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Heike Krieger & Andreas Zimmermann

**Sentenza 238/2014 of the Italian Constitutional Court and the  
International Rule of Law**

Berlin Potsdam Research Group „The International Rule of Law – Rise or Decline?“

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## **Sentenza 238/2014 of the Italian Constitutional Court and the International Rule of Law**

*Heike Krieger & Andreas Zimmermann*

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### **Abstract:**

*The German-Italian dispute over the scope of sovereign immunities and claims of reparations for war crimes committed by German armed forces during World War II in Italy is in many ways specific and historically contingent. At the same time, it touches upon a number of fundamental challenges which the international community has to address in the interest of furthering the international rule of law. In this working paper both authors address the question whether the current law of sovereign immunities should be changed or interpreted in a manner as to allow for exceptions from State immunities in cases of grave violations of human rights. While the first part of the paper focusses on the perspective of general international law the second part addresses the question through the lens of European law. Both authors agree that unilateral efforts to push for what many consider a progressive development of international law actually may entail adverse effects for the international rule of law and thus may even contribute to a broader crisis of the international legal order.*

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## Part I: Sentenza 238/2014 - A good case for law-reform?

*Heike Krieger*<sup>1</sup>

### 1. Introduction

The German-Italian dispute over the scope of sovereign immunities and claims of reparations for war crimes committed by German armed forces during World War II in Italy is in many ways specific and historically contingent. At the same time, it touches upon a number of fundamental challenges which the international community has to address in the interest of furthering the international rule of law. For many observers the case represents injustices and inconsistencies inherent in the international legal order and thus seems to contribute to its legitimacy deficits. They doubt that a legal order can be considered as a just order which hampers redress against serious human rights violations before national courts in the interest of an abstract legal concept, such as sovereign equality protected through State immunity. Moreover, they criticize a consistency deficit if the *ius cogens* character of a violated rule does not also affect relevant procedural rules.<sup>2</sup> Such a perspective furthers the idea to lift the case beyond the concrete details and context and take it as a plea for changing the rules on State immunity. For other observers the case reflects the growing challenges international law faces from unilateral acts of non-compliance by national courts in the interest of the protection of national constitutional law.<sup>3</sup> Brought together both perspectives raise the question whether and to what extent national courts can contribute in a balanced manner to changes of international law which they consider to be necessary. Thus, Sentenza 238 utters the hope that it „may also contribute to a desirable – and desired by many – evolution of international law itself.”<sup>4</sup> But is Sentenza 238/2014 of the Italian Constitutional Court a good case for law-reform?

Sentenza 238/2014 denied German immunity from civil jurisdiction against claims arising from war crimes committed by German armed forces during World War II. The Court argued that the customary international law rule of State immunity in such cases violated fundamental principles of the Italian Constitution. Therefore the Court struck down the Italian Law No. 5 of 2013 which had aimed to execute the 2012 judgment of the ICJ in the Jurisdictional Immunities Case<sup>5</sup> as well as the law which implements the UN Charter in relation to Art. 94 UN Charter and the respective ICJ judgment. In this judgment the ICJ had upheld the customary rule of jurisdictional immunities without any exceptions for claims arising from war crimes or crimes against humanity.

The creation of customary international law rules through judicial practice may be a means to overcome the opposition of the State executive to further legal development since judicial reliance

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<sup>2</sup> E.g. A. Orakhelashvili, ‘Jurisdictional Immunities of the State’ (2012) 106 AJIL 609, at 614 and 615.

<sup>3</sup> E.g. A. 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; <https://www.ejiltalk.org/let-not-triipel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i/>; R. Kunz, ‘The Italian Constitutional Court and ‘Constructive Contestation’ - A Miscarried Attempt?’ (2016) 14 JICJ 621; Massimo Lando, ‘Intimations of Unconstitutionality: The Supremacy of International Law and Judgment 238/2014 of the Italian Constitutional Court’ (2015) 78 MLR 1028.

<sup>4</sup> Italian Constitutional Court, Sentenza No. 238/2014, para. 3.3. (English version available at: [http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S238\\_2013\\_en.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf)).

<sup>5</sup> ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, ICJ Reports 2012, 99.

on customary international law allows for the State's explicit consent to become less important. Court networks may, in horizontal and vertical dialogs, accelerate the development of customary international law rules even against the expressed intention of the executive branch on the basis of the principle of judicial independence.<sup>6</sup> Given its role in international relations it is not surprising that in particular the executive branch tends to be sceptical of restricting immunities even in cases of serious human rights violations. The frictions which have arisen between the executive and the judicial branch in Italy are not as specific as it might appear at first sight. Actually, in a number of States there is a split between both branches about how to deal with immunity exceptions in cases of serious violations of human rights. Comparable developments have at least temporarily emerged in Switzerland and the US. The executive branch of another State may even try to stop horizontal dialogues between courts of different States by prompting an international court's decision. Likewise, the executive branch – at least in a parliamentary democracy – may also hold back legal development through instigating legislation.<sup>7</sup>

The adverse impacts which such uncoordinated efforts of prompting or retaining law-reform in a decentralised legal order may exert have culminated in the context of the Jurisdictional Immunities Case and *Sentenza 238* and point to the need for a cautious conduct by all actors involved. Such adverse impacts may affect the State itself in so far as non-compliance by courts may incur State responsibility. Simultaneously, such symbolic cases of non-compliance risk to undermine the authority of international judicial organs, such as the ICJ (B.1. and 2.). Thus, instead of promoting the legitimacy of international law a court opposing findings of international judicial organs might undermine the international rule of law. Unilateralist attempts to further legal developments should be aware of such adverse effects. Otherwise they may themselves contribute to perceived legitimacy deficits of the international legal order in that they further double standards, advocate standards which are highly contested (B.3.), or create expectations which international law might not be able to fulfil (B.4.). Instead, any such effort for law-reform should aim to advocate standards which are generalizable outside the specific context of the dispute at hand (C.).

## 2. Adverse Effects

The idea to promote legal development through judicial dialogue is ambivalent. On the one hand, the creation of customary international law can be seen as an uncoordinated bottom-up process entailing cases of non-compliance as a starting point for new legal rules. On the other hand, where constitutional courts contest recent findings of international courts and even choose non-compliance with a decision against "their" respective State as a means to further a specific perception of the adequate legal development they risk to engage their State's responsibility under international law.

### a) Incurring State responsibility

According to Art. 94 UN-Charter and Art. 59 ICJ Statute Italy has to comply with the findings of the ICJ judgment. Art. 94 UN-Charter requires a State to realize the obligations which stem from the operative part of the ICJ's decision, including the *ratio decidendi*.<sup>8</sup> In view of Art. 4 ASR the ICJ

<sup>6</sup> Parts of this paper are based on H. Krieger, 'Between evolution and stagnations: Immunities in a globalized world' (2014) 6 *GoeJIL* 177.

<sup>7</sup> H. Krieger (note 6), at 194 et seq.

<sup>8</sup> K. Oellers-Frahm, 'Art. 94' in B. Simma et al (eds.), *The United Nations Charter*, 3<sup>rd</sup> ed., Oxford 2012, MN 6/12.

decision obliges all State organs. Accordingly, the competent State organ has to follow the obligation established by the Court's decision. If it fails to do so, the State engages responsibility.<sup>9</sup> As defined in the commentary to the Articles on State responsibility "the essence of an internationally wrongful act lies in the non-conformity of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation."<sup>10</sup> The finding of the Italian Constitutional Court that Article 3 of Law No. 5/2013 which aims to implement the ICJ's decision "has to be declared unconstitutional"<sup>11</sup> constitutes such a non-conformity. However, the findings of the Constitutional Court may only establish conduct prior to a breach so that the breach is just "apprehended or imminent"<sup>12</sup> but has not yet occurred.<sup>13</sup> The commentary to the ASR does not formulate any general rule in this regard but highlights that the decision needs to take into account the concrete primary obligation, the facts of the case and the context. It suggests that "preparatory conduct does not itself amount to a breach if it does not 'predetermine the final decision to be taken'."<sup>14</sup>

Thus, the question whether the judgment of the Constitutional Court violates Italy's obligations under the ICJ judgment as based on Art. 94 UN-Charter depends on the effects that the decision entails within the Italian legal order for other Italian state organs in their international relations with Germany as well as on their actual behaviour. According to Art. 136 of the Italian Constitution a law which the Constitutional Court has declared unconstitutional does no longer have any effect from the day following the publication of the decision. As Karin Oellers-Frahm has demonstrated, because of *Sentenza 238* the law enacting the UN Charter albeit only in relation to Art. 94 UN Charter and also only in relation to *Sentenza 238* as well as the law implementing the ICJ judgment do no longer pertain to the Italian legal order. Neither is the customary international law rule on State immunity insofar as it contradicts fundamental constitutional principles.<sup>15</sup> However, as long as the decision gives a certain leeway that allows other courts, the executive and the legislative branch to comply with the judgment in a manner still compatible with international law a breach would not have yet occurred.<sup>16</sup> After all the ICJ in its 2012 ruling gave Italy a certain discretion in implementing the judgment when it found that "the Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect."<sup>17</sup> Thus, it is important to note that

<sup>9</sup> K. Oellers-Frahm (note 8), MN 12.

<sup>10</sup> J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge 2002), Commentary to art. 12, para. 3, at 126.

<sup>11</sup> Italian Constitutional Court, *Sentenza No. 238/2014* (note 4), para. 5.

<sup>12</sup> J. Crawford (note 10), Commentary to art. 14 para. 13, at 138 et seq.

