The Italian Review of International and Comparative Law

The titles published in this series are listed at *brill.com/iric*

The Italian Review of International and Comparative Law

VOLUME 2 (2022)

BRILL

Brill Open Access options can be found at brill.com/openaccess.

Typeface for the Latin, Greek, and Cyrillic scripts: "Brill". See and download: brill.com/brill-typeface.

PRINT ISSN 2772-5642
E-ISSN 2772-5650

This journal is printed on acid-free paper and produced in a sustainable manner.

BRILL

THE ITALIAN REVIEW OF INTERNATIONAL AND COMPARATIVE LAW 2 (2022) 123–139

The Italian Review of International and Comparative Law

brill.com/iric

Italy and the Enforcement of Foreign Judgments on Third States' Tort Liability for Sponsoring Terrorism

The Conundrum of Jurisdictional Immunity of Foreign States in the Presence of Serious Violations of Human Rights

Note to: Corte Suprema di Cassazione (*Sezione 1 Civile*), *Angela Stergiopoulos et al. v. Islamic Republic of Iran, Central Bank of Iran and other Iranian Public Agencies, 10 December 2021, Order No. 39391* (*President F.A. Genovese, Judge-Rapporteur F. Terrusi*)

Donato Greco
Department of Law, University of Naples Federico II, Naples, Italy
donato.greco@unina.it

Abstract

The present comment deals with the much-debated issue of the denial of foreign States' jurisdictional immunity for *acta iure imperii* resulting in serious violations of human rights. This question came to the fore in Italy in the early 2000s and has since led to a stark contrast between the International Court of Justice, on the one hand, and Italian courts, in particular the Constitutional Court, on the other. Against this backdrop, these pages are aimed at analysing Order No. 39391/2021 of the Italian *Corte di Cassazione*, which concerns a proceeding for the enforcement of a US judgment condemning Iran to pay damages to the victims of the 9/11 terrorist attacks. Based on the reasoning of the decision, this comment argues that Italian courts, while praiseworthy for attempting to protect fundamental human rights, seem to have renounced speaking the language of international law.

Keywords

9/11 attacks – international terrorism – tort liability claims – enforcement of foreign judgments – international public policy – punitive damages – jurisdiction of domestic courts – jurisdictional immunity of foreign States – serious violations of human rights – tort exception

Abstract of the Decision

In its Order No. 39391/2021, the Italian *Corte di Cassazione* stated that a foreign judgment ordering a third State to pay compensation and punitive damages to victims' families for injuries arising from serious violations of fundamental human rights is enforceable in Italy. In the case at issue, the Court annulled the Order of 11 December 2020, by which the Court of Appeal of Rome had rejected the application for the *exequatur* of the 22 October 2012 Judgment of the United States District Court for the Southern District of New York, which, in turn, had declared Iran liable to pay compensation for sponsoring terrorism in connection with the injuries resulting from the 9/11 terrorist attacks on the Twin Towers. In the Court's view, the US judgment can be enforced in Italy for two reasons. On the one hand, the judgment's effects are compatible with Italy's international public policy. On the other hand, the foreign judge which rendered the decision would have had jurisdiction on the case according to the principles governing jurisdiction in the Italian legal system.

Key Passages from the Ruling

(Paragraphs IV-V) "[…] According to the same Court of Appeal, the judgment whose enforcement is at issue is also contrary to the fundamental principles of imputability and culpability, since it is based on a legal presumption of liability without the reconstruction of any causal link. In this respect, it should be noted that the latter remark, per se, is of no relevance in *exequatur* proceedings. Indeed, Article 64(g) of Law No. 218/1995, which the Court of Appeal relied on in emphasising its concerns related to the presumption of liability or culpability, does not allow the reviewing of a mechanism of presumptive proof which has led the foreign judge to hold the defendant liable. […] Contrariwise, Article 64(g) merely refers to the effects of the judgment, which must not be contrary to public policy. […] In this regard, certainly it cannot be said that […] a decision awarding damages to the victims of a terrorist attack, even if it may be based on a lightened burden of proof, is incompatible with public policy".

(Paragraph VII) "[…] As regards its relationship with the concept of immunity, which might be relevant under Article 64(a) of Law No. 218/1995, the FSIA merely codifies a restrictive theory of immunity since it adopts criteria that are nowadays applied in international law and by the domestic courts of most Western States. […] Foreign States' immunity from the civil jurisdiction for *acta iure imperii* is an absolutely settled principle. It constitutes a prerogative, and not a right, recognised by customary international norms whose operation is

precluded – also for the Italian legal system, following Judgment No. 238/2014 of the Italian Constitutional Court – as long as *delicta imperii* are concerned, i.e. crimes committed in breach of *ius cogens* norms and to the detriment of universal values that transcend the interests of individual State communities".

(Paragraph VIII) "Second, [...] Article 64(a) merely requires, as a condition for *exequatur*, that the foreign judge which delivered the judgment could actually hear the case also in accordance with the principles governing the jurisdiction in the Italian legal system".

(Paragraph IX) "There is no doubt that the answer to this question [...] must be in the affirmative".

