

Closing a justice gap or opening Pandora's box?
A conference on the Italian Constitutional Court's Sentenza 238/2014 as
well as the relationship between state immunity and claims of
compensation for war crimes

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From 11th to 13th of May 2017 the Max Planck Institute for Comparative Public Law and International Law in collaboration with the Istituto di Ricerche sulla Pubblica Amministrazione and Villa Vigoni, German-Italian Centre for European Excellence convened a conference titled "Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court's Sentenza 238/2014" at Villa Vigoni, Lake Como, Italy.

The beautifully located Villa Vigoni is the seat of a bilateral association founded by both the Italian and the German government in order to promote cultural and academic exchange between the two states by hosting and organising up to a hundred events and conferences each year. At the same time it has become the object of a major struggle between Germany, Italy and victims of Nazi crimes in World War II claiming compensation from Germany before Italian courts. One of these successful claims resulted in the registration of a mortgage over Villa Vigoni – as its premises are owned by the German state.

It was *inter alia* this case that triggered a multi-level legal dispute. On an international plane, Germany initiated proceedings before the International Court of Justice (ICJ) arguing that Italy had violated the principle of jurisdictional immunity under international law by allowing civil claims against Germany to proceed. The ICJ's judgment of 2012 confirmed Germany's position and requested Italian courts to dismiss claims for compensation against Germany. On a national plane, the Italian Constitutional

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Court (ItCC) refused to give effect to this decision in its *Sentenza 238/2014* as the implementation of the ICJ judgment would conflict with supreme principles of the Italian Constitution (ItC).

It is against this background, that Villa Vigoni fittingly was the venue of a conference that aimed at analysing and discussing the ramifications of the ItCC's *Sentenza 238/2014* not only for Villa Vigoni and other pending claims but as well on a broader level. What is and what should be the relationship between the principle of state immunity and human rights guarantees? What is the role of domestic courts in the development of customary international law? How can the current stalemate be overcome and the existing justice gap be closed without opening the (in)famous Pandora's box? To answer these questions and to formulate concrete and constructive proposals, the conference brought together distinguished scholars and practitioners from Italy as well as Germany. The following report will sum up the conference's five panels and its main outcomes, starting with a brief summary of the case history of *Sentenza 238/2014* and its reasoning.

1. Case history

The majority of the current claims were initiated by the so-called Italian Military Internees (IMI) who have been deported to Germany after the occupation of Italy in 1943 and subjected to forced labour while being denied the status of prisoner of war. Not being covered by one of the existing compensation schemes, the IMI remain without compensation down to the present day. Additionally, victims of Nazi crimes in Greece were successful in attaining a judgment of an Italian court declaring a Greek court decision enforceable in Italy. It was this proceeding that eventually led to the registration of the mortgage over Villa Vigoni. After the reaffirmation of the principle of jurisdictional immunity in the ICJ judgment the dispute seemed to be settled for the time being. The *Consiglio dei Ministri* and the Italian parliament adopted (legislative) measures to comply with the judgment.

However, the Tribunal of Florence involved the ItCC claiming that it could not dismiss these claims on the grounds of jurisdictional immunity as this would violate Article 2 and 24 ItC which guarantee the respect for fundamental rights in general and the right to access to justice. The ItCC upheld this reasoning in *Sentenza 238/2014* and based it on the counter-limits doctrine. This doctrine prevents international norms from deploying

any effect in the Italian legal order if necessary to safeguard certain supreme principles of the Italian Constitution. The ItCC found that Article 2 and 24 were part of these supreme principles which would be infringed if Italian courts dismissed claims filed by victims of war crimes or other gross human rights violations. Thereby the court essentially established a human rights exception to the principle of state immunity.

Consequently, the ItCC authoritatively declared the legislation implementing the ICJ judgment as well as the ratification law to the UN Charter (in so far as the Charter is obliging Italy to comply with the 2012 judgment of the ICJ) unconstitutional. Finally, the judgment also found that Art. 10 ItC has to be interpreted as not allowing for the reception of the principle of jurisdictional immunity, in cases of war crimes and gross human rights violations, to enter the Italian constitutional order. Thus, the ItCC's Sentenza not only allowed the lower courts to proceed with the compensation claims, but in fact mandated them to do so.

