Waiting for Negotiations: An Italian Way to Get Out of the Deadlock

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Abstract The outcome of Judgment 238/2014 does not directly rely on the fact that the international dispute on state immunity involves two member states of the EU. Also, it is difficult to envisage at the European level any normative development on the international rules on state immunity. It seems, however, that some useful lessons can be learnt from the judicial dialogue between the European Court of Justice, the European Court of Human Rights, and constitutional courts. In very general terms and for many reasons, the relationship between constitutional courts and the International Court of Justice (ICJ) cannot rely on particularly sophisticated techniques of judicial dialogue.

This encourages us to consider the importance of involving state-level political organs as one of the counterparts to the dialogue. The potential power of judges to address these political organs in order to find a diplomatic solution raises the thorny question of whether this availability of alternative means of dispute settlement at the international level might impact on (or somehow restrict) the right of access to justice for Italian victims. Since both ICJ and the Italian Constitutional Court (ItCC) seem to agree that negotiation is the alternative dispute settlement par excellence (and the only means available to settle the present dispute at the international level), the ItCC might have given more importance to the availability of alternative means of redress—in the form of negotiations between the two states—in order to wear down the absolute character of the principle of judicial protection enshrined in Article 24 of the Italian Constitution.

Of course, a negotiated solution depends upon the willingness of both parties, whereas an Italian political initiative aimed at unilaterally granting reparation to the victims is always possible. Moreover, the latter solution may stop the enforcement of Judgment 238/2014 and reduce Italy's exposure to international responsibility for non-compliance with the 2012 ICJ Judgment. So long as Italian victims and their

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heirs are compensated, the restriction on their right to seek justice through the courts might become more tolerable for the Italian tribunals.

I. The EU Membership of Italy and Germany: Is It Relevant?

In its order of 21 January 2014, which raised questions about the constitutionality of the international rule on state immunity, the Tribunal of Florence emphasized the supranational and universal character of the principle of the absolute guarantee of judicial protection. According to the Tribunal of Florence, the importance of this common and collective value should be considered even more essential between member states of the EU ('*tanto più* (. . .) *tra Stati dell'Unione Europea*') than in a universal dimension.[1] The same Tribunal, when enforcing the effects of Judgment 238/2014,[2] was even more categorical. In its judgment of 6 July 2015, the Tribunal of Florence considered a customary international rule that precludes not only Italian judges but all 'European' judges from determining state responsibility for the commission of war crimes and crimes against humanity to be incompatible with fundamental human rights protections, as enshrined in the Italian Constitution and in the Charter of Fundamental Rights of the European Union (EU Charter).[3] In a more recent Judgment of 22 February 2016, the Tribunal, recalling the centrality of human dignity in the EU Charter, concluded that, at least in the relationships between EU member states, the restriction on state immunity envisaged by the Italian Constitutional Court (ItCC) is reasonable. This conclusion is supported by the fact that, although the EU Charter 'shall not extend in any way the competences of the Union as defined in the Treaties' (Article 6 of the Treaty on European Union), the high degree of human rights protection provided therein cannot but distinguish the very essence of the EU.[4]

The EU membership of Italy and Germany obviously does not affect the content of international norms. However, according to Tribunal of Florence, the fact that Italy and Germany built, together with many other states, a new and different legal order—the EU—cannot be irrelevant from an international law perspective.[5] This conclusion raises the question of whether the EU membership of both states is relevant at all in an assessment of the current dispute raised after Judgment

[1] *Tribunale di Firenze*, Order of 21 January 2014, No 84/2014, 6.

[2] *Corte Costituzionale*, Judgment of 22 October 2014, No 238/2014.

[3] *Tribunale di Firenze*, Judgment of 6 July 2015, No 2468/2015, 13. For an account on these decisions, see Elena Sciso, 'Brevi considerazioni sui primi seguiti della sentenza della Corte costituzionale 238/2014', *Rivista di diritto internazionale* 98 (2015), 887-897, at 895-897.

[4] *Tribunale di Firenze*, Judgment of 22 February 2016, No 14740/2009, 12 et seq.

[5] Ibid, 12: 'It cannot be irrelevant, also from an international law perspective, the fact that Germany and Italy—while in force an international customary rule on state immunity, as the one identified by the ICJ—have contributed, together with an increasing number of other states, to the creation of a new supranational legal order' (translated by the author).

238/2014, as suggested by the Tribunal of Florence. And if so, why should it be so? In the reasoning of the Italian tribunal, the reference to a European dimension serves the purpose of emphasizing the absolute centrality of human rights protections both in the constitutional traditions of EU member states and in the EU legal order itself. From this perspective, the existence of a common European dimension—characterized by the importance attached to human rights protections—may have the effect of strengthening the legitimacy, and eventually the acceptability, of the solution spelt out in Judgment 238/2014. From a strictly international law perspective, however, it is difficult to see how EU membership could affect the application of the international rule on state immunity.

