“Plus Ça Change, Plus C’est la Même Chose”: State Immunity and International Crimes in Judgment No. 20442/2020 of the Corte di Cassazione

Note to: Corte di Cassazione (Sezioni Unite Civili), P.T. v. Federal Republic of Germany and Republic of Italy, 28 September 2020, No. 20442

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Abstract

The Corte di Cassazione, with judgment No. 20442/2020, faced again the issue of German compensations for the victims of international crimes perpetrated by the Third Reich, ruling that immunity of Germany cannot be recognized in claims brought by the victims, or by their heirs, before the Italian courts. At first reading, the decision seems not to have added anything new to the domestic case law in Italy following judgment No. 238/2014 of the Corte Costituzionale. However, an in-depth analysis shows that there are two key points expressed by the Corte di Cassazione: the due effect of judgment No. 238/2014 and the overlap of the arguments used in the Italian judgments after 238/2014 and those prior to ICJ Judgment of 3 February 2012. At any rate, the problem of German compensation is still far from being resolved. The only way to reach the longed-for diplomatic solution would be a judgment similar to 238/2014 on the immunity of States’ properties from measures of constraint.

Keywords

Germany – Italy – international crimes – second world war – compensations – immunity – acta iure imperii – fundamental human rights – delicta imperii
1 Abstract of the Decision

In the event that a State perpetrated international crimes, the balance between the principle of respect for fundamental human rights of the individual and that of sovereign equality of States, from which the State immunity from foreign civil jurisdiction arises, tips in favour of fundamental human rights, with the consequence that no immunity will be granted to the State responsible for such crimes.

2 Key Passages from the Judgment

(Paragraph 1.2) “[F]rom the middle of the first decade of this century, a trend arose in the case law of the Corte di Cassazione, according to which the scope of the principle of State immunity from foreign civil jurisdiction for acts performed _jure imperii_ must no longer be deemed absolute – as in the past – due to the fundamental principle of respect for the inviolable rights of the human person [...]. According to the aforementioned trend, the category of _delicta imperii_ must be acknowledged, that cannot benefit from the customary prerogative of full State immunity.

(Paragraph 1.3) In this context, there was the _Germany v. Italy_ judgment of the International Court of Justice of 3 February 2012 [...]. In compliance with this judgment, [...] the Italian legislator promulgated Law No. 5/2013. [...] These Sezioni Unite have therefore changed their trend, by acknowledging once again the applicability of the principle of immunity.

(Paragraph 1.4) The above mentioned trend [...] has been no longer tenable, nor may it be now, starting from the subsequent judgment of the _Corte Costituzionale_ No. 238 of 2014 [...].

(Paragraph 1.5) Given the cumulative declaration [...] of _rigetto con interpretazione_ (binding, on the judge’s opinion, to prevent the repetition of the unconstitutional interpretation [...] ) and the declaration of constitutional illegitimacy of the internal rules transposed [in the judgment of the _Corte Costituzionale_ No. 238 of 2014], the case law of the Corte di Cassazione following the judgment of the _Corte Costituzionale_ came back to the former trend, by acknowledging the pre-eminence of the principle and meta-value of the respect for inviolable rights in case of _delicta imperii_, [...] with the following withdrawal of the principle of State immunity.

(Paragraph 1.6) It should be noted that the Corte di Appello di Firenze did not take into the least account both this consolidated trend of the Corte di
Cassazione and the following judgment of the Corte Costituzionale: it grounded its decision on an outdated approach and merely dissented from the arguments supporting the issues of constitutionality raised by the Tribunale di Firenze, which instead were accepted with a decision issued well four years earlier than the judgment challenged here.

3 Comment

3.1 A Brief Summary of the Case

The court case that led to the judgment at issue originates from the claim filed by Paolo Toldo against Germany before the Tribunale di Firenze in 2004 to obtain compensation for damages for the unlawful arrest in Italy, deportation to German concentration camps and subjection to forced labour of his father, General Michele Toldo, by the armed forces of the Third Reich during the Second World War.¹

Germany pleaded the lack of jurisdiction of the Italian Court on the basis of the customary rule of international law, which – according to the German interpretation – establishes the immunity of States from foreign civil jurisdiction for all the acta iure imperii (i.e. those performed by a State in the exercise of its sovereign prerogatives, which typically include war activities), without exceptions.

In addition, Germany proposed a regolamento preventivo di giurisdizione,² about which the Corte di Cassazione acknowledged the Italian jurisdiction in its order No. 14202 of 29 May 2008.³

¹ Michele Toldo is one among those who, by order of Hitler, could not benefit from the status of prisoners of war at the time of their detention by the German authorities, as they had been called as Italian Military Internees (imis). Such individuals did not benefit from the compensation allocated by Germany for the victims of National Socialism, as the compensation system excluded prisoners of war. Post-war German authorities deemed in fact that the status of prisoners of war had never ceased for imis because the Third Reich had unilaterally denied it, in violation of international law. See ex multis Hammermann, Gli internati militari italiani in Germania 1943–1945, Bologna, 2004.

² In compliance with Art. 41 (1) of the Italian Code of Civil Procedure, the regolamento preventivo di giurisdizione allows each party to a proceeding to request that the issues relating to jurisdiction, among which the acknowledgment of the Italian jurisdiction, be decided in advance by the Sezioni Unite of the Corte di Cassazione, rather than by the court where the proceeding was filed.

³ The decision is one of the thirteen orders, all adopted by the Corte di Cassazione (Sezioni Unite Civili) on 29 May 2008 (Nos. 14200–14212). See Focarelli, “Diniego delle immunità giurisdizionali degli Stati stranieri per crimini, jus cogens e dinamica del diritto internazionale”, Rivista di diritto internazionale, 2008, p. 738 ff. See also Corte di Cassazione (Sezioni Unite Civili), Federal Republic of Germany v. Regional Administration of Voiotia, 29 May 2008, No. 14199, commented by Franzina, “Norme sull’efficacia delle decisioni straniere e immunità
The decision was based on the trend expressed by the Corte di Cassazione in the well-known Ferrini judgment of 2004, which stated that the immunity of States from foreign civil jurisdiction granted by a customary rule of international law is not absolute, i.e. immunity cannot be invoked in case a State had such a serious misconduct as to constitute an international crime (the so-called delicta imperii), since it is prejudicial to the universal values of respect for human dignity that transcend the interests of individual States.4

However, the Tribunale di Firenze accepted the German preliminary objection and declared the claim for damages as inadmissible in its judgment No. 1086 of 28 March 2012.