Since Sentenza 238/2014 there has been a wave of claims, albeit none of them resulted in compensation, as enforcement measures would violate the customary rule of immunity from enforcement which has not been subjected to an exception by Sentenza 238/2014. Germany relies on the ICJ judgment which results in a situation that is often described as a "legal stalemate". This collides with the nearly unanimously shared conviction that the exclusion of the IMI from any compensation scheme is an unacceptable gap of justice which also mirrors the ICJ's view which expressed "surprise" and "regret" with regard to the status quo.

2. Panel I – German concerns

The opening panel of the conference dealt with German concerns after Sentenza 238/2014. A vast majority of participants agreed that Germany can, at least on an international level, rely on a strong legal position as formulated by the ICJ. Nevertheless, the conference identified several issues of concern raised by the ItCC's decision.

First, how should Germany deal with the pending claims and already delivered judgments obliging Germany to pay compensation? It has to be recalled that none of these judgments has been enforced yet which is also unlikely to happen in the near future. Nonetheless, it was cautioned that ongoing litigation equals the opening of Pandora's Box

leading to severe problems and a bottomless number of claims. It was pointed out that Germany already set up several compensation schemes, concluded bilateral agreements with Italy and paid 71 billion Euro as reparation to surviving Nazi victims. Leaving aside problems such as the question, who is to be entitled to compensation (only actual victims or also their heirs?), it was often argued that multilateral solutions are preferable over individual claims when it comes to historical injustices such as Nazi crimes during World War II. Righting historical wrongs in courtrooms would require judges to take the role of historians which they are not prepared to do. Furthermore, some participants submitted that maintaining legal peace between Germany and Italy is a desirable target that is endangered by the ongoing claims.

In turn, other comments underlined the important role individual claims can play in triggering public awareness as well as political which can force governments to enter into negotiations. Opposing individual claims in general was criticised at least in situations where the chances of reaching a multilateral solution are relatively low – which is the case with regard to the IMI. However, there was nearly a consensus that the current situation and the exclusion of the IMI from any compensation scheme are both untenable and frustrating – a situation giving rise to a moral and political duty of Germany (and Italy) to find a solution.

Second, participants discussed an attempt to ground this prima facie merely moral obligation on a legal basis in the form of a soft *obligatio de negotiando*. This obligation was derived from a noteworthy obiter dictum in para. 104 of the ICJ's judgment stating that the claims at hand "could be the subject of further negotiation". Whether this obiter dictum in the end really may be read as giving rise to a soft procedural obligation to negotiate, was a matter of dispute on which the participants did not reach a consensus. However, further negotiations were nearly unanimously supported as the most tenable way forward, regardless if based solely on a moral obligation or as well on a legal one.

Third, this recommendation of negotiations leads to another issue of particular concern to the German government: if Germany and Italy were to start negotiating a solution, in how far would this affect individual claims? Would the Italian courts dismiss them by referring to the ongoing negotiation process or rather allow them to proceed as the *Sentenza* still requires them to accept claims despite immunity? While the wording of the

judgment is silent on this issue, it can be inferred from the reasoning that there is no conditionality between granting jurisdictional immunity and the existence of alternative remedies. The existence of compensation schemes or their negotiation cannot per se satisfy the requirements of the right to access to justice. Therefore, the courts are at least not obliged to dismiss claims. It is unclear, whether courts would be obliged to continue with the claims or if a negotiation process would provide them with some leeway when having to decide on the merits.

This leaves the German government at unease and without any guarantee that ongoing political negotiations are not undermined by judgments of Italian courts. Even if the Italian government assured that the court proceedings would be discontinued (as the US government did after Germany pledged to create the foundation “Remembrance, Responsibility and Future” to compensate Nazi victims, that have *inter alia* claimed compensation before US courts), this would not necessarily affect the position of the Italian courts.

