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Between Sovereignty and Justice: The Legal Dispute Over State Immunity in *Germany v. Italy*

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Introduction

The legal dispute between Germany and Italy over state immunity represents one of the most intricate intersections between international law and constitutional principles. At the heart of the dispute lies a fundamental tension between the sovereign equality of states and the individual right to judicial protection for victims of gross human rights violations. Rooted in the legacy of atrocities committed during the Second World War, this tension has evolved over decades of legal proceedings, ending in a series of landmark judgments that have reshaped the Italian legal landscape and triggered international debate over the limits of state immunity.

This thesis will explore the evolution and implications of this complex legal dispute, beginning with the International Court of Justice's (ICJ) 2012 judgment in *Germany v. Italy*, which reaffirmed the traditional principle of state immunity, even in cases involving war crimes and crimes against humanity. In doing so, the ICJ effectively blocked the possibility for victims of Nazi crimes to obtain civil redress in Italian courts, forcing Italy to align its domestic practice with the demands of international law.

A decade later, in Judgment No. 159/2023, the Constitutional Court revisited the matter in light of new developments, including the establishment of a state-administered compensation fund. While reaffirming the unconstitutionality of an absolute immunity in such cases, the Court introduced a more flexible framework by recognizing the legitimacy of administrative alternatives and confirming the inviolability of enforcement immunity. Italy's constitutional response in Judgment No. 238/2014, boldly prioritized the right of access to justice over compliance with international norms. This decision, based on the counter-limits doctrine, posed profound questions about the hierarchy of legal norms and the interplay between domestic and international obligations. Such bold move provoked intense legal and institutional debate, raising questions about the interaction between constitutional identity and international legal obligations.

Building on this foundation, the discourse turns to the more recent Judgment No. 159/2023, in which the Constitutional Court reconsidered its earlier stance, introducing a more flexible and conciliatory approach. By upholding the legitimacy of a state-managed compensation fund while reaffirming enforcement immunity, the Court attempted to reconcile the demands of constitutional justice with the realities of Italy's international commitments. Through an analysis of these judgments and their broader legal, diplomatic and institutional consequences, this thesis argues that the Italy-Germany dispute offers a symbolic case study in the evolving relationship between sovereignty and justice. It also seeks to illuminate how national courts may act not only as guardians of constitutional values but also as actors in a global legal dialogue, capable of challenging, reshaping, or reinforcing the contours of international law.

Chapter 1: The Legal Dispute Between Germany and Italy: From ICJ 2012 to the Constitutional Court Judgment No. 238/2014

State immunity is a principle of international law that grants the states protection from being brought before the courts. However, this protection can, at times, be contested. Such is the example being given by the ongoing legal dispute between Germany and Italy regarding atrocities committed during the Second World War. This first chapter explores the origins and legal evolution of this dispute. It begins, with paragraph 1.1., by outlining the historical context and legal framework behind post-war claims, focusing on pivotal cases such as *Ferrini* in Italy and *Distomo* in Greece. Following with paragraph 1.2., the analysis then turns to the 2012 International Court of Justice (ICJ) judgment in *Germany v. Italy*, which reaffirmed the principle of state immunity under international law. The next section in paragraph 1.3. covers the Italian Constitutional Court's subsequent response in Judgment No. 238/2014. Finally, the chapter examines the scholarly reaction to such daring judgment and lastly highlights both domestic and international reactions to this constitutional ruling, which challenged the primacy of international legal norms in favor of fundamental rights protections enshrined in the Italian Constitution.

1.1. Historical Background and Legal Framework

Italy entered the Second World War as part of the Axis forces in June 1940. Three years later though, following the removal of Mussolini from power, Italy surrendered to the Allied Powers and declared war on Germany. At the height of war, German forces occupied a significant portion of Italian territory and perpetrated many atrocities against the population, including massacres and deportation of civilians. In addition, they also took as prisoners several hundred thousand members of the Italian armed forces. However, the Italian nationals were denied the status of prisoner of war under the Geneva Convention, rather, they were classified as military internees and deported to Germany and German-occupied territories to be used for forced labour.

Following the Second World War, the Allies concluded a Peace Treaty with Italy regarding the legal and economic consequences of the war. Article 77 of the Peace Treaty establishes the treatment of Italian property in Germany after the war and the resolution of financial claims between the two countries. It states that, from the treaty's enactment, Italian territory in Germany will no longer be considered enemy property, and previously applied restrictions will be removed. Additionally, any identifiable Italian property that was forcibly taken by German forces or authorities from Italian territory after September 3, 1943, is eligible for restitution. The restoration and restitution of such property will be carried out according to measures determined by the occupying Powers in Germany. Consequently, Italy forfeits, on behalf of itself and its nationals, all claims against Germany and German nationals that were made as of May 8, 1945, with exception for those based on contracts and rights acquired before September 1, 1939.¹

In 1953, the Federal Republic of Germany adopted the Federal Compensation Law concerning Victims of National Socialist Persecution (Bundesentschädigungsgesetz (BEG)) in order to compensate certain categories of victims of Nazi persecution.² Numerous claims made by Italian nationals under the Federal Compensation Law were denied, either because the claimants lacked the domicile or permanent residence in Germany required by the law or because they were not deemed victims of national socialist persecution under the law's definition. The Federal Compensation Law was modified in 1965 in order to include claims by individuals persecuted because of their nationality or their inclusion in a non-German ethnic group, while requiring that the persons in question had refugee status on 1 October 1953. Even after the Law was amended, many Italian claimants still did not qualify for compensation because they were not part of the group of people that possessed such refugee status. Because of the specific wording of the Federal Compensation Law many claims brought forward by foreign victims ended up being dismissed by the German courts.

¹ *Treaty of Peace with Italy*, February 10, 1947, 49 U.N.T.S. 311.

² *Federal Act on Compensation for Victims of National Socialist Persecution (Federal Compensation Act - BEG)*, October 1, 1953, BGBl. I 1953, 1874.

In 1961, Germany and Italy signed two agreements. The first, effective in 1963, settled economic and financial issues, with Germany compensating Italy and Italy declaring all claims against Germany and its nationals resolved. Italy also committed to shielding Germany from future legal actions by Italian individuals or entities. The second agreement, enforced in July 1963, addressed compensation for Italians persecuted by the Nazi regime. Germany agreed to pay 40 million Deutsche Marks to Italian nationals who suffered persecution based on race, faith, or ideology and endured loss of liberty. Article 3 of the agreement confirmed that this payment constituted the final settlement of all related claims between the two countries.³

On August 2, 2000, Germany enacted a federal law establishing the Remembrance, Responsibility and Future Foundation, also referred to as the “2000 Federal Law”. Its primary aim was to allocate funds to individuals who had been subjected to injustices during the National Socialist era. However, Article 11 of the 2000 Federal Law imposed certain limitations on the eligibility of individuals for compensation.⁴ One consequence of this provision was the exclusion of former prisoners of war from compensation unless they had been detained in concentration camps or fell into other specified categories. To justify the exclusion, the official commentary accompanying the draft law stated that, under international law, detaining powers were permitted to use prisoners of war for labor.

³ International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, I.C.J. Reports 2012, p. 110-116.

⁴ *Law on the Creation of a Foundation “Remembrance, Responsibility and Future”*, August 2, 2000, Federal Law Gazette, 1263.

As a consequence, many former Italian military internees, who had previously been denied prisoner-of-war status by the German Reich, now applied for compensation under the 2000 Federal Law. However, in 2001, the German authorities ruled that, under international law, Germany could not unilaterally change the status of Italian military internees from their originally intended status of prisoners of war to civilian workers. As a result, they concluded that the internees had never lost their prisoner-of-war status in the first place, thereby excluding them from eligibility for compensation under the 2000 Federal Law. Consequently, the vast majority of compensation claims submitted by Italian military internees were rejected. Indeed, in multiple rulings, German courts upheld the view that they were not entitled to compensation under the 2000 Federal Law because they had remained prisoners of war.

1.1.1. *The Ferrini Case*

On August 4, 1944, Italian national Luigi Ferrini was abducted by German troops and deported to Germany, where he was forced to work in a munition factory until the end of the war in 1945. On September 23, 1998, Ferrini brought his case to the Court of Arezzo and petitioned for reparations from Germany for physical and psychological harm. Nevertheless, the Court held that Germany, as a sovereign state, was protected by jurisdictional immunity and Ferrini's claims were deemed inadmissible. He turned to the Court of Appeal of France, which, in a Judgment of November 16, 2001, dismissed Ferrini's petitions on the same grounds. Ultimately, he reached out to the Italian Court of Cassation, which, in a groundbreaking judgment, asserted that a foreign state cannot enjoy immunity for sovereign acts which can be classified as international crimes at the same time. Namely, while Germany claimed entitlement to immunity in respect of sovereign acts (*acta jure imperii*), Italy believed that immunity shall not apply in respect of acts violating human rights protected by peremptory norms (*jus cogens*).⁵

⁵ *Ferrini v. Germany*, No. 5044/4, ILDC 19 (IT 2004), Corte Suprema di Cassazione, Italy, March 11, 2004.