The reasons had to be found in the judgment of the International Court of Justice (“ICJ”) Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) of 3 February 2012 (hereinafter, “2012 ICJ judgment”), which accepted the German appeal claiming the Italian Court’s infringement of the customary rule on immunity from civil jurisdiction starting from Ferrini judgment onwards. In short, the ICJ stated that the international custom has always acknowledged immunity in case of acta iure imperii, even if they resulted in serious violations of fundamental human rights.5

The Corte di Appello di Firenze confirmed the decision of the Tribunale with its judgment No. 2945 of 17 December 2014, decreeing that the trend of the Corte di Cassazione had changed, after the adoption of Article 3 of Law No. 5 of 14 January 2013,6 approved to enforce the 2012 ICJ judgment at national level, and that such trend acknowledged the immunity vis-à-vis foreign States in the event of acta iure imperii.

degli Stati dalla giurisdizione civile, in caso di violazioni gravi dei diritti dell'uomo”, Diritti umani e diritto internazionale, 2008, p. 638 ff.
4 Corte di Cassazione (Sezioni Unite Civili), Ferrini v. Federal Republic of Germany, 11 March 2004, No. 5044. See ex multis DE SENA, DE VITTOR, “State Immunity and Human Rights: The Italian Corte di Cassazione Decision on the Ferrini Case”, The European Journal of International Law, 2005, p. 89 ff.
5 Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, ICJ Reports, 2012, p. 99 ff. See ex multis TANZI, GRADONI, “Immunità dello Stato e crimini internazionali tra consuetudine e bilanciamento: note critiche a margine della sentenza della Corte internazionale di giustizia del 3 febbraio 2012”, La Comunità Internazionale, 2012, p. 203 ff.
6 The article established the obligation for the Italian judges to declare their lack of jurisdiction at all stages of the proceedings for those conducts of a foreign State for which the ICJ had excluded the subjection to civil jurisdiction; a new hypothesis of revocation for lack of civil jurisdiction was also provided for with regard to those judgments become final clashing with the ICJ decision. See CIAMPI, “L’Italia attua la sentenza della Corte Internazionale di Giustizia nel caso Germania c. Italia”, in Rivista di Diritto Internazionale, 2013, p. 146 ff.
Paolo Toldo then filed an appeal to the Corte di Cassazione. According to the plaintiff, it was no longer possible for the Italian legal system to acknowledge the immunity of a foreign State in case it committed international crimes, by virtue of the subsequent judgment of the Corte Costituzionale No. 238 of 22 October 2014 (hereinafter “judgment No. 238”).

As it is known, in fact, the Tribunale di Firenze, within the framework of suits similar to that brought by Mr. Toldo, raised three issues of constitutional legitimacy, relating to the compatibility with Articles 2 and 24 of the Constitution – the inviolable human rights and the right of access to justice, respectively – (i) of the rule created in the Italian law system by means of transposition, provided for by Article 10 (1) of the Constitution, of the international customary rule on State immunity from foreign jurisdiction, in the part in which – pursuant to the 2012 ICJ judgment – it imposes on the Italian judges to deny their jurisdiction in the actions for damages arising from war crimes and crimes against humanity perpetrated iure imperii by the Third Reich, at least partly in Italy; (ii) of Article 3 of Law No. 5 of 2013 and (iii) of Article 1 of Law No. 848 of 1957 (transposing the UN Charter in the Italian law system), in the part in which they imposed on the Italian judges, in compliance with the 2012 ICJ judgment, to deny the national jurisdiction in the above mentioned actions.

As to the first issue, the Corte Costituzionale stated that the mechanism of transposition provided for by Article 10 (1) of the Constitution does not operate if the international customs clash with the supreme principles of the same Constitution, in application of the theory of counter-limits.

The international rule on immunity, as interpreted by the ICJ, conflicts with the supreme principles included in Articles 2 and 24 of the Constitution; therefore, such rule could apply in the Italian law system only in its non-conflicting part. Thus, the Court declared the first issue as ill-founded, adopting a sentenza interpretativa di rigetto, given that the clashing portion of the international custom never became part of the Italian legal system.

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7 Corte Costituzionale, 22 October 2014, No. 238. See ex multis the latest article published in this Journal by Focarelli and the references indicated therein. 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 on International and Comparative Law, 2021, p. 29 ff., pp. 36–38, note 16. See also the references infra in the notes of this paper.

8 “The Italian legal system conforms to the generally recognized principles of international law”. It is debated whether art. 10 (1) Cost. provides for the transposition only of general customs or even particular customs.

9 On the theory of counter-limits, see ex multis POLIMENI, Controlimiti e identità costituzionale. Contributo per una ricostruzione del “dialogo” tra le Corti, Napoli, 2018.

10 The Corte Costituzionale adopts a sentenza interpretativa di rigetto when, among the various meanings attributable to a law thanks to an activity of interpretation, a meaning consistent
As to the second and third issue, the Court issued two pronouncements of unconstitutionality on the basis of the same conflict with the supreme principles, by declaring the thorough illegitimacy of Article 3 of Law No. 5 of 2013 and the partial illegitimacy of Article 1 of Law No. 848 of 1957, in the part in which such rule binds the Italian judges to conform to the ICJ judgment and thus to acknowledge the immunity of a foreign State that perpetrated international crimes.