The European dimension of the dispute has also been invoked from a different viewpoint. The argument goes that Italy and Germany's EU membership may play a role at the political level by facilitating the possibility of reaching a negotiated settlement. In other words, this context of regional integration 'should (. . .) help to settle a dispute which keeps alive conflictual relations originating from the Second World War'.[6]

The outcome of Judgment 238/2014 does not directly rely on the fact that the international dispute on state immunity involves two member states of the EU, and nor did the ItCC place any relevance on this aspect. Still, a European perspective may add some food for thought to the present debate. With this in mind, this chapter focuses on two different issues. In the first part, I will assess possible European *normative* developments in the field of state immunity (section II). I will evaluate whether Judgment 238/2014 may be seen as a contribution to the formation or consolidation of a European judicial practice on state immunity in the case of human rights violations. At the same time, I will try to assess whether the creation of a regional exception to the international rule on state immunity would or indeed should be desirable. Moreover, I will endeavour to verify whether, and to what extent, it is possible to envisage an EU legislative intervention on the scope or the application of the international customary rule on the jurisdictional immunity of the state. The second part of the chapter will appraise what we can learn from the *dialogue between judges* at the European level. In particular, I will try to shed some light on some of the drawbacks to the application of both the counterlimits doctrine and the equivalent protection technique in the relationship between constitutional courts and the International Court of Justice (ICJ) (section III). I will then explore how the availability of alternative means of dispute settlement at the international level may impact on the need to award redress for Italian victims (section IV). In the last paragraph, I will offer some concluding remarks (section V).

[6]Karin Oellers-Frahm, 'A Never-Ending Story: The International Court of Justice—The Italian Constitutional Court—Italian Tribunals and the Question of Immunity', *Heidelberg Journal of International Law* 76 (2016), 193-202, at 202.

II. At What Stage of Development is the EU's Law on State Immunity?

Judgment 238/2014 does not make any reference to the possible existence or development of a 'European' customary law on state immunity. The ItCC does not even examine the ICJ's qualified interpretation of the customary international law on state immunity from the civil jurisdiction of other states for acts considered *iure imperii*.

Nevertheless, one may consider the idea of an evolution to the rule on state immunity at the European level. For example, Pasquale De Sena has wondered whether Judgment 238/2014 could contribute to the formation of a '*regional* customary rule, according to which *European* States may invoke constitutional provisions on access to justice, as a circumstance capable of precluding the wrongfulness of their failure to comply with conflicting international legal duties'.[7] Following this line of reasoning, Judgment 238/2014 could be seen as an invitation for all EU member state judges to give prevalence to their own constitutional norms on human rights protections even when this implies a violation of international obligations. The Tribunal of Florence has also referred to the idea that supreme principles on human rights protections enshrined in the Italian Constitution (and common to both Germany and Italy as members of the EU) would represent an exception to the inability to invoke national law as a justification for non-observance of international obligations (Article 27 of the Vienna Convention on the Law of Treaties, and Article 32 of the Draft Articles on State Responsibility[8]).[9] However, the Italian Tribunal did not allude to the existence or development of a regional custom of this kind.

The possible existence of regional customary international rules has been recently reasserted by the International Law Commission (ILC).[10] The practice in this area, however, is scarce. One may only note the well-known case related to the particular practice of diplomatic asylum in Latin America, although the very existence of that regional custom was eventually denied.[11] Apart from that, any exception to the irrelevance of domestic law as a justification for non-compliance with international

[7]Pasquale De Sena, 'The Judgment of the Italian Constitutional Court on State Immunity in Cases of Serious Violations of Human Rights and Humanitarian Law: A Tentative Analysis under International Law', *Question of International Law: Zoom-Out* 2 (2014), 17-31, at 31.

[8]ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome), UN Doc A/56/10, 43, UN Doc A/RES/56/83, Annex, UN Doc A/CN.4/L.602/Rev.1, GAOR 56th Session Supp 10, 43.

[9]*Tribunale di Firenze*, Judgment No 14740/2009 (n 4), 25.

[10]ILC, Draft Conclusions on identification of customary international law with commentaries, adopted by the ILC at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10) (see, in particular, draft conclusion 16).

[11]ICJ, *Haya de la Torre (Colombia v Peru)*, Judgment of 20 November 1950, ICJ Reports 1950, 266.

law is also not supported by state practice or any international decision.[12] This appears to be true also for constitutional provisions. In particular, it is still difficult to counter the opinion of the Permanent Court of International Justice that 'a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force'.[13]

Moreover, compared to general customary law, 'stricter criteria apply' to the formation of regional customs: the relevant practice has to be accepted as law by each state concerned. In addition, particular customs require clearly established practice and greater evidence of the acceptance of that practice as law.[14] As things stand, these elements are far from being in existence, and even the Italian position on the emergence of an exception to the general rule remains unclear.[15]

More generally, customary international law has not only an elusive nature but it is typical of primitive legal systems, where there is no formal legislature. As a highly developed regional legal order, the EU can rely on more sophisticated modes of law-making. In the EU's legal order, a crucial choice—such as reconciling the traditional rule on state immunity and the scope of the individual's right of access to court—should be the result of a legislative process rather than based on the initiative of national judges. No doubts, judicial decisions often encourage legislative intervention. In the context of state immunity, however, (national) judicial activism may more likely increase legal uncertainty and raise diplomatic tensions.

The issue has in fact already been discussed, at least in relation to the adoption of a European regulation on the enforcement of judgments between member states. In its application to the ICJ, Germany recalled that recognition and enforcement of judgments between EU member states 'does not comprise legal actions claiming compensation for loss or damage suffered as a consequence of acts of warfare'.[16] This would be a consequence of the European Court of Justice (ECJ)'s interpretation of the Brussels Regulation on the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in EU countries.[17] In the *Lechouritou* case,[18] the ECJ clarified that the 'civil matters', referred to in Article 1 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in

[12]The commentary to Article 32 of the Draft Articles on State Responsibility does not refer to any exception to the rule; cf ILC, Draft Articles on State Responsibility 2001 (n 8), 94.