3. Panel II – Italian concerns

The second panel took a different perspective and tried to outline and discuss possible Italian concerns. One of these was the possible contribution of the *Sentenza* to the evolution of the law of state immunity by developing a customary international law exception to the principle of state immunity in cases of war crimes and gross human rights violations. The ItCC did not directly challenge the authority of the ICJ which found *de lege lata* no such exception. However, it explicitly expressed the intention to contribute to a “desirable – and desired by many – evolution of international law itself” in this regard. This somewhat contradicts the position of the Italian government and parliament which have passed legislation in 2012 in order to execute the ICJ judgment and generally uphold the principle of state immunity. Hence, there was broad consensus that *Sentenza* 238/2014 does not form part of a uniform Italian state practice which would be necessary in order to contribute to establishing a human rights exception to the customary norm of state immunity in international law.

Another point of discussion was the doctrine of *controlimiti*. Panellists and participants were divided over the question, whether the application of the *controlimiti* doctrine by the court was useful and advisable. Furthermore, it was discussed how a constitutional

court should deal with situations where it faces an (alleged) collision of a norm of international law with constitutional core principles in general. It was pointed out that the *controlimiti* doctrine can be a meaningful concept that allows for judicial independence and possibly constitutes a tool for a domestic court to contribute to an emerging customary rule of international law and consequently international law making. In the case at hand the *controlimiti* doctrine enabled the ItCC to contribute to the closing of the justice gap that was a subject of regret to the ICJ.

Nevertheless, a majority of the participants were concerned about the danger of what could be summarised as “legal protectionism”. In this context it was often referred to another technique being used to reconcile antagonistic norms and mediate judicial disputes between national (or multinational) and international courts: the so called concept of equivalent protection, which is employed *inter alia* by the German Federal Constitutional Court in the tradition of its “Solange” jurisprudence. Also the European Court of Human Rights (ECtHR) used it in its Bosphorus decision vis-à-vis the ECJ. According to this concept domestic courts may pull back from reviewing the case at hand and leave it to be dealt with by the judicial organs of the other legal order as long as its human rights protection is comparable or equivalent. It was stressed that the equivalent protection technique is a more flexible and fitting tool, because it leaves more leeway by forcing courts into a dialogue with the chance of avoiding a final collision of the two legal systems. Therefore, the majority was very critical of the method used by the ItCC as it makes it nearly impossible to reconcile the collision between international law and Italian constitutional law.

There were, however, doubts whether the equivalent protection principle would have been of use in the case at hand. Problems arise as the primary function and aim of this principle – judicial dialogue preventing a final collision of the legal systems involved – might not be achievable in the relation between a domestic court and the ICJ. Contrary to the EU framework, there exists no referral procedure as under Article 267 of the Treaty on the Functioning of the EU. Hence, it would have been difficult to really establish such a productive dialogue.

Finally, three more practical points were raised in this panel. First, the danger of (negative) reciprocity: pushing for an exception to state immunity would bear the risk that Italy is subjected to judicial proceedings abroad which might not at all times meet

the European standard of rule of law. Second, the danger of forum shopping: following the ItCC's reasoning, claimants from other states can file suits against other states before Italian courts. This point of criticism was countered by stressing, that the Sentenza's reasoning is limited to a very concrete historic situation – World War II Nazi crimes – and therefore might not be easily transferable to other conflicts. Ultimately, the danger of (legal) frustration: even if claimants succeed on the merits stage, there is still the principle of immunity from execution under international law preventing their claims from being enforced, which could be a frustrating result for the claimants.

4. Panel III – A European perspective

Panel III brought the discussion to a European level, not necessarily limited to a EU perspective, and focused mainly on two key questions, namely if there are and if there should be any European legal implications on the law of state immunity and vice versa. It was furthermore considered whether the European context influences the dispute in other than strictly legal ways.

At the outset, it was analysed whether there is an emerging rule of European customary law that allows for exceptions to the principle of jurisdictional immunity. The possibility of regional customary law in international law is generally accepted and requires a constant state practice supported by *opinio juris*. There are mainly two European states that have been denying immunity in cases related to World War II crimes: Italy and Greece. However, as already mentioned, it can be argued that the Italian state's practice is not sufficiently uniform due to the different positions of the executive and legislative on the one side and the judiciary on the other. A similar situation can be observed in Greece: the Greek executive refused to declare the Greek judgments against the German state enforceable.