The Corte di Cassazione, in its judgment No. 20442/2020, overturned the Appeal judgment, pointing out how the Corte di Appello had not taken into account the judgment No. 238 and the subsequent trend of the Corte di Cassazione, which both denied the immunity of foreign States from the Italian civil jurisdiction provided for *acta iure imperii* in case of international crimes.\(^{11}\)

### 3.2 *The “Eloquent Silence” of the Corte di Cassazione*

The judgment of the Corte di Cassazione at issue had been really longed for in the Italian legal system.

Despite four years had elapsed since judgment No. 238 and the fact that, in the meantime, the Italian case law had consolidated its denial of foreign States’ immunity from jurisdiction in the case of serious violations of fundamental

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\(^{11}\) See Berrino, “Cala ancora una volta la scure delle Sezioni Unite sull’esenzione della Germania dalla giurisdizione italiana per crimini internazionali perpetrati dal regime nazista”, Sistema penale, 27 ottobre 2020, available at <https://www.sistemapenale.it/it/scheda/sezioni-unite-20442-2020-sezioni-unite-immunita-giurisdizionale-germania-crimini-nazisti>; Venturini, “Le Sezioni Unite sulle immunità degli Stati (sent. n. 20442 del 2020): un’evoluzione soltanto apparente”, Forum di Quaderni Costituzionali, 2021, p. 169 ff, available at <https://www.forumcostituzionale.it/wordpress/wp-content/uploads/2021/02/12-Venturini-FQC-1–21.pdf>; Chechi, “Italian Jurisprudence on the Boundaries of State Immunity from Jurisdiction and Execution: Waiting for the Next Episode”, Italian Yearbook of International Law, 2020, p. 493 ff. See also: Focarelli, cit. supra note 7, pp. 39–40; Scovazzi, “Come se non esistesse”, Rivista di diritto internazionale, 2021, p. 167 ff, pp. 167–170.
human rights, the *Corte di Appello di Firenze*, in the instant case, unexpectedly declared the lack of Italian jurisdiction.

The *Corte di Cassazione, Sezioni Unite* was therefore expected – at least ideally – to face again the pros and cons on immunity in case of State international crimes, thus fulfilling its nomophylactic function.

Instead, the *prima facie* impression one gets while reading this pronouncement is that expectations have been disappointed. The Court merely made a full reconstruction of the evolution of the relationship between the rule on immunity and fundamental human rights in the Italian legal system and confirmed the loss of immunity if such rights had been violated, without adding any further considerations, in the light of its consolidated case law and of the judgment No. 238.

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12 See *ex multis Corte di Cassazione (Sez. I Pen.), Criminal proceedings against Opačić Dobrivoje and others*, 29 October 2015, No. 43696; *Corte di Cassazione (Sezioni Unite Civili), Flatow Francine and others v. Islamic Republic of Iran and others*, 28 October 2015, No. 21946; *Corte di Cassazione (Sezioni Unite Civili), Parrini Dina and others v. Federal Republic of Germany*, 13 January 2017, No. 762. On the first decisions of Italian judges in the aftermath of judgment No. 238 see *ex multis forlati*, “Judicial Decision, Immunities of Foreign States from Jurisdiction”, Italian Yearbook of International Law, 2015, p. 497 ff.

13 On the matter, Focarelli underlines that “this case nicely illustrates the oscillating attitude of the Italian jurisprudence” on immunity and that the *Corte d’Appello di Firenze* recognized immunity “without following (and hence, without assuming that it was compelled to follow) Judgment No. 238” FOCARELLI, *cit. supra* note 7, pp. 39–40. The same deems Venturini, who argues that the non-alignment of the *Corte di Appello di Firenze* with judgment No. 238 could depend on the nature of *sentenza interpretativa di rigetto* of the famous judgment, which is likely to have allowed the Appeal judges to diverge from the decision of the *Corte Costituzionale*. VENTURINI, *cit. supra* note 11, p. 176. However, in my opinion, the *Corte di Appello*, rather than meaning to diverge from the judgment of the *Corte Costituzionale*, maybe did not know it at all; indeed, in the text of the decision, no mention has ever been made of judgment No. 238, nor of the trend that followed from the same. The Appeal judges only said: “This court is aware that the *Tribunale di Firenze* [...] has raised doubts of constitutional legitimacy [...] however, the thesis of the referring judge [...] is not juridically convincing and cannot be embraced after that the *Sezioni Unite* of the *Corte di Cassazione*, further to a review of its previous case law, have expressly ascribed the denial of a civil action for a victim of war crimes to the limitations of sovereignty provided for by Art. 11, last part, of our Constitution”. The lack of knowledge of judgment No. 238 by the Appel judges is also highlighted by Scovazzi, who wonders how they could ignore that the *Corte Costituzionale* had already refused to acknowledge immunity in a similar case pending before another Court of the same district of the Court of Appeal four years earlier. *SCOVAZZI*, *cit. supra* note 11, p. 169.

14 Scovazzi states that judgment is not significant for the juridical arguments developed and that the main reason of interest is the thorough description of the double change of jurisprudence occurred on immunity in connection with the human rights in Italy. *SCOVAZZI*, *cit. supra* note 11, pp. 167; 169.
Someone deems that the Corte di Cassazione missed an opportunity to clarify on which grounds the immunity of a State from foreign jurisdiction should be denied in case it perpetrated international crimes.\footnote{Venturini, cit. supra note 11, p. 172.}

However, the Court’s omission could suggest more than one can see at first. In my opinion, the strength of the judgment lies just in the fact that the Corte di Cassazione had not brought the issue of immunity into sharper focus once again: it did not face either the grounds for the existence or not of the customary rule, as interpreted by the 2012 ICJ judgment, in the Italian legal system, or its extent when a State violates fundamental human rights.

This stance of the Corte di Cassazione sent a very clear message: there is no room for manoeuvre in the Italian legal system to reopen the debate on the operation of immunity in case of serious violations of fundamental human rights and the issue was closed once and for all.