[13]PCIJ, *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory*, Advisory Opinion of 4 February 1932, PCIJ series A/B No 44, 24.

[14]ILC, Draft Conclusions (n 10), 35.

[15]See Paolo Palchetti, chapter 'Right of Access to (Italian) Courts *über alles*?', and Andreas Zimmermann, chapter 'Would the World Be a Better Place If One Were to Adopt a European Approach to State Immunity?', in this volume.

[16]ICJ, *Jurisdictional Immunities of the State (Germany v Italy)*, Application Instituting Proceedings Filed in the Registry of the Court on 23 December 2008, para 6.

[17]Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12.

[18]ECJ, *Lechouritou and Others v the Federal Republic of Germany*, Judgment of 15 February 2007, Case No C-292/05, I-1540, paras 17-19.

Civil and Commercial Matters of 1968,[19] do not include legal actions 'for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare' in the territory of another state.[20] The reference to the sole 'successors' may suggest that civil actions brought by direct victims may have a chance to succeed. However, the ECJ also referred to Regulation No 805/2004, which creates a European Enforcement Order for uncontested claims,[21] and to Regulation No 1896/2006, which establishes a European order for payment procedures.[22] These regulations confirm, more generally, the idea of an exclusion of *acta iure imperii* from the 'civil and commercial' scope of the regulations, regardless of 'whether or not the acts or omissions are lawful' (Article 2(1) of both regulations).

Indeed, the creation of the European Enforcement Order was originally aimed at completely abolishing the exequatur procedure whereby national judges could decide to grant leave to any enforceable judgment obtained in another member state. A European Enforcement Order would have been automatically enforceable, without any kind of new examination of the case, as if the judgment was issued by another judge belonging to the member state where the execution is pursued. The explicit exclusion of *acta iure imperii* from the civil and commercial scope of Regulation No 805/2004 was actually due to the will of the German delegation within the Council of the EU. The initiative of the German delegation overtly aimed at ensuring that 'titles on the liability of the Federal Republic of Germany for war crimes committed during World War II should not be certified as a European Enforcement Order'.[23]

The German proposal was not opposed by other EU member states. This may be a sign of a common understanding between EU member states regarding all claims for compensation related to the *acta iure imperii*, including crimes committed in the course of World War II. Certainly, this does not preclude a different regulation intended to recognize a right to enforcement of any judgment granting compensation

[19]Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968, OJ L 299, 31 December 1972.

[20]Ibid, para 46. On this point, see Giovanni Boggero, 'The Legal Implications of Sentenza No. 238/2014 by Italy's Constitutional Court for Italian Municipal Judges: Is Overcoming the "Triepelian Approach" Possible?', *Heidelberg Journal of International Law* 1 (2016), 203-224, at 222-223.

[21]Regulation of the European Parliament and of the Council (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L 143.

[22]Regulation of the European Parliament and of the Council (EC) No 1896/2006 of 12 December 2006 creating a European order for payment procedure [2006] OJ L 399.

[23]On this aspect see, eg, Veronika Gärtner, 'The Brussels Convention and Reparations–Remarks on the Judgment of the European Court of Justice in *Lechouritou and others v. the State of the Federal Republic of Germany*', *German Law Journal* 8 (2007) 417-442, at 439; Nerina Boschiero, 'Jurisdictional Immunities of the State and Exequatur of Foreign Judgments: A Private International Law Evaluation of the Recent ICJ Judgment in Germany v. Italy', in Nerina Boschiero/Tullio Scovazzi/Cesare Pitea et al (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (The Hague: Asser Press 2013), 781-824, especially at 798 et seq.

for victims of human rights violations. Despite being technically possible, such a normative development seems at the moment to be far from reach. So, is there still something we can learn from the European legal order?

III. Techniques of Dialogue Between Judges at the European Level: What Lessons Can We Learn?

The relationship between EU law and national legal orders relies significantly on a continuous dialogue between judges. In this sometimes complicated interaction, constitutional courts play an essential role. Of course, this dialectical relationship between judicial organs takes place using a number of means. For our purposes, two techniques of judicial dialogue deserve particular attention: the counterlimits doctrine (*dottrina dei controlimiti*), applied by the ItCC, and the test of equivalent protection, often employed by national and European judges to ensure respect for fundamental rights. The key issue here is to evaluate the effects of using these techniques in the relationship between the ItCC and the ICJ.

Admittedly, the counterlimits doctrine presents an intrinsic contradiction. The contradiction stems from the recognition of a constitutional judicial power that prevents the entrance of international norms into the national system, for the purposes of safeguarding the supreme principles of the Italian Constitution. This power would be in conflict with the openess to international law granted by the Constitution itself (especially by those rules aimed at granting compliance with international obligations, for example Articles 10, 11, and 117 of the Italian Constitution).