(Paragraph X) "[...] This Court stressed on several occasions (see *Corte di Cassazione* (*Sezioni Unite*), Judgment No. 14201/2008) that the protection of inviolable rights of the human person has become a fundamental principle in the international legal system, so reducing the scope and extent of other principles which have traditionally inspired this legal order. Among these latter also (and precisely) stands the principle of sovereign equality, to which the norm on State immunity from the civil jurisdiction of other States is strictly connected. It follows that the generally accepted customary norm that requires States to refrain from exercising jurisdiction over foreign States for *acta iure imperii* is not [...] an absolute one. Indeed, it has to be balanced with the principle, also recognised in the international legal system, of the absolute primacy of the fundamental values of human dignity and freedom, when the former clashes with the latter. Consequently, foreign States are not granted total immunity from the civil jurisdiction of the territorial State in the presence of conduct of such a gravity as to constitute [...] *delicta imperii* or even as crimes against humanity. Insofar as this conduct is detrimental [...] to those universal values of human dignity that transcend the interests of individual State communities, it marks the breaking point of any tolerable exercise of sovereignty".

(Paragraph XI) "This interpretation [...] leads to recalling the doctrine according to which State immunity from civil jurisdiction for *acta iure imperii* constitutes a prerogative recognised by customary international rules whose application in the national legal system is however precluded as long as the so-called *delicta imperii* are concerned, following Judgment No. 238/2014 of the Constitutional Court. To enforce a foreign judgment condemning a third State to pay compensation for damages resulting from the violation of *ius cogens* norms (whether or not the facts are to be qualified as war crimes or crimes against humanity), it is necessary that the foreign judge which rendered the decision would have had jurisdiction on the case according to Italian rules of private international law".

(Paragraph XII) "[…] As regards the compatibility of punitive damages with the principles of public policy, this Court, in its highest composition, has clarified that, in the current legal system, civil liability is aimed not only at providing compensation to the injured party, but also at deterring and punishing the liable party. Therefore, the punitive damages of US origin are not incompatible with the public policy principles of the Italian legal system".[1]

Comment:

1 The Case Background

On 22 December 2011, in the *Havlish et al. v. Bin Laden et al.* case, the United States ("US") District Court for the Southern District of New York ("SDNY Court") entered a default judgment holding that Iran, the Central Bank of Iran and other Iranian agencies are liable to the plaintiffs for damages for sponsoring terrorism by providing material support to Al Qaeda in connection with the terrorist attacks on the Twin Towers in New York.[2] The case is part of the broader multidistrict litigation lawsuit *In Re Terrorist Attacks on September 11, 2001*,[3] which seeks redress for the victims of the 9/11 terrorist attacks. Since in all these proceedings US courts denied Iran's jurisdictional immunity, on 1 February 2017 the latter brought an action against the US before the International Court of Justice ("ICJ"), relying on the 1955 Treaty of Amity, Economic Relations, and Consular Rights in force between the two countries.[4] However, it is worth noting that, while the case is still pending on the merits stage, the judges will not address the question of immunity. Indeed, the ICJ has already decided that it does not have jurisdiction on Iran's claims based on the alleged violation of immunity guaranteed by customary international law, as they do not fall within the scope of the 1955 Treaty's compromissory clause.[5]

On 3 October 2012, the SDNY Court finally determined the total amount of damages, awarding to the victims and their families USD 1.36 billion in

1 Key passages from the ruling are translated by the author.

2 *Havlish et al. v. Bin Laden et al.*, US District Court, Southern District of New York, Judgment of 22 December 2011, No. 03 MDL 1570 (SDNY 2011).

3 *In Re Terrorist Attacks on September 11, 2001*, 349 F.Supp.2d 765, 779 (SDNY, 2005, Casey, J.).

4 *Case Concerning Certain Iranian Assets* (*Islamic Republic of Iran v. United States of America*), Memorial of the Islamic Republic of Iran of 1 February 2017, available at: <https://www.icj-cij.org/public/files/case-related/164/164-20170201-WRI-01-00-EN.pdf>.

5 *Certain Iranian Assets* (*Islamic Republic of Iran v. United States of America*), Preliminary Objections, Judgment of 13 February 2019, ICJ Reports 2019, p. 7 ff., para. 80.

compensatory damages and USD 4.68 billion in punitive damages.[6] In an attempt to seize Iranian assets abroad, from 2013 onwards the plaintiffs have therefore sought to enforce the 3 October 2012 Judgment in several European countries, including Luxembourg, the United Kingdom and Italy.[7]

Among these attempts, Angela Stergiopoulos, Fiona Havlish and others brought the case before the Court of Appeal of Rome. They filed an application for the *exequatur* of the US judgment in Italy, pursuant to Article 64 of Law No. 218/1995,[8] as well as a second application for a *sequestro conservativo* (precautionary seizure) of Iranian movable and immovable property and loans present in Italy and traceable to the Central Bank of Iran (Bank Markazi), including funds deposited with a Libyan Bank (Banca UBAE spa), with offices both in Rome and Milan.[9]

