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OBLIGATION TO COMPLY WITH ICJ DECISIONS: THE *JURISDICTIONAL IMMUNITIES* SAGA WITHIN THE ITALIAN LEGAL ORDER

Abstract

The 2012 judgment of the International Court of Justice in *Jurisdictional Immunities* concerned the application of state immunities in Italian courts and its failure to recognize the rights of Germany in this regard. Once the ICJ found Italy in violation of international customary law and ordered that relevant judicial decisions should cease to have effect, Article 94 of the UN Charter providing for the obligation to comply with ICJ decisions began to apply. The paper tracks down attempts to implement *Jurisdictional Immunities* in the Italian legal regime, analyses different – legislative and judicial – means of compliance, and presents general observations on the complexity associated with the fulfilment of the obligation to comply.

KEYWORDS

state immunity, International Court of Justice, war crimes, counter-limits doctrine, obligation to comply, UN Charter, domestic courts

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I. INTRODUCTION

World War II brought death and suffering to millions of people. Despite the passage of time – almost 85 years later – many wrongs have not been corrected, numerous victims and their families have not seen justice, and those responsible have not redressed the inflicted damage. The reasons are manifold – political, legal, logistical and others – some justified, other incomprehensible. But within the realm of public international law, the doctrine of state immunities plays here a key role. This rule of customary law derives from the principle of sovereign equality of states and provides protection to foreign states in a national jurisdiction from being sued or even subjected to legal proceedings before courts of a home state. Traditionally, international law did not provide any exceptions from placing a foreign state outside the jurisdiction of other states, but developments of international relations have led to relaxation of the restrictive approach to immunities and currently a limited doctrine is globally excepted, particularly in relation to economic activities of states.[1]

It is precisely at the intersection of issues relating to jurisdictional immunities of states and state responsibility for acts constituting international crimes committed during World War II that the German-Italian dispute arose. As the divergence of positions between these two European countries could not be resolved by diplomatic means, the case was brought to the International Court of Justice (ICJ) for settlement. It delivered its judgment in *Jurisdictional Immunities of the State*[2] in 2012 but the quest for compliance with the judicial decisions only started and continues to this day. Although the obligation to comply with the ICJ decision is clearly stipulated in Article 94 of the UN Charter,[3] the parties differ as to the measures adopted to secure such compliance. Furthermore, a close examination of the attempts to implement *Jurisdictional Immunities* clearly shows that it is a complex endeavour requiring a judgment-debtor to navigate through the norms

[1] Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, Oxford University Press 2015).

[2] *Jurisdictional Immunities of the State* (*Germany v Italy*: Greece intervening) [2012] ICJ Rep. 99 (*Jurisdictional Immunities*).

[3] Charter of the United Nations, 26 June 1945 San Francisco (UN Charter).

of international law but also limitations and requirements of its domestic legal regime. This inevitably produces frictions between these two legal systems and poses a question about the nature and usefulness of traditional division between the monistic and dualistic approach of national laws to international norms.[4]

The paper discusses those tensions and their practical implications using as an example the inter-state dispute between Germany and Italy resolved by the ICJ. Firstly, the general considerations on the obligation to comply with ICJ decisions are presented. The next section discusses the background of the disagreement and provides a detailed introduction into the ICJ pronouncement in *Jurisdictional Immunities*. Subsequently, the paper examines judicial and legislative measures adopted by Italy to implement the ICJ judgment and offers its assessment. Finally, general conclusions are provided.

II. DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE AND THE OBLIGATION TO COMPLY THEREWITH

The International Court of Justice is 'the principal judicial organ of the United Nations',[5] an international tribunal *par excellence* with the seat in The Hague, operating under the UN Charter and its Statute, annexed to the former. It resolves only inter-state disputes and consequently only states have standing before its bench, but it may as well issue advisory opinions on request from UN organs and specialized agencies.[6] The ICJ is the only international tribunal with a large, general, and universal jurisdiction and its decisions are considered the most authoritative pronouncements on international law.[7] Its prominence is further reaffirmed by the fact that the ICJ is the longest functioning permanent international tribunal, a direct successor of the Permanent Court of International Justice,[8] which is

[4] Francesco Francioni, 'From Utopia to Disenchantment: The Ill Fate of "Moderate Monism" in the ICJ judgment on *The Jurisdictional Immunities of the State*' (2012) 23(4) European Journal of International Law 1125; Andreas von Arnauld, 'Deadlocked in Dualism: Negotiating for a Final Settlement' in Valentina Volpe, Anne Peters and Stefano Battini (eds), *Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court's Sentenza 238/2014* (Springer 2021).

[5] UN Charter, Art 92.

[6] ibid, Art 96.

[7] Mohamed SM Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* (Kluwer Law International 2003) 119; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol 1 (9th edn, Longman 1992) 41; *Restatement (Third) of Foreign Relations Law of the United States* (American Law Institute Publishers 1987) 371.

[8] UN Charter, Art 92; Statute of the International Court of Justice, 26 June 1945 San Francisco (ICJ Statute), Arts 36(5) and 37.

tasked with promoting peaceful settlement of international disputes and advancing the rule of law in international affairs. Its jurisprudence is a first point of reference in international legal controversies, but at the same time it significantly contributes to constant development of international law.

