A Fresh Start: How to Resolve the Conflict between the ICJ and the Italian Constitutional Court

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Three months ago the Italian Constitutional Court decided that it would infringe the fundamental rights of Italians to follow the International Court of Justice and uphold state immunity as a barrier for individual claims of war crime victims (decision no. 238 of 2014). First commentators have pointed out the conflict between the two courts and the regime collision between international and domestic law. Germany's possible reaction to the Italian breach of international law has also been taken into consideration. Finally, the possible role of the Italian Constitutional Court's reasoning in the further development of international law with regard to state immunity in cases of serious human rights violations, which amount to the breach of a *jus cogens rule*, has been the focus of some contributions.

I would suggest making a fresh start in this debate. What we need right now are procedural mechanisms to harmonize for the future, as far as possible, the claim of sovereign immunity and access to the courts, in case a state happens to be in a better position to settle the dispute at the international level in the interests of the victims.

State Immunity vs. Access to Courts

Both the ICJ's and the Italian Constitutional Court's decisions have a key element in common, which also gives rise to the troubled relationship between international law and domestic order in this case. Either court conceives remedies available under international law (especially, diplomatic negotiations between Italy and Germany), on the one hand, and access to the courts by the victims, on the other, as being mutually exclusive.

In coming to its conclusion, the ICJ acknowledges that granting immunity from jurisdiction to Germany may preclude judicial remedies for the Italian nationals concerned. It considers however that the claims which formed the basis of the proceedings before the Italian courts could only be the subject of further negotiation involving Italy and Germany. The Italian Constitutional Court goes exactly the other way around. It argues that lifting immunity and exercising domestic jurisdiction are the only means to achieve justice in this case.

State immunity versus access to the courts: In the view of either court the conflict seems to be inescapable.

However, the opposite holds true. Procedural tools can be developed to weigh access to the courts against state immunity creating situations where sometimes the latter prevails of the former (and vice versa).

A Matter of Balancing

To make this balancing exercise, one ought to begin by saying that granting state immunity does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule. It only means that remedies available under international law, in particular diplomatic negotiation between the states concerned, may be better suited for seeking redress against serious human rights violations than proceedings before a domestic court promoted by the victims. Conversely, lifting state immunity and allowing victims to file lawsuits against the state held responsible for the consequences of wrongdoing do not exclude that judicial proceedings would have to stay for a reasonable period of time, in order for the states concerned to start a diplomatic negotiation with a view to resolving the issue. Of course, judicial proceedings may be resumed if negotiations are doomed to fail.

A view from ‚ordinary' civil justice might be helpful here: From that perspective it is almost a platitude to argue that avoiding litigation before the courts through a negotiated (or mediated) settlement agreement does not mean renouncing the goal of dealing with the case justly. It is not by chance that the development of dispute resolution methods, which have been qualified as 'alternative' to judicial proceedings, has been placed in the framework of the 'access-to-justice movement.'

Taking the interrelationship between the state civil justice system and out-of-court dispute resolution methods seriously allows one to determine those types of disputes that are better suited than others for resolution through negotiation and settlement, instead of being resolved through legal action before the courts. Negotiation and settlement can broaden the perspective and help maintain future relations between the parties, taking into account their real interests rather than their 'formal' legal claims.

While the Constitutional Court's decision no. 238 of 2014 arguably had to adopt an inflexible conception of the right of access to the courts because of the concrete development of the case, the same court keeps on stating that the right to access to the courts can be temporarily restricted in light of prevailing 'public' interests, such as the reduction of courts' workload or, arguably, the promotion of alternative resolution methods, which are better suited than court proceedings for certain types of disputes. This has been the rationale for allowing mediation proceedings to be compulsory prior to the commencement of judicial proceedings (cf., among others, the Constitutional Court's decision no. 276 of 2000). However, an effective and efficient machinery of state justice is needed to ensure that the risk of unequal bargaining power between the parties, which gives rise to unjust settlements, remains as low as possible. The power of parties (especially the weaker one) to file a lawsuit and to obtain an effective remedy from the state justice system is a key element of 'pressure' at the negotiation table to redress such power imbalances and to include alternative dispute resolution methods among the access-to-justice discourse.

Coordinating Diplomatic Negotiation and Access to the Courts

The foregoing account of the state of affairs in ordinary civil justice can help in dealing with claims for monetary compensation based on Nazi crimes pending before the Court of Florence (and similar situations).

First of all, this account makes a good case for coordinating interstate diplomatic negotiations on the one hand, and access to the courts by the victims, on the other. It holds true that the parties litigating before the court are not the same as the states sitting down at the negotiation table. Yet this difference could well be overcome if the Italian government resorted to diplomatic protection for the Italian plaintiffs, as it should already have done. It should be kept in mind that Germany decided to exclude from the scope of its national compensation scheme most of the claims by Italian military internees on the ground that prisoners of war were not entitled to compensation for forced labor. The overwhelming majority of Italian military internees were, however, denied treatment as prisoners of war by the Nazi authorities. It is a matter of regret, according even to the ICJ's reasoning (judgment of 3 February 2012, para no. 99) that Germany decided to deny compensation to a group of victims on the ground that they had been entitled to a status which, at the relevant time, Germany refused to recognize. At least some of the plaintiffs acting before the Italian courts fall in this category.

What is hardly tolerable is the inaction of the Italian government, failing to hold Germany accountable. The Italian government was from the outset anxious to please Germany in this matter.

'Access-to-Courts-Enhanced' Diplomatic Negotiation

The Italian Constitutional Court's decision no. 238 of 2014 restoring the power of the plaintiffs to go ahead with their lawsuits, should be seen less as a way of obtaining an effective remedy from the state justice system and more as an element of pressure directed to the Italian political organs to force them to take action at the negotiation table with Germany.

This is indeed a classic type of controversy that, in the perspective of dispute resolution theory, is more suited for negotiation and settlement than for judicial proceedings, as judicial decisions would be quite difficult to enforce.

One can object that the envisaged 'access-to-courts-enhanced' diplomatic negotiation has at least to take into account three drawbacks: *a)* further inaction of the Italian Government, *b)* unavailability of Germany to negotiate, and *c)* incapability of a diplomatic settlement to bind the plaintiffs.

One can reply that the envisaged solution is indeed unable to square the circle. However, the first mentioned drawback is by far the worse, as the dramatic inability of Italian Governments to deal effectively with current

domestic and global challenges is one of the most discouraging aspects of Italy's recent history. If that weakness could at least in this case be overcome, one should not underestimate the possibility of tackling the second and the third problems.

To the plaintiffs' eyes, compelling Italy and Germany to enhance initiatives like those envisaged on December 9, 2014 by the German government in the answer to a parliamentary question (*Drucksache* 18/3492, no. 21) could be even more satisfying than individual monetary compensation.

The argument of this article is further developped in a contribution to Giurisprudenza Costituzionale*, 2014, no. 5 (forthcoming).*

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