

A Never-Ending Story: The International Court of Justice – The Italian Constitutional Court – Italian Tribunals and the Question of Immunity

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I. Introduction

In its decision no. 238/2014¹ which was confirmed by the order no. 30 of 2015² the Italian Corte costituzionale (CC) denied the binding force for Italy of the judgment of the International Court of Justice (ICJ) of 3.2.2012.³

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¹ Decision no. 238/2014 of 22.10.2014. For comments to this decision see *G. Boggero*, The Legal Implications of *Sentenza* No. 238/2014 by Italy's Constitutional Court for Italian Municipal Judges: Is Overcoming the "Triepelian Approach" Possible?, in this issue p. 203 and the FOCUS articles in *Ital. Y.B. Int'l L.* 24 (2014): *F. Francioni*, From Deference to Disobedience: The Uncertain Fate of Constitutional Court Decision No. 238/2014, 1; *R. P. Mazzeschi*, Access to Justice on Constitutional and International Law: The Recent Judgment of the Italian Constitutional Court, 9; *M. Bothe*, The Decision of the Italian Constitutional Court Concerning the Jurisdictional Immunities of Germany, 25; *G. Cataldi*, A Historic Decision of the Italian Constitutional Court on the Balance Between the Italian Legal Order's Fundamental Values and Customary International Law, 37; *P. Palchetti*, Can State Action on Behalf of Victims Be an Alternative to Individual Access to Justice in Case of Grave Breaches of Human Rights?, 53.

² Order no. 30/2015 of 3.3.2015.

³ *Jurisdictional Immunities of the State (Germany v. Italy, Greece Intervening)*, Judgment of 3.2.2012. For comments to this decision see *C. J. Greenwood*, The International Court of Justice and International Humanitarian Law, in: C. C. Jalloh/O. Elias, *Shielding Humanity, Essays in International Law in Honour of Judge Koroma*, 2015, 263 et seq.; *F. Salerno*, *Giustizia costituzionale versus giustizia internazionale nell'applicazione del diritto internazionale*, *Quaderni costituzionali* 35 (2015), 33 et seq.; *R. van Alebeek*, *Jurisdictional Immunities of the State (Germany v. Italy): On Right Outcomes and Wrong Terms*, *GYIL* 55 (2012), 281 et seq.; *N. Boschiero*, *Jurisdictional Immunities of the State and Exequatur for Foreign Judgments: A Private International Law Evaluation of the Recent ICJ Judgment in Germany*

ZaöRV 76 (2016), 193-202

In this judgment the ICJ had confirmed the character and existence as customary international law of the principle of State immunity even in the context of war crimes and crimes against humanity. The decisions of the CC gave thus leeway to claims against Germany before Italian tribunals respectively the continuance of pending cases despite of the ICJ judgment.⁴ This situation was embarrassing for the Italian tribunals which were confronted with the problem to abide by the decision of the CC although aware of the fact that by admitting cases against Germany and convicting Germany they would violate international law and perhaps even trigger a new application of Germany before the ICJ. Furthermore, there was and still exists the unsolved problem of immunity from execution: In its decision of October 2014 the CC had expressly stated that the decision concerned only the jurisdictional immunity, not however immunity from execution, because the question presented to the CC only referred to jurisdictional immunity.⁵ Accordingly, the Italian tribunals have jurisdiction in cases against Germany concerning war crimes committed against Italian citizens, while the question of execution of such judgments – which certainly would not be complied with voluntarily by Germany – remains an open problem. The Italian tribunals, in particular the Tribunale di Firenze – which had triggered the decision of the CC – were highly creative in looking for a way out of the dilemma created by the CC. Although their judicial skill can only be admired, this does not change the outcome, namely that proceedings against Germany before Italian tribunals are violating international law and are in breach of the judgment of the ICJ which is binding upon Italy. Only if the judgment of the ICJ would fulfil one of the reasons giving rise to nullity of an international judgment,⁶ the non-compliance with the judgment would be justified. In the present case, however, not even Italy ever raised the