The ICJ Statute and the Rules of Court govern the proceedings before the ICJ in contentious and advisory cases in a rather detailed manner. Nevertheless, once a decision or an opinion is rendered, international law envisages rudimentary regulations as there is a qualitative separation between the adjudicative and post-adjudicative phase.[9] The actual involvement, with some minor exceptions,[10] of the judicial institution is limited on the international plane only to the first stage, leaving the latter for further political processes. Thus, the limited legal framework of the post-adjudicative phase of a dispute is restricted to Article 94 of the UN Charter, itself a political instrument rather than the ICJ Statute, which reads:

(1) Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

(2) If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Section (2) is the only enforcement mechanism of the ICJ judgments, though the United Nations codified in a positive law. It is, however, ineffective and impractical, what is further confirmed by the practice of states and the UN itself. The enforcement regime from Article 94(2) is highly politicized already in its design, as it designates the political organ – the UN Security Council, where any of four big powers may utilize a veto power[11] – with the task. Also, the literal reading of the provision highlights that the mechanisms is discretionary as the Council may 'if it deems necessary' take action in situations of non-compliance. Furthermore, even if the Council decides to get involved, it may firstly make recommendations, which by their very nature are non-binding on a judgment-debtor. The next step leads to measures, but the UN Charter does not specify their contents in cases of non-compliance with the ICJ judgments. The only point of reference here could be a catalogue under Articles 41 and 42 of the UN Charter. This notwithstanding, the provisions aim at maintaining or restoring international peace and security, thus they are applicable to cases of larger calibre. Those challenges are a real problem, what is further reaffirmed by the fact that so far no positive action has

[9] Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford University Press 2004) 19.

[10] The ICJ is not involved in the enforcement of its decisions, nevertheless it might play some role through interpretation and revision proceedings regulated in Arts 60 and 61 of the ICJ Statute, respectively.

[11] UN Charter, Art 27(3).

been taken by the Security Council, despite quite a few examples of flagrant non-compliance with ICJ decisions.[12]

In this situation, where no effective enforcement mechanism is envisaged in international instruments,[13] the voluntary compliance and legal commitments in this regard are of highest importance. Article 94(1) cited above is the primary source of states' obligation, which is further strengthened by other provisions of the UN Charter. In particular, Article 2(2) stipulates that all Member States are required to fulfil the 'obligations assumed by them in accordance with the present Charter' in good faith. Consequently, non-compliance with a decision of the International Court of Justice is not only an affront to the ICJ itself and another party to the proceedings, but foremost constitutes a violation of the UN Charter, the fundamental instrument of the international community and a 'constitution' of the modern international order. Furthermore, the obligation to 'give effect to the judgment of the Court'[14] seems to be not only of treaty character but also constituting a norm of customary international law,[15] deeply rooted in basic principles of good faith and *pacta sunt servanda*.

The obligation to comply under Article 94(1) of the UN Charter is directly linked with the principle of *res judicata* of ICJ decisions as stipulated in Articles 59 and 60 of the ICJ Statute. The latter underline that those rulings have a binding force between parties to a case and are 'final and without appeal'. Hence, the compliance and *res judicata* principles create together two obligations for a judgment-debtor, a negative and a positive one.[16] The first precludes the possibility of relitigating or deciding anew a case already settled. The other, though, entails

[12] For example, after (in)famous *Certain Activities Carried out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua*), Compensation, Judgment [2018] ICJ Rep. 15, Nicaragua petitioned the Security Council, but no resolution was adopted due to the veto of the United States; see UN Security Council, Provisional Verbatim Record of 2704 Meeting, 31 July 1986, UN Doc. S/PV.2704.

[13] It needs to be mentioned that in fact the UN Charter or the ICJ Statute do not provide for any other mechanism of enforcement of the ICJ decisions. This, however, does not mean that no other methods exist or are used – with different results – by the international community, states concerned or even private parties. For a discussion of those methods, see Oktawian Kuc, *The International Court of Justice and Municipal Courts: An Inter-judicial Dialogue* (Routledge 2022) 90–100.

[14] *Gabčíkovo-Nagymaros Project* (*Hungary v Slovakia*), Judgment [1997] ICJ Rep. 7 [143].

[15] Shabtai Rosenne, *The Law and Practice of the International Court 1920–2005*, vol 1 (4th edn, Martinus Nijhoff Publishers 2006) 210; Oscar Schachter, 'The Enforcement of International Judicial and Arbitral Decisions' (1960) 54(1) American Journal of International Law 1, 2; CW Jenks, *The Prospects of International Adjudication*, (Stevens & Sons Limited 1964) 663.

[16] Mutlaq M Al-Qahtani, *Enforcement of International Judicial Decisions of the International Court of Justice in Public International Law* (PhD thesis, University of Glasgow 2003) 67–68 <theses.gla.ac.uk/2487> accessed 14 September 2023.

that a judgment-debtor state is 'under an obligation fully to implement'[17] an ICJ's pronouncement.

As to the scope of the obligation to comply with decisions of the ICJ, their binding force *ratione personae* applies only to states, what is evident on the basis of Articles 3 and 4 of the UN Charter and Article 34(1) of the ICJ Statute. But Article 94(1) specifies that only states parties to a case undertake the relevant commitment. In this context, it is important to clarify the notion of state under international law. It is best explained by the traditional black-box theory of state,[18] which looks upon a state as a monad or a monolith, and disregards its internal structures and mechanisms. International law binds a state as a whole but does not speak directly to its organs or constituting parts. It requires certain outcomes from a monad but does not control processes leading to those outcomes. Although this concept is eroding in modern international law,[19] it is still relevant to the obligation to comply with rulings of the International Court of Justice as states are basically free to select adequate means and methods of compliance, according to their internal policies and domestic law as well as to designate their organs and institutions for this task. Also, the ICJ itself underlines this principle in its case law, when in prescribing in general terms an adequate reparation it specifies that the required actions of a judgment-debtor shall be achieved 'by means of its own choosing'.[20]

Notwithstanding the above, the *ratione materiae* scope of the obligation to comply, defining which parts of a decision of the International Court of Justice are to be implemented is more problematic. Undoubtedly, a disposition of a ruling is to be complied with, as per *Interhandel* case, '[t]he Court notes in the first place that to implement a decision is to apply its operative part'.[21] But limiting the scope of the obligation only to the operative clauses is a too restrictive approach as the motives and a *dispositif* are interdependent and closely interrelated. Already a predecessor of the International Court of Justice – the Permanent Court of International Justice – explained that 'all the parts of a judgment concerning the points in dispute explain and complete each other and are to be taken

[17] *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals* (*Mexico v United States of America*), Judgment [2009] ICJ Rep. 3 [60].