Following the Ferrini judgment of the Italian Court of Cassation on March 11, 2004, numerous claimants brought proceedings against Germany. For instance, the case concerning *Giovanni Mantelli and Others* brought forward to the Court of Turin on April 13, 2004. Moreover, on April 28, 2004, *Liberato Maietta* filed a case against Germany before the Court of Siacca. These cases concern acts of deportation and forced labour in Germany which took place between 1943 and 1945. In both instances Germany made a request for an interlocutory appeal requesting a declaration of lack of jurisdiction before the Italian Court of Cassation. By two orders of 29 May 2008 issued in the *Giovanni Mantelli and Others* and the *Liberato Maietta cases*, the Italian Court of Cassation confirmed the judgment previously made in the Ferrini case and stated that the Italian courts had jurisdiction over the claims against Germany.⁶

1.1.2 The Distomo Case

On June 10, 1994, the SS forces occupying Greece committed a massacre in the village of Distomo after an attempted attack by Greek troops. The appellants claimed damages on behalf of their parents, whose claims had transferred to them by way of succession, with respect to the destruction of the parental home and business. Additionally, they asked for compensation with respect to the damages made to their health and disadvantages in their professional training and prospects. The case was brought before multiple courts, such as the Regional Court of Bonn and the Higher Regional Court of Cologne, both of which had dismissed the action. The case was then presented to the District Court of Livadeia that, in September 1997, awarded damages to the appellants in a judgment against Germany. However, the Federal Court of Justice, in the decision of June 26, 2003, found that the judgment of the District Court of Livadeia was non-enforceable since the acts in discussion had been sovereign or public acts for which Germany was immune from another state's jurisdiction. The Federal Court of Justice concluded that the claim for damages was without merit and the decision of the Cologne Higher Regional Court was upheld.⁷

⁶ Pasquale De Sena and Francesca De Vittor, "*State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*", *European Journal of International Law* 16, no. 1 (2005): 89-112.

⁷ Sabine Pittrof, "*Compensation Claims for Human Rights Breaches Committed by German Armed Forces Abroad During the Second World War: Federal Court of Justice Hands Down Decision in the Distomo Case*", *German Law Journal* 5, no. 1 (2004): 16-21.

The Greek claimants then sought to enforce the judgments of the Greek courts in the Distomo case in Italy. The Court of Appeal of Florence held in a decision dated May 2, 2005, that the order contained in the judgment of the German Supreme Court, imposing an obligation on Germany to reimburse the legal expenses for the judicial proceedings before that Court, was enforceable in Italy. As a result, on June 7, 2007, the Greek claimants registered a legal charge over Villa Vigoni, a property owned by the German government near Lake Como and used as a cultural and research center. Germany strongly opposed this move and, in 2008, instituted proceedings to the International Court of Justice (ICJ) against the Italian courts, seeking to nullify the legal charge.⁸ Recognizing the diplomatic sensitivity of the matter, the Italian government intervened and suspended any legal action against Villa Vigoni pending the ICJ's ruling. This effectively froze the Greek claimants' enforcement efforts, maintaining the property under German ownership until the international legal dispute was resolved.

1.2. The ICJ Judgment of 2012 (*Germany v. Italy*)

On December 23, 2008, Germany claimed that Italy had violated its jurisdictional immunity and invoked Article 1 of the European Convention for the Peaceful Settlement of Disputes before the ICJ. Germany asked the Court to find that Italy violated Germany's jurisdictional immunity under international law. To begin, it stated that Italy allowed civil claimants to seek in their courts remedies from Germany for violations of international humanitarian law during the Second World War. Secondly, it took measures of constraint against German property in Italy, and, lastly, it found that Greek civil court judgments against Germany for similar violations were enforceable in Italy. In response, Italy submitted its counterclaim, asserting that the principle of sovereign immunity should not apply in cases of gross violations of human rights and international humanitarian law and it maintained that the right to judicial redress for victims of war crimes is a fundamental principle that should take precedence over traditional notions of state immunity.

⁸ Lucas Moreira Alcici, "*State Immunity from Execution: The Landmark Judgment of the International Court of Justice on the Jurisdictional Immunities of the State Case (Germany Versus Italy)*," Levan Alexidze Journal of International Law, 2020, 47-53.

To address the issue, the Court carefully distinguished between Germany's jurisdictional immunity and its liability for actions committed during World War II, focusing solely on whether Germany was entitled to immunity under customary international law. Germany argued that immunity should be assessed based on the law in force at the time of the acts (1943–1945), while Italy contended that the relevant legal framework was the one applicable when immunity was allegedly violated by Italian courts (2004-2011). The Court ruled that the applicable law was the one in place when Italian courts made their decisions, emphasizing the procedural nature of state immunity, which must be determined at the time of legal proceedings.⁹

Italy sought to deny Germany immunity on three grounds: the territorial tort exception, the subject-matter exception, and the last-resort argument. Although the Court found some evidence that the territorial tort exception to immunity could apply to both a state's sovereign and commercial acts, it rejected the territorial tort argument ruling that state practice and international conventions did not support applying it to sovereign military actions. It also dismissed the subject-matter exception, finding no evidence in state practice or international law that the gravity of a state's violations negates its immunity. Furthermore, it rejected Italy's claim that *jus cogens* violations override immunity, reasoning that jurisdictional rules remain separate from substantive norms of international law. The last-resort argument was also dismissed, with the Court acknowledging that while Germany had denied compensation to some victims, this did not justify disregarding immunity. It concluded that balancing the severity of violations, *jus cogens* status, and lack of redress would undermine the principle of state immunity by allowing courts to determine jurisdiction based on case merits. The Court also ruled on Italy's seizure of Villa Vigoni, despite Italy not contesting Germany's claim that this violated international law. It reaffirmed that enforcement immunity is broader than jurisdictional immunity, meaning that even if jurisdiction is waived, enforcement actions against state property used for sovereign purposes still require consent. Since Villa Vigoni was used for a governmental function, Italy's actions violated Germany's immunity. Additionally, the Court found that Italy had breached Germany's immunity by enforcing Greek court judgments against it.

⁹ Ben Love, "Introductory Note to the International Court of Justice: Jurisdictional Immunities of the State (*Germany v. Italy: Greece Intervening*)", *International Legal Materials* 51, no. 3 (2012): 563-605.

Although Germany and Italy argued that Greece's actions were relevant, the Court ruled that Italy had an independent obligation to assess Germany's immunity before enforcing foreign judgments. Since Italy would not have had jurisdiction over the original Greek cases, it violated international law by allowing their enforcement.

Ultimately, on February 3, 2012, the ICJ delivered its much-anticipated judgment in favor of Germany. The Court ruled that Italy had violated international law by allowing lawsuits against Germany in its domestic courts. The judgment reaffirmed that state immunity is a fundamental principle of international law, and no exception exists for cases involving gross human rights violations. Italy's failure to respect Germany's immunity was a clear breach of international obligations, and Italy was required to ensure that all legal decisions against Germany were no longer enforced. Additionally, the Court ordered Italy to take necessary steps to prevent future violations, effectively putting an end to legal claims against Germany in Italian courts.¹⁰

1.3. The Italian Constitutional Court's Response: Judgment No. 238/2014

Italy complied with the ICJ's judgment in accordance to its international obligations under Article 94(1) UN Charter, incorporated in the Italian legal system by means of Law 848/1957. To implement the ICJ's decision, the Italian Parliament approved Law 5/2013, allowing for the annulment of Italian court judgements that violated state immunity norms as determined by the ICJ. However, Judgment 238/2014 originated from new civil proceedings against Germany filed in Florence. In this case, Germany appeared and requested the judge to decline jurisdiction. At the same time, the applicants argued that the laws enforcing the ICJ's *Germany v. Italy* judgment, as well as the international legal norm on state immunity recognized by the ICJ, were unconstitutional, since incompatible with Articles 2 and 24. Article 24 of the Constitution guarantees that any individual has the right to initiate legal proceedings in a court of law to safeguard their rights as outlined in civil and administrative law.

¹⁰ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* - Summary of the Judgment of 3 February 2012. The Hague: International Court of Justice, 2012.

Furthermore, Article 2 of the Constitution affirms that the Italian Republic acknowledges and ensures the inviolable rights of individuals, both in their personal capacity and within the social groups that reflect human identity.¹¹

The Constitutional Court reached two conclusions. First, the rule of customary international law on state immunity as determined by the ICJ cannot prevail over the supreme constitutional principle of judicial protection of fundamental human rights. In particular, the Court held that when the recognition of a foreign state's immunity from civil jurisdiction leads to the absolute sacrifice of the right to judicial protection, especially in cases involving war crimes and crimes against humanity, it violates Articles 2 and 24 of the Italian Constitution. Such a sacrifice was deemed disproportionate and incompatible with the inviolable rights of the person and the fundamental right of access to justice. Second, Italy's obligation to comply with the ICJ decision under Article 94(1) UN Charter applies only insofar as it does not require a violation of the Constitution. The Court concluded that the Italian legal system does not incorporate the rule on jurisdictional immunity for acts of war crimes and crimes against humanity, and, therefore, found no discrepancy between the norm on jurisdictional immunity as incorporated and the Constitution. Concerning Law 5/2013, it was declared unconstitutional so far as it imposed on the judge the obligation to respect the *Germany v. Italy* judgment, which established a rule of international law not incorporated in the Italian legal system. Likewise, Law 848/1957 was declared unconstitutional only in respect of the incorporation of Article 94 (1) UN Charter, and only to the extent that it required Italy to respect the *Germany v. Italy* judgment.¹²

¹¹ Senato della Repubblica, *Constitution of the Italian Republic*, trans. Constitutional Court, updated to Constitutional Law No. 1 of September 26, 2023 (Rome: Senato della Repubblica, 2023).