To demonstrate this, it should be noted that the judgment seems to contain almost a “sharp reproach” to the Corte di Appello di Firenze,\footnote{On the matter, Scovazzi maintains that the Corte di Appello di Firenze’s unawareness of judgment No. 238 is so “astounding” that, in comparison, the complaints of Corte di Cassazione to the Appellate judges seem to be extremely mild. Scovazzi, cit. supra note 11, p. 169.} which, in the Corte di Cassazione’s view, “did not take into the least account” the “now consolidated trend of the Corte di Cassazione and the following judgment of the Corte Costituzionale”; it grounded its decision “on an outdated approach and merely dissented from the arguments supporting the issues of constitutionality raised by the Tribunale di Firenze, which instead were accepted with a decision issued well four years earlier than the judgment challenged here”\footnote{See para. 1.6. Emphasis added.}.

Two different implications arise from the minimalist but at the same time granitic stance of the Corte di Cassazione: the scope of judgment No. 238 as sentenza interpretativa di rigetto and the ultimate meaning of the Corte di Cassazione’s judgment.

3.3 Destiny of “a sentenza interpretativa di rigetto”

The judgment of the Corte di Cassazione at issue defined, once and for all, the scope of judgment No. 238 of the Corte Costituzionale in the Italian legal system, by providing an answer to a question that scholars had been wondering about for some time.

In fact, after judgment No. 238, the extent of the two pronouncements of unconstitutionality was undoubted; instead, there were many who wondered about the effects of the sentenza interpretativa di rigetto. In particular, they
wondered whether such pronouncement would have been binding only upon the referring judge, as it was “technically” meant to be, or if this would have had a wider scope, to be extended to all the Italian judges.\footnote{18}{It is true that, according to the most recent trend of scholars, the sentenze interpretative di rigetto would be only binding upon the referring judge, but there is still a tendency of all the other Italian judges to conform to the interpretation of the Corte Costituzionale. On this point, with special regard to judgment No. 238, see ex multis Lamarque, “Some WH Questions about the Italian Constitutional Court’s Judgment on the Rights of the Victims of the Nazi Crimes”, Italian Journal of Public Law, 2014, p. 198 ff., pp. 209–210, according to whom “in consolidated Italian practice a sentenza interpretativa di rigetto is never binding on ordinary courts. It is a recommendation, not a command”.
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The follow-up of the sentenza interpretativa di rigetto was in that case particularly awkward, due to the 2012 ICJ judgment, to which the Corte Costituzionale had de facto disobeyed.\footnote{19}{As Focarelli reminds, some scholars stated that judgment No. 238 is a dangerous act of disobedience against the ICJ and a breach of international law which jeopardizes the stability of the international legal system. With its unilateralistic approach, the judgment contributes to the characterization of international law as “soft law”. Focarelli, cit. supra note 7, pp. 37–38.}

This gave rise to a real “dilemma”\footnote{20}{See ex multis, Boggero, “The Legal Implications of Sentenza No. 238/2014 by Italy’s Constitutional Court for Italian Municipal Judges: Is Overcoming the ‘Triepelian Approach’ Possible?”, Heidelberg Journal of International Law, 2016, p. 203 ff., pp. 213–214; Oellers-Frahm, “A Never-Ending Story: The International Court of Justice – The Italian Constitutional Court – Italian Tribunals and the Question of Immunity”, Heidelberg Journal of International Law, 2016, p. 193 ff., p. 194.}

for the Italian judges: whether to abide by the decision of the ICJ or that of the Corte Costituzionale.

The Corte di Cassazione seems to have answered this question once and for all, by stating that:

“Given the cumulative declaration [...] of rigetto con interpretazione (binding, on the judge’s opinion, to prevent the repetition of the unconstitutional interpretation, [...] and the declaration of constitutional illegitimacy of the internal rules transposed [in the judgment of the Corte Costituzionale No. 238/2014], the case law of the Corte di Cassazione following the decision of the Corte Costituzionale came back to the former trend”.\footnote{21}{See para. 1.5. Emphasis added.}

It is clear that, from the viewpoint of the Sezioni Unite, judgment No. 238 must be necessarily taken into account – and was by the subsequent case law – in its entirety, by joining the sentenza interpretativa di rigetto to the two
pronouncements stating the constitutional illegitimacy. This must be done regardless of the technical value of the sentenza interpretativa di rigetto, which, according to the Court, merely provides for the Italian judges’ obligation, other than the referring judge, not to apply the interpretation of the rule non-compliant with the constitutional principle.

By carrying out an organic reading of judgment No. 238, the effect of the same – or better, of all the three different pronouncements which are part to the same – could only be binding upon all the Italian judges to deny the immunity of foreign States in case they committed serious violations of fundamental human rights.\(^{22}\)

If it is true, in fact, that the subject-matter of the three pronouncements was different, like the decision-making typologies were, it is true also that the underlying ratio was the same.\(^{23}\) This ratio must be appreciated and accepted by all the Italian judges, just like those who questioned the enforcement of the customary rule on immunity after judgment No. 238 did.\(^{24}\)

In the instant case, the sentenza interpretativa di rigetto produced an atypical effect, as it acquired a quid pluris able not only to direct the Italian judges, but also to be binding on them all,\(^{25}\) just thanks to the juxtaposition of the pronouncements of unconstitutionality.\(^{26}\)

\(^{22}\) Contra Lamarque, according to whom “there is still room […] to argue that the two declarations of unconstitutionality simply authorize or invite ordinary Italian courts to deny immunity to Germany, but they alone cannot impose this solution. The ‘form’ of the third part of the operative part of the ICC judgment [interpretativa di rigetto] confirms such a conclusion”.\(^{23}\) The same deems Torretta, who states that the meaning of the three pronouncements of judgment No. 238 ends up coinciding. Torretta, Giudicare la storia, Napoli, 2018, pp. 64–65.

\(^{24}\) See Corte di Cassazione (Sezioni Unite Civili), Flatow Francine and others v. Islamic Republic of Iran and others, cit. supra note 12, para. 4.1: “It is true that the Judgment of the Corte Costituzionale is entrusted in this part to a sentenza interpretativa di rigetto, not to a pronouncement of unconstitutionality […] And yet the Sezioni Unite agree to the principle set forth by that Judgment [No. 238]”.