v. Italy, in: N. Boschiero/T. Scovazzi/C. Ragni/C. Pitea (eds.), *International Courts and the Development of International Law*, 2013, 781 et seq.; M. Calisto, *Jurisdictional Immunities of the State: Germany v. Italy Before the ICJ from an Italian Perspective*, *GYIL* 55 (2012), 319 et seq.; K. Oellers-Frahm, *State Immunity vs. Human Rights: Observations Concerning the Judgment of the ICJ in the Jurisdictional Immunities of States Case (Germany v. Italy)*, in: D. Hanschel/S. Graf Kielmansegg/ U. Kischel/ C. Koenig/R. A. Lorz (eds.), *Mensch und Recht*, FS Eibe Riedel, 2013, 389 et seq.; F. Boudreault, *Identifying Conflicts of Norms: The ICJ Approach in the Case of the Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, *LJIL* 25 (2012), 1003 et seq.

⁴ As an example reference may be made to the decision of the Tribunale ordinario di Roma no. 11069/2015 of 20.6.2015 annulling an order by which in compliance with the ICJ judgment a proceeding against Germany had been terminated.

⁵ Pre-ultimate paragraph of the decision, § 1.

⁶ K. Oellers-Frahm, *Judicial and Arbitral Decisions, Validity and Nullity*, *MPEPIL* 2013, § E, 16 et seq.

question of nullity of the ICJ judgment being aware of the fact that such reproach would be completely unfounded.

On the basis of these preliminary remarks the following brief comment will focus mainly on how the Italian tribunals, in the first line the Tribunale di Firenze, but also other tribunals (i.e. Tribunale di Piacenza)⁷ tried to cope with the dilemma caused by the CC decision. As they were obliged not to apply the provisions considered contrary to the Italian constitution and thus had to admit the cases against Germany,⁸ it is highly interesting to see how they decided on the merits. Although they nearly all spent much argument in commenting and in general supporting the decision of the CC,⁹ they did not add new convincing reasons justifying the disregard of the ICJ judgment, but repeated more or less the argument of Italy advanced before the ICJ insisting primarily on the gravity of the acts committed and the trumping effect of human rights and human dignity concerning any other rule of international law.¹⁰

II. The Decision of the CC and the Position of the Government

With regard to the developments following the decision of the CC,¹¹ a first point worth mentioning is the fact that in the proceedings before Italian tribunals the Italian State, represented by the President of the Council of Ministers, took a position in compliance with the ICJ judgment, not the decision of the CC. In fact, the Government which participated in two of the

⁷ Tribunale di Firenze, Order of 23.3.2015 and decision no. 2468/2015 of 6.7.2015 and Tribunale di Piacenza, decision no. 1462/2015 of 28.9.2015.

⁸ See the recent decision of the Corte di Cassazione of 28.10.2015, Sez. Un. civ., sentenza no. 21946, § 4.1, where the Court confirms the obligation of lower tribunals not to apply the legal provisions declared unconstitutional in decision no. 238/2014 (note 1) of the CC.

⁹ This aspect is analyzed in detail by G. Boggero (note 1).

¹⁰ These arguments are relied upon meanwhile also in other proceedings concerning state immunity: see i.e. the judgment of the Corte di Cassazione, Prima Sezione Penale, no. 43696/2015 of 14.9.2015 which concerned *inter alia* questions of immunity of Serbia for acts committed in the context of the armed conflict in the former Yugoslavia; for the reasons stated in decision 238/2014 (note 1) of the CC immunity was denied; see also the decision of the Corte di Cassazione, Sez. Un. Civ. no. 21946 (note 8).

