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# DELIVERING JUSTICE FOR VICTIM STATES THE ITALIAN EXPERIENCE IN OBTAINING JUSTICE FOR VICTIMS OF WAR THROUGH COMPENSATION – BRIEF NOTES BY FILIPPO BIOLÉ

*Abstract: This short paper is aimed to offer a brief food for thought on the Italian recent jurisprudence created in the last 25 years regarding access to justice for compensation claims deriving from crimes against humanity committed in wartime during the Second World War. It offers an excursus from the first case in the Supreme Court up to the proclamation by the Constitutional Court of principles in contrast with the international panorama regarding the customary principle of immunity between states, up to the proposal of supranational legal instruments with a deterrent effect for new armed conflicts between peoples under the ages of the Council of Europe.*

**Keywords: war crimes, compensation, immunity principle.**

First of all I would like to thank the International Criminal Law Association, our kind hosts and organizers of this meaningful Conference and I'm so grateful to all of them for their kind invitation in Palić.

I'd like to point out that this important meeting follows other events I took part in less than one year, the first one at the Council of Europe in Strasbourg in April 2023, than at the European Public Law Organization in Athens last June and the following one in Westminster Central Hall – London, in October 2023.

In the meantime, there have been many significant developments in the Italian jurisprudence and once again it is for me a significant confirmation of how crucial the profession of lawyers can be in every healthy democracy.

The hard task of protecting and keeping intact the democratic and constitutional values of nations, such as the principles of the rule of law, the human rights and the future of democracy – which not only European institutions shall defend along

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with every single country – can be successfully carried out only by starting, so to say, from the lowest level: with the initiative of individual citizens and their attorneys at law and then by means of an international dialogue among the States.

In fact, as we'll see shortly, from an Italian perspective, international law and the perception of its customary principles are slowly changing, also thanks to the courage of a bunch of Italian and Greek citizens and their lawyers who, around 25/30 years ago, conceived the idea that constitutional values such as the access to justice and the dignity of individuals, must always prevail.

Italian Senator Liliana Segre, a woman of peace and great wisdom who survived the Holocaust in the concentration camp of Auschwitz-Birkenau, has admitted on several occasions her painful impossibility to forgive the outrage she herself (and obviously not alone) suffered thanks to the fascists first and then the Nazis. The French philosopher, pupil of Bergson, Vladimir Jankélévitch, of a Russian-Jewish family, in his well-known book "Pardonner?" (1971), connected in a cause and effect relationship, the implacability of resentment towards the atrocities committed by the followers of the Reich, with the fact that Nazi crimes are – legitimately and humanly – imprescriptible.

Thanks to the first Italian lawyers who dared to believe that the right of the victims of these crimes and their heirs to be compensated be statute-barred, after the standstill (moratorium) period agreed upon in art. 18 of the Peace treaty signed by Germany with the allies, Italian citizens - mainly heirs of those who had been personally deported and tortured and/or enslaved in concentration camps for racial, military or political reasons - were among the pioneers, along with the Greek citizens and their lawyers before them, to decide it was time to bring civil proceedings before the competent courts throughout Italy.

Well, many of them are now my clients.

The heirs of entire Jewish families assassinated in gas chambers in Birkenau and Flossenburg, or some of the heirs of the 67 Italian political prisoners selected and shot in the well-known massacre of Cibeno of July 12th 1944 near Fossoli, the sadly famous Durchgangslager not far from Modena.

Members of my own family, Bruno De Benedetti, Ida, Arturo e Luciano Valabrega, on behalf of those of us who were deported and killed, some of them on the very day of their arrival in Auschwitz-Birkenau and Dachau.

The families of soldiers who took the courageous decision not to join the fascists of the Italian Socialist Republic allied with Hitler after the armistice of 8th September 1943 and were therefore arrested and deported.

All of them took the decision to start a litigation against Germany.

But the first problem we had to face was how to overcome the customary Jurisdictional Immunity Principle governing the limits of jurisdiction in international relationships among States. Well I'm very proud to show how and why my Country has been among the first ones to succeed.

Considering the principle *PAREM IN PAREM NON HABET IUDICIUM*, deriving from the principle of sovereign equality of states, which dates back to the XVII century with the absolute monarchies, how could the Italian legal system

possibly allow its judiciary to repeatedly condemn a foreign country and grant reparations in favour of every victim of such crimes?

It is significant to highlight that in the last two decades, beginning with the well-known Ferrini case[1] and the decision taken by the Italian Court of Cassation (the highest judicial authority) in 2004 - followed by many other judgments consistent with that precedent[2], Italy has done something that had previously been considered unconceivable: Italian judges have begun to diverge from the opinion that the Jurisdictional Immunity Principle for *acta iure imperii*, such as acts of foreign armed forces, was unavoidable.