[18] Ward Ferdinandusse, 'Out of the Black-Box? The International Obligation of State Organs' (2003–2004) 29 Brooklyn Journal of International Law 45.

[19] ibid.

[20] E.g. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua v Colombia*), Judgment [2022] ICJ Rep. 266, para 261(6); *Avena and Other Mexican Nationals* (*Mexico v United States of America*), Judgment [2004] ICJ Rep. 12, para 153(9); *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium*), Judgment [2002] ICJ Rep. 3, para 78(3).

[21] *Interhandel* (*Switzerland v United States of America*), Preliminary Objections, Judgment [1959] ICJ Rep. 6 [28].

into account in order to determine the precise meaning and scope of the operative portion'.[22] Also, the practise of the ICJ confirms this constatation, as the Court sometimes refers in its operative clauses directly to motives of a decision[23] and in territorial and maritime disputes relevant coordinates, maps and delimitation details are only provided in *motifs*.[24] Accordingly, the obligation to comply covers the operative parts of a decision together with reasoning directly concerning the subject-matter of a dispute.

To sum up, the obligation to comply is an obligation of state parties to a dispute settled by the International Court of Justice. It is a treaty obligation deriving directly from the UN Charter but also a customary rule. It is a general norm that leaves means and methods of compliance to states concerned. Hence, international law is very concise in regulating compliance, but this does not mean that the matter of implementation of an ICJ decision is not a complex problem.

III. *FERRINI* CASE AND THE ICJ'S RESPONSE IN *JURISDICTIONAL IMMUNITIES*

The origins of the German-Italian dispute concerning state immunities can be traced back to 1998, when Luigi Ferrini instituted proceedings before the Court of Arezzo against Germany in relation to his deportation in August 1944 to Germany for forced labour in factories of Reimahg Werke and Messerschmitt. His claim for damages for material and moral injuries could not be heard due to jurisdictional immunity of the respondent, what was later upheld by the Court of Appeal of Florence. Only after lodging a cassation, the Italian Court of Cassation (Corte Suprema di Cassazione) in its landmark judgment of 11 March 2004 decided that his claim should proceed on merits by refusing to acknowledge the immunity of Germany.[25] It stressed that:

> There can be no doubt that the actions carried out by Germany on which Ferrini's claim is based were an expression of its sovereign power since they were conducted during war operations. However, the problem in question is to ascertain whether immunity from jurisdiction can be granted in the case of conduct which … is of an extremely serious nature, and which on the basis of customary international law con-

[22] *Polish Postal Service in Danzig*, Advisory Opinion [1925] PCIJ Series B No 11 [29]–[30].

[23] E.g. *Jadhav* (*India v Pakistan*), Judgment [2019] ICJ Rep. 418, para 149(7).

[24] E.g. *Maritime Delimitation in the Indian Ocean* (*Somalia v Kenya*), Judgment [2021] ICJ Rep. 206, para 214(1) and (3); *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (*Costa Rica v Nicaragua*) and *Land Boundary in the Northern Part of Isla Portillos* (*Costa Rica v Nicaragua*), Judgment [2018] ICJ Rep. 139, para 205(2), (4) and (5).

[25] *Ferrini v Germany*, Case no 5044/4, 11 March 2004 Court of Cassation of Italy, ILDC 19 (IT 2004).

> stitutes an international crime in that it violates universal values that transcend the interests of individual states.[26]

The Court of Cassation concentrated in its judgment on developments in international law which, in its opinion, indicated that the traditional approach to immunities was disintegrating. It concluded:

> Respect for inviolable human rights has by now attained the status of a fundamental principle of the international legal system … And the emergence of this principle cannot but influence the scope of the other principles that traditionally inform this legal system, particularly that of the 'sovereign equality' of States, which constitutes the rationale for the recognition of state immunity from foreign civil jurisdiction.[27]

Consequently, the case was remanded to the lower court for consideration. Only in 2011, did the Court of Appeal of Florence award Mr Ferrini damages by acknowledging the limitations of jurisdictional immunities under international law. But much more important consequence of the ruling was that the *Ferrini* case opened doors for other claimants seeking compensation against the Federal Republic of Germany for crimes committed by its armed forces during World War II, especially that the Court of Cassation developed a consistent jurisprudence in regard to war-related damage lawsuits.[28]

Faced with a considerable number of court proceedings, on 23 December 2008 Germany submitted its dispute[29] with Italy to the International Court of Justice for resolution by lodging an application. The ICJ judgment was delivered on 3 February 2012,[30] which in essence sided with the German position on the matter. The ICJ basically declared for a restrictive and traditional approach to state immunities without acknowledging certain developments in the area in recent decades. The ICJ rejected arguments of the respondent that the territorial tort principle applies to 'torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict'.[31] Furthermore, it affirmed that even the gravity of the unlawful acts did not justify the denial of immunity and it was irrelevant whether they constituted war crimes and crimes against humanity or a breach of a peremptory rule (*jus cogens*). Finally, Italy presented the 'last resort' argument indicating that

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[26] ibid, para 7.

[27] ibid, para 9.2.

[28] E.g. *Germany v Mantelli and ors*, Case no 14201/2008, 29 May 2008 Court of Cassation of Italy, ILDC 1037 (IT 2008) and *Germany v Milde*, Case no 1072/2009, 13 January 2009 Court of Cassation of Italy, ILDC 1224 (IT 2009).

[29] An important aspect of the dispute concerns as well foreign judgments rendered against Germany – particularly in Greece relating to the Distomo massacre – which subsequently was recognized and enforced in Italy. It was also considered by the ICJ in the *Jurisdictional Immunities* decision. But for the sake of brevity, this thread is not presented in this paper.

