After Sentenza 238: A Plea for Legal Peace

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1. INTRODUCTORY REMARKS

This post summarizes some of the key points of my presentation at the upcoming Villa Vigoni conference organized by the Max Planck Institute and its partners around the theme 'Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court's *Sentenza 238/2014*'.

There are no easy answers to the questions posed by the title of the conference. In section 2, I venture on a proposal for 'legal peace' between Germany and Italy. This proposal does not only arise from frustration with the current impasse, but also from the suspicion that the public good of legal peace has never seriously been canvassed by the stakeholders in this affair, *in primis* by the Italian and German governments. This is puzzling when compared to the successful outcome of intergovernmental negotiations prompted by litigation relating to World War II (WWII) crimes before United States (US) courts, a process started in the 1990s and still ongoing (section 3).

No magical recipe can be suggested for shaping 'legal peace' in the context of the dispute between Germany and Italy. It might well be channelled through arbitration conclusively determining which of either country has defaulted with respect to compensation owed to Italian Military Internees (IMIs) and similarly-situated victims of Nazi crimes. What seems crucial in the aftermath of *Sentenza 238* is the necessity to devise a fair institutional and funding mechanism, alternative to private litigation but capable of giving victims a voice, entrusted with the processing of outstanding compensation claims. The lack of an *effective* remedy for the victims, which would be alternative to judicial proceedings in the forum State, was indeed a key consideration at the basis of the Italian Constitutional Court's declaration of unconstitutionality of the ICJ *Jurisdictional Immunities* decision. There are sound reasons for believing that the setting up of a meaningful compensatory mechanism will lead to the suspension or termination of the many cases pending against Germany before Italian courts.

The preceding observations are consistent with my position on the 'immunity v human rights' debate. I am part of the growing number of authors who, although with several variations and to different degrees, take the view that the sole means of reconciling international and domestic law in this area – and international law with itself for that matter – is to hold that State immunity (for human rights violations) is conditional on effective alternative remedies for the victims.

2. CONFRONTATION AND MUTUAL NEGLECT VERSUS LEGAL PEACE

The conduct of the governments concerned (also) in the aftermath of *Sentenza 238* has been characterized – to different degrees and with different modalities – by reticence, ambiguities and a general lack of transparency and willingness to engage with the victims and civil society about the implications of the decision.

Two and a half years after the *Sentenza*, the Italian Government has yet to illustrate its official position on this decision to its citizens and especially to those most concerned, i.e. the plaintiffs and judgment holders in the various pending or concluded proceedings relating to WWII Nazi crimes. While *Sentenza 238* may arguably be considered 'as a shock to the international legal community' , the Italian layman and public at large ignore it, despite its importance for the national history and for sociological attitudes towards a tragic past which large sectors of the (older) population have never come to terms with.

It seems indeed that the Italian Government has erected a wall of silence around *Sentenza 238*, as if it was a decision too explosive and too embarrassing. But the Government, backed by its majority in Parliament, has continued its undeclared war on the Italian Judiciary. Soon after *Sentenza 238*, it surreptitiously took advantage of the parliamentary debates on the conversion into law of a pre-*Sentenza 238* governmental decree on civil

procedure in order to introduce an amendment making *in fact* impossible to attach *any* bank account held in Italy by foreign States. This most generous provision, according to which such bank accounts are not subject to execution provided the head of a diplomatic mission of a foreign State has declared to the Italian Ministry of Foreign Affairs and the relevant bank that the money deposited therein is exclusively intended for use in the performance of diplomatic and/or consular functions, goes beyond customary law and Article 21(1)(a) of the (not-yet-in-force) UN Convention on Jurisdictional Immunities of States and Their Property . A key concern here is that, by hastily seeking urgent solutions to the *Germany v Italy* contingencies, the Italian Government runs the risk of turning a blind eye to opaque transactions and abuses facilitated by the privilege afforded to any foreign State bank accounts held in Italy. One should just hope that the competent authorities will retain significant surveillance power over such accounts.

Moreover, far from withdrawing from treaty provisions conferring jurisdiction on disputes involving Italy to international bodies, on 25 November 2014 the Italian Government deposited its declaration of acceptance of the compulsory jurisdiction of the ICJ. At the very least, this decision seems imprudent and untimely in the wake of *Sentenza 238*.

