THE EVOLUTION OF THE STATE IMMUNITY LAW IN THE LIGHT OF THE CASE *GERMANY V. ITALY (2)*: WHERE DO WE STAND?[*]

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1. Introduction.

As is well known, the long-running German-Italian dispute over State immunity has recently undergone significant developments, with the filing on 29 April 2022 of a new action by the Federal Republic of Germany against the Italian State before the International Court of Justice (ICJ)[1]. Germany claims that, despite the famous *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* ruling of 2 February 2012[2], Italy has

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[1] Application Instituting Proceedings and Request for Provisional Measures (29 April 2022), *Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-Owned Property (Germany v Italy)*; see, also, International Court of Justice (ICJ), Order of 10 May 2022, which placed on record the withdrawal of the request for provisional measures by the German State (see *infra*). Among the first comments on the case, see A. Franzina, *Jurisdictional Immunities: Germany v. Italy, Again*, in *The European Association of Private International Law*, 4 May 2022, https://eapil.org/; L. Gradoni, *Is the Dispute between Germany and Italy over State Immunities Coming to an End (Despite Being Back at the ICJ)?*, in *Ejil:Talk!*, 10 May 2022, https://www.ejiltalk.org/; G. Berrino, *Un'istantanea del nuovo ricorso della Repubblica federale tedesca alla Corte internazionale di giustizia per violazione delle immunità giurisdizionali da parte dello Stato italiano*, in *SIDIBlog*, 16 May 2022, http://www.sidiblog.org/; R. Pavoni, *Germany versus Italy reloaded: Whither a human rights limitation to State immunity?*, in *Questions of International Law*, 31 July 2022; P. Rossi, *Italian courts and the evolution of the law of State immunity: A reassessment of Judgment No. 238/2014*, in *Questions of International Law*, 31 July 2022, http://www.qil-qdi.org/.

[2] ICJ, Judgment of 2 February 2012, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*; on the case see, *ex multis*, in *Italian Yearbook of International Law*, 2011, contributions from B. Conforti, *The Judgment of The International Court of Justice on the Immunity of Foreign States: A Missed Opportunity*, p. 133; R. Pavoni, *An American Anomaly? On the ICJ's Selective Reading of United States Practice in Jurisdictional Immunities of the State*, p. 143; C. Espósito, *Jus Cogens and Jurisdictional Immunities of States at The International Court Of Justice: A Conflict Does Exist*, p. 161; M. Sossai, *Are*

violated and continues to violate the jurisdictional immunities of the German State: 1) by allowing compensation claims to be brought against Germany for the violations of humanitarian law committed by the troops of the Third Reich during the Second World War in Italy; 2) by taking, or threatening to take, coercive measures against German State-owned properties intended for public purposes located on the Italian territory (including the German Archaeological Institute, the German Historical Institute, the Goethe Institut and the Germanic School)[3]. Furthermore, precisely because of this last point, the application issued by Germany was accompanied by a request for the indication of provisional measures under Article 41 of the Statute of the Court, in order to ensure that the seized state assets would not be authorised for public auction and that no further measures of constraint would be undertaken[4].

The case, however, was bound to have unexpected developments.

Germany indeed withdrew this last request, following the immediate reaction on the part of the Italian Government, which, the day after the filing of the appeal, adopted the Decree-Law No. 36 of 30 April 2022 (later converted into law under Law No. 79 of 29 June 2022)[5]. Article 43 of the decree establishes a Fund at the Ministry of Economy and Finance «for the compensation of damages suffered by the victims of war crimes and crimes against humanity for the violation of inviolable personal rights, committed on Italian territory or in any case to the detriment of Italian citizens by the forces of the Third Reich in the period between 1 September 1939 and 8 May 1945». This Fund is intended to satisfy those who

Italian Courts Directly Bound to Give Effect to the Jurisdictional Immunities Judgment?, p. 175; R. Pisillo Mazzeschi, *Il rapporto fra norma di ius cogens e la regola dell'immunità degli Stati: alcune osservazioni critiche sulla sentenza della Corte internazionale di giustizia del 3 febbraio 2012*, in *Diritti umani e diritto internazionale*, n. 6/2012, p. 310.

[3] Germany requests that the ICJ ascertains these violations, as well as the obligation for Italy to ensure that the decisions taken in violation of immunities cease to have effect and that national courts stop examining claims for compensation; finally, it requests guarantees of non-repetition and reparation of the damages caused, see the Application (note No. 1).

[4] On this point see K. Oellers-Frahm, *Questions relating to the request for the indication of provisional measures in the case Germany v Italy*, in *Questions of International Law*, 31 July 2022.

[5] Decree-Law No. 36 of 30 April 2022, *Ulteriori misure urgenti per l'attuazione del Piano nazionale di ripresa e resilienza (PNRR)*, Gazzetta Ufficiale della Repubblica Italiana No. 100 of 30 April 2022, 1, converted into law by Law No. 79 of 29 June 2022, Gazzetta Ufficiale della Repubblica Italiana No. 150 of 29 June 2022, 1; for more details see G., Boggero, *La reazione del Governo italiano al (nuovo) ricorso tedesco di fronte alla CIG. Prime note sugli effetti dell'art. 43 d.l. 30 aprile 2022, n. 36*, in *SIDIBlog*, 25 May 2022, http://www.sidiblog.org/; G. Berrino, *The impact of Article 43 of Decree-Law No. 36/2022 on enforcement proceedings regarding German State-owned assets*, in *Questions of International Law*, 31 July 2022, http://www.qil-qdi.org/.

have obtained a final judgment awarding damages against Germany[6] (excluding foreign victims who have obtained a foreign sentence for crimes committed abroad); moreover, pursuant to Article 43(3), it is intended to prevent the commencement or continuation of all enforcement proceedings based on such judgments (and, as clarified in its conversion into law, this also concerns foreign judgments[7]). The aim is to make payment through the Fund the only possible form of redress thus protecting Germany from all enforcement actions against its assets. Believing, therefore, that by setting up the Fund, Italy had intended to meet the *central concern* expressed by the request for provisional measures[8], Germany withdrew this specific claim. The appeal, however, still stands and the case is far from being over, since the provision establishing the Fund was subject to a question of constitutional legitimacy at the end of 2022[9], which makes the future of the dispute even more uncertain.

The latest developments, therefore, reopen the "never-ending story"[10] of the *Germany v. Italy* dispute and raise multiple questions as to the fate of the appeal as well as the impact of these events on the evolution of the rule of State immunity. We clearly refer to the central issue highlighted by the *Germany-Italy* affair, which concerns the possibility of limiting the State immunity from foreign civil jurisdiction in the case of a State conduct leading to the violations of *jus cogens*[11].

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[6] If the judgment results from proceedings which began before the entry into force of the decree or within a period of 180 days from such a date (the period was extended by the conversion of the decree into law).

[7] The critical issues related to this differential treatment will be highlighted in section No. 3 of the present article.

[8] As we learn from the statements of the German authorities in the ICJ Order of 10 May 2022 (see note No. 1).

[9] See Order No. 154/22 of 1 December 2022 (*G.M.T. v. Federal Republic of Germany and others 3*), by which a judge of the Court of Rome raised a question of constitutional legitimacy on Article 43 c. 3 of the decree-law No. 36 of 30 April 2022, and on law No. 79 of 29 June 2022 – *Conversione in legge, con modificazioni, del decreto-legge 30 aprile 2022, n. 36, recante ulteriori misure urgenti per l'attuazione del Piano nazionale di ripresa e resilienza (PNRR)* – that entered into force on 30 June (for more details see section No. 3).

[10] The expression is taken from K. Oellers-Frahm, *A Never-Ending Story: The International Court of Justice – The Italian Constitutional Court – Italian Tribunals and the Question of Immunity,* in *ZaöRV*, n. 76/2016, p. 193.