[30] *Jurisdictional Immunities* (n 2).

[31] ibid [78].

Italian courts denied Germany its immunity as Italian victims had attempted to secure compensation relating to German war crimes and crimes against humanity through other means, but with no avail, what left them with no alternative means of redress. In this context, the ICJ expressed its 'surprise and regret'[32] that Germany excluded from the compensation scheme military internees from Italy deported for forced labour. The applicant justified the exclusion by stressing that prisoners of war had not been entitled to any compensation, despite the fact that during World War II the Third Reich denied Italian deportees the status of prisoners of war and adequate treatment. The ICJ stressed the unreasonable character of this position as a state cannot refuse to recognize a certain status of a particular group protected under international law (e.g. prisoners of war) then to claim that this exact status prevents any payment of compensation (e.g. for forced labour). Notwithstanding those shortcomings, the ICJ emphasized the procedural character of immunities under international law, which is separate from substantive norms of state responsibility, including an obligation to make reparations. Consequently, international customary law still requires recognition of jurisdictional immunities for acts committed by armed forces of the Third Reich resulting in death, injury, and damage to property.

This stance of the International Court of Justice met with criticism from the international academia[33] as it neglects the victims, recognition of their suffering and their need for justice. In this regard, the ICJ in the judgment acknowledged that its application of international law on state immunities may have an effect of precluding judicial redress for the Italian nationals concerned,[34] but firstly, it did not delve into possible legal implication of this constatation – also under international law and particularly human rights standards, and secondly, it only recommended further negotiations between Germany and Italy on claims of individuals mistreated by German armed forces. This suggests a diplomatic approach to a long-lasting and complex dispute that has clear legal connotations and which the parties decided to settle through judicial means. Such negotiations, even after more than ten years, have not yielded any results as developments of the dispute described on following pages illustrate.

Yet another interesting aspect of the decision in *Jurisdictional Immunities* is that it was based almost entirely on international customary law. To reconstruct relevant norms on state immunities, the ICJ primarily examined practice

[32] ibid [99].

[33] See the dissenting opinion of Judge Cançado Trindade; Anogika Souresh, 'Jurisdictional Immunities of the State: Why the ICJ got it Wrong' (2017) 9(2) European Journal of Legal Studies 15; Markus Krajewski and Christopher Singer, 'Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights' (2012) 16 Max Planck Yearbook of United Nations Law 1; Carlos Espósito, 'Jus Cogens and Jurisdictional Immunities of States at the International Court of Justice: "A Conflict does Exist"' (2011) 21 The Italian Yearbook of International Law 161.

[34] *Jurisdictional Immunities* (n 2), [104].

of municipal courts faced with similar or analogous legal questions pertaining to actions of a military during armed conflicts. Interestingly enough, it did not omit the Polish case law, as the judgment of the Supreme Court of Poland in *Natoniewski v Germany*[35] was featured in the ICJ decision on several occasions.[36] It was the domestic jurisprudence of national judges that assisted the ICJ in concluding that 'the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945'.[37]

But the judgment in *Jurisdictional Immunities* was not only declaratory in nature, as at the same time the International Court of Justice ordered *restitutio ad integrum*. As the decision addressed actually the conduct of Italian courts, which were found in violation of international law, it is not surprising that the ICJ decided that:

> [T]he 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 cease to have effect.[38]

This short passage relates most closely to the obligation to comply as it directs the respondent to undertake actions in order to re-establish the situation which existed before the wrongful act was committed, to the extent possible. Here, the ICJ defined the final result of those actions – the cessation of effects of judicial pronouncements infringing upon the immunity of Germany. But it also hinted the possible means of reaching the prescribed result. Although it still repeated the traditional formula of methods of its choosing, nevertheless the ICJ firstly indicated enactment of appropriate legislation. It seems that in the case at hand, when multiple court proceedings have been concluded with final and unappealable judgments reaching *res judicata* status, it was the only reasonable solution that would also be in line with adequate international law standards. Notwithstanding that, one may also argue that measures of compliance, to which the ICJ hinted in its motives, might in fact be assessed as interfering too much with matters pertaining to internal legal regime of the judgment-debtor. In this regard, the ICJ elucidated that Italy had not demonstrated that the ordered restitution would involve 'a burden out of all proportion' and rejected the constatation that the acts of judiciary should enjoy a special status: 'In particular, the fact that some of the violations may have been committed by judicial organs, and some of the legal

[35] Case IV CSK 465/09, 29 October 2010 Supreme Court of Poland.
[36] *Jurisdictional Immunities* (n 2), [68], [74], [85] and [96].
[37] ibid [139] (1).
[38] ibid [139] (4).

decisions in question have become final in Italian domestic law, does not lift the obligation incumbent upon Italy to make restitution'.[39]

IV. RECEPTION OF THE *JURISDICTIONAL IMMUNITIES* IN ITALY AND A SAGA OF COMPLIANCE

Despite the ICJ's recommendations, it was the judiciary that firstly responded to *Jurisdictional Immunities* and took the responsibility of ensuring the compliance with Article 94 of the UN Charter and with the judgment itself.[40] In less than one and a half month after the ICJ judgment was rendered, the Tribunal of Florence in the *Toldo* case[41] acknowledged that 'whereas Article 94 of the UN Charter states that Member States are obliged to comply with all judgments of the ICJ, it actually does not refer to a particular State's institution (Government, Parliament), but to all institutions and organs of the State, including also the judiciary'.[42]

Hence, as a decision of the International Court of Justice has a similar effect to *jus superveniens*, it carries an immediate effect on the margin of evaluation of a judge deciding a matter. Similar reasoning was presented by the Turin Court of Appeal,[43] which was confronted with two final *res judicata* decisions: one domestic and another from the ICJ. It gave effect to the latter by declaring that the assessment of the merits of the case was precluded due to international obligations deriving from the UN Charter and Italian constitutional provisions incorporating international law. Those cases seem to suggest that Italian courts recognized that Article 94 requiring compliance with the ICJ decisions may be a direct and self-executing legal basis for compliance, even without an explicit domestic rule in this regard.