\(^{25}\) See also ex multis Battini, according to whom the pronouncement of the Corte Costituzionale, beyond all formalisms, it is not a sentenza interpretativa di rigetto, but a pronouncement of unconstitutionality. Battini, “È costituzionale il diritto internazionale?”, Giornale di diritto amministrativo, 2015, p. 368 ff. See also Veronesi, Colpe di Stato. I crimini di guerra e contro l’umanità davanti alla Corte Costituzionale, Milano, 2017, p. 229, who underlines that the judges of first instance who, after judgment No. 238 dealt with the issue of Germany’s immunity and international crimes, applied the sentenza interpretativa di rigetto of the Corte Costituzionale as if it were a pronouncement of unconstitutionality.

\(^{26}\) Venturini and Chechi, regardless of the joint interpretation of the pronouncements in judgment No. 238 which I proposed, believe that the Corte di Cassazione gave the sentenza interpretativa di rigetto a strength that it would not ontologically have. Venturini, cit. supra note 11, p. 176; Chechi, cit. supra note 11, p. 495.
The judges other than the referring judge have only to comply with the ultimate effect of the decision (the denial of immunity for delicta imperii). However, being the pronouncement a mere sentenza interpretativa di rigetto, they do not necessarily have to embrace the same argument of the Corte Costituzionale, as they may choose a different one that is compatible with the Constitution (save that they introduce again the issue of constitutional legitimacy).

3.4 Changing Perspective Does Not Change the Result

The second implication arising from the judgment of the Sezioni Unite is linked to the aspect just referred to above, that is, the lack of any obligation for the Italian judges to stick to a specific argument while denying immunity to foreign States which perpetrated international crimes.

This aspect has been well understood and transposed by the Corte di Cassazione in its judgment.

As said above, the Corte di Cassazione merely grounded its decision on the latest case law, by expressly referring both to the judgment No. 238 and to its own pronouncements following the latter.

The similarities, as well as the differences, between the approach of the Corte Costituzionale and that of the Corte di Cassazione are well known. Both disavow immunity in case of international crimes by referring to the need to protect fundamental rights. However, the Corte Costituzionale takes on a view based exclusively on internal constitutional law without challenging the scope of the rule on immunity as interpreted by the 2012 ICJ judgment, while the judges of the Corte di Cassazione, though constantly referring to the judgment No. 238, tend to take again the viewpoint of international law, by (re)interpreting the customary rule that clashes with the interpretation of the ICJ.

Therefore, the Corte di Cassazione seems to have highlighted in its decision (recalling both the judgment of the Corte Costituzionale and the following trend of the former) that, whatever the theoretical approach may be adopted in the Italian law system on the relationship between immunity and serious violations of fundamental human rights committed on the Italian territory, the result, from a practical point of view, is the same: immunity must always be disavowed.

27 The Corte di Cassazione has pointed out many times the substitutability of the theoretical arguments in its judgments issued after No. 238. See Corte di Cassazione (Sez. I Pen.), Criminal proceedings against Opačić Dobrivoje and others, cit. supra note 12, para. 5.2.1 according to which war crimes are so serious as to determine the “violation of the fundamental rights of the human person, whose protection is entrusted to imperative rules which are at the top of both the Italian and the International law system, and that prevails over any other
The irrelevance of the theoretical approach chosen would be also revealed by the reverse logical order in which the judges of the Corte di Cassazione mentioned what the Corte di Appello di Firenze did not take into account in its decision; they in fact mentioned first the “consolidated trend of the Corte di Cassazione”, and only after “the judgment of the Corte Costituzionale”.28

This way, the Corte di Cassazione revealed that the judgment No. 238 merely legitimated the trend already existing in the Italian legal system from Ferrini judgment to 2012 ICJ judgment,29 from a theoretical and formal viewpoint. In fact, it did not distinguish between its own trend post Ferrini-ante ICJ and its trend post No. 238, clearly stating that: “the case law of the Corte di Cassazione following the judgment of the Corte Costituzionale reverted to the previous trend”.30

28 See para. 1.6.

29 Legitimacy from the point of view of international law is debated. In fact, according to the international law system, the domestic law cannot be invoked to justify a violation of international law (See Vienna Convention on the Law of Treaties, 23 May 1969, entered into force 27 January 1980, Art. 27; International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001, Arts. 3 and 32). However, as well known, some scholars believe that the violation of international law by a State is justified when respect for the law conflicts with the supreme principles of its Constitution. See ex multis CONFORTI, Diritto internazionale, Napoli, 2018, p. 408. See also Cataldi, who affirms that the legitimacy on the international level of the violation of an international rule by national judges depends on whether or not the fundamental principles of the national system match with “common feeling of the International Community”: if there is a match, legitimacy exists. CATALDI, “La Corte Costituzionale e il ricorso ai ‘contro-limiti’ nel rapporto tra consuetudini internazionali e diritti fondamentali: oportet ut scandalia eveniant”, Diritti umani e diritto internazionale, 2015, p. 41 ff., pp. 47-48.

30 See para. 1.5. This aspect had been accepted by the Corte di Cassazione in other judgments. See supra note 27 and Corte di Cassazione (Sezioni Unite Civili), Parrini Dina and others v. Federal Republic of Germany, cit. supra note 12, in which the Court affirmed that its trend after judgment No. 238 “essentially refers to, and confirms, the previous trend followed in a similar cases before the Judgment of the ICJ of 2012”. The fact that, after judgment No. 238, there was not any change in the arguments already used by the Italian judges starting from Ferrini judgment until the 2012 ICJ judgment, was clear from the first Italian pronouncements following the decision of the Corte Costituzionale. On the matter, see OELLERS-FRAHM, cit. supra note 20, p. 195. Also Salerno underlines that the Italian judges found in judgment No.
Thus, the stance taken by the *Sezioni Unite* seems to answer an issue raised by scholars after judgment No. 238.