<sup>13</sup> ICJ, *Case concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, I.C.J. Reports 1997, 7, at 51 para. 79: "Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which 'does not qualify as a wrongful act' ..."

<sup>14</sup> J. Crawford (note 10), Commentary to art. 14, para. 13, at 138 et seq.

<sup>15</sup> K. Oellers-Frahm, 'A never-ending story: The International Court of Justice – The Italian Constitutional Court – Italian Tribunals and the Question of Immunity' (2016) *ZaöRV* 193, at 196.

<sup>16</sup> Cf. J. Crawford (note 11), Commentary to art. 12, para. 12 at 130; C. Tomuschat, 'National and international law in Italy: The end of an idyll' (2014) 6 *IJPL* 187, at 192 et seq.

<sup>17</sup> ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, ICJ Reports 2012, 99, at 155 para. 139.

the Italian executive branch argued in the ensuing cases before Italian civil courts that the courts should grant Germany jurisdictional immunity.<sup>18</sup> Of course, in the concrete case at hand these reflections are already theoretical because Italian court's have issued default judgments and decision on the merits in the wake of *Sentenza 238*.<sup>19</sup> These court proceedings do not only again infringe the rules on State immunity but they also constitute a breach of Italy's legal obligation flowing from the findings of the ICJ in its 2012 judgment.

In literature there are a number of voices which suggest that wrongfulness of such a conduct should be precluded. A particularly far-reaching approach suggests that wrongfulness could be precluded by invoking that a democratic State must respect the fundamental rights guaranteed in its Constitution.<sup>20</sup> However, such approaches are not only irreconcilable with Art. 27 VCLT as well as Artts. 4 and 32 ASR. They would also have adverse long-term effects for the international legal order. Such a justification would undermine the sovereign equality of States and induce a hierarchy between States necessarily distinguishing between democratic States and other States. The question would arise whether even an international tribunal would be well advised to make any determination on the basis of such value and policy loaded criteria. Would the German as well as the Italian Constitutional Court be justified to refuse compliance with judgments of the ECHR on the basis of their reasoning in the *Görgülü Case*<sup>21</sup> or in *Sentenza 238* because they are genuine constitutional democracies while the Russian Constitutional Court would not be justified to do so in the *Yukos Case*<sup>22</sup>?

#### **b) Preserving judicial authority through legitimizing strategies?**

Acting against traditional standards of the rule of law courts which choose non-compliance cross the limits of judicial dialogue and thus challenge the authority of international judicial organs. Therefore, they will have to rely on additional considerations of legitimacy in order to make their case acceptable for their national audiences as well as the international community. While the Italian Constitutional Court seems to have been aware of such dilemmas it has not succeeded in mitigating them through its legitimizing strategy.

In its self-perception, *Sentenza 238* pressures for a progressive evolution of international law and aims to gain legitimacy by referring to two precedents: the role of national courts in the early 20<sup>th</sup>

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<sup>18</sup> K. Oellers-Frahm (note 15), at 195 et seq.

<sup>19</sup> K. Oellers-Frahm (note 15), at 193 et seqq.; see, in particular, for decisions on the merits: Tribunale di Firenze, Order of 23 March 2015 and Decision No. 2468/2015 of 6 July 2015; Tribunale di Piacenza, *Sentenza* No. 723/2015 of 25 September 2015; for an English analysis of these three decisions see K. Oellers-Frahm (note 15) at 197 et seqq.

<sup>20</sup> For this approach albeit critically: M. Iovane, 'The Italian Constitutional Court Judgment No. 238 and the Myth of the 'Constitutionalization' of International Law' (2016) 14 JICJ 595, at 604 with reference to B. Conforti, *Diritto Internazionale*, 10<sup>th</sup> ed., Naples 2014, at 402 et seq.

<sup>21</sup> German Constitutional Court, BVerfGE 111, 307 (2004) - *Görgülü*.

<sup>22</sup> Constitutional Court of the Russian Federation, Judgment of 19 January 2017 № 1-П regarding the constitutionality of execution of the European Court of Human Rights judgment of 31 July 2014 in the case "OAO Neftyanaya Kompaniya "YUKOS" vs Russia" and ECHR, *OAO Neftyanaya Kompaniya Yukos v Russia*, Appl. No. 14902/04, Judgments of 20 September 2011 and 31 July 2014; for an analysis of the Russian Constitutional Court's approach see: M. Hartwig, 'Vom Dialog zum Disput? Verfassungsrecht vs. Europäische Menschenrechtskonvention -- Der Fall der Russländischen Föderation' (2017) 44 EuGRZ, 1-22.



century which enabled law-reform by establishing the distinction between *acta iure imperii* and *acta iure gestionis*<sup>23</sup> and the Kadi decision<sup>24</sup> of the European Court of Justice.<sup>25</sup>

Sentenza 238 stresses the historically important role Italian courts played in the process of establishing the differentiation between *acta gestiones* and *acta iure imperii*.<sup>26</sup> However, the historical comparison cannot sufficiently legitimize the Constitutional Court's approach since context conditions are different in both cases. In the early 20<sup>th</sup> century the international legal order was even more decentralized than it is today. Italian and Belgian courts did not act in non-compliance with a judgment of the central judicial organ of the international community in the immediate wake of the pronouncement of that decision. They did not set a precedent for other courts to question the authority of such an institution. As Anne Peters and Raffaella Kunz have underlined, this factor also constitutes a significant difference to the Kadi decision of the European Court of Justice. While both courts might aim to protect "constitutional principles" against conflicting international obligations the Kadi decision is directed against a political organ whose nearly unfettered discretion is hardly controlled by international courts.<sup>27</sup> In this respect, the ECJ can raise a much stronger claim to realize the idea of a *dédoulement fonctionnelle*, to act as an organ of international law, than the Italian Constitutional Court.

Judges who try to push for law-reform by initiating non-compliance with decisions of international courts should be aware that the overall international climate is currently changing. With the lingering shift from a unipolar to a multipolar world order the liberal perception of international law has come under attack. Across the board international norms and institutions are contested and perceptions of international law's legitimacy vary according to the again increasingly diverging national (ideological) backgrounds.<sup>28</sup> Today national courts act in the company of and thereby

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<sup>23</sup> Italian Constitutional Court, Sentenza No. 238/2014 (note 4), para. 3.3.

<sup>24</sup> ECJ, Judgment of the Court of 3 September 2008 - Kadi and Al Barakat - joint cases C-402/05 P and C-415/05 P, ECR 2008, I-6351.

<sup>25</sup> Italian Constitutional Court, Sentenza No. 238/2014 (note 4), para. 3.4.

<sup>26</sup> Italian Constitutional Court, Sentenza No. 238/2014 (note 4), para. 3.3.: "The customary international norm of immunity of States from the civil jurisdiction of other States was originally absolute, since it included all state behaviors. More recently, namely in the first half of the last century, this norm undertook a progressive evolution by virtue of national jurisprudence, in the majority of States, up until the identification of *acta iure gestionis* (an easily understandable expression) as the relevant limit. And it is well known that this limit to the application of the norm of immunity was progressively established mainly thanks to Italian judges (...) – the so-called „Italian-Belgian theory“. In short, national judges limited the scope of the customary international norm, as immunity from civil jurisdiction of other States was granted only for acts considered *iure imperii*. ... It is of significant importance that the evolution as described above originated in the national jurisprudence, as national courts normally have the power to determine their competence, and leave to international organs the recognition of the practice for the purposes of identifying customary law and its evolution.

Since such a reduction of immunity for the purposes of protection of rights took place, as far as the Italian legal order is concerned, thanks to the control exercised by ordinary judges in an institutional system characterized by a flexible Constitution (in which the recognition of rights was supported by limited guarantees only), the exercise of the same control in the republican constitutional order (founded on the protection of rights and the consequent limitation of powers, as guaranteed by a rigid Constitution) falls inevitably to this Court."

<sup>27</sup> A. Peters (note 3); R. Kunz (note 3), at 626; see also M. Scheinin, 'The Italian Constitutional Court's Judgment 238 of 2014 Is Not Another Kadi Case' (2016) 14 JICJ 615; C. Tomuschat (note 17), at 189.

<sup>28</sup> H. Krieger & G. Nolte, 'The International Rule of Law – Rise or Decline? – Points of Departure', KFG Working Paper Series, No. 1, Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?", Berlin October 2016; see also K. Alter, 'The Future of International Law' in D. Ayton-Shenker (ed.), *The New Global Agenda*, Lahnham 2018, available at: <https://ssrn.com/abstract=3015177>; D. Bosco, 'We have been here before' (2017) 70 Columbia JIA 9; A.-M. Slaughter, 'The return of anarchy?' (2017) 70 JIA.

support the Russian Constitutional Court which refuses compliance with the judgments of the ECHR. Even if *Sentenza 238* does not claim to argue at the level of international law the Italian Constitutional Court is well aware that declaring the legislation implementing the ICJ decision as unconstitutional challenges the authority of the UN's principal judicial organ. After all, the Court explicitly expresses the hope to contribute to law-reform. In the past, "reasonable resistance by national actors – if it is exercised ... in good faith and with due regard for the overarching ideal of international cooperation – might [have built]... up the political pressure needed for promoting the progressive evolution of international law in the direction of a system more considerate of human rights."<sup>29</sup> As Anne Peters has stressed decisions, such as the *Solange I* decision<sup>30</sup> of the German Constitutional Court or the ECJ's *Kadi* decision have contributed to a progressive development of international law and international institutions. However, today considerable changes in the overall atmosphere of the international order affect what should be considered as good faith. Challenge arising from non-compliance with decisions of the ICJ can be detrimental to the normativity of the international legal order in its current shape. They endanger universality and multilateralism as its most important foundations in favour of particularity and unilateralism. In the long run recurring precedents of national "civil disobedience" might be as dangerous for the normative force of international human rights law as they are at present detrimental for general international law. The symbolism and the precedential effects of such forms of disobedience can probably not be contained to what the Italian Constitutional Court conceives to be legitimate but extends to scenarios, such as the *Yukos Case*. Law-reform beyond formal avenues needs to make sure that its postulations are generalizable and needs to take the risk of misuse serious. In the case of *Sentenza 238/2014* the risk of abuse does not only arise from the precedential effects of non-compliance but also from the implications for the rule on immunities itself.

