Reconciling State Immunity with Remedies for War Victims in a Legal Pluriverse

Anne Peters and Valentina Volpe

Abstract The chapter explains the threefold aspiration of the book as an academic, societal, and diplomatic project. It introduces the three interwoven themes of international law arising in the German-Italian saga: state immunity, reparation for serious human rights violations committed during World War II, and the interplay between international and domestic law, notably the role of courts therein. The chapter proposes an approach of 'ordered pluralism' to coordinate this interplay, and finally tables a 'modest proposal' for a way out of the current impasse.

I. Introduction

We are writing this introduction while the COVID-19 pandemic has accelerated, especially in Italy, the dwindling of a generation leading to the obliteration of its memory. This book was conceived to recount that individual and collective remembrance in its intertwinements with law and history. Such entanglements are particularly painful when courts and judges are called to adjudicate on historical narratives.

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This is what happened in the litigation on reparation for German war crimes which culminated in *Sentenza* 238/2014.[1] With this judgment, the Italian Constitutional Court (ItCC) denied the German Republic's immunity from civil jurisdiction over claims to reparation for Nazi crimes committed during World War II (WWII), indirectly challenging the International Court of Justice (ICJ)'s *Jurisdictional Immunities* Judgment of 2012[2] and paving the way for a series of domestic proceedings against Germany.

Against this background, our work has a threefold aspiration: it provides a scholarly contribution on the issue of war crimes and reparation for the victims of armed conflict; it seeks to form part of a broader civic debate, shedding light on these topics for a larger public engagement; and it proposes concrete legal and political solutions to the parties involved to overcome the present paralysis with a view to a durable interstate conflict resolution. We submit that a latent crisis fuelled by *Sentenza* 238/2014 is festering in the relationship between the German and Italian Republics. Future exchanges at both institutional and civil society levels might also help judges directly involved in the post-*Sentenza* reparation cases which are currently pending. Keeping this objective in mind, we see the book as an exercise of academic diplomacy, in a forward-looking and conciliatory spirit.

Our authors hail from diverse academic backgrounds and represent a wide variety of perspectives across domestic and international public law. We deliberately invited only Italian and German nationals and addressed them specific sets of questions. One of our objectives was to tease out (and ideally overcome) postures of possible epistemic nationalism.[3]

The book's primary scholarly aim covers three legal themes: state immunity,[4] reparation for serious human rights violations and war crimes,[5] including historical ones,[6] and the interaction between international and domestic law and institutions, notably courts.[7]

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

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

[3] The exercise brought to light that the legal assessment (positive or negative) of *Sentenza* 238/2014 did *not* coincide with nationality (see Joseph H H Weiler, 'A Dialogical Epilogue', in this volume).

[4] See for recent scholarship Hazel Fox/Philippa Webb, *The Law of State Immunity* (Oxford: OUP 3rd ed 2013); Anne Peters/Evelyne Lagrange/Stefan Oeter/Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Leiden: Brill 2015); Tom Ruys/Nicolas Angelet/Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge: CUP 2019). See for an excellent compilation and analysis of the relevant case-law Rosanne van Alebeek/Riccardo Pavoni, 'Immunities of States and their Officials', in André Nollkaemper/August Reinisch et al (eds), *International Law in Domestic Courts: A Casebook* (Oxford: OUP 2018), 100-169.

[5] See in recent scholarship Cristián Correa/Shuichi Furuya/Clara Sandoval, *Reparation for Victims of Armed Conflict*, Max Planck Trialogues on the Law of Peace and War, Vol 3, edited by Anne Peters/Christian Marxsen (Cambridge: CUP 2020).

[6] See in scholarship on reparation for historical crimes: Gerry Johnstone/Joel Quirk, 'Repairing Historical Wrongs', *Social & Legal Studies* 21 (2012), 155-169; Daniel Butt, *Rectifying International Injustice: Principles of Compensation and Restitution Between Nations* (Oxford: OUP 2008).

[7] See in scholarship André Nollkaemper, *National Courts and the International Rule of Law* (Oxford: OUP 2012); Davíd Thór Björgvinsson, *The Intersection of International Law and*

These three themes are interlinked: the international rules and principles of state immunity operate in proceedings before national courts, and are being developed through the practice of those courts which in turn contributes to the formation of customary law, in addition to international treaty law.[8] With regard to the reparation of serious violations of international human rights, an interaction between the international and the domestic level of rules and institutions is visible as well: reparation is sometimes acknowledged and granted as a matter of international legal obligation, but needs in any case to be implemented through domestic procedures. These themes form the intertwined threads running through the volume.

After the introduction, Part II, *Immunity*, investigates core international law concepts, such as those of pre/post-judgment immunity and international state responsibility, as embedded in contemporary legal discourse (*Paolo Palchetti, Christian Tomuschat* and *Heike Krieger*). Part III, *Remedies*, examines the tension between state immunity and the right to remedy, suggesting original schemes for overcoming the legal impasse and solving the conundrum under international law (*Riccardo Pavoni, Jörg Luther, Stefan Kadelbach* and *Filippo Fontanelli*). Part IV adds *European Perspectives* to the main themes of the book by showcasing relevant regional examples of legal cooperation and judicial dialogue against a common European horizon (*Alessandro Bufalini, Bernardo Giorgio Mattarella, Doris König* and *Andreas Zimmermann*). Part V, *Courts*, addresses a series of questions on the role of judges in the areas of immunity and human rights at both the national and international level (*Christian J. Tams, Raffaela Kunz, Giovanni Boggero* and *Karin Oellers-Frahm*). Part VI, *Negotiations*, suggests, inter alia, concrete ways out of the impasse with a forward-looking aspiration (*Andreas von Arnauld, Valerio Onida, Andreas L. Paulus* and *Francesco Francioni*).

In Part VII, *The Past and Future of Remedies*, emeritus justice *Sabino Cassese*, sitting judge in the Court that decided *Sentenza* 238/2014, adds some personal recollections and critical reflections on the Judgment. *Joseph H. H. Weiler*'s Dialogical Epilogue concludes the volume by entering into conversation with some of the authors and placing the main findings of the book in a wider European and international law perspective.

In order to set the scene for the following chapters, we first summarise the proceedings leading to *Sentenza* 238/2014 (section II) and then contextualise the

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Domestic Law: A Theoretical and Practical Analysis (Cheltenham: Edward Elgar 2015); Helmut Philipp Aust/Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford: OUP 2016); Machiko Kanetake/André Nollkaemper, *The Rule of Law at the National and International Levels: Contestation and Deference* (Oxford: Hart 2016).

[8]See van Alebeek/Pavoni, 'Immunities of States' 2018 (n 4), 169: '[T]he pivotal role of domestic courts in the development of international immunity rules translates into an interplay of domestic law and international law in domestic immunity decisions, and partly explains the many controversies on the precise parameters of the various rules in this area of the law.' Immunities are therefore 'a messy affair', Anne Peters, 'Immune against Constitutionalisation?' in Peters et al, *Global Constitutionalism* 2015 (n 4), 1-19, at 1.

judgment by offering a snapshot of the law on the main themes of the volume (sections III–V), a law which is, as the European Court of Human Rights (ECtHR) put in *Jones*, in a 'state of flux'.[9] We close with concrete legal policy suggestions for moving toward a resolution of the Italian-German controversy (section VI).

II. *Sentenza* 238/2014: The Culmination of a Judicial Saga

1. The Historical Background

The events leading to *Sentenza* 238/2014 can be traced back to the unsolved quarrels between Italy and Germany regarding WWII crimes. *Sentenza* is, therefore, one pronouncement in a long judicial conversation or judicial tug-of-war that has developed at the local, national, and international level.[10] The facts that gave rise to the various judicial proceedings are the uncontested atrocities committed by German forces in the occupied Italian territory between September 1943 and the end of the war in May 1945.[11] They notoriously included massacres of civilians and the deportation of a large number of the population for forced labour. The core issue litigated on the multilevel judicial battlefield is reparation for these civilian victims and for the 'Italian Military Internees' (IMIs), ie the several hundred thousand members of the Italian army who German forces took prisoner both in Italy and elsewhere in Europe. IMIs were denied the status of prisoner of war (POW) and were deported to Germany and German-occupied territories for use as forced labour.

[9]ECtHR, *Jones and Others v The United Kingdom*, Judgment of 14 January 2014, Applications Nos 34356/06 and 40528/06, para 213 (concerning civil claims for torture lodged against foreign state officials).

[10]For an assessment of *Sentenza* 238/2014 primarily from the perspective of Italian domestic law which is not the focus of this book, see: Francesco Salerno, 'Giustizia costituzionale versus giustizia internazionale nell'applicazione del diritto internazionale generalmente riconosciuto', *Quaderni Costituzionali* 35 (2015), 33-58; Francesco Buffa, 'Introduzione: I diritti fondamentali tra obblighi internazionali e Costituzione', *Questione Giustizia* 1 (2015), 45-50; Paolo Veronesi, *Colpe di stato: I crimini di guerra e contro l'umanità davanti alla Corte costituzionale* (Milan: Franco Angeli 2017).

[11]See the German exhibition on Italian IMIs in the '*Dokumentationszentrum NS-Zwangsarbeit*' in Berlin: https://www.ns-zwangsarbeit.de/italienische-militaerinternierte/themen/deutschland-und-italien-als-buendnispartner-1936-1943/. See for a more in-depth analysis, the research of a group of Italian historians: Paolo Pezzino, 'The German Military Occupation of Italy and the War against Civilians', *Modern Italy* 12 (2007), 173-188.

2. *The Italian* Corte di Cassazione *and the* Ferrini *and* Milde *Judgments*

The question of war crimes reparation gained relevance and a renewed judicial and political attention in the early 2000s.[12] One of the main actors of this judicial turn has been the Italian Supreme Court (*Corte di Cassazione*), which gained international attention with the inauguration, in those years, of a ground-breaking jurisprudence concerning state immunity and gross human rights violations.

