How Broad is the Principle Upheld by the Italian Constitutional Court in Judgment No. 238?

How Broad is the Principle Upheld by the Italian Constitutional Court in Judgment No. 238?

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Abstract

The present article discusses the breadth of the principle upheld by the Italian Constitutional Court in Judgment No. 238 of 2014, concerning the unconstitutionality of grants of foreign state immunity over international crimes and comparable grave breaches of human rights. This article takes the view that two — and only two — requirements qualify that principle: first, the commission of an international crime by state agents; and second, the unavailability of effective compensatory remedies for the victims, which would provide an alternative to a suit in the courts of the forum state. The necessity of a territorial nexus — that the crime was perpetrated, at least in part, in the territory of the forum state — is ruled out. These two requirements are examined in light of Judgment No. 238 as well as the broader context of the Italian jurisprudence on state immunity and human rights both prior to, and falling after, the Constitutional Court's decision. The article briefly considers the prospects for universal civil jurisdiction over compensation claims arising from international crimes committed by foreign state agents. It submits that the coming challenge for Italian courts may involve an effort to reconcile the norms governing civil jurisdictional competence over states responsible for international crimes, and thus not entitled to immunity, with the right of access to justice as bolstered by Judgment No. 238.

1. Introductory Remarks

In Judgment No. 238 of 2014,[1] the Italian Constitutional Court held, in broad terms, that the protection of fundamental human rights, as mandated by the Italian Constitution, entails that the customary rule of foreign state immunity is not incorporated into the Italian legal system, insofar as that rule applies to international crimes for which there is no effective means of redress available to the victims other than a suit in the forum state. In the case at hand, this signifies that the sole effective means of redress for the victims was before the Italian courts.[2] For the same reason, the Court struck down[3] Italian legislation prescribing compliance with the 2012 judgment of the International Court of Justice (ICJ) in *Jurisdictional Immunities of the State*.[4] These holdings caught the sections of the ICJ judgment which had found Italy in violation of international law as a consequence of the Italian courts' decisions which had denied Germany immunity from suit with respect to compensation proceedings arising from Second World War crimes.

Consistently with the Tribunal of Florence's reasoning in its orders referring the pertinent cases to the Constitutional Court, the only explicit exclusion from the scope of the rulings in Judgment No. 238 relates to the norms on state immunity from enforcement measures.[5] It follows that the exact determination of the breadth of the principle endorsed by Judgment No. 238 deserves careful reflection. The cases considered by Judgment No. 238 involved war crimes against Italian

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[1] Constitutional Court, *Simoncioni and Others v. Germany and Presidency of the Council of Ministers*, Judgment No. 238, 22 October 2014, *Gazzetta Ufficiale* (special series), No. 45, 29 October 2014 (hereinafter 'Judgment No. 238'). Unless otherwise stated, all subsequent citations to Judgment No. 238 refer to the paragraphs in its section covering 'Conclusions on Points of Law' (*Considerato in diritto*). Translations from the Italian are by the author.

[2] *Ibid*., § 3.5.

[3] *Ibid*., *dispositif*, points 1 and 2.

[4] *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, 3 February 2012, ICJ Reports (2012) 99 (hereinafter '*Jurisdictional Immunities of the State*').

[5] Judgment No. 238, § 1.

nationals committed, at least in part, on Italian territory by Nazi forces during the Second World War. However, the Constitutional Court's holdings — as pointed out above — seem to go well beyond this specific legal situation.

The Court's decision appears to be qualified solely by two essential, inextricable elements: first, a serious breach of fundamental human rights by a foreign state, especially when it amounts to a war crime or crime against humanity; and second, the unavailability of effective legal remedies to secure reparation for the victims, aside from a suit in the courts of the forum state.

Thus understood, Judgment No. 238 may well have an impact on the application of the rules governing the jurisdictional competence of the Italian judiciary over civil lawsuits seeking compensation for international crimes and comparable breaches of fundamental rights attributable to state agents. The decision may be interpreted to support at least some forms of transnational and extraterritorial human rights litigation against foreign states in Italian courts, that is, a sort of creeping universal civil jurisdiction in cases concerning international crimes.