¹² Massimo Lando, "Intimations of Unconstitutionality: The Supremacy of International Law and Judgment 238/2014 of the Italian Constitutional Court", *Modern Law Review* 78, no. 6 (2015): 1028-1056.

In its Conclusions in Point of Law, the Constitutional Court held that supreme constitutional principles take precedence over customary international law, and found that a legal system based on the respect of human rights cannot accept their judicial protection to be restricted to such measures. The Court reached these conclusions on the basis of the doctrine of “counter-limits”, which refers to an inherent tension within the Italian Constitution. On the one hand, it lays the foundations of Italy’s participation in the life of the international community by accepting the limitations to domestic sovereignty deriving therefrom, expressly stated in Articles 10 and 11 of the Constitution. On the other hand, it creates a set of safeguards to protect national fundamental values from international and supranational interferences, especially those affecting the core of constitutional identity. Since these safeguards are designed to counter the aforementioned limitations to domestic sovereignty, their application by Italian courts is commonly known as the counter-limits doctrine. In Judgment 238/2014, this doctrine was used to prevent a customary international rule from being applied domestically where it conflicts with supreme constitutional principles.¹³

1.3.1. Scholarly Perspectives on the Constitutional Court’s Reasoning

Judgment No. 238/2014 has been the subject of significant scholarly criticism, particularly for its lack of engagement with the broader systemic and legal implications of its reasoning. Firstly, while the Constitutional Court invoked the constitutional values of human dignity and access to justice, it failed to consider the potential repercussions of its stance on international stability and inter-state relations. It appears that the Italian Constitutional Court did not assess whether overriding immunity in the name of domestic constitutional rights could disrupt Italy’s credibility or trigger reciprocal actions by other states.

¹³ Carlo Focarelli, “*State Immunity and Serious Violations of Human Rights: Judgment No. 238 of 2014 of the Italian Constitutional Court Seven Years On*”, *The Italian Review of International and Comparative Law* 1, no. 1 (2021): 29–41.

Moreover, the Court drew a flawed comparison between its humanitarian exception to jurisdictional immunity and the *jure gestionis* exception, which limits immunity in cases involving commercial acts. However, while this exception gradually emerged through consistent and widespread state practice and was ultimately codified in treaties and customary law, the proposed humanitarian exception lacks comparable international support. At the time of the judgment, and even now, no broad consensus exists among states to deny immunity in civil claims for serious human rights violations. Another criticism lays in the fact that the Court claimed that its ruling may act as a trigger for the evolution of international law, suggesting that its interpretation could help reshape the immunity regime in a more human rights oriented direction. However, this ambition remains largely aspirational. The Court offered no theoretical framework or persuasive reasoning to support why or how other states would adopt a similar stance, nor did it explore the realistic consequences of fragmenting established customary norms.¹⁴

Furthermore, the Court not only ignored the consistent position of the Italian executive and the State Attorney's Office, which have repeatedly defended Germany's entitlement to immunity, both domestically and before the international stage, it also rejected any intention to review the ICJ's 2012 judgment, asserting that international custom lies outside the domestic legal order. The Court not only rebuked the ICJ's interpretation of immunity as a procedural rule independent of the legality of the questioned acts, but it also implicitly denied the ICJ's authority by refusing to give effect to a binding judgment. This creates a situation of legal dissonance, where Italy simultaneously professes adherence to the international legal order while violating its judgments in practice, thus undermining the principle of good faith in international relations.

Finally, the Court's use of the counter-limits doctrine to exclude the customary rule on state immunity from the domestic legal order raises constitutional issues. It extends its competence beyond the scope of Article 134 by reviewing norms incorporated via Article 10(1), rather than those formally enacted.

¹⁴ Lando et al., op. cit., p. 1028-1056.

The Court also blurs the line between non-application and non-entry, creating a legal fiction whereby a norm is excluded solely due to its incompatibility with constitutional principles. This reasoning is internally inconsistent: the Court implicitly acknowledges the norm's incorporation through Article 10, only to later exclude it on constitutional grounds, thereby performing a constitutional review of a norm it simultaneously claims lies outside its jurisdiction. Collectively, these shortcomings revealed a judgment that, while motivated by a commitment to human rights, had the potential to undermine legal certainty and Italy's credibility in the international legal system.¹⁵

1.3.2. Domestic Reactions and Institutional Challenges in Italy

After Judgment No. 238/2014, Italian municipalities and lower courts struggled to balance their constitutional obligations with Italy's international commitments. For instance, the Court of Florence played a crucial role as it was one of the first to implement the Constitutional Court decision. The case originated before the aforementioned judgment, and the Court of Florence had to decide whether to apply the ICJ's ruling, which affirmed Germany's immunity, or whether to allow Italian victims of Nazi war crimes to pursue compensation claims under Articles 2 and 24 of the Italian Constitution. Faced with such decision, the Court of Florence referred to the Italian Constitutional Court. This referral ultimately led to Judgment No. 238/2014 which claimed that Germany's immunity could not override Italian constitutional protection of fundamental rights. In the aftermath of the judgment, the Court of Florence resumed its proceedings, however, instead of simply ruling against Germany, it attempted to mediate a solution between the differing legal obligations. To avoid immediate international repercussions, the Florence judges proposed a diplomatic solution, urging the Italian and German governments to negotiate a compensation settlement. Ultimately, the court ruled in favor of the victims, but delayed immediate enforcement measures against Germany, recognizing the risk of escalating diplomatic tensions.

¹⁵ Focarelli et al., op. cit., p. 42-55.

The case of Court of Florence was pivotal since it set the stage for how Italian courts would react to the tension between domestic and international legal obligations. Some judges have denied immunity on the basis of human rights exceptions, while others have emphasized the procedural limitations of the Constitutional Court's ruling, suggesting that it should not automatically override international law. The Court of Piacenza represents an example of a court that denied Germany's immunity based on human rights exceptions. In Case No. 1462 the Court ruled that Germany could be sued in Italian courts because war crimes and crimes against humanity violate *jus cogens*, which should take precedence over state immunity. It emphasized that acts violating fundamental human rights cannot be considered sovereign acts and, therefore, should not be protected under the principle of state immunity. The court aligned itself with the *Ferrini* doctrine, which had already established that state immunity should not apply when fundamental human rights violations are at stake. By taking this stance, the Court of Piacenza fully embraced the reasoning of the Italian Constitutional Court in Judgment No. 238/2014.¹⁶

The Court of Cassation, in contrast, adopted a more cautious stance. Although it recognized Judgment No. 238/2014, it did not immediately apply it as a strict rule against sovereign immunity in Judgment No. 21946. Rather, it acknowledged the procedural limitations imposed by the ICJ's decision and made an effort to compromise between Italy's constitutional duties and its international commitments. The Court of Cassation confirmed that even after the Constitutional Court's ruling, Italy was still subject to international law. Subsequently, it stated that the concept of state immunity might eventually be amended by framing the matter as part of a developing international legal discussion rather than firmly rejecting it. This approach differed from that of the Court of Piacenza, which immediately enforced the Constitutional Court's ruling without considering the potential international implications. The key difference between these two cases highlights the judicial divide within the Italian courts following Judgment No. 238/2014.¹⁷

¹⁶ Karin Oellers-Frahm, "A Never-Ending Story: The International Court of Justice - The Italian Constitutional Court - Italian Tribunals and the Question of Immunity" *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV) 76, no. 1 (2016): 193-202.

¹⁷ Riccardo Pavoni, "*Simoncioni v. Germany*", *The American Journal of International Law* 109, no. 2 (April 2015): 400-406

1.3.3. Germany's Response And Diplomatic Consequences

These new developments led Germany to, once again, bring the matter forward to the ICJ. On April 29, 2022, Germany formally filed a case against Italy. Germany pointed out that in 2012, the ICJ had already ruled on the issue of jurisdictional immunity and that, despite this ruling, Italy's courts continued to accept new legal claims against Germany, that declared it a direct violation of international law. The main concern Germany raises in regards of Judgment No. 238/2014 is that such ruling recognized the ICJ's decision but at the same time stated that Italian judges must prioritize the supreme constitutional principle of judicial protection of fundamental human rights. In turn, the Italian court allowed victims of war crimes and crimes against humanity to take legal action against Germany in Italian courts, despite the ICJ ruling stating that sovereign states are immune from such prosecutions. Germany argues that Italy's decision was a deliberate breach of international law and a failure to comply with the ICJ's authority as the primary judicial body of the United Nations. It also highlights that, since Judgment No. 238/2014, Italian courts have processed at least 25 new cases against Germany and violations committed during the Second World War, with rulings being issued in no less than 15 of them.¹⁸

The new application included a request for provisional measures. However, this was later withdrawn in light of the Decree-Law No. 36/2022 issued by Italy in response to German's concerns. Article 43 of the Decree-Law introduced a mechanism that Italy could use to compensate victims of war crimes and crimes against humanity. This applies to crimes committed either in Italy or against Italian citizens. The compensation is for the harm suffered due to serious violations of human rights and the laws of war by the forces of the German Reich between September 1, 1939 and May 8, 1945. Additionally, it effectively halted all ongoing and future lawsuits against Germany, making this fund the only avenue for compensation.¹⁹

¹⁸ Lorna McGregor, "State Immunity and Human Rights: Is There a Future after Germany v. Italy?", *Journal of International Criminal Justice* 11, no. 1 (2013): 125-145.

