ISSN 1478-1387

VOLUME 21, NO. 1
MARCH 2023

JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE

Founded by Antonio Cassese

https://academic.oup.com/jicj

OXFORD
UNIVERSITY PRESS

German Crimes and Italian Money?

Observations on the Sad Saga of Compensation to the Victims of Nazi Atrocities in Italy

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Abstract

On 29 June 2022, the Italian Parliament approved Law no. 79, which converted — with amendments — Article 43 of Decree-Law no. 36/2022 of 30 April 2022 into law, possibly marking the final stage of the long saga of the German–Italian dispute over Germany's civil liability for Nazi crimes against the Italian population during World War II. The Decree-Law was originally issued, as a matter of urgency, with a specific purpose: the Italian government intended to prevent the Federal Republic of Germany from suffering the loss of a significant real estate asset, located in Rome, due to the execution proceedings before the Court of Rome. However, the purpose of this legislative measure was not solely to avert this scenario in the short term. On the contrary, with the Decree-Law, now converted into law, the singular result has been reached that the Italian state will pay all compensation owed to victims of Nazi massacres on behalf of Germany. The article contextualizes the new provision, analysing the saga of Germany's civil liability in parallel with the criminal prosecutions of Nazi criminals in Italy, both after the war and in more recent years. It provides critical evaluations and proposes hypotheses on possible future scenarios.

1. Introduction

On the last day before the expiry of the 60 days required by the Constitution for the conversion of a Decree-Law into law,[1] the Italian Parliament enacted

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1 A Decree-Law is an urgent and provisional legislative measure adopted by the government with immediate effect that must be converted into a Law by the Parliament within 60 days; otherwise, it loses its effect retroactively.

Journal of International Criminal Justice **21** (2023), 211–231 https://doi.org/10.1093/jicj/mqad005

legislation that converted Article 43 of Decree-Law no. 36/2022 of 30 April 2022 into law.[2] This legislative measure may mark the final stage of the long saga of German–Italian dispute over Germany's civil liability for Nazi crimes against the Italian population during World War II. The Decree-Law was originally issued, as a matter of urgency, with a specific purpose: the Italian government intended to prevent the Federal Republic of Germany from suffering the loss of a significant real estate asset, located in Rome, due to the execution proceedings before the Court of Rome, which scheduled the hearing for the authorization of the sale of the seized assets for 25 May 2022. However, the purpose of this legislative measure was not solely to avert this scenario in the short term. On the contrary, with the Decree-Law, now converted into law, the singular result has been reached that the Italian state will pay all owed compensation to the victims of the Nazi massacres on behalf of Germany.

Analysis of the provision requires a reconstruction of this long story. The perspectives of either civil law or international law alone do not allow for the full understanding to be achieved; on the contrary, it is essential to read this recent development in parallel with the criminal prosecution of Nazi criminals in Italy. As will be shown, civil law claims have come to assume a fundamental significance when criminal prosecutions have encountered obstacles. Even more importantly, the current development must be read diachronically, linking together the post-war phase and the current one. Consequently, Section 2 provides an historical overview of the criminal prosecution of Nazi crimes committed in Italy; Section 3 describes how the issue of the civil liability of Germany was raised and how it was regarded by both national and international courts; Section 4 focuses on the most recent evolution, which led to the legislative intervention of 2022; Section 5 questions the legitimacy of the new law in the light of the Italian Constitution; Section 6 reflects on the next moves by Germany and the possible future scenarios, while Section 7 examines what impact this law could have on the victims of Fascist crimes, particularly the foreign civilian populations.

2. The Criminal Prosecution of Nazi Crimes

After the limited criminal prosecutions carried out by the Allies on Italian soil,[3] in the post-war period the Italian state carried out very few trials of Nazi

2 Law no. 79/2022 of 29 June 2022, *Conversion into law, with modifications, of the Decree-Law 30 April 2022, n. 36, containing further urgent measures for the implementation of the National Recovery and Resilience Plan*, entered into force on 30 June 2022.

3 A total of 49 trials were held by the British military courts on Italian soil (some, however, also against Italians), 60 if we count those of the branch in Austria relating to Italy. Crimes against the Italian civilian population were included in the trials of Albert Kesselring, Eberhard von Mackensen and Kurt Mältzer, Eduard Crasemann, Max Simon and Willy Tensfeld. None of the death sentences imposed were ever carried out, with the sole exception of General Anton Dostler. Subsequently, the Allies chose not to carry out new trials and to give the Italian authorities a deadline to submit requests for the extradition of German soldiers detained in

criminals before the Italian military courts. This was despite the enormous body of documentation collected by the Allies, the high number of Italian victims — civilian and military[4] — as well as the fact that there were no problems of retroactive application of the crimes, nor of jurisdiction of the Italian military criminal courts.[5] Thirteen such proceedings were concluded with a judgment,[6] of which only four concerned major massacres,[7] while the others were related to minor crimes. Eighteen concluded during the preliminary investigative phase. At the beginning of the 1950s, only two of the detained German soldiers were serving a life sentence (Herbert Kappler — who later escaped — and Walter Reder). Out of a total of 25 defendants, three life sentences were passed (Kappler, Reder and Niedermayer, the latter *in absentia*), two were given sentences of over 15 years (Wagener and Mair, the latter *in absentia*) and 12 were acquitted. The first judicial phase came

the occupation zones: P. Caroli, *Transitional Justice in Italy and the Crimes of Fascism and Nazism* (Routledge, 2022), at 68.