2. Commission of International Crimes and Absence of Effective Alternative Remedies as the *Sine Qua Non* of the Unconstitutionality of Grants of Foreign State Immunity

Judgment No. 238 clarifies that the two conditions mentioned earlier — that is, the alleged (or previously established, as in the case at hand) commission of international crimes by a foreign state and the absence of effective means of redress other than a suit in the courts of the forum state — must *cumulatively* be present in order to make grants of immunity constitutionally impermissible. Such conditions are regarded as 'inextricably linked'[6] by the judgment, and equally relevant for the purpose of the Court's review. Both find reflection in two provisions of the Italian Constitution concerning the protection of fundamental rights, namely, in Article 2 and Article 24. Unlike in the ICJ's view of the international legal order,[7] there is no room in the Italian Constitution for a hierarchical distinction between substantive human rights and procedural guarantees for vindicating those rights: 'It would be truly difficult to identify what would remain of a right if it could not be relied on before a court in order to obtain effective protection'.[8]

Although both the foregoing conditions were key to the Court's analysis, Judgment No. 238 must be especially noted for the cardinal importance attached to the infringement of the right of access to justice. The decision translates into a robust affirmation of the right to effective judicial protection as a cornerstone of democracy and the rule of law. First, the Court recalled its position that the right to judicial protection is one of the 'supreme principles'[9] of the Italian constitutional order; in the latter, 'securing a judge and a judgment to *anyone, anytime and for any dispute* is intimately connected to the principle of democracy itself'.[10] Second, the Court made it clear that the significance of this right transcended the Italian legal system and powerfully depicted it as one of 'the grand principles of legal civilization of every democratic system of our times'.[11]

The decisive weight accorded to the absence of effective remedies for the adjudication of claims for reparation by the victims of Nazi crimes constitutes a fundamental innovation in the Italian case law on the issue of state immunity versus human rights. Prior to Judgment No. 238, the link between absence of remedies and forfeiture of immunity had not been established unequivocally within that case law.[12] Indeed, when Italy advanced an argument to this effect before

[6] *Ibid*., § 3.4.
[7] *Jurisdictional Immunities of the State*, § 93.
[8] Judgment No. 238, § 3.4.
[9] *Ibid*., quoting Constitutional Court, Judgment No. 18, 2 February 1982.
[10] *Ibid*., reiterating Constitutional Court, Judgment No. 18 of 1982 (emphasis added).
[11] *Ibid*.
[12] It is precisely for this reason that even those commentators generally in favour of this jurisprudence have criticized it at times. See for example, R. Pavoni, 'Human Rights and the Immunities of Foreign States and International

the ICJ it was unable to pinpoint with precision any supportive reference drawn from Italian judicial precedents. The essence of the *Ferrini*[13] jurisprudence has consistently been its monolithic adherence to the alleged international law principle of the hierarchical priority of *jus cogens* over the customary state immunity rule.[14]

The Constitutional Court underscored that the absence of remedies means absence of *effective judicial* remedies.[15] Victims of crimes hold the right to obtain a fair and meaningful court determination of the merits of their compensation claims. The Court disavowed political processes,[16] especially diplomatic negotiations involving the states concerned such as those ventilated by the ICJ.[17] This approach seems too narrow. A flat rejection of *any* means of redress for victims of crimes other than judicial proceedings is at variance with the need to establish a rational balance between the protection of human rights under national constitutions and the principles underlying the international law of state immunity, which are also normally recognized in such constitutions, including under Article 10 of the Italian Constitution. However, it is submitted that the Constitutional Court's inflexible position on the necessity of judicial remedies was heavily fact-specific. The ICJ's recommendation of further negotiations between the German and Italian governments on the outstanding individual reparations for crimes against Italian nationals during the Second World War had to be regarded as inconsequential, since 'for decades'[18] these governments had been unable and/or unwilling to devise a solution. Such potential negotiations did not, therefore, represent an *effective* remedy on the facts of the case. In other contexts,[19] interstate processes may be considered an appropriate alternative route to provide a level of human rights protection roughly equivalent to court adjudication.