It may be the existence of this contradiction that has seen the counterlimits doctrine often invoked in the past but never concretely applied, at least until Judgment 238/2014. What is more interesting here, however, is a more latent aspect to this technique. As pointed out by Stefano Battini, so long as the application of the counterlimits doctrine remains a mere threat, the collision of legal orders continues to be an abstract scenario.[24] The effects of the potential application of the counterlimits doctrine may even be seen as a constructive one. First, the non-application of the counterlimits doctrine confirms the existence of common, or at least compatible, values between legal systems: if the counterlimits are not applied, it means that the 'external rule' is in compliance with national legal principles. Secondly, the possibility that the counterlimits doctrine *can* be applied may provide a warning to judges of other legal orders about the existence of a potential systemic collision. The threat of this clash may force them to take into account the interests that are conflicting and to look for acceptable, balanced

[24]Stefano Battini, 'È costituzionale il diritto internazionale?', *Giornale di diritto amministrativo* 3 (2015), 367-377, at 372-373.

solutions. The problem is that when the doctrine is in fact concretely applied, as in Judgment 238/2014, the contrast between legal orders becomes irreconcileable.

Admittedly, the judicial dialogue between constitutional courts (or the European Court of Human Rights (ECtHR)) and the ECJ has often relied on a different technique, one that favours a more dialectial interaction between legal systems: the test of equivalent protection.[25] In the application of this technique, the degree of judicial control over the 'external law' is loosened by the fact that the protection does not need to be exactly the same but comparatively adequate or generally acceptable.[26] It is the admissibility of an imperfect accordance between the two systems that specifically enhances 'the potentialities of equivalent protection as a technique for the balancing of interests'.[27] The counterlimits doctrine instead precludes this adaptability, since it rests on a purely hierarchical logic. In Judgment 238/2014, the ItCC has created an irremovable barrier to safeguard the supreme and non-derogable principles of the Italian Constitution. As a consequence, the balance between competing interests can be done only in light of national parameters. One may argue that the resulting and contested absence of a real balancing in Judgment 238/2014 is a consequence of the particular (national) perspective assumed by the ItCC,[28] although the above-mentioned constitutional provisions may have led to a different result.

A further distinction between the counterlimits doctrine and the equivalent protection test concerns the absence in the former of any presumption of conformity between the international rule or decision and national law.[29] The main idea behind

[25]Judgment 238/2014 is indeed often compared to other decisions that allowed constitutional courts (*Frontini* and *Solange I* and *II* concerning the Italian and German Constitutional Courts respectively) and the European Court of Human Rights (*Bosphorus*) to somehow limit the impact of EU law within their own systems. See *Corte Costituzionale*, Judgment of 18 December 1973, No 183/1973; *Bundesverfassungsgericht*, Order of 29 May 1974, 2 BvL 52/71, BVerfGE 37, 271 (*Solange I*), and Order of 22 October 1986, 2 BvR 197/83, BVerfGE 73, 339 (*Solange II*); ECtHR, *Bosphorus v Ireland*, Grand Chamber Judgment of 30 June 2005, Application No 45036/98.

[26]See, generally, Veronika Bílková, 'The Standard of Equivalent Protection as a Standard of Review', in Lukasz Gruszczynski/Wouter Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford: OUP 2014), 272–288; Maura Marchegiani, *Il principio della protezione equivalente come meccanismo di coordinamento tra sistemi giuridici nell'ordinamento internazionale* (Naples: Editoriale Scientifica 2018).

[27]Maurizio Arcari, 'Forgetting Article 103 of the UN Charter?: Some perplexities on "equivalent protection" after Al-Dulimi', *Questions of International Law: Zoom-In* 6 (2014), 31–41, at 37: Arcari criticizes the excessively demanding level of protection required in the more recent jurisprudence of the ECtHR on UN Security Council targeted sanctions (see, in particular, 39 et seq).

[28]On the absence of a real balancing in Judgment 238/2014, see Pasquale De Sena, 'Spunti di riflessione sulla sentenza 238/2014 della Corte Costituzionale', *SIDIBlog*, (30 October 2014), available at www.sidiblog.org/2014/10/30/spunti-di-riflessione-sulla-sentenza-2382014-della-corte-costituzionale/.

[29]On this point see Anne Peters, 'Let Not Triepel Triumph: How To Make the Best Out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order', *EJIL:Talk!*, (22 December 2014), available at www.ejiltalk.org/let-not-triepel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i/.

the equivalent protection technique lies precisely in the general assumption that safeguarding fundamental rights is normally considered a cornerstone of both the legal order making the norm or decision to be implemented and the system that should give effect to that norm or decision. This presumption is not supposed to be easily rebuttable, although judges have used the equivalent protection test in order to assess the degree of human rights protections provided by international organizations.[30] In this respect, one can note that this more dialogical technique has proved to be useful in the context of highly integrated and institutionalized systems, whereas it may be difficult to conceive of a judicial recourse to this method by constitutional courts in their relationship with the ICJ.

Despite these criticisms regarding the application of the counterlimits doctrine, Judgment 238/2014 may be seen as an 'episode in a more general tendency to return to dualistically colored practices in the relationship between the legal orders'.[31] However, Jugdment 238/2014 and the counterlimits doctrine therein applied display some specific features. One cannot ignore the particular context in which Judgment 238/2014 operates. In this regard, some scholars have highlighted that it is one thing to apply a national 'filter to a European supranational organization, such as the EU, and quite another to use it to scrutinize global institutions and universal rules'.[32] The difference would lie in the lower level of integration and the more varied array of legal values, principles, and intepretations characterizing international rules compared to the high degree of integration and sophistication reached by the EU. The application of a national filter may also cause tension within the EU system. But any claim for a protection of national identity has a wider and more dangerous impact at the international level, namely heavily weakening the application and enforcement of international law and decisions.[33]

Admittedly, an assessment of states' compliance with human rights has recently occurred in the case law related to the implementation of other international legal acts, that is the UN Security Council's targeted sanctions. The ItCC itself recalled, albeit in very general terms, the *Kadi* jurisprudence of the EU courts.[34] As for the

[30]See, eg, ECtHR, *Michaud v France*, Judgment of 6 December 2012, Application No 12323/11; *Al-Dulimi and Montana Management Inc. v Switzerland*, Judgment of 26 November 2013, Application No 5809/08; *AL v Italy*, Decision of 11 May 2000, Application No 41387/98.

