furthermore, they did not set a precedent for other courts to question the authority of such institutions. As Anne Peters and Raffaela Kunz have underlined, this last factor also constitutes a significant difference to the *Kadi* case of the ECJ. While both courts might aim to protect 'constitutional principles' against conflicting international obligations, the ECJ's *Kadi* decision is directed against a political organ whose nearly unfettered discretion is hardly controlled by international courts.[29] In this respect, the ECJ can raise a much stronger claim for realizing the idea of a *dédoublement fonctionnel*—ie that it acts as an organ of international law—than the ItCC.

Judges who push for law-reform by initiating non-compliance with the decisions of international courts should be aware that the overall international climate is currently changing. With the lingering shift from a unipolar to a multipolar world order, certain elements of the international rule of law have come under attack. Across the board, international norms and institutions are contested and perceptions of the legitimacy of international law vary according to an increasingly diverging array of national (ideological) backdrops.[30] Today national courts act in the company, and are thereby in support, of the Russian Constitutional Court, which refuses

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it is well known that this limit to the application of the norm of immunity was progressively established mainly thanks to Italian judges (. . .) the so-called "Italian–Belgian theory". In short, national judges limited the scope of the customary international norm, as immunity from civil jurisdiction of other States was granted only for acts considered jure imperii. (. . .) It is of significant importance that the evolution as described above originated in the national jurisprudence, as national courts normally have the power to determine their competence, and leave to international organs the recognition of the practice for the purposes of identifying customary law and its evolution. Since such a reduction of immunity for the purposes of protection of rights took place, as far as the Italian legal order is concerned, thanks to the control exercised by ordinary judges in an institutional system characterized by a flexible Constitution (in which the recognition of rights was supported by limited guarantees only), the exercise of the same control in the republican constitutional order (founded on the protection of rights and the consequent limitation of powers, as guaranteed by a rigid Constitution) falls inevitably to this Court.'

[29]Peters, 'Let Not Triepel Triumph' 2014 (n 4); Kunz, 'The Italian Constitutional Court' 2016 (n 4), 626; see also Martin Scheinin, 'The Italian Constitutional Court's Judgment 238 of 2014 Is Not Another Kadi Case', *Journal of International Criminal Justice* 14 (2016), 615-620; and Tomuschat, 'National and International Law' 2014 (n 18), 189.

[30]Heike Krieger/Georg Nolte, 'The International Rule of Law—Rise or Decline?—Approaching Current Foundational Challenges', in Heike Krieger/Georg Nolte/Andreas Zimmermann (eds), *The International Rule of Law: Rise or Decline?—Foundational Challenges* (Oxford: OUP 2019), 3-30; see also Karin Alter, 'The Future of International Law', in Diana Ayton-Shenker (ed), *The New Global Agenda: Priorities, Practices, and Pathways of the International Community*, (Lanhman/Maryland: Rowman & Littlefield Publishers 2018); David Bosco, 'We've Been Here Before: The Durability of Multinationalism', *Columbia Journal of International Affairs* 70 (2017), 9-15; Anne-Marie Slaughter, 'The Return of Anarchy?', *Columbia Journal of International Affairs* 70 (2017), Special 70th Anniversary Issue, 11-16.

compliance with the judgments of the ECtHR. Even if *Sentenza* 238/2014 claims to argue not at the level of international law but exclusively on the plane of domestic law, the ItCC is well aware that only declaring unconstitutional the legislation implementing the ICJ Judgment, and not the Judgment itself, still challenges the authority of the UN's principal judicial organ. After all, the ItCC explicitly expresses the hope of contributing to law-reform. In the past, 'reasonable resistance by national actors—if it is exercised (. . .) in good faith and with due regard for the overarching ideal of international cooperation—might (. . .) [have built] up the political pressure needed for promoting the progressive evolution of international law in the direction of a system more considerate of human rights'.[31] As Anne Peters has stressed, decisions such as *Solange I* of the German Federal Constitutional Court (FCC) or the ECJ's *Kadi* decision have indeed contributed to a progressive development of international law and international institutions.[32] However, considerable changes in the overall atmosphere of today's international order affect our understanding of what should be considered as good faith. Challenges arising from the non-compliance of courts with ICJ decisions can be detrimental to the normativity of the international legal order in its current shape.[33] But more troubling is that such challenges endanger the international legal order's most important foundations, namely universality and multilateralism and instead favour particularity and unilateralism. In the long run, recurring precedents of national 'civil disobedience' might be as dangerous for the normative force of international human rights law as they are detrimental at present for international law in general. The symbolism and the precedential effects of such forms of disobedience will likely not be contained to those areas the ItCC conceives to be legitimate but extend to other scenarios such as the *Yukos* case. Law-reform beyond formal avenues needs to make sure that its postulations are generalizable and needs to take seriously the risk of misuse. In the case of *Sentenza* 238/2014 the risk of abuse does not only arise from the precedential effects of non-compliance but also from the implications for the rule on immunities itself.