### **c) Change "desired by many?" – Highly contested exceptions to immunities**

*Sentenza 238* hopes to „contribute to a desirable – and desired by many – evolution of international law itself"<sup>31</sup> by furthering human rights based exceptions to State immunities. It starts from the assumption that the values which it wants to promote and which are based on its reading of the Italian Constitution are shared globally. Such an understanding would be a necessary starting point for any bona fide act of non-compliance with an ICJ decision. However, in the case of human rights based exceptions to immunities a consensus about the desirability of change is far from clear. The ICJ has based its 2012 findings on a thorough analysis of relevant national court decisions and other State practice.<sup>32</sup> In the aftermath of the decision other courts have applied the ICJ judgment.<sup>33</sup> The structurally comparable human rights based exceptions to the immunities of State officials have proved to be highly contested in the UN 6<sup>th</sup> Committee.<sup>34</sup>

<sup>29</sup> A. Peters (note 3).

<sup>30</sup> German Constitutional Court, BVerfGE 37, 271 (1974) – *Solange I*.

<sup>31</sup> Italian Constitutional Court, *Sentenza No. 238/2014* (note 4), para. 3.3.

<sup>32</sup> ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, ICJ Reports 2012, 99, at 127, paras. 65 et seqq.

<sup>33</sup> E.g.: Canada: Supreme Court of Canada, *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, paras. 61, 103-108.

<sup>34</sup> The 2017 debate on draft article 7 para (1) containing human rights based exceptions to State Official immunities can be summarized as follows: 23 States have argued in favour of the general rule included in the article while 21 States disagreed with it. A number of States promoting the rule have expressed their conviction that it constitutes a progressive development of international law.

Even within Italy the findings of the Court are not undisputed. The Italian executive branch seems to be well aware that changes in international law for which the Constitutional Court advocates are likely to entail adverse consequences also for Italy itself.<sup>35</sup> As, for instance, the U.S. State Department has affirmed in the past regarding the claim for a *ius cogens* based immunity exception for State officials in proceedings before national courts: “[t]he recognition of such an exception could prompt reciprocal limitations by foreign jurisdictions exposing U.S. state officials to suit abroad on that basis.”<sup>36</sup> The U.S. worries that by altering their own judicial practice, it will contribute to the creation of a new customary international law rule that would lead to their State officials being subject to similar proceedings all over the world. In particular, in the case of the U.S., there is a not entirely unfounded apprehension that these proceedings may not always be conducted in an impartial manner.<sup>37</sup>

Is this assumption farfetched? If proceedings are carried out against foreign States and their State officials in cases of grave violations of human rights before national courts in the U.S., Switzerland, Canada, Italy and the UK, these States will also have to accept such proceedings against themselves and their State officials before national courts in Algeria, China, Eritrea, Ethiopia, Libya, Iran, Congo, Rwanda or Zimbabwe.<sup>38</sup> In the end, the denial of immunity requires an international community of constitutional States. As long as this requirement is not met democratic constitutional States should perceive the perspective of legal proceedings in the forum State at least as ambivalent from a fundamental rights standpoint of their own nationals and with a view to their own standing. As long as there is no such international community of constitutional States, immunity also serves democratic constitutional States to protect themselves and their State officials from being exposed to court proceedings which do not meet the standard of the rule of law.<sup>39</sup> Hence, the United States District Court clearly stated in the case *Tabion v. Mufti* that the aim of granting immunity was “[to] protect United States [officials] from [...] prosecution in foreign lands [...] [because] not all countries provide the level of due process to which United States citizens have become accustomed [...]”.<sup>40</sup> In light of such conflicts between normative claims and legal reality, immunity seems to be, in the words of Hazel Fox, “[...] a neutral way of denying jurisdiction to States over the internal administration of another State and diverting claims to settlement in the courts of that State, or by diplomatic or other international means to which that State has consented.”<sup>41</sup>

If immunity serves as a plea against the exercise of jurisdiction in a decentralized legal system where competences are divided and is in the words of Fox and Webb “a signal to the forum court

<sup>35</sup> K. Oellers-Frahm (note 15), at 195 et seq.

<sup>36</sup> US Court of Appeals, *Matar and Others v. Dichter*, Brief for the United States of America as Amicus Curiae in Support of Affirmance, (2007) 2nd Cir. Docket No. 07-2579-cv, available at <http://ccrjustice.org/files/Matar%20v%20Dichter,%20US%20for%20Defendants%20Amicus%20Brief%2012.19.07.pdf> (last visited 16 February 2018), 4; see also J. B. Bellinger, ‘The Dog that Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Adviser to Official Acts Immunities’ (2011) 44 VJTL 819, 834.

<sup>37</sup> H. Krieger (note 6), at 193 et seq.

<sup>38</sup> H. Krieger (note 6), at 213 et seq.

<sup>39</sup> H. Krieger (note 6), at 214.

<sup>40</sup> U.S. District Court, *Tabion v. Mufti*, (E.D. Va. 1995) 877 F. Supp. 285, 293.

<sup>41</sup> H. Fox, ‘In Defence of State Immunity, Why the UN Convention on State Immunity is Important’ (2006) 55 ICLQ 399, at 405.

that jurisdiction belongs to another court or method of adjudication”<sup>42</sup> the question arises whether any consequences need to be attached to the fact that claims for reparation by Italian citizens are rejected by German courts. After all, a justification for granting immunity can be seen in the fact that generally immunities do not lead to the loss of a claim or that an offender remains criminally responsible. As a rule, there are alternative legal paths or international mechanism available that correspond to each kind of immunity.<sup>43</sup>

Thus, the Constitutional Court in *Sentenza 238* has been interpreted as mandating “that the customary rule of foreign state immunity is not incorporated into the Italian legal system, insofar as that rule applies to international crimes for which there is no effective means of redress available to the victims other than a suit in the forum state.”<sup>44</sup> However, the right to access to court, at least under the European Convention on Human Rights, is not per se infringed if a case is decided on the merits. Cases brought before German courts were considered to be unfounded because either the specific regime of State responsibility under German law was not applicable to military activities in armed conflict or because there is no individual right to compensation for violations of international humanitarian law.<sup>45</sup> While this approach may appear to be unjust, it conforms to the prevailing view in international humanitarian law and corresponds mutatis mutandis to approaches in other States under the rule of law.<sup>46</sup> It can therefore not be considered as an arbitrary jurisprudence.

#### **d) Creating false promises - Human rights exceptions to immunities from execution?**

Has the situation of Italian claimants now at least been improved by *Sentenza 238* and the ensuing decisions of Italian civil courts? To reach this aim yet another step in law-reform would be required by extending human rights exceptions to immunities from execution. In *Sentenza 238* the Constitutional Court did explicitly not deal with immunity from measures of constraint.<sup>47</sup> Thus, under Italian Constitutional Law it is not yet clear whether immunities from execution are compatible with the right to access to court where serious violations of human rights are at stake. Accordingly, in the situation at hand policy reasons push for further human rights exceptions to immunities from execution:

Court decisions rendered in the wake of the Supreme Court’s jurisprudence create an expectation on the side of the applicants that they will indeed receive a monetary compensation. In Italy, most German State assets are protected by immunities because they serve government non-commercial purpose, while enforcement in Germany will be unsuccessful because judgments, which are based

<sup>42</sup> H. Fox & P. Webb, *The Law of State Immunity*, 3rd ed., Oxford 2013, at 27.

<sup>43</sup> H. Krieger (note 6), at 204.

<sup>44</sup> R. Pavoni, ‘How Broad is the Principle Upheld by the Italian Constitutional Court in Judgment No. 238?’ (2016) 14 JICJ 573, at 574; see for a comparable argument M. Frulli, ‘Time Will Tell Who Just Fell and Who’s Been Left Behind’ On the Clash between the International Court of Justice and the Italian Constitutional Court’ (2016) 14 JICJ 587.

<sup>45</sup> Cf. German Constitutional Court, Judgement of the 1. Chamber of the Second Senate of 28 June 2004 - 2 BvR 1379/01, Rn. 38,39, available at [http://www.bverfg.de/e/rk20040628\\_2bvr137901.html](http://www.bverfg.de/e/rk20040628_2bvr137901.html) (last visited 16 February 2018); see also, German Federal Supreme Court, Judgement of 26 June 2003 - III ZR 245/98 - Distomo, BGHZ 155, 279 at 293 et seq.; for the period before 1949 and for the current legal situation see German Federal Supreme Court, Judgment of 6 October 2016 - III ZR 140/15, BGHZ 212, 173.

<sup>46</sup> See H. Krieger, ‘Addressing the Accountability Gap in Peacekeeping: Law-making by Domestic Courts as a Way to Avoid UN Reform?’ (2015) 62 NILR 259.