[31]Robert Kolb, 'The Relationship between the International and the Municipal Legal Order: Reflections on the Decision no 238/2014 of the Italian Constitutional Court', *Questions of International Law: Zoom-Out* 2 (2014), 5-16, at 6.

[32]Nico Krisch, 'The Backlash against International Courts', *VerfBlog*, (16 December 2014), available at http://verfassungsblog.de/backlash-international-courts-2/.

[33]See also Raffaela Kunz, chapter 'Teaching the World Court Makes a Bad Case', in this volume.

[34]ItCC, Judgment 238/2014 (n 2), para 3.4.

Strasbourg Court, one could refer to the *Nada*[35] and *Al-Dulimi*[36] cases. However, in this case-law, the courts were essentially talking to the political organs of the UN in order to improve the level of human rights protection of that legal system. Intersystemic dialogues do not always involve judicial organs only. If one takes into account the different counterparts of the dialogue, a clear consequence of Judgment 238/2014 is the 'more serious damage to the normativity of the international legal system'.[37] The judgment of the ItCC, in fact, questions the decision of another judicial organ and does not react—as in *Kadi*, *Al-Dulimi*, and similar cases—to the potential arbitrariness of political organs, whose acts directly impinge on individual rights.

All in all, both the counterlimits doctrine and the equivalent protection test suffer from additional inherent limitations, if applied to the relationship between constitutional courts and the ICJ. For example, in the thoroughly debated *Taricco* saga, the ItCC envisaged an application of the counterlimits doctrine against the ECJ without causing an insurmountable conflict or stalemate.[38] The ItCC, in fact, did not clarify the exact scope of the supreme principle (of legality in criminal law) endangered by a previous ECJ decision. This was likely a 'pure strategic choice', aimed at leaving some leeway to the ECJ in its eventual attempt to reconcile EU law with the Italian

[35]ECtHR, *Nada v Switzerland*, Grand Chamber Judgment of 12 September 2012, Application No 10593/08. For comments, see Nicolas Hervieu, 'La délicate articulation des engagements onusiens et européens au prisme de la lutte contre le terrorisme', (21 September 2012), available at https://revdh.files.wordpress.com/2012/09/lettre-adl-du-credof-21-septembre-2012.pdf, 1–11; Marko Milanovic, 'European Court Decides Nada v. Switzerland', *EJIL:Talk!*, (14 September 2012), available at www.ejiltalk.org/european-court-decides-nada-v-switzerland/; Maria E Gennusa, 'Nada c. Svizzera: sulle orme di Kadi?', *Quaderni costituzionali* 1 (2013), 164-167, at 164 et seq.

[36]ECtHR, *Al-Dulimi v Switzerland* (n 30). See, among others, Anne Peters, 'Targeted Sanctions after Affaire Al-Dulimi et Montana Management Inc. c. Suisse: Is There a Way Out of the Catch-22 for UN Members?', *EJIL:Talk!*, (4 December 2013), available at www.ejiltalk.org/targeted-sanctions-after-affaire-al-dulimi-et-montana-management-inc-c-suisse-is-there-a-way-out-of-the-catch-22-for-un-members/; Maura Marchegiani, 'Le principe de la protection équivalente dans l'articulation des rapports entre ordre juridique des NU et CED après l'arrêt Al-Dulimi', *Questions of International Law: Zoom-In* 6 (2014), 3-14, at 3 et seq.

[37]See Peters, 'Let Not Triepel Triumph' 2014 (n 29); see also Raffaela Kunz, 'The Italian Constitutional Court and "Constructive Contestation": A Miscarried Attempt?', *Journal of International Criminal Justice* 14 (2016), 621-627, at 626.

[38]*Corte Costituzionale*, Order of 26 January 2017, No 24/2017; in its request for a preliminary ruling, the ItCC explained both reasons for the contrast between a previous ECJ's decision and a supreme constitutional principle and the consequences in the event that the conflict persists: the non-application of the ECJ's decision (ECJ, *Taricco and Others*, Judgment of 8 September 2015, Case No C-105/14). For an account on the extensive doctrinal debate over this Order, see Alessandro Bernardi/Cristiano Cupelli (eds), *Il caso Taricco e il dialogo tra le Corti: L'ordinanza 24/2017 della Corte costituzionale* (Naples: Jovene Editore 2017).

Constitution.[39] And the ECJ took the chance[40] 'by emphasizing (. . .) the language of common constitutional [traditions] rather than one of constitutional identity',[41] thereby finding a way to accommodate both domestic and EU law. This case shows that the relationship between national courts and the ECJ is both sophisticated and highly developed, and provides judges with several 'means of dialogue' to solve normative conflicts. A wise use of the preliminary reference procedure may be one of these means and methods. The judicial dialogue within the EU's judicial order is built on these strategic, refined, and subtle choices.