Some scholars argued that the stance adopted by the *Corte Costituzionale* could prejudice any changes to the rule on immunity of customary law at international level;\(^{31}\) this also because the Court, focusing on domestic law, disrupted a consolidated Italian practice, that had continued almost interruptedly since 2004, which disavowed immunity by embracing an international law perspective.\(^{32}\)

The continuity remarked by the *Corte di Cassazione* between its own *post Ferrini-ante ICJ* and *post No. 238* case law seems, however, to cancel or at least downsize the concern expressed.

The Italian judges, in fact, have clearly realized what was evident to all: despite the *Corte Costituzionale* had expressly declared to abide by the interpretation of the rule on immunity of the ICJ,\(^{33}\) it had a negative opinion of the same and claimed to contribute to the progressive development of

\(^{238}\) the basis to reaffirm and even radicalise in some cases their previous line of thinking starting from the Ferrini case. Salerno, “Le norme di diritto internazionale «generalmente riconosciute» nella prospettiva della Corte Costituzionale”, Rivista di diritto internazionale, 2020, p. 291 ff., p. 293.

\(^{31}\) Focarelli states that “the *Corte Costituzionale* developed no argument to make its case credible and potentially acceptable to the courts of other States. In particular, the judgment has not attempted to clarify *why* or *to what extent* other States and their courts should follow its example, so as to achieve an ‘evolution’ of customary international law […].” FOCARELLI, *cit. supra* note 7, p. 45. See also Cannizzaro, according to whom the approach of the *Corte Costituzionale*: “From a theoretical viewpoint, […] has created a deep cleavage between international law […] and the constitutional legal order […]. From a judicial policy perspective, it can have rendered more difficult for the *Corte Costituzionale* to attain its stated objectives, namely to trigger a process of change in the international law of immunities, and to promote its development towards a regime more in accordance with the human rights inspiration of modern Constitutions”. CANNIZZARO, “Jurisdictional Immunities and Judicial Protection: The Decision of the Italian Constitutional Court No. 238 of 2014”, Rivista di diritto internazionale, 2015, p. 126 ff., p. 128.

\(^{32}\) See *ex multis* Boggero, according to whom if the *Corte Costituzionale* had tried to give a different interpretation, endeavouring to reconcile international and constitutional law, “the Italian practice on State immunity would have appeared more sound and coherent to other States and, more importantly, the Italian Constitutional Court would have not jeopardized the uniform and effective application of customary international law on grounds of domestic constitutional law”. BOGGERO, *cit. supra* note 20, pp. 210–211.

\(^{33}\) See para. 3.3.
international law by downsizing the custom about immunity,\textsuperscript{34} like all the other judges (\textit{post Ferrini – ante \textsc{ICJ}}).\textsuperscript{35}

The theses proposed by the \textit{Corte Costituzionale} and the \textit{Corte di Cassazione}, even if not perfectly identical, began at least to overlap.\textsuperscript{36}

Therefore, the change of the customary rule establishing the immunity of States from foreign civil jurisdiction if they commit international crimes seems not to have been prejudiced at international level.\textsuperscript{37}

The attempt of the Italian case law to change the customary rule goes on relentlessly, thanks to the same arguments that the Italian judges had set forth since the \textit{Ferrini} trend and that had been prohibited by the \textit{ICJ}.\textsuperscript{38}

\begin{enumerate}
\item In this sense, see \textit{ex multis} \textsc{Pisillo Mazzeschi}, “The sentence n. 238 of 2014 of the Constitutional Court and its possible effects on international law”, Diritti umani e diritto internazionale, 2015, p. 23 ff., pp. 26–27. On the point, see also \textsc{Papa}, who highlights how the approach of the \textit{Corte Costituzionale} would have contributed to demolish the existing international rule on immunity, being it clear that the Court deemed it essential a change in the applicable international regime. \textsc{Papa}, “Il ruolo della Corte costituzionale nella ricognizione del diritto internazionale generale esistente e nella proclamazione del suo sviluppo progressivo. Osservazioni critiche a margine della sentenza n. 238/2014”, Rivista AIC, 2015, p. 1 ff., p. 15.
\item Sometimes the Italian judges, even after the 2012 \textit{ICJ} judgment and before that of the \textit{Corte Costituzionale}, adopted in their judgments the solution of the \textit{ICJ}, showing at the same time their dissent from it. See for instance \textit{Corte di Cassazione (Sez. I Pen.)}, \textit{Criminal proceedings against A.P. and others}, 9 August 2012, No. 32139, para. 5–6.
\item A confirmation of this aspect can be found in \textit{Corte di Cassazione (Sez. I Pen.)}, \textit{Criminal proceedings against Max Josef Milde}, 13 January 2009, No. 1072, para. 7, where, among the arguments used to deny immunity, there was also the one adopted in the judgment No. 238, at least in part. It must also be remembered that some scholars affirm that the legal arguments of judgment No. 238 could also be used at the level of international law to resolve the conflict between State immunity and fundamental human rights. See \textit{ex multis} \textsc{Pisillo Mazzeschi}, \textit{cit. supra} note 34, p. 29 ff.
\item This is true if one sticks to the 2012 \textit{ICJ} judgment, that has been harshly blamed by the scholars. In particular, see the thesis of \textsc{Tanzi, Gradoni}, \textit{cit. supra} note 5, according to which, by analysing the practice examined by the \textit{ICJ}, it is possible to demonstrate that the customary rule applied by the \textit{ICJ} does not exist. See also \textsc{Gradoni}, “Consuetudine e caso inconsueto”, Rivista di diritto internazionale, 2012, p. 704 ff. Starting from the assumption of Tanzi and Gradoni, in my opinion, the decision of the \textit{Corte Costituzionale} would not prejudice the uniformity of Italian practice and the \textit{animus inducendi consuetudinem} to create a new international customary rule.
\item However, it is known that the Italian judges, in the \textit{post Ferrini-ante \textsc{ICJ}} judgments, adopted arguments which have never been perfectly coincident, although anchored to the internationalist viewpoint. In this sense, it could be argued that the lack of uniformity reported by the scholars with the issue of judgment No. 238 was already existing when the judges applied the principles expressed by the \textit{Ferrini} judgment before the 2012 \textit{ICJ} judgment.
\end{enumerate}
Conclusions: “Begin at the Beginning and Go on Till you Come to the End, then Stop”

In the judgment at issue, the Corte di Cassazione underlined that an obligation had arisen for the Italian judges from the “cumulative” reading of the three pronouncements constituting the judgment of the Corte Costituzionale No. 238/2014: regardless of the formal issue grounding the decisions, immunity must always be denied to a foreign State in case it perpetrates international crimes in the territory of the State of the forum.  