3. Change 'Desired by Many'?: Highly Contested Exceptions to Immunities

Sentenza 238/2014 hopes to 'contribute to a desirable—and desired by many—evolution of international law itself'[34] by furthering human rights-based exceptions to state immunities. It starts from the assumption that the values it wants to promote, and which are based on its reading of the Italian Constitution, are globally shared.

[31] Peters, 'Let Not Triepel Triumph' 2014 (n 4).

[32] *Bundesverfassungsgericht*, Order of 29 May 1974, 2 BvL 52/71, BVerfGE 37, 271 (*Solange I*).

[33] See also Christian Tomuschat, chapter 'The Illusion of Perfect Justice', in this volume.

[34] ItCC, Judgment 238/2014 (n 5), para 3.3.

Such an understanding would be a necessary starting point for any bona fide act of non-compliance with an ICJ decision. However, in the case of human rights-based exceptions to immunities, a consensus about the desirability of change is far from clear. The 2012 ICJ Judgment was based on a thorough analysis of relevant national court decisions and other state practice,[35] and in its aftermath, other courts have applied the Judgment.[36] While human rights-based exceptions to the immunities of state officials have proved to be highly contested in the Sixth Committee of the UN,[37] there are no comparable indications in international fora for such a dissent in relation to state immunities.

Even within Italy, the findings of the ItCC are not undisputed. The Italian executive branch seems well aware that changes in international law which the ItCC advocates for are likely to entail adverse consequences also for Italy itself.[38] As, for instance, the US State Department has affirmed in the past regarding the claim for a ius cogens-based immunity exception for state officials in proceedings before national courts, '[t]he recognition of such an exception could prompt reciprocal limitations by foreign jurisdictions exposing U.S. state officials to suit abroad on that basis'.[39] The US worries that by altering their own judicial practice, it will contribute to the creation of a new customary international law rule that would lead to US state officials being subject to similar proceedings all over the world. In particular, in the case of the US, there is a not entirely unfounded apprehension that these proceedings may not always be conducted impartially.[40]

Is this assumption farfetched? If proceedings are carried out against foreign states and their state officials in cases of grave violations of human rights before national

[35]ICJ, *Jurisdictional Immunities* (n 6), paras 65 et seq.

[36]Eg Supreme Court of Canada, Judgment of 10 October 2010, 2014 SCC 62, [2014] 3 S.C.R. 176 (*Kazemi Estate v Islamic Republic of Iran*), paras 61, 103-108.

[37]The 2017 debate on Draft Art 7(1) containing human rights-based exceptions to immunities of state officials can be summarized as follows: in total, 23 states have argued in favour of the general rule included in the Article while 21 disagreed with it. A number of states promoting the rule have expressed their conviction that it constitutes a progressive development of international law; see Janina Barkholdt/Julian Kulaga, 'Analytical Presentation of the Comments and Observations by States on Draft Article 7, Paragraph 1, of the ILC Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, United Nations General Assembly, Sixth Committee, 2017', *KFG Working Paper Series* 14 (Berlin Potsdam Research Group 'The International Rule of Law—Rise or Decline?'), (16 May 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3172104.

[38]Oellers-Frahm, 'A Never-Ending Story' 2016 (n 17), 195 et seq.

[39]US Court of Appeals for the Second Circuit, *Matar and Others v Dichter*, Brief for the United States of America as Amicus Curiae in Support of Affirmance, 19 December 2007, Docket No 07-2579-cv, available at http://ccrjustice.org/files/Matar%20v%20%20Dichter,%20US%20for%20Defendants%20Amicus%20Brief%2012.19.07.pdf, 4; see also John B Bellinger, 'The Dog that Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Adviser to Official Acts Immunities', *Vanderbilt Journal of Transnational Law* 44 (2011), 819-835, at 833 et seq.