However, by the Order of 11 December 2020,[10] the Court of Appeal of Rome rejected the application for enforcement of the US judgment, because the latter did not meet the necessary requirements under Article 64(a)(g) of Law No. 218/1995, which have been examined jointly. First, the decision was handed down by a Court which would not have had jurisdiction on the case according to the principles governing jurisdiction in the Italian legal system. Indeed, in the judges' opinion, the SDNY Court's jurisdiction was based on the "terrorism exception" under the Foreign Sovereign Immunities Act ("FSIA"), which provides for an exception to the rule on foreign States' jurisdictional immunity by virtue of a unilateral and arbitrary designation of Iran as a sponsor of terrorism. Moreover, the judgment provisions are (allegedly) incompatible with Italy's international public policy, i.e. the fundamental principles of a State's legal system in a given historical period. On the one hand, in the Court of Appeal's view, the FSIA introduces an absolute presumption of guilt and allows the defendant's civil liability to be established even in the absence of a causal link with its conduct. On the other hand, by limiting the right of access

6 *Havlish et al. v. Bin Laden et al.*, U.S. District Court, Southern District of New York, Judgment of 3 October 2012, No. 03 MDL 1570 GBD (FM).

7 LAW, RICHARD, STOPPIONI and MANTOVANI, "The Aftermath of the 9/11 Litigation: Enforcing the US Havlish Judgments in Europe", MPILux Research Paper Series 2020(1).

8 Law No. 218 of 31 May 1995 ("Riforma del sistema italiano di diritto internazionale privato"), Gazzetta Ufficiale, Vol. 136, No. 128 of 3 June 1995, Ord. Suppl. No. 68.

9 By Order of 14 June 2018, the Court of Appeal of Rome (First Civil Chamber) ordered a *sequestro conservativo* (precautionary seizure) of Iranian movable and immovable property and loans in Italy, for a total amount of approximately USD 6 billion. Later, the same Court revoked the interim measure by Order of 10 October 2018.

10 Despite the author's best efforts, it was not possible to find a copy of the Order of 11 December 2020.

to justice only in favour of US citizens, it allegedly introduces an illegitimate differentiation from foreign nationals.

2 The Order in Brief

The plaintiffs challenged the decision of the Court of Appeal of Rome before the Italian *Corte di Cassazione*, alleging several violations and misinterpretations of Article 64(a)(g) of Law No. 218/1995.

By Order No. 39391 of 10 December 2021 – under review here –, the *Corte di Cassazione* annulled the former decision. Accordingly, the Court ruled on some issues of legitimacy and jurisdiction, while it remitted the case to another section of the Court of Appeal for a new *exequatur* proceeding of the US judgment. In its reasoning, the *Corte di Cassazione* had to deal with three issues related to the enforcement of foreign judgments in Italy. As regards the compatibility of the US decision with Italy's international public policy, the Court had first to examine the compatibility of an affirmation of tort liability based on a simplified proof system with the fundamental principles of imputability and culpability underlying the Italian legal system. Second, it had to consider the compatibility of the foreign institution of punitive damages with the principles governing civil liability in Italy. As a third and independent issue, the *Corte di Cassazione* had to ascertain the compatibility of the foreign Court's jurisdiction with the principles governing jurisdiction in the Italian legal system.

3 The US Judgment vis-à-vis Italy's International Public Policy: The Prerequisites for Civil Liability and the Problem of Punitive Damages

The first issue before the *Corte di Cassazione* concerns the interpretation of Article 64(g) of Law No. 218/1995 and, in particular, the extent to which foreign judgments can be scrutinized when assessing their compatibility with Italy's international public policy. According to the Court of Appeal of Rome, the US judgment had affirmed the civil liability of Iran and the other defendants without establishing a causal link with their conduct. This situation was the result of an absolute presumption of guilt, as Iran was unilaterally designated as a State sponsor of international terrorism at a time prior to the trial.[11]

11 See Order under review, p. 9 and pp. 13–14.

The *Corte di Cassazione* rejected the Court of Appeal's reasoning, noting that these questions fall outside the scope of Article 64(g) of Law No. 218/1995. In its view, the compatibility assessment with Italy's international public policy does not allow any review of a presumptive evidentiary mechanism eventually applied in the foreign judgment but is limited to verifying the compatibility of the *effects* of a judgment with the Italian legal system. In other words, it does not concern *how* a specific decision was reached, because that would inevitably imply a review of the merits of a judgment that has already become final, in breach of the private international law principles governing the circulation and recognition of foreign judgments. At most, the appeal judges could have legitimately refused to enforce the US judgment under Article 64(b)(c) of Law No. 218/1995, if they had found violations of fundamental procedural rights (international procedural public policy).

In line with its previous and extensive case law, the *Corte di Cassazione* reiterated that the compatibility assessment with the international public policy under Article 64(g) of Law No. 218/1995 is limited to the practical results generated by foreign judgments in the Italian legal system. To this end, one should have regard to the fundamental principles inferable not only from the Italian Constitution, but also from the domestic legislation, the conventions on human rights to which Italy is a party, and the EU legal system.[12] As regards the case at stake, the Court ruled out that an award of damages in favour of the victims of the 9/11 terrorist attacks could be contrary to those principles, even when based on a lightened burden of proof.