[11] In this regard, it is recalled that the State immunity rule has been progressively eroded over time. In particular, from the conception of absolute immunity, which was classically held to be enjoyed by States by virtue of the principle *par in parem non habet iudicium*, the development of the theory of relative immunity came along, spurred by the Italian and Belgian jurisprudence following the First World War. According to this theory, which today corresponds to customary international law, immunity from civil jurisdiction applies only to acts *jure imperii*, i.e., acts through which the State exercises its public functions, and it does not apply to acts *jure gestionis*, i.e., acts of a private nature. This gradual evolution has also affected other areas such as employment disputes (see in this regard P. Rossi, *Controversie di lavoro e immunità degli Stati esteri: tra codificazione e sviluppo del diritto consuetudinario*, in *Rivista di diritto internazionale*, n. 1/2019, p. 5; P.

In this article, in addition to offering some thoughts on the future scenarios of the dispute, we will consider the current state of development of the rule of immunity, and we will take into account the contributions made in this regard thanks to the jurisprudential direction dictated by the Italian domestic courts[12]. Specifically, we believe that the issue should be assessed from several points of view: in particular, one should ask what contribution Italian jurisprudence has provided to 1) the evolution of the customary rule of immunity (with respect to its limitation on the basis of serious violations of human rights and humanitarian law); 2) the practice of invoking constitutional principles as a circumstance precluding wrongfulness; 3) the formation of a specific international norm protecting the right to justice.

To achieve this end, it will be necessary to start from the beginning.

2. The *Germany v. Italy* dispute: a long story (part. 1).

A snapshot of the long-standing dispute between Germany and Italy can be well represented by these three key rulings: the *Corte di Cassazione* Judgment *Ferrini v. Federal Republic of Germany* of 2004[13], in which the Supreme Court affirmed the Italian jurisdiction over Germany in relation to the compensation claims of a victim of international crimes committed by the troops of the Third Reich during World War II in Italy; the aforementioned judgment of the ICJ of 2012, in which the Hague judges firmly established that in customary law there is no exception to the immunity of States even in the presence of conduct contrary to *jus cogens*; the well-known judgment 238/2014 of the

Busco and F. Fontanelli, *Shunning Conventional Wisdom – Italian Courts and State Immunity in Employment Disputes*, in *Ejil: Talk!*, 28 December 2021, https://www.ejiltalk.org/).

[12] For a recent collection of Italian court rulings concerning the immunity of a foreign State from civil jurisdiction in proceedings concerning war crimes and crimes against humanity, see L. Baiada, E. Carpanelli, A. Lau, J. Lau and T. Scovazzi, *La giustizia civile italiana nei confronti di stati esteri per il risarcimento dei crimini di guerra e contro l'umanità*, Naples, Editoriale Scientifica, 2023 (forthcoming).

[13] *Corte di Cassazione (Sezioni Unite Civili)*, Judgment No. 5044 of 6 Nov. 2003, registered 11 Mar. 2004; on the case, see, *inter alia*, A. Gianelli, *Crimini internazionali ed immunità degli Stati dalla giurisdizione nella sentenza Ferrini*, in *Rivista di diritto internazionale*, 87/2004, p. 643; M. Iovane, *The Ferrini Judgment of the Italian Supreme Court: Opening Up Domestic Courts to Claims of Reparation for Victims of Serious Violations of Fundamental Human Rights*, in *Italian Yearbook of International Law*, 2004, p. 165; A. Gattini, *War Crimes and State Immunity in the Ferrini Decision*, in *Journal of International Criminal Justice*, 2005, p. 224; P. De Sena and F. De Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, in *The European Journal of International Law*, n. 1/2005, p. 89.

Italian Constitutional Court[14], which, resorting to the theory of *counter-limits*, held that the rule on immunity should be considered inoperative within the national legal system in the case of conducts corresponding to international crimes, since it is incompatible with the fundamental constitutional principle of the judicial protection of human rights.

It should be recalled that, in the leading case *Ferrini*, the Supreme Court had courageously noted an exception to the application of the customary rule on State immunity, due to its contrast with *jus cogens*. The Court, at first, had qualified the conduct of the German occupation forces during the Second World War as a conduct of extreme gravity, such as to constitute international crimes (Mr. Ferrini had been subjected to forced deportation). Then, by reconceiving the norms which prohibit international crimes as *jus cogens* norms, i.e., the inalienable values of our society, the Court affirmed that such crimes

> si concretano nella violazione […] dei diritti umani fondamentali della persona umana, la cui tutela è affidata a norme *inderogabili* che si collocano al vertice dell'ordinamento internazionale, *prevalendo* su ogni altra norma, sia di carattere convenzionale che consuetudinario[15]

[14] Constitutional Court, Judgment No. 238 of 22 October 2014; on the judgment see, *ex multis*, L. Gradoni, *Corte Costituzionale italiana e Corte internazionale di giustizia in rotta di collisione sull'immunità dello Stato straniero dalla giurisdizione civile*, in *SIDIBlog*, 27 October 2014; P. Passaglia, *Una sentenza (auspicabilmente) storica: la Corte limita l'immunità degli Stati esteri dalla giurisdizione civile*, in *Diritti comparati*, 28 October 2014; R. Pisillo-Mazzeschi, *Acces to justice in constitutional and international law: the recent judgment of the Italian constitutional court*, in *Italian Yearbook of International Law*, 2014, p. 9; M. Bothe, *The Decision of the Italian Constitutional Court Concerning the Jurisdictional Immunities of Germany*, in *Italian Yearbook of International Law*, 2014, p. 25; G. Cataldi, *A Historic Decision of the Italian Constitutional Court on the Balance between the Italian Legal Order's Fundamental Values and Customary International Law*, in *Italian Yearbook of International Law*, 2014, p. 37; P. Palchetti, *Can State Action on Behalf of Victims be an Alternative to Individual Access to Justice in case of Grave Breaches of Human Rights?*, in *Italian Yearbook of International Law*, 2014, p. 53; E. Cannizzaro, *Jurisdictional Immunities and Judicial Protection: The Decision of the Italian Constitutional Court No. 238 of 2014*, in *Rivista di Diritto Internazionale*, n. 1/2015, p. 126; L. Gradoni, *La sentenza n. 238 del 2014: Corte costituzionale italiana «controvento» sull'immunità giurisdizionale degli Stati stranieri?*, in *Quaderni costituzionali*, n. 3/2014, p. 905; P. De Sena, *The Judgment of the Italian Constitutional Court on State Immunity in Cases of Serious Violations of Human Rights or Humanitarian Law: A Tentative Analysis under International Law*, in *Questions of International Law*, 2014, p. 17; among those who had anticipated the outcome of the Supreme Court ruling there were: G. Cataldi, *The Implementation of the ICJ's Decision in the Jurisdictional Immunities of the State Case in the Italian Domestic Order: What Balance Should Be Made between Fundamental Human Rights and International Obligations?*, ESIL Reflections, 24 January 2013; R. Pavoni, *The Law of International Immunities after Germany v. Italy, Mothers of Srebrenica and Jones: The Best Is Yet to Come*, ESIL Newsletter, March 2014; F.M. Palombino, *Italy's Compliance with ICJ Decisions vs. Constitutional Guarantees: Does the 'Counter-Limits' Doctrine Matter?,* in *Italian Yearbook of International Law*, 2012, p. 187.

[15] *Corte di Cassazione (Sezioni Unite Civili)*, Judgment No. 5044, cit., par. 9.

Ferrini's *dictum* had thus kicked off a series of civil lawsuits against Germany, relating to the damage caused by *acta iure imperii* that took the form of international crimes[16]; moreover, the Italian courts had granted *exequatur* against certain decisions of the Greek courts that had condemned Germany[17].

As a result of the direction taken by the Italian courts, and especially following the initiation of enforcement actions on German real estate located in Italy (concerning, for example, the famous Villa Vigoni)[18], in 2008 the Federal Republic of Germany brought an action before the ICJ, claiming that Italy had breached the international obligation to respect its jurisdictional immunities enjoyed under customary law.

