Germany versus Italy reloaded: Whither a human rights limitation to State immunity?

Riccardo Pavoni [*]

1. *Two scenarios*

The application against Italy recently filed with the International Court of Justice (ICJ)[1] by Germany and associated circumstances invite a few preliminary observations about the possible impact of these developments on the central issue underlying this long-standing dispute, namely the relationship between human rights and State immunity.

In this connection, two scenarios should be distinguished. According to the first scenario, a successful, unhindered implementation of the 'Nazi Crimes Fund' created under Article 43 of Decree-Law No 36/2022[2] by the Italian Executive induces Germany to drop its case before the ICJ. By contrast, in the second scenario Germany maintains its application as a result of occurrences (or fear thereof) which are likely to dilute or compromise the smooth functioning of the Nazi Crimes Fund, such as especially novel

[*] Professor of International and European Law, Department of Law, University of Siena.

[1] Application Instituting Proceedings and Request for Provisional Measures (29 April 2022). The case name is *Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-Owned Property (Germany v Italy)*, see ICJ, Order of 10 May 2022 (placing on record Germany's withdrawal of its provisional measures request).

[2] Decree-Law No 36 of 30 April 2022, *Ulteriori misure urgenti per l'attuazione del Piano nazionale di ripresa e resilienza (PNRR)*, Gazzetta Ufficiale della Repubblica Italiana No 100 of 30 April 2022, 1, converted into law by Law No 79 of 29 June 2022, Gazzetta Ufficiale della Repubblica Italiana No 150 of 29 June 2022, 1.

constitutional challenges[3] brought against the Decree-Law itself in the wake of Judgment No 238/2014 of the Italian Constitutional Court.[4]

As spelled out below, it is safe to believe that the first scenario would yield a much-awaited closure in the State immunity saga involving World War II crimes committed by Germany on Italian soil or against Italian nationals. At the same time, it would *not* (at least formally) interfere with the continued application of the Italian *Ferrini*[5]*-cum*-Judgment No 238 jurisprudence to foreign States *other than Germany* for Nazi crimes. Absent a *revirement* from the Constitutional Court, those States would still be deprived of immunity from the adjudicative jurisdiction of Italian courts when serious violations of human rights are at stake, especially those arising from international crimes for which no effective means of redress other than a suit in the forum State exist.

Conversely, and assuming the case is not dismissed on jurisdictional or admissibility grounds, the second scenario would most likely have an impact on that case law. The ICJ would have to assess and rule on the merits of Germany's claims and submissions as laid down in its 2022 application. And it is a common perception[6] that the ICJ would reach conclusions analogous, if not essentially identical, to its 2012 judgment, thus holding Italy accountable for repeated violations of the jurisdictional immunities enjoyed by Germany. The Italian Government might then be

[3] One of the salient problems here is that the Nazi Crimes Fund is not accessible by non-Italian victims (and their heirs) which have been awarded damages against Germany on the basis of foreign judicial decisions duly recognized and declared enforceable in Italy, especially the decisions of Greek courts awarding damages against Germany for the so-called 'Distomo massacre' in Greece in June 1944.

[4] Constitutional Court, *Simoncioni v Germany*, Judgment No 238 of 22 October 2014. As is well-known, by relying on the supreme constitutional principle of effective judicial protection of fundamental human rights, this decision – which is at the roots of the new ICJ application by Germany – declared that the customary rule of State immunity never entered the Italian legal system insofar as it shielded grave violations of human rights, such as especially those arising from international crimes and deprived of any effective means of redress other than a suit in the forum State. For the same reasons, the Constitutional Court also found the 2012 ICJ judgment in *Jurisdictional Immunities* partially unconstitutional and struck down the Italian legislation passed to give it effect, see ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, (Judgment, 3 February 2012) [2012] ICJ Rep 99.

[5] Court of Cassation, *Ferrini v Germany*, Judgment No 5044 of 11 March 2004.

[6] See eg, L Gradoni, 'Is the Dispute between Germany and Italy over State Immunities Coming to an End (Despite Being Back to the ICJ)?' EJIL: Talk! (10 May 2022).

tempted to legislate away the *Ferrini* jurisprudence at least under given circumstances, whereas certain Italian courts might be willing to abandon that jurisprudence *proprio motu*, not only vis-à-vis Germany, but possibly in all cases concerning compensation claims against foreign States accused of serious breaches of *jus cogens* and/or human rights. At this juncture, a new pronouncement by the Constitutional Court would only be a matter of time and, again, a widespread feeling is that the Court in its current composition would significantly reshape, if not overrule altogether, its Judgment No 238/2014.[7]

The stakes are high, as can be realized. They go much beyond the contingencies and peculiarities of the Italo-German affair. They call into question the future of State immunity and particularly the trend towards a human rights limitation thereto as spearheaded by Italian court jurisprudence. It is therefore necessary to focus more closely on the foregoing scenarios in order to evaluate what they might signify for the 'human rights and State immunity' debate. In doing so, attention is paid to a number of elements arising from the pertinent practice and scholarly discussions which have emerged since the 2012 ICJ judgment. If *Germany v Italy* (reloaded) proceeds to the merits, those elements should hopefully induce the ICJ to rethink a few controversial aspects of its 2012 decision and, in turn, the Italian Constitutional Court to exercise caution when setting out to revisit and circumscribe Judgment No 238/2014.

2. *End of the Italo-German immunity saga as a result of the Italian Nazi Crimes Fund? Context and implications for the Italian* Ferrini *jurisprudence*

If Decree-Law No 36/2022 brings the Italo-German dispute to an end, what would that imply for the relationship between State immunity and the right to an effective remedy for fundamental human rights violations? This question can be addressed both generally and with specific reference to the victims of World War II Nazi crimes covered by the Decree-Law,[8]

[7] ibid.

[8] That is, war crimes and crimes against humanity perpetrated on Italian territory or against Italian nationals by the Third Reich Army between 1 September 1939 and 8 May 1945 (art 43(1) of Decree-Law No 36/2022).

especially those who have obtained final judgments before Italian courts awarding damages against Germany throughout the past decade.