[40]Krieger, 'Between Evolution and Stagnation' 2014 (n 1), 193 et seq with reference to Bellinger, 'The Dog that Caught the Car' 2011 (n 39), 834 et seq.

courts in the US, Switzerland, Canada, Italy, and the UK, these states will also have to accept such proceedings against them and their state officials before national courts in Algeria, China, Eritrea, Ethiopia, Libya, Iran, Congo, Rwanda, or Zimbabwe.[41] In the end, the denial of immunity requires an international community of states under the rule of law providing an equivalent level of human rights protection. As long as there is no such international community, immunity serves to protect states themselves and their state officials from being exposed to court proceedings that do not meet the standard of the rule of law.[42] Hence, Judge Ellis stated in his Memorandum Opinion in the *Tabion v Mufti* case that the aim of granting immunity was '[to] protect United States [officials] from (. . .) prosecution in foreign lands (. . .) [because] not all countries provide the level of due process to which United States citizens have become accustomed'.[43] In light of such conflicts between normative claims and legal reality, immunity seems to be, in the words of Hazel Fox, 'a neutral way of denying jurisdiction to States over the internal administration of another State and diverting claims to settlement in the courts of that State, or by diplomatic or other international means to which that State has consented'.[44]

If immunity serves as a plea against the exercise of jurisdiction in a decentralized legal system where competences are divided, and is—in the words of Hazel Fox and Philippa Webb—'a signal to the forum court that jurisdiction belongs to another court or method of adjudication',[45] the question arises whether any consequences need to be attached to the fact that claims for reparation by Italian citizens have been rejected by German courts. After all, a justification for granting immunity can be seen in the fact that generally immunities do not lead to the loss of a claim or that an offender remains criminally responsible. As a rule, there are alternative legal paths and international mechanism available that correspond to each kind of immunity.[46]

Thus, the ItCC in *Sentenza* 238/2014 has been interpreted as mandating 'that the customary rule of foreign state immunity is not incorporated into the Italian legal system, insofar as that rule applies to international crimes for which there is no effective means of redress available to the victims other than a suit in the forum state'.[47] However, the right of access to court, at least under the European

[41]Ibid, 213 et seq.

[42]Ibid, 214.

[43]US District Court for the Eastern District of Virginia, *Tabion v Mufti*, Memorandum Opinion of Judge Ellis, (E.D. Va. 1995) 877 F. Supp. 285, 293.

[44]Hazel Fox, 'In Defence of State Immunity, Why the UN Convention on State Immunity is Important', *International and Comparative Law Quarterly* 55 (2006), 399-406, at 405.

[45]Hazel Fox/Philippa Webb, *The Law of State Immunity* (Oxford: OUP 3rd ed 2013), 27.

[46]Krieger, 'Between Evolution and Stagnation' 2014 (n 1), 204.

[47]Riccardo Pavoni, 'How Broad is the Principle Upheld by the Italian Constitutional Court in Judgment No. 238?', *Journal of International Criminal Justice* 14 (2016), 573-585, at 574; see also Riccardo Pavoni, chapter 'A Plea for Legal Peace', in this volume. See, for a comparable argument, Micaela Frulli, '"Time Will Tell Who Just Fell and Who's Been Left Behind": On the Clash between the International Court of Justice and the Italian Constitutional Court', *Journal of International Criminal Justice* 14 (2016), 587-594.

Convention on Human Rights (ECHR), is not per se infringed if a case is decided on the merits. Cases brought before German courts were thought to be unfounded because either the specific regime of state responsibility under German law was not applicable to military activities in armed conflicts or because there is no individual right to compensation for violations of international humanitarian law.[48] While this approach may appear unjust, it conforms to the prevailing view in international humanitarian law and corresponds *mutatis mutandis* to approaches in other states under the rule of law.[49] It therefore cannot be considered arbitrary jurisprudence.

4. Creating False Promises: Human Rights Exceptions to Immunities from Execution?

Has the situation of Italian claimants now been improved by *Sentenza* 238/2014 and the ensuing decisions of Italian civil courts? To reach this aim yet another stage in law-reform would be required: extending human rights exceptions to immunities from execution. In *Sentenza* 238/2014, the ItCC explicitly did not deal with immunity from measures of constraint.[50] Thus, under Italian constitutional law it is not yet clear whether immunities from execution are compatible with the right of access to court where serious violations of human rights are at stake. Accordingly, in the situation at hand, policy reasons push for further human rights exceptions to immunities from execution.