As to the ambiguous judicial strategies pursued by the Italian Government in the ongoing proceedings against Germany, very little has changed vis-à-vis the pre-*Sentenza 238* situation. The Government supports Germany's position with respect to most of the key aspects of the dispute, save that it strongly contests its duty to hold Germany harmless from any WWII reparation claims by Italian nationals as allegedly flowing from the 1947 Peace Treaty and the bilateral 1961 Bonn Agreements.

On the other side, the most salient feature of Germany's recent conduct is its refusal to participate to the compensation proceedings resumed in Italian courts in the wake of *Sentenza 238*. In all such proceedings, Germany has been and will be a respondent in absentia (see for instance here) and the addressee of a growing number of default judgments awarding damages and costs. It has consistently referred the courts to a 2015 Note Verbale from Germany's Embassy in Rome to the Italian Ministry of Foreign Affairs for further explanation. Various excerpts of this Note Verbale are recalled by the judicial decisions in question. Thus we know inter alia that, according to Germany, *Sentenza 238* 'cannot change anything of what has been found by the ICJ with respect to the content and scope of the jurisdictional immunity enjoyed by Germany before Italian courts'; indeed, 'the principle of State immunity cannot be limited by the domestic law of one State, not even by fundamental principles of the national constitutional order, because national law must abide by the obligations arising under international law'. The Note also contains a 'precautionary warning' about the risks arising from the continuation of the judicial proceedings in question, i.e., a clear reference to further potential suits before the ICJ or other international bodies.

Germany has thus chosen a confrontational posture vis-à-vis Italian courts, by making it clear that it regards the ongoing proceedings as unlawful. Crucially, it has also taken an uncompromising attitude by refusing to accede to the requests from several courts to negotiate an out-of-court settlement with the plaintiffs (where these were heirs of the victims) and Italy by means of conciliation or mediation. Given the apparent disengagement of the governments concerned, these Italian courts were trying to make the best of the ICJ's consideration that the unredressed grievances of Italian victims of Nazi crimes 'could be the subject of further negotiation… with a view to resolving the issue' (para 104).

Against this background, the two governments should come out and tell the international community whether they have any intention to carry on these negotiations in good faith. Most significantly, how do they wish to deal with the historical 'justice/equity gap' which has uniquely affected IMIs and similarly-situated victims? Since they – as well as scholars (see here and here) – disagree on the nature and scope of the post-WWII labyrinthine regulation of reparations by Germany, why isn't arbitration or similar means of dispute settlement contemplated? The present situation is heading us nowhere; it is a recipe for failure to the whole disadvantage of the individual victims who, being now in their Nineties, are sadly passing away at an accelerating rate. While further litigation is likely to perpetuate the 'zero-sum game' which the whole dispute has turned out to be so far, a key question remains: why didn't the two governments – (at least) throughout the past twenty years – ever meaningfully embraced 'legal peace' as the overarching public good and objective guiding their actions?

In the first place, legal peace is needed in the interest of the victims. But it is also needed in the interest of the integrity of the international and national legal orders. Taking an unbending position is unhelpful to either side when national supreme courts plausibly invoke supreme constitutional principles as the last bulwark against international law rules. Such a position only exacerbates the impression that international law and domestic legal orders are two irreconcilable worlds apart. Dialogue and interaction among the relevant actors, as well as salutary competition between and mutual reinforcement of international and domestic law, seem necessary instead. Crucially, it should be recalled that the achievement of legal peace has always been a key consideration for the German and other governments when dealing with the outstanding problems arising from the WWII reparation regimes.

3. WHY THE FRENCH RAILROAD DEPORTEES AND NOT THE ITALIAN MILITARY INTERNEES?

It is frequently suggested that the 'time factor' runs against the soundness of the reparation claims of IMIs and similarly-situated Italian victims of Nazi crimes. For instance, it has been stated that, as compared to State immunity litigation involving torture and comparable crimes 'of current or recent regimes', the issue of the IMIs makes a bad case, because it 'concerns crimes committed more than one generation ago'; this would imply that '[e]ven if we do not accept any formal prescription for the prosecution of such egregious crimes, the lapse of time does weaken the claims'.

