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Remedies against Immunity?

Reconciling International and Domestic Law after the Italian Constitutional Court's *Sentenza* 238/2014

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During our long journey towards the book, Jörg Luther, a friend and colleague, sadly passed away. His contribution in this study is the best way to remember him as a man and a scholar, and allow his ideas to live on.

Lille, France — Valentina Volpe
Heidelberg, Germany — Anne Peters
Viterbo, Italy — Stefano Battini

February 2021

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A Dialogical Epilogue

Joseph H. H. Weiler

Abstract In this Dialogical Epilogue, I address a series of both general and specific questions to some of the contributors of this volume. The intent is to seek clarification on or even contest one or more propositions presented in the various chapters. In the role of a "Consul of the Readers" I enter into a conversation with the book's authors to discuss some of the fundamental questions to which *Sentenza* 238/2014 gives rise and that have, at best, received only indirect answers in the various chapters. I believe answering them will enhance the value of each contribution and of the book as a whole.

It is the nature of all law books, and edited books in particular—where authors are constrained by the space available to them—that oftentimes readers, if they could, would love to put a question, seek a clarification on, or even contest one or more propositions in what they read. My role here is to be a Consul of the Readers and to put such questions to some of the contributions to this excellent volume. The book is interesting in so many ways that go beyond the strict legal issues in question. For example: participation was limited to German and Italian nationals. (Oh, yes! I am a proud and patriotic Italian citizen). But the critical mood did not coincide (as is often the case in arbitrations or with national and ad hoc judges on the International Court of Justice (ICJ)) with nationality. Indeed, the most critical voices against the Italian Constitutional Court (ItCC) decision came from Italians and some of the most sympathetic voices to the real legal/moral dilemma it faces came from Germans.

Only a few, if any, were categorical in their conclusions; all understood that from an ethical perspective this was a tough issue—on the responsibility for which views differed—and almost all suggested various ways of squaring a circle.

In what follows I will be posing specific questions to some of the authors. In addition, there are two underlying fundamental questions to which the case gives rise and at best received only indirect answers in the various chapters. I believe these two

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questions would be lurking in the minds of many readers working their way through the various contributions, and it is hoped that answering them will enhance the value of each contribution and of the book as a whole.

General Questions

JHHW: *In what circumstances and under what conditions, if any, would you say that it would be justified or at least legitimate for a national court or tribunal, against whose decisions there is no judicial remedy, to defy a decision of the ICJ (or any other international tribunal), which under the rules of international law is binding on such a state? And, similarly, to give a decision which defies a rule of international law, clearly articulated by the ICJ or a relevant international tribunal, in some other case.*

I want you to imagine that such a case is before a national court and one of the parties is making an impassioned plea that this is an instance where the national jurisdiction should disregard the ICJ (or a relevant international tribunal) in the two circumstances mentioned above. And imagine further that either of the parties before the national court is to use your brief and terse statement as giving guidance on how to resolve this critical issue.

I want to make two further pleas: kindly do not hide behind the 'it all depends on the circumstances' cop-out; and kindly make your statement relevant to any national court (it should not be Italo-German specific).

Finally, this is not an invitation to write a whole new chapter. Imagine that you are involved in litigation and the court in question requests a written submission limited to 500 words.

The second, related question, is as follows: in what circumstances and under what conditions, if any, would you consider it justified or legitimate for a national court or tribunal, against whose decisions there is no judicial remedy, to defy a clearly established rule of international law, or legal obligation deriving from a treaty—ie in this case I am not putting in question the authority of the ICJ or another relevant international tribunal. I am not interested in cases where the national court calls into question the specific interpretation of the rule, or its validity, but where it is squarely accepted by both parties before it, and then by the court itself, that there is a binding international obligation but is asked to defy it.

The three pleas above apply here too.

Paolo Palchetti

My answer relates to your second question. Let me start with the 'if any' option. It is difficult to accept that under no circumstances would a national court be correct in defying a clearly established rule of international law, or legal obligations deriving from international rules (including, eventually, from binding judgments of the ICJ).

the FCC to protect the applicant's human rights without relying on its concept of identity control. The Court could have either opted for a preliminary ruling by the CJEU or it could have chosen an interpretation preventing a norm conflict with EU Law. It is doubtful that the act in question had to be considered as an act of German public authority determined by Union Law. Interpreting the Framework Decision on the European Arrest Warrant in light of Article 47 and 48 of the Charter of Fundamental Rights, the Court could have concluded that EU law does not require extradition in cases of absentia proceedings. The decision of the Higher Regional Court was not determined by EU law. The part of the decision violating human dignity could have been considered exclusively as an act of German public authority, which the Court could have assessed on the basis of the German Constitution.[2]

