JUDGMENT NO 159 YEAR 2023

In this case the Court heard a referral order questioning the constitutionality of Article 43(3) of Decree-Law No 36 of 30 April 2022 with reference to Articles 2, 3, 24, and 111 of the Constitution in connection with the establishment of a fund to compensate victims of war crimes and crimes against humanity for the infringement of inviolable personal rights committed on Italian soil or in any event to the detriment of Italian nationals by the forces of the Third Reich during World War II. Eligibility for compensation was conditional on having obtained a final judgment for damages for the crimes in question against Germany.

In essence, rather than allowing those judgments to be enforced against Germany, the legislation provided that they could only be satisfied out of the fund. Consequently, the challenged provision stipulated that no enforcement proceedings regarding the judgments concerned could be commenced or continued and any such proceedings that may already have been initiated were to be declared terminated.

The rationale underlying establishing the fund and limiting enforcement proceedings was to enable Italy to comply with international agreements concluded with Germany that had released the latter from liability for its actions during World War II. The question was whether preventing claimants from enforcing their judgments for damages against Germany and instead offering them an equivalent amount payable out of a fund set up for that very purpose was constitutional.

The Court held that the question as to constitutionality was unfounded because the challenged provision struck a not unreasonable balance between the protection afforded to litigants through enforcement action and the State's obligation to comply with its international agreements, both principles of constitutional rank. Such also bearing in mind that the legislation arguably put the claimants in a stronger position since they were guaranteed full satisfaction under the fund whereas any attempt to enforce their judgments against Germany would inevitably come up against the latter's jurisdictional immunity and the difficulty in locating assets over which execution could actually be levied.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 43(3) of Decree-Law No 36 of 30 April 2022 (Further Urgent Measures for the Implementation of the National Recovery and Resilience Plan (NRRP)), converted by parliament, with amendments, into Law No 79 of 29 June 2022, initiated by the Ordinary Court of Rome, Fourth Civil Division, Office for Enforcement against Real Property (*Tribunale ordinario di Roma, sezione quarta civile, ufficio esecuzioni immobiliari*), in proceedings between M.T.G. and others and the Federal Republic of Germany and others, by referral order of 1 December 2022, registered as number 154 in the 2022 Register of Referral Orders and published in *Official Journal of the Italian Republic* No 1, first special series 2023.

Having regard to the entries of appearance filed by R.S.E.G.C. and by M.T.G., and the statement in intervention of the President of the Council of Ministers;

after hearing Judge Rapporteur Giovanni Amoroso at the public hearing of 4 July 2023;

after hearing Counsel Joachim Lau for R.S.E.G.C., Counsel Salvatore Guzzi for M.T.G. and State Counsel Diana Ranucci and Giancarlo Caselli for the President of the Council of Ministers;

after deliberation in chambers on 4 July 2023.

The facts of the case

[omitted]

Conclusions on points of law

1.– By referral order of 1 December 2022 (registered as No 154 in the 2022 Register of Referral Orders), the Court of Rome, Fourth Civil Division, Office for Enforcement against Real Property, raised questions as to the constitutionality of Article 43(3) of Decree-Law No 36/2022, as converted by parliament.

The referring court states, as regards the facts and in relation to relevance, that the enforcement proceedings were brought by M.T.G., on foot of an enforceable instrument consisting in a final judgment against the Federal Republic of Germany, attaching that State's property located in Italy. M.T.G. did so in his capacity as heir of A.G. for the inhuman treatment suffered by the latter during World War II. The referring court also states that another creditor, D.C., intervened in the same proceedings, he too on foot of an enforceable instrument in the form of a judgment and in his capacity as heir, seeking damages for the harm suffered by G.C. as a result of the latter's capture, deportation and internment in a concentration camp by German military forces.

The referring court highlights that on 22 May 2022, during the stage devoted to attaching the real property at issue, the Sterea Ellada Region also intervened in the wake of a judgment issued on 30 October 1997 by the Greek Court of Livadia against the Federal Republic of Germany ordering the latter to pay damages to the heirs of the victims of a massacre carried out on 10 June 1944 by German armed forces in Distomo. A judgment that was granted *exequatur* by the Court of Appeal of Florence (a decision upheld by Court of Cassation, Joint Civil Divisions, Judgment No 11163 of 20 May 2011).

The referring court further states that the challenged provision, entitled "Establishment of the Fund for the compensation of victims of war crimes and crimes against humanity for the infringement of inviolable personal rights, committed on Italian soil or in any event to the detriment of Italian nationals by the forces of the Third Reich in the period between 1 September 1939 and 8 May 1945", provides that, in view of the establishment of that very fund, enforcement proceedings on foot of decisions that have awarded damages may not be commenced or continued and any enforcement proceedings that may have already been initiated are deemed to be terminated.

The referring court has pointed out, with specific regard to the issue of relevance, that the creditors bringing the proceedings had done so on foot of a final judgment issued against the Federal Republic of Germany for damages in respect of the harm for which the fund was established, i.e. for personal injuries suffered by their predecessors in title as a result of inhuman treatment during World War II perpetrated by the forces of the Third Reich. Accordingly, by virtue of the above-mentioned Article 43, the referring court should declare termination of the enforcement proceedings against real property.

Regarding the requirement that the question raised not be manifestly groundless, first and foremost, the referring court doubts that the challenged provision is compatible with Articles 2 and 24 of the Constitution since it would undermine the right to judicial protection, a right that includes the right to enforcement. Such would occur not only by indefinitely denying the persons specified in Article 43(1) any chance of initiating enforcement proceedings but also by terminating those already pending, with the ensuing cancellation of the relevant attachment, which could irreparably harm creditors' claims.