Starting with the victims of Nazi crimes, Decree-Law No 36 foresees the termination of their right of access to a court to vindicate compensation claims against Germany upon the expiration of a 180-days time limit from its entry into force.[9] Moreover, victims who are judgment creditors are barred from initiating or pursuing *whatever* execution proceedings,[10] including against State property which is not protected by Germany's immunity from measures of constraint under international law. Indeed, the Nazi Crimes Fund envisaged by the Decree-Law is intended as the exclusive means to recover damages awarded to the victims. Upon receipt of payment from the Fund, the victims' right to compensation for damage ceases to exist.[11]

Yet the Fund does constitute a means of redress for the victims alternative to a lawsuit in the courts of the forum. It does afford them a measure of justice, however out-of-court, delayed and (most probably) incomplete; it does imply recognition that such categories of victims have historically been ignored or – at best – marginalized within the many compensation arrangements put in place by Germany and Italy. Clearly, it is not equivalent to a judicial remedy. At any rate, were the Italian Constitutional Court to uphold its Judgment No 238/2014 in future proceedings, that factor alone should not lead to quashing the Decree-Law. The insistence in that judgment on the necessity to secure effective *judicial* protection for fundamental rights was due to the exceptional circumstances of the case, which was denoted by an absence of effective remedies for the victims, as evidenced by the dismissal of their claims before German and international courts[12] for reasons unrelated to the merits, *as well as* by the long-standing diplomatic *impasse* between the governments concerned about a final settlement of the issue.[13] There is no com-

[9] ibid art 43(6).
[10] ibid art 43(3).
[11] ibid art 43(5).
[12] European Court of Human Rights, *Associazione Nazionale Reduci and 275 others v Germany*, Appl No 45563/04 (ECtHR, 4 September 2007).
[13] Judgment No 238/2014 (n 4), para 1.2 (The Facts) (recalling the considerations of the Tribunal of Florence in its decision referring the case to the Constitutional Court:

pelling reason why, in and of itself, the creation of the Fund as an alternative means of redress for the victims should not persuade the Constitutional Court to redraw the balance between *Germany's* immunity and the right to a remedy in favour of the former, also taking account that, this time, immunity from execution would inevitably be at stake.

The same goes for the requirement of *effectiveness* of the remedy represented by the Fund. Although much will depend on the specific rules governing access to, and the concrete operation of the Fund that the Italian Executive will (soon) develop,[14] it may be assumed that the Court, by assessing the whole context of the dispute and the rationale for setting up the Fund, would be inclined to interpret that requirement in a flexible manner.

For one thing, the notion that Italy should assume upon itself the burden of compensating individuals whose right of access to justice is restricted as a result of the law of international immunities or inter-State arrangements has a long-standing pedigree in literature[15] and practice,[16] including in the matter of Nazi crimes. It has frequently been seen as a rational solution or, at least, the lesser evil when the alternative would be lawsuits before domestic courts challenging foreign State immunity or intergovernmental agreements.[17]

'immunity cannot entail that the individuals affected are denied any possibility of ascertainment and protection of their rights, both of which, in the case at issue, have already been denied in the German legal order'; 'Italian courts cannot leave the protection of individuals to the dynamics of the relationships between the political organs of the States involved, since these organs have not been able to come up with a solution for decades').

[14] See art 43(4) of Decree-Law No 36/2022.

[15] See eg, L Condorelli, 'Le immunità diplomatiche e i principi fondamentali della Costituzione' (1979-I) Giurisprudenza Costituzionale 455 at 462 fn 13; G Gaja, 'L'esecuzione su beni di Stati esteri: l'Italia paga per tutti?' (1985) 68 Rivista di Diritto Internazionale 345; and lately, J Weiler, 'Editorial: Germany v Italy: Jurisdictional Immunities – Redux (and Redux and Redux)' EJIL: Talk! (18 October 2021).

[16] It was already ventilated in 1953 by the Italian Supreme Court of Cassation in a key decision in this context which upheld Italy's waiver of all claims against Germany 'outstanding' on 8 May 1945, pursuant to art 77(4) of the 1947 Peace Treaty with the Allied Powers, see Court of Cassation, *Ditta Cavinato v Società Ilva e Mittelmeer Reederei*, Judgment No 285 of 2 February 1953 ('Potrà discutersi sul se a seguito di tale rinunzia il Governo italiano sia tenuto o meno ad indennizzare i propri cittadini del pregiudizio ad essi derivato…').

[17] P Palchetti, 'Can State Action on Behalf of Victims Be an Alternative to Individual Access to Justice in Case of Grave Breaches of Human Rights?' (2014) 24 Italian YB Intl L 53 at 59-60; G Gaja, 'Alternative ai controlimiti rispetto a norme internazionali generali e a norme dell'Unione europea' (2018) 101 Rivista di Diritto Internazionale 1035 at 1044-1046.

It is true that, as things stand, the Fund is entirely financed by Italy, ie by Italian taxpayers,[18] and that that might be regarded as an unfair solution greatly curtailing the chances to recover the full amount of damages awarded by the courts. Yet the Decree-Law indicates that the Fund is intended to secure 'continuity'[19] with the 1961 Bonn Agreement between Germany and Italy concerning Settlement of Certain Property-Related, Economic and Financial Questions. All doubts about the meaning of that wording are disposed of by the governmental report accompanying the bill for the conversion of Decree-Law No 36 into a Law.[20] According to this report, the reason why Italy is affording 'adequate satisfaction'[21] via the Fund to the victims who are creditors of final judicial decisions against Germany is the necessity to *respect the international obligation* to indemnify Germany for the effects stemming from such decisions.[22] Seen in that light, the Fund can hardly be challenged for its ineffectiveness or unfairness. It would be somehow paradoxical to insist on the duty of Germany to make reparation to the Italian plaintiffs when the Italian Government have declared that to do so would contravene a treaty obligation undertaken sixty years ago that they are determined to honour.

A more troubling aspect of the Nazi Crimes Fund is that it appears that the victims and their associations have yet to participate in any manner whatsoever to the decision-making process leading up to its creation and operationalization. Hopefully, the Italian Government will involve and consult with victims and associations at the time of shaping the implementing regulations for the Fund. This would be a key step capable of minimizing the prospects of a challenge to the Decree-Law on that ground, given that victims' participation to the processes aimed at regulating their right to reparation for human rights violations is increasingly

[18] The amount currently allocated is approximately € 55 million.

[19] Art 43(1) of Decree-Law No 36/2022.

[20] Bill No 2598 of 30 April 2022, *Conversione in legge del decreto-legge 30 aprile 2022, n. 36, recante ulteriori misure urgenti per l'attuazione del Piano nazionale di ripresa e resilienza (PNRR)* available at <https://www.senato.it/service/PDF/PDFServer/BGT/01348508.pdf >.