However, in one of the first pertinent decisions following Judgment No. 238, a criminal division of the Italian Supreme Court of Cassation did not accept that the absence of alternative remedies amounted to a requirement qualifying the principle upheld by the Constitutional Court. The *Opačić* case involved the criminal prosecution *in absentia* of an official of the former Yugoslav People's Army who, in January 1992, had ordered the downing of a military helicopter operating in the former Yugoslavia on behalf of the European Community Monitoring Mission, the latter being entrusted with overseeing respect for the ceasefire temporarily proclaimed in the territory then affected by the 1990s Yugoslav wars.[20] The so-called 'Podrute massacre' caused the death of the five soldiers — four Italians and one French — on board the helicopter. The heirs of the Italian victims intervened in the criminal proceedings as *parties civiles* and sought compensation from both the defendant *and* Serbia in its capacity as civilly liable for the defendant's conduct. After determining that the facts at stake corresponded to the war crimes of willful killing and intentional attack against a humanitarian assistance mission under the ICC Statute,[21] the Supreme Court of Cassation denied immunity to Serbia and, as anticipated, rejected the latter's defence based on the existence of alternative remedies available to the *parties civiles* in order to recover damages.[22] The

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Organizations', in E. de Wet and J. Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (2012) 71, at 91-93.

[13] Court of Cassation, *Ferrini v. Germany*, Judgment No. 5044, 11 March 2004 (hereinafter '*Ferrini*').

[14] See also Section 3 of this article.

[15] Judgment No. 238, especially §§ 3.4, 3.5, 5.1 ('absence of any other form of judicial redress of violations of fundamental rights').

[16] *Ibid.*, §§ 3.1, 3.4.

[17] *Jurisdictional Immunities of the State*, § 104. See also *ibid.*, § 102.

[18] Judgment No. 238, § 1.2, The Facts (*Ritenuto in fatto*), recalling the view of the Tribunal of Florence.

[19] This remark is without prejudice to the significance of potential future negotiations and settlement agreements between Germany and Italy. It is undeniable that such developments would, in principle, impact on the related litigation before Italian courts relying on Judgment No. 238.

[20] Court of Cassation (first criminal section), *In the Matter of Criminal Proceedings against Dobrivoje Opačić*, Judgment No. 43696, 29 October 2015 (hereinafter '*Opačić*').

[21] *Ibid.*, § 5.2.1, Conclusions on Points of Law (*Considerato in diritto*).

[22] *Ibid.*

latter requirement, the Court pointed out,[23] was not present in the *dispositif* of Judgment No. 238, nor could it be evinced from the legal considerations and rationale underlying the substance of that decision. At best, the Court went on, the passages emphasizing the complete deprivation of judicial protection suffered by the victims of the crimes at stake in Judgment No. 238 were meant as an *a fortiori* argument to corroborate the findings of the Constitutional Court.[24]

As observed above, a close reading of Judgment No. 238 yields the opposite conclusion: the absence of effective alternative remedies represents a crucial condition for the unconstitutionality of grants of immunity in cases concerning international crimes. Tellingly, in *Opačić* the Supreme Court of Cassation was not persuaded by its own flat rejection of this point. Thus, the Supreme Court felt the necessity to add that, at all events and in accordance with Judgment No. 238, judicial protection must necessarily translate into *effective* remedies to the benefit of the victims.[25] This was not the case for the remedies ventilated by Serbia, which had apparently relied on the victims' ability to recover compensation from the individual defendant. The assets of private individuals, the Court remarked,[26] may well prove insufficient to honour substantial awards of damages. Therefore, in the Court's view, where the most serious crimes are at stake, it would be unreasonable to deprive victims of the possibility to sue civilly liable public subjects, such as the states whose organs have materially committed the crimes, which in principle have adequate financial capacity. Accordingly, the *Opačić* decision shows that the effectiveness of alternative remedies invoked by a defendant state will most likely constitute a key contentious issue in the emerging jurisprudence post-Judgment No. 238, rather than the existence of the requirement per se.

Conversely, it should be recalled that the centre stage afforded by the Constitutional Court to the lack of judicial protection does not imply that this may be, in and of itself, sufficient to make conferrals of state immunity unconstitutional. To that effect, the absence of judicial remedies must occur in a situation where the foreign state is accused of serious breaches of human rights, first and foremost those resulting from international crimes. Even a complete nullification of the right to judicial protection (as in the dispute at hand) may be acceptable, the Court held,[27] if a proportionality balancing exercise yields the conclusion that the public interest underlying the recognition of foreign state immunity outweighs that right. However, this does not apply when the commission of war crimes and crimes against humanity is at stake. According to the Court, 'an overriding public interest capable of justifying the sacrifice of the right to judicial protection of fundamental rights, *impaired by acts recognized as serious crimes*, cannot be identified in the Italian constitutional order'.[28] Neither the objective of maintaining sound international relations nor the duty of non-interference in the governmental affairs of foreign states justifies immunity for crimes of deportation, forced labour and massacres of civilians that have not been redressed.[29] In other words, the preclusion of judicial review for the purpose of protecting the fundamental rights of victims of the crimes at issue renders the impairment of supreme constitutional principles 'wholly disproportionate vis-à-vis the objective of non-interference with the exercise of states' governmental authority',[30] *but only* 'whenever such authority took shape, as in the present case, through conduct amounting to war crimes and crimes against humanity'.[31]