The *Corte di Cassazione* adopted the well-known *Ferrini* judgment in 2004.[13] The procedural history began in September 1998, when Luigi Ferrini instituted proceedings against the Federal Republic of Germany before the Tribunal of Arezzo. Ferrini was an Italian national who had been arrested and deported to Germany in 1944 where he had been detained and forced to work in a factory until the end of the war. He was seeking damages for the physical and psychological injuries suffered.

Unsurprisingly, in November 2000, the Tribunal of Arezzo decided that Luigi Ferrini's claim was inadmissible because Germany, as a sovereign state, was protected by jurisdictional immunity. On the same grounds, the Court of Appeal of Florence dismissed the appeal of the claimant. However, on 11 March 2004, the Italian *Corte di Cassazione* quite unpredictably contradicted this well-established line of jurisprudence grounded in international customary law, holding that Italian courts had jurisdiction over the claims for compensation brought against Germany by Luigi Ferrini. The Court argued that state immunity does not apply in circumstances in which the act complained of constitutes an international crime. Assuming the role of an interpreter of international law, the Italian *Corte di Cassazione* affirmed: 'Respect for the inviolable rights of the human person has indeed assumed the value of a fundamental principle of the international legal order (. . .). The emergence of this principle cannot fail to reflect on the scope of other principles to which this order is traditionally inspired and, in particular, on the "sovereign equality" of States, to which state immunity from foreign civil jurisdiction is linked'. '[T]here can be no doubt that the antinomy should be resolved by giving prevalence to the highest-ranking norms'.[14]

A few years later, while numerous reparation proceedings were instituted before ordinary Italian courts, the *Corte di Cassazione* confirmed the *Ferrini* jurisprudence

[12] In 1996 two important prodromal events fuelled a renewed political and legal interest towards Nazi crimes in Italy, the *Priebke* case (*Corte di Cassazione*, Judgment of 15 October 1996 and *Corte Costituzionale*, Judgment of 28 February 1996, No 60/1996. Cf as well, *Corte di Cassazione*, Judgments of 10 February 1997 and 16 November 1998, No 1230/1998 (*Priebke and Hass*)) and the discovery of the *Armadio della Vergogna* (the closet of shame) containing the long hidden names and files of numerous war criminals. The establishment of the German Foundation 'Remembrance, Responsibility and Future' (*Erinnerung, Verantwortung und Zukunft*) in 2000, which excluded the IMIs from the available financial compensation, is another important event in this judicial saga.

[13] *Corte di Cassazione*, Judgment of 11 March 2004, No 5044/2004 (*Ferrini*).

[14] Ibid, paras 9.2 and 9.1 (translated by the authors).

in a number of cases all adjudicated in 2008. The most remarkable of them was surely the *Milde* case.[15] Max Josef Milde had been a member of the 'Hermann Göring' division of the German armed forces who was charged with participation in massacres committed on 29 June 1944 in Civitella in Val di Chiana, Cornia and San Pancrazio in Italy. The Military Court of La Spezia had sentenced Milde in absentia to life imprisonment and ordered Milde and Germany, jointly and separately, to pay reparation to the successors in title of the victims of the massacre who appeared as civil parties in the proceedings. Germany appealed to the Military Court of Appeals in Rome against that part of the decision which was directed against the German Republic and the Court dismissed the appeal in 2007. The following year, the *Corte di Cassazione* rejected Germany's argument of lack of jurisdiction and confirmed the reasoning it had adopted in *Ferrini*: in cases of serious international law crimes, the jurisdictional immunity of states should be set aside. According to the Court, 'the principle of respect for the "sovereign equality" of States must remain without effects in the event of crimes against humanity (. . .) whose real substance consists in an abuse of state sovereignty'.[16]

In the same year, the *Corte di Cassazione* granted an application of exequatur to the Greek courts' judgments *Prefecture of Voiotia v Federal Republic of Germany* concerning Nazi massacres of the Greek civilian population during WWII.[17]

3. *The ICJ and the* Jurisdictional Immunity *Judgment*

The German reaction was not long in coming. In December 2008, just a few months after the *Milde* judgment of the *Corte di Cassazione*, the Federal Republic of Germany instituted proceedings before the ICJ against the Italian Republic.

[15]Cf *Corte di Cassazione*, Orders of 28 May 2008, Nos 14201/2008, 14202/2008, 14203/2008, 14204/2008, 14205/2008, 14206/2008, 14207/2008, 14208/2008, 14209/2008, 14210/2008, 14211/2008, 14212/2008. *Corte di Cassazione*, Judgment of 21 October 2008, No 1072/2008 (*Milde*). Annalisa Ciampi, 'The Italian Court of Cassation Asserts Civil Jurisdiction Over Germany in a Criminal Case Relating to the Second World War: The Civitella Case', *Journal of International Criminal Justice* 7 (2009), 597-615. For a critical appraisal of the case, Giovanni Boggero, 'Giustizia per i crimini internazionali di guerra nella strage di Civitella?', in Procura Generale Militare della Repubblica presso la Corte Suprema di Cassazione (ed), *Casi e 'materiali' di diritto penale militare* (Rome: Stabilimento Grafico Militare 2012), 277-303.

[16]*Corte di Cassazione*, *Milde* (n 15), para 5. As a consequence, 'the customary principle of the jurisdictional immunity of States does not have an absolute and indiscriminate character and is destined to remain inoperative in cases (. . .) [concerning] the reintegration of damages caused by international crimes.' Ibid, para 4 (translated by the authors).

[17]*Corte di Cassazione*, Judgments of 29 May 2008, No 14199/2008 and 20 May 2011, No 11163/2011. Cf, Tribunal of Leivadia, *Prefecture of Voiotia v Federal Republic of Germany*, 30 October 1997 and Supreme Court of Greece, *Prefecture of Voiotia v Federal Republic of Germany*, Judgment of 4 May 2000, No 11/2000.

According to Germany, Italy through its judicial practice 'failed to respect the jurisdictional immunity which . . . [the German state] enjoys under international law'.[18]

In the *Jurisdictional Immunities* Judgment, issued in 2012, the ICJ endorsed the German position. In particular, the Court openly contradicted the *Ferrini* jurisprudence and the legal argument that a normative hierarchy between peremptory human rights and immunity must lead to setting aside state immunity in domestic litigation dealing with ius cogens violations. The Court stated that 'under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law'.[19] The ICJ grounded this decision on the quite formalistic assumption that the rules of ius cogens and those of state immunity do not conflict because they operate at different levels. The rules of state immunity 'are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State',[20] and these procedural immunity rules do not address the question of whether or not the conduct around which the proceedings turn in substance was lawful or unlawful.[21]

The ICJ also rejected an additional set of arguments brought by Italy.[22] The Italian 'last resort' claim deemed 'Italian courts (. . .) justified in denying Germany the immunity to which it would otherwise have been entitled, because all other attempts to secure compensation for the various groups of victims involved in the Italian proceedings had failed'.[23] The ICJ considered, with particular reference to the IMIs status, that it was '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 [that of POW] which, at the relevant time, Germany had refused to recognize'.[24] However, the Court could find 'no basis' in the state practice conditioning the entitlement of state immunity 'upon the existence of effective alternative means of securing redress'.[25]

In conclusion, the ICJ held that Italy violated the jurisdictional immunity which Germany enjoys under international law by allowing civil claims based on violations of international humanitarian law by the German Reich between 1943 and 1945,[26] and that Italy also committed violations of the immunity owed to Germany by taking enforcement measures against German properties, in particular Villa Vigoni, a German cultural centre on Lake Como.[27]

[18]ICJ, *Jurisdictional Immunities* (n 2), para 1, quoting the German application.

[19]Ibid, para 91. See for the ius cogens argument paras 80, 84, 89.

[20]Ibid, para 93.

[21]Ibid, para 100.

[22]Ibid, paras 98-104.

[23]Ibid, para 98.

[24]Ibid, para 99.

[25]Ibid, para 101.

[26]Ibid, para 139.

[27]Ibid, para 120.

The ICJ judgment received mixed assessments in the academic world, and critical voices seemed to prevail.[28] Commentators found the judgment 'unsatisfying',[29] with 'thin reasoning',[30] and failing to give 'an encouraging legal message', while being 'not particularly persuasive', and 'collaborating in the deconstruction of *jus cogens*'.[31] They deplored the 'excessively formalistic reasoning' and 'disputable logic' of the judgment which was ultimately deemed a 'missed opportunity'.[32] The fiercest critic sensed an 'air of strong conservatism' in the judgment, identified 'entirely misplaced' statements, and in the end, found the judgment's reasoning 'unacceptable'.[33] In the opposing camp, defenders appraised the ICJ judgment as 'no surprise, but wise'[34] and as making 'eminent sense'.[35]

Most of the Italian courts immediately acknowledged and complied with the ICJ judgment. They declared all further civil actions brought against Germany with claims for reparation for human rights violations during WWII inadmissible.[36]

In order to avoid further civil actions before Italian courts and obey the ICJ Judgment, the Italian Parliament adopted Law No 5/2013 by which Italy ratified the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI).[37] The Statute prescribes how Italian courts must react to a judgment

[28]See for a recent critical assessment: Selman Özdan, 'State Immunity or State Impunity in Cases of Violations of Human Rights Recognised as Jus Cogens Norms', *The International Journal of Human Rights* 23 (2019), 1521-1545.

[29]François Boudreault, 'Identifying Conflicts of Norms: The ICJ Approach in the Case of the *Jurisdictional Immunities of the State* (Germany v Italy: Greece Intervening)', *Leiden Journal of International Law* 25 (2012), 1003-1012, at 1008. The author also sees merits in the judgment.

[30]Lorna McGregor, 'State Immunity and Human Rights: Is There a Future after *Germany v. Italy*?', *Journal of International Criminal Justice* 11 (2013), 125-145, at 128.