<sup>47</sup> Italian Constitutional Court, *Sentenza No. 238/2014* (note 4), para.1; cf. K. Oellers-Frahm (note 15), at 194.

on a violation of German jurisdictional immunities, suffer from a serious procedural defect so that they cannot serve as a basis for measures of constraint.<sup>48</sup> Therefore, it is not farfetched to assume that the case at hand will put additional pressure on the distinction between (pre-judgment) immunity from jurisdiction and (post-judgment) immunity from execution. It is not unconceivable that if immunity from jurisdiction was to be considered unconstitutional because of an infringement of the right to access to court, immunity from execution will likewise be affected.<sup>49</sup>

Such additional pressure is also buttressed by a broad expectation of consistency as an element of the rule of law concept. Expectations of consistency create an extra argumentative burden for justifying that human rights exceptions should not apply to immunities from execution. A lack of consistency is the major policy argument in favour of any kind of additional restriction of enforcement immunity because “a denial of justice on the enforcement level would render the adjudicatory jurisdiction, granted under any restrictive immunity concept meaningless.”<sup>50</sup>

Accordingly, based on its jurisprudence that human rights should be effective and not illusory the European Court of Human Rights held that the right of access to Court according to Art. 6 ECHR does not only concern the pre-judgment phase but also the post-judgment phase of execution. The right based on Art. 6 ECHR would “... be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party.”<sup>51</sup> Accordingly, a consequentialist argument has been raised by two Judges of the European Court of Human Rights in a concurring opinion in the *Al-Adsani* Case according to which restrictions on immunity for violations of the right to access to court „would thus have required a possibility of having judgments – probably often default judgments – ... executed against respondent States. This in turn would raise the question whether the traditionally strong immunity of public property from execution would also have had to be regarded as incompatible with Article 6.”<sup>52</sup>

However, the judges who were raising this argument actually used it as a counterargument against restricting pre-judgment immunity. They warned against the unintended consequences that result from expectations of consistency which blur more complex reasons for differentiation. Thus, the confirmation of the ICJ in the *Jurisdictional Immunities* case that immunity from suit and immunity from execution are distinct<sup>53</sup> is still widely shared.<sup>54</sup> Under customary international law States enjoy immunity from execution in relation to property which is used for government non-commercial purposes (see also Art. 19 of the Convention on Jurisdictional Immunities of States and their Property). Since immunity from execution is applied separately from immunity from jurisdiction reasons excluding to invoke immunity from jurisdiction are not directly applicable to immunity from execution.<sup>55</sup>

<sup>48</sup> C. Tomuschat (note 16), at 193.

<sup>49</sup> Cf. H. Fox & P. Webb (note 42), at 514.

<sup>50</sup> Cf. A. Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures* (2006) 17 EJIL 803, at 809.

<sup>51</sup> ECHR, *Hornsby v. Greece*, Appl. No. 18357/91, Judgment of 19 March 1997, para. 40.

<sup>52</sup> ECHR, *Al-Adsani v. the United Kingdom*, Appl. No. 35763/97, Judgment of 21 November 2001, Concurring opinion of Judge Pellonpää joined by Judge Sir Nicolas Bratza.

<sup>53</sup> ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, ICJ Reports 2012, 99, at 146 para. 113

<sup>54</sup> H. Fox & P. Webb (note 42), at 490.

<sup>55</sup> ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, ICJ Reports 2012, 99, at 146 para. 113.

Such a differentiation is justified because measures of constraint against property used for government non-commercial purposes intrude even further into sovereign rights than the institution of proceedings before courts in the forum State.<sup>56</sup> It is particularly difficult for States to protect assets and other property situated in a foreign State. These assets may therefore be susceptible to abusive enforcement measures while at the same time they form an essential basis for the actual conduct of international relations. The rationale of strong protection for property designed for government non-commercial purposes has clearly been expressed in the presidential waiver issued by President Clinton in relation to the Foreign Sovereign Immunities Act which allows United States victims of terrorism to attach and execute judgments against a foreign State's diplomatic or consular properties:<sup>57</sup>

“If this section [of the Act] were to result in attachment and execution against foreign embassy properties, it would encroach on my authority under the Constitution to ‘receive Ambassadors and other public Ministers’. Moreover, if applied to foreign diplomatic or consular property, section 177 would place the United States in breach of its international treaty obligations. It would put at risk the protection we enjoy at every embassy and consulate throughout the world by eroding the principle that diplomatic property must be protected regardless of bilateral relations .... In addition, section 177 could seriously affect our ability to enter into global claims settlements that are fair to all United States claimants and could result in United States taxpayer liability in the event of a contrary claims tribunal judgment.”<sup>58</sup>

### **3. Generalizable standards - Towards an obligation to provide for individual reparation in cases of mass atrocities?**

The presidential waiver emphasizes the need to negotiate global claims settlements as an alternative form of compensation to individual reparation granted by national courts in the U.S. thus stressing the need for political leeway in such cases. Are there good reasons for retaining such a leeway? Or should there be an obligation incumbent upon States to provide for individual monetary compensation in cases of mass atrocities as a matter of a general rule of international law?

While international law still does not provide for a general right to compensation in cases of violations of international humanitarian law, there are increasing efforts on the international as well as on the national level to change the existing law. Such a call for an obligation to grant individual monetary compensation is owed to changing perceptions in public opinion on the position of the individual in armed conflicts and the concerted NGO efforts to bring pertinent cases before national courts.<sup>59</sup> Indications for a change in the overall perception might, inter alia, be seen in the “Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International

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<sup>56</sup> A. Reinisch (note 50), at 804.

<sup>57</sup> See § 117 of the Treasury and General Government Appropriations Act of 1999, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

<sup>58</sup> Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, 34 Weekly Comp. Pres. Doc. 2108, 2133 (October 23, 1998), quoted in (1999) 93 AJIL 161, at 185 et seq.

<sup>59</sup> Part E of the paper is based on: H. Krieger (note 46).

Humanitarian Law”<sup>60</sup> although these principles would still not create a subjective right under international law on which an individual could rely before a domestic court.<sup>61</sup>

Even the German Constitutional Court seems to have left the door open for future judicial review of activities of the German armed forces abroad in the 2013 Varvarin decision. Although it did not have to decide the question whether the ordinary law of State liability covers damages caused by war,<sup>62</sup> it made clear that courts are competent and capable to judicially control the decision to qualify an object as a military object according to international humanitarian law.<sup>63</sup> It thus stressed its competence to deal with violations of international humanitarian law as a matter of human rights adjudication. Thus, while the German Federal Court of Justice in its 2016 judgment clinged to the traditional interpretation that neither the specific regime of State responsibility under German law is applicable to military activities in armed conflict nor that there is an individual right to compensation for violations of international humanitarian law,<sup>64</sup> the Constitutional Court might take a different stance.

But it is not only the increasing focus on the individual in international law and international relations which fosters such a change in the conceptualization of how to treat individuals during and in the aftermath of an armed conflict. The perception that the individual should be compensated as a matter of law is also owed to the predominant nature of armed conflicts during the last 20 years. Military interventions by NATO States or under the umbrella of the United Nations were often not understood as being conducted against a whole State and its population but against non-state actors or “rogue” governments. Accordingly, the post-conflict order needed to distinguish more clearly between different groups and individuals within a State.<sup>65</sup> This supported the idea that the affected population should be redressed for any harm incurred during the armed conflict or at least during the phase of post-conflict reconstruction. However, the issue of individual reparations in cases of mass atrocities should be treated cautiously. Military interventions with an aim to stabilize a State and even to protect human rights might in the nearer future fade into the background while more traditional forms of armed conflict might re-emerge, such as in Ukraine and Syria.

In this context it is important to note that in the current debates in the ILC on crimes against humanity a general rule that in cases of mass atrocities an individual right to reparation exists or should exist under international law is apparently treated cautiously. The Special Rapporteur emphasises in his third report of 2017 that “there appears to be recognition ... that establishing an individual right to reparation for each victim may be problematic in the context of a mass atrocity.<sup>66</sup> ...While reparation specific to each of the victims may be warranted, such as through the use of regular civil claims processes in national courts or through a specially designed process of mass claims compensation, in some situations only collective forms of reparation may be feasible

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<sup>60</sup> UN Doc. A/Res/60/147, 16 December 2005.

<sup>61</sup> P. Stöckle, ‘Victims Caught between a Rock and a Hard Place: Individual Compensation Claims against Troop-Contributing States’ (2013) 88 *Die Friedens-Warte* 119, at 128.

<sup>62</sup> German Constitutional Court, Order of Non-Acceptance of 13 August 2013, No. 2 BvR 2660/06, 2 BvR 487/07, para. 52.

<sup>63</sup> German Constitutional Court, Order of Non-Acceptance of 13 August 2013, No. 2 BvR 2660/06, 2 BvR 487/07, para. 55.

<sup>64</sup> German Federal Supreme Court, Judgment of 6 October 2016 – III ZR 140/15, BGHZ 212, 173.

<sup>65</sup> G. Blum, ‘The Fog of Victory’ (2013) 24 *EJIL* 391, at 393.

<sup>66</sup> S. Murphy, Third Report on crimes against humanity, UN Doc. A/CN.4/704, 23 January 2017, para. 191.

or preferable, such as the building of monuments of remembrance or the reconstruction of schools, hospitals, clinics and places of worship.”<sup>67</sup>

This more cautious approach takes into account the complexities of ending armed conflicts and negotiating peace deals. An individual right to monetary compensation based on civil claim processes in cases of mass atrocities does not allow for taking into account broader political considerations related to establishing a stable post-war order. Such a right is conducive to bilateral settlements between the State parties concerned which might create new injustice towards other groups of victims. It might also overburden negotiations for a settlement of an on-going armed conflict. Take the Syrian example: Already the individual criminal responsibility of Assad contributes to obstructing peace talks. Likewise, ex post claims for monetary compensation before civil courts in the aftermath of a comprehensive peace agreement entail the concrete risk that parties to a conflict will be even more reluctant to reach agreement if they cannot rely on the stability of such an agreement.<sup>68</sup> Armed conflicts and conditions for ending them differ considerably. The specificities of these situations speak against any generalization with a view of changing existing international law. Those responsible for concluding peace agreements which allow for reconciliation should have a broad political discretion in reaching this aim. While individual claims for monetary compensation might be part of such a process, such as in Colombia,<sup>69</sup> it seems wise to me to give room for the possibility that only collective and symbolic forms of reparation will be foreseen.