Turning to the second issue, that is to say the compatibility of the punitive damages awarded by the US judgment with Italy's international public policy, the *Corte di Cassazione* correctly recalled its Judgment No. 16601 of 5 July 2017, issued in its highest composition (*Sezioni Unite*), which represents the leading case on the subject matter.[13] In Judgment No. 16601, the Court clarified that, generally speaking, there is no conflict between punitive damages and international public policy, since the Italian legal system, for some time now, has opened up to a societal function and more public-oriented form of civil

12 See *Corte di Cassazione* (*Sezioni Unite Civili*), *Mayor of* [...] *v. M.L.A.M. et al.*, Judgment No. 9006 of 31 March 2021, para. 14; *Axo Sport spa v. Nosa inc.*, Judgment No. 16601 of 5 July 2017, paras. 6–7; and *Mayor of Trento vs. AAAA e BBBB et al.*, Judgment No. 12193 of 8 May 2019, para. 12.2; *Corte di Cassazione* (*Sezione I Civile*), *O.A. v. O.M.*, Order No. 17170 of 14 August 2020, para. 7. In this respect, see ZARRA, *Imperativeness in Private International Law. A View from Europe*, Berlin-Heidelberg, 2022, Chapter 3. With regard to EU public policy, see FERACI, *L'ordine pubblico nel diritto dell'Unione europea*, Milano, 2012, *passim*.

13 LOPEZ DE GONZALO, "La Corte di Cassazione cambia orientamento sui *punitive damages*", Diritto del commercio internazionale, 3, 2017, p. 714 ff.

liability, which is absolutely compatible with the sanctioning and deterrent functions underlying the foreign institution at hand.[14]

A different question, which instead the *Corte di Cassazione* remitted to the Rome Court of Appeal for consideration, concerns the compatibility of the order to pay punitive damages with the principle of legality, as enshrined in Article 23 of the Italian Constitution, which also represents a principle of international public policy. This provision requires that "[n]o obligation of a personal or financial nature may be imposed on any person except by law". Therefore, to assess the compatibility of the judgment with international public policy, the Rome Court of Appeal will have to ascertain whether or not the award of punitive damages complies with the principle of legality.

In the author's opinion, the latter concept should be understood according to a substantive conception. In greater detail, the Court should assess whether a person could reasonably have foreseen, at the material time, that, according to the law, its conduct was unjust, thus risking being held liable and therefore incurring the penalty which the wrongdoing carried. Against this backdrop, the term "law" comprises both legislative and judicial law-making and implies qualitative requirements, notably those of accessibility and foreseeability. This approach would be justified by three main arguments. First, with the US being a common law country, it would not make sense to apply the civil law concept of legality (strict legality), namely the idea that every single obligation or sanction should be prescribed by a legislative act. Second, this consideration may justify an attenuated conception of international public policy, which yields substantive legality over the strict legality shaping the Italian legal order. Last but not least, such a conception is in line with Article 7 of the European Convention on Human Rights ("ECHR"), which supplements Italy's international public policy. Indeed, according to the authoritative interpretation of the European Court of Human Rights ("ECtHR"), the concept of legality must be understood as implying the two qualified requirements of foreseeability of the charge and accessibility of its sources.[15] Should the Court apply the *lex fori*

14 On the compatibility of damages with Italy's international public policy, see PERLINGIERI and ZARRA, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale*, Napoli, 2019, pp. 166–177. For a general reference, see BARIATTI, FUMAGALLI and CRESPI REGHIZZI (eds.), *Punitive Damages and Private International Law: State of the Art and Future Developments*, Milano, 2019.

15 For the case law of the Strasbourg Court, see *Kokkinakis v. Greece*, Application No. 14307/88, Judgment of 25 May 1993, Series A No. 260-A, paras. 40–41; Grand Chamber, *Scoppola v. Italy* (*No. 2*), Application No. 10249/03, Merits and Just Satisfaction, Judgment of 17 September 2009, para. 99; Grand Chamber, *G.I.E.M. S.R.L. and Others v. Italy*, Applications Nos. 1828/06 and 2 Others, Merits, Judgment of 28 June 2018, paras. 241–242.

notion of legality, it would be very unlikely that a foreign judgment issued in common law countries and awarding punitive damages could be enforceable in Italy.

4 The Foreign Judge's Jurisdiction from the Perspective of the Italian Legal System and the Problem of Foreign (Third) State Immunity from Jurisdiction

For the *exequatur* of the US judgment, the *Corte di Cassazione* – in accordance with Article 64(a) of Law No. 218/1995 – ultimately had to ascertain whether the SDNY Court would have had jurisdiction on the case according to the principles governing jurisdiction in the Italian legal system. Such an examination inevitably required the Court to consider the relationship between the FSIA and the customary rule on foreign States' jurisdictional immunity, in order to verify whether it is compatible with the Italian approach to State immunity.