[31]Carlos Espósito, '*Jus Cogens* and Jurisdictional Immunities of States at the International Court of Justice: "A Conflict Does Exist"', *Italian Yearbook of International Law* 21 (2011), 161-174, at 174, 163, and 173.

[32]Stefania Negri, 'Sovereign Immunity v. Redress for War Crimes: The Judgment of the International Court of Justice in the Case Concerning *Jurisdictional Immunities of the State (Germany v. Italy)*', *International Community Law Review* 16 (2014), 123-137, at 137; Benedetto Conforti, 'The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity', *Italian Yearbook of International Law* 21 (2011), 134-142.

[33]Benedetto Conforti, 'A Missed Opportunity' 2011 (n 32), 142.

[34]Markus Krajewski/Christopher Singer, 'Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights', *Max Planck Yearbook of United Nations Law* 16 (2012), 1-34, at 27.

[35]Stefan Talmon, '*Jus Cogens* after *Germany v. Italy*: Substantive and Procedural Rules Distinguished', *Leiden Journal of International Law* 25 (2012), 979-1002, at 1002.

[36]Graziella Romeo, 'Looking Back in Anger and Forward in Trust: The Complicate Patchwork of the Damages Regime for Infringements of Rights in Italy', in Ewa Bagińska (ed), *Damages for Violations of Human Rights: A Comparative Study of Domestic Legal Systems* (Heidelberg: Springer 2016), 217-240, at 232, citing as an example *Corte d'Appello di Torino*, Judgment of 14 May 2012, No 941/2012 (*Germany v De Guglielmi*).

[37]Italian Law 14 January 2013, No 5. Article 3(2) of the Law added new grounds for a reopening of proceedings beyond the grounds already provided for in the Italian Code of Civil Procedure.

of the ICJ declaring the immunity of a foreign state: in proceedings pending a final judgment, the courts are to pronounce *ex officio* their lack of jurisdiction.[38] Final judgments can be appealed to be overturned ('*impugnate per revocazione*').[39]

In the meantime, further civil proceedings were nonetheless instituted. The Tribunal of Florence heard three such proceedings. Instead of declaring the complaints inadmissible, the Tribunal stayed the proceedings and addressed a question of constitutionality to the ItCC, concerning the compatibility of Law No 5/2013 with Article 2 and Article 24 of the Italian Constitution.[40] This proceeding gave rise to *Sentenza* 238/2014.

4. The Italian Constitutional Court and Sentenza *238/2014*

The ItCC's *Sentenza* of 22 October 2014[41] reopened the legal and political debate on the issue of compensation to Italian victims (and their heirs) of Nazi crimes during WWII.[42]

Using a different approach from the one adopted by the *Corte di Cassazione* in *Ferrini,* the Judgment of the ItCC paid lip service to the international law principle of state immunity and to the 'external' binding force of ICJ judgments (by virtue of Article 94 of the UN Charter). In *Sentenza* 238/2014, the ItCC neatly distinguished the 'international' from 'domestic' effects of an international norm and the ICJ judgment. The *Corte Costituzionale* stated that these international norms and acts

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); The Convention has 22 ratifications as of October 2020, while 30 are needed for its entry into force.

[38]Italian Law, 5/2013 (n 37), Art 3(1).

[39]Ibid, Art 3(2).

[40]Article 2: 'The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled.' Article 24(1): 'Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law'.

[41]The English translation of *Sentenza* 238/2014, as published on the website of the Italian Constitutional Court, is reproduced at the end of this volume, with kind permission of the *Corte Costituzionale*.

[42]The following section builds on 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-italianconstitutional-court-for-a-global-legal-order-part-i/. See also Anne Peters/Valentina Volpe, 'In Search for Conciliation—Conference Remedies against Immunity?', *VerfBlog*, (11 May 2017), available at http://verfassungsblog.de/introduction-in-search-for-conciliation.

could not deploy any internal effect within the Italian legal order, on the basis of a dualistic ('Triepelian')[43] understanding of the relationship between domestic law and international law: '[T]he incorporation, and thus the application, of the international norm would inevitably be precluded, insofar as it conflicts with inviolable principles and rights' of the Italian constitutional order.[44]

Access to justice, as guaranteed by Article 24 of the Italian Constitution, is both a right and a principle in this sense. The guarantee encompasses the right to appear and to be defended before a court of law in order to protect one's rights and at the same time, in the Court's jurisprudence, it is considered among the 'supreme principles' of the Italian constitutional order.

The Italian Constitutional Court did not verbally contest the 'particularly qualified' ICJ interpretation of the *international* customary law regarding immunity.[45] However, the *Corte Costituzionale* strongly affirmed its exclusive role as a guarantor of *constitutional* principles: 'It falls exclusively to this Court to ensure the respect of the Constitution and particularly of its fundamental principles'.[46] The *Corte* reserved for itself the competence to review the compatibility of the international norm of state immunity from the civil jurisdiction against the benchmark of those (constitutional) principles. It ascertained whether the customary norm of immunity, as interpreted by the ICJ, can be 'incorporated into the constitutional order'.[47] By framing the issue purely as a matter of 'incorporation', the ItCC 'shields Judgment 238/2014 from the obvious criticism: that the ItCC thought it knew international law better than the ICJ (. . .). Rather, [the ItCC] claims to know Italian constitutional law better', as *Christian J. Tams* puts it in his chapter. This is a particularly problematic feature of *Sentenza* 238/2014. The outcome is that, without openly admitting it, the ItCC reserved for itself the competence to ascertain whether international law 'is constitutional' or not.[48]

Despite its staunch dualism, the *Corte* brought international law into play, by insinuating that the Judgment 'may also contribute to a desirable—and desired by many—evolution of international law itself'.[49]

[43]Cf Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig: Verlag von C. L. Hirschfeld 1899).

[44]ItCC, Judgment 238/2014 (n 1), 'The Law' para 3.4.

[45]'[T]he interpretation by the ICJ of the customary law of immunity of States from the civil jurisdiction of other States for acts considered *jure imperii* is particularly qualified and does not allow further examination by national governments and/or judicial authorities, including this Court'. Ibid, 'The Law' para 3.1.

[46]Ibid, 'The Law' para 3.3.

[47]Ibid, 'The Law' para 3.4.

[48]Stefano Battini, 'È costituzionale il diritto internazionale?', *Giornale di diritto amministrativo* 3 (2015), 367-377.

[49]ItCC, Judgment 238/2014 (n 1), 'The Law' para 3.3.

Sentenza 238/2014 has triggered extensive and heated scholarly commentary. Supporters[50] celebrated the judgment as the 'best possible solution'[51] which 'deserves full appreciation' because it 'reflects the most cherished values of our civilization',[52] and it was seen as 'a lesson in juridical civilization' and a 'badge of honour (. . .) to human rights'.[53] Critics[54] reproached the judgment for 'seriously imperil[ing] the authority of international law',[55] as well as for being 'contradictory' and a 'breach of the law',[56] and they qualified it as a 'sort of murder of international law through municipal law', even as a 'judicial putsch'.[57] Both sides probably agree that it was the 'judgment of the year'[58] and a 'historic decision'.[59]

Sentenza 238/2014 itself does not yet constitute an internationally wrongful act, because it does not in itself disregard state immunity. What counts are the lower courts' reconsiderations of the claims and their decisions on holding them admissible by setting aside state immunity. Arguably, the simple reopening of those proceedings, not only decisions on their merits or the execution of a judgment, could already be seen to constitute an internationally wrongful act. The content of Italian state responsibility would then be primarily restitution in kind which in our case would mean to somehow strike down the civil lawsuits against Germany.

Moreover, any execution of a substantive judgment would, in addition, violate post-judgment immunity against execution (*Paolo Palchetti*). The relevant parts of the pertinent provision of Article 19 of the UN Convention on State Immunity of

[50]See, besides the voices quoted: Gianluigi Palombella, 'German War Crimes and the Rule of International Law', *Journal of International Criminal Justice* 14 (2016), 607-613.

[51]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, at 590.

[52]Cesare Pinelli, 'Decision no. 238/2014 of the Constitutional Court: Between Undue Fiction and Respect for Constitutional Principles', *Questions of International Law: Zoom Out* 2 (2014), 33-41, at 41.

[53]Giuseppe Cataldi, 'A Historic Decision of the Italian Constitutional Court on the Balance between the Italian Legal Order's Fundamental Values and Customary International Law', *The Italian Yearbook of International Law* 24 (2015), 37-52, at 38 and 52.

[54]See for a different type of critique 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.

[55]Enzo Cannizzaro, 'Jurisdictional Immunities and Judicial Protection: The Decision of the Italian Constitutional Court No. 238 of 2014', *Rivista di diritto internazionale* 98 (2015), 126-134, at 133.

[56]Felix Würkert, 'Historische Immunität? Anmerkung zu Sentenza Nr. 238 der Corte Costituzionale vom 22. Oktober 2014', *Archiv des Völkerrechts* 53 (2015), 90-120, at 108 and 110 (translated by the authors).

[57]Robert Kolb, 'The Relationship Between the International and the Municipal Legal Order: Reflections on the Decision no 238/2014 of the Italian Constitutional Court', *Questions of International Law: Zoom Out* 2 (2014), 5-16, at 11 and 13.

[58]Oreste Pollicino, 'From Academia to the (Constitutional) Bench', *Diritto pubblico comparato ed europeo* 4 (2015), 1117-1140, at 1117.

[59]Cataldi, 'A Historic Decision' 2015 (n 53).

2004 seem to express customary international law.[60] The most attractive German object of execution, the Villa Vigoni, is protected because it serves governmental objectives in a wider sense, including cultural policy, and has a non-commercial character.[61] However, a mortgage on part of this property was registered (again) in 2019, shedding light on the persisting legal insecurity.[62]

Sentenza 238/2014 triggered a wave of judgments by several Italian courts.[63] These lower court decisions in Florence (2015 and 2016),[64] Rome (2015),[65] Piacenza (2015),[66] Ascoli Piceno (2016 and 2017),[67] Sulmona (2017),[68] and Fermo (2018)[69] ordered Germany to pay reparation to Italian victims of massacres and deportation. At least 38 cases are currently pending,[70] although Germany has decided to no longer appear before Italian courts. The *Corte di Cassazione* ultimately

[60]UNCSI, 2004 (n 37).