As is well known, the ICJ fully agreed with Germany, finding, in the light of *practice* and *opinio juris*, that the rule on the immunity of States from civil proceedings and enforcement actions is applicable even in the presence of serious violations of human rights and international humanitarian law. While it is undeniable that the findings of the 2012 judgment were widely supported in the international community, especially in Common Law countries, there is no shortage of authoritative criticism, which described it as a *missed opportunity* and a deeply *conservative* judgment[19]. From this point of view, in fact, the judgment reflects a traditionalist view of the international order, in which the pre-eminence of State sovereignty is confirmed, whereas the transformative thrust of the protection of human rights and the role they have acquired as fundamental values within our legal system is not recognised.

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[16] It is recalled, *inter alia*, the case involving Milde, a member of the S.S., who was sentenced to life imprisonment for the Civitella (Val di Chiana) massacre by the Criminal Court of La Spezia, and also to compensation for damages against the rightful claimants together with Germany. Following the German State's appeal against this part of the decision, there was a judicial process ending with the 21 October 2008 ruling of the Court of Cassation (No. 1072), which rejected the argument of Germany's lack of jurisdiction and confirmed Ferrini's findings; see on the case A. Ciampi, *The Italian Court of Cassation Asserts Civil Jurisdiction Over Germany in a Criminal Case Relating to the Second World War: The Civitella Case*, in *Journal of International Criminal Justice*, n. 3/2009, p. 597; M. Frulli, *La 'derogabilità' della norma sull'immunità degli Stati dalla giurisdizione in caso di crimini internazionali: la decisione della Corte di Cassazione sulla strage di Civitella della Chiana*, in *Diritti umani e diritto internazionale*, n. 2/2009.

[17] See for example the *Distomo* case, Court of Appeal of Florence, decree of 5 May 2005, confirmed by Court of Cassation, Judgment of 29 May 2008, No. 14199; on this case: M. Bordoni, *L'ordine pubblico internazionale nella sentenza della Cassazione sulla esecuzione della decisione greca relativa al caso Distomo*, in *Rivista di diritto internazionale*, n. 2/2009, p. 496.

[18] The enforcement actions on German property located on Italian territory initially concerned the German-Italian Centre for European Dialogue, based at Villa Vigoni, following the *exequatur* by the Court of Appeal of the sentence issued by the Greek Court of Cassation concerning the compensation due to the victims of the 1944 Distomo massacre, see *supra*.

[19] B. Conforti, *The Judgment of The International Court of Justice on the Immunity of Foreign States: A Missed Opportunity*, cit.

Specifically, one cannot deny the critical aspects of the arguments put forward by the ICJ, which have been widely noted in doctrine. We shall recall, in particular, the distinction made by the Court between the rules on immunity, of a *procedural* nature (which therefore come into play in a preliminary and autonomous way), and the rules of *jus cogens*, of a *substantive* nature, on the basis of which it was established that there could be no conflict between them. According to the Court, in fact «the two sets of rules address[ing] different matters. The rules of State immunity are procedural in character and [...] do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful»; therefore «recognising the immunity of a foreign State in accordance with customary international law does not amount to recognising as lawful a situation created by the breach of a *jus cogens* rule»[20]. As has been argued, this is an entirely formalistic assessment, which threaten to empty *jus cogens* of all practical meaning[21].

The Court also rejected the Italian argument of a possible application of the so-called *tort exception*[22], provided for by Article 11 of the 1972 *European Convention on State Immunity*[23] and Article 12 of the 2004 *UN Convention on Jurisdictional Immunities of States and Their Property*[24], as well as by the domestic legislation of various States[25], arguing that, regardless of the existence of a customary rule on the matter[26], it applies only to ordinary torts and not to torts committed *pendente bello*[27]. Finally, the Court also rejected the so-called *last resort argument* put forward by the Italian defence, according to which the victims of Nazi crimes, having been unable to obtain any compensation in Germany, risked being deprived of the fundamental right to justice. While expressing regret for the lack of alternative remedies for the victims, the ICJ only stated that the argument does not affect the application of the immunity rule and that a negotiation between Germany and

[20] ICJ, *Jurisdictional Immunities of the State*, cit, par. 93.
[21] See, among others, C Espósito, *Jus Cogens and the Jurisdictional Immunities of States in the International Court of Justice: A Conflict Does Exist,* cit.
[22] According to which the immunities of the foreign State are excluded in case of actions for compensation for damage to persons and property provided that the action took place in the territory of the forum State.
[23] *European Convention on State Immunity*, Basel, 16.V.1972.
[24] *United Nations Convention on Jurisdictional Immunities of States and Their Property*, New York, 2 December 2004.
[25] See the national legislations of the countries listed in para. 70 of the Judgment.
[26] The Court observes that it is not called upon to resolve the question of the existence, in customary international law, of a *tort exception* to State immunity applicable to *acta jure imperii* in general. It is also noted that the two aforementioned conventions are not applicable, as Italy had not ratified them at the time of the events; see ICJ, *Jurisdictional Immunities of the State*, cit, paras. 62-79.
[27] On the criticality of asserting such a *counter-exception* to the *tort exception*, see ICJ, *Jurisdictional Immunities of the State*, cit., Dissenting Opinion of Judge *ad hoc* Gaja.

Italy to solve the issue is always possible[28]. On this aspect, which was strongly criticised because it risks leading to a denial of justice[29], the Court's omission of some important precedents endorsing, instead, the *alternative remedy* test as a condition for granting immunity was also noted[30]. There were also those who found the Court's investigation into the current state of customary law on State immunity to be very deficient in other respects, especially its treatment of the US practice, which was considered incomplete and misleading[31].

In any case, following the ICJ ruling, the Italian courts discontinued the ongoing proceedings against Germany, that had been initiated by the victims (or their descendants) of Nazi crimes. Moreover, as required by the ICJ, which also asked for the intervention of the national legislature to ensure that the decisions of the domestic courts ceased to have effect, Italy adopted the law of accession to the aforementioned 2004 UN Convention, Law No. 5/2013[32], whose Article 3 provided that Italian courts must decline jurisdiction in any proceedings against foreign States whenever the ICJ had excluded Italy's jurisdiction in such cases.

2.1 The *Germany v. Italy* dispute: a long story (part. 2).

Notoriously, the historic *turning point* that reignited the controversy came along in 2014 with the Italian Constitutional Court's ruling No. 238. Interpreted by commentators as an

[28] ICJ, *Jurisdictional Immunities of the State*, cit., paras. 98-104.
[29] See Dissenting Opinions of Judges Cançado Trindade and Yusuf.
[30] See B. Conforti, *The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity*, cit. The author cited judgments of domestic courts that, in admitting immunity of jurisdiction of the foreign State in compensation for gross violations of human rights, argue that such a pronouncement is practicable *because* victims can turn to the courts of the State invoking immunity, as well as judgments admitting the immunity of international organisations because there is a court within them to which they can turn.
[31] R. Pavoni, *An American Anomaly? On the ICJ's Selective Reading of United States Practice,* cit. The author criticises the lack of an accurate reconstruction of US practice in many respects, especially regarding the issue of the *tort exception*, since, in his opinion, it would have supported the Italian side's defence argument. Moreover, about the relationship between immunity and human rights violations, it is worth recalling that the United States introduced an exception for acts of terrorism in its law on immunity of foreign States from jurisdiction (the FSIA, *Foreign Sovereign Immunities Act*) as early as 1996. Canada went in the same direction in 2012 with the amendment of its *State Immunity Act* (SIA).
[32] Law No. 5 of 13 January 2013, *Accession of the Italian Republic to the United Nations Convention on the Immunity Courts of States and their Property.*

expression of "robust dualism"[33], the ruling gave rise to an intense debate among those who favoured it and disapproved it[34]. Referring to the following paragraphs for further considerations in this regard, we would like to summarise here the content of the judgment. It is recalled that the Constitutional Court, responding to questions of constitutionality raised by a judge of the Court of Florence[35], had declared that the international rule on the immunity of States is incompatible, on the subject of compensation for damages caused by war crimes and crimes against human rights, with Article 24 (right to a judge) in conjunction with Article 2 (protection of human rights) of the Constitution.