In this regard, it should be noted that in the *Havlish* case, the jurisdiction of the SDNY Court was based, cumulatively, on two exceptions the FSIA provides to the rule on foreign States' immunity from jurisdiction.[16] On the one hand, the "territorial (non-commercial) tort exception" under Section 1605(a)(5) provides that a foreign State shall not be immune from the jurisdiction of US courts in any case "in which money damages are sought against a foreign State for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign State or of any official or employee of that foreign State while acting within the scope of his office or employment". On the other hand, the "terrorism exception" under Section 1605A establishes the US courts' jurisdiction for "any case [...] in which money damages are sought against a foreign State for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign State while acting within the scope of his or her office, employment, or agency".[17]

16 See the *Havlish* case, *cit. supra* note 2, p. 3 and p. 46 ff., in particular para. 4. Cf. Order under review, p. 8.

17 Based on the "terrorism exception", US courts have jurisdiction on a case involving a foreign State if the latter has been designated as a sponsor of terrorism. In the case of Iran, such designation was made by US Department of State, Secretarial Determination No. 84-3 "Determination Pursuant to Section 6(i) of the Export Administration Act of 1979 - Iran" 49 FR 2836, 23 January 1984.

By dismissing the reasoning of the Rome Court of Appeal, which concluded that the FSIA was incompatible with the principles governing jurisdiction in the Italian legal system, the *Corte di Cassazione* made two arguments. In its view, the FSIA merely codifies a restrictive interpretation of the jurisdictional immunity rule, which, as such, would be in line with both customary international law and Italy's domestic approach to immunity.

As regards the first argument, the Court recalled the position it maintained in the twin Decisions No. 14199 and No. 14208 of 29 May 2008,[18] which, in turn, reiterate the famous *Ferrini* ruling.[19] In this respect, the Order under review essentially builds upon these three decisions. As a consequence, the *Corte di Cassazione* concluded that "the generally accepted customary norm which requires States to refrain from exercising jurisdiction over foreign States as for *acta iure imperii* is not […] an absolute one. Indeed, it has to be balanced with the principle, *also recognised in the international legal system*, of the absolute primacy of the fundamental values of human dignity and freedom, when the former clashes with the latter" (emphasis added; author's translation).[20] In other words, while the immunity rule, in itself, covers all *acta iure imperii*, following a balancing with other competing interests it cannot apply in the presence of a "conduct of such a gravity as to constitute […] *delicta imperii* or even as crimes against humanity", inasmuch as such a conduct "is detrimental […] to those universal values of human dignity that transcend the interests of individual State communities, it marks the breaking point of any tolerable exercise of sovereignty".[21]

18 *Corte di Cassazione* (*Sezioni Unite Civili*), *Federal Republic of Germany v. Regional Administration of Vojotia*, Judgment No. 14199 of 29 May 2008; *Corte di Cassazione* (*Sezioni Unite Civili*), *Giovanni Mantelli and Others v. Federal Republic of Germany*, Order No. 14201 of 29 May 2008 (hereinafter referred to as "*Mantelli*"). With regard to these two decisions see, respectively, FOCARELLI, "Diniego delle immunità giurisdizionali degli Stati stranieri per crimini, *ius cogens* e dinamica del diritto internazionale", Rivista di diritto internazionale, 91(3), 2008, p. 738 ff.; FRANZINA, "Norme sull'efficacia delle decisioni straniere e immunità degli Stati dalla giurisdizione civile, in caso di violazioni gravi dei diritti dell'uomo", Diritti umani e diritto internazionale, 2(3), 2008, p. 638 ff.

19 *Corte di Cassazione* (*Sezioni Unite Civili*), *Luigi Ferrini v. Federal Republic of Germany*, Judgment No. 05044 of 11 March 2004 (hereinafter referred to as "*Ferrini*"). In this respect, see IOVANE, "The Ferrini judgment of the Italian Supreme Court: opening up domestic courts to claims of reparation for victims of serious violations of fundamental human rights", Italian Yearbook of International Law, 14, 2004, p. 163 ff.

20 See para. 10 of the Order under review. The "human dignity primacy" argument was applied in *Ferrini*, *cit. supra* note 19, para. 9.2.

21 See para. 10 of the Order under review. The "abuse of sovereignty" argument was already made in identical terms in *Ferrini*, *cit. supra* note 19, para. 7, and in *Mantelli*, *cit. supra* note 18, tenth recital in point of law.

Turning to the domestic-oriented argument, the *Corte di Cassazione* reiterated the position affirmed by the Italian Constitutional Court in Judgment No. 238/2014.[22] According to the latter Court, to the extent that the customary rule on the immunity of foreign States from civil jurisdiction prevents claims for damages arising from *acta iure imperii* that constitute serious violations of human rights, it is contrary to both the inviolable rights of the human person and the right of access to justice, and therefore cannot apply in the Italian legal system under Article 10 of the Constitution.[23]

Based on these two arguments, the *Corte di Cassazione* concluded that the SDNY Court would have had jurisdiction on the case according to the principles governing jurisdiction in Italy.

5 Critical Remarks on the Court's Reasoning as Regards State Immunity and Serious Violations of Human Rights

As already mentioned, in the Order under review the *Corte di Cassazione* had to ascertain whether the SDNY Court would have had jurisdiction on the case according to the principles governing jurisdiction in the Italian legal system. Answering this question in the affirmative, the Court stated that, from the Italian perspective, the denial of immunity to Iran in the presence of serious violations of human rights is compatible with both international law (by virtue of the "human dignity primacy" argument established in the *Ferrini* case) and Italy's domestic approach to immunity (by virtue of the "counter-limits" doctrine as applied in Judgment No. 238/2014). In this regard, it cannot but be surprising that the *Corte di Cassazione* made two absolutely irreconcilable arguments as if the former were not the opposite of the latter and vice versa.