Therefore, Courts in places like Turin and Sciacca and many others have not applied this principle in every dispute concerning *crimina juris gentium*, and more precisely damage claims arising from war crimes, such as murder, ill-treatment, or deportation to slave labour or for any other purpose and other inhuman acts against any civilian population committed by the 3rd Reich in violation of international humanitarian law, and kept on taking favourable decisions against the Federal Republic of Germany …

Until Germany decided to sue Italy before the International Court of Justice (ICJ) in 2008, in particular after Italy permitted the Greek claimants of the Distomo case to take measures of constraint in 2007 against the German State property in Italy (named Villa Vigoni, near Como), having declared enforceable in Italy decisions of Greek civil courts rendered against Germany on the basis of acts similar to those which gave rise to the claims brought before Italian courts.

In this dispute Germany fully acknowledged the "*untold suffering inflicted on Italian men and women in particular during massacres and on former Italian military internees*" admitting its responsibilities and the nature of these crimes as *crimina contra gentium*, but requested the Court to find that Italy had failed to respect the jurisdictional immunity which Germany enjoys under international law, by allowing civil claims to be brought against it in the Italian courts, seeking reparations for injuries caused by violations of international humanitarian law, and also objected that every dispute concerning the same reparations had already been settled with Italy with the Treaty of Peace of 1947 and the following 2 agreements of 1961.

Italy's main argument was that customer international law had developed to the point where a State is no longer entitled to immunity regarding acts occasioning death, personal injury or damage to property on the territory of the forum state, even if the act in question was performed *jure imperii*.

In support of such argument Italy pointed to the adoption of Article 11 of the European Convention of 1972 and Article 12 of the United Nations Convention of 2004.

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1 Corte di Cassazione – Sezioni unite civili – sentenza 6 novembre 2003 - 11 marzo 2004, n. 5044.

2 Corte di Cass. Sez. Un. ordd. nn. 14201 e 14202 del 2008, Corte di Cass. n. 1072/2008; Corte di Cass. n. 11163/2011.

However, the International Court of Justice on February, 3rd in 2012[3] took its decision in favour of Germany. It held that such systematic denial of immunity to Germany by the Italian courts "*constitutes a breach of the obligations owed by the Italian State to Germany*". Among the arguments of the Court, other than those concerning the aforementioned European Convention and the United Nations Convention being neither provisions clearly intended to apply to acts of foreign armed forces, worth mentioning is also the State practice to be found in all national judicial decisions listed in the judgment (like those taken in France, Slovenia, Poland, Belgium, Brazil) that constantly held that Germany was entitled to immunity in a series of cases of deportations and other crimes. Moreover, the *diuturnitas* (consuetudine/practice) and the *opinio juris*, support the same position according to the Court.

Surprisingly, only two years later, in 2014 the Constitutional Court of Italy with judgment n. 238/2014[4], signed by one of the most brilliant jurists of our Country, Prof. Giuseppe Tesauro, who died the 7th July 2021 leaving this precious heritage, literally turned the tables. It stated that two laws, and in particular Art. 1 L. 848/1957 – the one implementing the United Nations Charter, Art. 94, and the one Art. 3 L. 5/2013, that expressly obliged Italian Courts to conform and comply with the decision of ICJ, had to be considered unconstitutional because their provisions had the effect to bind the Italian Courts to the said judgement of the International Court of Justice of 2012.

The Constitutional Court in effect judged inadmissible that supreme and irrepressible principles of the Italian constitutional legal system and in particular - among the fundamental rights of individuals - the dignity of human beings, provided by Art. 2 of Italian Constitution, and most of all the access to justice and in particular the right to obtain jurisdictional protection of the inviolable human rights, provided by Art. 24 of the same Constitutional Charter, could be sacrificed by the immunity principle, as the same ICJ had somehow foreseen and acknowledged, by encouraging Germany and Italy to negotiate a solution… and confirmed that Italian judges have jurisdiction, that means that they were allowed to keep on condemning Germany for those crimes.

In the meantime, new disputes were brought before Italian courts by other private claimants, and many of them came to the conclusion that most of the time sees Germany repeatedly condemned by Italian judges, recently even for those crimes that have permanently scarred Italian history, like the inhuman massacres of Sant'Anna di Stazzema and Marzabotto[5], the latter with the decision taken by the Court of Bologna in June 2022. Furthermore, the said judgement of our Constitutional Court was recently followed by another important decision taken by the Supremo Tribunal Federal of Brasil on September 24th 2021, consistent with the Italian precedent.

Consequently, since in 2022 the above-mentioned decisions were enforced with seizure measures on German properties (like the Goethe Institut, the Deutsche Schule, the Historical German Institute and the German archaeological Institute)

3 Case Germany/Italy 3rd February 2012.

4 Corte Costituzionale 22/10/2014, n. 238.

5 Trib. Bologna, 8/6/2022 n. 1516.

in Rome, the Federal Republic of Germany, immediately sued Italy for the second time before the International Court of Justice for the same grounds (violation of its immunity and now of the mentioned judgement of the International Court of Justice) and the Court has fixed the time limit for the filing of memorials for Germany (within June 12, 2023) and for Italy (June 12, 2024). This judgment is still pending and will probably end by 2025.