I think that – on intertemporal, fairness and other grounds – the lapse of time does weaken *the argument* that State immunity should be lost when the defendant State is accused of grave breaches of human rights, thereby opening up the possibility that the relevant 'ancient' conduct might come to be reassessed through the prism of modern legal achievements and standards. I have always had the impression that a significant part of the criticism levelled against the Italian *Ferrini* jurisprudence stems from these intertemporal considerations, where 'intertemporal' is not necessarily used in a technical sense, as it also refers to the contemporary uneasiness of Italy and Germany, and Italian and German people alike, about discussions which might reopen old wounds and controversial chapters of the respective national history. With its historical overtones, the *Germany v Italy* controversy has unduly monopolized the debate, thus detracting attention from the advancement of international law which might result from the application of a narrow human rights limitation to State immunity in contemporary cases concerning State involvement in abuses and crimes.

Conversely, I do *not* think that the passage of time as such constitutes a valid reason for dismissing the substantive claim for reparation of a whole class of victims of war crimes dating back to many decades ago; this is especially true in our case where the responsibility for those crimes is acknowledged and what is disputed is only whether Germany has fully discharged its obligation to make reparation for the resulting injuries. The time factor should rather suggest a sense of urgency for the governments' approaches to, at least, the outstanding claims of Italian WWII direct victims, i.e., the survivors who are now in their Nineties.

It is precisely this sense of urgency and the determination to attain an 'enduring legal peace' regarding WWII litigation before national courts that, as recently as 2014, have led to an agreement between the US and France on compensation for the so-called French railroad deportees who were excluded from prior French reparation programmes. The basic bargain is well-known as it builds upon extensive US practice in this area: France makes USD 60 million available to satisfy claims of uncompensated railroad deportees, while the US is under an obligation 'to recognize and affirmatively protect the sovereign immunity of France within the United States legal system with regard to Holocaust deportation claims and, consistent with its constitutional structure, to undertake all actions necessary to ensure an enduring legal peace at the federal, state, and local levels' (Article 2(2)).

The reason for mentioning the French Railroad Deportees Agreement is by no means to suggest that it should be taken as a template for a similar outcome of potential negotiations on the unresolved issue of the Italian Nazi victims. The historical and legal background is obviously different. The Agreement is rather an indication that States are nowadays still reckoning with their past wrongs and that, under the pressure of litigation and legislative initiatives jeopardizing their entitlement to immunity, they are willing to settle past accounts.

More generally, the French Railroad Deportees Agreement is just an example of the key role played by State

immunity litigation before domestic courts in the area of human rights and international crimes. However one sides in the 'immunity v human rights' debate, it cannot reasonably be denied that, often times and for the sake of legal peace, such litigation may urge the relevant States to go back to the negotiating table, give a fresh look to the underlying issues and accordingly devise fair arrangements affording a decent measure of justice to uncompensated victims. If we have not yet reached that point with respect to the claims of IMIs and comparable Italian victims, there is reason to hope that it will be the path the governments concerned will want to follow henceforth. For the time being, we should not overlook that, were it not for the *Ferrini* jurisprudence, the tragic and paradoxical historical trajectory of the IMIs would by now most probably be forgotten, as it has been for too many decades.

In this context, it is clear that the US immunity practice is paradigmatic. Insofar as relevant here, it includes a line of WWII-reparations cases which have spurred intergovernmental settlements (with a scheme and rationale fundamentally similar to the 2014 French Railroad Deportees Agreement) and which were dismissed when those settlements were finalized. The most famous examples involve Austria (see here and here), France and Germany (see here and here). Most importantly, legal peace was actually achieved as a result of such agreements (see e.g., here, here and here).

Again, the reason for quoting this practice is not to suggest that the *Germany v Italy* affair should replicate the outcomes devised in the US context. The point is simply that a most useful lesson for the German and Italian governments arises from the US experience: dialogue and non-adversarial means of dispute settlement, possibly put in place in a transparent manner and with the involvement of the victims, are the only avenues to achieve legal peace and step out of the current unsustainable *impasse*. Such conduct would also dispose of any unpleasant feeling that the US, due to its political and economic leverage, is capable of accomplishing in this area what is beyond the reach of other States.

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