[21] ibid at 51.

[22] ibid. This is clearly an implicit reference to the obligation set out in art 2(2) of the 1961 Bonn Agreement concerning Settlement of Certain Property-Related, Economic and Financial Questions.

regarded as a condition of legality for those processes and their outcomes.[23]

Yet there may be doubts about the genuine nature of the explanation for establishing the Fund offered by the Italian Executive. It should not be forgotten that the governments concerned have in the past maintained different views about the extent to which the 1961 Bonn Agreements settled the issue of reparations for Nazi crimes on Italian territory and against Italian nationals. With that explanation, the Italian Executive is also reneging on Italy's counter-claim filed in the context of the original proceedings in *Jurisdictional Immunities* which the ICJ found inadmissible,[24] as well as on the most recent Italian jurisprudence concerning the Bonn Agreements.[25] The creation of the Fund seems rather a pragmatic *political* solution devised for compelling foreign policy considerations.

Irrespective of the official reasons given by the Italian Executive for the establishment of the Fund, and if the latter brings indeed the Italo-German dispute to an end, this precedent would support the proposition that State immunity for grave violations of human rights is conditional upon the availability of an alternative remedy for the victims. Germany's immunity in Italian courts would be restored precisely because reparations for the victims would flow from the Fund. And the actual decisive factor for setting up the Fund should be identified with the dozens of Italian court decisions that have denied Germany's immunity since 2004.

As to the general implications for the Italian practice withdrawing State immunity from adjudication when grave breaches of human rights are at stake, a desirable closure of the Italo-German affair brought about by the Nazi Crimes Fund would certainly not entail the closure of that practice. Decree-Law No 36 does not contain any provision disturbing the application of the *Ferrini* jurisprudence beyond the case of Nazi crimes, not even when a violation of foreign State immunity by Italy has been found by the ICJ or other international bodies. Judgment No 238/2014 of the Constitutional Court was clearly the stumbling block

[23] See eg, lately, A Bufalini, 'Immunità degli Stati dalla giurisdizione e negoziazioni fra Stati: sulla vicenda delle *comfort women* coreane' (2021) 15 Diritti umani e diritto internazionale 699 at 707-708.

[24] ICJ, *Jurisdictional Immunities of the State (Germany v Italy)* (Order, 6 July 2010) [2010] ICJ Rep 310 para 25.

[25] Court of Cassation, *Criminal Proceedings against Milde*, Judgment No 1072 of 13 January 2009 para 8.

here, given that it had *inter alia* struck down legislation,[26] passed in the aftermath of the 2012 ICJ judgment, which compelled the courts to declare their lack of jurisdiction on foreign States in the event of an adverse ruling by the ICJ, and introduced a specific hypothesis of revocation of final judgments inconsistent with those ICJ rulings.

Denials of immunity to foreign States other than Germany for Nazi crimes have so far been exceptional in Italian court practice, although the key holding of the *Ferrini* jurisprudence has consistently been upheld as a matter of principle, especially[27] in proceedings involving Argentina[28] and the United States of America (US).[29] Two exceptions arising from the case law of the Supreme Court of Cassation involve Serbia,[30] whose immunity from compensation claims has been lifted in relation to an international crime committed in the context of the 1990s Yugoslav wars, and lately Iran,[31] whose immunity from *exequatur* proceedings has not barred the recognition in Italy of a major US decision awarding damages for the destruction of the Twin Towers in 2001 on the basis of the notorious US State-sponsored terrorism exception to sovereign immunity.

When the dust finally settles over the Italo-German dispute with its thorny political and historical overtones, it will hopefully be the right time to reflect about the broader implications of the *Ferrini* jurisprudence and its viability vis-à-vis current instances of gross violations of human rights imputable to States. These cases will represent the real test for that jurisprudence. Just to take a prominent example, how would the Italian Supreme Court react to a damages action brought against Egypt for its alleged involvement in the brutal torture and murder in Cairo of the Italian PhD researcher Giulio Regeni back in 2016? In theory, this

[26] Art 3 of Law No 5 of 14 January 2013, *Adesione della Repubblica italiana alla Convenzione delle Nazioni Unite sulle immunità giurisdizionali degli Stati e dei loro beni, fatta a New York il 2 dicembre 2004, nonché norme di adeguamento all'ordinamento interno*, Gazzetta Ufficiale della Repubblica Italiana, No 24 of 29 January 2013, 1.

[27] See also the following twin decisions by the Court of Cassation, *Flatow v Iran*, Judgment No 21946 of 28 October 2015; *Eisenfeld v Iran*, Judgment No 21947 of 28 October 2015.

[28] Court of Cassation, *Borri v Argentina*, Order No 11225 of 27 May 2005.

[29] Cf the following decisions by the Court of Cassation, *Criminal Proceedings against Lozano*, Judgment No 31171 of 24 July 2008; *Unites States of America v Tissino*, Order No 4461 of 25 February 2009.

[30] Court of Cassation, *Criminal Proceedings against Opačić Dobrivoje*, Judgment No 43696 of 29 October 2015.

[31] Court of Cassation, *Stergiopoulos v Iran*, Order No 39391 of 10 December 2021.

and similar situations may well be caught by the *Ferrini* non-immunity principle.

Rather than backsliding away from a jurisprudence which is in line with a progressive vision and modern key tenets of the international legal order,[32] Italian courts should explain once and for all the precise contours of the human rights limitation to State immunity. It is safe to speculate that an unqualified limitation would not withstand the test of time, as it would be regarded as an unacceptable assault on sovereignty and met by countless protests and legal battles. In a context of renewed dialogue with the political branches of government which the closure of the Italo-German dispute would certainly favour, Italian courts should clarify, in particular, whether the limitation only applies to serious human rights violations committed on Italian territory and/or against Italian nationals. In addition, a sensible and reasonable condition on the withdrawal of immunity should be unequivocally identified with the absence of effective remedies to vindicate the victims' right to reparation other than a suit in the forum State.

Frankly, one fails to see why this forward-looking approach should not be pursued in the aftermath of the 2012 ICJ judgment, whereas it should have been canvassed beforehand.[33] This view unduly treats ICJ decisions as untouchable[34] and *de facto* binding *erga omnes* until they are

[32] Consider that one day, if not now, this jurisprudence might be remembered as a matter of national pride. An eminent scholar as Joseph Weiler 'predict[s] that sooner or later sovereign immunity will no longer provide a shield to grave violations of human rights/*jus cogens* and the Italian decision could be an important element in shifting customary law in that direction', Weiler (n 15).