To be precise, the Constitutional Court did not intend to question the interpretation provided by the Hague judges (not having, by the way, the authority to do so), noting, «(with concern) that the scope of the norm has been so defined by the ICJ»[36]. However, it asserted that the rule on immunity, as interpreted by the ICJ, does not allow for the operation of the so-called *permanent transformer* constituted by Article 10(1) of the Constitution, through which the Italian legal system adapts to customary law. The rule on immunity rather (in the part covering the actions for damages caused by international crimes) encounters a *limit to entry*, represented by the contrast with the principle of the judicial protection of fundamental rights guaranteed by the Italian Constitution in Articles 2 and 24[37].

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[33] R. Kolb, *The Relationship between the International and the Municipal Legal Order: Reflections on the Decision no. 238/2014 of the Italian Constitutional Court*, in *Questions of International Law*, 2014, p. 5.

[34] See the doctrine in note No. 14. This aspect is dealt with in sections No. 4 and 4.1 of the present article.

[35] See Orders No. 84, 85 and 113 of 21 January 2014, by which the Court of Florence raised the question of the constitutionality 1) of the norm created in our legal order by the incorporation, by virtue of Article 10, para. 1 of the Constitution, of the international custom on State immunity, as found by the ICJ in its Judgment of 3 February 2012; 2) of Article 1 of Law No. 848 of 17 August 1957 (Execution of the United Nations Charter, signed in San Francisco on 16 June 1945), insofar as, through the incorporation of Article 94 of the U.N. Charter, it obliges the national judge to comply with the ICJ Judgment; 3) of Article 1 (*recte*: Article 3) of Law No. 5 of 14 January 2013 (Accession by the Italian Republic to the United Nations Convention on Jurisdictional Immunities of States and their Property, signed in New York on 2 December 2004, as well as provisions for the amendment of the domestic legal order), insofar as it obliges the national judge to comply with the ICJ Judgment, in relation to Articles 2 and 24 of the Constitution.

[36] Constitutional Court, Judgment No. 238/2014, par. 3.1.

[37] It is recalled that as early as 1979, with the *Russell* Judgment of 18 June 1979, No. 48, the Court had adopted the principle that the adaptation mechanism is interrupted in the case of customary rules that are incompatible with the fundamental principles of the State. Moreover, see the Judgment of 22 March 2001, No. 73, *Baraldini*, where the Court further clarified its thinking by stating that «I 'principi fondamentali dell'ordinamento costituzionale' e i 'diritti inalienabili della persona' costituiscono infatti limite all'ingresso tanto delle norme internazionali generalmente riconosciute alle quali l'ordinamento italiano 'si conforma' secondo l'art. 10, primo comma, Cost. […]; quanto delle norme contenute in trattati istitutivi di organizzazioni internazionali aventi gli scopi indicati dall'art. 11 Cost. o derivanti da tali organizzazioni» (par. 1.2).

In the Court's view, in fact, the victims' rights, given the impossibility for them to obtain equivalent protection, would have suffered an *absolute sacrifice*. In particular, the Court affirmed:

> in an institutional context characterized by the centrality of human rights, emphasized by the receptiveness of the constitutional order to external sources (…), the denial of judicial protection of fundamental rights of the victims of the crimes at issue (now dating back in time), determines *the completely disproportionate sacrifice of two supreme principles of the Constitution*. They are indeed sacrificed in order to pursue the goal of not interfering with the exercise of the governmental powers of the State even when, as in the present case, state actions can be considered war crimes and crimes against humanity, in breach of inviolable human rights, and as such are excluded from the lawful exercise of governmental powers[38].

For this reason, the Court concluded that the customary rule on immunity requires the domestic bodies to respect it for acts *jure imperii*, excluding acts such as deportation, forced labour, massacres and in general acts that result in the violation of fundamental rights and that are recognised as international crimes.

Therefore, the Court qualified as *not founded* the question of constitutional legitimacy advanced by the judge *a quo* of the rule introduced into the domestic legal order corresponding to the customary rule on immunity. In fact, in the Court's view, since the rule does not enter the legal system at all and is therefore not really reproduced in domestic law by Article 10 of the Constitution, it does not operate *ab initio*, so the problem of its constitutional legitimacy does not arise[39]. Furthermore, again on the basis of the contrast with Articles 2 and 24 of the Constitution, the Court declared the constitutional illegitimacy of the aforementioned Article 3 of Law 5/2013, as well as of Article 1 of Law 848/1957 (*Execution of the Charter of the United Nations*, signed in San Francisco on 26 June 1945), limited to the execution given to Article 94 of the Charter of the United Nations,

[38] Constitutional Court, Judgment No. 238/2014, par. 3.4.

[39] The Court's reasoning on this point has given rise to an intense debate, especially as to what the object of the Court's assessment is: there are those who argue that if the rule does not enter into the domestic legal system (and is therefore non-existent), the Court should declare the question inadmissible and not unfounded (see A. Ruggeri, *La Corte aziona l'arma dei "controlimiti",* cit.); on the other hand, there are those who maintain that, in this case, the Court is expressing an *atypical judgment*: the object of the assessment is certainly an international rule, alien to the domestic legal system, but the Court is entitled to analyse it, in order to subject the rule itself to the test of the counter-limits (see L. Gradoni, *Un giudizio mostruoso. Quarta istantanea della sentenza 238/2014 della Corte costituzionale italiana*, in *SIDIBlog*, 15 December 2014, http://www.sidiblog.org/).

exclusively in the part in which it obliges the Italian judge to comply with the ruling of the ICJ of 3 February 2012.

Judgment 238/2014 has thus once again opened the way for proceedings before Italian courts against Germany for war crimes and crimes against humanity committed by the Third Reich, resulting, overall[40], in the disavowal of the German State's immunity from Italian jurisdiction.

As regards immunity from execution, however, some developments only emerged later. It is recalled, in fact, that Judgment 238/2014 ruled only on the issue of the jurisdiction to examine the claim for compensation for damages and not also on the issue of enforcement action. In this regard, there have been conflicting developments in the case law of merit, with trends aimed at restricting the waiver of immunity to cognitive proceedings only[41] and attempts to make Germany's convictions executive[42]. The latest of these attempts concerned the seizure of the above-mentioned real estate (the German Archaeological Institute, the German Historical Institute, the Goethe Institut and the Germanic School)[43]. This case is, in fact, the one that prompted Germany to present the new appeal before the

[40] It should be recalled in this regard that, under Italian constitutional procedure law, the judgments with which the Court declares unfounded the appeals challenging the constitutionality of a law (the so-called *sentenze di rigetto*, are binding only on the judge *a quo*, whereas they have an exhortatory effect for all the other judges, unlike the so-called *sentenze di accoglimento*). This has been commented on as somewhat of a limitation to the effectiveness of the judgment, but it should be noted that the judges have generally conformed to the direction indicated by the Constitutional Court (see the case law commented by S. Forlati, *Judicial decisions – Immunities*, in *Italian Yearbook of International Law*, n. 1/2016, p. 497).

[41] This was the case, for instance, in the Villa Vigoni affair (see note No. 18): in the ruling of the *Corte di Cassazione* of 8 June 2018 No. 1488, it was decided that it would not be possible to subject the assets of a foreign State intended for public functions located on Italian territory to coercive measures (see O. Lopes Pegna, *Giù le mani da Villa Vigoni. Quale tutela "effettiva" per les vittime di gravi crimini compiuti da Stati esteri?*, in *Rivista di diritto internazionale*, no. 4/2018, p. 1237); it should also be recalled that, aiming at limiting the effects of Judgment 238/2014 once again, the Italian Government adopted Decree-Law No. 132 of 12 September 2014, converted by Law No. 162 of 10 November 2014, by which, in Article 19 bis, it provided that sums intended for the exercise of public functions deposited in bank or postal accounts in Italy belonging to foreign States could not be subject to enforcement actions (see B. Conforti and M. Iovane, *Diritto internazionale*, 12th edition, Naples, Editoriale Scientifica, 2021, pp. 369-370).