¹¹ See M. I. Papa, Il ruolo della Corte costituzionale nella ricognizione del diritto internazionale generale esistente e nella promozione del suo sviluppo progressivo, <www.rivistaaic.it>, no. 3/2015, 6 ff.

three cases¹² on the side of the defendant as a third party pleaded in favor of dismissal of the case for lack of jurisdiction – namely because of the existing and applicable rule of jurisdictional State immunity –, or alternatively requested to suspend the case until the political authority, namely the Government, had determined its position with regard to the reach of the decision of the CC and its relationship to the judgment of the ICJ. Accordingly there is a clear contradiction between the decision of the CC which unambiguously declares that Italy is not bound by the ICJ judgment and the attitude of the political organs which are aware of the international implications of non-compliance with the ICJ judgment and which prefer, as already demonstrated by the law adopted in order to implement the ICJ judgment,¹³ to act in conformity with their international obligations. This fact raises the question of the effect of decisions of the CC with regard to State organs, here the Government. As already mentioned elsewhere¹⁴ the consequence of a decision of the CC declaring the unconstitutionality of a law is that the law ceases to have effect from the day following the publication of the decision (Art. 136 of the Italian Constitution). Accordingly due to the decision of the CC declaring unconstitutional on the one hand the law enacting the Charter of the United Nations (UN Charter)¹⁵ – although only with regard to Art. 94 UN Charter and also only with regard to the judgment of 3.2.2012 – and on the other hand the law enacting explicitly the implementation of the ICJ Judgment¹⁶ these laws cease to have effect; they are no longer part of the Italian legal order to which also the Government is submitted. The customary law concerning State immunity on the other side has never become part of the Italian legal order according to Art. 10 of the Constitution to the extent that it is – according to the finding of the CC – in contradiction to fundamental principles of the Italian constitution. In this perspective the attitude of the Italian Government in the cases against Germany before Italian tribunals reveals a controversial position between Italian state organs, namely the judiciary and the executive: While the Italian courts and tribunals following the decision of the CC (have to) disregard international law, the Government prefers to abide by its international obligations and to plead for dismissal of the case, a dilemma which reflects the disputable character of the decision of the CC and which makes more diffi-

¹² Tribunale di Firenze (note 7); Tribunale di Firenze, sentenza 2468/2015 (note 7), and Tribunale di Piacenza, sentenza no. 723/2015 of 25.9.2015, § 1.

¹³ Law no. 5/2013 of 14.1.2013.

¹⁴ K. Oellers-Frahm, Das italienische Verfassungsgericht und das Völkerrecht – eine unerfreuliche Beziehung, EuGRZ 42 (2015), 8 et seq.

¹⁵ Law no. 848/1957 of 17.8.1957.

¹⁶ Law no. 5/2013 of 14.1.2013.

cult the emersion as customary international law of the so-called human rights exception so vehemently supported by Italian courts and tribunals.

III. The Decisions on the Merits Against Germany

In the second place it is interesting to see how the tribunals reacted to the decision of the CC in their findings on the merits. While in the three cases referred to above¹⁷ the tribunals (Piacenza, Firenze) all dismiss the German objection to jurisdiction based on the existence of state immunity as confirmed by the ICJ, thus complying with the decision of the CC, they try to find a way for not convicting Germany to pay compensation in two cases and convict Germany to pay compensation in the third case which differs from the two other cases insofar as in this latter case the plaintiff is the person himself having suffered war crimes and not his family.

a) In the two cases brought before the Italian tribunals by the heirs of the victim the tribunals openly address the dilemma resulting from the contradiction between the ICJ judgment and the decision of the CC. The Tribunale di Firenze which gave the first decision following the decision of the CC, explicitly refers in its order of 23.3.2015 to the risk of the Italian state to commit an international wrongful act by violation of the customary rule of law on state immunity confirmed by the ICJ. In its very succinct order it therefore follows a rather innovative approach by focusing on the passage of the ICJ judgment where the Court stated

“that it is a matter of surprise – and regret – that Germany decided to deny compensation to a group of victims on the ground that they had been entitled to a status which, at the relevant time, Germany had refused to recognize, particularly since those victims had thereby been denied legal protection to which the status entitled them”

(§ 99 of the judgment) and that these claims “could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue” (§ 104 of the judgment). On the basis of these statements of the ICJ and without further commenting the decision of the CC the tribunal comes to the conclusion that in the present case it has to proceed by seeking a solution by conciliation. As, however, these statements of the ICJ cannot serve as a legal basis for a conciliatory solution to be ordered by a municipal tribunal because judgments of the ICJ – unlike judgments of the

¹⁷ Tribunale di Firenze (note 7); Tribunale di Firenze, sentenza 2468/2015 (note 7), and Tribunale di Piacenza, sentenza no. 723/2015 (note 12), § 1.