The referring court also considers that Article 43 infringes Articles 3 and 111 of the Constitution, with reference to the principles of sovereign equality between States and equality of the parties to the proceedings. According to the referring court, above all, the

sacrifice immediately imposed on the creditors of the Federal Republic of Germany, owing to termination of the enforcement proceedings aimed at obtaining payment of the damages referred to in paragraph 1 of Article 43 would not be adequately offset by the fund referred to in paragraph 3. Such in view also of the failure to enact the regulatory framework intended to govern the forms of access to that fund, the amount (total or partial) of the compensation, and the way that it is to be paid.

Lastly, the referring court points out that the challenged provision also infringes Article 3 of the Constitution to the extent that it precludes only Italian nationals from bringing enforcement proceedings, without prejudice to the right of others, such as the Greek Region which intervened in the proceedings pending before it, to bring enforcement proceedings before the Italian courts against the Federal Republic of Germany in relation to damages awarded in connection with crimes committed during World War II.

2.– The President of the Council of Ministers has submitted a preliminary plea to the effect that the questions as to constitutionality are inadmissible on the ground that the referring court did not indicate, in the referral order, the property of the foreign State that had been attached in the enforcement proceedings. It is argued that that flaw makes it impossible to assess whether the assets in question are among those which, insofar as they are intended for public functions of the State, cannot be attached pursuant to the rule of customary international law recognising the so-called restrictive immunity of States from enforcement. A rule that is alleged not to be affected by the principles laid down by this Court in Judgment No 238/2014, relating as they do to proceedings adjudicating solely on substantive rights.

Moreover, State Counsel submits that the failure to indicate in the referral order the assets attached in the enforcement proceedings also prevents the referring court from assessing whether it has jurisdiction, which would have to be considered to be lacking in the case of assets intended for public purposes.

3.– Although premised on a correct interpretation of the law, that plea is nonetheless groundless.

3.1.– As has been clarified for some time in this Court's own case law (Judgment No 329/1992), and subsequently explained in Court of Cassation case law (see, amongst many, Joint Civil Divisions, Judgment No 5888 of 1 July 1997), the immunity of foreign State assets from enforcement operates as a limit on the possibility of attachment but does not affect jurisdiction, which exists at the enforcement stage subject to the constraints deriving from the principle of the restrictive immunity of States.

That immunity – which has long been classified as "restrictive" by a rule of customary international law – operates in general regarding both the initial proceedings adjudicating on substantive rights and the subsequent enforcement proceedings, within the scope defined by the International Court of Justice in its judgment of 3 February 2012 with reference to a case similar to the one at issue here.

However, by virtue of the aforementioned Judgment No 238/2014, an exception has been established for the special case of proceedings concerning damages for the harm suffered by the victims of war crimes and crimes against humanity as a result of the infringement of their inviolable personal rights, such as those committed on Italian soil or in any event to the detriment of Italian nationals by the forces of the Third Reich in the period between 1 September 1939 and 8 May 1945. As a matter of fact, this Court has affirmed that the "right to a court" – repeatedly stated by it to be among the supreme principles of the constitutional order (as far back as Judgments Nos 18/1982 and 82/1996) – must be recognised when the assessment concerns the harm caused by war crimes.

Consequently, this Court has held that in those cases the ordinary courts can entertain proceedings adjudicating on substantive rights.

The above-mentioned rule of customary international law whereby States enjoy jurisdictional immunity before the courts of other States for acts *iure imperii* does not operate – in the sense that there is no automatic incorporation of that rule into the Italian legal system under Article 10(1) of the Constitution – when it would result in the violation of the right to a court of those who have been victims of crimes against humanity and serious violations of fundamental human rights. This Court has affirmed that "[t]he immunity of a foreign State from the jurisdiction of the Italian courts granted by Articles 2 and 24 of the Constitution protects the sovereign function of the State but not conduct that does not entail the typical exercise of government power and that is expressly held and classified as unlawful in that it constitutes a breach of inviolable rights".

That decision also declared that Article 1 of Law No 848 of 17 August 1957 (Execution of the Charter of the United Nations, signed in San Francisco on 26 June 1945) was unconstitutional, limited to the execution given to Article 94 of the UN Charter to the extent that it obliged Italian courts to comply with the above-mentioned decision of the International Court of Justice of 3 February 2012, which required them to deny their jurisdiction in relation to the acts of a foreign State consisting of war crimes and crimes against humanity infringing inviolable personal rights.

Article 3 of Law No 5 of 14 January 2013 (Accession of the Italian Republic to the United Nations Convention on Jurisdictional Immunities of States and Their Property, signed in New York on 2 December 2004, as well as provisions amending domestic law) was likewise declared to be unconstitutional, again – as is clear from the reasoning – to the extent that it obliged Italian courts to comply with the decision of the International Court of Justice.

All this, however, applies to proceedings adjudicating on substantive rights.

3.2.– On the other hand, in the different context of enforcement proceedings, to which Judgment No 238/2014 does not refer, the perspective is different because the principle of the restrictive immunity of States does not exclude the jurisdiction of the national courts but merely limits the assets that can be attached and subject to levy of execution. The right to a court and to judicial protection, in that case by means of enforcement proceedings to initiate levy of execution, is nevertheless guaranteed even though tempered by the operation of the rule of customary international law.