[42] See the unsuccessful attempt to seize the receivables that the German railways, Deutsche Bahn Aktiengesellschaft, had from Trenitalia s.p.a. and Rete Ferroviaria s.p.a., on the case G. Berrino, *The Court of Cassation returns to the subject of jurisdictional immunities of states and their assets*, in *Rivista di diritto internazionale*, n. 3/2020, p. 844.

[43] Germany attempted to oppose the attachment several times. In this regard, it is worth noting the order of 12 July 2021 of the Court of Rome, which rejected the German petition and disallowed Germany's immunity also from enforcement action, since the forced execution of the judgment (in the event of lack of spontaneous fulfilment) must always be guaranteed, so that the judicial protection under Article 24 of the Italian Constitution is effective; following a further complaint, Germany's immunity was instead recognised but the public purpose of the real estate was deemed unproven (see G. Berrino, *Un'istantanea del nuovo ricorso*, cit.). Following the further rejection, Germany brought the appeal before the ICJ.

ICJ on 29 April 2022, together with the request for provisional measures, which was later withdrawn.

3. The new appeal before the International Court of Justice and the Italian reaction: future scenarios.

A possible solution to the dispute at hand, as repeatedly observed[44], lies in the diplomatic domain, considering that in this case international and domestic courts "have seemingly settled on non-dialectical conflicting positions, whereas governments' stances tend to converge in the effort to stabilise the legal framework of their mutual relations"[45].

In this view, there is no doubt that the establishment of the Fund under Decree-Law No. 36/2022 constitutes a political and pragmatic attempt by the Italian government to favour the settlement of the dispute, addressing, in particular, the implications of lifting Germany's immunity in enforcement proceedings. Of course, the Italian response leaves the issue of Germany's immunity from cognitive proceedings unaltered, even more so because it is based precisely on the assumptions established by Judgment 238/2014. The functioning of the Fund indeed presupposes that trials have been held against Germany (contrary, therefore, to the international obligations established by the ICJ in its 2012 judgment), since – it should be recalled – under Article 43 (2), only those who obtain a final judgment establishing an infringement and assessing the extent of the resulting damage can turn to it. Therefore, it is clear that the Fund does not resolve all the issues raised by the new complaint against Germany; however, as has been observed[46], the Italian government could not have gone any further, without putting itself at odds with Judgment 238/2014 and thus violating the Constitution itself.

In any case, it should be noted, first of all, that the Italian response actually converges with what has already been put forward in doctrine by those who support, as a rational *way out*

[44] L. Gradoni, *Is the Dispute between Germany and Italy over State Immunities Coming to an End (Despite Being Back at the ICJ)?*, cit.; R. Pavoni, *Germany versus Italy reloaded: Whither a human rights limitation to State immunity?*, cit.; P. Rossi, *Italian courts and the evolution of the law of State immunity: A reassessment of Judgment No. 238/2014*, cit.

[45] L. Gradoni, *Is the Dispute between Germany and Italy over State Immunities Coming to an End (Despite Being Back at the ICJ)?*, cit.

[46] P. Rossi, *Italian courts and the evolution of the law of State immunity: A reassessment of Judgment No. 238/2014*, cit.

of the problem, the idea that Italy should directly assume the burden of compensating the victims of Nazi war crimes[47]. Secondly, the establishment of the Fund, should it be implemented unhindered, could indeed trigger a more accomplished diplomatic effort to end the dispute.

In this regard, it has been observed that now it could be Germany to take the second step, waiving its immunity in the civil proceedings, the financial consequences of which would now fall on Italy alone[48]. Such a diplomatic strategy would not interfere with the application of *Ferrini-Judgment 238/2014* beyond the Nazi crimes case, in which, for example, foreign States other than Germany are involved. Therefore, it would entail for Germany the waiver of immunity from jurisdiction only for a specific category of proceedings and it could lead to the withdrawal of the action before the ICJ, since the waiver of immunity would result in the termination of the tort[49]. The will to reach a political agreement is also proved by the fact that Germany has agreed with Italy a fairly long time for the filing of pleadings before the ICJ, so as to probably allow Italy to take the necessary measures to ensure the proper functioning of the Fund[50]. Completely uncertain, on the other hand, (and according to some unlikely[51]) is the possibility that Germany might contribute economically to the Fund, on the basis of new agreements with Italy.

In any case, as things stand, such a scenario is linked to the outcome of various questions, which concern not only Germany's possible diplomatic efforts, but also and above all the

[47] See, *inter alia*, P. Palchetti, *Can State Action on Behalf of Victims Be an Alternative to Individual Access to Justice in Case of Grave Breaches of Human Rights?*', cit.; E. Cannizzaro, *Jurisdictional Immunities and Judicial Protection: The Decision of the Italian Constitutional Court No. 238 of 2014*, cit., p. 131; F. Francioni, *Access to Justice and Its Pitfalls: Reparation for War Crimes and the Italian Constitutional Court*, in *Journal of International Criminal Justice*, n. 3/2016, p. 629; G. Gaja, *Alternative ai controlimiti rispetto a norme internazionali generali e a norme dell'Unione europea*, in *Rivista di Diritto Internazionale*, 2018, p. 1035; J. Weiler, *Editorial: Germany v Italy: Jurisdictional Immunities – Redux (and Redux and Redux)*, in *EJIL: Talk!*, 18 October 2021, https://www.ejiltalk.org/. However, the idea that Italy should bear the burden of compensating individuals whose right of access justice is restricted due to international immunity law still predates this case, see G. Gaja, *L'esecuzione su beni di Stati esteri: l'Italia paga per tutti?*, in *Rivista di Diritto Internazionale*, 1985, p. 345.

[48] L. Gradoni, *Is the Dispute between Germany and Italy over State Immunities Coming to an End (Despite Being Back at the ICJ)?*, cit.

[49] Always on the condition that Germany thereby is also satisfied with respect to the claim for damages caused by the Italian conduct. In fact, Germany could discontinue the proceedings before the ICJ by waiving a sum that might not be too high, since Italy bears the burden of paying the reparations, see L. Gradoni, *supra*.

[50] G. Berrino, *Il «ristoro» dei cittadini italiani vittime di crimini di guerra e contro l'umanità commessi dalla Germania durante il secondo conflitto mondiale*, in *Rivista di diritto internazionale*, n. 3/2022, p. 827.

[51] *Ibidem*.

uncertain future of the Fund. In fact, several criticisms have been highlighted[52] with respect to the functioning of the Fund on which the Constitutional Court is called upon to rule, because of the questions of constitutionality raised of Article 43 of Decree-Law 36/2022[53]. In particular, the Constitutional Court will have to assess its conformity with the judicial protection of the rights under Articles 2 and 24 of the Constitution, since, as the judge *a quo* contests, the rule denies a specific category of creditors the right to proceed to forced execution by reason of convictions obtained in the judgment, when, on the contrary, «l'azione esecutiva è, invero, fattore *complementare e necessario* dell'effettività della tutela giurisdizionale»[54]. Furthermore, the judge *a quo* contests: a violation of Article 111 in relation to the principle of equality of the parties in the process, by creating an imbalance between the parties, in favour of the German State alone, which is exempted from the prejudicial effects of the judicial sentence; and a violation of Article 3 (principle of equality) since access to the Fund is excluded for foreign citizens who have been victims of crimes committed abroad[55].