4 Schreiber estimates 9180 civilians, 11,400 Italian soldiers executed either in Italy or in the Balkans and in Greece between September 1943 and October 1943, and 44,720 partisans killed: G. Schreiber, *Deutsche Kriegsverbrechen in Italien: Täter, Opfer, Strafverfolgung* (Beck, 1996), at 8. Gentile argues that Schreiber's reference to 9180 is an error, since the original source to which Schreiber refers speaks of 9980 — and not 9180 — civilians: C. Gentile, *I crimini di guerra tedeschi in Italia 1943-1945* (Einaudi, 2015), at 29. In relation to the national territory of Italy alone, the database of the Atlas of the Nazi and Fascist Massacres (*infra* note 24) has so far identified 23,662 victims in a total of 5626 episodes, although 2893 of them were victims of Fascist crimes. As regards Italian Jews, 7579 were arrested after 8 September; of these 322 were killed on Italian territory, while another 6000 died in the Nazi extermination camps, see the database of the Foundation Contemporary Jewish Documentation Centre (CDEC), available online at http://digital-library.cdec.it/cdec-web/.

5 The crimes committed by the Germans were subject to the Military Criminal Code of War of 1941, by virtue of Art. 13: 'The provisions of the IV Title, III Book of this Code, relating to crimes against the laws and customs of war, also apply to the military and to any other person belonging to the enemy armed forces, when any of such crimes are committed to the detriment of the Italian state or of an Italian citizen, or of an allied state, or one of its subjects.' In particular, German soldiers were charged with the military crimes pursuant to Arts 185 (*Violence of military personnel against private enemies or of inhabitants of occupied territories against Italian soldiers*) and 211 (*Violence, threat or insult in general*) of the Military Criminal Code of War. These cases were under the jurisdiction of the military courts.

6 Cf. Commissione parlamentare di inchiesta sulle cause di occultamento dei crimini nazifascisti (CPICOCN), *Relazione di Minoranza*, XIV Legislatura, Doc. XXIII, No. 18-*bis*, 24 January 2006, at 151. Two in Turin, one in Naples, one in Padua, one in La Spezia, four in Rome, three in Florence, one in Bologna and one in Verona. Some historians, however, do not consider the South Tyrolean Ambrogio Webhofer as German but as Italian: F. Focardi, 'Giustizia e ragion di Stato. La punizione dei criminali di guerra tedeschi in Italia', in K. Härter and C. Nubola (eds), *Grazia e giustizia* (Il Mulino, 2011) 489–542, at 510.

7 The massacre of the Fosse Ardeatine in the *Kappler* trial (1948–1953), some massacres in Tuscany (included Civitella, val di Chiana, Stia and Vallucciole) in the *Schmalz* trial (1950), the massacre of the Fucecchio Marshes in the *Strauch* trial (1948–1949), the one in Monte Sole/Marzabotto and Vinca in the *Reder* trial (1951–1954). To be added to these are the proceedings related to Kefalonia, where the *Wehrmacht* executed an unknown number of Italian soldiers, but approximately between 2000 and 3800. They were all dismissed between 1950 and 1960 before reaching the trial phase.

to a standstill on 14 January 1960, when the Military Prosecutor General of the Republic, Enrico Santacroce, ordered a 'provisional dismissal' of all related cases — a mechanism which does not exist in the Italian procedural law — illegally concealing 695 files documenting Nazi–Fascist war crimes and hiding them in the infamous 'armoire of shame'.[8] The Military Judiciary Council, which investigated the matter in the 1990s, affirmed that governmental organs and of the Office of the Military Prosecutor General had colluded in what had amounted to a cover-up operation.[9] In 2003, the Parliamentary Commission of Inquiry into the Causes of the Concealment of Nazi–Fascist Crimes was established. The Commission published a Majority Report[10] and a Minority Report in 2006.[11] The former, approved by the centre-right majority, explained the concealment of documents, which was classified as illegitimate, as due to a 'profound inertia'[12] of the leading figures at the Office of the Military Prosecutor General. This was fostered by technical problems such as the impossibility of obtaining the extradition of German citizens after the entry into force of Article 16 of the German Basic Law of 1949,[13] and due to the reinstatement of the extradition and judicial assistance treaty of 1942,[14] which prohibited extradition to Italy for political offences. Conversely, the centre-left Minority Report, denounced the government directives to military prosecutors, especially in relation to the new policy, not to cause problems for Western Germany. Furthermore, the scant criminal prosecutions and the subsequent illegal concealment of the relevant files were politically explained by a contradiction: the Italians were at the same time victims of Axis crimes, which legitimized the prosecution of German criminals in Italy, and perpetrators of such crimes in countries such as Greece, Yugoslavia, Ethiopia, which were also demanding the extradition of Italian citizens. The perceived need to avoid the extradition and prosecution of Italian war criminals slowed down the prosecution of Nazi criminals in Italy.[15]

The discovery of the infamous *armoire* in 1994 led to the reopening of the criminal prosecution of Nazi crimes 60 years later. Initially, these efforts were hampered by understaffing and organizational difficulties, especially at the Military Prosecutor's Offices of La Spezia, which, for geographical reasons, had jurisdiction over the majority of the massacres. Nonetheless, between

8 Cf. Caroli, *supra* note 3, at 73; F. Giustolisi, *L'armadio della vergogna* (Nutrimenti, 2004); M. Franzinelli, *L'armadio della vergogna* (Mondadori, 2002).