Crucially, this unequivocal limitation of the scope of the Constitutional Court's ruling to situations involving international crimes may *a contrario* imply that the infringement of the right to judicial protection is tolerated by the Italian Constitution in all other cases where international law

[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.* Cf. Pavoni, *supra* note 12, at 97-98.
[27] Judgment No. 238, § 3.4.
[28] *Ibid.*, (emphasis added).
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*

requires immunity to the benefit of foreign states and their agents. Reference should not only be made to each *jure imperii* act that cannot be characterized as a serious violation of fundamental human rights, but also to acts of a private law or mixed nature, such as certain complex commercial transactions or employment contracts, which nevertheless attract immunity on grounds established by the 2004 Convention on Jurisdictional Immunities of States and Their Property or customary law as interpreted by domestic courts. The Constitutional Court observed that foreign state immunity is 'permitted'[32] by the Italian Constitution when it protects ordinary sovereign functions, not when it would shield 'conduct unrelated to the typical exercise of governmental authority',[33] which has, rather, been 'expressly considered and qualified as unlawful because it infringes inviolable rights'.[34] This part of the judgment is not straightforward. It seems that the Court did not distinguish between the 'typical' or 'lawful' exercise of governmental authority[35] as the benchmarks for granting state immunity that is compatible with the Constitution. The first qualification appears to accept the constitutional legality of every conferral of immunity connected to the performance of ordinary *jure imperii* acts regardless the availability of alternative remedies for the individuals suing foreign states before domestic courts. By contrast, the second qualification may be taken to imply that, irrespective of the distinction between *jure imperii* or *jure gestionis* acts, any recognition of immunity for *unlawful* state conduct that has not been redressed would attract a declaration of unconstitutionality. Pace the ambiguous terminology used by the Constitutional Court, it is safe to reiterate that the most convincing reading of the decision is one which confines its scope to serious breaches of human rights and humanitarian law for which effective alternative means of individual redress are absent.

In this sense, Judgment No. 238 leaves untouched the key problem of reconciling the right of access to justice with all cases unrelated to international crimes where, more or less indisputably, international law binds the forum courts to grant immunity, but effective alternative remedies do not exist elsewhere, such as before the courts of the defendant state. However, given that this problem has been recurrent in Italian practice,[36] and the associated constitutional challenges have been dismissed on a variety of frequently unpersuasive grounds, it will most likely be revisited in the aftermath of Judgment No. 238.

3. The Strange Story of the Territorial Nexus

The fact that those war crimes at issue in the cases that underpinned Judgment No. 238 had been committed (in part) on Italian territory cannot be viewed as an indispensable element qualifying the Constitutional Court's ruling. While the territorial nexus was outlined in all of the questions referred by the Tribunal of Florence to the Court, such factor was simply not reflected in the *dispositif* of Judgment No. 238,[37] as well as in its key holdings. In those few occasions the territorial

[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.* The Constitutional Court used the expression 'lawful exercise of governmental authority' in the passage of the decision immediately subsequent to the one quoted in the text. See also *ibid.*, § 5.1, referring to the 'unlawful exercise of governmental authority by a foreign state, *such as, in particular*, that taking shape through acts held to constitute war crimes and crimes against humanity' (emphasis added).
[36] For a telling example, see Court of Cassation (labour section), *Cargnello v. Italy*, Judgment No. 13175, 20 June 2005. See also R. Pavoni, 'La jurisprudence italienne sur l'immunité des États dans les différends en matière de travail: tendances récentes à la lumière de la convention des Nations Unies', 53 *Annuaire français de droit international* (2007) 211, at 221-223.
[37] The territorial nexus is, instead, mentioned in the *dispositif* of a 2015 decision by the Court that reiterated and apparently fully endorsed Judgment No. 238 with respect to a further case referred by the Tribunal of Florence involving a Nazi massacre perpetrated entirely on Italian territory. However, it must be noted that such *dispositif* merely reproduced verbatim the questions of constitutionality as referred by the Tribunal of Florence, which, as noted in the text, consistently highlighted the connection of the crimes at stake with the Italian territory. See Constitutional Court, *Donati v. Scheungraber, Stommel and Federal Republic of Germany*, Order No. 30, 3 March 2015.

