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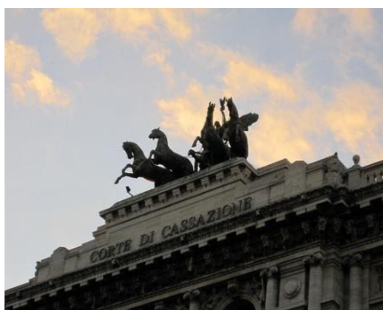

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The Implementation of the ICJ's Decision in the *Jurisdictional Immunities of the State* case in the Italian Domestic Order: What Balance should be made between Fundamental Human Rights and International Obligations?

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In its judgment of 3 February 2012—*Jurisdictional Immunities of the State, Germany v. Italy; Greece intervening*—the International Court of Justice (ICJ) ruled against Italy for denying Germany's immunity from civil jurisdiction for claims for compensation for war crimes committed by German forces during the Second World War. The Italian Supreme Court of Cassation had decided in 12 identical decisions on 28 May 2008 that the need to apply rules of *ius cogens* on human rights (breached by Germany) prevailed over customary laws on immunity, This conclusion was justified, according to the majority of Italian commentators, also in the light of the absence of alternative means for the victims to obtain reparation, as Germany had denied compensation for damages to a certain number of such victims.

The implementation of the ICJ's ruling within the Italian legal system is currently the subject of much debate. The ICJ made specific reference to the problem of implementation by stating, at paragraph 139, that

> the Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law ceases to have effect.

It appears, therefore, to be an obligation of result: an obligation that, according to the ICJ, does not imply a burden out of all proportion for Italy. This is even though, as the ICJ points out, "some of the legal decisions in question have become final in Italian domestic law" (paragraph 137, *in fine*) and, therefore, the effect of *res judicata* has been produced.

The situation brings to mind the precedent set by the decisions of the ICJ in the *Avena* case (*Mexico v. United States*, Judgment of 31 March 2004) and the *LaGrand* case (*Germany v. United States*, Judgment of 27 June 2001). These were decisions that were not enforced in the United States' domestic system although, in contrast to the present case, the situation from the perspective of the consideration due to human rights was completely reversed. In these cases, the ICJ had called for the United States to remedy, in its domestic law, a violation of a fundamental right of the individual, specifically Article 36 of the Vienna Convention on Consular Relations. In the *Jurisdictional Immunities of the State* case, the ICJ asked the Italian State's organs to set aside human rights guarantees in order to give precedence to the customary rules on state immunity.

According to international law there is no doubt that enforcement of an ICJ decision is mandatory for the state to which the decision is directed. The consent of the state to the competence of the ICJ also implies consent to enforcement of its decisions. This is made clear in Article 94.1 of the UN Charter, Article 59 of the ICJ Statute, and Article 60, which provides that "[t]he judgment is final and without appeal". But it is also a customary obligation, in application of the rule of "*pacta sunt servanda*" and the general principle of "good faith".

Still, from the standpoint of international law, decisions of the ICJ, like all other international decisions, are addressed to the state as a whole, as a subject of international law. In other words, Article 94 of the UN Charter is addressed to all organs of the state, which must consequently act in compliance with the rulings of the ICJ. Thus, although a decision of the ICJ is not directed specifically to the domestic organs of the state, these organs are obligated, according to international law, to act in conformity with the decision, each according to its competence as regulated by domestic law.

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Let us have a closer look at the Italian legal system. The obligation to implement decisions of the ICJ, in general, is inferred from constitutional norms. This is clear from Article 117 of the Italian Constitution, which envisages the prevalence of the provisions of treaties (and thus also Article 94 of the UN Charter and Articles 59 and 60 of the ICJ Statute) over domestic laws. Furthermore, Article 11 of the Constitution allows for a limitation of national sovereignty in order to provide for "a system that ensures peace and justice among Nations" and calls for Italy's commitment to promote and encourage "international organizations established for this purpose". Finally, Article 10.1 of the Constitution states that "the Italian legal system complies with the generally recognized rules of international law". This provision introduces customary international law rules into the Italian legal system at a constitutional level. Consequently the customary norm on the immunity of states from civil jurisdiction, in the manner determined by the ICJ, must be applied within the state. Moreover, Italy expressed its consent to the acceptance of the ICJ's determination concerning the above norm regarding this

specific case by virtue of the 1957 European Convention for the Peaceful Settlement of Disputes.