[33] For this opinion, see C Focarelli, 'State Immunity and Serious Violations of Human Rights: Judgment No. 238 of 2014 of the Italian Constitutional Court Seven Years On' (2021) 1 Italian Rev of Intl and Comparative L 29, at 57-58.

[34] It is telling that in a lengthy article containing a scathing, unbridled critique of Judgment No 238 of the Italian Constitutional Court, the author does not spend a single word on the controversial aspects of the 2012 ICJ judgment, see Focarelli (n 33). With all respect, that critique seems overstated and at times paradoxical, with Judgment No 238 being variously depicted as a potential risk to national security and the stability of the global system (ibid 42), a gift to 'currently popular "souverainist" positions' by the Italian judiciary (ibid 54), an illustration of '"typically Italian" opportunist proclivity' (ibid 58), and even a manifestation of a diplomatic or political conception of international law! (ibid 51). For a similar posture, see A Gattini, '"E qui comando io. E questa è casa mia": la Corte costituzionale italiana, i limiti, i controlimiti e le giurisdizioni internazionali', in A Annoni, S Forlati, P Franzina (eds), *Il diritto internazionale come sistema di valori. Scritti in onore di Francesco Salerno* (Jovene 2021) 557 (speaking *inter alia* of a lasting damage

overruled by the ICJ itself, while barring any subsequent development of the law through State practice inconsistent therewith. As such, it simply cannot be reconciled, or is at least in tension with the actual workings and dynamics of international law.

3. *Continuation of the saga? A quest for an open-minded approach to a human rights limitation to State immunity by the ICJ*

The controversial aspects of the 2012 ICJ judgment may be approached on two distinct planes. On the one hand, it is possible to take issue analytically with a number of holdings, *obiter dicta* and passages of the decision, and accordingly underscore their weaknesses, dubious logics and/or inaccuracy. On the other, the decision may be appraised at a level of generality by focussing on its vision of the international legal system, and its significance and repercussions for the evolution of international law.

It is appropriate to prioritize this second perspective as it clarifies why one could rightfully be wary of the prospect of continuation of the *Jurisdictional Immunities* litigation before the ICJ. The problem with the general outlook proffered by the 2012 ICJ judgment can be stated in very simple terms: it just 'cannot satisfy observers with an earnest interest in developing international law further'[35] for the sake of human rights. The

to the credibility of Italy as a State which abides by the international rule of law, ibid 585); cf G Palombella, 'German War Crimes and the Rule of International Law' (2016) 14 J Intl Criminal Justice 607 (claiming that Judgment No 238, 'although decried as violating the international rule of law,… can be understood as better advancing rule of law values' ibid 607-608). For a further sample of authoritative Italian scholarship holding diametrically opposed views vis-à-vis those of the first two authors quoted above and paradigmatic of the intellectual diversity existing in this area, see T Scovazzi, 'Come se non esistesse' (2021) 104 Rivista di Diritto Internazionale 167 at 180, who considers Judgment No 238 as a solid precedent to promote a further evolution of the law of State immunity, one which has the merit of corresponding to *elementary requirements of justice and human rights protection* also operating at the level of international law; Gradoni (n 6), who underscores that Judgment No 238, 'whether one likes it or not, stands firmly on important considerations of principle'.

[35] M Krajewski, C Singer, 'Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights' (2012) 16 Max Planck YB of United Nations L 1 at 28.

judgment was a triumph for State sovereignty,[36] whereas the undeniable, modern transformation of the international legal order under the pressure of human rights protection and the latter's increasing recognition as a fundamental value of that legal order were essentially ignored. In no areas of the law examined by the decision was the ICJ capable of identifying restrictions on, or at least tensions with, a foreign State's entitlement to immunity in a case denoted by an indisputable absence of adequate remedies and reparations for the victims of *jus cogens* crimes.

Within the Court's apparently impeccable, rigorously positivist analysis of the state of customary law, there was no glimmer of hope that the shield of sovereign immunity may, or at least might one day, be scratched by the victims' right to reparation for grave breaches of human rights and humanitarian law. And the language used in a decision which is dense of implications for the future of international law and human rights does matter.[37] True, the ICJ expressed its 'surprise'[38] and 'regret'[39] for the unjust treatment reserved for a prominent category of Italian plaintiffs (ie, the Italian military internees), as well as its awareness that the recognition of Germany's immunity 'may preclude judicial redress for the Italian nationals concerned',[40] but these uncompensated victims were simply diverted to the classic inter-State means of dispute settlement, such as negotiations that '*could*'[41] be pursued by the governments. In short, the Court was firmly determined to preserve the *status quo* and deliver a decision intended to forestall any further evolution of the law. In this sense, the 2012 ICJ judgment may safely be characterized as conservative.[42]

[36] PB Stephan, 'Sovereign Immunity and the International Court of Justice: The State System Triumphant', in JN Moore (ed), *Foreign Affairs Litigation in United States Courts* (Brill 2013) 67.

[37] Krajewski, Singer (n 35) at 31.

[38] *Jurisdictional Immunities of the State* (n 24) para 99.

[39] ibid.

[40] ibid para 104.

[41] ibid (emphasis added). Language strikes again, as it has been duly emphasised that a 'stronger hortatory *should*' would have fared much better in this much-quoted passage of the ICJ judgment, see F Francioni, 'Access to Justice and Its Pitfalls: Reparation for War Crimes and the Italian Constitutional Court' (2016) 14 J Intl Criminal Justice 629 at 635.