[61]ICJ, *Jurisdictional Immunities* (n 2), para 119; cf, Art 19(c) of the UNCSI (n 37): 'No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that: (c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that postjudgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.'

[62]Registry of the judicial mortgage on 11 November 2019 after the *Tribunale di Sulmona* had issued its Order of 2 November 2017, RGACC 20/2015. Moreover, the question of whether credits owed by the *Ferrovie dello Stato* to *Deutsche Bahn AG* can legitimately be attached by the Italian state remains open. See Giovanni Boggero/Karin Oellers-Frahm, chapter 'Between Cynicism and Idealism', in this volume.

[63]See on the post-238/2014 cases, Giovanni Boggero/Karin Oellers-Frahm, chapter 'Between Cynicism and Idealism', in this volume, and 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; Giovanni Boggero, 'The Legal Implications of *Sentenza* No. 238/2014 by Italy's Constitutional Court for Italian Municipal Judges: Is Overcoming the "Triepelian Approach" Possible?', *Heidelberg Journal of International Law* 76 (2016), 203-224.

[64]*Tribunale di Firenze*, Judgment of 6 July 2015, NRG 8879/2011 and Judgment of 22 February 2016, NRG 14740/2009.

[65]*Tribunale di Roma*, Judgment of 20 May 2015, No 11069/2015.

[66]*Tribunale di Piacenza,* Judgment of 28 September 2015, No 723/2015.

[67]*Tribunale di Ascoli Piceno*, Order of 8 March 2016, NRG 112/2015 and Order of 24 February 2017, NRG 523/2015.

[68]*Tribunale di Sulmona*, Order of 2 November 2017, RGACC 20/2015.

[69]*Tribunale di Fermo*, Judgment of 20 October 2018, No 708/2018.

[70]A source from the German Ministry of Foreign Affairs communicated this figure to the authors in July 2020. The text of the email reads: 'The Federal Government does not have a complete overview of the number of plaintiffs in Italy, their background, their submissions or the exact status of the proceedings, because the Federal Government does not participate in these proceedings that are contrary to international law and rejects the illegal notification of the proceedings, usually without taking note of the content of the application. We are currently aware of 38 pending proceedings' (translated by the authors).

confirmed and reinforced these judgments, echoing the familiar *Ferrini* jurisprudence, in a recent case of September 2020.[71]

Moreover, just one year before, the same *Corte di Cassazione* seemed to have already allowed the execution of some of these lower judgments, at least against those assets of the Federal Republic of Germany that are not devoted to public purposes (*Giovanni Boggero/Karin Oellers-Frahm*).[72]

As early as 25 November 2014, one month after *Sentenza* 238/2014, Italy had declared its general recognition of the jurisdiction of the ICJ under the optional clause of Article 36(2) of the ICJ Statute, potentially inviting a second lawsuit before the ICJ. However, Germany decided against instituting a second proceeding before the ICJ against Italy for violating state immunity and for failing to uphold the 2012 judgment. At the time of writing, the situation does not seem any closer to a solution.

III. Immunity and Human Rights-Based Exceptions

The recent development of international law on immunities has been marked, in the words of Rosanne van Alebeek and Riccardo Pavoni, by 'a clear trend towards restricting immunity so as to impact least the rights and interests of private parties'.[73] Nevertheless, 'unabated heed is usually paid to the core rationale for immunity rules: the need to protect the sovereign rights of states'.[74] In a sober assessment, Ingrid Wuerth affirms that '[a]s international law stands today, immunity applies in suits alleging human rights violations as it does in other cases.'[75] The early millennium's momentum towards human-rights based exceptions to immunity[76] has been slowed down or even cut off. This halt may be due to the experience that such exceptions cause interstate frictions (as illustrated by the German-Italian case), and it is of course a consequence of the authoritative pronouncement by the ICJ in *Jurisdictional Immunities*. The hesitation also corresponds to a mounting scepticism toward the humanisation of international law and what the critique calls a human rights

[71] *Corte di Cassazione*, Judgment of 28 September 2020, No 20442/2020.

[72] *Corte di Cassazione*, Judgment of 3 September 2019, No 21995/2019; Cristina M Mariottini, 'Case Note: Deutsche Bahn AG v. Regione Stereá Ellada', *American Journal of International Law* 114 (2020), 486-493.

[73] van Alebeek/Pavoni, 'Immunities of States' 2018 (n 4), 169.

[74] Ibid.

[75] Ingrid Wuerth, 'International Law in the Post-Human Rights Era', *Texas Law Review* 96 (2017), 279-349, at 292.

[76] See in scholarship among the many voices, Paola Gaeta, 'Immunity of States and State Officials: A Major Stumbling Block to Judicial Scrutiny?', in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford: OUP 2012), 227-238.

overreach or 'proliferation'.[77] The backlash against international human rights is, to some extent, populist rhetoric.[78] Nevertheless, it must be taken seriously.

The tension between immunity and the protection of private interests is most acute when it comes to claims for reparation for war crimes and crimes against humanity before national courts. While the ICJ in *Jurisdictional Immunities* has decided only on the immunity of the state sued as a legal person before domestic courts in civil procedures, the Court explicitly distinguished this constellation from criminal law proceedings against state officials.[79] However, a range of actors is seeking to keep the door open for a further evolution of the law, notably but not strictly limited to criminal proceedings against state officials. So far, six states have deposited interpretative declarations upon their ratification of UNCSI, stating that the Convention is without prejudice to any future international development in the protection of human rights.[80] In 2009, the *Institut de droit international* adopted its Naples Resolution which states that '[i]mmunities should not constitute an obstacle to the appropriate reparation to which victims (...) are entitled.'[81] A decade later, draft Article 7 'Crimes under international law in respect of which immunity *ratione materiae* shall not apply' was provisionally adopted within the International Law Commission.[82]

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[77]Costas Douzinas, *The End of Human Rights: Critical Thought at the Turn of the Century* (Oxford: Hart 2000); Jacob Mchangama/Guglielmo Verdirame, 'The Danger of Human Rights Proliferation: When Defending Liberty, Less Is More', *Foreign Affairs* (24 July 2013); Makau Mutua, 'Is the Age of Human Rights Over?', in Sophia A McClennen/Alexandra Schultheis Moore (eds), *The Routledge Companion to Literature and Human Rights* (London: Routledge 2016), 450-458; Stephen Hopgood, *The Endtimes of Human Rights* (Ithaca/New York: Cornell University Press 2013).

[78]Veronika Bílková, 'Populism and Human Rights', *Netherlands Yearbook of International Law* 49 (2018), 143-174.

[79]ICJ, *Jurisdictional Immunities* (n 2), para 91.

[80]Interpretative declarations by Norway (27 March 2006); Sweden (23 December 2009); Switzerland (16 April 2010); Italy (6 May 2013); Finland (23 April 2014); Liechtenstein (22 April 2015).

[81]Article 2(2) of the *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes*, Rapporteur: Lady Fox. Institut de droit international, Third Commission, Naples Session, 3-11 September 2009, *Annuaire de l'Institut de droit international* 73 (2010), 1-231.

[82]ILC, Seventy-first session, Geneva, 29 April to 7 June 2019 and 8 July to 9 August 2019, Seventh report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur (A/CN.4/729) with Annex I: 'Draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted by the Commission'. Draft Article 7 runs: '1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: (a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of *apartheid*; (e) torture; (f) enforced disappearance. 2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.' See for state practice the criminal proceeding in Switzerland against a former Algerian minister of defence, instituted for torture, where the Swiss Federal Criminal Tribunal denied immunity *ratione personae* for acts which the minister had allegedly committed when still in office (Swiss Federal Criminal Tribunal, *Khaled Nezzar case*, Decision of 25 July 2012, BB.2011.140).

Three main argumentative strategies have been employed to carve out an exception from immunity in the event of serious human rights violations and crimes: the idea of an implied waiver of immunity, the theory of a normative hierarchy under which the ius cogens status of the crimes would trump immunity, and finally the 'remedy theory' which focuses on the right to a judge which would lead to an obligation of the courts to examine the merits instead of dismissing *a limine* any complaint, and if only as a last resort (*ultima ratio*).[83] However, none of these approaches has gained much ground (except the last one to which we will return below), nor has led to a broad change in practice.[84]

As a factual matter, the development of a new customary law—or treaty-based exception to state immunity (especially from execution) in cases of serious violations of human rights and international humanitarian law—is not impossible, but it still seems improbable, even at the highly integrated European regional level, as *Andreas Zimmermann* convincingly demonstrates in his chapter. A distinct question is whether and under which conditions it is desirable in legal policy terms.

Normatively, granting compensation for international crimes (notably recent ones) may form a useful part of a transitional justice strategy and contribute to the establishment of a sustainable peaceful order. Nevertheless, executive measures against foreign states based on judgments granting compensation against those countries, issued by the domestic courts of the victims' own states, risk creating significant international tensions. 'No state'—as *Christian Tomuschat* recalls—'is prepared to see its governmental conduct supervised by the judiciary of another country', and 'by attributing to each state its own sphere of jurisdiction (. . .) international law contributes to upholding peace in interstate relations'. This risk of conflict might even be exacerbated when judgments concern historical as opposed to recent crimes.