Eventually, you may argue that I am evading the baseline of your argument, namely that in exceptional cases and for moral reasons a court should defy a rule of customary international law or a judgment of an international tribunal. But my worries are that such cases are not as exceptional as you suggest. In a multipolar world order characterized by increasing value contestations, arguments based on national identity as embodied in national constitutions are already being raised more frequently. Pertinent cases in recent years do not only refer to severe war crimes but they include cases on extradition, expropriation, or refugee relocation schemes. To define where there is sometimes a justified legal or moral imperative and where such imperatives are abusively claimed to protect all kinds of ostensible national values may become a slippery slope. With its reliance on human dignity in the *Constitutional Identity* case, the FCC may indeed have opened yet another door for widening national identity jurisprudence against international courts given that a human dignity core may well underlie all fundamental rights. In this light, I have always been sceptical about recourse to morality for creating instances of 'civil disobedience' between courts. In the end, international human rights protection exists precisely for those who get into conflict with national identities.

To Riccardo Pavoni

JHHW: *I think we are all in favour of peace, not least legal peace. And I think that your use of international comparative precedents makes a strong case for how this peace may be obtained in negotiations between the parties. But the proposed 'peace agreement' you advocate for does have legal ramifications for evaluating* Sentenza *238/2014. Since, assuming I and your readers understand you correctly, it is*

[2]Dana Burchardt, 'Die Ausübung der Identitätskontrolle durch das Bundesverfassungsgericht - Zugleich Besprechung des Beschlusses 2 BvR 2735/14 des BVerfG vom 15.12.2015 ("Solange III"/"Europäischer Haftbefehl II")', *Heidelberg Journal of International Law*, 2 (2016), 527–551, at 549.

premised on the assumption that if adequate remedies for serious rights violations were not provided to victims, the parties have to negotiate such remedies.

But does that not at least implicitly vindicate the position taken by the ItCC? And had the ItCC not taken that principled position—which would lead to what you consider to be the necessary fair and equitable solution—what incentive would there be for the parties to engage in negotiations?

RP: I am very thankful for your question, Professor Weiler, as it gives me an opportunity to reiterate some of my thoughts on *Sentenza* 238/2014. Indeed, I believed it was more in line with the spirit and purpose of this volume to espouse a forward-looking approach in my chapter and accordingly enquire into the future prospects of the German–Italian dispute concerning outstanding compensation claims by victims of crimes committed during World War II. Yet a clarification on the interaction between my findings and *Sentenza* is certainly in order.

Yes, you do understand me correctly. The 'legal peace' I am advocating, preferably by way of an intergovernmental arrangement between the parties setting up meaningful compensatory procedures for uncompensated victims, is premised on the assumption that, *under international law*, victims of serious breaches of human rights and humanitarian law are entitled to adequate remedies and reparation. Pace the ICJ's *Jurisdictional Immunities* Judgment, in my view—and that of a substantial number of scholars—this *international law* right to a remedy and reparation[3] qualifies the rule of state immunity for international crimes: the immunity of the responsible state before the courts of other states may be denied if and when *effective alternative remedies* are unavailable to the victims. Thus, not only should the negotiation of 'legal peace' between the parties be regarded as a reflection of their obligation to secure such remedies and reparation, it would also be a means of protecting state immunity for *acta iure imperii*—admittedly a key tenet of the world order—against backlashes and challenges coming from turbulent domestic courts, as the ItCC in delivering *Sentenza* may be depicted.

However, only indirectly and implicitly (at best) do the foregoing observations vindicate the holdings of *Sentenza* 238/2014. Certainly, *Sentenza*, by declaring in essence the 2012 ICJ Judgment incompatible with the Italian Constitution, has provided a robust incentive for the parties to come back to the negotiating table. It is easy to assume that, in the absence of *Sentenza* 238/2014, the whole affair would be buried once and for all, both at the judicial and—a fortiori—governmental levels. This is probably the key message arising from the Judgment and a number of comparable domestic cases, notably in the US, where the denial (or threat of denial) of state immunity has given impulse to fresh diplomatic representations and negotiations for the sake of victims' right to reparation for human rights violations. But this has little to do with the legal reasoning of the Constitutional Court. That reasoning lends itself to distinct layers of criticism.

[3]UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Annex, GA Res. 60/147, 16 December 2005.

First, the Constitutional Court was not crystal clear about the (domestic law) implications for state immunity stemming from the lack of alternative remedies for the victims. The decision may be interpreted as envisaging the commission of serious violations of human rights as the sole requirement for the loss of state immunity and, accordingly, as playing down the 'alternative remedies' test or merely using it as an a fortiori argument. This is the view expressed, for instance, by the late Benedetto Conforti in his commentary on *Sentenza* published in the *Revue générale de droit international public* and, in the judicial practice post-dating *Sentenza* 238/2014, by the Italian Court of Cassation in its 2015 *Opačić* decision involving and denying Serbia's immunity for war crimes. If this view were correct, the principle upheld by *Sentenza* 238/2014 would be especially broad as it would justify a withdrawal of immunity in each and every case implicating serious breaches of human rights by foreign states. I would consider this principle unacceptable as it would not draw a reasonable balance between the competing values at stake.