The problems arising from the stance of the Italian case law are well known. Among them, the fact that in the proceedings involving Germany and the compensation for damages for the Second World War, as in the instant case, it is really difficult, almost impossible, to ensure an effective satisfaction to the beneficiaries of the above compensations, once immunity has been denied and the foreign State condemned.

Germany refuses in fact to abide by the sentences, and their enforcement is very hard to implement. The first reason is the customary international rule applicable in these cases, which establishes that the properties of a State cannot be subjected to foreign measures of constraint if they are meant for government non-commercial purposes – pursuant to the 2012 ICJ judgment – without exceptions. The second reason is the impossibility to identify German properties located on the Italian territory without such destination of use.

To the best of the writer’s knowledge, after judgment No. 238/2014, no judge recognised immunity in cases similar to the one at issue. The judgment issued by the Corte di Appello di Firenze cannot be considered a significant precedent to the contrary for the reasons already explained (see supra note 13).

Among the various problems, it is of fundamental relevance the violation of international law and of the 2012 ICJ judgment, that Italy perpetrated through the reiteration of its denial of immunity. In this respect, Focarelli criticized judgment no. 20442/2020 of the Corte di Cassazione, as it did not make any remarks about the above infringements. FOCARELLI, cit. supra note 7, p. 40.

Germany also asked the ICJ to declare Italy’s violation of the customary rule that prohibits measures of constraint on properties used for government non-commercial purposes; all the above, in Germany’s opinion, without exception, even in case a State committed international crimes. According to Germany, Italy had perpetrated such violation by raising a mortgage on Villa Vigoni, a German property located close to Lake Como, premises of a cultural centre aimed at promoting cultural exchange between Germany and Italy. The ICJ accepted the German interpretation of the customary rule. See ICJ, cit. supra note 5, para. 109–120. For the latest Italian developments about immunity of the State properties from foreign measures of constraint, see ex multis LOPES PEGNA, “Giù le mani da Villa Vigoni: quale tutela «effettiva» per le vittime di gravi crimini compiuti da Stati esteri?”, Rivista di diritto internazionale, 2018, p. 1237 ff; BERRINO, “La Corte di Cassazione torna sul tema delle immunità giurisdizionali degli Stati stranieri e dei loro beni”, Rivista di diritto internazionale, 2020, p. 844 ff.
Several times, in case law and among scholars, an extrajudicial composition of the Italian-German issue has been sought for.\textsuperscript{42}

However, until now, this outlook is hardly looming on the horizon, due to the attitude of Germany and, even more, of the Italian Government.

If, as Torretta remarks, Germany and Italy have shown for decades their incapability or unwillingness to adequately manage the issue of compensations due to victims,\textsuperscript{43} the situation seems to have even worsened after judgment No. 238.

As it is known, immediately after the decision of the \textit{Corte Costituzionale}, the Embassy of Germany sent a note to the Italian Ministry of Foreign Affairs.\textsuperscript{44}

The note, in which Italy was requested to comply with the 2012 ICJ judgment, stated that the decision of the \textit{Corte Costituzionale} could not affect in any way the contents and scope of the judicial immunity defined by the ICJ; it also underlined how the principle of immunity could not be limited by the internal law of the State, not even by the fundamental principles of the Constitution.\textsuperscript{45} For this reason, the Germany asked the Italian Government to be thoroughly informed, as soon as possible, of the way it intended to abide by the international obligations arising from the judgment of the ICJ, in order to avoid any further disputes.\textsuperscript{46}

Furthermore, Germany stopped appearing and standing up for defence in many proceedings as a defendant before the Italian courts, as it deemed that such proceedings were brought up in infringement of international law.\textsuperscript{47} This

\begin{enumerate}
\item In case law, see ICJ, \textit{Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)}, \textit{cit. supra} note 5, para. 104. In scholars, see \textit{ex multis} Palchetti, “Can State Action on Behalf of Victims be an Alternative to Individual Access to Justice in Case of Grave Breaches of Human Rights?”, \textit{Italian Yearbook of International Law}, 2015, p. 53 ff., pp. 57–60. See also Peters and Volpe who, seeing diplomacy as the solution to the dispute between Germany and Italy about the compensations for damages of the Second World War, have recently elaborated a “Modest Proposal”, that is – as the same authors define it – “a short manifesto ideally addressed to decision makers” focuses on the fundamental steps that must be adopted. Peters, Volpe, “Reconciling State Immunity with Remedies for War Victims in a Legal Pluriverse”, in \textit{Volpe et al. (eds.)}, \textit{Remedies against Immunity}, Berlin Heidelberg, 2021, p. 3 ff., pp. 29–30.
\item Torretta, \textit{cit. supra} note 23, p. 134. On the point see also Francioni who blames both Germany and Italy for the lack of spirit of reconciliation. Francioni, “Overcoming the Judicial Conundrum: The Road to a Diplomatic Solution”, in \textit{Volpe et al. (eds.)}, \textit{cit. supra} note 42, p. 343 ff., p. 344.
\item Embassy of the Federal Republic of Germany in Rome, Note Verbale No. 2 of 5 January 2015, available at <https://www.auswaertiges-amt.de/blob/2232368/c7a677b55f071b682c26ca24b07f8b1f/staatenimmunitaet-vn-ita-original-data.pdf>.
\item \textit{Ibid}, paras. 3–4.
\item \textit{Ibid}, para. 7.
\item See Peters, Volpe, \textit{cit. supra} note 42, p. 14, saying that a source of the German Minister of Foreign Affairs communicated to the authors in July 2020 that “the Federal Government
\end{enumerate}
also happened in the instant case, where the defendant challenged the plaintiff’s claims before the Tribunale and Corte di Appello, but did not stand up for its defence before the Corte di Cassazione.