At the same time, there is no other supportive state practice in this regard. To the contrary, several European states made it clear when acceding the UN Convention on Jurisdictional Immunities that the accession should be without prejudice to the immunity for actions of armed forces. This view is also to be found in Article 31 of the European Convention in State Immunity. Therefore it was concluded that European state practice is not in favour of the exception desired by the ItCC, but rather against it.

The analysis of the current state of positive law was followed by a normative discussion, whether such a European exception would be desirable. This approach of a “European exceptionalism” was widely rejected as too Eurocentric and not constructive when considering global implications. It was cautioned that European states might have an interest in a strong sovereignty-oriented principle of state immunity. It still figures as one of the key elements of international law and prevents domestic courts from interfering with foreign states’ actions and thereby ensuring peaceful international relations. The recognition of a human rights exception could prompt an increased level of litigation claiming compensation from foreign states before domestic courts, possibly causing severe diplomatic and political tensions (another form of Pandora’s box, now on a European level).

At the same time it was argued, that from today’s perspective there is no need for a human rights exception as the European Convention for the Peaceful Settlement of Disputes (now) establishes jurisdiction of the ICJ. All in all, there was a broad consensus that from a normative viewpoint there should not be any European exceptions to the law of state immunity.

From a legal point of view, the European dimension of the dispute around *Sentenza 238/2014* therefore has no direct implications. However, the European dimension marked the conference in another way. While the European context does not offer any specific additional means of dispute settlement, it was argued that the European dimension adds a political obligation to come to an amicable solution of the dispute. Solving this dispute between two core EU members would be especially decisive at times where nationalist movements and EU critics are on the rise. As the Italo-German relations are generally excellent, it should be possible to overcome this dispute without the help of legal institutions such as the ICJ or national courts.

5. Panel IV – An international law perspective

Panel IV discussed *Sentenza 238/2014* from an international law perspective. The relationship of remedial rights for war crimes and grave human rights abuses and the principle of state immunity has been debated at length by scholars of international law. *Sentenza 238/2014* has reignited this debate and at the same time added a constitutional law perspective. The ItCC’s judgment was on the one hand met with criticism as

potentially bringing about unfathomable repercussions for the international rule of law. On the other hand, it was welcomed for its progressive stance as it argues for fundamental rights and specifically for the right to judicial protection to prevail over “traditional” principles of international law such as jurisdictional immunity in exceptional circumstances.

One of the most discussed issues was the “concern of non-compliance”. The ItCC clearly stated, albeit in a somewhat contradictory way, that it is not disputing the ICJ’s authority in interpreting international law, but rather cannot give effect to its judgment due to domestic constitutional reasons. Such a constitutional override bears certain risks: non-compliance invites non-compliance. The line of argument used by the ItCC could easily be applied by other national constitutional courts or potential abusers bearing the risk of a gradual undermining of the authority of both the ICJ and international law in general.

This danger of the *Sentenza*, however, might be overstated. Its reasoning referred specifically to the case at hand taking place in World War II and thus in very exceptional and therefore not generalizable circumstances. At the same time, constitutional override is a practice that is not at all singular and exceptional. Several domestic courts have handed down similar decisions (see *inter alia* the decision of 15 December 2015 of the German Federal Constitutional Court concerning a Double Taxation Treaty concluded with Turkey). Therefore, it was stressed that *Sentenza* 238/2014 is not a groundbreaking precedent.

Nevertheless, it can be argued that there might be more cautious and constructive ways than the one chosen by the ItCC which leads to a second concern identified by some participants: the wording and the methodological approach used by the ItCC. During the conference the judgment was repeatedly criticised for a lack of balancing and taking into consideration international law in the constitutional justification for the judgment. Some, however, were of the opinion that the very nature of the concept of immunity prohibits a balancing exercise. This was opposed by reminding that the ItCC was arguing on a constitutional law level and therefore did not have to take the international law principle of immunity itself into account, but rather the constitution’s openness towards international law as an integral element of Italy’s constitutional order.