In this regard, it is especially noteworthy how the first question will lead the Court to dwell on the issue of immunity from enforcement action (and its relationship to Articles 2 and 24), a subject on which it had avoided ruling in Judgment 238/2014. The difference, however, with the 2014 scenario is that a victim compensation Fund has now been established. Thus, the question to be assessed will be whether or not, in such a case, that *absolute sacrifice* of the judicial protection of fundamental rights, deemed incompatible with immunity from civil jurisdiction, occurs: the provision of the Fund could play a role in the balance test and thus not lead to the waiver of immunity from enforcement proceedings; at the same time, it is to be assessed whether the Fund can guarantee effective equivalent protection, considering that it will most likely provide lump sum payments[56].

[52] See the analysis of G., Boggero, *La reazione del Governo italiano al (nuovo) ricorso tedesco di fronte alla CIG. Prime note sugli effetti dell'art. 43 d.l. 30 aprile 2022, n. 36*, cit.; G. Berrino, *The impact of Article 43 of Decree-Law No. 36/2022 on enforcement proceedings regarding German State-owned assets*, cit.; G. Berrino, *Il «ristoro» dei cittadini italiani vittime di crimini di guerra e contro l'umanità commessi dalla Germania durante il secondo conflitto mondiale,* cit.

[53] Order No. 154/22 of 1 December 2022 (see note No. 9).

[54] *Ibidem*.

[55] As mentioned above, foreign victims with a foreign conviction do not have access to the Fund, but at the same time (as specified in the conversion of the law) enforcement proceedings are stopped even in the case of foreign judgments; on this point see G. Berrino, *The impact of Article 43 of Decree-Law No. 36/2022 on enforcement proceedings regarding German State-owned assets*, cit.

[56] *Ibidem*.

Of course, also the different treatment of the victims of Nazi crimes is very critical, insofar as Article 43 of the Decree precludes any enforcement proceedings against German assets in Italy on the basis of a foreign judgment, and, therefore, any form of compensation for those victims[57].

There are, in fact, many question marks that suggest that the diplomatic route will also be fraught with obstacles. However, especially in the light of the analysis that will be carried out in the following paragraph, we believe that diplomatic mediation would be preferable to the continuation of the appeal before the ICJ, since any new ruling would certainly have an impact on the jurisprudence *Ferrini-Judgment 238/2014*[58]. Indeed, it must be considered that the international community is still very reluctant to the idea of admitting a limitation of State immunity based on human rights. At the same time, it is widely believed[59] that the ICJ would not come to a different conclusion from the 2012 judgment, condemning Italy once again for the violation of Germany's jurisdictional immunities. This could cause the Italian government to take action to ensure that the findings of the ICJ are respected, as well as the abandonment of this jurisprudence by domestic courts (even in cases of claims against other foreign States accused of serious human rights violations). Consequently, this could also have a significant impact on the jurisprudential practices of other domestic jurisdictions, which show signs of alignment with the *Ferrini-Judgment 238/2014* jurisprudence.

In other words, from the perspective of those who advocate the need for a new conception of State immunity that takes into account fundamental human rights, perhaps it would be better to *buy time*, hoping for a diplomatic solution to the *Germany v. Italy* dispute and waiting for an increasing number of national courts to align themselves with the perspective outlined by the Italian courts.

In any case, as the following analysis will show, we believe that there are important jurisprudential developments and sound legal arguments that the ICJ should not ignore when reassessing the rule of State immunity. We will try to summarise these aspects by wondering whether and what contribution Italian case law has made to the development of the immunity rule, with Judgment 238/2104.

[57] *Ibidem*.
[58] R. Pavoni, *Germany versus Italy reloaded: Whither a human rights limitation to State immunity?,* cit.
[59] L. Gradoni, *Is the Dispute between Germany and Italy over State Immunities Coming to an End (Despite Being Back at the ICJ)?,* cit.

4.1 On the principles of domestic law as a circumstance precluding wrongfulness, and the right to justice.

As is well known, Article 25 of the 1969 Vienna Convention[60] states that domestic law may not be invoked as a justification for non-compliance with the rules of the Convention. The Draft Articles on the International Responsibility of States[61], moreover, do not contemplate the invocation of the fundamental principles of a State's Constitution among the circumstances precluding wrongfulness, while Article 32 makes clear the irrelevance of a State's internal law to compliance with the obligations of cessation and reparation.

It is clear, therefore, that the impossibility to invoke constitutional principles as a circumstance precluding wrongfulness stands guard over the rigid dualistic division between domestic and international law[62]. Judgment 238/2014 has been criticised precisely because it would have risked compromising the *principle of supremacy* of international law. It could have led to relativist drifts with the consequence of weakening international legality and its jurisdictional guarantees[63]. The *short-circuit* consists in the fact that, if on the one hand the judgment, from a constitutionalist perspective, legitimately indicates the principles of law to be invoked within the national legal system, on the other hand this does not justify the violation of the international obligation, the consequences of which the State would in any case have had to answer for.

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[60] *Vienna Convention on the Law of Treaties*, done in Vienna on 23 May 1969, entered into force on 27 January 1980.

[61] International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* 2001.

[62] See the analysis of L. Acconciamessa, *Il dramma dei vicoli ciechi: sui principi costituzionali come causa di esclusione dell'illecito internazionale*, in *SIDIBlog*, 6 May 2021, http://www.sidiblog.org/.

[63] See, *inter alia*, F. Fontanelli, *I know it's wrong but I just can't do right: First impressions on judgment no. 238 of 2014 of the Italian Constitutional Court*, in *Verfassungsblog*, 24 October 2014, https://verfassungsblog.de/; A. Tanzi, *Sulla sentenza Cost. 238/2014: cui prodest?*, in *Forum di Quaderni costituzionali*, 24 November 2014; G. Guarino, *Corte costituzionale e Diritto internazionale:il ritorno dell'estoppel?*, in *Consulta Online*, 2014; A. Ruggeri, *La Corte aziona l'arma dei "controlimiti"*, in *Consulta Online*, 2014, A Gattini, *"E qui comando io. E questa è casa mia": la Corte costituzionale italiana, i limiti, i controlimiti e le giurisdizioni internazionali*, in A. Annoni, S. Forlati and P. Franzina (eds.), *Il diritto internazionale come sistema di valori. Scritti in onore di Francesco Salerno Jovene*, 2021; for a recent critical view of the judgment see C. Focarelli, *State Immunity and Serious Violations of Human Rights: Judgment No. 238 of 2014 of the Italian Constitutional Court Seven Years On*, cit.

However, it would be appropriate to completely reverse this view by assuming a non-formalistic and rigid perspective about the principle of supremacy, but rather a substantial and functional one, considering the possibility that international and constitutional law operate "in a fluent state of interaction and reciprocal influence, *based on discourse and mutual adaptation, but not in a hierarchical relationship*"[64].

It is possible, in fact, to look at the question not on the level of the conflict between legal systems, the domestic and international ones, but rather on the level of the conflict between international obligations and values. In other words, the conflict between the two systems and the principle of supremacy would not really come into play when the principles of domestic law, coinciding with the international ones, are invoked[65]. When such an alignment happens – and here one must refer to George Scelle's theory of *dédoublement fonctionnel*[66] – the national courts, in the domestic sphere, act, from a functional point of view, as international organs, thus serving the rule of law. The only conflict that arises, therefore, is between the international values at stake, and it must be resolved at an international level. The limit to the so much feared relativist drifts is given by the reason why the internal organs would be promoting meta-national values: it is one thing if – according to the sovereigntist paradigm[67] – they are acting to safeguard their own personal interests[68]; it is another thing if – according to the internationalist paradigm – they are operating in the service of the international community. In the second case, the principle

[64] A. Peters and U. Preuss, *International relations and international law*, in M. Tushnet, T. Fleiner and C. Saunders (eds.), *Routledge Handbook of Constitutional Law*, Routledge, 2013, p. 42.