With respect to the methods that could be utilized to implement the ICJ's decision, there appear to be two viable options: a legislative process and a judicial means. Under the first option, the introduction of an "ad hoc" law ordering the annulment of definitive decisions (*res judicata*) and compelling the Italian courts to re-open trials in order to implement the ICJ decision does not seem appropriate here. This would put in issue other constitutionally-guaranteed principles, such as respect for the function of the judiciary by the other powers of the state and the right of individuals to judicial protection (Articles 102 and 113 of the Constitution, respectively), as well as the principle of equality before the law and before the courts (Articles 3 and 24 of the Constitution, respectively). The European Court of Human Rights (ECtHR) has often censured the intervention of legislators to modify situations that have already been judicially defined as that would violate Article 6.1 of the European Convention on Human Rights (see *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, and *Smokovitis and Others v. Greece*, 11 April 2002). One might argue that the constitutional norms referred to above (Articles 10.1, 11, and 117 of the Constitution) allow the obligation to implement an international decision to prevail, but this would be a contentious and controversial solution.

A more convincing approach appears the one chosen by Italian parliament, that is, the enactment of a law to introduce, on a more general level, the possibility of re-opening trials in which a final decision has been reached. This law has been finally approved on December 21, 2012 by the Senate. Its Article 3, paragraph 2 envisages the possibility of challenging final decisions through the process of a motion to repeal final judgments—not only in cases contemplated by the Code of Civil Procedure, but also in disputes in which, Italy being a party, the ICJ has "excluded the possibility to subject a specific conduct of another State to civil jurisdiction". The first paragraph of the same article, on the other hand, refers to proceedings in which no final decision had been issued by the domestic courts. In this case, the law calls for the judge hearing the case to formally and directly declare Italy's lack of jurisdiction. Since, as stated above, we believe that an ICJ decision obligates the state as a whole, this last possibility may have been helpful, but not strictly necessary.

Before the law was adopted, the Italian courts had to develop creative solutions. This is because the situation is undoubtedly a novel one, with no specific precedents.

The only similar judgments, in fact, have been decisions of the Court of Cassation and the Constitutional Court implementing judgments of the ECtHR which declared that domestic trials that concluded in final judgments were contrary to Article 6 of the European Convention on Human Rights. For example, in the *Somogy* case of 3 October 2006, n. 32678, ILDC 560 (IT 2006), the First Criminal Section of the *Corte di Cassazione* re-opened the criminal proceedings following the ECtHR's decision of 18 May 2004 in the case of *Somogyi v. Italy*. Also, on 11 April 2011 the Constitutional Court declared Article 630 of the Code of Criminal Proceedings to be unconstitutional.

This provision did not envisage the possibility of the re-opening of a trial consequent upon a judgment by the ECtHR declaring the trial contrary to the Convention. It is, nevertheless, evident that in these cases the decision to re-open domestic trials in order to implement decisions of the ECtHR was facilitated by the necessity to remedy violations of guarantees relating to fundamental human rights in criminal cases. It would undoubtedly be more difficult for a domestic judge to succeed in affirming this requirement in a civil proceeding.

Three Italian courts have addressed the implementation of the ICJ's decision.
The Court of Florence, in a decision of 28 March 2012, attempted to resolve, in a hierarchical manner, the conflict between the need to retain Italian jurisdiction, as affirmed by the Court of Cassation in its order n. 14202 of 28 May 2008, and the decision of the ICJ. As discussed above, the obligation to comply with the ICJ's decision is derived from Article 94 of the UN Charter, in combination with Article 11 of the Italian Constitution. The aforementioned order n. 14202 of the Italian Court of Cassation is, in fact, only attributed legislative status—that is, the same status as the Code of Civil Procedure—but it has the effect of *res judicata* on the issue of jurisdiction. This also highlighted the *ius superveniens* status of the ICJ judgment in respect of the judgment of the Court of Cassation regarding jurisdiction. Therefore, the ICJ judgment prevailed. This construction appears to be a convincing one. But it does have a shortcoming, as the court did not discuss the possible constitutional foundation of the principle of *res judicata* itself, which Italian commentators find in the combined effects of Articles 111 and 24 of the Italian Constitution.

The Torino Court of Appeal, in *Federal Republic of Germany vs De Guglielmi*, No 941/2012, ILDC 1905 (IT 2012) of 14 May 2012, adopted a different solution. In attempting to reconcile the irreconcilable—that is, the observance of both Italian jurisdiction as affirmed by the Court of Cassation and the ICJ decision—the Torino Court of Appeal decided that it was competent to hear the case, in conformity with the Court of Cassation's decision on jurisdiction, but affirmed that a review of the merits of the case would be contrary to the ICJ's decision, and therefore it abstained from deciding the merits. As noted by Italian commentators, a question of jurisdiction has been reshaped into a question of merit in order to elude the inviolability of the Court of Cassation's ruling, ensuring compliance with the ICJ's decision. This is a clear demonstration that when it becomes necessary to set aside domestic decisions that have the effect of *res judicata*, the duty to implement ICJ rulings should be entrusted to the legislative power.