9 The Report of the Military Judiciary Council of 23 March 1999 is in the appendix to R. Ricci, 'Processo alle stragi naziste? Il caso ligure. I fascicoli occultati e le illegittime archiviazioni', 2 *Storia e Memoria* (1998) 119–178.

10 CPICOCN, *Relazione Finale*, XIV Legislatura, Doc. XXIII, No. 18, 8 February 2006.

11 CPICOCN, *Relazione di Minoranza*, *supra* note 6. Commissions of inquiry are foreseen in the Constitution. The adoption of one or more alternative final reports (so-called minority reports) has been envisaged in the praxis, expressing the point of view of members of the commission who do not share the conclusions reached by the majority.

12 CPICOCN, *Relazione Finale*, *supra* note 10.

13 This article, later modified in 2000, generally precluded extradition for all German citizens.

14 CPICOCN, *Relazione Finale*, *supra* note 10, at 67.

15 Caroli, *supra* note 3, at 47.

2002 and 2013, 57 German war criminals were sentenced to life imprisonment. They had all been tried *in absentia* (with the exception of the previous trial against Erich Priebke and Karl Hass), due to the fact that, in the Italian legal system, defendants have the right to be physically present once they have been formally notified of the trial, but they are not obliged to attend. Some of the accused Germans chose their own defence counsel while others accepted attorneys appointed *ex officio*, but none of them opted to be personally present at the hearings. Most importantly, only Priebke (extradited from Argentina), Hass (a resident of Italy) and Michael Seifert (extradited from Canada) actually served their sentences.

While German prosecutors had collaborated with the Italian authorities during the trials, the German judiciary steadfastly refused to surrender from Germany those convicted, mainly on the basis of the inadmissibility of trials *in absentia* in the German legal system.[16] Despite several attempts to initiate new trials in Germany — with a conviction achieved in one case, against Josef Scheungraber[17] — none of the German war criminals convicted in Italy served a single day in prison. In 2021 Marco De Paolis, the military prosecutor in those Italian belated trials, announced that all of those who had been convicted in Italy were dead.[18] With ironic timing — though probably coincidental — a few months after this announcement, De Paolis was awarded the *Bundesverdienstkreuz* — Germany's highest honour — by the President of the Federal Republic of Germany, Frank-Walter Steinmeier, for his role as military prosecutor in most of those trials.[19]

3. Civil Liability and State Immunity: The International Court of Justice *v.* the Italian Constitutional Court

The new judicial phase that (slowly) began after the discovery of the 'armoire of shame' brought most of those German war criminals, whose files were included in the 'armoire', before a judge for the very first time. In this context,

16 On the problematic relationship between the European arrest warrant and trials *in absentia*, S. Quattrocolo and S. Ruggeri (eds), *Personal Participation in Criminal Proceedings* (Springer, 2019).

17 Friedrich Siegfried Engel was convicted and sentenced to seven years in Hamburg in 2002, but the *Bundesgerichtshof* overturned the judgment and ordered a retrial in 2004; nonetheless, because Engel was 95, he was deemed unfit for trial. Josef Scheungraber was sentenced to life imprisonment in 2009 and the appeal was rejected in 2010 (LG München I, 11 August 2009 1 Ks 115 Js 10394/07); because he was 90, he was considered unfit for imprisonment. Siegfried Böttcher was indicted both in La Spezia and in Stuttgart, but died in 2005, before both the Italian and German trials could come to an end. The attempt to bring Theodor Emil Saevecke to justice in Osnabrück ended in 2000, following his death. Gerhard Sommer, convicted in Italy in 2005, was considered unfit for trial in Hamburg in 2015.

18 'Morti gli ultimi due ergastolani nazisti condannati in Italia', La Repubblica, 28 February 2021, available online at https://www.repubblica.it/cronaca/2021/02/28/news/morti_gli_ultimi_due_ergastolani_nazisti_condannati_in_italia-289594743/.

19 'Italienischer Nazi-Jäger erhält Bundesverdienstkreuz', Jüdische Allgemeine, 25 May 2021, available online at https://www.juedische-allgemeine.de/juedische-welt/italienischer-nazi-jaeger-erhaelt-bundesverdienstkreuz/.

a new judicial issue was raised that had never occurred in the post-war trials: the possibility of summoning a foreign state (The Federal Republic of Germany) for civil liability for damage caused by the international crimes committed by its soldiers. Such liability was based on the idea that the perpetrators were military personnel acting in the interest of Germany and therefore both the perpetrator and Germany were jointly and severally liable for the civil damages arising from the crimes. The novelty at the core of this new case law was the finding that, while in normal circumstances Germany would be considered covered by international law immunity for acts committed *iure imperii*, such immunity should be excluded in relation to the international crimes.

Germany's liability was first affirmed in 2004 by the Court of Cassation in a civil trial concerning a case of forced labour (the *Ferrini* case).[20] Meanwhile, after the Constitutional Court admitted the possibility for the injured party to pursue civil action in a military criminal court by participating as *parte civile*, the request to summon Germany for civil liability was presented in criminal trials as well, starting in 2006 with the trial for the massacre of the citizens of Civitella Val di Chiana before the Military Court of La Spezia.[21]

After both Italian civil and criminal courts acknowledged the admissibility of summoning Germany, the political relationship between Italy and Germany became tense. In 2008, German Chancellor Angela Merkel and Italian Prime Minister Silvio Berlusconi agreed on a first political response:[22] the establishment of a mixed Italian–German Commission of Historians. The Commission was entrusted with the task of dealing with the 'Italian-German war past' and in particular the fate of military internees in Germany, in order to contribute to the creation of a shared culture of memory.[23] Following the recommendations made by the Commission, the German government established an Italian–German fund to finance a series of initiatives for the enhancement of the Italo-Germanic wartime memory. One such initiative was the creation of the *Atlas of the Nazi and Fascist Crimes*, a database of the episodes of violence

20 P. De Sena and F. De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case', 16 *European Journal of International Law* ('*EJIL*') (2005) 89–112; A. Gattini, 'War Crimes and State Immunity in the *Ferrini* Decision', 3 *Journal of International Criminal Justice* ('*JICJ*') (2005) 224–242.