Soon after, the Court of Cassation in the *Albers* case[44] presented its own stance relating to *Jurisdictional Immunities*. Although it voiced certain criticism finding arguments of the ICJ unconvincing, the pronouncement represents a good

[39] ibid [137].

[40] More about the first judicial response in Giuseppe Nesi, 'The Quest for a "Full" Execution of the ICJ Judgment in *Germany v Italy*' (2013) 11(1) Journal of International Criminal Justice 185.

[41] *Toldo v Repubblica Federale Tedesca*, Case no 16410/2004, 14 March 2012 Tribunal of Florence, Italy.

[42] ibid.

[43] *Germany v De Guglielmi and De Guglielmi and Italy*, Case no 941/2012, 14 May 2012 Court of Appeal of Turin, Italy, ILDC 1905 (IT 2012).

[44] *Military Prosecutor v Albers and Others and Germany*, Case no 32139/2012, 9 August 2012 Court of Cassation of Italy, ILDC 1921 (IT 2012).

example of judicial dialogue[45] on a controversial legal issue and ultimately an instance of judicial compliance with the ICJ decisions. The Court of Cassation acknowledged that its approach to state immunity developed by the *Ferini* judgment was not followed by the ICJ and other domestic courts, although it still insisted that such advancement was still possible in the coming years. Furthermore, it stressed that the *Albers* case relating to the San Terenzo Manti massacre was not considered by the ICJ, thus its judgment was not controlling in this case. Notwithstanding that, the Court of Cassation abandoned its previous jurisprudence by annulling judgments of lower courts 'as the civil action cannot be heard by the Italian judge' and at the same time recognizing the authoritative position of the Court in the Hague and its pronouncements on the contents of customary law. Subsequent cases[46] only reaffirmed the renunciation of the *Ferrini* jurisprudence in line with the *Jurisdictional Immunities*.

Only later did the Italian Parliament resolve to join the efforts to ensure compliance in conformity with the ICJ decision in the Italian-German dispute through its legislative powers. It ratified the UN Convention on Jurisdictional Immunities[47] through its Law no 5 of 14 January 2013,[48] which simultaneously included Article 3 titled 'Enforcement of judgments of the International Court of Justice' reading:

> 1. For the purpose of Article 94(1) of the Charter of the United Nations … , when the International Court of Justice in a judgment resolving a dispute, to which the Italian State is a party, precluded the subjection of a specific conduct of another State to a civil jurisdiction [of Italian courts], a judge before whom a dispute is pending in relation to the same conduct shall declare the lack of jurisdiction *ex officio* at any stage and instance of the proceedings, even if a final interlocutory decision ascertaining jurisdiction has already been rendered.
> 2. Final judgments contrary to the decision of the International Court of Justice referred to in sec. 1 even if rendered subsequently, may be challenged for revision for lack of jurisdiction … .

[45] Anna Wyrozumska (ed), *Transnational Judicial Dialogue on International Law in Central and Eastern Europe* (Wydawnictwo Uniwersytetu Łódzkiego 2017); Antonio Tzanakopoulos, 'Judicial Dialogue as a Means of Interpretation' in Helmust Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016).

[46] *Frascà v Germany and Giachini (Guardian of Priebke)*, Case no. 4284/2013, 21 February 2013 Court of Cassation of Italy, ILDC 1998 (IT 2013).

[47] United Nations Convention on Jurisdictional Immunities of States and their Property, signed 2 December 2004 in New York, UNGA Res. A/59/38, not yet in force (UN Convention on Jurisdictional Immunities).

[48] Legge 14 gennaio 2013, n. 5. Adesione della Repubblica italiana alla Convenzione delle Nazioni Unite sulle immunita' giurisdizionali degli Stati e dei loro beni, fatta a New York il 2 dicembre 2004, nonche' norme di adeguamento all'ordinamento interno, Gazzetta Ufficiale no 24, 29 January 2013 (note added).

Interestingly, Law no 5 explicitly referred to Article 94 of the UN Charter containing the obligation to comply. Hence, it constituted a method of compliance with the ICJ decision and confirmed that legislative acts play a substantial role in fulfilling the international commitments of a judgment-debtor state. The same was concluded by the Italian Court of Cassation in yet another proceeding of the *Ferrini* case, where it stated:

> No doubt regarding constitutionality can be raised concerning the provisions of Article 3 of the law in question, since they are dictated for the purposes of Article 94, paragraph 1, of the United Nations Charter … The Statute of the International Court is a rule (derived) from international law; accordingly, Article 3 of Law no 5 of 2013 constitutes a provision for bringing national legislation into line with international law.[49]

At that stage, it seemed that the Italian-German dispute on state immunities was settled and the compliance with *Jurisdictional Immunities* achieved through legislation as well as the jurisprudence of Italian courts. Notwithstanding this, at the beginning of 2014 the Tribunal of Florence[50] petitioned the Italian Constitutional Court (Corte costituzionale) with a question of constitutionality of the measures adopted by Italy in order to implement the decision of the International Court of Justice. In particular, the requesting court pointed to Article 24 of the Italian Constitution[51] guaranteeing absolute judicial protection of individual rights. The Constitutional Court delivered its judgment on 22 October 2014,[52] which generally shared the constitutional objections of the Tribunal of Florence. It acknowledged that the judicial protection of fundamental rights is one of the supreme principles of the constitutional order and declared the unconstitutionality of Article 3 of Law no 5 cited above as well as Article 1 of Law no 848 ratifying the UN Charter, but 'in so far as it concerns the execution of Article 94 … , exclusively to the extent that it obliges the Italian judge to comply with the Judgment of the ICJ of 3 February 2012, which requires that Italian courts deny their jurisdiction in case of acts of a foreign State constituting war crimes and crimes against humanity'.