Secondly, one may well take the opposite view and believe—as I do—that the *Sentenza* was a breakthrough vis-à-vis the previous Italian jurisprudence in this area, precisely because the absence of alternative remedies was a key reason for the holdings of the Constitutional Court. Yet, *Sentenza* did not recognize that it could be implemented via political negotiations yielding whatever intergovernmental agreement and compensatory mechanism open to the victims. The Constitutional Court repeatedly pointed out that, in order to fulfil the victims' right to reparation, effective *judicial* remedies must be available. As the concerned Italian victims were denied such remedies in any other jurisdiction including before German courts, the only way forward was the repudiation of Germany's immunity and the consequent endorsement of assertions of jurisdiction by Italian courts. In short, according to the Court, 'legal peace' should be pursued through the judicial route, not by means of administrative or political processes. Of course, this does not mean that diplomatic negotiations would be a waste of time, but it does at least mean that the putative arrangements devised by the governments concerned might well be scrutinized by the Italian Constitutional Court under the high threshold of effective judicial protection set by *Sentenza*. Although clearly arising from frustration about the decades-long unwillingness of the German and Italian governments to engage in meaningful negotiations, the unbending position of the Court should be rejected as once again not establishing a satisfactory balance between the competing interests at play.

Thirdly, and most fundamentally, I firmly disagree with the methodological stance taken by the Court in *Sentenza* 238/2014. The latter contains a sort of preliminary disclaimer where the Court, relying on a confusing version of the doctrine of consistent interpretation, stated that it would only assess the consistency of the customary rule of state immunity for international crimes within the Italian constitutional order, without questioning how that rule was interpreted by the ICJ in its *Jurisdictional Immunities* Judgment. I do not subscribe to this view and I am not at all vindicating it in my chapter. On the contrary, and this is a good occasion to answer—at least in part—the general questions put to the volume's authors, I am unable to find any legal rule characterizing the decisions by the ICJ (or other

international courts) and the interpretations of international law offered therein as untouchable by domestic courts. Of course, this question must be kept distinct from the binding effect of such decisions. At any rate, the Constitutional Court did not justify its domestic law approach on account on that binding effect, which it explicitly rejected, and merely highlighted the 'especially authoritative' nature of the ICJ's interpretations. The result was perverse: the ICJ's decisions addressed to Italy may not be binding as a matter of Italian constitutional law, whereas the ICJ's interpretations in those same decisions are binding under both international and domestic law. There was nothing in theory or precedent barring an autonomous review of the pertinent practice by the Constitutional Court, that might have paved the way for findings different from those of the ICJ yet still justified under *international* law. It is true that *Sentenza* 238/2014 includes a number of tacit critiques of the ICJ's holdings, and it is also true that the Constitutional Court perceived itself as contributing to the progressive development of international law. But you cannot have your cake and eat it too! With its exclusive domestic law approach and associated disregard for its consistency with *international* practice and opinio juris, *Sentenza* rests on a fragile legal basis. This consideration may easily be relied upon to depict Judgment 238/2014 as a violation of international law *sic et simpliciter*, one which is liable to further engage the international responsibility of Italy arising from this affair. Full stop. Game over. The practical significance of the *Sentenza* may militate in favour of 'legal peace' and may be conducive to an evolution of international law in this area but not its legal reasoning.

To Filippo Fontanelli

JHHW: *You suggest a mutually agreed reparations scheme. If the two parties agree, this might indeed solve the problem. But one can understand German reticence to indicate their willingness to reopen settled agreements with multiple countries that fell victim to German WWII atrocities. How do you prevent such a settlement from destabilizing such agreements with claims of a differing nature surfacing from many quarters?*

Be that as it may, you sidestep the question of whether Sentenza *was justified. Was it?*

FF: Indeed, my chapter does not speak about *Sentenza* 238/2014, let alone assess it. The omission is deliberate: reparation schemes derive in all or in part from the states' agreements, so their establishment is possible also (and precisely) when there is no underlying obligation to set up one or when the obligation is contested. Incidentally, I do not think *Sentenza* is justified under international or Italian law, and I find it ethically dubious. Being righteous with another's money is a cheap method of virtue-signalling at best, and at worst a way to pass the buck and redirect away the claims of victims. This is why the proposed Reparation Scheme would call Italy's bluff and force it to put its money where its constitutional mouth is. The