#### **4. Concluding Remarks**

Thus, instead of furthering the law’s legitimacy decisions, such as *Sentenza 238/2014* may erode international law’s legitimacy. To point out to such adverse consequences is not sustained by a “realistic” view that fosters State sovereignty for the protection of national interests. To my mind, we should not lose out of sight that the stability of the international legal order itself as guaranteed by concepts such as immunities and that the respect for its juridical organs serves to protect human rights albeit in an indirect manner. It might thus be wiser to accept that not every injustice can be addressed by law, that law cannot always provide a satisfying solution but that such a solution should sometimes better be looked for and confined to the political stage. In line with the passage of the ICJ judgment<sup>70</sup> a solution sustainable for both side could be seen in negotiations at the political stage.

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<sup>67</sup> S. Murphy (note 66), para. 194.

<sup>68</sup> C. Tomuschat (note 16), at 191.

<sup>69</sup> Colombia, Ley de Víctimas y Restitución de Tierras, Law 1448, Diario Oficial No. 48.096, ratified 10 June 2011.

<sup>70</sup> ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, ICJ Reports 2012, 99, at 144 para. 104; see on preferable ways to deal with injustices that have arisen: F. Francioni, ‘Access to Justice and Its Pitfalls: Reparation for War Crimes and the Italian Constitutional Court’ (2016) 14 JICJ 629.



**Part II: Would the world be a better place if one were to adopt a ‘European’ approach to State immunity? or: ‚Soll am europäischen Wesen die Staatenimmunität genesen?’**

**- Is there a specific European law perspective after Sentenza 238/2014 ... or ought there to be one anyhow? –**

Andreas Zimmermann<sup>71</sup>

**1. Introduction**

This contribution addresses a somewhat colorful bundle of questions. All of those questions, however, one way or the other, relate to the overarching theme as to whether there exist *de lege lata*, or whether there at least ought to exist *de lege ferenda*, specific European perspectives when it comes to the law of State immunity in situations where serious violations of international law have been committed, or where, more realistically in current circumstances, such violations are being alleged by the claimant. To come straight to the point, the blunt answer to this question is, in the author’s opinion, a twofold clear and simple ‘no’: there is no European *Sonderweg*, or ‘special way’, when it comes to the law of State immunity, and there ought not to be such a European *Sonderweg* either.

Rather, member States of the European Union, as well as the contracting parties of the European Convention on Human Rights more broadly, should continue to abide by universally recognized principles of State immunity, as having been confirmed by the International Court of Justice in its 2012 judgment on the matter.<sup>72</sup> Accordingly, relevant treaty norms, including the European Convention on Human Rights,<sup>73</sup> as well as applicable secondary legislation of the European Union,<sup>74</sup> should (continue to) be interpreted and applied in line with currently applicable norms of customary and treaty law on the matter.

Having thus set the scene for the approach adopted in this contribution, the following sections will delve into more specific issues surrounding the topic. First, a somewhat technical aspect will be addressed, namely the enforcement, in individual European States, of domestic judgments rendered contrary to traditional concepts of State immunity (2.). In particular, the debate within the Hague Conference on Private International Law in the late 1990s will be summarized since it was also of relevance for both the debate on the 2004 United Nations Convention on Jurisdictional

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<sup>72</sup> ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, ICJ Reports 2012, 99, paras. 56 et seq.

<sup>73</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Council of Europe, 4 November 1950, 213 UNTS 221.

<sup>74</sup> I.e. Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, Official Journal of the European Union, Vol. 47, L 143, entered into force 21 January 2005; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, Official Journal of the European Union, Vol. 49, L 399, entered into force 31 December 2006; Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Official Journal of the European Union, Vol. 55, L 351, entered into force 10 January 2015, for details on the latter see *infra*, part 2.2.

Immunities of States<sup>75</sup> and the development of the Brussels regulation. Second, the possible development of specific rules of *regional* customary law on the matter will be discussed (3.). Third, the legal implications of the jurisprudence of the Italian Constitutional Court for European military operations, in particular for military operations under the auspices of the European Union, will be analyzed (4.). The contribution will conclude with some remarks as to possible “European perspectives” beyond Sentenza 238 (5.).

## 2. Enforcing foreign judgments not having respected State immunity

### a) Hague Conference on private international law

It was in 1996 that the Hague Conference on Private International Law, with an important input from European States, as well as from the European Union, had decided to “include in the agenda of the 19<sup>th</sup> Session the question of (...) recognition and enforcement of foreign judgments in civil and commercial matters”.<sup>76</sup> This led to the creation of a Special Commission to come up with a first draft of such a convention. The Special Commission’s 1999 draft had included a draft Art. 18 para. 3 which, if adopted, would have provided, as one option, for the possibility of exercising universal jurisdiction in civil matters in respect of conduct which constitutes genocide, a crime against humanity or a war crime, another form of a serious crime against a natural person under international law, respectively a *jus cogens* violation.<sup>77</sup> It is worth recalling that the draft provision had also provided that, at least as far as the two latter categories of violations of international law are concerned (*i.e.* serious crimes under international law and *jus cogens* violations other than genocide, war crimes and crimes against humanity) the envisaged broad acceptance of jurisdiction would only apply “(...) if the party seeking relief is exposed to a risk of a denial of justice because proceedings in another State are not possible or cannot reasonably be required”.<sup>78</sup>

This draft provision thus foreshadowed the last resort-argument later made by Italy during the ICJ proceedings brought by Germany for alleged violations of Germany’s State immunity.<sup>79</sup> It ought to be noted, however, that, as the underlying Nygh/Pocar explanatory report had then made clear,<sup>80</sup> this provision was only meant to govern jurisdictional issues, while State immunity was not meant to be limited by the envisaged treaty. This was confirmed by its draft Art. 1 para. 4, which in broad

<sup>75</sup> United Nations Convention on Jurisdictional Immunities of States and their Property, 2 December 2004, UN Doc. A/RES/59/38, available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=III-13&chapter=3&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en) (last visited: 27 February 2018).

<sup>76</sup> See C. Kessedjian, ‘International jurisdiction and foreign judgments in civil and commercial matters’, Preliminary Document No 7 (April 1997), para. 26, available at: <https://assets.hcch.net/docs/76852ce3-a967-42e4-94f5-24be4289d1e5.pdf> (last visited: 27 February 2018).

<sup>77</sup> Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, 30 October 1999, text to be found in the Report by Peter Nygh and Fausto Pocar concerning the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission, Preliminary Document No 11, August 2000, p. 10, available at: <https://assets.hcch.net/docs/638883f3-0c0a-46c6-b646-7a099d9bd95e.pdf> (last visited: 27 February 2017).

<sup>78</sup> Ibid.

<sup>79</sup> ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, ICJ Reports 2012, 99, paras. 98 et seq.

<sup>80</sup> See Report by Peter Nygh and Fausto Pocar concerning the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (note 77).

terms had provided that “(...) [n]othing in this Convention affects the privileges and immunities of sovereign States or of entities of sovereign States, or of international organizations”.<sup>81</sup>

It ought to be also noted that the International Law Commission was, during the very same period, also working on a draft convention on jurisdictional immunities of States<sup>82</sup>, which, as is well-known, later led to the adoption of the United Nations Convention on the matter.<sup>83</sup> The ILC’s draft convention did *neither* include any reference to a possible limitation on State immunity in case of serious violations of international law.<sup>84</sup>

Notwithstanding this development within the ILC, the further 2001 draft Hague convention, as submitted to and discussed by the Hague diplomatic conference, had retained, *mutatis mutandis*, identical language to the same effect as the 1999 draft by the then Special Commission. Put otherwise, it had retained the concept of State immunity even when it comes to instances of genocide, war crimes, as well as other violations of *jus cogens*.

What is brought out by this development is that even the possible acceptance of the exercise of universal jurisdiction in matters such as genocide, crimes against humanity, or war crimes, in the envisaged future convention on the recognition and enforcement of foreign judgments, would not have been meant to curtail traditional concepts of State immunity, even when it comes to serious violations of international law. What is more, however, as is evident from the fate of the draft, is that even on those issues no consensus could be reached, which led, in 2005, to the adoption of a mere convention on choice of court agreements.<sup>85</sup>

## **b) Brussels Ia Regulation**

Turning now to developments within the framework of the European Union more specifically, as is well known, the Brussels regulation was amended in 2015. Commonly referred to as the Brussels Ia Regulation, it built on the Brussels and Lugano conventions<sup>86</sup>, as well as earlier versions of the Brussels regulation itself.<sup>87</sup> It significantly facilitates the enforcement of judgments on civil and

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<sup>81</sup> Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Hague Conference on Private International Law, adopted by the Special Commission on 30 October 1999; text to be found in S. Rinke, *Schadensersatzklagen gegen Staaten wegen schwerer Menschenrechtsverletzungen im Europäischen Zivilprozessrecht*, Berlin 2016, 128, or in the Report by Peter Nygh and Fausto Pocar concerning the Preliminary draft convention on jurisdiction and foreign judgments in civil and commercial matters (note 77).