[65] See on this theme A. Nollkaemper, *National Courts and the International Rule of Law*, Oxford, 2011.

[66] G. Scelle, *Précis de droit des gens. Principes et systématique. Première partie*, Paris, 1932, p. 43 ff.; *Deuxième partie*, 1934, p. 10 ff.; for more recent reassessments of the theory, see A. Cassese, *Remarks on Scelle's Theory of 'Role Splitting' (dédoublement fonctionnel) in International Law*, in *European Journal of International Law*, 1990, p. 210; R. Kolb and M. Milanov, *Quelques réflexion sur le dédoublement fonctionnel*, in S. Marchisio (ed.) *Liber amicorum Sergio Marchisio. Il diritto della comunità internazionale tra caratteristiche strutturali e tendenze innovative*, Naples, Editoriale Scientifica, 2022.

[67] Regarding the State sovereignty paradigm and internationalist paradigms see N. Petersen, *The Reception of International Law by Constitutional Courts through the Prism of Legitimacy*, Max Planck Institute for Research on Collective Goods Bonn 39, 2009.

[68] In this picture should be framed the risks feared in the doctrine (note No. 84) with regard to the fragmentation of the international legal order. One may think of: the attempt by Islamic countries to justify their non-compliance with international human rights law on the basis of the rules imposed by *Sharia* law (a problem raised by A. Tanzi, *Sulla sentenza Cost. 238/2014: cui prodest?*, cit.); the *Yukos* case, in which the Russian Constitutional Court decided not to implement a ruling of the Strasbourg Court on equitable satisfaction (with the judgment of 19 January 2017), as it was necessary to protect its own constitutional principles of fairness and equality in taxation (ECtHR, Judgment of 31 July 2014, Application no. 14902/04, *Case of Oao Neftyanaya Kompaniya Yukos v. Russia*). In this regard see L. Acconciamessa, *Il dramma dei vicoli ciechi: sui principi costituzionali come causa di esclusione dell'illecito internazionale,* cit.

of supremacy would not be questioned and the rule of law would be (even better) protected, since, under these conditions, "le corti nazionali difendono il diritto internazionale ... da se stesso!"[69].

The findings of Judgment 238/2014 are well placed in this mood[70], precisely because of the significance given to the judicial protection of fundamental human rights in international law. In fact, it has been argued in the doctrine that the right to access justice can be considered a general principle of law of civilised nations[71]. In Judgment 238/2014, the Constitutional Court seems to embrace this idea when it recalls that it is indisputable «that the right to a judge and to an effective judicial protection of inviolable rights is one of the greatest principles of legal culture in democratic systems of our times»[72].

Incidentally, it must be remembered that the *sacrifice* of the right to a judge was also considered intolerable by the Court of Justice of the European Union (CJEU) in the *Kadi* case[73]. In that case, the CJEU prevented a UN Security Council resolution, which provided for limitations on individual rights for reasons of preventing transnational terrorism, from having effect in EU law. This was done because the UN resolution did not guarantee the possibility of recourse to the courts for the individuals affected by such limitations (a possibility considered inalienably protected by Article 47 of the EU Charter of Fundamental Rights). Also in the same vein are some judgments[74] of the ECtHR in which

[69] G. Cataldi, *La Corte costituzionale e il ricorso ai 'contro-limiti' nel rapporto tra consuetudini internazionali e diritti fondamentali: oportet ut scandala eveniant*, in *Diritti umani e diritto internazionale*, n. 1/2015, p. 47.

[70] See for example the analysis of G. Cataldi, *La Corte costituzionale e il ricorso ai 'contro-limiti' nel rapporto tra consuetudini internazionali e diritti fondamentali: oportet ut scandala eveniant,* cit.; L. Gradoni, *La sentenza n. 238 del 2014: Corte costituzionale italiana «controvento» sull'immunità giurisdizionale degli Stati stranieri?*, cit.; P. De Sena, *The Judgment of the Italian Constitutional Court on State Immunity in Cases of Serious Violations of Human Rights or Humanitarian Law: A Tentative Analysis under International Law*, cit., F.M. Palombino, *Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles*, in *ZaöRV*, 2015, p. 503.

[71] P. De Sena, *The Judgment of the Italian Constitutional Court on State Immunity in Cases of Serious Violations of Human Rights or Humanitarian Law: A Tentative Analysis under International Law*, cit.; Pursuant to Article 38 of the Statute of the ICJ, for an internal principle to become a general principle of law recognised by civilised nations, it is considered sufficient that it is provided for by the majority of internal legal systems and that it is perceived as necessary and obligatory in the context of relations based on international law.

[72] Judgment 238/2014, cit., par. 3.4.

[73] Court of Justice of European Union (CJEU), judgment of 18 July 2013, C-584/10 P, C-593/10 P and C-595/10, *European Commission and Others v Yassin Abdullah Kadi*; for a comment F. Fontanelli, *Kadi II, or the happy ending of K's trial – Court of Justice of the European Union, 18 July 2013*, in *Diritti comparati*, 29 July 2013, https://www.dirritticomparati.it/.

[74] ECtHR (Grand Chamber), Judgment of 12 September 2012, Application no. 10593/08, *Nada v. Switzerland*; Judgment of 21 June 2016, No. 5809/08, *Al-Dulimi and Montana Mangement inc. v. Switzerland*.

the Court affirmed the violation of Article 6 of the Convention (right to a fair trial) because of the absence of judicial remedies in the UN system available to individuals in the event of Security Council sanctions against them.

These last considerations provide a further line of argument for a reassessment of the relationship between the immunity rule and the judicial protection of fundamental rights.

Indeed, someone should wonder whether Judgment 238/2014 had the merit of contributing to the formation of a new custom, which precisely provides for the obligation of States to guarantee the right to a judge and reparation for victims of international crimes[75]. While it is not possible to conduct such an investigation here[76], we would like to highlight the implications of such a statement.

In fact, if the right to a judge and reparation can be considered as a new emerging norm, of a concurrent nature to that on State immunity (if not of a higher rank, when linked to serious violations of human rights[77]), the ICJ should assess the conflict in a new light. It will be recalled, in fact, that the ICJ held the conflict between the rule on immunity and *jus cogens* to be non-existent because of their different nature[78]. In the highlighted case, on the other hand, under the conditions mentioned above, the Hague judges could not exempt themselves from assessing the relationship between the immunity rule and the right to access justice, since both are procedural in nature[79].

The conflict between the two rules, therefore, becomes concrete and real when the right to justice cannot be guaranteed through "equivalent protection"[80]. This would lead to the possibility, put forward by Italian doctrine[81], of defining a clear and circumstantial

[75] See P. De Sena, *The Judgment of the Italian Constitutional Court on State Immunity in Cases of Serious Violations of Human Rights or Humanitarian Law: A Tentative Analysis under International Law*, cit; R. Pisillo-Mazzeschi, *Acces to justice in constitutional and international law: the recent judgment of the Italian constitutional court*, cit.

[76] Please refer to the authors cited *supra*; for a study on the right to justice see F. Francioni, *Access to Justice as a Human Right*, Collected Courses of the Academy of European Law, 2007.

[77] R. Pisillo-Mazzeschi, *Acces to justice in constitutional and international law: the recent judgment of the Italian constitutional court*, cit.; the author argues that the right to access justice and the associated right to reparation for violations of fundamental human rights are established by two customary norms; in his view they also prevail over the rule of State immunity, because they are peremptory in nature, as they are functionally linked to the violation of fundamental human rights.

[78] See Section No. 2.

[79] R. Pisillo Mazzeschi, *Il rapporto fra norma di ius cogens e la regola dell'immunità degli Stati: alcune osservazioni critiche sulla sentenza della Corte internazionale di giustizia del 3 febbraio 2012*, cit.

[80] R. Pisillo-Mazzeschi, *Acces to justice in constitutional and international law: the recent judgment of the Italian constitutional court*, cit.