¹⁹ Serena Forlati and Pietro Franzina, "Jurisdictional Immunities Again", *QIL, Zoom-in* 94 (2022): 1-4.

1.4. Conclusion

The legal conflict between Germany and Italy over the legacy of Nazi atrocities reveals a profound and ongoing struggle to reconcile the principles of state immunity with the demands of justice for victims of war crimes. As this chapter has shown, the evolution from the *Ferrini* and *Distomo* cases to the ICJ's 2012 ruling and the Italian Constitutional Court's Judgment No. 238/2014 reflects both the rigidity and flexibility of international legal norms when confronted with constitutional values. The ICJ's affirmation of Germany's immunity highlighted the strength of sovereign equality in international law, while the Italian Constitutional Court, invoking the doctrine of counter-limits, prioritized the constitutional protection of fundamental human rights and access to justice. The resulting judicial fragmentation within Italy and renewed litigation before the ICJ illustrate the wider diplomatic and legal consequences of this tension. Ultimately, this chapter lays the groundwork for understanding how the Italian legal system has continued to navigate these conflicting obligations, setting the stage for the recent developments addressed in the next chapter.

Chapter 2: Constitutional Court Judgment No. 159/2023: Legal Foundations and Key Arguments

While the first chapter outlined the historical and legal foundations of the dispute between Germany and Italy, culminating in the Constitutional Court's Judgment No. 238/2014, this second chapter turns to a more recent development: Judgment No. 159/2023. This new ruling emerged in response to the constitutionality of Article 43 of Decree-Law No. 36/2022, which introduced a state-managed compensation mechanism for victims of Nazi crimes and simultaneously restricted enforcement actions against Germany. Paragraph 2.1. begins by contextualizing the Tribunal of Rome's referral and the admissibility of the constitutional question. Paragraph 2.2. then follows and addresses the contents of the judgments followed by an analysis of the Constitutional Court's legal reasoning, focusing on the balance between international obligations, particularly state immunity, and constitutional guarantees such as the right to judicial protection and compensation for serious human rights violations. The chapter then continues with subparagraph 2.2.1 that shift the focus to a comparative analysis with Judgment No. 238/2014 and critically assesses the broader legal and institutional implications of the Court's more conciliatory posture in 2023. Finally, paragraph 2.3. concludes the discourse by highlighting the scholarly perspective behind Judgment No. 159/2023.

2.1. Introduction to the Judgment

The Tribunal of Rome's decision to refer the case back to the Italian Constitutional Court was prompted by new instances of legal action against Germany. One such example is M.T. Giorgio, as the heir of A. Giorgio, who had been captured, deported, and interned in concentration camps by the forces of the Third Reich, initiated enforcement proceedings for the seizure of these four properties located in Rome, owned by Germany: the German Historical Institute, the German Archaeological Institute, the Goethe Institut, and the German School. These institutions, while devoted to scientific, educational, and cultural activities, were brought into the litigation as tangible symbols of Germany's enduring presence in Italy and as potential sources of reparatory enforcement. In the same case, D.

Cavallina also intervened as the heir of G. Cavallina, who was likewise a victim of similar crimes. The fact that multiple heirs of deported Italian civilians sought enforcement highlights the ongoing resonance of these historical wrongs within Italian society and the persistent demand for individualized justice.

Additionally, the Region of Steréa Elláda, in Greece, acted on the basis of an enforceable title stemming from Judgment No. 137 of October 30, 1997, issued by the Livadeia Tribunal. That judgment had condemned the German state to pay compensation to the heirs of 218 victims of the Distomo massacre. The Greek regional government's participation demonstrates the transnational dimension of post-war reparations litigation, and the interconnectedness of claims arising from Nazi atrocities committed across Europe. During the proceedings, Germany and the State Attorney General's Office, which intervened as part of institutional cooperation, asked the Tribunal to declare the proceeding extinguished by law, pursuant to Article 43(3) of Decree-Law No. 36/2022. This legal provision, introduced in direct response to renewed enforcement activity and in the context of a pending ICJ case, was aimed at safeguarding Germany's sovereign immunity from the execution of judgments based on wartime conduct.²⁰

However, on November 21, 2022, the Tribunal of Rome brought forward to the Italian Constitutional Court a question regarding the constitutionality of Article 43(3) of the Decree-Law, which was officially converted by Parliament into Law No. 79, specifically in relation to Articles 2, 3, 24 and 111 of the Constitution. The decision to raise a constitutional question signaled the national judiciary's continued vigilance over the balance between international legal obligations and domestic fundamental rights. It also underscored the enduring complexity of implementing international immunity norms within a constitutional system that strongly emphasizes access to justice and individual guarantees.²¹

²⁰ Giacomo Palombino, *"Il Fondo per le vittime del Terzo Reich attraverso il prisma del (necessario) bilanciamento tra principi costituzionali. Nota a Corte cost., sent. n. 159 del 2023"*, Osservatorio Costituzionale, no. 6 (2023): 178-194.

²¹ Roberto Baratta, *"Il Fondo ristori tra rispetto del diritto internazionale, controlimiti e ragioni creditorie delle vittime di crimini nazisti"*, Rivista di diritto internazionale 106, no. 4 (2023).

The Italian government, represented by State Counsel, argued that the referral by the Tribunal of Rome was inadmissible because the Tribunal had failed to specify the nature and location of the German assets targeted for enforcement. According to this line of argument, the identification of specific property was a necessary condition for assessing whether immunity under international law applied. The government contended that the failure to identify the specific assets made it impossible to determine whether they were immune from enforcement under customary international law, which recognizes state immunity for property used for sovereign purposes. In its view, the referral was therefore procedurally flawed and lacking in essential factual context. The government also argued that the Tribunal's failure to identify the assets in question deprived the court of the ability to assess whether the enforcement action involved property protected by diplomatic or consular immunity. These objections were aimed at preventing the Constitutional Court from engaging with the broader legal question, and at limiting the scope of constitutional review to technical procedural grounds.

The Constitutional Court rejected these objections and held that the referral by the Tribunal of Rome was admissible. In doing so, the Court affirmed its willingness to evaluate legislation that impacts constitutionally protected rights, even in contexts involving complex questions of international law. The Court ruled that the central constitutional question was not the nature of the assets targeted for enforcement but the validity of Article 43(3) itself, which imposed a blanket termination of all enforcement proceedings based on judgments against Germany for Nazi crimes. This shift in focus, from the specificity of the assets to the general reach of the legislative measure, enabled the Court to frame the issue as one of principle, rather than mere procedure.

The Court reasoned that the challenged provision applied universally to all enforcement proceedings involving Germany's liability for war crimes, regardless of the specific nature of the assets targeted, and that the existence of a constitutionally adequate alternative remedy, meaning the compensation fund, was therefore the decisive issue. The very fact that the legislation affected a broad class of proceedings, without distinction, raised fundamental questions about proportionality, legal certainty, and the right to judicial protection.

The Court concluded that the Tribunal of Rome's failure to specify the assets in question did not undermine the relevance of the constitutional question because Article 43(3) terminated all enforcement proceedings on a general basis, not on the basis of the specific assets involved. This distinction allowed the Court to reach the broader constitutional question of whether blocking enforcement while providing an alternative remedy through the fund violated the victims' right to judicial protection and compensation. The approach adopted in this case reflects the Court's evolving sensitivity to the complexities of reconciling domestic constitutional values with international norms. Having established the admissibility of the constitutional question, the Court turned to the substance of the case.²²

2.2. The Constitutional Court's Legal Reasoning in Judgment No.159/2023

The question before the Court regarded whether Article 43(3) violated the constitutional right to judicial protection, the right to compensation for serious human rights violations, the right for a fair trial and, lastly, the principle of equality before the law because it terminated enforcement proceedings and substituted them with an uncertain and untested compensation mechanism. The constitutional doubt focused not only on the effectiveness of the fund, but also on whether its imposition through a general rule extinguishing pending proceedings was compatible with the victims' procedural and substantive guarantees. The claimants argued that the compensation fund was inadequate since the implementing regulations had not yet been finalized, raising concerns about whether the fund would provide an effective compensation equivalent to the enforcement of a judgment. Moreover, doubts were raised as to whether the legislative mechanism arbitrarily discriminated against certain categories of claimants, particularly foreign nationals and holders of non-Italian titles, by excluding them from access to the fund or enforcement in Italy.²³

²² Donato Greco, "Ancora su immunità giurisdizionali e gravi violazioni dei diritti umani: La sentenza n. 159/2023 della Corte costituzionale dichiara il fondo per le vittime del Terzo Reich un rimedio equivalente alla tutela esecutiva", *Diritto Pubblico Europeo Rassegna online*, no. 2 (2023): 266-283.

²³ Tullio Scovazzi, "Un passo avanti in un contesto complesso: Considerazioni sulla sentenza n. 159 del 2023 della Corte costituzionale italiana", *Rivista di diritto internazionale* 107, no. 1 (2024): 5-19.