[42] B Conforti, 'The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity' (2011) 21 Italian YB Intl L 135, underlining 'an air of strong conservatism' (ibid 137) and 'the excessive conservatism' (ibid 142) in

As to the specific controversial aspects of the 2012 ICJ judgment, they have already been addressed in sizeable scholarship and it is therefore unnecessary to review them in detail. Such aspects include, in particular, the ICJ's formalistic distinction of procedural immunity rules and substantive human rights norms with the alleged consequent absence of conflict between them,[43] an incomplete and misleading account of US practice in this area,[44] the omission of a few relevant precedents endorsing the alternative remedy test as a condition on the grant of State immunity,[45] a flat and brisk rejection of any balancing exercise between competing principles performed by national courts when dealing with the 'uncustomary'[46] case of States liable for international crimes, and the affirmation of a military activities or armed conflict counter-exception to the territorial tort exception of shaky foundations and uncertain contours.[47]

If and when the ICJ rules on the merits of *Germany v Italy* (reloaded), it is safe to assume that a substantial part of the decision will be devoted to State property immunity from execution.[48] Yet – hopefully – the Court

the ICJ judgment; N Ronzitti, 'La Cour constitutionnelle italienne et l'immunité juridictionnelle des États' (2014) 60 Annuaire Français de Droit International 3 ('la C.I.J. a donné une interprétation extrêmement conservatrice de la règle sur l'immunité de juridiction des États', ibid 8); Palombella (n 34) at 613 ('conservative trends and formalist reading undertaken by the ICJ'). Another author (Focarelli (n 33) at 32) seems puzzled by the use of the adjective 'conservative' when referring to the ICJ judgment (see also ibid 56). Obviously, such adjective does not have a negative connotation in and of itself. We may well have to do with wise conservatism, but wisdom remains very much in the eye of the beholder in our context, as the vast diversity of doctrinal approaches to the ICJ judgment shows.

[43] See eg, C Espósito, '*Jus Cogens* and Jurisdictional Immunities of States at the International Court of Justice: "A Conflict Does Exist"' (2011) 21 Italian YB Intl L 162.

[44] R Pavoni, 'An American Anomaly? On the ICJ's Selective Reading of United States Practice in *Jurisdictional Immunities of the State*' (2011) 21 Italian YB Intl L 143.

[45] Conforti (n 42). Cf *Jurisdictional Immunities of the State* (n 24) Dissenting Opinion of Judge Yusuf.

[46] L Gradoni, 'Consuetudine internazionale e caso inconsueto' (2012) 95 Rivista di Diritto Internazionale 704 at 712-715.

[47] See eg, Pavoni (n 44) at 152-158. Cf *Jurisdictional Immunities of the State* (n 24) Dissenting Opinion of Judge ad hoc Gaja.

[48] Even in the area of immunity from execution, it cannot be assumed that the ICJ would be able to rapidly dispose of the issues raised by Germany. At the very least, it would have to address questions of burden of proof about the actual governmental use of the properties which have been targeted by measures of constraint in Italian proceedings, as well as the novel argument advanced by Germany, according to which 'States are precluded under international law from taking *any* measure of constraint

will not marginalize State immunity from adjudication and limit itself to recalling the pertinent holdings in the 2012 precedent. There exist elements from post-2012 non-Italian practice which the Court should obviously examine, such as for instance Canada's adoption of a terrorism exception to State immunity[49] similarly to the US, as well as the puzzling stalemate which is preventing the entry into force of the 2004 UN Convention on State Immunity,[50] ie, a treaty and treaty-context heavily relied on by the 2012 ICJ decision, while viceversa being currently met with increasing scepticism by domestic courts, including the UK Supreme Court,[51] which had so far been frequently taken as one of the staunchest supporters of its 'authoritative'[52] nature.

Most important, as Canada's terrorism exception already shows, the 2012 ICJ judgment has not proved to be 'the final nail in the coffin'[53] of State practice denying immunity to foreign States accused of grave breaches of international and constitutional human rights law. The ICJ would certainly have to carefully consider these elements, including especially the domestic court decisions reviewed in the next section, and

against the property of a foreign State on the basis of a judgment that itself has been rendered in violation [of] the other State's sovereign immunity' Application (n 1) at 19 para 38 (emphasis added). As logical as it may appear, one is unable to find a basis for the latter proposition in international law.

[49] Justice for Victims of Terrorism Act, Part I of the Safe Streets and Communities Act, Bill C-10 (13 March 2012).

[50] United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not in force) UN Doc A/RES/59/38 (16 December 2004). As of 19 July 2022, the Convention has been ratified or acceded to by 23 States, whereas 30 ratifications or equivalent instruments are necessary for its entry into force. On 7 July 2022, Benin deposited its instrument of ratification, breaking the ice after four years of absence of ratifications.

[51] *General Dynamics United Kingdom Ltd v State of Libya* [2021] UKSC 22 paras 49-57, 163-164 (dismissing the customary nature of art 22 of the UN Convention on service of process and noting that the Convention 'cannot yet amount to a widespread representative and consistent practice and is of no value as evidence of such a consensus among nations', ibid para 163). See C Harris, C Miles, '*General Dynamics v. Libya*' (2022) 116 AJIL 157, describing the decision at hand as the 'capstone' (ibid 161) of a process whereby English courts have debunked their former position that the UN Convention 'may reflexively be taken as reflecting custom' (ibid 160).

[52] *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2006] UKHL 26 para 26.

[53] As foreseen by R O'Keefe, 'State Immunity and Human Rights: Heads and Walls, Hearts and Minds' (2011) 44 Vanderbilt J Transnational L 999 at 1032.

ponder whether a simple reiteration of its 2012 position of complete closure vis-à-vis a human rights limitation to State immunity would be viable and resilient.

4. *From Seoul to Brasilia via Washington, DC (with a detour to Luxembourg)*

There is no doubt that for our purposes the most pertinent, non-Italian latest jurisprudence consists of a few decisions delivered in 2021 by courts in South Korea, the US and Brazil.

Before addressing that jurisprudence, it is appropriate – if only because the Italo-German dispute involves two (founding) Member States of the European Union (EU) – to highlight a passage in a judgment rendered a year before by the EU Court of Justice, which deals with the relationship between the customary principle of State immunity and the right of access to justice under Article 47 of the EU Charter of Fundamental Rights. After recalling that the customary rules of international law 'are binding, as such, upon the EU institutions and form part of the EU legal order',[54] the Luxembourg Court crucially added: 'However, a national court implementing EU law… must comply with the requirements flowing from Article 47 of the Charter… Consequently, in the present case, the referring court must satisfy itself that, if it upheld the plea relating to immunity from jurisdiction, [the plaintiffs] *would not be deprived of their right of access to the courts*, which is one of the elements of the right to effective judicial protection in Article 47 of the Charter'.[55]

This holding may be regarded as confined to the peculiarities of the underlying lawsuit, which involved a damages action brought – notably – in Italy against a private company performing activities on behalf of a foreign State. Yet it may also be taken as an expression of a general position under EU law that international law immunities are not *ipso facto* effective in the EU legal order as they must be reconciled with the right of access to justice whenever EU law is applicable to the dispute at

[54] Case C-641/18, *LG and Others v Rina SpA and Ente Registro Italiano Navale*, Judgment of 7 May 2020, ECLI:EU:C:2020:349 para 54.