ECJ, for example –, do not have direct binding effect on all state organs, but have to be implemented by state action and because, furthermore, the negotiation argument was not part of the decision on the merits, but only part of the reasoning, the Tribunale referred to Arts. 185 and 185bis of the Italian code of civil procedure (codice di procedura civile – c.p.c.) which are concerned with conciliation. On the basis of these provisions the tribunal presents to the parties a concrete proposal of conciliation providing that the plaintiffs withdraw their claim for compensation and that the Federal Republic of Germany in return grants financial support amounting to 15.000 € for a stay of some members of the family of the victim in Germany for study or other cultural aims. If the parties do not accept this proposal there will be formal mediation before a particular body.

This solution of the tribunal seems at first sight to offer an elegant way out of the dilemma of contradictory obligations resulting from the ICJ judgment and the decision of the CC. It seems the more reasonable as in its decision the CC only denied state immunity with regard to jurisdiction, not however with regard to execution. The consequence thereof would be that the plaintiff may obtain a positive judgment convicting Germany to pay compensation, but that such judgment, which surely would not be complied with voluntarily by Germany, could probably not be subjected to forceful execution or otherwise would trigger a new case before the ICJ from the part of Germany. Besides the fact that Germany did not and will not react to this order, the decision of the tribunal seems to give a rather far-reaching interpretation of Art. 185 of the Italian code of civil procedure. Art. 185 bases the procedure of “alternative dispute settlement”, namely conciliation, on the prerequisite that *both* parties make a request for conciliation (in caso di richiesta congiunta delle parti ...). Such a request has not been made and it is not provided that conciliation may be “ordered” by the tribunal¹⁸ which, by the way, would be highly unusual as tribunals have the task to settle disputes by applying the law in force; alternative means of dispute settlement can thus only be applied if accepted by both parties. On the other side, if both parties are requesting conciliation, the tribunal may make a proposal as to the terms of the conciliation. In the present case and in the absence of a joint request for conciliation, the order can, however, only be understood as an invitation to Germany to embark on the way of conciliation, already proposed by the ICJ, which, however, it probably will not do. Furthermore, the passage of the judgment of the ICJ cited by the tribunal

¹⁸ Also Art. 185bis c.p.c. cannot be understood as a basis for mandatory conciliation as it only empowers the judge to make a *proposal* for conciliation (proposta transattiva o conciliatoria) which then may or may not be accepted by the parties.

can certainly not be understood as a basis for individual negotiation in any single case before a municipal tribunal, but is aimed at enhancing negotiation on the political level. This would not change even if the ICJ had found that Germany and Italy were obliged to negotiate – as it had not. As already mentioned, due to the limited binding effect which only concerns the states parties to the case, not directly all state organs, even a binding decision of the ICJ concerning negotiation could not have served as a legal basis for municipal tribunals to order negotiations between Germany and Italy. But if Germany would initiate negotiations as proposed by the ICJ, the order of the Tribunale di Firenze might be understood as a guideline with regard to the amount of compensation to be paid. But as an agreement between Germany and Italy would, however, certainly only fix a lump sum, the order may raise unrealistic expectations in the victims/plaintiffs.

b) The Tribunale di Piacenza in its *sentenza non definitiva* of 25.9.2015 – brought also not by the victim himself but his heirs – follows the approach taken by the Tribunale di Firenze, but in a more cautious way. It comes to the conclusion that the parties concerned should try to find a negotiated settlement of the dispute, also in view of the absolute particularity of the dispute. Unlike the Tribunale di Firenze the Tribunale di Piacenza “invites” Italy and Germany to consider the opportunity of depositing a note containing a proposal for an amiable solution, thus it does not itself make a concrete conciliation proposal. The tribunal underlines, however, in this context that the procedural attitude of the parties will be decisive for the regulation of the costs of the procedure, which has to be understood as some kind of pressure for initiating negotiations.