nexus was mentioned, the Court seemed to be doing so for descriptive purposes only.[38] Unlike issues of state immunity from execution,[39] the Court did not explicitly consider the scope of its review as excluding cases concerning state immunity from suits alleging extraterritorial breaches of fundamental rights. Should it then be assumed that this was an *implicit* exclusion and that the significance of the ruling must be appraised accordingly? At least a couple of reasons exist indicating that this question should be answered in the negative.

First, as previously mentioned, the Court emphasized precedents according to which the right of access to justice in Article 24 of the Italian Constitution covers *anyone, anytime and any dispute*. In Italian practice on state immunity, such a universalistic conception of this right has, for instance, induced courts to assert jurisdiction in labour disputes involving foreign states, with no distinction whatsoever in terms of nationality of the employee.[40] Secondly, and most importantly, in Judgment No. 238 the Court appeared to consider that international law *allows* an exception to immunity regarding compensation claims for personal injury caused by foreign states' acts performed in the territory of the forum state, including when those acts take place in the context of military activities and armed conflicts — the so-called 'non-commercial territorial tort exception'. In this light, the *true* significance of the Court's decision concerns extraterritorial gross violations of human rights. The customary rule that has not been incorporated in the Italian legal system is necessarily that shielding human rights violations occurring abroad, as in the Court's reasoning this rule would not encompass *any* territorial wrongs occasioning death or personal injury.

This conclusion emerges from the sole part of Judgment No. 238 under which emphasis was placed upon the territorial nexus, namely, the part involving the constitutional legality of Article 3 of Law No. 5 (2013). The Court recalled that this provision was specifically passed by the parliament of Italy in order to dispel any doubt about the obligation of Italian courts to comply with the judgment in *Jurisdictional Immunities of the State* (as well as similar future ICJ decisions).[41] However, this was carried out, the Court continued, without excluding from the scope of the legislation those cases where the ICJ, as in *Jurisdictional Immunities of the State*, had upheld state immunity for war crimes and crimes against humanity, 'even if they were committed by the armed forces of a state on the territory of the forum state'.[42] As such, in the Court's view, 'the challenged legislation *derogates even from what has been expressly provided for in the UN Convention on Jurisdictional Immunities of States and Their Property*'.[43] The Court had in mind Article 12 of the UN Convention, which lays down the territorial tort exception. Under this exception, immunity does not cover claims for compensation for personal injury or death caused by foreign states' acts occurring in whole or in part in the territory of the forum state. The Court assumed that this norm — evidently regarded as a reflection of customary law — may apply irrespective whether the tort arises from *jure gestionis* or *jure imperii* acts, including especially military activities. Although the

[38] With one exception outlined in the subsequent part of this section, that corroborates the view expressed here, rather than disproving it.

[39] Judgment No. 238, § 1.

[40] Thus, irrespective whether the employee was an Italian national or resident, or whether she or he was a national of the employer state. See Pavoni, *supra* note 36, at 219-220. It is useful to recall that this practice goes well beyond what is established by the pertinent treaties. Cf. Art. 5(2) European Convention on State Immunity; Art. 11(2)(e) Convention on Jurisdictional Immunities of States and Their Property. In the context of the employment exception to state immunity, it is the *ratione personae* extension of its scope as supported by Italian courts that is problematic, whereas — *ratione loci* — the exception is only triggered if and when the work in question is performed in the territory of the forum state.

[41] Judgment No. 238, § 5.1. Italian Law No. 5 (2013) bound Italian courts to decline their jurisdiction with respect to any pending proceedings involving state acts found by the ICJ to be covered by immunity, even in the presence of opposite decisions by Italian courts with authority of *res judicata*. It also introduced a special remedy (*revocazione*) for setting aside final judicial decisions in conflict with judgments of the ICJ. See G. Nesi, 'The Quest for a "Full" Execution of the ICJ Judgment in *Germany v. Italy*', 11 *Journal of International Criminal Justice* (2013) 185, at 193-195.