The decision issued by the First Criminal Section of the Court of Cassation in *Criminal Proceedings against Albers and ors*, Final appeal judgment, No. 32139/2012; ILDC 1921 (IT 2012) on 9 August 2012 recalls the conclusions of Italian case law regarding the merits of this controversy, reiterating the Court's conviction of the hierarchical superiority of *ius cogens* rules concerning international crimes detrimental to fundamental rights over the customary international law rule on the immunity of foreign states from jurisdiction. According to the Court of Cassation, such superiority cannot be confined to the merits alone and it thus declined during the procedural phase to

ascertain jurisdiction, as foreseen by the ICJ in its decision. But the Court of Cassation did recognize that its opinion was not supported by the overall jurisprudential practice of foreign courts. That is, there was no international judicial practice to support its own interpretation of the rule and so there was not (yet) a customary rule in the sense it indicated. This fact, accompanied by the "indisputable authority" of the ICJ decision, forced the Court to take note of the ICJ's decision and, consistent with Italy's obligations, sustain Germany's appeal and reconsider previous decisions. The contested judgment of the Military Court of Appeal of Rome of 10 May 2011, which had asserted the liability of Germany and denied it sovereign immunity, was therefore quashed.

The Court of Cassation did specify, however, that the ICJ ruling does not automatically lead to "direct and immediate obligations" for Italian courts. We do not agree with this last point, as it seems to contend that implementation of the ICJ's decision has been decided for reasons of comity and political opportunity, rather than as a result of an obligation that also rests on the Court.

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A Law on the point been adopted, is now the question definitively settled? The answer is negative, in our opinion. There is in fact another very important aspect of the issue that has not been treated so far in the judgments, mentioned above. We must ask ourselves whether, in this case, the requirement to implement the ruling of the ICJ should defer to the requirement to respect the fundamental values of the Italian legal system, in accordance with the theory of "counter-limits" as developed by the Constitutional Court. According to this theory both customary law and European Union Law, which normally prevails over Italian law (at times, as is the case with customary law, even over constitutional norms) cannot conflict "with the fundamental principles of our constitutional system" (for European Union Law see decision No. 282/1989 and 117/ 1994; for customary law see decision No. 73/2001; for the European Convention on Human Right as interpreted by the Court of Strasbourg, see decision n. 264/2012) At this point, in our view, it would be decisive to obtain a ruling, on the matter, of the United Sections of the Supreme Court of Cassation (and in fact, at the time of this writing, two appeals are pending: n. 17962/2011 (*L. Ferrini and heirs*), n. 12021/12 (*O. Ferrini and heirs*).

The theory of counter-limits seems applicable to this particular case: that is, a case involving a demand for compensation for damage caused by heinous crimes, in which there is the real risk that no court will render a decision. This includes both the German court that refused to declare the claims as acceptable, and the Italian courts, if they were to give effect to the rule on immunity from civil jurisdiction as interpreted by the ICJ. The consequence of this would be a violation of Article 24 of the Italian Constitution, which expresses a truly fundamental principle—sanctioning the right to a judge.

As is well known, an analogous principle regarding the immunity of international organizations from civil jurisdiction was affirmed by the ECtHR in *Waite and Kennedy v. Germany* (Grand Chamber, Application no. 26083/94, judgment 18 February 1999). In this case the Court determined that immunity in respect of the courts of the appellant state could be granted only if a jurisdictional procedure for resolving controversies existed within the organization itself. The domestic case law of many states has also conformed to this line of interpretation. Even the European Court of Justice, in *Kadi v. Council and Commission* (C-402/05, decision of 3 September 2008), applied a theory very similar to that of the "counter-limits" theory, stating that, in spite of the mandatory nature of the decisions of the UN Security Council for all Member States, the measures adopted against transnational terrorism were to be declared unenforceable within the European Union as they were contrary to the fundamental principle of the right of every individual to a judicial review of any decision that concerned him.

As can be seen, the issue of implementation in Italy of the ICJ's decision in the *Jurisdictional Immunities of the State* case is anything but self-evident and for the time being not definitively resolved. We must also add that the ICJ ruling indicates that all claims by Italian nationals that have not been settled and that have formed the basis for the Italian proceedings "could be the subject of further negotiations involving the two States concerned, with a view to resolving the issue" (paragraph 104, *in fine*).

Therefore, should Germany refuse to seriously and definitively review the possibility of alternative forms of extra-judicial compensation, Italy would, in our opinion, have the right not to enforce the decision of the ICJ as a form of pacific reprisal in the face of the non-fulfillment of the other party.

It is worth noting, also as confirmation of a "positive presumption" of compliance with decisions of the ICJ, which is an aspect inherent to European states—in contrast with the practice of the United States—that on the occasion of the inauguration of the 67th session of the UN General Assembly, Italy, despite the unfavorable verdict in the case of *Germany v. Italy*, assumed the commitment to formulate for the first time its declaration of acceptance of compulsory jurisdiction of the ICJ, pursuant to Article 36.2 of the ICJ Statute.