

The Dust Has Not Yet Settled: The Italian Constitutional Court Disagrees with the International Court of Justice, Sort of

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As Riccardo Pavone [surmised](#) last March, the ICJ judgment in *Jurisdictional Immunities* ([here](#)) has not been the last word in the matter of reparations for the forced labour of Italian prisoners of war in Germany. As reported by Christian Tams ([here](#)), the Italian Constitutional Court ([here](#)) has found the provisions adopted by Italy to implement the ICJ's judgment contrary to the Italian Constitution, more precisely to the guarantee of access to a court. Those provisions had been meant to oblige Italian courts to follow the judgment of the ICJ, which required those courts to extend jurisdictional immunity to a foreign State (ie Germany) also for actions which constitute war crimes and crimes against humanity violating inviolable human rights.

Insofar as the customary international law norm on sovereign immunity found by the ICJ extends jurisdictional immunity to States against actions for damages resulting from such crimes the Court has refused to accept it into the Italian legal order (para 3.5). The Court's reasoning presumably would also cover the question, which was not however before it, of Germany's immunity in the exequatur proceedings instigated by Greek plaintiffs. In contrast, although this issue was also not before the Court, its reasoning might allow to stand Germany's immunity from execution concerning the Villa Vigone as determined by *Jurisdictional Immunities* as this determination is based on the non-commercial use of the villa. It therefore does not exclude an execution against other (commercial) objects. Also, the villa has a cultural purpose which the Court might accept as a legitimate restriction of the plaintiffs' position.

The Court's reasoning and conclusion are of course disputed by some Italian lawyers (cf. eg Filippo Fontanelli, [here](#) and [here](#), who also discusses international law issues, and with whom I mostly agree). However, I am neither interested in those questions of municipal Italian law nor in the least competent to have an opinion about them. For me, it is *Roma locuta* – but is the *causa finita*, has the dust settled?

Hardly. From the view-point of international law, the Court has done no more than to close one way, albeit the one chosen by the Italian government, to implement *Jurisdictional Immunities*. Italy's international law obligation to implement the ICJ's judgment remains unaltered by the Court's decision; indeed, municipal law, including constitutional law, is generally not apt to affect a State's obligations under international law. But that implementation may well have become more burdensome, for Italy, by the Court's decision.

Ways still open to Italy to implement the ICJ judgment

So what ways stand now open to the Italian government? An Italian colleague suggested to me that it could try to overturn the Court's decision by a constitutional amendment, a course of action which however might raise the spectre of the Court's declaring the constitutional amendment contrary to the principles of the constitution – a power which at least the (similarly situated) German Federal Constitutional Court has claimed to possess since long ago ([here](#), at p. 235). In the alternative, Italy could presumably enact a law substituting itself for Germany in the court

proceedings in question. Such a course of action would meet the requirements of both *Jurisdictional Immunities* and the Court's decision: the plaintiffs would have their day(s) in court, and Germany's immunity would be respected. However, it would have the (more than slightly) perverse effect that Italy would have to pay for Germany's war crimes, and, even more perverse, presumably also for those crimes dealt with in the Greek decisions underlying the Italian exequatur cases.

Consequences of an Italian inaction

What if the Italian government decides to do nothing? The Italian civil courts will then most likely proceed with the numerous actions against Germany. Those proceedings will be so many internationally wrongful acts in themselves. Indeed, the Court acknowledges that its decision contravenes present international law. (It is one of the rather strange features of this ongoing saga that key participants – Germany, the Court – are quite contrite over their actions but insist nevertheless on their positions which can be deemed correct only in the respective legalistic framework.) Thus Germany might resort to countermeasures (reprisals). It might also try to bring Italy before the Security Council under article 94 (2) of the UN Charter. Both courses of action, of course, are not very likely to be taken between close allies.

In any case, Germany would presumably have a claim against Italy to be indemnified against claims from judgments rendered in proceedings having violated Germany's international law claim to immunity. In the event of an execution of such judgments Germany also would have a rather clear claim to corresponding reparations under customary international law as codified in art. 31 of the draft articles on State responsibility ([here](#)). In this way, Italy might again have to pay, in the final analysis, for Germany's war crimes against Italian and Greek citizens. Indeed, it is hard to conceive of the ICJ, should Germany bring a new case for damages before it, as denouncing *Jurisdictional Immunities* and, in effect, following the Constitutional Court, even if the latter's judgment may correspond better to modern human rights sensibilities.

An equitable solution?

Is there a way out of this conundrum? The German and Italian governments could rely on Germany's far reaching immunity from execution and keep fingers crossed that no court will deny that immunity in the case of claims for reparations for war crimes and crimes against humanity. They could also try to negotiate a settlement providing for an equitable indemnification of the different categories of plaintiffs, again hoping that no court would refuse the negotiated result in favour of higher indemnities. It is not clear that the Court's decision has strengthened the hand of the Italian government in such negotiations, seen the perverse results that might obtain without a negotiated settlement. In any case, the dust cannot be expected to settle anytime soon on this matter. One is somewhat reminded of another famous saga in which a supreme court refused to follow the ICJ: the LaGrand ([here](#)) and Avena ([here](#) and [here](#)) judgments of the ICJ in actions brought by different States against the US, and the US Supreme Court's decisions refusing ([here](#)) to follow them which have been called by Bruno Simma (in Essays in Honour of Christian Tomuschat) a "never ending story". However, the way out of that story finally chosen by the US ie to denounce the protocol on which those actions had been based (cf The Oxford Handbook of Modern Diplomacy, p. 515-6) will not be open to Italy which cannot withdraw from, and will not likely succeed in changing, the relevant customary international norm.