One way of containing this risk is resorting to domestic litigation in the home state of the victims only as an *ultima ratio*. This was, as mentioned, the Italian argument before the ICJ.[85] The civil proceedings are the last resort only when alternative remedies are lacking. As previously explained, *Sentenza* 238/2014 and subsequent judgments by the Italian *Corte di Cassazione*[86] have resorted to the third argumentative strategy, relying on the individual victims' right of access to a court

[83]See for the identification and analysis of these three strategies: Pierre D'Argent/Pauline Lesaffre, 'Immunities and *Jus Cogens* Violations', in Tom Ruys/Nicolas Angelet/Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge: CUP 2019), 614-633, at 615-624.

[84]Ibid, 614 and 630.

[85]See above text with notes 23-24. ICJ, *Jurisdictional Immunities* (n 2), para 98.

[86]Cf, *Corte di Cassazione*, Judgment of 28 October 2015, No 21946/2015 (*Flatow*), especially paras 4, 5, 6.6. The judgment concerns the request for exequatur of a US court decision awarding damages against Iran for acts of terrorism that had killed, inter alia, Michelle Alisa Flatow and were qualified as a crime against humanity. The second judgment is *Corte di Cassazione*, Judgment of 29 October 2015, No 43696/2015 (*Opačić*), especially para 5.2.1. It concerned a war crime against an Italian non-combat helicopter during the Yugoslav Wars.

(as also stressed by *Valerio Onida*). However, these judgments have not endorsed the condition of 'last resort'. In other words, they have not conditioned the displacement of state immunity on the absence of another effective and reasonable means for the plaintiffs to reclaim their rights.[87] Before the Italian courts, applicants have not been asked to show that they do not benefit from any other effective remedy.

The weak point of the Italian case law is that it does not dwell sufficiently on the contours of how the right of access to a court (which is of course not absolute) may legitimately be restricted. The task therefore is to spell out the conditions for such restrictions.

This task has so far been undertaken mainly by the ECtHR which has been called a '*de facto* court of appeal' on immunity.[88] Philippa Webb finds that the Strasbourg Court 'has the potential to lead us into an age of greater accountability for human rights violations'.[89] The ECtHR case law on the immunity of international organizations (not of states) has gone in the direction of a balancing test, tying the denial of access to a court (as a lawful restriction of the right to access under Article 6 of the European Convention on Human Rights (ECHR)) to the existence of a reasonable alternative remedy. With regard to state immunity, such a balancing approach would however not be in line with ICJ's ruling in *Jurisdictional Immunities*.[90] And because the ECtHR has confirmed that the 2012 ICJ Judgment 'must be considered by this Court as authoritative as regards the content of customary international law',[91] a further elaboration of a balancing approach by the Strasburg Court seems unlikely.

An alternative to lifting state immunity (under certain conditions) might be to strengthen diplomatic protection, maybe by acknowledging an international law-based obligation of the states to consider properly and with due diligence any request by their citizens to undertake steps of diplomatic protection at the international level.[92] Another way to secure accountability could be to establish an obligation of the states whose officials committed the crimes to grant access to judicial remedy and to award reparation under their own domestic law,[93] typically state liability statutes. Such a state obligation would ultimately be enforceable in international fora, and might help victims more than adjudication and enforcement in other equally sovereign

[87]See explicitly, *Corte di Cassazione*, *Opačić* (n 86), para 5.2.1. See also D'Argent/Lesaffre, 'Immunities' 2019 (n 83), 623.

[88]Philippa Webb, 'A Moving Target: The Approach of the Strasbourg Court to Immunity', in Anne van Aaken/Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford: OUP 2018), 251-263, at 262.

[89]Ibid, 263.

[90]See above text with notes 23-24. ICJ, *Jurisdictional Immunities* (n 2), para 101.

[91]ECtHR, *Jones* (n 9), para 198.

[92]Anja Höfelmeier, *Die Vollstreckungsimmunität der Staaten im Wandel des Völkerrechts* (Berlin: Springer 2018), 306-308; Cf also Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge: CUP 2016), 402-405.

[93]Italian (and Greek) lawsuits before German courts have been unsuccessful in this sense. Cf, *Bundesverfassungsgericht*, Order of 28 June 2004, 2 BvR 1379/01, BVerfGK 3, 277; *Bundesverfassungsgericht*, Order of 15 February 2006, 2 BvR 1476/03, BVerfGK 7, 303 (*Distomo*).

states.[94] Given the dilemma in which courts find themselves, 'between a rock and a hard place' (*Andreas Paulus*), it seems important to continue exploring these strategies for reconciling human rights protection with peaceful interstate coexistence.

IV. Reparation for Gross Human Rights Violations and War Crimes

The deportation of IMIs and their exploitation as forced labourers together with the massacres against the civilian population were (as Germany acknowledges) 'a serious violation of the international law of armed conflict applicable in 1943-1945' for which the state has assumed full responsibility.[95] Moreover, Germany paid reparations to the state of Italy, based on two international treaties of 1961.[96] Nevertheless, Germany has not granted individual reparation to large numbers of victims, and this denial is what led to *Sentenza* 238/2014.

The civil proceedings which ultimately involved the *Corte Costituzionale* might be seen in the overall current climate of addressing historical crimes. A strong wave of demands for reparation in the context of colonialism,[97] violence committed against indigenous peoples,[98] and slavery[99] is rolling on. Germany in particular is confronted with state claims for reparation, notably for damages caused in WWII, by Greece and Poland.[100] In addition, Namibia has requested reparation for crimes

[94]Höfelmeier, 'Vollstreckungsimmunität' 2018 (n 92), 307-308.

[95]ICJ, *Jurisdictional Immunities* (n 2), para 52.

[96]On 2 June 1961, two Agreements were concluded between the Federal Republic of Germany and Italy. Individual payments were nonetheless not contemplated. Agreement between the Federal Republic of Germany and Italy on the Settlement of Certain Property-Related, Economic and Financial Questions (Bonn, 2 June 1961), German and Italian version published in Bundesgesetzblatt II 26 June 1963 No 19, 668; Agreement between the Federal Republic of Germany and Italy on the Compensation for Italian Nationals Subjected to National-Socialist Measures of Persecution (Bonn, 2 June 1961), German and Italian version published in Bundesgesetzblatt II 5 July 1963 No 22, 791.

[97]See, eg, Larissa van den Herik, 'Reparation for Decolonisation Violence: A Short Overview of Recent Dutch Litigation', *Heidelberg Journal of International Law* 78 (2018), 629-633.

[98]Federico Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford: OUP 2008).

[99]Cf the current US debate on reparation for slavery: H.R. 40 - Commission to Study and Develop Reparation Proposals for African-Americans Act, 116th Congress 1st Session, introduced in House 3 January 2019, available at www.congress.gov/bill/116th-congress/house-bill/40/text. Cf as well the 2021 South Korean's judgment ordering Japan to pay compensation for wartime sexual slavery, Daniel Franchini, 'South Korea's denial of Japan's immunity for international crimes: Restricting or bypassing the law of state immunity?', *Voelkerrechtsblog*, (18 January 2021), available at https://voelkerrechtsblog.org/south-koreas-denial-of-japans-immunity-for-international-crimes/.

[100]See the Greek verbal note of 4 June 2019, available at https://www.mfa.gr/epikairotita/diloseis-omilies/anakoinose-tou-upourgeiou-exoterikon-skhetika-me-ten-epidose-rematikes-diakoinoses-sto-germaniko-upourgeio-exoterikon-gia-tis-polemikes-epanorthoseis-kai-apozemioseis-apo-ton-kai-pagkosmio-polemo-04062019.html. A Polish commission to identify damage done by

committed by German officials in the colonial context against the Herero and Nama people.[101] In a recent urgent debate in the UN Human Rights Council, the High Commissioner for Human Rights stated that '[b]ehind today's racial violence, systemic racism, and discriminatory policing lies the failure to acknowledge and confront the legacy of the slave trade and colonialism'. She urged states to 'make amends for centuries of violence and discrimination, including through formal apologies, truth-telling processes, and *reparations* in various forms.'[102]

It is of course a fundamental question whether and under which conditions it makes sense to draw history before courts. Indeed, as *Andreas von Arnauld* recalls in his chapter, 'adjudicating history might prove bottomless once one goes further back, with claims relating to early colonialism and beyond. However, in most of the recent cases of "history taken to court," compensation is but a secondary aim, the primary aim being to make the voice of the victims heard (. . .)'. He continues that courts are increasingly turned into fora to make one's story heard, 'and this process is used as leverage to exert pressure on the political system to listen'.

A judicial response is plausible where, as in the case leading to *Sentenza* 238/2014, the conduct was already unlawful according to the standards of international law applicable at the time of perpetration. Still, the issue of reparation for *individual* victims might need a nuanced response when the crimes lie in the distant past.

Even for contemporary atrocities, general international law as it stands does not yet fully acknowledge an individual right to reparation for victims of armed conflict.[103] But individual reparation is increasingly present in special reparation schemes, established by interstate treaties, other (often hybrid international/domestic) legal instruments, and soft law.[104] In other words, reparation for victims of international and non-international armed conflicts is becoming a typical feature in the ius post bellum, and this trend is unlikely to fade away. Nonetheless, as *Stefan*

Germany against Poland in the context of World War II has, according to the press, accomplished its work in May 2020. However, the results are not public. The commission had been established by the Polish governing party 'Law and Justice' and was chaired by a member of parliament belonging to that party.

[101] Negotiations between Germany and Namibia are ongoing. See for two antagonist assessments: Patrick O Heinemann, 'Die deutschen Genozide an den Herero und Nama: Grenzen der rechtlichen Aufarbeitung', *Der Staat* 55 (2016), 461-487; Kenneth L Lewis Jr, 'The Namibian Holocaust: Genocide Ignored, History Repeated, Yet Reparations Denied', *Florida Journal of International Law* 29 (2017), 133-149.

[102] UN High Commissioner for Human Rights, Michelle Bachelet, statement of 17 June 2020 (43rd session of the Human Rights Council, Urgent Debate on current racially inspired human rights violations, systemic racism, police brutality against people of African descent and violence against peaceful protests) (emphasis added).