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[49] *Federal Republic of Germany v Ferrini and Ferrini*, Case no 1136, 21 January 2014, Court of Cassation of Italy, ILDC 2724 (IT 2014).

[50] *Alessi and ors v Germany and Presidency of the Council of Ministers of the Italian Republic* (intervening), Order no 85/2014, 21 January 2014 Florence Court of First Instance, Italy, ILDC 2725 (IT 2014), [10]–[11].

[51] Constitution of the Italian Republic, Gazzetta Ufficiale no 298, 27 December 1947, Art 24: 'Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law'.

[52] Judgment no 238/2014, 22 October 2014 Constitutional Court of Italy, GU no 45, 29 October 2014.

Consequently, the Constitutional Court established limits to the obligation to comply under Article 94 set by the fundamental constitutional principles of the Republic. In this vein, Sentenza n. 238/2014 relied on the doctrine of *controlimiti*:

> [T]he fundamental principles of the constitutional order and inalienable human rights constitute a 'limit to the introduction … of generally recognized norms of international law, to which the Italian legal order conforms under Article 10, para 1 of the Constitution' … and serve as 'counter-limits' to the entry.[53]

This precludes the incorporation into the Italian constitutional order, and hence the application of international obligations in cases of conflicts of those obligations with fundamental principles and inviolable rights. The Constitutional Court understands it even broader as limits on the receptiveness to the international and supranational order. Accordingly, it concluded that customary norms on state immunities, as construed by the International Court of Justice in its judgments, are not simply unconstitutional but rather they have never 'entered the Italian legal order', and hence do not 'have any effect therein'.[54] Similar arguments of *controlimiti*[55] were forwarded in relation to the UN Charter and its Article 94 requiring compliance with ICJ decisions. Even this most fundamental, constitutional international treaty and the Italian ratifying legislation operate within the limits demarcated by the fundamental principles and inviolable rights protected by the Italian Constitution.

To soften somewhat its stand, the Constitutional Court firstly focused its motives on the Law no 848 that ratified the UN Charter. It explained that its conclusions do not have any bearing on 'the lawfulness of the external norm itself' but rather concern the ratifying legislation and through it the incorporation of the conventional norm into the national regime. The outcome, however, is the same as the application of the obligation to comply under Article 94 within the Italian domestic system is hindered or rather confined to cases when fundamental constitutional principles are not infringed.[56] Secondly, the Constitutional Court opted for a restricted application of its conclusions in relation to ICJ decisions stressing their exclusive and specific character relating only to 'the judgment of the ICJ that interpreted the general international law of immunity from the jurisdiction of foreign states as to include cases of acts considered *jure imperii* and classified as war crimes and crimes against humanity, in breach of inviolable human rights'.[57]

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[53] ibid, para 3.2.

[54] ibid, para 3.5.

[55] Fulvio M Palombino, 'Italy's Compliance with ICJ Decisions vs Constitutional Guarantees: Does the "Counter-limits" Doctrine Matter?' (2013) 22 The Italian Yearbook of International Law 185.

[56] It is important in this regard to recall Art 27 of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 UNTS 31, which precludes the invocation of internal law as a justification for a state's failure to fulfil its obligations under an international agreement.

[57] Judgment no 238/2014 (n 52), para 4.1.

Thirdly, it strongly reaffirmed the validity of the obligation to comply within the Italian legal regime in all other cases.

The Constitutional Court recognized in its Sentenza the purpose of Law no 5 and its Article 3 as a compliance means with the ICJ judgment of 3 September 2012: '[T]his article specifically regulates the obligation of the Italian State to comply with all of the rulings by which the ICJ excluded certain conducts of a foreign State from civil jurisdiction'.[58] Also, the parliamentary proceedings were examined, what convinced the Italian court that it was adopted to ensure 'explicitly and immediately observance' of the ICJ decision. This notwithstanding, it also recognized that such a compliance cannot justify 'the absolute sacrifice of the right of judicial protection of fundamental rights'. Hence, Sentenza n. 238/2014 is an interesting example of judicial examination of compliance efforts carried out under Article 94 of the UN Charter. The Constitutional Court was requested to balance two constitutional norms: one addressing the status of international law, and the other providing guarantee of judicial protection. It found that the methods proposed by the Executive on implementing *Jurisdictional Immunities* and adopted by the Legislature in the form of national laws were unconstitutional as not adequately balanced with the *principi fondamentali dell'ordinamento costituzionale*. Nevertheless, at the same time the court confirmed the principle that ICJ decisions have legal effect in Italy and upheld the general obligation to comply. Therefore, it was a call for the Government to find another way of fulfilling international undertakings and simultaneously to observe constitutional standards.

Importantly, the judgment of the Italian Constitutional Court led to revival of the *Ferrini* jurisprudence in the Italian legal order, particularly by the Court of Cassation,[59] and constituted yet another drastic plot twist in applying state immunities to cases of gross violations of international humanitarian law during World War II. This resulted in reinvigoration of domestic proceedings and lodgement of new claims against Germany by private parties. As final judgments were rendered, German real property, particularly in Rome, was being targeted for settlement of claims. As a response to enforcement proceedings against its property in Italy in ongoing violation of its immunity affirmed by the ICJ in its judgment, the Federal Republic of Germany instituted on 29 April 2022 yet another proceeding before the International Court of Justice.[60] In its application in the case of *Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-Owned Property*, Germany referred directly to the judgment of

[58] ibid, para 5.1.

[59] *Toldo v Germany*, Case no 20442, 7 July 2020 Court of Cassation of Italy, ILDC 3220 (IT 2020).