[42] Judgment No. 238, § 5.1.

[43] *Ibid*., (emphasis added).

Court is not alone in advocating it,[44] this position is far from being settled. It represents a very controversial issue in international law theory and practice. In *Jurisdictional Immunities of the State*, by selectively quoting from the *travaux préparatoires*, the ICJ did not accept that Article 12 of the UN Convention could be interpreted in this manner,[45] and concluded that customary law continues to require an armed forces and armed conflict exemption from the territorial tort exception.[46]

Two options exist to explain the Constitutional Court's attitude. The first is that the Court intended to *openly* challenge the ICJ's views relating to the state of international law with respect to the scope of the tort exception. This may safely be ruled out, because such a challenge would represent an anomaly vis-à-vis the methodology endorsed in Judgment No. 238. In other words, the Court had made it clear that its review was confined to domestic constitutional issues and did not extend to the 'especially authoritative'[47] (*particolarmente qualificat[e]*) interpretations of relevant norms of international law as set out by the ICJ. The second, more likely option, is that the Court did not grasp the terms and extent of the debate revolving around the applicability of the tort exception to acts of foreign armed forces. This observation finds confirmation in the Court's reliance on the interpretative declaration made on 6 May 2013 by Italy when depositing its instrument of accession to the Convention on Jurisdictional Immunities of States and Their Property.[48] The relevant portion of the declaration reads: 'Italy states its understanding that the Convention does not apply to the activities of armed forces and their personnel, whether carried out during an armed conflict as defined by international humanitarian law, or undertaken in the exercise of their official duties'. The Court's mistakenly believed that such declaration intended to reiterate that — evidently as a matter of international law — the acts of foreign armed forces do not enjoy immunity when committed on the territory of the forum state. The opposite is true. The purpose of this declaration — as well as that of the essentially identical declarations made by Finland, Norway, and Sweden — is to preclude any interpretation of the tort exception in Article 12 of the UN Convention to cover military activities.[49]

It must be noted that the Constitutional Court's declaration of purpose consisting in the blind, *albeit apparent*, acceptance of the international law interpretations given by the ICJ is particularly unfortunate here. The part of *Jurisdictional Immunities of the State* discussing the tort exception may certainly be considered as the weakest of the judgment. This is shown by the wealth of pertinent contradictory indications emerging from state practice — of which some were astutely ducked by the ICJ.[50] Thus, had the Constitutional Court taken issue with this part of the ICJ's judgment, the resulting ruling would have been less controversial and even welcomed by many as well-founded in international law, precisely because the territorial nexus would have been regarded as one of its key elements.

Instead, the odd story of the Constitutional Court's treatment of the tort exception indicates that the territorial nexus is foreign to the essence of Judgment No. 238. In this perspective, the

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[44] See for example, N. Ronzitti, 'L'eccezione dello *ius cogens* alla regola dell'immunità degli Stati dalla giurisdizione è compatibile con la Convenzione delle Nazioni Unite del 2005?', in F. Francioni, M. Gestri, N. Ronzitti and T. Scovazzi (eds), *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione europea* (2008) 45, at 63-64.

[45] *Jurisdictional Immunities of the State*, § 69. See also *ibid.*, §§ 64-65.

[46] *Ibid.*, § 78.

[47] Judgment No. 238, § 3.1.

[48] *Ibid.*, § 5.1.

[49] This conclusion is in line with what the ICJ assumed when assessing the meaning of the saving clause on armed forced contained in Art. 31 European Convention on State Immunity and, more to the point, when recalling the analogous declarations made by Norway and Sweden on becoming parties to the Convention on Jurisdictional Immunities of States and Their Property, see *Jurisdictional Immunities of the State*, §§ 67-69. As a result of the inconclusiveness of such clauses and declarations, what is questionable in the ICJ's reasoning is its appraisal of the state of customary law with respect to immunity for territorial wrongs committed by foreign armed forces.

[50] See for example, R. Pavoni, 'An American Anomaly? On the ICJ's Selective Reading of United States Practice in *Jurisdictional Immunities of the State*', 21 *Italian Yearbook of International Law* (2011) 143.

decision may be viewed as the logical and consistent continuation of the *Ferrini* jurisprudence of Italian courts, which has refrained from attaching decisive weight to the *locus commissi delicti* for the purpose of denying immunity to states accused of grave breaches of human rights.[51] At best, such element has played the role of an *a fortiori* argument in favour of lifting immunity when international crimes were at stake.