The doctrine of immunity of States does not shield them from the jurisdiction of courts in enforcement proceedings at all but affects the State assets in respect of which execution may be levied. If the assets relate to a public function in a broad sense, i.e. to acts *iure imperii,* there is immunity (labelled as "restrictive immunity") and hence they cannot be attached as part of the enforcement process. If, on the other hand, they are assets pertaining to acts *iure gestionis* of the State, they can be attached as a matter of course.

In those terms, the rule of customary international law, as recognised by the International Court of Justice in the previously mentioned judgment of 3 February 2012, has been incorporated into our legal system pursuant to Article 10(1) of the Constitution, without any counter-limits hindering it, including in particular the limit identified by Judgment No 238/2014 as regards proceedings that adjudicate on substantive rights. The duty of domestic courts to comply with the decision of the International Court of Justice remains with reference to enforcement proceedings, while solely with reference to proceedings adjudicating on substantive rights are domestic courts released from that duty as a result of the declarations of unconstitutionality made by this Court's aforementioned Judgment No 238/2014 allied to the declaration that the relevant rule of customary

international law had not been incorporated into our legal system under Article 10(1) of the Constitution.

As regards enforcement proceedings, the rule of customary international law of restrictive immunity of States is, moreover, consistent with the United Nations Convention on Jurisdictional Immunities of States and Their Property, signed in New York on 2 December 2004, not yet in force but already ratified by Italy through Law No 5/2013. Part IV of the Convention (Articles 18 to 21) provides for the immunity of foreign States from pre-judgment and post-judgment measures of constraint.

Court of Cassation case law has already taken this line. Precisely with reference to an asset belonging to the Federal Republic of Germany and intended for governmental purposes of that State and therefore "public" (in the case in point, Villa Vigoni), the Court of Cassation held that under customary international law enforcement proceedings are not permitted in respect of assets belonging to foreign States where they are intended for public purposes (Third Civil Division, Judgment No 14885 of 8 June 2018).

Alongside States' restrictive immunity in enforcement proceedings, there is also the further specific protection provided by Article 19-*bis* of Decree-Law No 132 of 12 September 2014 (Urgent measures for dejudicialisation of disputes and other steps to alleviate the backlog in civil proceedings), converted by parliament, with amendments, into Law No 162 of 10 November 2014. That provision, introduced in the aftermath of this Court's above-mentioned decision, established that no measures of constraint may be taken, on penalty of nullity that can be raised by a court of its own motion, in relation to the sums available to the entities referred to in Article 21(1)(a) of the United Nations Convention on Jurisdictional Immunities of States and Their Property, deposited in bank or post office current accounts. Subject to the head of the representation, consular post or director, howsoever called, of the international organisation in Italy having declared in advance to the Ministry of Foreign Affairs and International Cooperation and the banking institution with which the sums are deposited that the accounts contain exclusively sums intended for the performance of the functions of the aforesaid entities.

3.3.– State Counsel is therefore correct in its interpretation of the law to the extent that it is argued that the rule of customary international law on the restrictive immunity of States applies to enforcement proceedings, which will also be discussed below (in Section 16) in scrutinising the balance to be struck between the protection afforded to judgment creditors through enforcement action and the Italian State's obligation to comply with international agreements.

Nonetheless the plea of inadmissibility of the question as to constitutionality raised is unfounded.

It is true that in the main proceedings – i.e. the enforcement proceedings brought by the judgment creditor with the intervention of other creditors also holding an enforceable instrument – the question is whether or not execution can be levied in respect of the attached property (i.e. property hosting the German Historical Institute, the German Archaeological Institute, the Goethe Institut, and the German School), the public use of which is alleged by the judgment debtor the Federal Republic of Germany.

However, for the purposes of the applicability of the challenged provision, that circumstance is not relevant because the latter provides for the statutory termination of all enforcement proceedings seeking to enforce final judgments ordering the Federal Republic of Germany to pay damages for the harm suffered by the victims of war crimes and crimes against humanity in breach of their inviolable personal rights, committed on Italian soil or in any event to the detriment of Italian nationals by the forces of the Third Reich in the period between 1 September 1939 and 8 May 1945, without any distinction as to the use, public or otherwise, made of the attached property.

That suffices for the purposes of recognising the relevance of the questions as to constitutionality, which are therefore admissible. Moreover, the submission made by the referring court discloses that the questions are not manifestly groundless.

4.– Before examining the questions raised by the referring court on their merits, it is necessary to briefly review the relevant legislative and case law framework into which the challenged provision (Article 43 of Decree-Law No 36/2022, as converted by parliament) fits.

5.– The topic of war reparations has long been the subject of international treaties.

The reparations owed by Germany to the victorious countries of World War I, including Italy, were the subject of lengthy negotiations and multiple agreements up to the Lausanne Conference in 1932.

The 1947 Paris Peace Treaties dealt also with reparations for war damage caused by World War II.

By Law No 811 of 2 August 1947 (Authorisation to the Government of the Republic to Ratify the Treaty of Peace Between the Allied and Associated Powers and Italy), approved by the Constituent Assembly, the government was authorised to ratify the Treaty of Peace Between the Allied and Associated Powers and Italy, signed in Paris on 10 February 1947.

Subsequently, by means of Provisional Head of State Legislative Decree No 1430 of 28 November 1947 (Execution of the Treaty of Peace Between the Allied and Associated Powers and Italy, signed in Paris on 10 February 1947), the Treaty was executed.

As the aforementioned International Court of Justice judgment of 3 February 2012 did not fail to note, Article 77(4) of the Peace Treaty provided, inter alia, that without prejudice to any other dispositions adopted in favour of Italy and Italian nationals by the Powers occupying Germany, Italy waived on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on 8 May 1945.