The Italian Constitutional Court, on the other hand, defended Article 43 on the grounds that Italy was obligated to comply with the ICJ's 2012 ruling and that state immunity is a binding norm of customary international law incorporated into the Italian legal system through Article 10(1) of the Constitution. The Court recognized that the enforcement of judgments against the property of a foreign state falls squarely within the domain of state immunity, and is thus constitutionally constrained by international obligations that Italy is bound to respect. It also stated that the compensation fund provided an adequate remedy, thereby balancing the victims' constitutional rights with Italy's international legal obligations. In its view, the fund was not an abstract or symbolic solution but a concrete alternative designed to ensure full payment of the amounts already judicially awarded, preserving the substance of judicial protection while avoiding an international breach.²⁴

The Constitutional Court's reasoning in Judgment No. 159/2023 reflects a meticulous and carefully balanced approach to resolving this constitutional and international conflict. The Court began by reaffirming that the right to judicial protection under Article 24 of the Constitution includes not only the right to seek a judgment but also the right to enforce it. A judgment that cannot be enforced is, in practical terms, meaningless, as judicial protection includes the ability to ensure compliance with a court order. However, the Court also emphasized that this right is not absolute, and may be subject to limitations when conflicting with other principles of constitutional rank, such as the obligation to respect international law. The Court also reaffirmed that the right to compensation for human rights violations, including war crimes and crimes against humanity, is protected under Article 2 of the Constitution as a fundamental and inviolable right. Yet, in the specific context of enforcement, it drew a clear line between the jurisdictional phase, where it had previously rejected immunity in Judgment No. 238/2014, and the enforcement phase, where it now upheld immunity. The Court stressed that Italy is constitutionally bound to respect international law under Article 10(1) of the Constitution, which incorporates generally recognized principles of international law, including state immunity, into the Italian legal system.

²⁴ Palombino et al., *op. cit.*, 178-194.

It clarified that the enforcement of decisions against sovereign property must be governed by the international law principle of restrictive immunity, which prohibits execution on state-owned property used for sovereign, public purposes.²⁵

The Court held that the principle of state immunity continues to apply at the enforcement stage, even in cases involving war crimes and crimes against humanity. Indeed, enforcement against a foreign state's property directly affects the sovereign equality of states, a foundational principle of the international legal order. The ICJ's Judgment of 2012 established that state immunity at the enforcement stage extends to properties used for sovereign functions, including diplomatic, cultural, and educational institutions. The Court recognized that the properties targeted in the enforcement proceedings were clearly linked to sovereign functions and therefore protected by state immunity under international law. Attempting to enforce judgments against these properties would have placed Italy in breach of its international obligations and would have invited diplomatic retaliation from Germany. This, in turn, would have jeopardized Italy's international legal credibility and its ability to act as a reliable subject of international law.

However, the Court did not stop at recognizing state immunity. It carefully examined whether Article 43 (3) provided an alternative remedy that satisfied the victims' constitutional right to judicial protection. The Court ruled that the compensation fund created by the aforementioned article established a constitutionally appropriate remedy. The fund guaranteed that victims would receive the full amount of damages awarded in their judgments, including legal costs. The Court found that the fund offered a more practical and reliable means of securing compensation than direct enforcement, which would have been rendered impossible by state immunity. It reasoned that the compensation fund preserved the victims' right to judicial protection, even though the formal mechanism of enforcement was blocked.

²⁵ Oktawian Kuc, "Obligation to Comply with ICJ Decisions: The Jurisdictional Immunities Saga within the Italian Legal Order", *Studia Iuridica* 102 (2024): 125-128.

The Court also noted that the fund would be administered according to clear procedural rules established in an inter-ministerial decree, ensuring that payments would be made within 180 days and that victims would receive full satisfaction of their claims. In this way, the Court aligned the effectiveness of the remedy with constitutional standards.²⁶

The Court concluded that Article 43(3) struck a reasonable balance between the victims' right to seek legal protection and Italy's obligation to respect state immunity. While the right to judicial protection includes the right to enforce judgments, it is not absolute and can be restricted when necessary to comply with superior constitutional or international obligations. The compensation fund ensured that the restriction on enforcement did not nullify the victims' right to redress, thereby maintaining the equilibrium between constitutional and international norms. Furthermore, the Court implicitly recognized that Italy's dualist constitutional model requires mechanisms to resolve conflicts between domestic rights and international obligations, and that Article 43(3) functioned precisely as such a mechanism. The Court therefore upheld Article 43(3) as constitutionally valid, rejecting the claimants' arguments that the law violated Articles 2, 3, 24 and 111 of the Constitution. By doing so, the Court reaffirmed the fundamental principle that state immunity remains a structural requirement of the international legal order but acknowledged that constitutional protection of human rights requires an effective remedy when enforcement is unavailable. Judgment No. 159/2023 thus stands as a complex constitutional reconciliation of the competing demands of human rights, state immunity, and international law.²⁷

²⁶ Kuc et al., op. cit., p. 125-128.

²⁷ Italian Constitutional Court, "*Judgment No. 159 Year 2023*", published in the Official Journal of the Italian Republic, No. 1, first special series (2023).

2.2.1. Revisiting Judgment No. 238/2014: A Comparative Perspective

Judgment No. 238/2014 marked a decisive moment in the long-standing issue of reparations for war crimes committed by the Third Reich, setting a precedent that the Constitutional Court was compelled to revisit it in its most recent deliberation. This earlier ruling not only framed the historical context but also influenced the resolution of the new constitutional question addressed in Judgment No. 159/2023. In 2014, the Court gave absolute precedence to the right of access to justice under Articles 2 and 24 of the Constitution, even at the expense of established international norms such as state immunity. At the time, the Court dismissed any attempt to balance constitutional values with international obligations, asserting instead the absolute primacy of fundamental rights over conflicting rules of customary international law. The doctrine of counter-limits was central to this reasoning, allowing the Court to prevent the entry of international norms into the domestic legal order when they clashed with constitutional principles. In this way, Judgment No. 238/2014 constituted not only a breach of the ICJ's 2012 decision but also an attempt to provoke a broader evolution of international law.²⁸

In contrast to the rigidity of its 2014 stance, the Constitutional Court has taken a notably more flexible and pragmatic approach in Judgment No. 159/2023. While it still upholds the fundamental nature of the right to access justice, the Court now emphasizes the distinction between the right to adjudication and the right to enforce judgments. It makes clear that the constitutional protection granted to enforcement measures does not carry the same weight as that afforded to the right to access a court. Consequently, the rule of customary international law granting state immunity from enforcement is considered compatible with the Italian Constitution and continues to apply through Article 10, without triggering the counter-limits doctrine. The Court underscores that such immunity limits only which state-owned assets can be seized, not the ability of victims to seek recognition of their rights.

²⁸ Giovanni Boggero, “*The Legal Implications of Sentenza No. 238/2014 by Italy’s Constitutional Court for Italian Municipal Judges: Is Overcoming the ‘Triepelian Approach’ Possible?*” *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* 76, no. 1 (2016): 203-224.

Notably, the Court no longer displays the same ambition to contribute to the progressive development of international law. In 2014, it explicitly expressed the desire to reduce the scope of sovereign immunity and to trigger a shift in customary norms. In 2023, however, that normative aspiration was set aside. The Court makes no reference to recent foreign jurisprudence that, echoing the Italian stance, has begun to acknowledge exceptions to immunity in cases involving grave human rights violations, nor does it assess whether Judgment No. 238/2014 exerted any real influence internationally. Instead, the Court's tone reflects a more reserved and state-centric attitude, marked by an awareness of Italy's international responsibilities.²⁹

A key difference between the two rulings lies in the Court's attitude toward alternative remedies. In 2014, no thought was given to the possibility of non-judicial or political solutions, and the Court dismissed the relevance of any substitute for judicial enforcement. On the other hand, Judgment No. 159/2023 welcomes the Fund as a legitimate and effective remedy that justifies the suspension of enforcement proceedings against Germany. While the ICJ's 2012 ruling had required Italy to halt such proceedings to preserve Germany's immunity, the Fund provides a domestic mechanism for satisfying final judgments already issued against Germany. Therefore, the Court carefully balances competing interests by preserving the domestic effect of the judgments, while blocking their coercive enforcement and transferring the reparations process to a state-managed, negotiated solution. This shift is further reinforced by the Court's deference to Italy's international obligations, including its commitment to the Bonn Agreements of 1961, even though it avoids directly mentioning Article 94(1) of the UN Charter, which mandates compliance with ICJ judgments.³⁰

²⁹ Pierfrancesco Rossi, "*Le sentenze della Corte Costituzionale 159 del 2023 e 238 del 2014: continuità o rivoluzione?*", *Diritti umani e diritto internazionale* 17, no. 3 (2023): 569-588.

³⁰ Paolo Palchetti, "*Judgment 238/2014 of the Italian Constitutional Court: In Search of a Way Out*", *Questions of International Law* 2 (2014): 44-47.

Importantly, the Court's 2023 decision does not contradict its 2014 ruling but rather reframes its scope. The earlier case dealt with the denial of access to courts, a violation the Court viewed as constitutionally intolerable in the absence of any remedy. The 2023 case, in contrast, concerns the execution of already issued decisions, in a context where a concrete alternative mechanism is now available. The presence of this Fund allows the Court to reintroduce constitutional balancing as a method, rather than applying the absolute logic of the counter-limits. This shift toward a more balanced approach between domestic rights and international law represents a notable departure from the assertive stance of 2014, reflecting a Court more conscious of the broader legal and diplomatic consequences of its decisions.³¹

2.2.2. Immunity from Jurisdiction and Immunity from Enforcement: Why the Counter-Limits Doctrine Was Not Extended

When comparing the approach of the Constitutional Court in Judgment No. 238/2014 and that in Judgment No. 159/2023 an important difference emerges between the treatment of jurisdictional immunity and immunity from enforcement. In 2014, the Court held that the denial of access to a judge for victims of war crimes and crimes against humanity constituted an intolerable sacrifice of fundamental rights protected under Articles 2 and 24 of the Constitution. Applying the doctrine of counter-limits, it prioritized constitutional rights over the customary rule of state immunity from jurisdiction, allowing proceedings against Germany to continue.