[81] See, *inter alia*, Pavoni, *Germany versus Italy reloaded: Whither a human rights limitation to State immunity?*, cit.; among the first to address the issue see L. Condorelli, *Le immunità diplomatiche e i principi*

limitation to the rule of State immunity: the necessary and reasonable condition for the waiver of immunity would be found precisely in the absence of effective remedies to enforce the victims' right to justice, other than legal action in the forum State. Having said this, it must also be remembered that the ICJ rejected the so-called *last resort argument*, refusing to strike a balance between the principle of sovereign equality among States and the right to an effective remedy[82]. One possibility is, therefore, that this argument be *revitalised*, bringing out the possible conflict from competing rules and the need to balance the interests at stake.

5. Conclusions.

The new appeal *Germany v. Italy* raises new questions and opens *old wounds*. The new questions concern the future of the dispute, the possibility of reaching a diplomatic solution (and its possible positive effects[83]), but also the adequacy of the response that Italy has put in place with the establishment of the Fund for Victims of Nazi Crimes. Already hovering over this is the pronouncement of the Italian Constitutional Court, along with the risk that it may activate the *counter-limits* again (renewing the *short-circuit* with the ICJ?) or, according to other opinions[84], retrace its steps, even with respect to the 2014 ruling.

The first *old wound* brings to light an ancient but still prevailing conception of State immunity, frankly at odds with the modern features of the international order. It is difficult for the current state of practice and *opinio juris* to outline the modification of the customary

fondamentali della Costituzione, in *Gius. Cost.*, 1979, p. 455; B. Conforti and M. Iovane, *Diritto internazionale*, cit., p. 372.

[82] However, it was also noted that Italy had not tried any possible routes to obtain compensation from Germany for the victims of international crimes, for example by not acting in diplomatic protection, see R. Pisillo-Mazzeschi, *Acces to justice in constitutional and international law: the recent judgment of the Italian constitutional court*, cit.; on the possibility of using the action in diplomatic protection see also F. De Vittor, *Immunità degli Stati dalla giurisdizione e tutela dei diritti umani fondamentali*, in *Rivista di diritto internazionale*, 3/2002, p. 573; on the possibility of finding a constitutional obligation to diplomatic intervention for the Government see E. Cannizzaro, *Jurisdictional Immunities and Judicial Protection: The Decision of the Italian Constitutional Court No. 238 of 2014*, cit., p. 131; P. Palchetti; *Judgment 238/2014 of the Italian Constitutional Court: In Search of a Way Out*, cit., p. 47.

[83] This article calls for a diplomatic solution to the dispute, believing that it could have positive effects on the evolution of the immunity rule. Indeed, there is a good chance that in a possible new ruling the ICJ could confirm the 2012 findings, and thus inhibit the action of domestic courts that are aligning themselves (or could do so) with *the Ferrini-Judgment 238/2014* jurisprudence, see section No. 3.

[84] L. Gradoni, *Is the Dispute between Germany and Italy over State Immunities Coming to an End (Despite Being Back at the ICJ)?*, cit.

rule on immunity. Anyway, it is to be hoped that if the ICJ rules on the issue again, it will give due consideration to the valid arguments in support of a human rights-based limitation on immunity, as well as to what more recent jurisprudential developments, such as the 2021 Seoul and Brasilia court rulings, indicate. In particular, the emerging international norm protecting the right to justice (in its forms of right to a judge and reparation) should be reassessed with respect to the ability to balance the applicability of immunity. The elaboration of a well-defined and circumscribed limitation, precisely based on the right to justice, could ensure that immunity is only waived when legal action in the forum State becomes the only remaining alternative to guarantee effective remedies for victims of international crimes. It is not believed that this would lead to a destabilisation of the global legal system, but rather that it could curb serious misconducts on the part of States and strengthen the rule of law.

The second *old wound* that has been reopened concerns the (difficult) relations between domestic and international law, stretched in a sort of continuous "duel for supremacy"[85], where, in general, international law prevails[86]. However, as someone[87] put it, "non è questa una posizione estremamente rigida – anche se radicata in un'opinione antica e diffusa – che è da rivedere alla luce di una moderna e realistica visione del diritto internazionale che contemperi i valori internazionalistici con quelli interni?". In fact, the outcome of the 238/2014 Judgment may have shown us a new (albeit familiar[88]) way, which is to conceive the principle of supremacy from a substantive and functional perspective, in light of the connection that may be created between fundamental domestic values and internationally recognised values. When this connection exists, domestic courts can act from a functional point of view as international bodies and participate in the progression of international law. The new case *Germany v. Italy* will probably also show us whether such a thought may find favour with the Hague judges and whether international law is willing to *adapt* in specific cases to fundamental domestic values and recognise an act as justifiable even if it is contrary to international obligations. The challenge promises to be daunting.

[85] F.M. Palombino, *Duelling for Supremacy*, Cambridge University Press, 2019.
[86] L. Acconciamessa, *Il dramma dei vicoli ciechi: sui principi costituzionali come causa di esclusione dell'illecito internazionale*, cit.
[87] B. Conforti, *Diritto internazionale*, 11th edition, Naples, Editoriale Scientifica, 2018, p. 409, referring specifically to the possibility of invoking constitutional principles as circumstances precluding wrongfulness.
[88] The approach has its roots in George Scelle's theory of *dédoublement fonctionnel*, See section No. 4.1.

Abstract: The contribution deals with the complex issue of State immunity from foreign civil jurisdiction in case of State conducts resulting in serious violations of human rights and humanitarian law. In particular, in light of the new appeal *Germany v. Italy* brought before the International Court of Justice (ICJ) on 29 April 2022, the possible future scenarios of which will be here assessed, the current state of development of the immunity rule and the contribution made to this end by the Italian case law *Ferrini-Judgment 238/2014* will be questioned. The latter will be assessed from multiple perspectives, namely in relation to the contribution made 1) to the development of the customary rule of immunity, 2) to the practice of invoking constitutional principles as a circumstance precluding wrongfulness, and 3) to the formation of a specific international norm protecting the right to justice. Considering this assessment, although the rule of State immunity is still widely supported by the international community, the contribution argues that there are important jurisprudential developments and solid legal arguments in support of a limitation based on the protection of fundamental human rights, which the ICJ should not ignore when re-evaluating the rule of immunity in a possible new ruling.

Abstract: Il contributo si occupa della complessa questione dell'immunità degli Stati dalla giurisdizione civile straniera in casi di condotte statali corrispondenti a gravi violazioni di diritto internazionale dei diritti umani e di diritto umanitario. In particolare, alla luce del nuovo ricorso *Germania c. Italia* presentato dinanzi alla Corte internazionale di Giustizia (CIG) il 29 aprile 2022, di cui in questa sede si valuteranno i possibili scenari futuri, ci si interrogherà sullo stato attuale dello sviluppo della norma sull'immunità e sull'apporto dato a tal fine dalla giurisprudenza italiana *Ferrini-Sentenza 238/2014*. Quest'ultimo verrà valutato sotto molteplici aspetti, in relazione cioè al contributo fornito 1) all'evoluzione della norma consuetudinaria dell'immunità, 2) alla pratica di invocare i principi costituzionali come causa di esclusione dell'illecito internazionale e 3) alla formazione di una specifica norma internazionale a tutela del diritto alla giustizia. Alla luce di tale valutazione, sebbene la norma sull'immunità statale sia ancora largamente condivisa dalla comunità internazionale, il contributo sostiene che vi sono importanti sviluppi giurisprudenziali e solide argomentazioni giuridiche a sostegno di una limitazione basata sulla tutela dei diritti umani fondamentali, che la CIG non dovrebbe ignorare nel rivalutare la regola sull'immunità in un'eventuale nuova pronuncia.

Parole chiave: State immunity – Germany v. Italy – International Crimes – Jus cogens – Right to justice.

Key words: Immunità statale – Germania c. Italia – Crimini internazionali – Jus cogens – Diritto alla giustizia.