21 A. Ciampi, 'The Italian Court of Cassation Asserts Civil Jurisdiction Over Germany in a Criminal Case Relating to the Second World War: The Civitella Case', 7 *JICJ* (2009) 597–615; B. Faedi Duramy, 'Making Peace with the Past: The Federal Republic of Germany's Accountability for World War II Massacres Before the Italian Supreme Court: the *Civitella* Case', in K.J. Heller and G. Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford University Press, 2013) 215–228; M. Frulli, 'La 'derogabilità' della norma sull'immunità degli Stati dalla giurisdizione in caso di crimini internazionali: la decisione della Corte di Cassazione sulla strage di Civitella della Chiana', 3 *Diritti umani e diritto internazionale* (2009) 442.

22 Cf. Focardi, *supra* note 6, at 491.

23 The Commission's report is available online at https://italien.diplo.de. For a critique of the German donations presented as an act of 'generosity' by Germany, see the paper given by Luca Baiada during the conference *Stragi e deportazioni neofasciste: per la giustizia e contro l'ambiguità*, Senate of the Republic, 7 March 2019, available online at https://www.youtube.com/watch?v=gpDYeJPX4gU.

against civilians committed by the German army and its Fascist allies in Italy, freely available online.[24]

Meanwhile, Germany resorted to the International Court of Justice (ICJ), claiming violation of the principle of state immunity from foreign jurisdictions. In 2012 the ICJ ruled in favour of Germany.[25] Italy complied with the ruling, both with regard to the subsequent judgments of the Court of Cassation, which annulled the decisions of the lower courts, and with the passing of Law of 14 January 2013, No. 5, which expressly allowed appeals for revocation of judgments that had already become final (Article 3).[26] However, the Court of Florence, by Order of 21 January 2014, raised the question of the constitutional legitimacy — with reference to Articles 2 and 24 of the Constitution — of both the new law and the domestic rules that require compliance with the judgment of the ICJ.[27] With the decision of 23 October 2014, No. 238, the

24 The Atlas is available online at www.straginazifasciste.it.

25 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 3 February 2012, ICJ Reports (2012) 37, at § 105. See S. Negri, 'Sovereign Immunity v. Redress for War Crimes: The Judgment of the International Court of Justice in the Case Concerning Jurisdictional Immunities of the State (Germany v. Italy)', 16 *International Community Law Review* (2014) 123–137; C.E.M. Jervis, 'Jurisdictional Immunities Revisited: An Analysis of the Procedure Substance Distinction in International Law', 30 *EJIL* (2019) 105–128.

26 G. Nesi, 'The Quest for a ''Full'' Execution of the ICJ Judgment in *Germany v. Italy*', 11 *JICJ* (2013) 185–198.

27 The literature on this historic decision abounds. See a recent collective and transnational reflection by the *Max Planck Institute for Comparative Public Law and International Law* in Heidelberg: V. Volpe, A. Peters and S. Battini, *Remedies against Immunity?* (Springer, 2021). Limiting our reference to the comments in English language, in the Italian scholarship cf. E. Cannizzaro, 'Jurisdictional Immunities and Judicial Protection: the Decision of the Italian Constitutional Court No. 238 of 2014', 1 *Rivista di Diritto Internazionale* ('*RDInt*') (2015) 126; G. Cataldi, 'A Historic Decision of the Italian Constitutional Court on the Balance between the Italian Legal Order's Fundamental Values and Customary International Law', 24 *The Italian Yearbook of International Law Online* ('*IYIL Online*') (2015) 37–52; F. De Santis di Nicola, 'Civil Actions for Damages Caused by War Crimes vs. State Immunity from Jurisdiction and the Political Act Doctrine: ECtHR, ICJ and Italian Courts', 2 *International Comparative Jurisprudence* (2015) 107–121; P. De Sena, 'The Judgment of the Italian Constitutional Court on State Immunity in Cases of Serious Violations of Human Rights or Humanitarian Law: A Tentative Analysis under International Law', *Questions of International Law* ('*QIL*'): *Zoom Out II* (2014) 17–31; F. Fontanelli, 'I Know it's Wrong but I Just Can't Do Right: First Impressions on Judgment No. 238 of 2014 of the Italian Constitutional Court', Verfassungsblog, 27 October 2014, available online at https://verfassungsblog.de/know-wrong-just-cant-right-first-impressions-judgment-238-2014-italian-constitutional-court/; R. Pavoni, 'How Broad is the Principle Upheld by the Italian Constitutional Court in Judgment No. 238?', 14 *JICJ* (2016) 573–585; M. Frulli, '''Time Will Tell Who Just Fell and Who's Been Left Behind'': On the Clash between the International Court of Justice and the Italian Constitutional Court', 14 *JICJ* (2016) 587–594; M. Iovane, 'The Italian Constitutional Court Judgment No. 238 and the Myth of the ''Constitutionalization'' of International Law', 14 *JICJ* (2016) 595–605; G. Palombella, 'German War Crimes and the Rule of International Law', 14 *JICJ* (2016) 607–613; F. Francioni, 'Access to Justice and Its Pitfalls. Reparation for War Crimes and the Italian Constitutional Court', 14 *JICJ* (2016) 629–636; C. Meloni, 'Jurisdictional Immunity of States: The Italian Constitutional Court v. the International Court of Justice?' 6 *Zeitschrift für Internationale Strafrechtsdogmatik* ('*ZIS*') (2015) 348–352; P. Palchetti, 'Judgment 238/2014 of the Italian Constitutional Court: In Search of a Way Out', *QIL, Zoom Out II* (2014) 44–