Court decisions rendered in the wake of the ItCC's jurisprudence create an expectation on the side of the applicants that they will indeed receive a monetary compensation. In Italy, most German state assets are protected by immunities because they serve government non-commercial purposes, while enforcement in Germany will be unsuccessful because judgments based on a violation of German jurisdictional immunities suffer from a serious procedural defect, which means they cannot serve as a basis for measures of constraint.[51] Therefore, it is reasonable to assume that the case at hand will put additional pressure on the distinction between (pre-judgment) immunity from jurisdiction and (post-judgment) immunity from execution. Moreover, it is not inconceivable that if immunity from jurisdiction was

[48]Cf *Bundesverfassungsgericht*, Order of 28 June 2004, 2 BvR 1379/01, BVerfGK 3, 277, para 38 et seq; see also *Bundesgerichtshof* (Federal Court of Justice), Judgment of 26 June 2003, III ZR 245/98, BGHZ 155, 279 (*Distomo*), 293 et seq for the period before 1949 and for the current legal situation see *Bundesgerichtshof*, Judgment of 6 October 2016, III ZR 140/15, BGHZ 212, 173 (*Kunduz*).

[49]See Heike Krieger, 'Addressing the Accountability Gap' 2015 (n 1).

[50]ItCC, Judgment 238/2014 (n 5), para 1; cf Oellers-Frahm, 'A Never-Ending Story' 2016 (n 17), 194.

[51]Tomuschat, 'National and International Law' 2014 (n 18), 193.

to be considered unconstitutional because of an infringement of the right of access to court, immunity from execution will likewise be affected.[52]

Such additional pressure is also buttressed by a broad expectation of consistency as an element of the rule of law concept. Expectations of consistency create an extra argumentative burden for justifying that human rights exceptions should not apply to immunities from execution. A lack of consistency is the major policy argument in favour of any kind of additional restriction of enforcement immunity because 'a denial of justice on the enforcement level would render the adjudicatory jurisdiction, granted under any restrictive immunity concept, meaningless'.[53]

Accordingly, based on its jurisprudence that human rights should be effective and not illusory, the ECtHR held that the right of access to court according to Article 6 of the ECHR does not only concern the pre-judgment phase but also the post-judgment phase of execution. The right, based on Article 6 of the ECHR, would 'be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party'.[54] Accordingly, a consequentialist argument has been raised by two judges of the ECtHR in a concurring opinion in the *Al-Adsani* case, according to which restrictions on immunity for violations of the right of access to court 'would thus have required a possibility of having judgments—probably often default judgments—(. . .) executed against respondent States. This in turn would raise the question whether the traditionally strong immunity of public property from execution would also have had to be regarded as incompatible with Article 6'.[55]

However, the judges raising this argument actually used it as a counterargument against restricting pre-judgment immunity. They warned against the unintended consequences which result from expectations of consistency and blur more complex reasons for differentiation. Thus, the confirmation of the ICJ in the *Jurisdictional Immunities* Judgment that immunity from suit and immunity from execution are distinct[56] is still widely shared.[57] Under customary international law, states enjoy immunity from execution in relation to property which is used for government non-commercial purposes.[58] Since immunity from execution is applied separately from immunity from jurisdiction, arguments for excluding immunity from jurisdiction are not directly applicable to immunity from execution.[59]

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[52]Cf Fox/Webb, *The Law of State Immunity* 2013 (n 45), 514; see also Paolo Palchetti, chapter 'Right of Access to (Italian) Courts *über alles*?', in this volume.

[53]Cf August Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures', *European Journal of International Law* 17 (2006), 803-836, at 809.

[54]ECtHR, *Hornsby v Greece*, Judgment of 19 March 1997, Application No 18357/91, para 40.

[55]ECtHR, *Al-Adsani v The United Kingdom*, Judgment of 21 November 2001, Application No 35763/97, Concurring Opinion of Judge Pellonpää, joined by Judge Sir Nicolas Bratza.

[56]ICJ, *Jurisdictional Immunities* (n 6), para 113.

[57]Fox/Webb, *The Law of State Immunity* 2013 (n 45), 490.