At the same time, in order to avoid the provisional measures that Germany had asked to the ICJ, on April 2022, Italy approved an urgent law-decree[6] to avoid the mentioned enforcements of roman properties of Germany. This law-decree extinguished all the relevant proceedings, but most of all established an alternative: a fund of 55 million euro in favour of those who had already won their cases against Germany or would have brought analogous proceedings against Germany within the deadline of 30 days (delay that afterwards was postponed until October 2022, then again until 28th June 2023 and at last until 31th December 2023).

This explains why in that period of 21 months around 1000 new proceedings have been brought before Italian courts by Italian citizens against Germany. It is estimated that these new claimants amount to around 10-15,000 people, many proceedings being set up as class actions.

Some of those trials have already come to a conclusion and they all have condemned Germany granting protection to such claims, sometimes for significant amounts of money.[7]

It is also significant to point out that last June the Italian Constitutional Court, with decision n. 159/2023[8], rejected a constitutional matter concerning the said extinguishment of the enforcement proceedings against German properties; the Court considered the fund, that in the meantime had been considerably increased up to 67.000.000,00 €, as a valid alternative to grant equal protection to the creditors on condition that the relevant claims are fully paid; but it also confirmed that the principles like the access to justice shall prevail on the immunity principle as already stated in its previous decision of 2014. It just added that the properties enforced had to be considered immune because of their public institutional scope.

It is relevant to outline what the motivations of those who after 80 years decided to sue Germany are.

As a lawyer, appointed for many of these proceedings, I can confirm that all my clients, but also those of many colleagues throughout the Country with whom I am in contact, are mainly interested in achieving one main objective: the cyclical reaffirmation and protection of the country's democratic values through the memory of their ancestors who were the victims of those crimes and paid with their sufferings or their lives the same values and the democratic order of modern

6 Decreto-Legge convertito con modificazioni dalla L. 29 giugno 2022, n. 79 (in G.U. 29/06/2022, n. 150).

7 See Trib. Roma 3/3/2024, n. cron. 3450/24, n. rg. 65012/2022 that condemned Germany to pay 700.000,00€ c.a. to the heirs for the deportation and assassination of a man in 1943.

8 Corte Costituzionale, 4/7/2023, n. 159.

States, especially now, with other wars, in the heart of Europe and in the Middle East, with new massacres and new deportations.

As the second conference on this subject that I personally organized a few months ago with the University of Genoa has shown, such proceedings produce the effect of keeping attention focused and a vivid interest of people in our recent past, in our own responsibilities; a heritage and a memento that should induce nations to protect their democratic values and to do better than their ancestors.

Considering the numerous proceedings started in the last 10 years and which ended up with the jurisdictional immunity of States being set aside, but also the new practices and legal precedents, I believe that the proceeding recently brought before the ICJ by Germany against Italy could have a surprisingly different conclusion.

However, it's my belief that instead of waiting for a decision to be taken by a Court, this could be the right moment to give a sign of evolution arising from hope and the desire of citizens who were not indifferent and have never forgotten their past and the price paid for freedom and democracy.

In all of this we find the importance of cooperation among states that want to keep peace by preferring the international dialogue instead of acts of violence and prevarication.

In my opinion, it would now be time to evaluate the promotion of a new convention where the States accept beforehand to give up the right to invoke the immunity principle for crimes committed during conflicts by foreign armed forces. This is exactly what I have proposed to the Council of Europe and at the Westminster conference; it could be, especially now, the right and modern evolution of International Law and of customary principles. It is my belief that it would create a deterrent to new conflicts and an incentive to solve disputes thanks to negotiation, in the name of all of those thousands of people to whom the mentioned proceedings are dedicated, under the auspices and aegis of the International Institutions, set up after WWII to protect peacekeeping and European democratic order.

When on the 30th January 2020 she gave her remarkable speech at the European Parliament for the 75th anniversary of the Liberation of Auschwitz, the former deportee Liliana Segre mentioned the strength of her resistance towards survival during the 'march of death', one foot in front of the other, and also remembered a little girl and her crayon drawing she made in Terezin KZ. As a grandmother, she asked all her ideal nephews, nieces and grandchildren, and I quote '*to live their lives with the responsibility and the consciousness of a yellow butterfly flying over the barbed wire*'.

This is her "peaceful war" against indifference, her powerful heritage for those future generations that have the chance to make the choice not to live the same story ever again.

Immunity grants no punishment for crimes against humanity committed in wartime, exactly like the barbed wire that in the recent past protected the crimes committed inside the concentration camps.

Access to justice is the solution for the progress of civilization and is that yellow butterfly flying over the barbed wire.