Constitutional Court declared constitutionally illegitimate the regulations of domestic law that prevented Italian judges from finding foreign states liable for the commission of international crimes on Italian territory to the detriment of Italian citizens. The Court expressly pointed out that the principle of state immunity 'does not apply to acts deemed *iure imperii* if they are in violation of international law and of the fundamental personal rights', guaranteed by the Constitution.

This created a curious situation: Italian judges continued to condemn Germany,[28] but, in the absence of a spontaneous payment by Germany, those decisions could not be enforced through the seizure and sale of properties belonging to the Federal Republic of Germany located in Italy. The obstacle was compounded by the immunity provided by international law for assets for

77; A. Pin, 'Tearing Down Sovereign Immunity's Fence. The Italian Constitutional Court, the International Court of Justice, and the German War Crimes', *Opinio Juris*, 19 November 2014, available online at http://opiniojuris.org/2014/11/19/guest-post-tearing-sovereign-immunitys-fence-italian-constitutional-court-international-court-justice-german-war-crimes/; C. Pinelli, 'Decision no. 238/2014 of the Constitutional Court: Between Undue Fiction and Respect for Constitutional Principles', *QIL, Zoom Out II* (2014) 33–41; C. Focarelli, 'State Immunity and Serious Violations of Human Rights. Judgment no. 238 of 2014 of the Italian Constitutional Court Seven Years On', 1 *The Italian Review of International and Comparative Law* ('*IRICL*') (2021) 29–58. Outside Italy, *ex plurimis* R. Kolb, 'The Relationship Between the International and the Municipal Legal Order: Reflections on the Decision no 238/2014 of the Italian Constitutional Court', *QIL, Zoom Out II* (2014) 5–16; C. Tams, 'Let the Games Continue: Immunity for War Crimes before the Italian Constitutional Court', EJIL:Talk!, 24 October 2014, available online at https://www.ejiltalk.org/let-the-games-continue-immunity-for-war-crimes-before-the-italian-supreme-court/; T. Schilling, 'The Dust Has Not Yet Settled: The Italian Constitutional Court Disagrees with the International Court of Justice, Sort of', EJIL:Talk!, 12 November 2014, available online at https://www.ejiltalk.org/the-dust-has-not-yet-settled-the-italian-constitutional-court-disagrees-with-the-international-court-of-justice-sort-of/; A. Peters, 'Let Not Triepel Triumph. How To Make the Best Out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order', EJIL:Talk!, 22 December 2014, available online at https://www.ejiltalk.org/let-not-triepel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i/; M. Bothe, 'The Decision of the Italian Constitutional Court Concerning the Jurisdictional Immunities of Germany', 24 *IYIL Online* 23–35; M. Schleinin, 'The Italian Constitutional Court's Judgment 238 of 2014 Is Not Another *Kadi* Case', 14 *JICJ* (2016) 615–620; R. Kunz, 'The Italian Constitutional Court and ''Constructive Contestation'': A Miscarried Attempt?' 14 *JICJ* (2016) 621–627.

28 G. Berrino, '''Plus Ça Change, Plus C'est la Même Chose'': State Immunity and International Crimes in Judgment No. 20442/2020 of the Corte di Cassazione', 1 *IRICL* (2021) 374–391; C.M. Mariottini, 'Deutsche Bahn AG v. Regione Stereá Ellada', 3 *American Journal of International Law* (2020) 486–493; A. Peters and A. Volpe, 'Reconciling State Immunity with Remedies for War Victims in a Legal Pluriverse', in Volpe et al., *supra* note 27, 3–35, at 14; G. Boggero and K. Oellers-Frahm, 'Between Cynicism and Idealism: Is the Italian Constitutional Court Passing the Buck to the Italian Judiciary?' in Volpe et al., *supra* note 27, 281–309; A. Chechi, 'Relationship Between Municipal and International Law: Italian Jurisprudence on the Boundaries of State Immunity from Jurisdiction and Execution: Waiting for the Next Episode' 30 *IYIL Online* (2021) 493–496.

public use, such as embassy buildings.[29] Moreover, in order to avoid a major crisis with Germany, the Italian legislator hastily ruled that the bank accounts of foreign states intended for the performance of public functions could not be subject to the enforcement measures.[30] Therefore, in order to prevent the enforcement of a decision, it was sufficient for Germany to declare that a specific property was intended for the performance of a public function.