Some commentators referred to the Al-Adsani judgment of the ECtHR as a good example. Therein the ECtHR affirmed that the dismissal of claims on the grounds of immunity is affecting the right to access to justice, but is not per se a violation of that right. Rather it can be justified when balanced with other interests and legal principles worth protecting. The Sentenza was perceived as having failed to sufficiently balance the two diverging interests at hand by subordinating state immunity to the right to access to justice in absolute terms. Balancing and mitigating the wording could have been a way of reconciling or at least facilitating a reconciliation of the Italian constitutional law concerns with the international law principle of state immunity.

The overall picture from an international law perspective was found to be an ambivalent one. On the one hand, not abiding by the ICJ judgment is a clear violation of Italy's international obligations with the mentioned possible negative effects for the international rule of law. On the other hand, it was cautioned not to overstate Sentenza's negative effects for international law stressing the judgment's singular character and recognizing the possible impetus for a development of the law of state immunity.

6. Panel V – Suggesting Solutions

After two days of closed discussions, a very fruitful and productive conference ended with a roundtable and a final discussion on possible solutions to the dispute around Sentenza 238/2014. The following paragraphs contain some of the main outcomes of the conference.

The different disputes (Italy-Germany, Italian judiciary-executive, claimants-Germany) are not solvable with purely legal means, as the situation is rightly described as a “legal stalemate”. An extensive analysis of Sentenza 238/2014 has shown that the key legal aspects are clear: the judgment violates international law by disregarding the ICJ's binding decision and Germany is under no obligation to compensate the victims. Participants were of the opinion that another proceeding before the ICJ would not be a constructive option. A great part of the discussions therefore focused on normative aspects and future implications.

As already outlined, a starting point in this regard is the nearly unanimously proclaimed moral obligation of both Italy and Germany that might crystallise in a soft procedural

obligatio de negotiando. In addition, another often mentioned point of reference was the ICJ's obiter dictum expressing "surprise" and "regret" with regard to the status quo and recommending negotiations. An important motivation to eventually take measures must not be ignored in the dispute over legal and normative issues: the victims have not only unquestionably suffered from great injustices but also fought a long battle for justice and compensation and deserve some recognition and satisfaction. It was reminded, that the victims should be at the core of the discussion, which has partly been neglected in the overall dispute.

When sketching out a possible way forward, the vast majority supported the opening of negotiations leading to the establishment of a fund equipped with financial means to compensate the IMI. This fund was suggested to be a common initiative by the German and Italian government or possibly even the presidents of Germany and Italy. The Italian president could take the lead, as it is on the one hand unlikely that the German government will do so and give up its strong position right away. On the other hand, it was stressed that the Italian state bears a responsibility towards the IMI too as it has remained largely passive and was accused of failing to (successfully) push for a compensation scheme.

It was pointed out that it would be extremely important to include civil society organizations and the victims in the course of negotiations. Being recognised as a victim and finding a forum to tell one's story might be as or even more important to the victims than financial compensation. Therefore, a compensation fund should also find means to personally address victims. Of course, this approach bears problems of both political and legal nature. The majority of participants were, however, of the opinion that these are not decisive and can be overcome.

Several of the participants and panellists thus pleaded intensively that it is time to overcome the overly formal and positivist approach and concentrate on a practically doable compromise. This could be materialised in the proposed creation of a common fund operationalised in cooperation with the IMI. Such a fund would not set a precedent in terms of a human rights exception to the principle of state immunity, it could be limited to the IMI and therefore cannot be rejected by referring to the dangers of opening Pandora's box. At the same time it would certainly not even come close to really compensate the damages suffered by the IMI. However, it might be a welcomed and long-

awaited sign of good will for the victims and their families and at least enable them to put an end to their decade long struggle for recognition. It might therefore be the best compromise possible between an opening of Pandora's box and the closing of the existing justice gap.

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