22 Italian Constitutional Court, *Simoncioni et al. v. Germany and President of the Council of Ministers of the Italian Republic* (*intervening*), Judgment No. 238 of 22 October 2014; an English translation is available at: <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf>. See the comments by CHECHI, "Simoncioni and ors v Germany and President of the Council of Ministers of the Italian Republic (intervening), Constitutional review, Judgment No 238/2014", ORILDC 2237 (IT 2014) and by CANNIZZARO, "Jurisdictional Immunities and Judicial Protection: The Decision of the Italian Constitutional Court No. 238 of 2014", Rivista di diritto internazionale, 98(1), 2015, p. 126 ff.

23 This decision applied the so-called "counter-limits" doctrine (*dottrina dei controlimiti*), according to which when a general international law rule limiting the sovereignty of the State does not comply with the fundamental principles of the Italian constitutional order protecting human dignity, the latter operate as "counter-limits" and, as a consequence, the former is not incorporated in Italy's legal system. For an extensive work on this issue

The Court did not even attempt any autonomous argumentative effort but fell into line with arguments already made in previous case law, of which, however, it does not seem to be fully aware.

As regards the first solution, the "human dignity primacy" argument claims that the fundamental values of human dignity and freedom should take precedence over the customary rule on immunity. This approach represents a leap back in time of almost twenty years, when it could appear as a pioneering theory. Then, it was authoritatively disavowed in the 2012 *Jurisdictional Immunities* case, where the ICJ affirmed that "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict".[24] It does not seem that, at the present stage, State practice may support a different conclusion.[25] Therefore, nowadays, this thesis resembles no more than a weary prèt-a-porter argument or a legal fiction which could hardly be taken seriously as a true international law-oriented solution. Moreover, the reference to the *Mahamdia* Judgment[26] of the Court of Justice of the EU ("CJEU") as a relevant precedent is misleading in the present context. Indeed, the latter was an employment dispute between a German-Algerian national (Mr. Mahamdia) and the Algerian Embassy in Berlin and the denial of immunity concerned *acta iure gestionis*, which have nothing to do with the kind of facts under consideration.

---

see AMOROSO, "Italy", in PALOMBINO (ed.), *Duelling for Supremacy: International Law vs. National Fundamental Principles*, Cambridge, 2019, p. 184 ff.

24 *Jurisdictional Immunities of the State* (*Germany v. Italy, Greece Intervening*), Judgment of 3 February 2012, ICJ Reports, 2012, p. 99 ff., para. 91. A boundless literature has been written on this judgment; *ex multis*, see CONFORTI, "The Judgment of the International Court of Justice on the Immunity of Foreign States: A missed opportunity", Italian Yearbook of International Law, 21, 2011, p. 135 ff.

25 Beyond Italian judicial practice, to the author's knowledge there are only a few post-2012 domestic decisions adopting a view similar to Judgment No. 238/2014. In this respect, see Brazilian Supreme Federal Court, *Changri-la*, Judgment of 23 August 2021 – which, however, did not explicitly referred to Judgment No. 238/2014 – and Seoul Central District Court, 34th Civil Chamber, *Hee Nam Yoo v. Japan*, Judgment of 8 January 2021, case No. 2016 Ga-Hap 505092. As regards the latter decision, see BUFALINI, *Immunità degli Stati dalla giurisdizione e negoziazioni fra Stati: sulla vicenda delle* comfort women *coreane*, Diritti umani e diritto internazionale, 15(3), 2021, p. 699 ff. and GERVASI, "Immunità giurisdizionale degli Stati ed eccezione umanitaria: in margine alla recente giurisprudenza sudcoreana sul sistema delle «donne di conforto»", Rivista di diritto internazionale, 105(1), 2022, p. 167 ff.

26 CJEU (Grand Chamber), *Ahmed Mahamdia v. People's Democratic Republic of Algeria*, Judgment of 19 July 2012, Case C-154/11, ECLI:EU:C:2012:491.

Turning to the domestic-oriented solution, it also shows at least two serious shortcomings. In the first place, the Court justifies the denial of immunity to foreign States "as long as *delicta imperii* are concerned, i.e. crimes committed in breach of *ius cogens* norms and to the detriment of universal values that transcend the interests of individual State communities". However, it is worth noting that in the case at issue, Iran has been held responsible for sponsoring terrorism, which, according to the prevailing international criminal law scholarship, at present, does not constitute an international crime or a *distinct* violation of *ius cogens* or customary international law.[27] Not even has the SDNY Court framed the terrorist attacks as a crime against humanity.