[55] ibid para 55 (emphasis added).

hand.[56] And such reconciliation is evidently possible only when the recognition of immunity does not deprive the victims of effective remedies alternative to a suit in the forum State.[57] This interpretation certainly needs confirmation in future proceedings concerning immunity issues before the EU Court of Justice. In the meantime, the implications of the foregoing holding should be carefully assessed before concluding that EU law does not have any bearing on, and is actually fully supportive of, unconditional immunity for *acta jure imperii*.[58]

In 2021, decisions expressly supporting the Italian *Ferrini* jurisprudence came from the Seoul Central District Court in South Korea and the Brazilian Supreme Court (*Supremo Tribunal Federal*). In January 2021, the Seoul Court denied immunity to Japan in a damages action brought by several victims (infamously known as the 'comfort women') of the system of military sexual slavery operated by Imperial Japan especially during World War II.[59] Yet, in April 2021, a different panel in the same court upheld Japan's immunity in parallel proceedings initiated by other victims of that system.[60] Whereas – however – an appeal against the

[56] See further, M Ferri, 'Attività di certificazione delle navi svolte da società private su delega di Stati: tra immunità e tutela giurisdizionale delle vittime' (2020) 103 Rivista di Diritto Internazionale 789 at 807-808, 816; R Pavoni, 'Diritto alla tutela giurisdizionale effettiva e immunità degli Stati: irrompe la Corte di giustizia dell'Unione Europea', in Annoni, Forlati, Franzina (n 34) 427.

[57] Indeed, the failure of the alternative remedies test was a chief reason given by the Italian Supreme Court to find that State immunity could not stand in the way of the jurisdiction of Italian courts over a case parallel to that which gave rise to the EU Court of Justice decision in *RINA*; for that purpose, the Supreme Court relied on the latter decision, as well as on Judgment No 238/2014 of the Italian Constitutional Court, see Court of Cassation, *Abdel Naby Hussein Mabrouk Aly and Others v RINA SpA*, Judgment No 28180 of 10 December 2020 paras XI-XII.

[58] Cf A Zimmermann, 'Would the World Be a Better Place If One Were to Adopt a European Approach to State Immunity? Or, "*Soll am Europäischen Wesen die Staatenimmunität Genesen*"?', in V Volpe, A Peters, S Battini (eds), *Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court's* Sentenza *238/2014* (Springer 2021) 219.

[59] *Hee Nam Yoo and Others v Japan*, Case No 2016 Ga-Hap 505092 Judgment of 8 January 2021.

[60] *Lee Yong-soo and Others v Japan*, Case No 2016 Ga-Hap 580239, Judgment of 21 April 2021. For insightful commentaries on the South Korean decisions at stake, see E Hee-Seok Shin, S Minyoung Lee, 'Japan Cannot Claim Sovereign Immunity and Also Insist that WWII Sexual Slavery was Private Contractual Acts' Just Security (20 July

second judgment is ongoing, the first judgment became a *res judicata* on 23 January 2021 and its damages award (KRW 100 million for each of the twelve plaintiffs) is currently awaiting execution.

The January decision ruled that State immunity was ineffective in the South Korean legal order in the case of international crimes on the basis of a well known mix of arguments from international and domestic constitutional law (*jus cogens*, tort exception, last resort for the victims' right of access to justice, primacy of fundamental constitutional principles). Similarly to the Italian jurisprudence, the key argument relied on, and thus the boundaries – if any – of the principle affirmed, by the Seoul Court cannot thus be readily identified. At any rate, as a careful reading of certain passages of the decision has persuasively underscored,[61] this ruling may also be read as the outcome of an interpretative balance drawn by the Court between the *international* law principles of sovereign equality of States and human rights protection.

In turn, in September 2021, the Brazilian Supreme Court published its long-awaited judgment in the *Changri-lá* case,[62] whereby – upon reversing the lower court decisions – it set aside Germany's immunity in a damages action involving the sinking of a fishing boat in Brazilian territorial waters in 1943 by a submarine of the Third Reich army, with the consequent death of ten fishermen.

Again, the Supreme Court relied on a variety of elements of international and national law, although the tie-breaking rule here was certainly the clause in the Brazilian Constitution dictating the prevalence of human rights in the conduct of international relations by Brazil (Article 4(II)). The Court frequently quoted with approval the dissenting opinions of

2021); M Gervasi, 'Immunità giurisdizionale degli Stati ed eccezione umanitaria: in margine alla recente giurisprudenza sudcoreana sul sistema delle "donne di conforto"' (2022) 105 Rivista di Diritto Internazionale 167; Bufalini (n 23).

[61] Gervasi (n 60) at 172-176.

[62] *Karla Christina Azeredo Venancio da Costa e Outro v República Federal da Alemanha*, ARE 954858/RJ, Judgment of 23 August 2021 (published 24 September 2021). The Portuguese text of the decision is available at <https://portal.stf.jus.br/processos/downloadPeca.asp?id=15347973404&ext=.pdf >. See AT Saliba, LC Lima, 'The Law of State Immunity before the Brazilian Supreme Court: What Is at Stake with the "Changri-la" Case?' (2021) 18 Brazilian J Intl L 53; AT Saliba, LC Lima, 'The Immunity Saga Reaches Latin America. The Changri-la Case' EJIL: Talk! (2 December 2021); E Branca, 'Immunità degli Stati e violazioni dei diritti umani. Riflessioni a margine della sentenza "Changri-la" del Supremo Tribunal Federal brasiliano' SIDIBlog (24 January 2022).

the late Judge Cançado Trindade,[63] as well as the Italian *Ferrini* case law and the January 2021 decision by the Seoul Central District Court. The upshot was a sweeping principle, according to which 'wrongful acts committed by foreign States in violation of human rights do not enjoy immunity from jurisdiction'.[64]

Most recently, following a challenge to the breadth of that principle by the Federal Public Prosecutor (*Ministério Público Federal*), the Supreme Court published the *dispositif* of a new decision, whereby it has clarified that the same principle should actually read as follows: 'wrongful acts committed by foreign States in violation of human rights, *within the national territory*, do not enjoy immunity from jurisdiction'.[65] In other words, the rectified Brazilian judgment upheld the well-known territorial tort exception to State immunity[66] as one fully applicable to death or personal injury caused by human rights violations perpetrated by foreign States, including those violations which arise from *jure imperii* conduct, such as military activities carried out in times of armed conflict. It is clear that, even thus circumscribed, this decision remains inconsistent with the 2012 ICJ judgment, precisely because it did not back a military activities or armed conflict counter-exception to the territorial tort exception as the ICJ had done in what may safely be considered the weakest part of that judgment.[67]

Even if they both relate to crimes dating back to World War II, it is worth noting that the Korean and Brazilian decisions differ in several important respects. The most significant is probably the absence of any inter-State reparation scheme devised for the benefit of the victims of the Brazilian case, a factor duly underlined by the Brazilian Supreme Court, which – conversely – dismissed the feasibility and effectiveness of the victims' resort to the German courts.[68] Viceversa, the Korean-Japanese affair arises in a historical context denoted by the conclusion of at least two

[63] See especially, *Jurisdictional Immunities of the State* (n 24) Dissenting Opinion of Judge Cançado Trindade.