[60] ICJ, *Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-Owned Property* (*Germany v Italy*) <https://www.icj-cij.org/case/183> accessed 21 September 2023.

the Constitutional Court. It expressed the opinion that Sentenza n. 238/2014 was 'adopted in conscious violation of international law and of Italy's duty to comply with a judgment of the principal judicial organ of the United Nations'.[61] The applicant similarly linked dire consequences with this pronouncement by highlighting that at least fifteen judicial proceedings had been completed before Italian courts regarding claims against Germany for its conduct during World War II and measures of constraints were put in place in relation to four German properties in Rome since it had been rendered.[62]

The German application was accompanied with a request for indication of provisional measures as four properties used for governmental non-commercial purposes (a German school, research and cultural institutions) were to be sold in a public auction. It argued that the applicant was facing the permanent loss of its legal title to properties in question and hence the risk of irreparable prejudice was imminent.[63] The Federal Republic of Germany requested that Italy should ensure that German assets were not subjected to sale and any further measures of constraint. Interestingly, this request was withdrawn only after a few days in response to a new law introduced by Italy that was supposed to address concerns voiced by Germany.[64]

The second legislative attempt to implement the *Jurisdictional Immunities* decision took the form of the Decree-Law no 36 of 30 April 2022[65] converted into law under Law no 79 of 29 June 2022[66]. Although the legislation concerned urgent measures implementing the National Recovery and Resilience Plan, its Article 43 established a special compensation fund for damages suffered by victims of war crimes and crimes against humanity committed on the territory of Italy or to the detriment of its citizens by armed forces of the Third Reich between 1 September 1939 and 8 May 1945. The fund was created at the Ministry of Economy

[61] *Application Instituting Proceedings Containing a Request for Provisional Measures*, 29 April 2022, [8] <https://www.icj-cij.org/sites/default/files/case-related/183/183-20220429-APP-01-00-EN.pdf> accessed 21 September 2023.

[62] ibid [23]–[25].

[63] ibid [71].

[64] *Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-Owned Property* (*Germany v Italy*), Withdrawal of the Request for the Indication of Provisional Measures, Order of 10 May 2022 [2022] ICJ Rep. 462.

[65] Decreto-Legge 30 aprile 2022, n. 36. Ulteriori misure urgenti per l'attuazione del Piano nazionale di ripresa e resilienza (PNRR), (22G00049) Gazzetta Ufficiale no 100, 30 April 2022.

[66] Legge 29 giugno 2022, n. 79. 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), (22G00091) Gazzetta Ufficiale no 150, 29 June 2022. Decree-Laws are legislative acts adopted by the Government as urgent measures. They are later submitted to the Parliament for conversion into law. In the case at hand, the Parliament covered the Decree-Law 36 with some amendments, but for the purpose of this paper those changes are immaterial, and so the final version of the provisions is discussed.

and Finance with the endowment of 20 million euros for the year 2023 and 13.6 million euros for three subsequent years.

Access to the fund is provided for individuals who have secured final judgments awarding damages in proceedings initiated before the entry into force of the Decree or within prescribed deadline of 180 days. Importantly, the Decree envisages that such judgments may be satisfied only from the fund, and any enforcement proceedings against Germany may neither be initiated nor pursued and shall be discontinued. Consequently, the legislation effectively excluded any form of enforcement or measures of constraint against Germany and its assets, but at the same time provided for a new form of redress for victims or their surviving family members.

However, the *Jurisdictional Immunities* saga did not end with Law no 79 and continued with yet another constitutional challenge filed with the Italian Constitutional Court by the Court of Rome. On 4 July 2023, Sentenza n. 159/2023[67] was issued, which basically upheld the legislation in question. The Constitutional Court did not share objections relating to Articles 2 and 24 of the Italian Constitution concerning access to court and protection of individual rights. It explained that the judicial protection guarantee extends over enforcement proceedings that ensure effectiveness of judicial pronouncements. At the same time, the Constitutional Court recognized that compliance with international obligations of the state was likewise the principle of domestic legal system of constitutional nature. In the opinion of the Court, '[t]he contested provision strikes a not unreasonable balance between these principles'.[68] Furthermore, the fund mechanism is actually a method of transferring the economic burden caused by final judgments awarding damages to victims and contested provisions do not hinder judgment-creditors' prospects to satisfy their claims. In summary, 'Article 43 provides that the compensation claim against Germany is replaced by a right of a similar content from the fund, hence providing an adequate and alternative safeguard to the one achievable through an enforcement against the Federal Republic of Germany'.[69] The Constitutional Court explained that the provided method of satisfaction would be actually more effective than pursuing regular enforcement proceedings against German assets. The state immunity extends as well over post-judgment measures of constraint and provides for even more stringent rules in this regard,[70] while many foreign state assets enjoy likewise special diplomatic and consular protection.[71]

Law no 79 along with the endorsement from the Constitutional Court is a step towards compliance with the initial ICJ judgment of 2012 and an Italian

[67] Judgment no 159/2023, 4 July 2023, Constitutional Court of Italy.

[68] ibid [13].

[69] ibid [16].

[70] UN Convention on Jurisdictional Immunities, Art 19.

[71] Vienna Convention on Diplomatic Relations, 18 April 1961, Vienna, 500 UNTS 95, Art 22.

attempt to respect its international obligations within the limits of its own constitutional legal regime. It remains to be seen whether it will be considered by Germany sufficient as it ensures only a partial implementation of *Jurisdictional Immunities.* No measures of constraint may be taken against German assets and no enforcement proceedings may be initiated or continued. Thus, at least at the post-judgment phase, compliance has been secured through legislative and judicial measures. But the access to the fund is dependent on an existence of the final judgment issued by Italian courts against Germany awarding damages for violations, which occurred during World War II. Consequently, on the one hand, the state immunity of Germany is not respected as Italian courts had to exercise its civil jurisdiction in order to render damage judgments. As the ICJ explained, the question of immunity is a procedural matter for courts to consider as a preliminary issue before engaging with the merits of the case.[72] Similarly, it is problematic to conclude whether judicial decisions infringing on immunities of Germany have ceased to have effect, as ordered by the International Court of Justice. On the other hand, Law no 79 provides a solution that does not infringe upon individuals' right to judicial protection, which is not only an Italian constitutional right but also an international standard of human rights. Additionally, Law no 79 introduced a tight statute of limitations for claims to be adjudicated against Germany and most of those proceedings are already concluded or at the final stage.