A similar waiver was also provided for in respect of claims for losses or damages sustained as a consequence of acts of the armed forces of the Allied or Associated Powers (Article 76 of the Treaty).

However, precautionary measures against persons accused of committing or ordering war crimes and crimes against peace or humanity could be taken (Article 45(1) of the Treaty). The affirmation of national criminal jurisdiction for war crimes is an *acquis* shared in the international community.

At the same time, the rules governing war reparations operated in the national sphere.

In the immediate post-war period, Regency Legislative Decree No 532 of 31 August 1945 (Transitional establishment at the Ministry of the Treasury of the General Directorate for Compensation for War Damage) was adopted, followed by Law No 968 of 27 December 1953 (Granting of Compensation and Benefits for War Damage), Article 3 of which in particular defined the notion of "event of war" (such as, for example, round-ups, reprisals, imprisonment, and internment) granting eligibility precisely for compensation and benefits.

The legislative framework was perfected by Law No 593 of 20 October 1981 (Streamlining of payment procedures relating to war damages, requisitions and allied damages, debts contracted by partisan groups and abolition of the commissariat for the settlement and payment of war contracts). In particular, that statute provided that payments of war damages were to be considered "lump-sum" and introduced, in Article 2, a deadline (31 May 1982) for submitting claims for compensation.

However, what is of particular importance is that, compared to the more general theme of reparations for war damage, the need to provide compensation to the victims of Nazi war crimes came to the fore as a particular and special need. A necessity felt both in Germany – first with the federal law on reparations for victims of Nazi persecution and later with another federal law, establishing the Remembrance, Responsibility and Future Foundation – and in Italy, with various provisions (more about which below) up and including the challenged one.

6.– In the new European climate inspired by ideals of peace, concord, and a commonality of fundamental values, very soon a joint initiative was undertaken to provide a common and not just a unilateral response to that need.

An initiative that took the form of two contemporaneous (and connected) agreements between the Italian Republic and the Federal Republic of Germany with exchanges of notes, concluded in Bonn on 2 June 1961, concerning, one, the settlement of certain property-related, economic and financial questions, and the other, compensation for Italian nationals subjected to National-Socialist measures of persecution.

The execution and ratification of these agreements are contained respectively in Decree of the President of the Republic No 1263/1962 and Law No 404 of 6 February 1963 (Ratification and execution of the Agreement between the Italian Republic and the Federal Republic of Germany on compensation for Italian nationals subjected to National-Socialist measures of persecution with Exchange of Notes, concluded in Bonn on 2 June 1961).

In the first agreement, the parties settled a number of economic issues.

The second contemporaneous agreement, which is more relevant in the present proceedings, was more specific because through it the Federal Republic of Germany undertook to pay the Italian Republic 40 million marks "for the benefit of Italian nationals who, on grounds of their race, faith or ideology" had been subjected to "National-Socialist measures of persecution and who, as a result of those persecution measures, suffered loss of liberty or damage to their health, and for the benefit of the dependents of those who died in consequence of such measures" (Article 1).

The purpose of the agreement ratified by Law No 404/1963 was to achieve closure, through granting compensation deemed adequate at the time, in relation to the tragic harm suffered, in particular, by deportees in concentration camps during World War II and especially during the period of the occupation of Italy by German armed forces after 8 September 1943 and until the end of the conflict.

That 1961 agreement expressly included a release clause. Specifically, Article 3 provided that without prejudice to any claims of Italian nationals based on German compensation legislation, the payment provided for in Article 1 was to constitute final settlement between the Federal Republic of Germany and the Italian Republic of all questions governed by the agreement.

Subsequently, Article 3 of Law No 404/1963, ratifying and executing the agreement concerning compensation for Italian nationals subjected to National-Socialist measures of persecution, delegated the government power to issue, within six months of the entry into force of the law, the rules for the distribution of the sum paid by the German government under the agreement referred to in Article 1 of that same law.

Decree of the President of the Republic No 2043 of 6 October 1963 (Rules governing the distribution of the sum paid by the Government of the Federal Republic of Germany, on the basis of the Bonn Agreement of 2 June 1961, for compensation for Italian nationals subjected to National-Socialist measures of persecution) was adopted on foot of the exercise of that delegation of power. That decree regulated the distribution of

the sums paid by Germany in furtherance of the 1961 Agreement "as moral reparation in favour of Italian nationals who were victims of deportation on grounds of race, faith or ideology".

Reparations were payable to those who, under any circumstances and wherever they were at the time (including outside Italy), had been deported to Nazi concentration camps.

7.– That this was to settle the issue of compensation once and for all is borne out by Article 6 of Decree of the President of the Republic No 2043/1963, which provided that any application to obtain payment of the compensation had to be submitted to the Ministry of the Treasury within six months after the date of publication of the decree in the *Official Journal of the Italian Republic* under penalty of forfeiture of the right to compensation.

Particularly important is Article 10, under which the commission referred to in Article 7 would apportion the sum within two months after finalisation of the lists of beneficiaries. For this purpose, the amount of the sum paid by the Federal Republic of Germany, after deduction of the rates referred to in Article 13, was to be divided by the total number of months spent in concentration camps by the deportees whose applications for compensation had been accepted. The quotient thus obtained was to be multiplied by the number of months of deportation of each applicant or their predecessor in title. The product would represent the personal share of each applicant whose claim had been granted.

What was involved was not a mere legitimate interest in receiving compensation but a veritable individual right (Court of Cassation, Joint Civil Divisions, Judgment No 2188 of 2 March 1987), albeit not to damages for the harm suffered but to compensation for the very serious, often tragic, harm suffered due to what customary international law considered *delicta iure imperii*, falling within the immunity of States (as later held by the International Court of Justice in its judgment of 3 February 2012).