4. The 2021/2022 Turn

This saga underwent a rapid evolution in 2021, following the distraint of various assets owned by Germany and located in Rome: the German Archaeological Institute, the *Goethe-Institut*, the German Historical Institute and the German School (*Scuola Germanica*). Although Germany opposed the seizures, pointing to the public purposes of the assets, the Court of Rome unexpectedly applied the principles of the Constitutional Court's decision to the enforcement phase and scheduled the hearing on authorization of the auction for 25 May 2022.[31] As a consequence, on 29 April 2022, Germany instituted proceedings before the ICJ while also requesting provisional measures.[32] The day after, the Italian government issued Decree-Law no. 36, which entered into force on 1 May. Article 43 of the Decree-Law established, at the Ministry of Economy and Finance,

> a Fund for the compensation of damage suffered by victims of war crimes and crimes against humanity for the violation of inviolable rights of the person, committed on Italian territory or in any case to the detriment of Italian citizens by the forces of the Third Reich in the period between 1 September 1939 and 8 May 1945, ensuring continuity to the Agreement between the Italian Republic and the Federal Republic of Germany made executive by decree of the President of the Republic April 14, 1962, n. 1263, with an endowment of 20,000,000 euros for the year 2023, 11,808,000 euros for each of the years from 2024 to 2026.

The Decree-Law set two prerequisites for accessing the fund: (1) a final judgment on the liquidation of damages issued in a proceeding started either before the entry into force of the Decree-Law or within the following 30 days (i.e., by 31 May 2022); or (2) an out-of-court settlement between the victim and Germany. Subsection 3 of the Decree-Law also effectively blocked the

29 See in particular Art. 19 of the United Nations Convention on Jurisdictional Immunities of States and their Property of 2004, considered to be the expression of a *jus cogens* international law norm. P. Palchetti, 'Right of Access to (Italian) Courts über alles? Legal Implications Beyond Germany's Jurisdictional Immunity', in Volpe et al., *supra* note 27, 39–53.

30 By means of Art. 19 *bis* of the Decree-Law no. 132 of 12 September 2014, inserted during the conversion (Law no. 162 of 10 November 2014). The dubious constitutionality of the new provision has been highlighted by many scholars, see B. Conforti, 'Il legislatore torna indietro di circa novant'anni: la nuova norma sull'esecuzione sui conti correnti di Stati stranieri', 98 *RDInt* (2015) 558–561.

31 Tribunal of Rome, IV, 12 July 2021.

32 The application is available online at https://www.icj-cij.org/public/files/case-related/183/183-20220429-APP-01-00-EN.pdf.

distraint proceedings — including the hearing scheduled for 25 May — by allowing distraints only on the basis of a final decision against Germany and not while the appeal was pending. After the Decree-Law was adopted, Germany withdrew its request for interim measures, while the main proceedings on the merits remain pending before the ICJ.[33]

The conversion law of 29 June 2022 intervened on various issues. In the first place, the possibility of enforcing a decision against Germany was now definitively precluded, even for those in possession of a final judgment. The new subsection 3, in fact, stated that the executive procedures 'are carried out exclusively on the Fund referred to in subsection 1'. With this modification, the Italian state stepped in accepting to indemnify the victims and permanently held the Federal Republic of Germany non-liable. The law then expressly intervened in order to prevent Italy from becoming the chosen place for the so-called *forum shopping* for a sort of universal jurisdiction on the basis of the decision of the Constitutional Court of 2014.[34] The new subsection 3 stated:

> The executive procedures based on decisions concerning the liquidation of the damages referred to in subsection 1 or deriving from foreign judgments ordering Germany to compensate damages caused by the forces of the Third Reich in the period between 1 September 1939 and 8 May 1945 cannot be started or continued, and any execution procedures undertaken are extinguished.

Furthermore, as was to be expected, due to the pressure applied by the associations of the victims,[35] the 30-day deadline for the initiation of proceedings against Germany was extended to 180 days, thus moving the date to 28 November 2022.

5. The Issue of Constitutionality

With this legislative intervention, the Italian government and Parliament clearly intended to put a definitive end to the long-standing (and diplomatically inconvenient) affair of compensation, by inviting victims to present their lawsuits within a very short time and then paying compensation in the stead of Germany. However, there are several possible future scenarios that may arise from this intervention.[36]

33 News on the case is available online at https://www.icj-cij.org/en/case/183. On the possible evolution, cf. K. Oellers-Frahm, 'Questions Relating to the Request for the Indication of Provisional Measures in the Case Germany v Italy', *QIL, Zoom-in 94* (2022) 5–17; R. Pavoni, 'Germany Versus Italy Reloaded: Whither a Human Rights Limitation to State Immunity?' *QIL, Zoom-in 94* (2022) 19–40.

34 With reference to Greece, see Boggero and Oellers-Frahm, *supra* note 28, at 292.

35 See *infra* note 42.

36 Cf. G. Berrino, 'Il ''ristoro'' dei cittadini italiani vittime di crimini di guerra e contro l'umanità commessi dalla Germania durante il secondo conflitto mondiale', 3 *RDInt* (2022) 827–835; G. Berrino, 'The Impact of Article 43 of Decree-Law no 36/2022 on Enforcement Proceedings Regarding German State-Owned Assets', *QIL, Zoom-in 94* (2022) 59–72; P. Rossi, 'Italian Courts and the Evolution of the Law of State Immunity: A Reassessment of Judgment no 238/2014', *QIL, Zoom-in 94* (2022) 41–57; P. Franzina, 'Judicial Immunities: Germany V. Italy, Again', EAPIL, 4 May 2022, available online at https://eapil.org/2022/05/04/jurisdiction