However, in Judgment No. 159/2023, the Court expressly refused to apply the counter-limits to the immunity from enforcement. The distinction lies in the nature and constitutional relevance of the two phases. While the right to bring a claim and obtain a judicial decision is directly tied to the fundamental right of access to justice, the execution of a judgment, particularly against a foreign State's sovereign assets, involves different considerations. Enforcement immunity is seen as a core component of the principle of sovereign equality

³¹ Daniele Manelli, *"Il Fondo ristori per i crimini commessi dalle forze armate del Terzo Reich al vaglio della Corte costituzionale tra "restorative justice" e "tribunalizzazione" della storia (Considerazioni a margine di Corte cost., sentenza n. 159 del 2023)"*, in Osservatorio Costituzionale, Fasc. 2/2024 (2 aprile 2024): 186-201.

and enjoys a more robust protection under international law. Thus, the Court reasoned that while access to judicial recognition of one's rights must be safeguarded even against international norms, the means of enforcing such rights, specifically, coercive measures against another State's property, could legitimately be limited without breaching constitutional protections, provided that an alternative remedy was available. Enforcement immunity affects only the modalities of satisfaction, not the recognition of rights themselves.³²

Moreover, the Court noted that the phase of enforcement touches more acutely upon the sovereign functions of a foreign State and the structural principles of international law, such as non-intervention and sovereign equality, making it even less susceptible to constitutional derogations. In the absence of a comparable fundamental constitutional imperative directly requiring coercive execution, and given the existence of a compensatory mechanism, the application of the counter-limits doctrine was not justified. This differentiation allowed the Court to maintain fidelity both to the spirit of Judgment No. 238/2014 (defending victims' rights) and to Italy's binding international commitments, thus avoiding the rupture in international legal relations that would have resulted from extending the counter-limits to the enforcement stage.³³

2.3. The Limits of Judgment 159/2023: A Critical Appraisal of Its Unresolved Issues

Despite Judgment No. 159/2023, scholars continue to express concerns about the restrictions on access to court adjudication introduced by Decree-Law No. 36/2022. Specifically, Article 43(6) of the Decree, which prohibits claims against Germany filed after December 31, 2023, may conflict with Articles 2 and 24 of the Italian Constitution, as interpreted by the Italian Constitutional Court in Judgment No. 238/2014. Additionally, Article 43(3) of the Decree, which mandates the termination of proceedings to enforce foreign judgments against Germany, has been interpreted by Italian judges through a constitutionally-focused lens.

³² Palchetti et al., *op. cit.*, p. 44-47.

³³ Manelli et al., *op. cit.*, p. 202-206

This interpretation prevents the termination of enforcement in cases like those of Greek claimants, where no alternative remedies exist. In such instances, where claimants are excluded from the compensation fund, the enforcement of foreign judgments remains their only avenue for obtaining justice. Consequently, halting these proceedings altogether would amount to a denial of justice, which would be unconstitutional under Italian law.

Another layer of critique focuses on the socioeconomic disparities inherent in judicial remedies, an issue the Constitutional Court's reasoning does not fully confront. Given that legal proceedings are adversarial, expensive, and often drawn out, only those victims with sufficient financial resources, legal knowledge, or emotional resilience can realistically pursue claims to compensation. This dynamic produces a structurally exclusionary effect: while some claimants receive substantial awards, others are effectively shut out due to procedural hurdles or limited means. As a result, critics contend that the system fosters a form of selective justice, where the gravity of the harm suffered is overshadowed by one's capacity to navigate the legal process.³⁴

It is important to note that the Italian government initially allocated approximately 60 million euros to the Fund; however, as several scholars have pointed out, this amount will likely prove insufficient over time. To avoid a "first come, first served" possible scenario, the Italian executive will need to replenish the Fund in order to ensure full compensation for all eligible victims. This necessity stems from the fact that some individuals have already been awarded substantial sums, often in the millions. Without temporal limitations, it is foreseeable that additional heirs of victims will continue to bring claims against Germany, further increasing the total compensation required. Moreover, in the absence of stricter eligibility criteria, the financial resources of the Fund would need to be significantly expanded. This becomes especially evident when considering cases like *Distomo*, where Greek courts alone ordered Germany to pay approximately 50 million euros in compensation and legal costs. Yet even with stricter limitations or increased funding, these measures may still fall short of addressing the broader issue of reparations or delivering a solution that is equitable and satisfactory for all victims.³⁵

³⁴ Francesco Salerno, "*Il contenzioso italo-tedesco dopo la sentenza n. 159/2023 della Corte costituzionale*", *Giurisprudenza Italiana*, no. 10 (2023): 2073–2080.

³⁵ Greco et al., *op. cit.*, p. 266-283.

Although Italy is an economically advanced country, providing millions of euros in compensation to the victims of the Second World War may still pose a significant financial burden, potentially affecting the State's ability to fund other social and welfare initiatives. In this context, the intervention of the State Attorney's Office to contest the claims of Italian victims, thereby delaying or obstructing compensation, is not unexpected. This dynamic underscores a broader limitation of judicial remedies: only those victims with the financial means, social and emotional support may be able to withstand protracted and demanding legal proceedings are likely to obtain compensation.³⁶

2.4. Conclusion

Judgment No. 159/2023 marks an evolution in the Italian Constitutional Court's approach to balancing state immunity with the right to judicial protection. Unlike its 2014 predecessor, this ruling adopts a more cautious and conciliatory stance, acknowledging international obligations while seeking to preserve the substance of victims' rights through a state-managed compensation mechanism. While the judgment avoids the constitutional rupture of 238/2014, it also introduces new tensions, particularly regarding the practical limits of access to justice and the long-term adequacy of the reparations fund. These unresolved issues will be treated more in depth in the next chapter's exploration of the broader legal, diplomatic, and institutional legacy of Judgment No. 159/2023, and its implications for the future of state immunity in international law.

³⁶ Alessandro Bufalini, "*The Italian Nazi Crimes Reparations Fund and Judicial Protection: Navigating the Drawbacks of Judicial Responses to Mass Crimes*", *Italian Yearbook of International Law* 33 (2023): 335–345.

Chapter 3: The Legacy of Judgment No. 159/2023 on State Immunity and Future Perspectives

As the previous chapter highlights the legal process behind the Judgment and its contents, this consequent chapter examines the broader future implications of the Italian Constitutional Court's evolving stance on state immunity, with particular attention to Judgment No. 159/2023 and the introduction of the Reparations Fund. Building on the analyses of Judgments No. 238/2014 and No. 159/2023, the aim here is to explore how the Italian legal system has attempted to reconcile constitutional principles with international obligations, and what consequences this shift entails. While Judgment No. 159/2023 marks a partial realignment with the ICJ's position, it does so by relying on a state-managed fund that raises a distinct set of legal and practical concerns. This chapter first considers in paragraph 3.1. the consequences such decision sparked in the relations between the main actors of this dispute, meaning Germany and Italy, and the continuous tensions. It then highlights what can be considered the precedent set by the Judgment which introduced a more flexible framework for reconciling constitutional rights with the principle of state immunity. Follows paragraph 3.2. that touches upon the international repercussions of the legal dispute and the impact it brought to proceeding featuring state immunity, highlighting cases in countries such as Brazil and Korea. Lastly, the chapter is concluded with paragraph 3.3 which brings the focus on future implications and what could happen in international law regarding the rules behind state immunity, on whether the Judgments brought change or unrest.

3.1. Consequences of the Judgment on Italy-Germany Relations

The pending proceedings before the International Court of Justice and the Judgment 159/2023 rendered by the Italian Constitutional Court have sparked renewed interest in the decade-long legal dispute between Italy and Germany concerning reparations for WWII crimes. The judicial dispute generated numerous unresolved legal problems that continue to burden Germany and Italy's political and diplomatic relationship, with vast repercussions on core questions of international law and the relationship between different legal orders.

Looking ahead, several scenarios may emerge. On a diplomatic level, Judgment 159/2023 and the reparations fund may serve as a functional turning point. The legislative and judicial steps taken by Italy have already prompted a partial de-escalation in the ICJ proceedings, as shown by Germany's withdrawal of the request for provisional measures and the multiple extensions granted in the submission schedule. These moves suggest that Germany may view the Italian solution as a sufficient response, at least provisionally, to its legal concerns. If the fund succeeds in delivering effective compensation to eligible victims, the dispute may gradually fade from the active diplomatic agenda, replaced by more constructive forms of bilateral cooperation.³⁷

However, important tensions remain. The legal framework established by Judgment 238/2014 remains formally in force within the Italian legal order. Although its scope was limited in Judgment 159/2023, the Constitutional Court did not overturn or neutralize its core finding: namely, that denying jurisdiction to victims of international crimes may violate constitutional rights. As a result, domestic courts in Italy may still be able to accept new claims against Germany at the jurisdictional level, despite the apparent ban on enforcement. This legal ambiguity could fuel new litigation or even reopen the diplomatic dispute, especially if enforcement attempts are again pursued in sensitive contexts. The reparations fund itself may also generate future legal and political challenges. Its current structure excludes non-Italian victims, judgments issued by foreign courts, and claims not filed within strict deadlines. These limitations may give rise to further constitutional questions, particularly concerning equal treatment and access to justice. If new constitutional referrals are made, the Italian Constitutional Court may be forced to revisit the relationship between immunity, fundamental rights, and the adequacy of alternative remedies, an issue that Judgment 159/2023 only partially resolved.³⁸

³⁷ Francesco Biondo, *“Una promessa di giustizia alle vittime di crimini di guerra che l’ordinamento italiano non poteva mantenere. Un dramma in cinque atti”*, *Diritto & Questioni pubbliche* 24, no. 1 (2024): 43–62.