[103] The UN General Assembly's Principles are not hard law and cannot in themselves create such an entitlement. UN General Assembly, 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, Annex, GA Res. 60/147, 16 December 2005.

[104] Christian Marxsen, 'The Emergence of an Individual Right to Reparation for Victims of Armed Conflict', in Peters/Marxsen, *Max Planck Trialogues* 2020 (n 5), 1-15.

Kadelbach argues, in the law of international armed conflict, a true antagonism is visible between the substantial and procedural dimensions of the law of reparations. While the victims are recognized as holders of the claims, 'the procedural right to espouse these claims on their behalf is still in the hand of the states.' This might also explain why a gap in implementation of 'scandalous proportions' remains, as a UN Special Rapporteur—who saw a 'dismal record in the implementation of reparations'—put it.[105]

With regard to the German crimes in particular, Graziella Romeo deplores the 'double standards' on the side of Italy. Human rights violations committed by Italian officials during the Fascist regime, for example by adopting and applying racial laws, and also by aiding German forces in perpetrating massacres against civilians, were not compensated on an individual basis but were mainly addressed 'with legislative provisions pertaining to welfare policy and only insufficiently restored, while a general regime concerning the restoration for human rights violations is still missing.'[106] She opines that the 'desirable (...) evolution of international law itself', as solicited by the *Corte Costituzionale*,[107] 'needs to be paired with a similar effort on the side of the Italian Parliament and courts'.[108] This shared 'sorry saga' indeed generates a shared committment (*Francesco Francioni*). Similar 'double standards' seem to be applied by the German side, too. In particular, the selectivity of various compensation schemes adopted by Germany and the constant exclusion of IMIs from reparation schemes dedicated to WWII victims (*Jörg Luther*) are not clearly justified: 'Why the French railroad deportees and not IMIs?' (*Riccardo Pavoni*).

Another important point is that—in the end—reparation for victims of armed conflict can only come about in an interplay between international and domestic law. If domestic institutions and procedures are not built up, then a putative international law-based entitlement to reparation would anyway remain virtual, a 'pie in the sky' as Shuichi Furuya recently put it.[109] However, the domestic reparation programmes for the victims of war crimes in both interstate and civil wars are often situated in a grey zone between law and politics. Such programmes have occasionally become an issue in regional human rights courts. These courts then examine the effectiveness of such programmes while applying the principle of subsidiarity which demands a certain amount of deference to the domestic institutions. This aspect is another manifestation of the new pluriverse made of international law and multiple domestic legal orders. This brings us to the third theme of the book: the interaction between international and domestic law and the role of domestic courts therein.

[105]Pablo de Greiff, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc. A/69/518, 14 October 2014 (quote from the summary).

[106]Romeo, 'Looking Back' 2016 (n 36), 237.

[107]ItCC, Judgment 238/2014 (n 1), para 3.3.

[108]Romeo, 'Looking Back' 2016 (n 36), 237.

[109]Shuichi Furuya, 'The Right to Reparation for Victims of Armed Conflict', in Peters/Marxsen, *Max Planck Trialogues* 2020 (n 5), 19.

V. The Interplay Between International and Domestic Law

As we have seen, state immunity, remedies and reparation for victims of atrocities are legal institutions which sit at the interface of international and domestic law. 'Cross-fertilisation' among different jurisdictions and their courts is typical in both areas.[110]

Generally speaking, national courts are called to apply and enforce international rules. This role has been captured by the theory of '*dédoublement fonctionnel*',[111] and by the idea that national judges are the 'natural judges of international law'.[112] Thus, the activity of domestic courts strengthens and promotes international law.

On the other hand, national courts often, and maybe increasingly so, resist the application of international law and the implementation of international judgments, notably of the regional human rights courts.[113] In the Inter-American human rights system, courts in Venezuela, Uruguay, Dominican Republic, Costa Rica, El Salvador, and Argentina have refused to fully implement judgments issued by the Inter-American Human Rights Bodies since 2011.[114] In the European human rights system, the resistance by the Russian Constitutional Court, followed by the legislature, is notorious, and the Court quoted *Sentenza* 238/2014 as a precedent.[115]

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[110]Cf for the issue of immunity D'Argent/Lesaffre, 'Immunities' 2019 (n 83), 629.

[111]See Georges Scelle, 'Le phénomène juridique du dédoublement fonctionnel', in Walter Schätzel/Hans-Jürgen Schlochauer (eds), *Rechtsfragen der internationalen Organisation: Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Frankfurt a M: Vittorio Klostermann 1956), 324-342. Hans Kelsen referred to domestic criminal courts as organs of the international community that apply domestic law and international law simultaneously; Hans Kelsen, *Principles of International Law* (Robert W Tucker (ed), New York: Holt Rinehart and Winston 2nd ed 1966), at 205-206 and 210.

[112]Antonios Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts', *Loyola of Los Angeles International and Comparative Law Review* 34 (2011), 133-168, at 150.

[113]Raffaela Kunz, 'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts', *European Journal of International Law* 30 (2019), 1129-1163; Raffaela Kunz, *Richter über internationale Gerichte?* (Heidelberg: Springer 2020).

[114]See Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights', *Cornell International Law Journal* 44 (2011), 493-533; Ximena Soley/Silvia Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights', *International Journal of Law in Context* 14 (2018), 237-257.

[115]Russian Constitutional Court, Judgment of 14 July 2015, No 21-П/2015. See also Federal Law of the Russian Federation, No 7-KFZ introducing amendments to the Federal Constitutional Law, No 1-FKZ of 21 July 1994 on the Constitutional Court of the Russian Federation, entered into force on 15 December 2015; Cf, more recently, Federal Law of the Russian Federation on the amendment to the Constitution of the Russian Federation, No 1-FKZ of 14 March 2020. See on the 2015 judgment and on further decisions of the Russian Constitutional Court, Lauri Mälksoo, 'Russia's Constitutional Court Defies the European Court of Human Rights: Constitutional Court of the Russian Federation Judgment of 14 July 2015, No 21-П/2015', *European Constitutional Law Review* 12 (2016), 377-395; Matthias Hartwig, 'Vom Dialog zum Disput?

1. Sentenza *238/2014 in the Line of Resistance of Domestic Courts Against International Judgments*

Thus, *Sentenza* 238/2014 appears as one more building block in the wall of 'protection' built up by domestic courts against 'intrusion' of international law, relying on the precepts of their national constitution.[116] This theme runs as a *fil rouge* through various chapters of the book. By way of introduction, we wish to recapitulate the most important *points de repère*.[117] The ItCC relied on its established case-law on the effects of European Union law, notably on the doctrine of *controlimiti* in order to erect a barrier to the 'introduction' of the ICJ judgment into the domestic legal order: 'As was upheld several times by this Court, there is no doubt that the *fundamental principles of the constitutional order* and inalienable human rights constitute a "limit to the introduction (. . .) of generally recognized norms of international law' (. . .) and serve as 'counterlimits' [*controlimiti*] to the entry of European Union [and now international] law"' into the domestic legal system.[118]

Ironically, this front of resistance had been spearheaded—as it is well known—both by the German Federal Constitutional Court (FCC), and by the ItCC already in the 1970s.[119] In 2004, the FCC denied a strictly binding effect of the ECHR and ECtHR-judgments, and instead (only) ordered German authorities and courts to 'take into account' the Convention and Strasbourg judgments, and only within the confines of the German Basic Law.[120] The most recent German case of 2020 held

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Verfassungsrecht vs. Europäische Menschenrechtskonvention: Der Fall der Russländischen Föderation', *Europäische Grundrechtezeitschrift* 44 (2017), 1-23; Ausra Padskocimaite, 'Constitutional Courts and (Non)execution of Judgments of the European Court of Human Rights: A Comparison of Cases from Russia and Lithuania', *Heidelberg Journal of International Law* 77 (2017), 651-684; Jeffrey Kahn, 'The Relationship between the European Court of Human Rights and the Constitutional Court of the Russian Federation: Conflicting Conceptions of Sovereignty in Strasbourg and St Petersburg', *European Journal of International Law* 30 (2019), 933-959; Galina A Nelaeva/Elena A Khabarova/Natalia V Sidorova, 'Russia's Relations with the European Court of Human Rights in the Aftermath of the Markin Decision: Debating the "Backlash"', *Human Rights Review* 21 (2020), 93-112.

[116] Anne Peters, 'Supremacy Lost: International Law Meets Domestic Constitutional Law', *Vienna Journal on International Constitutional Law* 3 (2009), 170-198. The judgments mentioned in the preceding section differ in tone and substance. But even well-meant decisions which erect moderate and good faith-'protections' against international law can be abused as 'precedents' by actors with a pronounced anti-international law agenda.

[117] This section again builds on Peters, 'Triepel' 2014 (n 42).

[118] ItCC, Judgment 238/2014 (n 1), 'The Law', para 3.2 (emphasis and square brackets added).

[119] In the 1970s, both Courts mounted critique against an insufficient respect for human rights by the then European Community (*Bundesverfassungsgericht*, Order of 29 May 1974, 2 BvL 52/71, BVerfGE 37, 271 (*Solange I*) and ItCC, Judgment of 27 December 1973, No 183/1973 (*Frontini*)) and threatened, with different levels of intensity, to scrutinize EC-acts against the yardstick of domestic fundamental rights and to refuse to allow their application in Germany and Italy.

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

that the Court of Justice of the European Union (CJEU)'s judgment upholding the European Central Bank's decision to establish a Public Sector Purchase Programme was 'manifestly disproportionate' and thus ultra vires.[121]

Sentenza 238/2014 repeats that any international norm (or international judgment) which stands in conflict with '*principi fondamentali dell'ordinamento costituzionale*' may not be applied by domestic institutions. The German FCC in *Görgülü* had marked the boundary of applicability of judgments of the ECtHR with exactly the same wording ('*tragende Grundsätze der Verfassung*').