The relationship between constitutional courts and the ICJ cannot rely on these kinds of means and subtleties. There is no preliminary reference procedure on which constitutional courts may rely upon. More generally—as the ItCC itself has actually recognized in Judgment 238/2014—the ICJ should have the last word on international law matters. As far as this word might be wrong, a purely confrontational attitude from national courts will likely only have the effect of undermining respect for international law, especially if one takes into account the infrequent opportunities for dialogue between constitutional courts and the ICJ.

There is another element that might be worth briefly recalling here. In the cases of *Nada* and *Al-Dulimi*,[42] the Strasbourg Court partly departed from the test of equivalent protection and relied on the idea that states enjoy a degree of discretion in the implementation of United Nations Security Council resolutions. In practice, states can decide how to give effect to Security Council resolutions, provided that they comply with their obligations under the European Convention on Human Rights (ECHR). This approach can also be problematic, since it might be difficult to assess if and to what extent there is any real discretion left to the state by a Security Council decision. What matters more here, however, is that the ECtHR not only assumes that it is possibile to comply with the Security Council decisions while protecting human rights but leaves states free to decide how to achieve this goal. For our purposes, a remarkable aspect of this approach is that it transfers the burden of solving potential conflicts between legal orders to state-level political organs.

At the end of the day, even in the undesirable scenario of an application of the counterlimits doctrine, the ItCC should try to leave some leeway for other actors—

[39]See Davide Paris, 'Carrot and Stick: The Italian Constitutional Court's Preliminary Reference in the Case Taricco', *Questions of International Law: Zoom-In* 5 (2017), 5–20, at 10–11. See also Giacomo Rugge, 'The Italian Constitutional Court on Taricco: Unleashing the Normative Potential of National Identity?, *Questions of International Law: Zoom-In* 5 (2017), 21-29.

[40]ECJ, *M.A.S. and M.B. (Taricco II)*, Judgment of 5 December 2017, Case No C-42/17. For a critical analysis, see Francesco Viganò, 'Melloni Overruled?: Considerations on the Taricco II Judgment of the Court of Justice', *New Journal of European Criminal Law* 9 (2018), 18-23.

[41]See Marco Bassini/Oreste Pollicino, 'Defusing the Taricco Bomb through Fostering Constitutional Tolerance: All Roads Lead to Rome', *VerfBlog*, (5 December 2017), available at https://verfassungsblog.de/defusing-the-taricco-bomb-through-fostering-constitutional-tolerance-all-roads-lead-to-rome/.

[42]ECtHR, *Nada v Switerzland* (n 35); ECtHR, *Al-Dulimi v Switzerland* (n 30).

particularly political organs of the Italian state—to find alternative solutions.[43] In more general terms, the ItCC should not jeopardize the quest for alternative and perhaps political solutions and could even suggest ways to resolve the deadlock. In Judgment 238/2014, the ItCC appears to have neglected this promising facet of its role. As we shall see, however, *Sentenza* does not preclude the viability of alternative means of dispute settlement and redress.

IV. The Existence of Alternative Means of Dispute Settlement and a Reasonable Way to Award Redress to the Victims

In reconciling human rights protections with immunity from jurisdiction, the interaction between legal systems may take different forms. As for state immunity, the ECtHR heavily relied on the importance of the principle *par in parem non habet iurisdictionem*, that is, equals have no jurisdiction over each other. As a consequence, restrictions on access to a judge (Article 6(1) ECHR) have often been considered legitimate and proportionate to the aim of complying with international law and respecting state sovereignty.[44] In light of the 'principled approach' adopted by the Court of Strasbourg, recognition of state immunity would not require any assessment on the protection granted to individuals in other legal systems and, particularly, on the very existence of alternative means of protection. In practice, as Luigi Condorelli has critically pointed out, the international law of state immunity is in no way connected, balanced or reconciled with human rights law, so far.[45]

By contrast, the existence of alternative means of protection has played an important role in relation to the jurisdictional immunities of international organizations. According to the ECtHR, in order to establish whether an international organization enjoys immunity from municipal jurisdiction, a relevant factor relates to the availability to the applicants of 'reasonable alternative means to protect their rights under the Convention'.[46] Rare exceptions to this test, as in the well-known

[43]In this sense, see Paolo Palchetti, 'Judgment 238/2014 of the Italian Constitutional Court: In search of a way out', *Questions of International Law: Zoom-Out* 2 (2014), 44-47.

[44]ECtHR, *Fogarty v The United Kingdom*, Grand Chamber Judgment of 21 November 2001, Application No 37112/97, para 34; ECtHR, *McElhinney v Ireland*, Grand Chamber Judgment of 21 November 2001, Application No 31253/96, para 35; ECtHR, *Al-Adsani v The United Kingdom*, Grand Chamber Judgment of 21 November 2001, Application No 35763/97, para 52.

[45]Luigi Condorelli, 'Conclusions générales', in Hervé Ascensio/Jean-François Flauss (eds), *La soumission des organisations internationales aux normes internationales relatives aux droits de l'homme* (Paris: Pedone 2009), 127-142, at 132 (translated by the author).