What is particular in this case is the fact that the tribunal, referring to § 104 of the ICJ judgment, invites only Germany and Italy, that is the parties to the ICJ case, and not all the parties to the case pending before it, to initiate negotiations. As conciliation under Art. 185 c.p.c. is aimed at finding a solution between the plaintiff and the defendant, not between the defendant and a third party without involving the plaintiff at all, the proposal of conciliation does not keep within the framework of Art. 185 c.p.c. In this case, more openly than in the Order of the Tribunale di Firenze, the tribunal enters into a field of competence which lies rather with the political organs, namely the Ministry of Foreign Affairs.

c) Finally mention shall be made of the judgment of the Tribunale di Firenze of 6.7.2015¹⁹ by which Germany is convicted to pay compensation amounting to 50.000 € and in addition the payment of interests of 4 % running from 1.1.1945 as well as the expenses of the procedure. The tribunal

¹⁹ Tribunale di Firenze, decision no. 2468/2015 (note 7), R.G. no. 14049/2011 of 6.7.2015.

does not explain in detail on what basis the amount of compensation is fixed, but refers merely to a judgment of the Court of Appeal of 2011²⁰ where an amount of 30.000 € was accorded in a similar case, having view in particular to the immaterial damage. In any case, the consequence of this decision will be that the question of execution and of immunity from execution will become relevant in the near future.

In difference to the two other cases this was one of the rare proceedings where the victim himself and not his heirs was the plaintiff. Also in this case, the tribunal commented the decision of the CC in order to justify its denial of the existence of the principle of immunity. In this context the tribunal brings in a new argument for denying immunity relying on the “new-born European constitutional framework” (*neonato quadro costituzionale europeo*) to which Germany and Italy belong. The existence of the European framework leads the tribunal to argue that a violation of the principle of immunity and thus of state sovereignty which is reflected in this principle, is less grave than a violation of the principle of effective judicial protection of fundamental rights, because

“the European institutional relations between Italy and Germany based on the principles guaranteed in the European constitution do not run any risk with regard to the respect of their reciprocal sovereignty because the decision of the tribunal is merely a judgment having declaratory nature (*sentenza di mero accertamento e condanna*)”,²¹

not implying enforcement as the parties remain free to negotiate with regard to the execution of the decision. Therefore the tribunal regards the “sacrifice of the international legal order” by admitting the civil jurisdiction of Italian tribunals as rather secondary as compared to the denial of the right of the victims to judicial protection. This argument seems not really helpful since the membership of both, Italy and Germany, in the European Union does not affect their other obligations under international law. Furthermore this judgment cannot be considered as merely declaratory because the plaintiff has the right to seek execution which certainly will not be reached by negotiation.

The European context is also the basis for dismissing a new objection brought by Germany in addition to the earlier objections regarding not only the reparation already paid, but in particular the waiver of further claims against Germany on the basis of the Bonn Agreements of 1961 and the ob-

²⁰ Corte d'Appello di Firenze no. 480/2011 of 11.4.2011.