[58]See also Article 19 of the UN Convention on Jurisdictional Immunities of States and Their Property (2 December 2004), UN Doc A/RES/59/38, UN Doc A/59/49, 486 (not yet in force).

[59]ICJ, *Jurisdictional Immunities* (n 6), para 113.

Such a differentiation is justified because measures of constraint against property used for government non-commercial purposes intrude even further onto sovereign rights than the institution of proceedings before courts in the forum state.[60] It is particularly difficult for states to protect assets and other property situated in a foreign state. These assets may therefore be susceptible to abusive enforcement measures while at the same time constituting an essential basis for the actual conduct of international relations. The rationale of strong protection for property designated for government non-commercial purposes has clearly been expressed in the presidential waiver issued by President Bill Clinton in relation to the 1976 Foreign Sovereign Immunities Act, which allows US victims of terrorism to attach and execute judgments against the diplomatic or consular properties of a foreign state:[61]

> If this section [of the Act] were to result in attachment and execution against foreign embassy properties, it would encroach on my authority under the Constitution to "receive Ambassadors and other public Ministers". Moreover, if applied to foreign diplomatic or consular property, section 177 would place the United States in breach of its international treaty obligations. It would put at risk the protection we enjoy at every embassy and consulate throughout the world by eroding the principle that diplomatic property must be protected regardless of bilateral relations (...). In addition, section 177 could seriously affect our ability to enter into global claims settlements that are fair to all United States claimants and could result in United States taxpayer liability in the event of a contrary claims tribunal judgment.[62]

III. Generalizable Standards: Towards an Obligation to Provide for Individual Reparation in Cases of Mass Atrocities?

The presidential waiver outlined above emphasizes a need to negotiate global claims settlements as an alternative form of compensation to individual reparation granted by national courts in the US, thus stressing the need for political leeway in such cases. Are there good reasons for retaining such leeway, or should there be an obligation incumbent upon states to provide for individual monetary compensation in cases of mass atrocities as a general rule of international law?

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[60] Reinisch, 'European Court Practice' 2006 (n 53), 804.

[61] See Section 117 of the US Treasury and General Government Appropriations Act of 1999, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Public Law 21 October 1998, No 105-277, 112 Statute 2681.

[62] Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, 34 Weekly Compilation of Presidential Documents 2108, 2133 (23 October 1998), quoted in Sean D Murphy, 'Contemporary Practice of the United States Relating to International Law', *American Journal of International Law* 93 (1999), 161-194, at 185 et seq.

While international law still does not provide for a general right to compensation in cases of violations of international humanitarian law, there are increasing efforts at the international as well as the national level to change the existing law.[63] Such a call for an obligation to grant individual monetary compensation is owed to changing public perceptions on the position of the individual in armed conflicts and a concerted effort by NGOs to bring pertinent cases before national courts. Indications of a change in the overall perception may, inter alia, be seen in the 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,[64] although these principles would still not create a subjective right under international law on which an individual could rely before a domestic court.[65]

With respect to the 2013 *Varvarin* case, even the German FCC seems to have left the door open for future judicial review of the activities of German armed forces abroad. Although it did not have to decide on the question of whether the ordinary law of state liability covers damages caused by war,[66] it made clear that courts are competent and capable to judicially control the decision to qualify the object of an attack as a military object according to international humanitarian law.[67] The FCC thus stressed its competence to deal with violations of international humanitarian law as a matter of human rights adjudication. Therefore, while the German Federal Court of Justice in a 2016 judgment on an air strike in Kunduz, Afghanistan, clung to the traditional interpretation that neither the specific regime of state responsibility under German law is applicable to military activities in armed conflict nor that there is an individual right to compensation for violations of international humanitarian law,[68] the FCC might take a different stance in an appropriate case.

But it is not only the increasing focus on the individual in international law which fosters such a change in the conceptualization of how to treat individuals during and in the aftermath of an armed conflict. The perception that the individual should be compensated as a matter of law is also due to the predominant nature of armed conflicts during the last 20 years. Military interventions under the umbrella of the UN or by NATO member states were often not understood as being conducted against a whole state and its population but against non-state actors or 'rogue'

[63]Cf Christian Marxsen/Anne Peters (eds), 'Reparation for Victims of Armed Conflict: Impulses from the Max Planck Trialogues', *Heidelberg Journal of International Law* 78 (2018), 519-633.