The referring court of Florence had quoted a previous Italian constitutional judgment pointing to the '*identità*' of the Italian legal order. There, the ItCC had reaffirmed the principle that 'the tendency of the Italian legal order to be open to generally recognized norms of international law and international treaties is limited by the necessity *to preserve its identity*; thus, first of all, by the values enshrined in the Constitution'.[122] This is exactly what other European courts have done before (albeit with regard to EU law): the Spanish *Tribunal Constitucional*,[123] the French *Conseil constitutionnel,*[124] and the German *Bundesverfassungsgericht*.[125]

Sentenza 238/2014 is in some way a follower of the CJEU's *Kadi* decision[126] which the ItCC quotes.[127] But unlike *Kadi,* which mounts resistance against the UN Security Council and thus against an essentially unaccountable and not fully representative body, *Sentenza* 238/2014 is directed against the International Court of Justice, a body which represents the international rule of law and all regions of the world. Generally speaking, this Court has so far enjoyed a high degree of acceptance.[128] The de facto disobedience to the ICJ seems less justified as a matter of principle, and implies more serious damage to the normativity of the international legal system than disobeying the Security Council.

Just like *Kadi*, *Sentenza* 238/2014 insists on the fact that it has nothing to do with 'outbound' compliance of the state (Italy) with international law, but only concerns the internal compatibility of two Italian laws with the Italian Constitution: 'The

[121] *Bundesverfassungsgericht*, Judgment of 5 May 2020, 2 BvR 859/15, paras 117-143. See for a strong critique Sabino Cassese, 'Il Guinzaglio Tedesco', *Il Foglio*, 19 May 2020.

[122] ItCC, Judgment 238/2014 (n 1), para 1.2, quoting Judgment of 22 March 2001, No 73/2001 (emphasis added).

[123] *Tribunal constitucional*, Declaration of 13 December 2004, DTC 1/2004, sec II, para 3.

[124] *Conseil constitutionnel,* Decision of 27 July 2006, No 2006-540, para 19.

[125] *Bundesverfassungsgericht*, Judgment of 30 June 2009, 2 BvE 2/08 (*Treaty of Lisbon*), para 340. (See also Constitutional Court of Lithuania, case no 17/02-24/02-06/03-22/04 on the priority of the state constitution over EU law, 14 March 2006, sec III, para 9.4).

[126] CJEU, *Kadi and Al Barakaat International Foundation v Council and Commission*, Judgment of 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, EU:C:2008:461.

[127] But see Martin Scheinin, 'The Italian Constitutional Court's Judgement 238 of 2014 Is Not Another Kadi Case', *Journal of International Criminal Justice* 14 (2016), 615-620.

[128] This acceptance is not tainted by the fact that less than half of all states have accepted the Court's *compulsory* jurisdiction. States regularly subject themselves to its jurisdiction and the authority of the judgments is rarely contested.

result is a further reduction of the scope of this norm, *with effects in the domestic legal order only*.'[129] Put differently, the ItCC neatly distinguishes 'internal' and 'external' effects of an international norm: 'The impediment to the incorporation of the conventional norm [Article 94 of the United Nations Charter] to our legal order—albeit exclusively for the purposes of the present case—*has no effects on the lawfulness of the external norm* itself, and therefore results in the declaration of unconstitutionality of the special law of adaptation, insofar as it contrasts with the abovementioned fundamental principles of the Constitution'.[130] So technically (in a dualist world view), the case is not about supremacy but about incorporation: 'Accordingly, the *incorporation*, and thus the application, of the international norm would inevitably be precluded, insofar as it conflicts with inviolable principles and rights. This is exactly what has happened in the present case.'[131]

The judicial pretence that the 'internal' unconstitutionality basically does not concern international law, and the observation that the judicial pronouncement does not accord any priority or supremacy to internal law is formally correct. However, it is as unpersuasive in substance as it was in the CJEU *Kadi* judgment.[132] That distinction between inside and outside resonates with good old nineteenth century dualism, according to which international law and domestic law are 'two circles which at best touch each other but which never intersect'.[133]

The Italian Constitutional Court's consolation that '[i]n any other case, it is certainly clear that the undertaking of the Italian State to respect all of the international obligations imposed by the accession to the United Nations Charter, including the duty to comply with the judgments of the ICJ, remains unchanged'[134] does not help much for managing the practical problem at stake.

2. A Plea for a Pluralisme Ordonné

That stiff dualism à la Heinrich Triepel and Dionisio Anzilotti does not only fail to resolve the practical problem but additionally bears the real risk of reinforcing the perception that international law is only soft law or even no law at all. We submit that more flexibility is warranted. Courts should entertain procedural mechanisms of reciprocal restraint, respect, and cooperation for adjusting competing claims of authority between the international and the national bodies.[135]

[129] ItCC, Judgment 238/2014 (n 1), 'The Law', para 3.3 (emphasis added).

[130] Ibid, para 4.1 (emphasis added).

[131] Ibid, para 3.4 (emphasis added).

[132] CJEU, *Kadi* (n 126), paras 287-288 and 299.

[133] Triepel, *Völkerrecht* (n 43), 111 (translated by the authors).

[134] ItCC, Judgment 238/2014 (n 1), para 4.1.

[135] Cf also Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization', *International Journal of Constitutional Law* 15 (2017), 671-704.

Domestic (constitutional) courts should take into consideration international law in good faith and interpret the domestic constitution in the light of international law. A domestic court could interpret the (constitutional) right of access to a court (such as under Article 24 of the Italian Constitution) in the light of the ECtHR judgment *Sfountouris v Germany*, which implicitly held that access to domestic courts (in Germany) in suits for damages on account of German WWII-crimes appears to satisfy the standards of Article 6 ECHR.[136] Against this context, *Sentenza* 238/2014 appears as *une occasion perdue*, considering that 'the ItCC had the opportunity to oppose state immunity from jurisdiction to another international law principle' (*Sabino Cassese*).

National courts can also use a more 'harmonising' approach à la *Jones*.[137] *Jones* was a case on state immunity (involving Saudi Arabia) against allegations of torture. The ECtHR here had insisted that both issue areas of international law, the law of immunities and human rights law, must be reconciled, acknowledging 'the need to interpret the Convention so far as possible in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity'.[138] This led the ECtHR 'to conclude that measures taken by a State which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court'.[139] But the Court also observed that 'in light of the developments currently under way in this area of public international law, this is a matter which needs to be kept under review'.[140]

National courts can also apply the *Bosphorus* strategy.[141] In that approach, courts should employ a legal presumption that a legal act performed by a body rooted in 'another' legal system is in conformity with their 'own' standards. In *Bosphorus*, this presumption is coupled with the reciprocal recognition of such acts, 'as long as' some minimum requirements are not undercut. In this scheme, domestic courts abstain from revisiting (judicial or quasi-judicial) decisions taken by an international body on the basis of the rebuttable presumption that the respective international regime, or another state's domestic legal system (in our case Germany) offers a functionally equivalent legal protection. It is 'the admissibility of an imperfect accordance between the two systems', as *Alessandro Bufalini* puts it, that enhances the potentialities of equivalent protection as a technique for the balancing of different interests. Concededly, this more dialogical technique requires a close relationship or

[136]ECtHR, *Sfountouris and Others v Germany*, Decision of 31 May 2011, Application No 24120/06. This decision on inadmissibility found a claim based on Article 1 AP 1 in conjunction with Article 14 ECHR to be inadmissible *ratione materiae*.

[137]ECtHR, *Jones* (n 9).

[138]Ibid, para 189.

[139]Ibid.

[140]Ibid, para 215.

[141]ECtHR, *Bosphorus v Ireland*, Grand Chamber Judgment of 30 June 2005, Application No 45036/98.

similarity of legal orders, explaining why the technique is often used in the European context, while 'it is not used very often in genuine international law cases' (*Doris König*).

Most importantly, conflicts between international law and constitutional law should be resolved by balancing in the concrete case, not on the basis of a normative hierarchy or the norms' expression in international law as opposed to domestic law. Less attention should be paid to the formal sources of law, and more to the substance of the rules in question. The ranking and effects of the norms at stake should be assessed in a subtler manner according to their substantial weight and significance.[142] Such a non-formalist, substance-oriented perspective implies that on the one hand, certain less significant provisions in state constitutions would have to give way to important international norms. Inversely, fundamental rights guarantees should prevail over less important norms (independent of their locus and type of codification). The fundamental idea is that what counts is the substance, not the formal category of conflicting norms. Admittedly, this new approach does not always offer strict guidance, because it is debatable which norms are 'important' in terms of substance. Still, such a flexible approach appears to correspond better with the current state of global legal integration than the idea of a strict hierarchy, particularly in human rights matters. From this perspective, international law, constitutional law, and other states' constitutional law find themselves in a fluid state of interaction and reciprocal influence, based on discourse and mutual adaptation, but not in a hierarchical relationship.[143]

This flexible, procedural solution also reflects the fact that many different interests and claims are at play and to a certain extent allows the multiple roles played by domestic courts to be reconciled. *Raffaela Kunz* invites courts to increasingly see themselves as 'mediators *between* orders' rather than guardian of a particular legal system. 'More than strict conflict rules and hierarchies, what better fits to the complex reality is an approach that allows to take into account the different interests at stake and to balance them'.

Is the openness of the question 'who decides who decides' and the lack of an ultimate authority—in our context a tribunal sitting over and above the ICJ and the Italian *Corte Costituzionale*—a merit of the global order? In theory, such openness constitutes an additional mechanism for limiting power and seems to allow for a heterarchical adjustment of regimes. Within this paradigm, the constitutional resistance of the *Corte Costituzionale* might be interpreted as the pulling of an 'emergency brake' whose availability had been the pre-condition for the opening-up of the states' constitutions towards the international sphere in the first place. Along this line, one could argue that—in the absence of a super-arbiter—the Italian courts are entitled to act as 'guardians' of the rights of the victims or their descendants 'as long

[142]Peters, 'Supremacy Lost' 2009 (n 116).