Subsequent special legislation increased this protection with the introduction of a "life allowance of merit" in the event of a reduced capacity to work of at least 30 percent, as provided for by Law No 791 of 18 November 1980 (Establishment of a life allowance in favour of former deportees to K.Z. Nazi extermination camps). Later, Law No 94 of 29 January 1994 (Additions and amendments to the legislation providing for benefits in favour of former deportees to the K.Z. Nazi extermination camps) provided that upon death the allowance would inure for the benefit of the surviving family members.

8.– At the time of the 1961 Bonn Agreement and for many years thereafter, the principle of the restrictive immunity of States, by denying the jurisdiction of national courts, was considered to operate as a shield against individual claims for damages over and above the previously mentioned benefits, as the International Court of Justice, with specific reference to reparation for war crimes committed by the Third Reich, stated in its oft-cited judgment of 3 February 2012.

For a long time, that had also been the stance adopted in Court of Cassation case law (see, amongst many, Joint Civil Divisions, Order No 8157 of 5 June 2002), further to which acts performed by the State in the conduct of war were exempt from any review by the courts.

Subsequently, there were also common initiatives to create a new culture of remembrance. In a joint declaration by the governments of the Federal Republic of Germany and the Italian Republic, made in Trieste (on the occasion of the highly symbolic visit to the former Risiera di San Sabba concentration camp) on 18 November 2008, the "untold suffering inflicted on Italian men and women in particular during massacres, and on former Italian military internees" was solemnly acknowledged.

9.– The panorama, briefly described so far, radically changes starting from the *Ferrini* decision (Court of Cassation, Joint Civil Divisions, Judgment No 5044 of 11 March 2004). In a clear break with its previous case law, the Court of Cassation stated that for acts carried out during warfare constituting international crimes in violation of fundamental human rights, there was an exception to the principle of immunity, albeit restrictive, of States. What would later be called the "humanitarian exception".

Immunity from jurisdiction does not operate in the case of acts – falling with the realm of crimes against humanity – that seriously infringe fundamental human rights, which can be classified as international crimes since those acts harm universal values that transcend the interests of individual national communities. In essence, the rule of customary international law requiring States to refrain from exercising jurisdiction over foreign States cannot be invoked in the case of crimes of the foreign State that are so serious as to rise to the level of veritable international crimes that infringe universal values such as respect for human dignity and human rights.

The subsequent events are well known.

Suffice it to recall, on the one hand, that that new stance adopted by the Court of Cassation was denied by the International Court of Justice, which in the aforementioned judgment of 3 February 2012 declared that the Italian Republic had breached its obligation to observe the immunity afforded to the Federal Republic of Germany by international law. It had done so, firstly, in proceedings adjudicating on substantive rights before civil courts by granting the claims against Germany for violations of international humanitarian law committed by the German Third Reich between 1943 and 1945. And, secondly, at executive branch level by adopting measures of constraint (the registration of a legal charge) in relation, in the specific case, to Villa Vigoni, owned by Germany.

The International Court of Justice granted Germany's application, reaffirming that the principle of immunity of foreign States from jurisdiction for governmental acts plays an important role in international law and international relations because it derives from the principle of equal sovereignty between States, which in turn is a fundamental principle of the international order under Article 2(1) of the Charter of the United Nations, signed on 26 June 1945 in San Francisco and ratified by Italy through Law No 848/1957.

The International Court of Justice held that the (albeit legitimate) claims for damages made by the victims of war crimes, precluded from being entertained by the courts due to the immunity thus recognised, could have been the subject of negotiations between the two States involved, aimed at the peaceful resolution of the matter.

In order to comply with the aforementioned decision of the International Court of Justice, Italy introduced Article 3 of Law No 5/2013, by virtue of which "when the International Court of Justice, in a judgment settling a dispute to which Italy is a party, has ruled out that civil proceedings can be brought in respect of the specific conduct of another State, the court before which a dispute is pending concerning the conduct at issue shall, of its own motion and even when it has already issued a provisional judgment that has become final and has recognised the existence of jurisdiction, find that it lacks jurisdiction at any stage and level of the proceedings" (paragraph 1).

Noting the change in the law and reversing the stance that it had adopted in the aforementioned *Ferrini* judgment, the Court of Cassation held that the civil courts did not have any jurisdiction in the matter of actions for damages brought against the Federal Republic of Germany for war crimes (Joint Civil Divisions, Judgment No 1136 of 21 January 2014).

Following that legislative change, the issue of the judicial protection of the rights of the victims of Nazi crimes reached this Court, which as aforesaid adopted a declaratory ruling of unconstitutionality, in the terms already mentioned (Judgment No 238/2014),

holding, in essence, that ordinary courts have jurisdiction to hear claims for damages for war crimes.

While ruling out the possibility of reviewing the International Court of Justice's interpretation on the scope of the rule of customary international law of a foreign State's jurisdictional immunity for *acta iure imperii*, by contrast it held that it had to scrutinise whether or not the effects of the domestic provision derived from the rule of customary international law as expounded by the International Court of Justice were compatible with the Italian constitutional order. As a result of that scrutiny, this Court held that the effects produced by that domestic provision were in conflict with one of the supreme principles of the constitutional order, namely the "right to a court (Article 24), in conjunction with the principle of protection of the fundamental rights of the person (Article 2)", both encapsulated in the fundamental right to human dignity, which operates as a "counter-limit" to the incorporation of the rules of any other order. Consequently, as already mentioned, the question as to constitutionality of the rule created in the Italian legal system by the incorporation pursuant to Article 10(1) of the Constitution of the rule of customary international law of the jurisdictional immunity of foreign States for *acta iure imperii* was declared to be unfounded. Whereas both Article 1 of Law No 848/1957, executing the Charter of the United Nations (insofar as it obliged the courts to comply with the decision of the ICJ of 3 February 2012), and Article 3 of Law No 5/2013 were declared to be unconstitutional.