[64]UN General Assembly, Resolution on 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, 16 December 2005, UN Doc A/Res/60/147. See also Andreas von Arnauld, chapter 'Deadlocked in Dualism', in this volume.

[65]Philipp Stöckle, 'Victims Caught between a Rock and a Hard Place: Individual Compensation Claims against Troop-Contributing States', *Die Friedens-Warte* 88 (2013), 119-141, at 128.

[66]*Bundesverfassungsgericht*, Order of 13 August 2013, 2 BvR 2660/06, 2 BvR 487/07, (German Constitutional Court Order of Non-Acceptance), para 52.

[67]Ibid, para 55.

[68]BGH, *Kunduz* (n 48).

governments. Accordingly, the post-conflict order needed to distinguish more clearly between different groups and individuals within a state.[69] Accordingly, the affected population should be redressed for any harm incurred during the armed conflict, or at least during the phase of post-conflict reconstruction. However, the issue of individual reparations in cases of mass atrocities should be treated cautiously. Military interventions with an aim of stabilizing another state and even of protecting human rights may in the near future diminish in frequency while more traditional forms of armed conflict may re-emerge, such as in Ukraine and Syria.

In this context, it is important to note that in current debates within the International Law Commission on crimes against humanity, the assertion that an individual right to reparation in cases of mass atrocities exists, or should exist, under general international law is apparently being treated carefully. The Special Rapporteur emphasized in his third report of 2017 that:

> [T]here appears to be recognition (. . .) that establishing an individual right to reparation for each victim may be problematic in the context of a mass atrocity.[70] (. . .) While reparation specific to each of the victims may be warranted, such as through the use of regular civil claims processes in national courts or through a specially designed process of mass claims compensation, in some situations only collective forms of reparation may be feasible or preferable, such as the building of monuments of remembrance or the reconstruction of schools, hospitals, clinics and places of worship.[71]

This more cautious approach takes into account the complexities of ending armed conflicts and negotiating peace deals. An individual right to monetary compensation based on civil claims proceedings in cases of mass atrocities does not allow for taking into account broader political considerations related to establishing a stable post-war order. Such a right is conducive to bilateral settlements between the state parties concerned, which might create new forms of injustice towards other groups of victims; it might also overburden negotiations for a settlement to an ongoing armed conflict. Take Syria as an example: the invocation of the individual criminal responsibility of Bashar al-Assad is already obstructing peace talks. Likewise, ex post claims for monetary compensation before civil courts in the aftermath of a comprehensive peace agreement entail the tangible risk that parties to a conflict will be even more reluctant to reach agreement if they cannot rely on the stability of such an agreement.[72] The various armed conflicts and conditions for ending them differ considerably among each other. The specificities of these situations speak against any generalization with a view of changing existing international law. Those responsible for concluding peace agreements which allow for reconciliation should have a broad political discretion in reaching this aim. While individual claims for monetary

[69]Gabriela Blum, 'The Fog of Victory', *European Journal of International Law* 24 (2013), 391-421, at 393.

[70]Sean D Murphy, Third Report on Crimes against Humanity, 23 January 2017, UN Doc A/CN.4/704, para 191.

[71]Ibid, para 194.

[72]Tomuschat, 'National and International Law' 2014 (n 18), at 191; see also Christian Tomuschat, chapter 'The Illusion of Perfect Justice', in this volume.

compensation might be part of such a process, as in Colombia,[73] it seems wise to leave room for the possibility that only collective and symbolic forms of reparation will be foreseen.

IV. Concluding Remarks

Instead of furthering the law's legitimacy, judgments such as *Sentenza* 238/2014 may erode the legitimacy of international law. Such a criticism is not sustained by a 'realistic' view that fosters state sovereignty for the protection of national interests. To my mind, we should not forget that the stability of the international legal order itself, as guaranteed by concepts such as immunities or the respect for its juridical organs serves to protect human rights, albeit indirectly. It might be wiser to accept that not every injustice can be addressed by law, that law cannot always provide a satisfying solution, and that such solutions are sometimes better looked for and confined to the political stage. In line with the passage of the 2012 ICJ Judgment,[74] a solution sustainable for both sides could be seen in negotiations at the political level.

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[74]ICJ, *Jurisdictional Immunities* (n 6), para 104; see, on preferable ways to deal with injustices that have arisen, 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 Francesco Francioni, chapter 'Overcoming the Judicial Conundrum', in this volume.

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