As for the Italian Government, it could side with the Italian judges; as a matter of fact, it made its best efforts to thwart the decisions and effects of jurisprudence, thus indirectly responding to the request made by Germany in its diplomatic note.\footnote{Some scholars blame the Corte Costituzionale for not having included in judgment No. 238 a formula to urge the Italian Government to take actions to protect the victims. See \textit{ex multis} Salerno, “Giustizia costituzionale \textit{versus} giustizia internazionale nell’applicazione del diritto internazionale generalmente riconosciuto”, Quaderni costituzionali, 2015, p. 33 ff., pp. 37–39; Palchetti, \textit{cit. supra} note 42, p. 57.}

First of all, the Italian Government, immediately after the judgment of the Corte Costituzionale, adopted the Decreto Legge No. 132/2014, whose Article 19 bis establishes that the sums deposited in bank or post office accounts in the name of foreign States cannot be attached, under penalty of nullity also \textit{ex officio}, if they have been allocated solely for the performance of public functions, as the diplomatic representatives of the foreign State in Italy declared to the Ministry of Foreign Affairs.\footnote{The Decreto Legge “Misure urgenti di degiurisdizionalizzazione ed altri interventi per la definizione dell’arretrato in materia di processo civile” was converted into Law of 10 November 2014, No. 162, Gazzetta Ufficiale, 10 November 2014, No. 261. On Art. 19 bis of the Decreto, see Conforti, “Il legislatore torna indietro di circa novant’anni: la nuova norma sull’esecuzione sui conti correnti di Stati stranieri”, Rivista di diritto internazionale, 2015, p. 558 ff.}

Moreover, the Avvocatura dello Stato (Government lawyers) went on defending Germany in many proceedings brought up against the latter by the Italian victims of international crimes or their heirs.\footnote{See Baiada, “L’Italia non difenda i crimini nazisti”, Il Ponte, 21 May 2019 available at <https://www.ilponterivista.com/blog/2019/05/21/la-repubblica-non-difenda-i-crimini-nazisti/>; Scovazzi, \textit{cit. supra} note 11.}

It seems that the stance of the Italian Government,\footnote{For other discrepancies between the positions adopted by the various powers of the Italian State, see Papa, \textit{cit. supra} note 34, pp. 16–18.} clashing with that of the judges, stressed the scholars’ concern about the lack of uniformity of Italian practice in the enforcement of the customary rule on immunity, by triggering thus a sort of “short circuit” between these two institutions.

As I pointed out elsewhere, although a diplomatic solution would be, in abstract terms, preferred to the judicial one,\footnote{For a comparison on the models to be adopted to solve the issue of German compensations for crimes committed during the Second World War, with special attention also to Greece.} in the case at issue it seems that,
to break the deadlock, one can do nothing but wait for the Italian judges to complete their path.\textsuperscript{53}

If the issue of constitutional legitimacy was raised also with reference to the customary rule of international law on the immunity of States' property from foreign measures of constraint, as interpreted by the 2012 ICJ judgment (besides the aforementioned Article 19 \textit{bis} of Law No. 162/2014) and if the \textit{Corte Costituzionale} issued a judgment similar to No. 238,\textsuperscript{54} the reaction of Governments would be inevitable\textsuperscript{55} and maybe negotiations could eventually start,\textsuperscript{56} unless the famous “last bastion of immunity”\textsuperscript{57} is not embodied so much by the immunity from measure of constraint, but rather by the conduct of the Italian Government. This will help to restore somehow a sort of uniformity of the Italian practice \textit{lato sensu}, at least with regard to the specific case of compensation for serious violations of fundamental human rights perpetrated by Germany during the Second World War.

\textsuperscript{53} On the supplementary role of the Judges with respect to the Italian Government, see \textit{ex multis} Veronesi, \textit{cit. supra} note 25, p. 258.

\textsuperscript{54} On the possibility that a judgment similar to No. 238 may be adopted also in connection with the immunity of the State property from foreign measures of constraint, see \textit{ex multis} Pustorino, \textit{La sentenza n. 238 del 2014 della Corte costituzionale: limiti e prospettive nell'ottica della giurisprudenza italiana}, Diritti umani e diritto internazionale, 2015, p. 51 ff., pp. 52–56.

\textsuperscript{55} As noted by Gattini since 2003: “civil actions by individuals, although dubiously founded in international law, would probably have the beneficial effect of spurring states to reach settlements more consistent with international law”. Gattini, “To What Extent are State Immunity and Non-Justiciability Major Hurdles to Individuals’ Claims for War Damages?”, Journal of International Criminal Justice, 2003, p. 348 ff., p. 367.

\textsuperscript{56} Pavoni suggests that a solution could be “arbitration, thereby conclusively determining whether Germany or Italy, or both, have defaulted with respect to compensation owed to [...] imis and similarly situated victims of Nazi crimes”. Pavoni, “A Plea for Legal Peace”, in Volpe et al. (eds.), \textit{cit. supra} note 42, p. 93 ff., p. 94. Negotiations seem more plausible than a new German appeal to the icj or request for a UN Security Council intervention. As Von Arnauld remarks, the stance of the \textit{Corte Costituzionale} in judgment No. 238/2014 is not so different from that of Germany. This State sometimes demonstrated with its case law to disregard international and supranational obligations in case they clashed with its fundamental principles of internal constitutional system. See Von Arnauld, “Deadlock in Dualism: Negotiating for a Final Settlement”, Volpe et al. (eds.), \textit{cit. supra} note 42, p. 313 ff., pp. 316–318. See also Cataldi, \textit{cit. supra} note 29, p. 48.

\textsuperscript{57} See Report of the International Law Commission on Jurisdictional Immunities of States and their Property, \textit{YILC}, 1991, vol. ii, Part 2, Jurisdictional Immunities of States and their Property, Comment on Art. 18 of the Draft articles on jurisdictional immunities of States and their property.