The constitutionality of the Decree-Law and the following conversion law has already been formally challenged. By Order No. 154/22 of 1 December 2022, a judge of the fourth civil section of the Court of Rome, raised the question of the constitutional legitimacy — with reference to Articles 2, 3, 24 and 111 of the Constitution — of the Decree-Law and the following conversion law.[37] The judge questioned whether it is admissible for the legislator to intervene in already established trials in favour of one of the parties (Germany), or whether it represents a *ius singulare*, an unjustifiable privilege that violates the equality of the parties and the right to judicial remedy and to a fair trial.[38]

Theoretically, other grounds of constitutional challenge could be possible. For example, one could question the legitimacy of the new law in the light of international law, considering that compliance with generally recognized principles of international law is required by Articles 10 and 117 of the Constitution. In fact, it is widely accepted that international crimes cannot be barred from prosecution due to the statute of limitations.[39] But this does not seem to imply the same rule for civil actions for payment of damages caused by the international crimes; even for violations of *jus cogens* norms.[40] All the more so because on one side of the claim for compensation, there is a legal person (the German state) that is civilly liable and, on the other, institutional civil parties who are mostly heirs of the victims or legal persons as well (victims' associations, etc.). Therefore, if no statute of limitation is admitted, the claim could be brought before a judge at any point in the future, not even subject to the natural limit given by the deaths of the natural persons involved as perpetrators or victims. For this same reason, it is also difficult to detect a violation of Article 6 ECHR based on the statute of limitation.[41]

al-immunities-germany-v-italy-again/; L. 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, available online at https://www.ejiltalk.org/is-the-dispute-between-germany-and-italy-over-state-immunities-coming-to-an-end-despite-being-back-at-the-icj/; G. Boggero, 'La Reazione Del Governo Italiano Al (Nuovo) Ricorso Tedesco Di Fronte Alla Cig. Prime Note Sugli Effetti Dell'art. 43 D.L. 30 Aprile 2022, N. 36', SIDIBlog, 25 May 2022, available online at http://www.sidiblog.org/2022/05/25/la-reazione-del-governo-italiano-al-nuovo-ricorso-tedesco-di-fronte-alla-cig-prime-note-sugli-effetti-dellart-43-d-l-30-aprile-2022-n-36/.

37 For the text of the order and a comment, P. Caroli, 'Sollevata la questione di costituzionalità della norma istitutiva di un Fondo (italiano) per le vittime dei crimini nazisti', *Sistema Penale*, 23 January 2023, available online at https://www.sistemapenale.it/it/scheda/caroli-sollevata-qlc-norma-istitutiva-fondo-per-vittime-crimini-nazisti.

38 As already highlighted by Palchetti, it is not clear to what extent the decision of the Constitutional Court of 2014 admits a 'political' solution (Palchetti, *supra* note 28, at 50).

39 R.A. Kok, *Statutory Limitations in International Criminal Law* (Asser Press, 2007).

40 On the additional issues raised, in the Italian legal system, by the claims of the so-called IMI (Italian Military Internees), which would not be based on crimes punished with life imprisonment and therefore imprescriptible, see Tribunal of Turin, 20 October 2009, No. 7137 *Mantelli*; P. Actis Perinetto - L. Pasquet, 'Immunità e prescrizione come estreme difese degli stati autori di gravi crimini internazionali: il caso dei deportati italiani', 2 *ISPI Analysis* (2010) 1–9.

41 One could also argue that the legislative intervention in favour of one of the parties represents a violation of the equality of arms, altough such argument does not seem to be grounded.

Turning to Article 3 of the Constitution (which affirms the principle of equality and prohibits discriminations among citizens), we can see different types of discrimination. First, a distinction can be drawn between those victims of Nazism who have obtained judicial recognition and those who have not resorted to a judge. As underlined by the victims' associations, the Italian state still needs to delegate to a judge an assessment on the official status of 'victim', according to the strict rules on trial evidence.[42] Second, there is discrimination between Italian victims and the foreign victims of Nazism (especially Greeks), who in the past had chosen Italy to start executive proceedings, acting on the basis of their national judgments. Following the new legislation, they will be precluded from both the judicial procedure and access to the fund. Third, as will be shown in Section 7, there is discrimination with reference to the victims of Fascist crimes, both Italian and foreign. In fact, with this new law Italy provides the victims of Nazi crimes with compensation on the basis of a judicial assessment of the damage suffered. However, such individual compensation was not provided for the victims of crimes of Fascism and the Italian Social Republic (RSI).[43]

Beyond the specific issue raised, the question for the Constitutional Court is much more profound. Did the 2014 judgment lead the Court into a dead end? Considering what was stated in such a radical and high-sounding manner in 2014, with a worldwide echo, can the Court today accept a 'political' solution other than the judicial path, without contradicting itself and retracing its steps?.

42 On 20 May, the Association Martyrs of S. Anna-Stazzema 'August 12, 1944', the Association of Victims of Nazi-Fascist massacres at Grizzana, Marzabotto, Monzuno, the National Association of Italian Families of Martyrs Fallen for the Freedom of the Fatherland, the survivors and family members of the victims of the massacres of Mommio, Fivizzano and Padule del Fucecchio, sent a letter to the presidents of the Senate of the Republic and of the Chamber of Deputies, drawing attention to some critical issues concerning the Decree-Law, and with particular regard to the 30-day deadline to initiate proceedings as a condition for access to the Fund. It is was stated in the letter that 'the provisions governing access to the aforementioned Fund introduce an UNACCEPTABLE AND ABSURD DISCRIMINATION among the survivors of the Nazi massacres ... it would seem that, after SEVENTY-EIGHT years of celebrations, anniversaries, books, testimonies, trials, the Republic does not yet have clear ideas about what happened in Italy during the Second World War and then asks the survivors of the slaughters and the families of the Victims to apply to a judge who will have to ascertain whether, for example, the Massacres of Sant'Anna, Montesole, Fosse Ardeatine, Mommio, Fivizzano, Padule di Fucecchio, were or were not ''crimes against humanity'' and whether or not ''the inviolable rights of the person were violated!''' (Uppercase in original). In a more radical way, a petition (no. 972, consigned on 31 May to the first Commission of the Chamber) asked the Parliament not to convert the Decree-Law.