[46]ECtHR, *Waite and Kennedy v Germany*, Grand Chamber Judgment of 18 February 1999, Application No 26083/94, para 68; ECtHR, *Beer and Regan v Germany*, Grand Chamber Judgment of 18 February 1999, Application No 28934/95; ECtHR, *Naletilić v Croatia*, Decision of 4 May 2000, Application No 51891/99; ECtHR, *Gasparini v Italy and Belgium*, Decision of 12 May 2009, Application No 10750/03.

Mothers of Srebrenica case,[47] are normally justified by the unique and imperative nature of the functions of the United Nations Security Council in mantaining or restoring international peace and security.[48]

The issue of the availibility of alternative means of protection was also addressed before the ICJ. Italy argued that the denial of immunity to Germany was justified by the failure of all other attempts to obtain reparation for the victims involved. The Italian argument however, was rejected, since the ICJ was unable to determine the existence of a customary international rule that 'makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress'.[49]

From its side, the ItCC, in Judgment 238/2014, rested on the assumption that no access to justice was granted to Italian victims. This impression is discernable, for example, in the statement that it 'would indeed be difficult to identify how much is left of a right if it cannot be invoked before a judge in order to obtain effective protection'.[50] Later on, the ItCC also affirmed that 'the completely disproportionate sacrifice of two supreme principles of the Constitution' (Articles 2 and 24) stems from 'the denial of judicial protection'.[51]

Italian military internees indeed tried to bring their case before German judges, going all the way up to the German Constitutional Court.[52] Their legal action did not meet with success. According to some scholars, however, the individuals did not lack access to justice but to a judge who could grant them compensation.[53] Be that as it may, the ItCC should have scrutinized whether access to justice was effectively granted to victims instead of assuming, as an automatic consequence of the unachieved reparation, the denial of judicial protection. After all, one of Italy's

[47]Supreme Court of The Netherlands, *Mothers of Srebrenica et al v State of The Netherlands and the United Nations*, Judgment of 13 April 2012, Case No10/04437.

[48]See Beatrice Ilaria Bonafé, 'L'esistenza di rimedi alternativi ai fini del riconoscimento dell'immunità delle organizzazioni internazionali: la sentenza della Corte suprema olandese nel caso Madri di Srebrenica', *Rivista di diritto internazionale* 95 (2012), 826-828.

[49]ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment of 3 February 2012, ICJ Reports 2012, 99, para 101.

[50]ItCC, Judgment 238/2014 (n 2), para 3.4.

[51]Ibid.

[52]*Bundesverfassungsgericht*, Order of 28 June 2004, 2 BvR 1379/01, BVerfGK 3, 277; *Verwaltungsgericht Berlin*, Judgment of 9 September 2004, 9 A 336.02. In this context see also the *Distomo* cases where German courts dismissed claims brought by Greek victims of WWII massacres: *Bundesverfassungsgericht*, Order of 15 February 2006, 2 BvR 1476/03, BVerfGK 7, 303.

[53]Battini, 'È costituzionale il diritto internazionale?' 2015 (n 24), 375. See also Christian Tomuschat, 'The National Constitution Trumps International Law', *Italian Journal of Public Law* 2 (2014), 189-196, at 191-192; Sabino Cassese, *Dentro la Corte: Diario di un giudice costituzionale* (Bologna: Il Mulino 2015), at 260-261; see also Christian Tomuschat, chapter 'The Illusion of Perfect Justice', and Sabino Cassese, chapter 'Recollections of a Judge', in this volume. For a different perspective, see Valerio Onida, chapter 'Moving beyond Judicial Conflict in the Name of the Pre-Eminence of Fundamental Human Rights', in this volume.

arguments before the ICJ was specifically aimed at demonstrating that many Italian victims 'were not included in any postwar reparation scheme agreed upon between Italy and Germany nor were they included in the reparation schemes set up unilaterally by Germany'.[54] This would lead to the conclusion that 'the remedies available under German law provided no reasonable possibility of obtaining effective redress'.[55]

Yet, in the event that judicial means were considered unsatisfactory or unavailable, the ItCC's evaluation could then have dwelt upon the existence of interstate negotations as a possible alternative means of redress. The Tribunal of Florence, for example, in evaluating the effectiveness of the protection granted to Italian victims, gave decisive relevance to the fact that Germany did not attempt to undertake negotiations with Italy.[56] In other words, besides an assessment of the effectiveness of the right to a judge granted to Italian victims, the ItCC may have inquired as to the viability of other (diplomatic) means of protecting the rights of the victims. This would have implied that political organs, and especially the Italian government, could have become a counterpart of the dialogue.

As is well-known, the ICJ was 'not unaware' that the customary rule on state immunity 'may preclude judicial redress for the Italian nationals concerned', and, on this basis, the international judge envisaged 'further negotation involving the two States concerned, with a view of resolving the issue'.[57] The ICJ seems therefore to suggest that negotiation is the alternative dispute settlement par excellence. Even the ItCC interpreted this paragraph as indicative of the fact that the 'opening of new negotiations is the only means available to settle the dispute in international law'.[58] More generally, Judgment 238/2014 on no less than three occasions recalls the fact that the ICJ referred to the opening of new negotiations as the only appropriate method of finding a solution on the international plane.

If this is the only path to a solution at the international level, then the ItCC could have given more importance to the availability of alternative means of redress—in the form of negotiations between the two states—in order to wear down the absolute character of the principle of judicial protection enshrined in Article 24 of the Italian Constitution. In its jurisprudence, after all, the ItCC itself considers the promotion of

[54]ICJ, *Jurisdictional Immunities of the State (Germany v Italy)*, Rejoinder of Italy, 10 January 2011, para 4.22.