Likewise, beside reputational harm, the mechanism proposed by the new legislation protects Germany from negative effects of World War II violations and the economic burden falls on the State of Italy. Although the attribution and accountability of the German State were not disputed, neither at the national level nor during the proceedings before the International Court of Justice, it is rather surprising that Germany does not show any willingness to ease this burden via at least an *ex gratia* contribution[73] into the victims' fund established by Italy. This would mitigate the still present animosity in the German-Italian relations, constitute some sort of acknowledgement of suffering of individuals for moral rather than legal reasons, and ultimately lead to the amicable settlement of the dispute and probably all its aspects. This lack of cooperation is particularly puzzling as Germany has already explored and executed similar arrangements that allow no direct acknowledgement of responsibility. For example, in the *Joint German-Namibian Declaration*[74] of 15 May 2021 the Federal Republic of Germany

[72] *Jurisdictional Immunities* (n 2), [82].

[73] For more on the State practice on *ex gratia* payments, see e.g. Steven van de Put, 'Ex Gratia Payments and Reparations: A Missed Opportunity?' (2023) 14(1) Journal of International Humanitarian Legal Studies 131.

[74] *Joint Declaration by the Federal Republic of Germany and the Republic of Namibia 'United in Remembrance of our Colonial Past, United in our Will to Reconcile, United in our Vision of the Future'*, 15 May 2021, <https://www.dngev.de/images/stories/Startseite/joint-declaration_2021-05.pdf> accessed 27 December 2023.

recognized the 'Germany's moral responsibility for the colonization of Namibia', accepted 'a moral, historical and political obligation to tender an apology for this genocide', and pledged the amount of 1.1 billion euros over 30 years for reconstruction and development as well as reconciliation projects supporting affected communities. Although the arrangement met with certain criticism, often justified,[75] it shows that the political solution is still an option to a highly complex legal matter once at least a moral responsibility is acknowledged.

Furthermore, the Italian-German saga has likewise profound impact on the political discourse on the post-World War II justice and possible compensation for victims or even reparations. In fact, Italy was the first to reopen the discussion. It was the persistence of affected individuals coupled with the activism of domestic judiciary that paved the way for a new channel of accountability: from criminal prosecution to civil liability litigation. This route seems to be finally closed by the International Court of Justice and the Italian Constitutional Court in the name of state immunity. But it certainly does not mean that other venues are not possible, when the perseverance of victims, or rather their heirs, and the supportive domestic judiciary meet. As the legal action against Germany as a state is at least hindered, such obstacles are not present in suing German corporations and other private entities entangled with and assisting the Third Reich.[76] In fact, such an option may prove to be more effective in securing the awarded compensation, if any, as due to processes of globalization and European integration, the presence of German businesses in Italy is widespread and not protected by the jurisdictional immunities.

VI. CONCLUSIONS

The Italian quest for compliance with *Jurisdictional Immunities* has been carried out for eleven years with the engagement of all departments of government. The particular role has been undoubtedly played by domestic courts of different levels – from trial institutions to the Constitutional Court. They contributed to the creation of the dispute, later to facilitate the implementation of the ICJ judgment

[75] Karina Theurer, 'Minimum Legal Standards in Reparation Processes for Colonial Crimes: The Case of Namibia and Germany' (2023) 24(7) German Law Journal 1146; Henning Melber, 'Germany and Reparations: The Reconciliation Agreement with Namibia' (2022) 111(4) The Commonwealth Journal of International Affairs 475.

[76] Florian Jessberger, 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity: IG Farben on Trial' (2010) 8(3) Journal of International Criminal Justice 783; Kevin M McDonald, 'Corporate Civil Liability under the US Alien Tort Claims Act for Violations of Customary International Law during the Third Reich' (1997) St. Louis-Warsaw Transatlantic Law Journal 167.

in the domestic legal order, but at the same time to set limits and restraints to means of compliance proposed by other governmental branches. This process of trial and error, which undoubtedly has not contributed to certainty of law in the realm of state immunities with the changing judgments of domestic courts, has lasted for more than a decade. But it also emphasizes the complexity of the general obligation to comply envisaged in Article 94 of the UN Charter and stresses the need of a judgment-debtor to reconcile principles and rules of two distant legal systems: international and domestic. It often requires balancing different values and norms, and emerging normative conflicts may not be resolved easily or at all. It is actually at the national level that the task of compliance becomes complicated, when states need to navigate carefully though multifaceted hierarchies of norms and institutions, constitutional constraints, and political entanglements, as well as legislative and judicial processes and executive regimes. The example of the German-Italian dispute illustrates those challenges. Interestingly, the Italian Republic has not ensured so far a full compliance with the ICJ decision, thus being at least in a partial violation of Article 94 of the UN Charter. Nevertheless, at the same time it has demonstrated significant efforts in meeting its obligations in this regard. Those efforts seem to create a situation when guaranteeing full compliance is not essential to resolve a dispute.

As explained, the legality and efficacy of compliance measures adopted by Italy in the aftermath of *Jurisdictional Immunities* have been subject to judicial scrutiny. At the domestic level, the Constitutional Court rejected the first attempt by declaring relevant legislation unconstitutional but gave its imprimatur to the mechanism based on a compensation fund. Within the international domain, the International Court of Justice has again been petitioned to adjudicate on state immunities as applied by Italian courts but indirectly also on measures implementing its previous judgment. The proceedings are at the initial stage. Thus, the saga continues.

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