<sup>82</sup> Yearbook of the International Law Commission II, Part 2 (1999), chap. VII, 127 et seq.

<sup>83</sup> UN Convention on Jurisdictional Immunities of States and their Property, 2004 (note 75).

<sup>84</sup> See S. Rinke (note 81), 128 et seq.; see also G. Hafner, ‘Das Übereinkommen der Vereinten Nationen über die Immunität der Staaten und ihres Vermögens von der Gerichtsbarkeit’ (2006) 61 ZÖR 381, 394.

<sup>85</sup> Convention on Choice of Court Agreements, The Hague Conference on Private International Law, 30 June 2005, available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> (last visited: 27 February 2018).

<sup>86</sup> Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968, Official Journal of the European Communities L 299, 31 December 1972; Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 16 September 1988, Official Journal of the European Communities, Vol. 31, L 319, 25 November 1988.

<sup>87</sup> Council (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 22 December 2000, Official Journal of the European Communities, Vol. 44, L 12, 16 January 2001.

commercial matters rendered in another member State of the European Union by providing for a quasi-automatic system of enforcement of such judgments.<sup>88</sup>

This raises the question whether under the Brussels regulation a judgment by a domestic court of one member State of the European Union, denying State immunity when it comes to alleged violations of *jus cogens* committed by armed forces of another State, is enforceable in other member States of the European Union. *If* that were the case, this would clearly be indicative of an acceptance, by the European Union, of a special regime of a more limited State immunity.

Before entering into details, it should be noted that preambular paragraph 38 of the said regulation confirms that in view of its drafters it “respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular the right to an effective remedy and to a fair trial guaranteed in Article 47 of the Charter.” After having thus confirmed that the regulation stands in line with the right to an effective remedy, the regulation, as amended in 2015, now *expressis verbis* settles that it “shall not extend, in particular, to (...) the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)”<sup>89</sup>.

The amended version, therefore, now also *expressis verbis* reiterates what the European Court of Justice had already decided in 2007 under the then applicable older version of the Brussels regulation in the Kalavryta case brought by Ms Lechouritou versus Germany involving a claim for damages related to a massacre committed by the German army in 1943 against Greek civilians.<sup>90</sup> The European Court of Justice had then decided that such claims do *not* amount to civil and commercial claims within the meaning of the Brussels system providing for the intra-Union enforcement of judgments.

What is, however, brought out by the interplay between the preamble of the amended regulation and the exclusion from its scope of *acta jure imperii*, such as acts of armed forces, in particular when they take place within the framework of armed conflicts,<sup>91</sup> is that the Brussels regulation, as amended, wanted to ‘safeguard’ traditional rules of State immunity.

What is more is that the drafters of the amended regulation were obviously aware of the then recent judgment of the ICJ in the Germany versus Italy jurisdictional immunities case. They were also aware of the prior unsuccessful attempts to use the Brussels regulation to enforce Greek court decisions in Italy,<sup>92</sup> which had set aside Germany’s State immunity in cases involving war crimes, but which could not be enforced in Greece itself for lack of consent by the Greek Minister of Justice.<sup>93</sup> Accordingly, the amendment of the Brussels regulation in 2015, when read in conjunction with the above-mentioned preamble to the regulation, must be seen as evidence of the conviction

<sup>88</sup> As to details see, inter alia, preambular para. 2, Arts. 36 para. 1, 39, and 40 of Regulation (EU) No 1215/2012 (note 74).

<sup>89</sup> Article 1 of Regulation (EU) No 1215/2012 (note 74).

<sup>90</sup> CJEU, Lechouritou and Others, Judgment of 15 February 2007, C-292/05, EU:C:2007:102.

<sup>91</sup> During the ICJ proceedings leading to the 2012 judgment neither of the two parties argued for such acts not to amount to *acta jure imperii*, see ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, ICJ Reports 2012, 99, paras. 60 et seq.

<sup>92</sup> Cf. ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, ICJ Reports 2012, 99, paras. 33 et seq.

<sup>93</sup> Enforcement against a foreign State requires the consent of the Minister of Justice under Article 923 of the Greek Code of Civil Procedure, which was not granted.

of the member States of the European Union that the traditional rules of State immunity, including when it comes to violations of *jus cogens*, are indeed compatible with the international and European rule of law.

### 3. Regional European customary law on State immunity?

Obviously, international law, ever since the judgment of the International Court of Justice in the *Asylum* case, recognizes, be it only as a matter of principle, the concept, notion and possibility of regional customary law.<sup>94</sup> Yet, as the Court then stated, the existence of any such rule presupposes that “(...) [t]he Party which relies on a custom of this kind must prove (...) that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question”, which statement, the Court confirmed, “(...) follow[ed] from Article 38 of the Statute of the Court, which refers to international custom ‘as evidence of a general practice accepted as law’.”<sup>95</sup>

Accordingly, in the case at hand, in order to argue in favor of a rule of regional customary law limiting State immunity when it comes to *jus cogens* violations, one would have to show coherent and consistent State practice, by European States, confirming the existence of such a rule (or the emergence thereof). Yet, even if one were to limit oneself to the practice of the member States of the European Union (which in itself would be problematic), there are only singular cases where no State immunity has been granted even where the underlying issues related to serious violations of either international humanitarian law or human rights law. As a matter of fact, even in the case of Italy, the Italian government continues to take the position that Germany at least enjoys immunity when it comes to the execution of the underlying judgments,<sup>96</sup> while the judgment of the Italian Constitutional Court<sup>97</sup> did not base its decision on international law, but rather exclusively on domestic Italian law.<sup>98</sup>

What is more is that the 2012 judgment of the ICJ, in turn, had made frequent reference specifically to decisions of European Courts, including judgments by Polish,<sup>99</sup> Slovenian,<sup>100</sup> Belgian<sup>101</sup> and Serbian courts,<sup>102</sup> and on that basis had upheld Germany’s State immunity even in the face of serious violations of the laws and customs of war.<sup>103</sup> Hence, at most, there is practice by two European States only, namely Italy itself, and possibly Greece (even if the Greek government did not grant the necessary permission to enforce a judgment of Greek courts against Germany, which

<sup>94</sup> ICJ, *Asylum Case (Colombia v. Peru)*, Judgment of 20 November 1950, ICJ Reports 1950, 266, at 276 et seq.

<sup>95</sup> *Ibid.*

<sup>96</sup> ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, ICJ Reports 2012, 99, para. 112. Cf. also K. Oellers-Frahm (note 15), 195 et seq.

<sup>97</sup> Italian Constitutional Court, *Sentenza No. 238/2014* (note 4).

<sup>98</sup> *Ibid.*, *Conclusions in Point of Law*, para. 3. For details on the approach taken by the Constitutional Court see e.g. R. Kunz (note 3), 623 et seq.

<sup>99</sup> Supreme Court of Poland, *Natoniewski v. Federal Republic of Germany*, Judgment of 29 October 2010, Polish Yearbook of International Law, Vol. XXX, 2010, 299.

<sup>100</sup> Constitutional Court of Slovenia, *Decision of 8 March 2001, Case No Up- 13/99*, Constitutional Court, para. 13.

<sup>101</sup> Court of First Instance of Ghent, *Botelberghe v. German State*, Judgment of 18 February 2000.

<sup>102</sup> Court of First Instance of Leskovac, *Judgment of 1 November 2001*.

<sup>103</sup> ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, ICJ Reports 2012, 99, cites: ECHR, *McElhinney v. Ireland [GC]*, Application No 31253/96, Judgment of 21 November 2001, ECHR Reports 2001 XI, 39; ECHR, *Grosz v. France*, Application No 14717/06, Decision of 16 June 2009; and ECHR, *Kalogeropoulou and Others v. Greece and Germany*, Application No 59021/00, Decision of 12 December 2002, ECHR Reports 2002 X, 417. See also the ICJ’s conclusion in para. 78.

then led to an attempt to have the said judgment be enforced in Italy) denying State immunity in cases of *jus cogens* violations. Even in those instances, this practice is, however, limited to the practice of national courts, rather than that of either the executive or the legislative branch, which in and of itself raises fundamental questions as to the notion and concept of State practice within the meaning of Art. 38 ICJ Statute.<sup>104</sup>

Furthermore, four European States, namely Finland, Sweden, Norway, but also Italy itself, have made it clear, when ratifying the 2004 United Nations Convention on State Immunity, that in their respective understanding the foreign tort exception to State immunity under the Convention does *not* apply when it comes to activities of armed forces during an armed conflict, and indeed even beyond as far as any form of “activities undertaken by military forces of a State in the exercise of their official duties” are concerned.<sup>105</sup> Besides, one might also recall the well-known Art. 31 of the *European Convention on the matter*<sup>106</sup> which even *expressis verbis* contains the very same idea.<sup>107</sup> Finally, the regional European human rights institution, *i.e.* the European Court of Human Rights, has also, time and again, upheld a broad concept of State immunity. As a matter of fact, it did so even in the face of *jus cogens* violations such as torture.<sup>108</sup>

Put otherwise, one might even be tempted to say that if there is one region in the World where the traditional concept of State immunity has been upheld the most, it is Europe. Even if one were to, however, take a different position, be it only *arguendo*, namely that there indeed was a European tendency to restrict State immunity when it comes to violations of international humanitarian law or human rights law, the necessary requirements for the creation of a new, more limited rule of customary international law on the matter within a short period of time within the parameters of the ICJ’s North Sea Continental Shelf case<sup>109</sup> are clearly *not* fulfilled. Indeed, they are not fulfilled not only for lack of a virtually uniform practice, but also for lack of participation in such practice of

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<sup>104</sup> Implications of inconsistent practice of States of the identification of customary international law are also addressed in Draft Conclusion 7 and the accompanying commentary adopted by the ILC in its sixty-eighth session in the framework of its on-going project on the “Identification of customary international law”, cf. Report of the International Law Commission, Sixty-eighth session (2 May-10 June and 4 July-12 August 2016), General Assembly Official Records, Seventy-first session Supplement No. 10 (A/71/10), 92 et seq.