Crucially, the judgment in *Ferrini* did not only endorse a limitation of state immunity when *jus cogens* human rights breaches — regardless where they have been committed — are at stake. The judgment also asserted, in one of its concluding statements, that Italian courts undoubtedly had jurisdiction over the case, as in matters of war crimes the criterion of *universal civil jurisdiction* applied.[52] In the subsequent jurisprudence, the most telling example of a similar approach comes from the 12 identical orders by which, in May 2008, the Supreme Court of Cassation consistently denied immunity to Germany for acts of deportation and forced labour carried out by Nazi forces during the Second World War.[53] As further alleged evidence of their soundness, all the decisions contained a rapid reference to the fact that 'the unlawful conduct also occurred in Italy'.[54] However, the *Sciacqua* case related to an Italian soldier captured by Nazi troops in Larisa, Greece, then occupied by the Italian army, and eventually deported to slave labour in a German concentration camp.[55] Assuming that the key principle upheld by the 2008 orders was that the denial of immunity was only justified in the case of territorial crimes, Germany hastily requested that the Supreme Court revoke the *Sciacqua* decision on the grounds that it was vitiated by a decisive error of fact. This application was flatly rejected as inadmissible.[56] The Supreme Court made clear that the reference to Italian territory in the *Sciacqua* ruling was inadvertent and inconsequential. The Court stated that the essential principle retained in that decision was — once again — loss of immunity by reason of the gravity of the crimes in question and the resulting universal civil jurisdiction.[57] It should be recalled that, although intertwined, immunity and jurisdiction remain distinct concepts. A determination that immunity is unavailable in a given legal situation does not imply that the courts of the forum may lawfully exercise jurisdiction. For that purpose, a suitable jurisdictional ground in accordance with national (and possibly, international) law is necessary. Yet, the *Ferrini* jurisprudence made it clear that the problem could be solved simply by merging the *jus cogens* exception to state immunity with the notion of universal civil jurisdiction over international crimes.

However, the Italian Supreme Court of Cassation itself has lately ignored this jurisprudence in two of the most significant decisions rendered so far in the aftermath of Judgment No. 238. In *Flatow*,[58] and *Eisenfeld*,[59] the Supreme Court refused to grant exequatur to decisions of courts in the United States, which, on the basis of the well-known terrorism exception to state immunity enshrined in the United States Foreign Sovereign Immunities Act, had awarded damages (including

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[51] The only possible exception being Court of Cassation, *Germany v. Autonomous Prefecture of Vojotia*, Judgment No. 11163, 20 May 2011. In coming to the conclusion that the Greek decision awarding compensation to the victims (or their heirs) of the Distomo massacre during the Second World War was not contrary to the Italian public order and could thus be granted *exequatur*, the Court placed special emphasis on the territorial nexus of the crime and denied that the judgment in *Ferrini* could be read as endorsing a principle of universal civil jurisdiction over cases involving international crimes, *ibid.*, §§ 32-33.

[52] *Ferrini*, § 12: 'It has been pointed out that the facts on which the petition is based also occurred in Italy. But it must merely be stated that, since such facts amount to international crimes, jurisdiction over them should be asserted in accordance with the principles of universal jurisdiction'. For a fierce critique of the endorsement of the criterion of universal civil jurisdiction by the judgment in *Ferrini*, see A. Gattini, 'War Crimes and State Immunity in the *Ferrini* Decision', 3 *Journal of International Criminal Justice* (2005) 224, at 231, 237-239.

[53] Court of Cassation, Orders Nos 14201 to 14212, 29 May 2008. See for example, *Germany v. Mantelli*, Order No. 14201, 29 May 2008.

[54] *Ibid.*

[55] Court of Cassation, *Germany v. Sciacqua*, Order No. 14206, 29 May 2008.

[56] Court of Cassation, *Germany v. Sciacqua*, Order No. 21468, 9 October 2009.

[57] *Ibid.*

[58] Court of Cassation, *Flatow v. Islamic Republic of Iran*, Judgment No. 21946, 28 October 2015 (hereinafter '*Flatow*').