[64] *Karla Christina Azeredo Venancio da Costa* (n 62) at 2, 30.

[65] *Karla Christina Azeredo Venancio da Costa e Outro v República Federal da Alemanha*, ARE 954858/RJ Decision of 23 May 2022, emphasis added ('Os atos ilícitos praticados por Estados estrangeiros em violação a direitos humanos, dentro do território nacional, não gozam de imunidade de jurisdição'). See < https://portal.stf.jus.br/processos/detalhe.asp?incidente=4943985 >.

[66] See eg art 12 of the UN Convention on State Immunity.

[67] For references see (n 47).

[68] *Karla Christina Azeredo Venancio da Costa* (n 62) at 23-24.

reparations agreements between the governments concerned, by the subsequent repudiation or restrictive interpretation of those agreements by the same governments and the Korean courts,[69] and by the multiple unsuccessful attempts of the victims of the 'comfort women' system to obtain redress in domestic courts, including Japanese courts. As such, it more closely resembles the Italo-German dispute.

Overall, however, the Brazilian decision is more significant for the trend towards a human rights limitation to State immunity. Indeed, it is a final judgment from a supreme court[70] endorsing a principle in line with prior decisions of the Italian and Greek[71] supreme courts. On the other hand, what the January 2021 Korean decision[72] and the Brazilian *Changri-lá* judgment[73] share is their emphasis on the inherent dynamism of the law of State immunity driven by the increasing recognition of the central place occupied by human rights in international law and their consolidation as supreme domestic constitutional law.

Less than one month after the first 2021 Korean court pronouncement, a decision going in the opposite direction was handed down by the

[69] See Bufalini (n 23) at 699-701, 705-708.

[70] This holds true *a fortiori*, when one considers that in the *Changri-lá* case, pursuant to Brazilian procedures, the Supreme Court was sitting in plenary session and entrusted to determine a principle of law with precedential value (*Tese*) in a case earmarked as having 'general repercussions' (*Repercussão Geral*). See Saliba, Lima, 'The Law of State Immunity' (n 62) at 53 (note 3).

[71] Supreme Court (*Areios Pagos*), *Germany v Prefecture of Voiotia*, Case No 11/2000, Judgment of 4 May 2000. This landmark final decision, which denied immunity to Germany for crimes against humanity committed in Greece during World War II and predated the analogous Italian jurisprudence, was eventually overruled by Special Supreme Court (*Anotato Eidiko Dikastirio*), *Germany v Margellos*, Case No 6/2002, Judgment of 17 September 2002. But it was not reversed or annulled, and indeed enforcement proceeding relating to the damages awarded to the victims are ongoing. As such, it does remain a national supreme court precedent in favour of a human rights limitation to State immunity.

[72] 'The doctrine of state immunity is not permanent nor static. It continuously evolves in accordance with the changes in the international order', *Hee Nam Yoo and Others v Japan* (n 59) section 3.C para 3.3.

[73] 'The question [of State immunity for human rights violations] remains in the agenda of international law' ('a questao persiste na ordem do dia do direito internacional'), *Karla Christina Azeredo Venancio da Costa* (n 62) at 17, and despite the 2012 ICJ judgment, 'new paths are still open' ('[n]ovas veredas, portanto, ainda estao abertas') ibid 23.

US Supreme Court.[74] The issue was whether the so-called 'expropriation exception' to State immunity under the US Foreign Sovereign Immunities Act[75] (FSIA) deprived Germany of immunity in relation to the alleged coerced sale of a collection of precious medieval artifacts, known as the Welfenschatz, to the Nazi authorities in 1935 by a consortium of Jewish people of German nationality. The heirs of the consortium had successfully argued before the lower courts that the nationality rule, which – according to classic international law – implies that a wrongful taking does not occur when the dispossessed people are nationals of the expropriating State, does not bar the application of the exception at issue as the latter generally refers to property taken in violation of international law; thus, the argument continued, such a violation may well arise from international crimes and human rights breaches that are also unlawful when the victims are a State's own nationals, as the genocidal act which was allegedly perpetrated against the Jewish owners of the Welfenschatz.

The latter position would entail an expansive reading of the FSIA expropriation exception capable of discreetly subsuming a variety of human rights violations accompanied by a taking of property within its scope.[76] Clearly, the stakes were high, as it is also demonstrated by the large number of *amicus curiae* briefs submitted to the Supreme Court,[77] including one from a group of international law scholars forcefully urging rejection of the foregoing argument.[78] The Supreme Court decided in favour of Germany, thus rejecting any human rights 'contamination' of the FSIA expropriation exception, as it had previously done with the FSIA commercial activity exception.[79] The Court stated that the heirs' 'construction would arguably force [US] courts themselves to violate international law, not only ignoring

[74] *Federal Republic of Germany v Philipp*, 141 S.Ct. 703 (2021) Opinion of 3 February 2021.

[75] 28 USC section 1605(a)(3).

[76] What the Supreme Court described as the transformation of the expropriation exception 'into an all-purpose jurisdictional hook for adjudicating human rights violations', *Philipp* (n 74) at 713.

[77] See <https://www.scotusblog.com/case-files/cases/federal-republic-of-germany-v-philipp>.

[78] *Philipp* (n 74) Brief of Amici Curiae Foreign International Law Scholars and Jurists in Support of Petitioners and Reversal (filed 20 September 2020). The signatories were L Berster, C Brown, A Gattini, R Kolb, R O'Keefe, S Talmon, CJ Tams, C Tomuschat, A Zimmermann.