<sup>105</sup> Cf. UN Convention on Jurisdictional Immunities of States and their Property, 2004 (note 75), Declarations and Reservations available at: <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20III/III-13.en.pdf> (last visited: 28 February 2018).

<sup>106</sup> Article 31 of the European Convention on State Immunity, ETS No 074, 16 May 1972, reads:

“Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State.”

<sup>107</sup> It should also be mentioned that, as noted by the ICJ in its 2012 judgment that courts in Belgium (Court of First Instance of Ghent, *Botelberghe v. German State*, Judgment of 18 February 2000), Ireland (Supreme Court in *McElhinney v. Williams*, Judgment of 15 December 1995, 3 Irish Reports 382), Slovenia (Constitutional Court, Case No Up-13/99, para. 13), Greece (*Margellos v. Federal Republic of Germany*, Case No 6/2002, ILR, Vol. 129, p. 529) and Poland (Supreme Court of Poland, *Natoniewski v. Federal Republic of Germany*, Polish Yearbook of International Law, Vol. XXX, 2010, p. 299) all held that that the immunity of a State for torts committed by its armed forces is unaffected by Article 11 of the Convention by virtue of its Article 31, cf. ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, ICJ Reports 2012, 99, at para. 68.

<sup>108</sup> ECHR, *Jones and Others v. the United Kingdom*, Judgment of 14 January 2014, Applications No 34356/06 and No 40528/06, para. 93.

<sup>109</sup> ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, ICJ Reports 1969, 3, at para. 74.

those States most concerned by the matter, which in the case at hand, certainly not the least, would also have to include Germany.

Given this situation, it seems to be hardly imaginable that in the foreseeable future a specific “European” customary law norm on State immunity could develop. Rather, it seems that the European Union and its member States, as well as other member States of the Council of Europe, such as Norway, Turkey or the Russian Federation, continue to rely on a broad concept of State immunity. This is also brought out, *inter alia*, by the recent demarches of the European Union against the so-called United States ‘Justice Against Sponsors of Terrorism Act’ (JASTA)<sup>110</sup>, that, by way of amending the US Foreign Sovereign Immunities Act, significantly narrows the scope of foreign sovereign immunity under domestic US law – and it does so in violation of international law.<sup>111</sup>

As a matter of fact, out of the 14 European States having so far ratified the 2004 UN Convention on State Immunity,<sup>112</sup> only one State, namely Switzerland, has formally taken the position that the said treaty is without prejudice to developments in international law as to pecuniary compensation for human rights violations,<sup>113</sup> while Italy, when ratifying the Convention, more generally, merely referred to the necessity to interpret the treaty in line with human rights law.<sup>114</sup> This acceptance, by the vast majority of ratifying European States, of the 2004 Convention, which does not contain a *jus cogens* or some other form of human rights exception, once again confirms the general European perspective on the matter, as outlined above. It is even more telling that six of those ratifying European States have done so *after* the ICJ judgment in the Jurisdictional Immunities case between Germany versus Italy had been rendered<sup>115</sup> – and they did so without entering any reservation or formal declaration as to the ‘conservative’ interpretation of the current status of the rules of State immunity by the ICJ.

#### **4. Possible legal implications of the jurisprudence of the Italian Constitutional Court for European military operations**

Turning to possible legal implications of the jurisprudence of the Italian Constitutional Court for European military operations, *i.e.* in particular for military operations under the auspices of the European Union, it should *first* be noted that it is highly unlikely that European armed forces and

<sup>110</sup> US, Justice Against Sponsors of Terrorism Act, 28 September 2016, Public Law No 114-222, available at: <https://www.gpo.gov/fdsys/pkg/BILLS-114s2040enr/html/BILLS-114s2040enr.htm> (last visited: 27 February 2018).

<sup>111</sup> European Union, Delegation to the United States of America, note to the US Department of State of 9 September 2016. Available at: <http://www.washingtonpost.com/news/powerpost/wp-content/uploads/sites/47/2016/09/EU-on-JASTA.pdf> (last visited: 27 February 2018).

<sup>112</sup> Those are: Austria, Czech Republic, Finland, France, Italy, Latvia, Liechtenstein, Norway, Portugal, Romania, Slovakia, Spain, Sweden, and Switzerland. See UN Convention on Jurisdictional Immunities of States and their Property, 2004 (note 75).

<sup>113</sup> *Ibid.* Upon ratification in date of 16 April 2010, Switzerland declared: “Switzerland considers that article 12 does not govern the question of pecuniary compensation for serious human rights violations which are alleged to be attributable to a State and are committed outside the State of the forum. Consequently, this Convention is without prejudice to developments in international law in this regard”.

<sup>114</sup> *Ibid.* Upon ratification in date of 6 May 2013, Italy declared: “(...) the Italian Republic wishes to underline that Italy understands that the Convention will be interpreted and applied in accordance with the principles of international law and, in particular, with the principles concerning the protection of human rights from serious violations.”

<sup>115</sup> *Ibid.* Those are Czech Republic, Finland, Italy, Latvia, Liechtenstein, and Slovakia.

their members will commit violations of international humanitarian law amounting to violations of *jus cogens* akin to the war crimes that gave rise to the jurisprudence of the Italian courts in the first place. Hence, most probably, the issue of a possible *jus cogens* exception will, hopefully, remain a mere academic issue, when it comes to the realities of current European military operations.

Besides, and that is a somewhat more difficult question to answer, it is *secondly* doubtful whether the result reached by the ICJ in its 2012 judgment confirming State immunity for belligerent acts<sup>116</sup> would also apply to activities of armed forces *not* amounting to the participation in an armed conflict as a belligerent party, but rather, for example, to acts as part of a peacekeeping operation. This would then bring back the issue of the scope and status under customary law of the foreign tort exception. It ought to be, however, again noted that several European States, including Italy, have taken the position that the reverse armed forces exception to the foreign tort exception should be broadly defined including as covering all forms of military activities, even those beyond the scope of armed conflicts.<sup>117</sup>

In any case, any debate as to the issue of the extent of State immunity when it comes to ‘European’ military operations would, obviously, first and foremost and as a preliminary matter, have to tackle the issue of attribution<sup>118</sup>. If ‘European’ military operations, undertaken under the auspices of the European Union, were to be attributed to either the European Union as such, or in the case of an underlying mandate by the UN Security Council to the United Nations<sup>119</sup> in line with the however somewhat problematic jurisprudence of the ECHR in the Behrami/Saramati case,<sup>120</sup> the question of State responsibility would obviously *not* arise. Yet, as the domestic proceedings in the Netherlands concerning the United Nations peacekeeping operation in Bosnia and Herzegovina have confirmed, *mutatis mutandis*, parallel issues as to the immunity of international organizations might nevertheless come to light.<sup>121</sup> It ought to be noted, however, that the ‘Protocol on the Privileges and Immunities of the European Union’, annexed to the Treaty of Nice,<sup>122</sup> does not, as such, provide for a general immunity of the European Union at least when it comes to civil proceedings for damages brought before civil courts of one of the member States of the European Union.

If one were to assume, however, that acts of military operations led by the European Union were to be, at least also, attributable to the troop contributing member States of the European Union, as was *inter alia* the position taken by German Courts concerning military operations off the coast of Somalia within the framework of the operation EUNAVFOR,<sup>123</sup> no specific issues of State immunity

<sup>116</sup> ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, ICJ Reports 2012, 99, at para 139, findings (1) and (3).

<sup>117</sup> Those are Finland, Italy, Norway, and Sweden. See UN Convention on Jurisdictional Immunities of States and their Property, 2004 (note 75).

<sup>118</sup> Cf. A. Sari & R. Wessel, ‘International Responsibility for EU Military Operations: Finding the EU’s Place in the Global Accountability Regime’ in: B. Van Vooren, S. Blockmans & J. Wouters (eds.), *The EU’s Role in Global Governance: The Legal Dimension*, Oxford 2013, 126–141.

<sup>119</sup> Cf. T. Gill, ‘Legal Aspects of the Transfer of Authority in UN Peace Operations’ (2011) 42 NYIL 42 37, at 53 et seq.

<sup>120</sup> ECHR, Behrami and Behrami v. France, 31 May 2007, Application No 71412/01 and ECHR, Saramati v. France, Germany and Norway, 2 May 2007, Application No 78166/01.

<sup>121</sup> ECHR Behrami and Behrami v. France (note 120) and ECHR, Saramati v. France, Germany and Norway, (note 120); Cf. T. Gill (note 119), 39.

<sup>122</sup> Protocol (No 7) on the Privileges and Immunities of the European Union, annexed to the Treaty on European Union (‘Treaty of Nice’), 13 December 2007, Official Journal of the European Union, Vol. 55, C 326/266.

<sup>123</sup> See *inter alia* Higher Administrative Court of Nordrhein-Westfalen, Judgment of 18 September 2014, 4 A 2948/11, DVBl 2015, 375–379, findings (Leitsätze) (1), (2) and (3).



arise. Rather, the respective troop-contributing State would be entitled to enjoy State immunity exactly to the same degree as in any kind of unilateral military operations. It is again interesting to note that Italy, when ratifying the 2004 UN Convention on State Immunity, has expressly reiterated that, in its view, the Convention does not set aside “special immunity regimes, including the ones concerning the status of armed forces and associated personnel following the armed forces”<sup>124</sup> and, it is submitted, this is completely in line with customary law. Accordingly, given that European armed forces would, at least in most cases including those like Afghanistan, where they are involved in actual fighting, act within the framework of a status of forces agreement concluded with the territorial State specifically providing for the immunity of the respective European State, the issue would be moot since any such European State involved in a military operation would then continue to be entitled to full-fledged immunity as a matter of treaty law.