In light of the above, while there can be no doubt that the 9/11 terrorist attacks represent one of the most heinous terrorist attacks in history and infringed the rights to life and to physical integrity of thousands of people, the *Corte di Cassazione* should have clarified at least the reasons why it deemed the 238/2014 doctrine automatically applicable to the present case and the criteria to assess the gravity of conducts which may justify a denial of State immunity.[28] Such clarifications would have been appropriate since the Constitutional Court, while making several references to "serious violations of human rights", concluded that "the international law norm that our legal system has incorporated by means of Article 10(1) of the Constitution does not include State immunity from civil jurisdiction with respect to claims for damages arising from *war crimes* and *crimes against humanity*, which are detrimental to inviolable rights of the human person" (emphasis added).[29]

In the present case, however, the *Corte di Cassazione* limited itself to only mention "damages resulting from the violation of *ius cogens* norms (whether

27 In this sense, see SAUL, *Defining Terrorism in International Law*, Oxford, 2006, pp. 191 and 270; CRYER, ROBINSON and VASILIEV, *An Introduction to International Criminal Law and Procedure*, 4th ed., Cambridge, 2019, pp. 323 and 334; O'KEEFE, *International Criminal Law*, Oxford, 2015, p. 160, para. 4.104. *Contra*, see CASSESE, *Terrorism as an International Crime*, in BIANCHI (ed.), *Enforcing International Law Norms against Terrorism*, Oxford, 2004, p. 213 ff., p. 218; AITALA, *Diritto internazionale penale*, Milano, 2021, pp. 190–194. For the case law, see Special Tribunal for Lebanon (Appeals Chamber), *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/I, 16 February 2011, para. 86, where Cassese was both President and Judge-Rapporteur. For a strong criticism to this decision, see SAUL, "Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism", Leiden Journal of International Law, 24(3), 2011, p. 677 ff.

28 For example, on another occasion, the same Court held that there is indeed a crime of terrorism under customary international law: *Corte di Cassazione* (*Sezione I Penale*), *Criminal Proceedings Against B.M.B.A., T.A.B.S. and D.M.*, Judgment No. 1072 of 17 January 2007, para. 2.1.

29 Judgment No. 238/2014, *cit. supra* note 22, para. 3.5.

or not the facts are to be qualified as war crimes or crimes against humanity)", without providing any evidence that terrorism is actually prohibited under *ius cogens* and without engaging with the elements of any of the two crimes mentioned. This is particularly surprising as in its previous case law the *Corte di Cassazione* itself showed awareness of the fact that such qualifications are decisive to justify the denial of immunity when enforcing a foreign judgment holding a third State liable. In 2015, in twin proceedings for the *exequatur* of two US judgments ruling that Iran was liable for damages due to terrorist attacks by Hamas in Israel, the *Corte di Cassazione* concluded that the two decisions were enforceable according to the 238/2014 doctrine, in view of the fact that "the terrorist attack […] can be qualified as a crime against humanity, as it was a criminal offence perpetrated as part of a systematic and deliberate attack on the civilian population".[30]

In the second place, even assuming that the present case meets all the necessary requirements, from an international law perspective recourse to the counter-limits doctrine continues to place Italy in a wrongful position. As the ICJ expressly pointed out in 2012,[31] the fact that the case at issue is an *exequatur* proceeding makes no difference in this respect. This approach is still highly controversial, as confirmed by the new application Germany filed to the ICJ on 29 April 2022,[32] on the grounds that, from 2014 onwards, Italian courts have

30 *Corte di Cassazione* (*Sezioni Unite Civili*), *Flatow and others v. Iran and Ministry of Intelligence and Security of Iran*, Judgment No. 21946 of 28 October 2015, para. 4 in point of law; *Corte di Cassazione* (*Sezioni Unite Civili*), *Eisenfeld and others v. Iran and Ministry of Intelligence and Security of Iran*, Judgment No. 21947 of 28 October 2015, para. 4 in point of law. See a comment by FORLATI, "Judicial Decisions: Immunities", Italian Yearbook of International Law, 25, 2015, pp. 497–509, pp. 505–506.

31 *Jurisdictional Immunities* case, *cit. supra* note 24, para. 131.

32 *Certain Questions of Jurisdictional Immunity and Enforcement of Judgments Federal Republic of Germany v. Italian Republic*, Application instituting proceedings and request for the indication of provisional measures of 29 April 2022, available at: <https://www.icj-cij.org/public/files/case-related/183/183-20220429-APP-01-00-EN.pdf>. On the day following the lodging of the new application, the Italian Government established a fund to compensate the victims of war crimes and crimes against humanity for the infringement of inviolable personal rights committed on Italian territory or in any event to the detriment of Italian citizens by the armed forces of the Third Reich between 1 September 1939 and 8 May 1945: see Art. 43 of Law-Decree No. 36 of 30 April 2022, Gazzetta Ufficiale, Vol. 163, No. 100 of 30 April 2022, p. 1 ff. On both these subjects, see FRANZINA, "Jurisdictional Immunities: Germany v. Italy, Again", EAPIL, 4 May 2022. As a consequence, on 6 May Germany withdrawn its request for provisional measures: see GRADONI, "Is the Dispute between Germany and Italy over State Immunities Coming to an End (Despite Being Back at the ICJ)?", EJIL:Talk!, 10 May 2022.

continued to disregard the jurisdictional immunity of State by resorting to the 238/2014 doctrine.[33]

6 Concluding Remarks

Looking at the reasoning of the *Corte di Cassazione*, one can argue that the Order's impact on future cases will be very limited (if any). Indeed, it does not present significant novelties compared to previous decisions, of which it merely recalls, in a rather confused way, the fundamental theses. Thus, the *Corte di Cassazione* missed a great opportunity to clarify some key issues.