[79] *Saudi Arabia v Nelson*, 507 US 349 (1993) Opinion of 23 March 1993.

the domestic takings rule but also derogating international law's preservation of sovereign immunity for violations of human rights law'.[80] It explicitly endorsed the 2012 ICJ judgment for this proposition.[81]

The *Philipp* decision confirms that the US FSIA does not provide for a general human rights exception to State immunity. That said, drawing arguments against the Italian *Ferrini* jurisprudence from this US decision, as some scholars do,[82] is misplaced, paradoxical, and self-defeating. In and of itself, the FSIA expropriation exception is 'unique'[83] and 'anomalous'[84] worldwide. It removes immunity for extraterritorial *jure imperii* acts which, when carried out in armed conflict, may also amount to war crimes. Indeed, *pace* the ICJ, it does apply to expropriatory acts performed by armed forces in wartime. As the US Government duly noted in its *amicus* brief in *Philipp*,[85] a decision in favour of Germany would thus have avoided to *exacerbate* a situation labelled by the Supreme Court as one of 'nonconformity',[86] and by certain authors as one of 'stark disconformity'[87] with international law. In *Phillip*, the Court devised an explanation for this 'nonconformity' grounded in '[h]istory and context':[88] the expropriation exception was intended as a means 'to protect the property of [US] citizens abroad as part of a [long-standing] defense of America's free enterprise system'![89]

Remarkably, and again *pace* the ICJ, the US is also well known for legislating away sovereign immunity when the foreign State is accused of certain egregious breaches of international law traditionally regarded as *jure imperii* conduct, ie, specific human rights violations, such as torture and extrajudicial killing, perpetrated by State sponsors of terrorism *outside of the US territory*.[90] First introduced in the FSIA in 1996, the US terrorism

[80] *Philipp* (n 74) at 713.
[81] ibid.
[82] See eg, Focarelli (n 33) 29-31, 42, 57.
[83] *Philipp* (n 74) at 713, quoting Restatement (Fourth) of Foreign Relations Law of the United States para 455 Reporters' Note 15 (2017).
[84] *Philipp* (n 74), Brief for the United States as Amicus Curiae Supporting Petitioners (filed 26 May 2020) at 29.
[85] ibid at 30.
[86] *Philipp* (n 74) at 713.
[87] R O'Keefe, 'The Restatement of Foreign Sovereign Immunity: *Tutto il Mondo è Paese*' (2021) 32 Eur J Int L 1483 at 1487.
[88] *Philipp* (n 74) at 713.
[89] ibid.
[90] FSIA, Section 1605(A).

exception has been strengthened multiple times in the following years and, in 2016, it was supplemented by a further, broader exception, which lifts the immunity of a foreign State responsible for acts of terrorism in the US in connection with tortious acts committed by the same State *everywhere*, regardless – unlike the earlier FSIA provision – of prior designation of the foreign State as a State sponsor of terrorism by the US Executive.[91]

These exceptions have generated an impressive amount of litigation and damages awards, most famously against Iran. Whereas the ICJ has so far managed to avoid scrutinizing such exceptions,[92] authoritative US scholarship is keen on supporting their legality under international law.[93]

At any rate, the preceding short account of the massive US practice relating to State immunity is sufficient to observe that, rather than contradicting the Italian *Ferrini* jurisprudence, that practice opens up a Pandora's box of arguments in its favour.

5. *Conclusion*

As the foregoing analysis makes clear, a well-defined and circumscribed human rights limitation to State immunity should not be flatly dismissed using dogmatic or formalistic arguments. Also, pointing to impending risks for the stability of the global system arising from that limitation seems greatly exaggerated. After all, a reasonable human rights limitation should not be intended to supplant traditional inter-State diplomatic and judicial means of dispute settlement, or available remedies sought by the victims in the courts of the allegedly responsible State. That limitation should be triggered in exceptional cases, ie, when those means and remedies are absent and a lawsuit in the forum State is the only remaining option to obtain relief *and* to exert pressure on the governments

[91] FSIA, Section 1605(B). This is the so-called '9/11 amendment' to the FSIA.

[92] ICJ, *Certain Iranian Assets (Islamic Republic of Iran v United States of America*, (Judgment, 13 February 2019) [2019] ICJ Rep 7 paras 48-80.

[93] See eg, for a balanced yet unequivocal defence of the US practice at stake, DP Stewart, 'Immunity and Terrorism', in T Ruys, N Angelet, L Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019) 651; see also DP Stewart, IB Wuerth, 'Sovereign Immunity as Liminal Space' (2021) 32 Eur J Int L 1501 at 1502 ('some of the [FSIA's] exceptions to immunity may *arguably* be inconsistent with, or *even* violate, international law', emphasis added).

concerned so that they reckon with their past wrongs, as well as – on the other side – with their (at least moral) duty to secure protection to their citizens who are victims of uncompensated gross violations of human rights. This is the lesson that can be taken from two decades of Italian *Ferrini* jurisprudence up to the recent establishment of the Nazi Crimes Fund by the Italian Executive.

In turn, the dynamism of domestic court practice despite the 2012 judgment should advise the ICJ, if and when it deals with the merits of *Germany v Italy* (reloaded), that freezing that practice for an indefinite period of time is unfeasible and unwarranted.

In this connection, when looking back at the three major decisions relevant to the 'human rights and State immunity' debate rendered in 2021 by domestic courts, one may be surprised that, similarly to the overwhelming majority of Italian cases, they all dealt with alleged crimes dating back to World War II and/or the preceding years. It is high time for this practice to be tested against current situations of serious breaches of human rights. Indeed, as graphically stated by one of the attorneys for the plaintiffs when commenting on the recent judgment by the Tribunal of Bologna denying immunity to Germany for the so-called 'Marzabotto massacre' in 1944,[94] the principle of derogation from State immunity in lawsuits instituted by the victims of international crimes is denoted by an 'extraordinary modernity'[95] and 'may constitute a bulwark against barbarism'.[96] If that will even minimally prove to be true, a human rights limitation to State immunity will have already accomplished a noble and fundamental mission.

[94] The judgment of the Tribunal of Bologna is dated 21 June 2022. The 'Marzabotto massacre' is commonly described as the most heinous crime perpetrated by the Nazis across Europe. Around 800 civilians (including more than 200 children) were brutally killed. See <https://bologna.repubblica.it/cronaca/2022/06/21/news/la_sentenza_strage_di_marzabotto_la_germania_deve_risarcire-354794010>.

[95] ibid (authors' translation).

[96] ibid (authors' translation).