Besides, to the extent that a domestic court of the territorial State, with which a status of forces agreement has been concluded providing for immunity, would have to decide the matter, setting aside such treaty-based immunity would not only require to argue that there is no State immunity in such cases. Rather, it would also have to argue that the alleged customary rule setting aside State immunity in case of alleged war crimes was in and of itself also of a *jus cogens* character. Such argument, while being in line with the general thrust of the judgment of the Italian Constitutional Court,<sup>125</sup> would, however, then necessarily assume another bold step not supported by actual State practice.

In any case, it is worth noting that at least when it comes to European military operations in the strict sense, *i.e.* those undertaken under the auspices of the European Union rather than operations within the framework of NATO involving European States, the respective status of forces agreements concluded by the European Union provide as a matter of routine for an individual right to seize a claims commission, followed by some form of arbitration. For example the “Agreement between the European Union and the Republic of Uganda on the Status of the European Union-led Mission in Uganda”,<sup>126</sup> regulating the legal status of EUTM Somalia in Uganda, while confirming in its Art. 5 para. 3 that EUTM Somalia “shall enjoy immunity from every form of legal process” at the same time provides in its Art. 15 for the set-up of a claims commission, where claims by individuals can be brought, as well as for the creation of an arbitral tribunal, should the claims process arguably fail to adequately address alleged individual damages.

In such a scenario the last resort argument, as submitted by Italy in the ICJ proceedings brought by Germany,<sup>127</sup> and somewhat also reflected in the judgment of the Italian Constitutional Court here under consideration,<sup>128</sup> would be of no relevance anymore, given the alternative to setting aside

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<sup>124</sup> Declaration by the Italian Republic concerning the UN Convention on Jurisdictional Immunities of States and their Property, 2004 (note 75) made upon ratification in date of 6 May 2013, available at: <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20III/iii-3.en.pdf>. (last visited: 27 February 2018).

<sup>125</sup> Italian Constitutional Court, Sentenza No. 238/2014 (note 4).

<sup>126</sup> Agreement between the European Union and the Republic of Uganda on the Status of the European Union-led Mission in Uganda, entered into force 12 August 2010, Official Journal of the European Union, L 221/2. Available at: <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&reDirect=true&treatyId=9781> (last visited: 27 February 2018).

<sup>127</sup> ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, ICJ Reports 2012, 99, at paras. 98–104.

<sup>128</sup> Italian Constitutional Court, Sentenza No. 238/2014 (note 4), Conclusions in Point of Law, para. 3.4.

State immunity. In most situations of deployment of troops under the auspices of the European Union, the issue underlying the judgment of the Italian Constitutional Court is thus somewhat of a mere academic nature.

### 5. Further perspectives after *Sentenza 238*

Obviously, the unfortunate approach chosen by the Italian Constitutional Court of, at least *de facto*, disregarding the international legal obligations of Italy to implement a binding judgment of an international court or tribunal, claiming a violation of domestic constitutional law, is not unique. It suffices to refer to the 2008 judgment of the US Supreme Court in *Medellín v. Texas*<sup>129</sup> (setting aside the effects of the ICJ judgment in *Avena*<sup>130</sup>), or the more recent decision of the Russian Constitutional Court in the *Yukos* case.<sup>131</sup> Just like the German Constitutional Court, which unfortunately had in the past, be it only as a matter of principled approach, *mutatis mutandis* chosen the collision course with the European Court of Justice<sup>132</sup> and later the European Court of Human Rights,<sup>133</sup> the course chosen by the Italian Constitutional Court has, however, not – or rather not yet at least – led to a concrete collision with the principal judicial organ of the United Nations. Such collision would only occur if concrete steps were now to be taken to execute judgments for damages against German State property located in Italy and where Germany were to then start renewed proceedings before the ICJ which could possibly lead to yet another ICJ judgment most probably reconfirming the ICJ's 2012 judgment – yet hopefully such collision can be avoided.

This leads to the almost philosophical question whether the redress awarded by domestic (Italian) courts 'as long as' neither the German nor the international system grant equivalent protection to the victims of serious violations of international humanitarian law committed during World War II is necessary or at least tolerable. For one, this raises the issue whether indeed such individual claims do exist in the first place as a matter of the current international *lex lata*, which, one might say, is doubtful. What is more is that, even if that were the case, such individual claims might have not either been satisfied under previous inter-State agreements, or been subject to some other form of prescription one way or the other.

While these questions would, however, go beyond the scope of this contribution, one has to ask more broadly, whether, at the current stage of international law, and currently prevailing political developments, it truly makes sense to try to take bold steps such as recognizing an individual right to compensation for such violations (and even where such violations have been committed more than 60 years ago) combined with denying the State concerned State immunity. The Pandora Box

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<sup>129</sup> Supreme Court of the United States of America, *Medellín v. Texas*, Judgment of 25 March 2008, No. 06–984, available at: <https://supreme.justia.com/cases/federal/us/552/491/> (last visited: 27 February 2018).

<sup>130</sup> ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, ICJ Reports 2004, 12.

<sup>131</sup> Constitutional Court of the Russian Federation, Judgment of 19 January 2017, No. 1-П/2017. See also on the decision M. Hartwig (note 22), at 1 et seq.

<sup>132</sup> Federal Constitutional Court of Germany, Decision of 22 October 1986 - *Solange II*, BVerfGE 73, 339, English version: (1984) Case 345/82, [1987] 3 CMLR 225; Federal Constitutional Court of Germany, Decision of 12 October 1993 - *Maastricht Judgment*, BVerfGE 89, 155.

<sup>133</sup> Federal Constitutional Court of Germany, Order of 14 October 2004 - *Görgülü*, BVerfGE 111, 307; English translation provided by the Court, available at: [http://www.bverfg.de/entscheidungen/rs20041014\\_2bvr148104en.html](http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html) (last visited; 27 February 2018).

argument, while having been repeated time and again,<sup>134</sup> is obvious: does it really make sense – to provide but one example and there are many more – to e.g. have Georgian courts decide cases against the Russian Federation for alleged violations of international humanitarian law during the 2008 armed conflict – and then obviously also *vice versa* – with almost ‘automatic’, yet completely contrary, results on the merits? Should one really consider that to constitute an improvement of the international legal order, and would such a development truly foster the international rule of law?

Rather, the way forward would be to, be it only for future cases, enlarge and strengthen the jurisdiction of international courts and tribunals, either those that provide access to individuals or that have some form of compulsory jurisdiction, and the European Convention for the Peaceful Settlement of Disputes certainly forms part of such attempt, which as might be recalled, could not be invoked by Italy as a jurisdictional basis for its counter-claim for reasons *ratione temporis*.<sup>135</sup> Put otherwise: if a similar scenario of violations of international humanitarian law was to arise again today between two or more of the contracting parties of the said Convention, and it is hoped that this will not happen, the underlying interstate case for damages could be brought, and rightly so, before the ICJ. It is submitted that this might be the right way forward.

In the same vein, providing for claims commissions where even *individual* compensation might be sought for violations of international humanitarian law might also be a useful and appropriate mechanism, provided the parties involved are indeed able and willing to follow up on such process.<sup>136</sup>

This leads to the last question, namely what lessons ought to be learned when it comes to a possible dialogue between domestic, and namely constitutional courts on the one hand, and international courts on the other. In the author’s understanding, international courts not only constitute a cornerstone, but also a capstone of the construction of international law. Once such capstone is being removed or damaged – and unfortunately we currently see many instances, benevolent or not, to that effect throughout the World – the danger arises that the whole edifice if not collapses, at least might show cracks. Hence, every attempt should be made not to question their authority even more so since such international judicial institutions by their very nature have the clear advantage to be by far further away from domestic political pressures, moods and feelings.

In summary, one might say that European States, as well as European (constitutional) courts should not take *Frank Sinatra* too much at face value, who once stated in his song ‘My Way’ that he did not act ‘in a shy way’, and that he ‘had to say the things he truly felt’, and not ‘the words of one who kneels’, and that ‘the record therefore showed that he had to take the blows’ in order to ‘do it my way’.<sup>137</sup> Domestic courts, and even more so the highest courts of democratic and rule-based countries do not only have a responsibility for their own constitutional order, but also more

<sup>134</sup> A. Zimmermann, ‘Das Völkerrecht stärken!’ (13 September 2011) Die Tageszeitung (‘taz’), available at: <http://www.taz.de/!5112119/> (last visited: 27 February 2018).

<sup>135</sup> ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, ICJ Reports 2012, 99, para. 44.

<sup>136</sup> Eritrea Ethiopia Claims Commission, Eritrea/Ethiopia, Partial Award of 19 December 2005, Ius Ad Bellum Ethiopia’s Claims 1-8, available at: <https://pcacases.com/web/sendAttach/763> (last visited: 27 February 2018).

<sup>137</sup> Frank Sinatra sings ‘My Way’, available at: <https://www.youtube.com/embed/5AVOpNR2PIs> (last visited: 27 February 2018).

broadly speaking for the international legal order. Hence, such courts, but also Europe more generally, should try to avoid deciding matters of State immunity 'their own way' because the blow would then not only expose themselves, but would threaten to undermine international law and the international rule of law at large.

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The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.