As regards the 238/2014 doctrine, the Court could have better defined its scope of application, specifying for what serious offences it is possible to deny immunity to foreign States, given what has been said above about the status of terrorism under international law. But there is more. By assessing the compatibility of the SDNY Court jurisdiction with the principles of the Italian legal system, instead of resorting to the "human dignity primacy" argument, which was authoritatively dismissed by the ICJ in 2012, the *Corte di Cassazione* could have considered the territorial tort exception as a more promising international law-oriented solution. The latter would have deserved to at least be taken into consideration for more than one reason. First, the tort exception constituted the second head of jurisdiction in the original proceedings before the US Court. Second, both Iran and Italy are contracting parties to the United Nations ("UN") Convention on Jurisdictional Immunities of States and Their Property.[34] Even if the latter is not yet in force, Article 12 of the Convention may be relevant in so far as its text and the process of its adoption and implementation shed light on the content of customary international law.[35] In this respect it is worth noting that, in the *Jurisdictional Immunities* Judgment, the ICJ never ruled out the existence of a tort exception under customary international law.[36] Rather, it limited itself to noting that, in any event, "State immunity for *acta iure imperii*

33 A list of 25 decisions, including 15 awarding damages to the plaintiffs, is annexed to the application filed by Germany, *cit. supra* note 32, Annexes 6 and 7. As recent examples, see *Corte di Cassazione* (*Sezione III civile*), *Deutsche Bahn Ag v. Sterea' Ellada Region and Federal Republic of Germany*, Judgment No. 21995 of 3 September 2019; *Corte di Cassazione* (*Sezioni Unite*), *T.P. v. Federal Republic of Germany*, Judgment No. 20442 of 28 September 2020. As regards the latter decision, see VENTURINI, "Sezioni Unite, sentenza n. 20442 del 2020: il «contrappunto fugato» della sent. 238/2014 Corte Cost.", SIDIBlog, 18 December 2020.

34 New York 2 December 2004, not yet in force, UN Doc. A/59/508.

35 *Jurisdictional Immunities* case, *cit. supra* note 24, para. 66.

36 *Jurisdictional Immunities* case, *cit. supra* note 24, para. 65.

continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property *committed by the armed forces and other organs of a State in the conduct of armed conflict*, even if the relevant acts take place on the territory of the forum State" (emphasis added).[37]

Third, the facts under consideration in the case at hand are very different in nature from those on which the dispute between Germany and Italy was based, as they do not relate activities undertaken by military forces of a State in the exercise of their official duties.[38] Therefore, the tort exception does not seem to show here all the weaknesses it presented in the 2012 Judgment and which prevented its application. As Judge Gaja noted in his dissenting opinion – entirely dedicated to tort exception –, a better consideration of State practice "should have led the Court to conclude that, at least for certain decisions of Italian courts, the exercise of jurisdiction could not be regarded as being in breach of an obligation under general international law".[39] Even more so, this reasoning appears to be well-founded with respect to acts of terrorism in the US territory which were *not* committed by the armed forces of a State in the conduct of armed conflict.

Last, it is worth nothing that the case at issue is an *exequatur* proceeding where Italian courts are prevented from reviewing the merits of the foreign decision. Accordingly, the present comment did not address any issue related to the evidence which brought the SDNY Court to affirm Iran's liability. However, the author notes that the denial of foreign States immunity from jurisdiction, which is already a controversial issue per se (as long as it results in an internationally unlawful conduct), may be even more questioned in situations where Italian courts' jurisdiction is highly limited as is the case in *exequatur* proceedings. In fact, the "serious violations" exception without any judicial review on the merits may give rise to abuses since, in the interest of free circulation of judgments, it may allow the enforcement of decisions to the detriment of foreign States' immunity, even when such decisions follow default proceedings, have questionable evidentiary bases or suffer from other significant substantial defects. It is far from clear whether Italian courts would be able to avoid such a risk, when assessing the compatibility of foreign judgments with international procedural public policy, which only implies a review over the respect of fundamental procedural rights.

37 *Jurisdictional Immunities* case, *cit. supra* note 24, para. 77.

38 *Jurisdictional Immunities* case, *cit. supra* note 24, para. 69.

39 Dissenting Opinion of Judge *ad hoc* Gaja in the *Jurisdictional Immunities* case, *cit. supra* note 24, p. 309 ff., p. 322.

In light of the above, it is the author's opinion that Italian courts should be aware of these concerns and striving to speak the language of international law is the only way forward, if they really want to "contribute to a desirable – and desired by many – evolution of [customary] international law", in the words of the 238/2014 Judgment.[40] This is what could have been, and was *not seriously*, attempted.[41]

40 Judgment No. 238/2014, *cit. supra* note 22, para. 3.3.

41 For a convincing (as well as severe) appraisal of Judgment 238/2014's legacy, see FOCARELLI, "State Immunity and Serious Violations of Human Rights: Judgment No. 238 of 2014 of the Italian Constitutional Court Seven Years on", Italian Review of International and Comparative Law, 1(1), 2021, p. 29 ff., where the author contends that Italian Constitutional Court, together with domestic courts, "has substantially failed to argue the plausibility of the change in the international law in force that it wished to promote for the future" (p. 58).