Therefore, the jurisdiction of the State was recognised over any actions seeking declaratory relief and an order for damages brought as part of proceedings adjudicating on substantive rights against foreign States, and specifically against the Federal Republic of Germany, with respect to acts that can be classified as international crimes, hence *delicta iure imperii* rather than *acta iure imperii*, committed (or initiated by acts such as forced deportation) on Italian soil.

Court of Cassation case law (see, amongst many, Joint Civil Divisions, Judgment No 20442 of 28 September 2020) has adapted to the new situation, changing its stance once again and holding that the jurisdictional immunity of foreign States in the civil sphere for acts *iure imperii* constitutes a prerogative enshrined in customary international law, the operation of which is, however, precluded in our legal system for *delicta imperii*, i.e. for those crimes committed in violation of peremptory norms of international law in that they infringe fundamental human rights.

Trial and appeal courts have followed that stance (as borne out by the judgments of the Court of Appeal of Bologna and the Court of Appeal of Rome, which constitute the enforceable instruments underpinning the enforcement proceedings at issue here).

10.– In this changed environment, especially as regards case law, Italy was faced with the problem of giving effect to the 1961 agreement, which contained – as already noted – a release clause in favour of the Federal Republic of Germany and against the Italian State.

The final deadline for bringing claims for damages, set by Article 6 of Decree of the President of the Republic No 2043/1963, was in the end superseded in so far as it was recognised, as from this Court's aforementioned 2014 judgment, that the ordinary courts could entertain claims for damages against the Federal Republic of Germany for serious human rights violations resulting from conduct attributable to the Third Reich during World War II and classifiable as crimes against humanity.

Since Judgment No 238/2014, there have been several judgments awarding damages against Germany issued by trial and appeal courts, rulings that have also become final or at least provisionally enforceable.

In the proceedings before the referring court, the claim for damages sought to be enforced by the principal creditor and that of the first intervening creditor stem from final judgments of the Court of Appeal of Bologna and the Court of Appeal of Rome respectively, both of which had been issued against the Federal Republic of Germany.

At times – as reported by State Counsel at the public hearing – the judgment was extended jointly and severally to the Italian State.

That litigation induced the Italian legislature to take action, with a view to maintaining good international relations, informed by principles of peace and justice, also in consideration of the constitutional constraint (Article 117(1) of the Constitution) of respect for treaties, of which the 1961 Bonn Agreement counts as one.

Lastly – as reported by State Counsel – the Federal Republic of Germany, in an application of 29 April 2022, again brought an action before the International Court of Justice complaining, in particular, of the denial (or rather, the risk of denial) of the restrictive immunity of States at least at the stage of enforcement proceedings.

11.– At this juncture, the government adopted a special and radical provision – the challenged Article 43 – intended to give continuity to the 1961 Bonn Agreement so as to definitively put the matter to rest.

Article 43 establishes a fund for compensating the harm suffered by victims of war crimes and crimes against humanity for the breach of inviolable personal rights, committed on Italian soil or in any case to the detriment of Italian nationals, by the forces of the Third Reich in the period between 1 September 1939 and 8 May 1945. And this is done by "ensuring continuity with the Agreement between the Italian Republic and the Federal Republic of Germany, executed by Presidential Decree No 1263 of 14 April 1962", i.e. the 1961 Bonn Agreement. This is also borne out by Article 43(4)(b) pursuant to which the amount of damages awarded by a court must be reduced by any sums already received from the Italian Republic as benefits or compensation under Decree of the President of the Republic No 2043/1963 containing – as already mentioned – rules for the distribution of the sum paid by the Government of the Federal Republic of Germany, on the basis of the Bonn Agreement of 2 June 1961, as compensation for Italian nationals subjected to National-Socialist measures of persecution. Such a deduction is also envisaged for sums received as benefits under Law No 96 of 10 March 1955 (Provisions in favour of persons persecuted on anti-fascist or racial grounds and their surviving family members), Law No 791/1980 and Law No 94/1994.

Precisely in continuity with the 1961 Bonn Agreement, the State takes over responsibility – with a virtuous albeit onerous provision – for the "compensation" payable for the harm suffered by the victims of war crimes, committed by the armed forces of the Third Reich on Italian soil or in any case to the detriment of Italian nationals.

Eligibility for access to the fund is premised on having obtained a judgment establishing liability and assessing damages for war crimes that has become final, following legal proceedings commenced by the date of entry into force of Decree-Law No 36/2022, as converted by parliament, in other words, by the deadline most recently extended to 28 June 2023 by Article 8 of Decree-Law No 198 of 29 December 2022 (Urgent provisions on legislative deadlines), converted by parliament, with amendments, into Law No 14 of 24 February 2023.

Judgments awarding damages, which – by way of derogation from Article 282 of the Code of Civil Procedure (as prescribed by the challenged Article 43) – are enforceable once they become final, may be satisfied exclusively through recourse to the fund. Consequently, no enforcement proceedings may be commenced or continued and any enforcement proceedings that may already have been initiated are declared terminated.