[143]Yota Negishi, 'The *Pro Homine* Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control', *European Journal of International Law* 28 (2017), 457-481.

as' a customary human rights exception to state immunity has not crystallized or until a special agreement between Germany and Italy, on a special compensation programme or a claims tribunal, has been concluded. Potential models for each of these solutions already exist. In particular, numerous internal and international arrangements in the context of transitional justice might inspire the creation of a German-Italian Fund for the IMIs, as *Filippo Fontanelli* explains in detail in his chapter.

In the long run, reasonable resistance by national actors—if it is exercised under respect of the principles for ordering pluralism, notably in good faith and with due regard for the overarching ideal of international cooperation—might build up the political pressure needed to promote the progressive evolution of international law in the direction of a system more considerate of human rights. This is the 'barking and biting' approach mentioned by *Bernardo Giorgio Mattarella*: barking and a 'bite, from time to time and in exceptional circumstances, can be appropriate and necessary'. Indeed, such domestic resistance has, in the past, had salutary effects in the sense that it has stimulated an improvement in the attacked regime's fundamental rights protection: in reaction to the German Constitutional Court's *Solange I* decision, the EC/EU formalised its scheme of fundamental rights protection culminating in the European Charter of Fundamental Rights and—perhaps—the accession of the EU to the ECHR. Arguably, it was in reaction to the CJEU's *Kadi* decision and its progeny that the United Nations 1267-sanctions regime was complemented with an ombudsman procedure.[144]

At first glance, *Sentenza* 238/2014 strengthens the position of the individual against the state. But on a more profound level, it strengthens unilateralism and particularism over universalism and multilateralism. As *Heike Krieger* highlights, these kinds of challenges to the normativity of the international legal order are troubling. *Sentenza* 238/2014 ultimately gives priority to one state's national outlook about what constitutes a proper legal order over the universal standard pronounced by an international court. Concededly, this ICJ standard is unsatisfactory and seems to be biased in favour of the stability of an interstate system. On the other hand, it still has the merit of being *universal*. The lack of an ultimate arbiter tends to result in the political dominance of the more powerful actors which are normally the domestic ones such as the Italian *Corte Costituzionale*—and the German *Bundesverfassungsgericht*. One way out would be to establish such an arbiter.[145]

[144]UN Security Council, Resolution 1904 (17 December 2009), which has been gradually improved, UN SC Res. 1989 (17 June 2011).

[145]As recently proposed by Daniel Sarmiento and Joseph H H Weiler in the aftermath of the *Bundesverfassungsgericht's* ultra vires pronouncement. The authors suggested to establish a mixed chamber, composed of both European and national judges, to decide about allegations that an international body acts ultra vires and thereby infringes national sovereignty (and national constitutional law). Daniel Sarmiento/Joseph H H Weiler, 'The EU Judiciary After *Weiss*: Proposing A New Mixed Chamber of the Court of Justice', *VerfBlog*, (2 June 2020), available at https://verfassungsblog.de/the-eu-judiciary-after-weiss/. See also along this line, Christine Landfried, 'Politische Versäumnisse', *Neue Zürcher Zeitung* (18 June 2020).

As long as this is missing, we need to work towards what has been called a '*pluralisme ordonné*'.[146]

VI. A 'Modest Proposal'

This book reflects multiple sensibilities and different perspectives on the issue of war crimes, immunities and reparation. Although an *idem sentire* is recognizable among the authors, they meaningfully disagree on strategies for a sustainable solution of the stalemate. This variety of viewpoints prevents us from adopting one shared conclusion and explains the form of the 'dialogical' epilogue *en lieu de conclusion*.

As editors, in a purely personal capacity, we nevertheless submit a five-step 'modest proposal' which is inspired by ideas formulated by numerous authors, and represents a short manifesto ideally addressed to decisionmakers.

Negotiations
Political talks concerning the issue at hand should be resumed as soon as possible, as already encouraged by the ICJ in its 2012 Judgment.[147] Further legal action, eg filing another case before the ICJ, would not lead to an effective solution and would come at the expense of the victims.

Reparation
A joint German-Italian reparation fund should be created to provide lump sum payments to the victims. A prior stocktaking of the reparation measures adopted so far and a non-bureaucratic registration of victims would form the basis for the creation of such a fund. When compiling the list of victims and determining the most important reparation criteria (eligibility requirements, level, and type of reparation), Italy could take over a leading role and send an important sign of assuming responsibility towards its own citizens. Criteria based on the economic need of victims could also be taken into consideration.

Victims
There is a need to recognize those victims who have thus far received no attention, including the IMIs. Together with the payment of an—at least symbolic—reparation sum, such recognition would generate satisfaction, encouraging pacification.[148]

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[146] Mireille Delmas-Marty, *Le pluralisme ordonné: Les forces imaginantes du droit* (Paris: Seuil 2006).

[147] '[The Court] considers (. . .) that the claims (. . .) could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue.' ICJ, *Jurisdictional Immunities* (n 2), para 104.

[148] In the end, it may be less the 'status' of victim which is disputed but the legal (and economic) consequences, namely the entitlement to financial compensation. See for an empirical analysis of the pronounced preferences of victims for monetary compensation over other forms of 'reparation',

Where a direct victim had lost her or his life as a consequence of wrongful acts, the heirs can bring a case before courts. First degree relatives (in the vertical line) and the spouse should be considered as direct victims still affected by the events. In principle, no other relatives or further generations of heirs should be eligible for lump sum reparation.

Actors
Besides the Italian and German foreign ministers, the Heads of State could assume a leading role in initiating the necessary steps. It is advisable to involve civil society organizations as well as other non-state actors.

Time-Factor
Effective reparation requires adopting the aforesaid measures urgently. At the same time, determined action might be appreciated as manifesting cooperation within Europe and as underlining Italy's and Germany's unreserved commitment to safeguarding human rights and promoting human dignity.

Post (Personal) Scriptum

Valentina Volpe

For a long time, a shared family memory portrayed my grandfather Giuseppe Volpe, *Maresciallo dei Carabinieri,* as a deportee in the concentration camp of Dachau. We knew few things about his imprisonment: the couple of letters he sent, the watch and the wedding ring he wore, and the fact that he died in this same camp, on Christmas Eve 1944, mere months before liberation. Contradicting decades of family narrations, recent databases dedicated to non-returned IMI's indicated, in fact, a camp on the French territory, in the Vosges mountains, as the alleged destination of his European wartime journey.

Coincidenze The Natzweiler-Struthof camp was located just a few kilometers from Strasbourg, the city where I spent my Erasmus year. Exactly 60 years after the end of WWII, I was living, in the same places of my grandfather's imprisonment, one of the most genuine experiences of European companionship, and 'companion'—as Mario Rigoni Stern once wrote—etymologically unites those who shared the same bread ('cum panis').[149] As I was gradually getting used to the image of the peaceful Vosges mountains as his ultimate resting place, additional coincidences linked to this volume's research began to emerge, bringing our discontinuous stories closer. The Natzweiler-Struthof concentration camp, as Dachau before, turned out to be just another intermediate stop in his deportation journey.

Prakash Adhikari/Wendy L Hansen, 'Reparations and Reconciliation in the Aftermath of Civil War', *Journal of Human Rights* 12 (2013), 423-446, at 441. These findings concern victims of recent conflicts who need the money to rebuild their lives out of the ruins of war. The preferences may be different when it comes to crimes lying further in the past.

[149]Mario Rigoni Stern, Letter to the Provincial Congress of the ANPI Treviso, 2007, *Il Calendario del Popolo* (August-September 2008).

In the German city of Heilbronn, in the district of Neckargartach, there is a small concentration camp cemetery near the river Neckar in which 246 deportees were laid to rest. It was there that I discovered Giuseppe Volpe's resting place in May 2018. If finally, there is a flower on his memorial, it is thanks to this volume.[150] Heilbronn is just an hour's drive from Heidelberg, the city in which I completed my postdoctoral research on human rights and international law at the MPIL, and where this book about interstate conciliation was conceived. For three years, unaware, we have been both, grandfather and granddaughter, contemplating the same Neckar river, which crosses both Heidelberg and Heilbronn, silently linking our generations.

I dedicate this book to *nonno* Giuseppe who I never met, to his generation and to my own, to those in-between and especially to those to come. May they handle the unprecedented, yet fragile, privilege of being *com-panions* in Europe with care.

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[150] I particularly need to thank the precious and voluntary work of Roberto Zamboni and his website *Dimenticati di Stato*, https://dimenticatidistato.com. He has been the only source to correctly cite the camp of Heilbronn, where I could discover the concentration camp cemetery and memorial, while closing some family circles. He also reconstructed all the steps of my grandfather's painful European journey and found additional archive material. I also want to thank Enzo Orlanducci, President of the National Association of the POWs, military and civilian camp internees and combatants of the War of Liberation and their families (*Associazione Nazionale Reduci dalla Prigionia, dall'Internamento, dalla Guerra di Liberazione e loro familiari*, ANRP), for the time he kindly dedicated to me on the occasion of a visit to the Rome Museum *Vite di IMIs* and for having included Giuseppe Volpe's story within the IMIs' database.

Giuseppe Volpe was born on 21 January 1905 in La Maddalena, in Sardinia. *Maresciallo dei Carabinieri,* he was captured on the Croatian front after 8 September 1943 and deported with another 101 prisoners on a convoy leaving from Trieste in December. The train had as its destination the Dachau concentration camp. Upon arrival, he was assigned the serial number 60657 and was classified as deported for precautionary reasons (abbreviation SCH – *Schutzhäftlinge*/ *Sch. Itl.* 'Italian prisoner'). On 27 March 1944, he was transferred to the Natzweiler concentration camp in Alsace and then finally deported to the Neckargartach subcamp, in Heilbronn, Germany. Giuseppe Volpe died on Christmas Eve 1944, at the age of 39.

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