[55]Ibid.

[56]*Tribunale di Firenze*, Judgment No 14740/2009 (n 4), 13: '[I]n order to find a proper balance, in the present case, between the rationale behind the customary rule on State immunity with the effectiveness of human rights protection, one must consider that the radical choice of the Italian Constitutional Court was determined by the conduct of the Federal Republic of Germany. The latter, although admitting to be responsible for the crimes committed by the Third Reich, has not only invoked its jurisdictional immunity before Italian judges, but it did not undertake any negotiations with the victims and their heirs, or with Italy' (translated by the author).

[57]ICJ, *Jurisdictional Immunities* (n 49), para 104.

[58]ItCC, Judgment 238/2014 (n 2), para 3.1.

alternative means of dispute settlement as a public interest apt to temporarily restrict the right of access to a judge.[59]

Notwithstanding the ICJ's auspices, it is unclear whether the two states genuinely attempted to find a negotiated solution to the dispute. In that light, the ItCC may have scrutinized adverse human rights impacts resulting from a reluctance of the Italian government to pursue diplomatic initiatives. Scrutiny of Italy's behaviour in granting human rights protection to its citizens may have encouraged the government to look either for a diplomatic settlement or for any other internal solution capable of addressing the unanswered claims of the victims.

An interesting example in this regard comes from the South Korean Constitutional Court. In light of a duty to protect citizens abroad (Article 2 of the Korean Constitution) and to respect the dignity of the victims of human rights violations, the Korean government was deemed liable for the negative consequences affecting Korean comfort women as a result of both the content of the bilateral agreement concluded with Japan in 1965 and the failure to pursue economic compensation from Japan through diplomatic channels.[60] More pointedly, the Constitutional Court decided that the Korean government had not done enough to obtain reparations for the violence suffered by its own citizens, and that this inaction represented a breach of constitutionally enshrined individual rights. Eventually, the Korean Constitutional Court asked the government to activate all diplomatic means at its disposal in order to solve the interpretive disputes concerning the content of the peace treaty signed in 1965 by the two states.[61] While the ItCC cannot impose such an obligation on the Italian government, the consequences of the enforcement of Judgment 238/2014 might still exert a certain pressure on Italian political organs to either find a means to settle the dispute at the international level or to directly award some means of redress to the victims. The point is that a negotiated solution depends of course upon the willingness of both parties, whereas an Italian political initiative aimed at unilaterally granting reparation to the victims is always (and immediately) possible.

My suggestion is that, while waiting for a negotiated solution, Italy should compensate its own nationals. From a legal viewpoint, such a political choice

[59]Remo Caponi, 'A Fresh Start: How to Resolve the Conflict between the ICJ and the Italian Constitutional Court', *VerfBlog*, (28 January 2015), available at http://verfassungsblog.de/fresh-start-resolve-conflict-icj-italian-constitutional-court/. See especially the reference to the Constitutional Court's decision No 276/2000, para 3.4.

[60]Korean Constitutional Court, Determination of the constitutionality of the inaction with respect to Article 3 of the Agreement on the Settlement of Problems concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan, Anonymous (64 former Japanese military sex slaves) v Minister of Foreign Affairs and Trade, Individual constitutional complaint, 23-2(A) KCCR 366, ILDC 1880 (KR 2011), 2006 Hun-Ma 788, 30 August 2011. See also Filippo Fontanelli, chapter 'Sketches for a Reparation Scheme', in this volume.

[61]The Korean Constitutional Court reached this conclusion despite the fact that the Korean government had provided for economic compensation to Korean victims and had made the decision to focus its diplomatic efforts 'only' on obtaining Japanese apologies and a recognition of all committed violations.

would confine the question of compensation within the Italian legal order. It would possibly arrest the enforcement of Judgment 238/2014 and reduce Italy's exposure to international responsibility for non-compliance with the 2012 ICJ Judgment. From a diplomatic perspective, Italy's engagment in compensatation—even if not full compensation—would be a gesture of goodwill toward Germany. This gesture—while stopping domestic proceedings against Germany—could potentially foster the resumption of negotiations. From a humanitarian point of view, compensation may partially restore the victims' dignity, many of whom have been waiting too long and might yet die while waiting.

Finally, the risks of failing to find a settlement at the international level and the costs of a lack of protection for its nationals should be temporarily borne by Italy. As long as Italian victims and their heirs are compensated, a restriction on their right to seek justice through the courts might become more tolerable for the Italian tribunals.

V. Conclusions

To date, it is hard to envisage any rapid development regarding the evolution of international rules on the jurisdicitional immunity of the state. Despite all the attention paid to the rights of the individuals, the European legal order does not seem to be an exception to the actual state of affairs. However, judicial dialogue at the European level shows many different ways to solve normative conflicts. In particular, the need to reconcile the international rules on state immunity with the norms for the protection of human rights seems to make it necessary to involve state-level political organs and to look at the existence of alternative non-judicial means of dispute settlment.

Maybe it is no accident that both the ICJ and the ItCC suggest that the best option to solve the conflict lies in negotiation. But however trite it may be to say, a negotiated solution might never materialize. Thus, in order to get out of the actual deadlock—and to avoid the consequences of an inability to reach a political solution at the international level falling back onto the victims—Italy should grant its own citizens compensation and thereby restore their dignity.

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