The precise details of the procedures for accessing the fund and disbursing sums to the beneficiaries were addressed in the above-mentioned Interministerial Decree of 28 June 2023.

12.– Having clarified all of the above at the outset, the questions as to constitutionality, raised with reference to Articles 2 and 24 of the Constitution, are unfounded.

13.– This Court has held on several occasions that the guarantee of judicial protection of rights enshrined in Article 24 of the Constitution also includes the enforcement phase in that it is necessary to make the implementation of judicial measure effective (Judgments Nos 140/2022, 128/2021, 522/2002, and 321/1998). That is all the more so when a fundamental right is infringed (Article 2 of the Constitution).

That said, a principle of the legal system is observance of the obligations arising from international obligations and hence from treaties (Judgment No 102/2020), the provisions of which – in accordance with this Court's own case law since the well-known Judgments Nos 348/2007 and 349/2007 – even constitute parameters against which the constitutionality of domestic legislation must be judged (Article 117(1) of the Constitution).

The challenged provision strikes a not unreasonable balance between those principles, all of which are of constitutional rank.

14.– On the one hand, the imperativeness of judicial protection also through enforcement proceedings led this Court to hold in one case that the (albeit temporary) freezing of enforcement actions with the ensuing ineffectiveness of attachment was unconstitutional (Judgment No 228/2022).

It was also held that the right to judicial protection had been unlawfully impaired in cases where, like those at issue in Judgment No 123/1987, the challenged provision affected claims that had already been settled in litigation by then concluded. Article 24 of the Constitution was found to have been infringed because the law had essentially nullified the judicial process as a means of giving effect to a pre-existing right (Judgments No 186/2013 and 364/2007).

15.– On the other hand, it was held that procedural provisions terminating pending proceedings were not unconstitutional when matched by substantive provisions ensuring the substantial satisfaction by non-judicial means of the rights covered by the terminated proceedings (Judgments Nos 277/2012 and 364/2007).

In particular, in considering a question as to constitutionality to be unfounded because the challenged legislation "is certainly positive", this Court (Judgment No 103/1995) stated in general that "in order to identify the limits of constitutionality of legislative intervention in relation to proceedings that dictates that their outcome is that they are to be deemed to be terminated, the Court has already on other occasions assessed the relationship between that intervention and the degree to which the claims at issue have been satisfied by way of legislation. When the supervening law has satisfied, even if not in full, the claims asserted in proceedings whose termination has been prescribed, the unconstitutionality of the latter provision has been ruled out, precisely because it is consistent with the statutory recognition of the right claimed through the courts". And this Court specified that "in order to rule out the impairment of the right of action it is necessary and sufficient that the scope of the legal positions held by the persons concerned is in any event strengthened as a result of the legislation giving rise to the termination of proceedings".

That same principle had already informed Judgment No 185/1981, again relating to a case where proceedings were terminated by operation of law because of new legislation governing the matter at issue.

16.– In the case in point, as against the halting of the enforcement proceedings in progress, there is the protection afforded by the "compensation" fund entailing a transfer of the economic burden of the obligation to pay damages awarded by judgments that have become final. Such in the context of striking an overall balance between the constitutional principles at stake, reconciling the judicial protection of the victims of the aforesaid war crimes with observance of the specific international agreements on the subject (the 1961 Bonn Agreement).

Article 43(2) provides that those who have obtained an instrument consisting of a judgment establishing liability and assessing damages for war crimes that has become final are entitled to access the fund, subject to the conditions and in accordance with the procedures established by the subsequent recently issued Interministerial Decree of 28 June 2023. And it adds that the legal costs assessed in the judgment are also to be borne by the fund.

Article 43(3), as amended by the statute into which the decree-law has been converted by parliament, further provides that judgments establishing liability and assessing damages for war crimes "shall be satisfied exclusively through the Fund". Therefore, access to the latter is treated as enforcement of a judgment that has become final.

The interministerial decree was to address the "procedures for disbursement" – not affecting the quantum – of the amounts to those entitled to them, subject to the deduction of any sums already received by way of similar benefits or compensation, i.e. linked to the circumstance of having been the victim of a war crime.

This further confirms the prospect of full performance of the judgments that have become final.

In summary, Article 43 provides that an award of damages against Germany is replaced by a right of similar content to be satisfied through recourse to the fund, thus providing adequate alternative protection to that attainable by enforcement against the Federal Republic of Germany.

This is especially so in view of the fact that the procedure for enforcing final, or at any rate provisionally enforceable, judgments for damages against the Federal Republic of Germany would in any case come up against the restrictive immunity of States, as already stated above (in Section 3.2). Accordingly, it would not be easy for the judgment creditor to find assets without a public purpose and therefore attachable. Or indeed sums of money in bank or post office accounts of diplomatic and consular representations of Germany, without the routine declaration that the account contains exclusively monies intended for the performance of governmental functions of that State.

17.– The Interministerial Decree of 28 June 2023 – which introduced a secondary-level regulation authorised directly by the law (Article 43) – further clarified the scope of the protection provided by the "compensation" fund.

In fact, Article 2(2) of the interministerial decree provides that "in compliance with the laws and regulations in force and in accordance with the procedures set forth in Articles 3 and 4 of this decree, the Fund shall bear the cost of payment of the damages assessed in the judgment [...] and any legal expenses assessed by the same judgment, after deducting the sums received by the beneficiary from the Italian Republic by way of benefits or compensation pursuant to Law No 96 of 10 March 1955, Decree of the President of the Republic No 2043 of 6 October 1963, Law No 791 of 18 November 1980, and Law No 94 of 29 January 1994".