[59] Court of Cassation, *Eisenfeld v. Islamic Republic of Iran*, Judgment No. 21947, 28 October 2015.

punitive damages for hundreds of millions of US dollars) against Iran to the heirs of victims of terrorist attacks in Israel. The Supreme Court found that none of the criteria established by Italian law for exercising civil jurisdiction applied to the legal situation adjudicated by the decisions in the United States.[60] These decisions, thus, could not be recognized and declared enforceable for want of an essential requirement set by the Italian legislation on private international law.[61] In particular, the extraterritoriality of the crime at stake and the absence of a legal representative of Iran in the United States at the time of the events were central to this conclusion. In the preceding passages, however, the Supreme Court fully upheld Judgment No. 238 of the Constitutional Court and, having accepted that the terrorist bombings at stake amounted to crimes against humanity, declared that the exequatur requests could not be refused by reason of the immunity allegedly enjoyed by Iran.[62] By contrast, in the Supreme Court's view, no support whatsoever could be found in Judgment No. 238 to justify the assertion of jurisdiction over the the *Flatow* case by the United States courts and the *exequatur* to the ensuing decisions by the Italian courts. The Court observed that Judgment No. 238 was only concerned with immunity issues, whereas it did not create any new jurisdictional ground.[63] In particular, it did not recognize 'a principle of universal civil jurisdiction over actions for damages arising from *delicta imperii*'.[64]

In short, immunity and jurisdiction were completely divorced by the decision in *Flatow*. Accordingly, Judgment No. 238 may well impose a duty to deny state immunity (also) for extraterritorial crimes, but that duty is not necessarily accompanied by a concomitant assertion of civil jurisdiction. Theoretically, the Supreme Court's reasoning may be correct, but it remains in tension with the rationale and substance of Judgment No. 238 and — *a fortiori* — of the *Ferrini* jurisprudence. Future constitutional challenges to Italian norms barring civil jurisdiction over *any* compensation claims for international crimes and comparable human rights violations are not implausible. At the same time, it cannot be overlooked that in the above mentioned decision in *Opačić* handed down by the first criminal section of the Supreme Court,[65] the circumstance that the downing of the Italian military helicopter had occurred in the territory of the former Yugoslavia (now Croatia) did not play any role. At once, immunity was denied to Serbia and jurisdiction over the compensation claim brought against it by the (heirs of the) victims upheld. Despite the extraterritorial nature of the crime, certain jurisdictional grounds and doctrines may well have supported the assertion of *civil* jurisdiction over the specific facts underlying the case.[66] Yet the jurisdictional issue was entirely sidestepped by the Supreme Court.

4. Conclusion

The foregoing remarks are not meant to suggest that the endorsement of *permissive* universal civil jurisdiction over claims of compensation for international crimes is necessarily sensible, or recommended, or has been argued in any persuasive manner by Italian courts. Rather, the idea is simply that in this area a complete divorce between immunity and jurisdiction may paradoxically

[60] *Flatow*, §§ 6.1-6.5, Conclusions on Points of Law (*Considerato in diritto*).
[61] Art. 64(1)(a) Law No. 218, 31 May 1995.
[62] *Flatow*, §§ 4-5.
[63] *Ibid*., § 6.6.
[64] *Ibid*. The Supreme Court drew a questionable argument in favour of its conclusion from the tort exception to state immunity in Art. 12 Convention on Jurisdictional Immunities of States and Their Property, which was regarded as authoritative evidence of the principle of territoriality of civil jurisdiction, see *ibid*.
[65] *Opačić*.
[66] For instance, a number of intriguing issues and complications arise from the well-known, especially in civil law countries, remedy of the *constitution de partie civile*, which — as in *Opačić* — allows the victims of crimes to bring a compensation claim within criminal proceedings against both the individual defendants and the civilly liable natural and legal persons (such as Serbia in this case). In principle, the fact that criminal jurisdiction is correctly asserted — on the basis of universality or otherwise — over the individual defendants does not have a bearing on the existence of jurisdiction vis-à-vis the civil action against the civilly liable persons.

undermine the right to a remedy and reparation for victims of international crimes. The main lesson from Judgment No. 238 should apply also in this context. In other words, before declining jurisdiction over grave breaches of human rights allegedly perpetrated by foreign state agents on account of the absence of relevant links to the forum state, the courts should ascertain that the competent fora are willing and able to offer a meaningful and effective remedy to victims.