³⁸ Lorenzo Acconciamezza, *“Il rimedio alternativo come criterio della legittimità delle limitazioni del diritto di accesso al giudice: sul bilanciamento realizzato dalla Corte costituzionale nella sentenza n. 159/2023 sul ‘Fondo ristori’ per i crimini nazisti”*, *Diritti umani e diritto internazionale* 17, no. 3 (2023): 627–654.

Internationally, the judgment's selective embrace of immunity principles could continue to raise concerns about consistency with Italy's obligations under international law. While the Court upheld immunity from enforcement measures, it confirmed the validity of its prior ruling denying immunity from jurisdiction in cases involving international crimes. This dual track might be perceived as undermining the principle of sovereign equality, and could influence Germany's broader position in international forums. At the same time, the Judgment's pragmatic tone and the creation of the fund may serve as a model for other states facing similar conflicts between constitutional rights and international immunity rules. In the best-case scenario, this moment could evolve into a more structured path of bilateral reconciliation. The fund, although unilaterally financed by Italy, may serve as a platform for joint initiatives in memory, historical truth, and symbolic justice. Such initiatives, while not altering the legal distribution of responsibility, could help repair the human and moral dimension of the dispute. More broadly, the Italian approach might influence the international debate on how to reconcile access to justice with the principle of state immunity, especially in cases involving serious violations of human rights.³⁹

In conclusion, while Judgment 159/2023 has defused some immediate tensions, it does not eliminate the underlying complexities. The future of German-Italian relations on this issue depends on whether both states are willing to consolidate this temporary stabilization into a more permanent political and legal solution, capable of addressing residual claims while respecting both constitutional and international legal norms.

³⁹ Pierfrancesco Rossi, "Truce or Settlement? The Dispute over Germany's Immunity from Wartime Reparations Claims after Judgment No. 159/2023 of the Italian Constitutional Court", *Italian Yearbook of International Law* 33 (2023): 1-25.

3.1.1. The Precedent Set by Judgment No. 159/2023

Judgment No. 159/2023 sets an important precedent by introducing a more flexible framework for reconciling constitutional rights with the principle of state immunity. Without abandoning the protections affirmed in Judgment No. 238/2014, the Constitutional Court shifts from an oppositional stance to a more cautious, system-compatible approach. The Court upholds the right of victims to obtain a judgment, but confirms that enforcement remains subject to customary international law, which enters the domestic legal order via Article 10 (1) of the Constitution. In doing so, it draws a clearer distinction between recognition and execution, allowing the judiciary to maintain the internal validity of prior decisions while simultaneously limiting their practical enforceability through coercive means. This distinction enables the Court to uphold the relevance of the counter-limits doctrine without applying it directly at the enforcement stage. By avoiding a direct constitutional override of international obligations, the judgment implicitly narrows the reach of the doctrine while preserving its theoretical availability. The introduction of the Reparations Fund is central to this balancing act: it offers an alternative path to compensation while protecting the state from further diplomatic and legal friction. Although not without its limitations, the Fund allows the Court to acknowledge victims' rights without undermining Italy's international commitments.⁴⁰

What makes this ruling particularly significant is its potential applicability beyond the Germany v. Italy dispute. The model it proposes, meaning a separation of judicial recognition from enforcement, backed up by a state-managed compensation mechanism, may be invoked in future cases involving competing obligations under constitutional and international law. Because of such model, Judgment No. 159/2023 does not merely resolve a specific conflict but quietly lays the groundwork for a more sustainable approach to similar tensions. However, the broader potential of this precedent remains uncertain, especially in the absence of clear international standards and given the unresolved questions around access, equality, and the limits of state discretion in administering alternative remedies.⁴¹

⁴⁰ Acconciamezza et al., op. cit., p. 627-654.

⁴¹ Salerno et al., op. cit., p. 2073-2080.

3.2. Evolution of State Immunity: The International Impact of Judgment 159/2023

The Italian Constitutional Court's handling of state immunity disputes, particularly through Judgment No. 238/2014 and its subsequent reconsideration in Judgment No. 159/2023, has generated a set of complex ripple effects that extend well beyond the German-Italian context. Two key dynamics emerge from this peculiar situation: the potential spillover of Italy's legal doctrines into ongoing or future cases involving different states, and the Italian Court's cautious, strategic avoidance of directly supporting an emerging body of comparative jurisprudence that supports humanitarian exceptions to state immunity.

3.2.1. The International Spillover of Italian Jurisprudence: The Case of Iran

The first of these dynamics concerns the possible international spillover, particularly in cases where state immunity is questioned in relation to claims of gross violations of human rights, terrorism, or other international crimes. This is particularly relevant in contexts where foreign states have been subjected to civil proceedings and enforcement actions abroad, as can be noticed in the recent cases involving Iran. In jurisdictions such as the United States and Canada, legislative exceptions to sovereign immunity, most notably the U.S. Foreign Sovereign Immunities Act (FSIA), Canada's State Immunity Act (SIA) and Justice for Victims of Terrorism Act (JVTA); have enabled victims of terrorism to initiate lawsuits against Iran and enforce judgments against Iranian assets, including diplomatic and non-commercial property. Iran has reacted with legal challenges before the International Court of Justice. In *Certain Iranian Assets (Iran v. United States)*, it contested the attachment and seizure of assets by U.S. courts, arguing that these actions violated the 1955 Treaty of Amity and customary international law; and more recently, in *Alleged Violations of State Immunities (Iran v. Canada)*, it accused Canada of systematically dismantling Iran's jurisdictional and enforcement immunities through retroactive legislation and recognition of U.S. default judgments.⁴²

⁴² Valentin von Stosch and Felix Herbert, "Jurisdictional Immunities, All Over Again?" EJIL:Talk!, July 7, 2023, p. 1-4.

These proceedings take place against the specific stage previously set by the ICJ's authoritative ruling in *Germany v. Italy* (2012), where the Court held that state immunity is a procedural rule distinct from the substantive norms allegedly violated, and that even grave breaches of *jus cogens* norms do not override a foreign state's entitlement to immunity before national courts. The ICJ reaffirmed this position by declining to address the sovereign immunity question in *Certain Iranian Assets*, having already excluded such claims at the preliminary objections stage.⁴³ The pending Iran v. Canada case may compel the Court to revisit this stance, as it now faces a direct challenge to the compatibility of domestic terrorism exceptions with customary international law. The expanding tension between immunity and accountability now positions domestic courts, particularly in states that have enacted immunity-limiting statutes, as powerful agents in the reconfiguration of the rules governing jurisdiction over foreign states, potentially undermining the very principle of sovereign equality that the ICJ has sought to preserve.⁴⁴

3.2.2. Selective Engagement with Comparative Jurisprudence: Italy's Strategic Silence

Italy's own jurisprudential evolution, from the humanitarian exception affirmed in Judgment 238/2014 to the enforcement immunity reaffirmed in Judgment 159/2023, now represents a legal model characterized by internal incoherence. While the Italian Constitutional Court in 2023 upheld immunity from enforcement, it did not overturn the 2014 decision rejecting jurisdictional immunity. This coexistence of contradictory doctrines within the same legal system risks creating ambiguity that other states may exploit. States like Iran may claim, with some credibility, that Western legal systems inconsistently apply international norms: defending immunity strictly in some cases, like for Germany, while tolerating broader exceptions in politically sensitive cases involving designated adversaries. The perception of such double standards could undermine the credibility of international legal institutions and provoke reciprocal noncompliance.

⁴³ International Court of Justice, *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Judgment of 30 March 2023, I.C.J. Reports 2023, p. 51-130.

⁴⁴ International Court of Justice, *Alleged Violations of State Immunities (Islamic Republic of Iran v. Canada)*, Application Instituting Proceedings, 27 June 2023, General List No. 189, p. 4-14.

Moreover, the Italian legal system may remain vulnerable to renewed enforcement attempts by claimants holding judgments against other states, especially where foreign judgments or alternative remedies are unavailable. The logic of the 2014 ruling continues to inform the reasoning of lower Italian courts, and unless explicitly overturned, it could be revived in new litigations. This scenario is not necessarily hypothetical, Italy could become a potential ground for plaintiffs seeking to bypass enforcement barriers elsewhere, particularly if their cases involve claims of *jus cogens* violations. The current balance struck in Judgment No. 159/2023 is delicate, it mitigates the most immediate political risk, but the broader systemic consequences for Italy's credibility in international legal forum remain uncertain.⁴⁵

A second, equally significant dimension of the Italian experience lies in the judicial handling of comparative influences. When addressing the constitutionality of the Reparations Fund in Judgment 159/2023, the Italian Constitutional Court was presented with an opportunity to engage with a global jurisprudential shift. Other national courts, such as Brazil's Supremo Tribunal Federal in the 2021 *Changri-La case* and South Korea's Seoul High Court in comfort women litigation, have begun carving exceptions to state immunity in response to mass atrocities. These decisions reflect a growing judicial willingness to subordinate procedural immunity to the substantive imperative of accountability.⁴⁶

Notably, while the Italian Court acknowledged these cases in its factual section, it did not incorporate them into its reasoning. It did not place its stance within a broader trend nor used emerging consensus to justify its reasoning. This silence is not accidental. It reflects a conscious decision to withdraw from the assertive stance that characterized Judgment No. 238/2014 and to realign with the classical international law model endorsed by the ICJ in 2012. By refraining from invoking foreign precedents that endorse humanitarian exceptions, the Court avoided exacerbating tensions with Germany or appearing to endorse a different legal path.