Access to the "compensation" fund is therefore conceived of as an individual right, stemming from an enforceable instrument in the form of a judgment for damages against

the Federal Republic of Germany without the constraints of restrictive immunity applying.

The relevant payment is to be made in a lump sum within 180 days after the date of receipt of the application, which may be rejected only if the legal requirements are not fulfilled. Such payment extinguishes, as provided for by Article 43(5) of Decree-Law No 36/2022, as converted by parliament, any right or claim related to the claims for damages for the same events (Article 4(5) of the aforementioned interministerial decree).

Hence there is a full and unconditional individual right, consisting in the payment of the damages already awarded in a judgment that has become final, with the release of the original debtor (Germany) and with the sole deduction of sums already received and linked to the condition of victim of the war crimes in question (compensation under the 1961 agreement and other benefits). This is a sort of statutory expromission (Article 1272 of the Civil Code), exceptionally with a release since the enforcement proceedings in course against the debtor (Germany) are terminated at the same time and new ones may no longer be initiated.

Moreover, with reference precisely to the restrictive immunity of States in enforcement proceedings, this Court (Judgment No 329/1992) has stated that "it may be possible, for example, for the Italian State to intervene in the enforcement proceedings by offering the creditor payment of the third party pursuant to Article 1180 of the Civil Code".

In short, there is no right to mere compensation in lieu of damages. Nor is there a mechanism for the distribution of the sums available, such as that provided for in Article 10 of Decree of the President of the Republic No 2043/1963 for calculating the personal share of each applicant eligible to participate in the distribution of the total amount paid by Germany in furtherance of the 1961 Bonn Agreement. Instead, full satisfaction of the claims for damages is prescribed.

Moreover, according to the above-mentioned decision of this Court (Judgment No 103/1995), a finding of appropriateness, which legitimises the termination of pending proceedings, requires that the supervening law must have satisfied the claims, brought in the proceedings whose termination is ordered, "even if not in full". All the more reason, therefore, why the protection afforded by the challenged Article 43 is appropriate, given that it entails full satisfaction.

The condition laid down in this Court's case law (in particular in Judgment No 103/1995) can therefore be said to be fulfilled: the statutory termination of the enforcement proceedings, to which the restrictive immunity of States would in any event apply as regards attachable assets, is offset by the protection afforded by the fund, which is of an equal amount and indeed satisfies the expectations of creditors (heirs of the victims of war crimes) to a greater extent because there is no uncertainty connected with the operation of the restrictive immunity of States as regards enforcement proceedings.

18.– For similar reasons, the questions as to constitutionality raised with reference to Articles 3 and 111 of the Constitution are unfounded.

The absolutely special circumstances of the case, which call for a need to strike a balance between the obligation to comply with the 1961 Bonn Agreement and the judicial protection of the victims of the aforementioned war crimes, constitutes sufficient justification for a differentiated and exceptional regulatory framework, which – for all the reasons explained above – achieves a not unreasonable balance in the complex matter of compensation and reparations for war crimes.

19.– Lastly, the further question as to constitutionality raised with reference to Article 3 of the Constitution is unfounded.

The referring court's doubts take into account only the original wording of Article 43, as set out in Decree-Law No 36/2022, as converted by parliament. That wording did effectively appear to sanction an alleged disparity in treatment between enforcement proceedings instituted on the basis of enforceable instruments in the form of judgments issued by the Italian courts on the one hand and those instituted on the basis of enforceable instruments in the form of judgments issued by foreign courts and duly recognised in Italy on the other hand. The original wording effectively did not seem to provide for the automatic termination of the latter type of enforcement proceedings unlike the former, leading the referring court to complain about a disparity in treatment in respect of that *tertium comparationis*.

However, the subsequent amendment made by Law No 79/2022 into which the decree-law has been converted by parliament, dating from before the referral order, expressly provides that also enforcement proceedings based on enforceable instruments in the form of foreign judgments awarding damages against Germany for the harm caused by the forces of the Third Reich in the period between 1 September 1939 and 8 May 1945 may not be continued and are automatically terminated. It has been thus clarified, in unequivocal terms, that enforcement proceedings based on such instruments are also terminated by operation of law, so that the supposedly more favourable treatment alleged by the referring court as a *tertium comparationis* does not in fact exist. It follows that the related question as to constitutionality is unfounded.

Moreover, the creditor intervening in the enforcement proceedings before the referring court on the basis of the judgment of the Greek court granted *exequatur* (Sterea Ellada Region) is also aware of that fact. In its pleading, the creditor complains, on the contrary, that those foreign enforceable instruments for which recognition had been sought are treated less favourably given that the statutory termination of the enforcement proceedings is not offset by the right of access to the "compensation" fund since the foreign judgment concerns damages for harm caused by a war crime committed in Greece against Greek nationals.

In its pleading, that intervening creditor's legal counsel requested this Court to raise that question of its own motion. However, that is clearly outside the scope of the issue for decision as set out in the referral order and in any event is not of the preliminary nature necessary to warrant this Court's examination of the matter on its own motion (see, amongst many, Judgment No 24/2018).

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares that the questions as to the constitutionality of Article 43(3) of Decree-Law No 36 of 30 April 2022 (Further Urgent Measures for the Implementation of the National Recovery and Resilience Plan (NRRP)), converted by parliament, with amendments, into Law No 79 of 29 June 2022, raised with reference to Articles 2, 3, 24, and 111 of the Constitution by the Ordinary Court of Rome with the relevant referral order, are unfounded.

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 4 July 2023.

Signed by:

Silvana SCIARRA, President

Giovanni AMOROSO, Judge Rapporteur