²¹ Last point of the judgment, p. 19; translation by the author.

jection concerning prescription which shall not be commented here²² and which all are dismissed by the Tribunale di Firenze.²³ This additional objection of Germany is based on the principle that a state cannot invoke its internal law as a justification for failure to comply with its international obligations, a principle that is enshrined in Arts. 27 and 32 of the ILC Draft Articles on State Responsibility. Accordingly Germany argued that by convicting Germany the tribunal – and thus Italy – would violate international law and that consequently Germany should in return be released from liability. The tribunal dismisses also this objection repeating again the always proffered argument that the nature of the crimes committed and the fundamental values protected by the highest principles not only of Italy but also of the European Union justify the breach of the international obligation. This leads the tribunal to the rather strange conclusion that not only the sovereignty of Germany (by violating the principle of immunity), but also the sovereignty of Italy (by contracting international responsibility for not complying with customary international law) have to step back behind the *sovereignty of fundamental and internationally recognized values* provided for in the Italian Constitution and in the Charter of Fundamental Rights of the European Union which together protect Italy and Germany from the horrors of the past.

IV. Concluding Remarks

The decisions briefly commented above lead to the following conclusions: The decision of the CC which is the guardian of the Constitution and the organ to give guidance to the lower tribunals in order to maintain legal certainty, has passed the buck to the lower tribunals which have to find a way between Scylla and Charybdis, namely the violation of either national law or international law. Their attitude is interesting in so far as they evidently felt some reluctance to convict Germany to pay compensation with regard to the heirs of a victim, but not with regard to the victim himself. This attitude reflects the concern of never-ending claims of compensation even 70 years after the commission of the crimes in particular in the context of war-related actions. Therefore these decisions might be considered as a

²² Cf. K. Oellers-Frahm, Judicial Redress of War-Related Claims by Individuals: The Example of the Italian Courts, in: U. Fastenrath/R. Geiger/D.-E. Khan/A. Paulus/S. von Schorlemer/C. Vedder (eds.), *From Bilateralism to Community Interest, Essays in Honour of Bruno Simma*, 2011, 1055 et seq. with further bibliographical references.

²³ Tribunale di Firenze, sentenza no. 2468/2015 (note 7), § 4.3.

guideline in seeking a way out of the impasse in which Germany and Italy are caught: Although the application of Art. 185 c.p.c. in the concrete cases was rather problematic, it nevertheless set the signal that the best, if not only solution seems to lie in negotiation, as already stated by the ICJ. If negotiations would be opened they could, as demonstrated by the cases commented above, make a distinction between the victims themselves and their heirs in that compensation would only be due for victims still alive. Such solution would be in line with the recent example concerning Russian victims²⁴ and seems the more appropriate with regard to the content of the conciliation terms proposed by the Tribunale di Firenze in its Order of 23.3.2015: The grant of a stay of some member of the family in Germany demonstrates that such kind of “compensation” lacks any direct justification or link to the cause of the conviction and would fit better into an initiative such as the German-Italian Future Fund. This Fund was enacted in 2014²⁵ and does not provide for compensation in individual cases, but disposes of a sum of 1.000.000 € in order to develop a culture of remembrance between the two states.²⁶ Furthermore, the example of compensation for Russian prisoners of war might also serve as a model with regard to the kind and amount of compensation which cannot be aimed at granting full compensation – which is in any case illusory – but only symbolic compensation. This solution seems to be acceptable with a view also to the fact that during the negotiations after the war Italy itself failed to endorse the justified claims of individuals constraint to forced labor in Germany. The reference of in particular the Tribunale di Firenze in its judgment of 6.7.2015 to the membership of both states in the European Union, which does not change anything with regard to the applicable international law, should, however, help to settle a dispute which keeps alive conflictual relations originating from the Second World War which have no place in the European framework.

²⁴ On 20.5.2015 the German Government decided to pay a symbolic financial compensation to the some 4000 Russian prisoners of war which are still alive. An amount of 10 Mio € is provided for them which can only serve as a symbolic compensation for their sufferance. Zeit-online, 20.5.2015.

²⁵ The Fond goes back to a proposal of the German-Italian Commission of Historians of 2012.

²⁶ In this context it may be recalled that the German Minister of Foreign Affairs, *Frank-Walter Steinmeier*, inaugurated on 9.11.2015 a documentation center in Ponte Buggianese, where in 1944 German soldiers had committed a massacre. The construction of this center had been largely supported by the German-Italian Future Fund.