⁴⁵ Bufalini et al., op. cit., p. 335-345.

⁴⁶ Marco Longobardo and Federica Violi, "Access to Justice for Atrocities in the Comparison of Landmark Cases on State Immunity in Brazil and Italy", *The International Journal of Human Rights* 29, no. 4 (2025): 713-735.

This judicial strategy can be understood as an effort to soften Italy's previous defiance of international customary laws. The Court's measured tone and formal neutrality signal a broader institutional attempt to rebuild Italy's legal credibility while preserving domestic constitutional values. By avoiding a direct confrontation with the ICJ and by introducing a national compensation mechanism, the Court presented itself as a constitutional actor that respects international constraints but does not fully relinquish its protective function toward victims. This posture, though pragmatic, has the side effect of reinforcing the fragmentation of international law on immunity: leaving national courts with diverging standards and creating legal uncertainty for both victims and states.⁴⁷

In conclusion, the Italian experience after 2023 demonstrates a refined yet precarious effort to reconcile constitutional values with the constraints of public international law. While Italy has moved toward compliance through legislative and judicial instruments, it has not resolved the foundational tensions that its earlier jurisprudence introduced into the international legal system. This dual legacy of activism and restraint leaves Italy as both a reference point and a cautionary tale. Its case illustrates the high stakes of constitutional courts intervening in domains traditionally governed by international consensus, and the enduring challenges of integrating human rights protections into a legal order still fundamentally shaped by the principle of sovereign equality.⁴⁸

3.3. Future Implications: Toward a New Framework for State Immunity?

The Italian experience raises pressing questions about the future of state immunity and its capacity to accommodate the evolving demands of justice in a global legal order that is increasingly confronted with claims arising from violations of human rights. The tension between the international obligation to respect state immunity and the constitutional imperative to protect fundamental rights has exposed an unregulated area that neither constitutional law nor customary international law has fully addressed.

⁴⁷ Biondo et al., *op. cit.*, p. 43-62.

⁴⁸ Rossi et al., *op. cit.*, p. 20-25.

As demonstrated by the Italian Constitutional Court's shift from a confrontational stance in 2014 to a more cautious and conciliatory posture in 2023, there is a growing recognition that domestic courts are being asked to adjudicate in a space where international legal norms remain ambiguous and often inadequate. This judicial fragmentation reveals the urgent need for clearer international standards capable of reconciling state immunity with the right to redress for victims of international crimes.⁴⁹

One possible direction for the future lies in a functional distinction between jurisdictional immunity and enforcement immunity, where access to courts may be granted in exceptional circumstances involving *jus cogens* violations, while enforcement against sovereign assets remains subject to stricter constraints in order to preserve the foundational principle of sovereign equality. Judgment 159/2023 implicitly gestures toward such a model by accepting jurisdiction in principle but limiting coercive enforcement in favor of a state-managed remedy. However, this balance remains fragile. The absence of international consensus and the increasingly spreading of national rulings suggest that domestic courts are becoming a stage for the development of a fragmented, and at times contradictory, customary practice. While this may reflect a shift toward prioritizing accountability over procedural immunity, it also carries the risk of legal uncertainty and selective application.⁵⁰

The Italian case highlights how legal arguments surrounding immunity can become entangled with broader geopolitical dynamics, particularly when immunity is upheld for allies but questioned in politically sensitive contexts involving adversaries, as evidenced by the parallel case of Iran at the ICJ. This perceived inconsistency threatens the legitimacy of international legal institutions and reinforces the necessity of a more coherent framework. A potential path forward may lie in the construction of a hybrid model that allows limited exceptions to immunity in cases of international crimes, while channeling reparations through nationally administered compensation schemes that meet constitutional standards and demands.

⁴⁹ Angelo Jr Golia, “Dopo la disaggregazione. La sent. n. 159/2023 come ‘amministrazione diplomatica’ tra argomentazione giuridica e giustizia costituzionale”, *Nomos: Le attualità nel diritto* 3 (2023): 1–30.

⁵⁰ Golia et al., op. cit., p. 1-30.

Italy's Reparations Fund could serve as a preliminary template, but only if it is transparently funded, periodically replenished, and open to all eligible victims without discriminatory exclusions.⁵¹

Ultimately, the challenge is not simply to defend or dismantle the doctrine of state immunity, but to redefine its boundaries in a way that safeguards both the sovereign equality of states and the right of individuals to obtain meaningful justice. If successful, this redefinition could represent a more sustainable and principled reconciliation between constitutional values and international obligations, one that avoids the confrontational ruptures of the past while addressing the structural injustices they sought to remedy.⁵²

3.4. Conclusion

Judgment No. 159/2023 and the establishment of the Reparations Fund reflect a shift away from the open constitutional conflict of Judgment No. 238/2014 toward a more cautious attempt to balance Italy's constitutional commitments with its obligations under international law. While this model avoids direct defiance of the ICJ and maintains the formal framework of immunity, it does so at the cost of creating new inequalities and uncertainties. The Fund itself remains limited in scope, both financially and procedurally, and does not eliminate the structural barriers many victims continue to face in seeking reparations. Moreover, the broader normative question, whether and how serious violations of international law should limit state immunity, remains unresolved at both the national and international levels. Italy's experience, while significant, highlights the limits of relying on domestic constitutional courts to shape customary international law in the absence of broader consensus. If future developments are to provide more consistent and equitable solutions, they will likely require clearer guidance at the international level or coordinated efforts across jurisdictions. In this sense, the Italian case offers both a possible reference point and a warning about the fragility of legal compromise in matters involving fundamental rights and sovereign immunity.

⁵¹ Giorgia Berrino, "*La sentenza della Corte costituzionale n. 159/2023 tra precisazioni e suggestioni: verso l'epilogo della controversia italo-tedesca?*", *Diritti umani e diritto internazionale* 17, no. 3 (2023): 589-625.

⁵² Berrino et al., op. cit., p. 589-625..

Conclusion

The legal dispute between Germany and Italy over state immunity and reparations for Nazi crimes exemplifies the enduring struggle to reconcile the principles of international law with the imperatives of constitutional justice. The Italian legal response to the question of state immunity in the context of Nazi atrocities has not only reshaped domestic constitutional doctrine but also contributed to a broader international dialogue on the evolving boundaries of sovereign responsibility.

The first chapter set the stage by examining the 2012 judgment of the International Court of Justice in *Germany v. Italy*. The ICJ reaffirmed the traditional understanding of jurisdictional immunity, even in the context of grave breaches of international humanitarian law. While the Court acknowledged the gravity of the Nazi crimes committed, it concluded that customary international law afforded no exception to immunity in such cases, thereby confirming a rigid separation between state responsibility and individual access to justice.

The second chapter turned to Italy's constitutional response in Judgment No. 238/2014, which represented a direct challenge to the ICJ's decision. The Constitutional Court invoked the doctrine of counter-limits to assert that the right to judicial protection and human dignity, as protected by the Italian Constitution, could not be overridden by international norms conflicting with fundamental constitutional principles. In doing so, the Court effectively refused to enforce jurisdictional immunity in cases involving international crimes, thereby triggering a significant constitutional-international conflict.

The third chapter examined the more recent Judgment No. 159/2023, in which the Constitutional Court revisited its position. While reaffirming its earlier constitutional principles, the Court introduced a more conciliatory approach: it upheld the legitimacy of a state-managed reparations fund as an alternative means of redress and distinguished between jurisdiction and enforcement immunity. This attempt to balance constitutional protection with international obligations marked a shift from direct judicial confrontation to institutional compromise.

While Judgment No. 159/2023 offers a more measured approach, by distinguishing between jurisdiction and enforcement and relying on a state-managed reparations fund, it also leaves open critical questions regarding access to justice, the limits of state immunity, and the future applicability of the counter-limits doctrine. The fund itself is not immune to challenges concerning pressing questions about its scope, sustainability, and inclusivity, particularly with regard to foreign victims and international enforcement claims.

Looking ahead, the Italian experience may prove to be more than an isolated constitutional episode. It offers a potential model for other states navigating similar tensions between immunity and justice. The judgments of the Italian Constitutional Court have already found echoes in global debates, from Canada and the United States' litigation involving terrorism-related exceptions, to ongoing proceedings against Iran before the International Court of Justice. Whether these developments will bring forward a concrete shift in customary international law remains uncertain, but the seeds of change are visible.

This thesis concludes by affirming that the dispute between Germany and Italy should not be read solely as a controversy in the international sphere, but as a turning point in the legal and moral recognition of state-perpetrated atrocity. It reveals both the fragility and the potential of legal systems to adapt under normative pressure. In this sense, Italy's jurisprudence, while fragmented, may continue to shape the limits of state immunity and contribute to a future in which access to justice is no longer sacrificed in the name of sovereignty.

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