43 On the crimes of the RSI, T. Rovatti, *Leoni vegetariani. La violenza fascista durante la RSI* (Clueb, 2011); on the prosecution of Fascist crimes, Caroli, *supra* note 3. The discrimination against the victims of Fascism, for whom there was no compensation on an individual basis, but only forms of (insufficient) social security protection, is underlined by G. Romeo, 'Looking Back in Anger and Forward in Trust: The Complicate Patchwork of the Damages Regime for Infringements of Rights in Italy', in E. Bagińska (ed.), *Damages for Violations of Human Rights: A Comparative Study of Domestic Legal Systems* (Springer, 2016) 217, at 237.

6. The Next Moves by Germany

Another question that can be asked concerns the next moves by Germany. In fact, one wonders whether this gesture by the Italian government and Parliament, clearly aimed at protecting the interests of Germany, can be appreciated to such an extent that it elicits a German contribution to the new fund for the victims,[44] an action that would not officially constitute compensation. With this in mind, it may be interesting to consider the so-called 'Reconciliation Agreement' that Germany reached in 2021 with Namibia, in relation to the genocide of the Herero and Nama between 1904 and 1908.[45] By this agreement, Germany agreed to a generous economic contribution, provided that it was not qualified as compensation from a legal point of view, hence establishing international responsibility. This was one of the most criticized aspects of the agreement, because it had the unpleasant effect of 'reinforcing the relationship between ''saviors'' and ''supplicants,'' where the former act pursuant to a *noblesse oblige*'.[46] If this dynamic is evident in the relationship between rich Germany and an African state, it can be argued that this side effect would also take place in the relationship with the south European state of Italy.

Above all, it must be acknowledged that none of the present scenarios seem to respond to the needs of the victims. It suffices to watch the film footage of the (belated) trial for the Marzabotto massacre to realize the importance for victims of telling their story for the first time before a judge.[47] While the Nazi crimes took the form of an 'absolute cancellation of the life of the *polis* ... (w)hat emerged from the Italian judicial experience therefore placed the national community before a request of listening ... a sort of ''poetic-narrative retribution'''.[48] The fact that all the accused — mainly responsible for killing

44 Previously, an 'elegant' closure of the issue with the creation of a mixed Italian–German fund for the IMI, had already been hypothesized in detail by F. Fontanelli, 'Sketches for a Reparation Scheme: How Could a German-Italian Fund for the IMIs Work?', in Volpe et al., *supra* note 27, 159–187; for another proposal cf. Peters and Volpe, *supra* note 27, at 29. On the fact that the fund should be paid by both Germany and Italy, as a form of assumption of responsibility by the Italian state for the faults of fascism, A. von Arnauld, 'Deadlocked in Dualism: Negotiating for a Final Settlement', in Volpe et al., *supra* note 27, 313–329, at 326; advocating for a payment by Italy, already J. Weiler, 'Editorial: Germany v Italy: Jurisdictional Immunities – Redux (and Redux and Redux)', EJIL:Talk!, 18 October 2021, available online at https://www.ejiltalk.org/germany-v-italy-jurisdictional-immunities-redux-and-redux-and-redux/.

45 On this genocide and possible judicial remedies, J. Sarkin, *Germany's Genocide of the Herrero* (Currey, 2011).

46 S. Imani, K. Theurer and W. Kaleck, 'The ''Reconciliation Agreement'': A Lost Opportunity', ECCHR 3 June 2021, available online at https://www.ecchr.eu/fileadmin/Hintergrundberichte/ECCHR_GER_NAM_Statement.pdf. The concepts of 'Saviors' and 'Supplicants' refer to M. Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights', 41 *Harvard International Law Journal* (2001) 201–245.

47 They are to be found in the documentary *Lo stato di eccezione* by G. Maccioni, Italy 2009.

48 A. Speranzoni, 'La difesa delle vittime nei processi per crimini nazifascisti in Italia. Tra ricostruzione dei fatti e ''irrisolto'' risarcitorio', in G. Focardi and C. Nubola (eds), *Nei tribunali. Pratiche e protagonisti della giustizia di transizione nell'Italia repubblicana* (Il Mulino, 2015) 335, at 340 and 344. Outside the context of criminal trials, an example of spontaneous reconciliation is

unarmed civilians, mostly women and children, in a punitive action against the Italian population as a whole — deliberately chose not to be physically present at the hearings — which is a legitimate choice in the Italian legal system — was a major disappointment for the victims. This was later followed by the refusal of German authorities to surrender those convicted precisely — and ironically — on the basis of their choice not to attend. This was undoubtedly the greatest disappointment, not only because those found guilty did not serve their sentences, but also because it was perceived as a sort of delegitimization of the Italian trials. We can therefore speak of a second victimization. Hence, a victim's claim that was never about money, but mainly about being heard and being recognized, was turned into a claim for money because all the other options were ruled out.

On the German side, it does not seem correct to speak of a deliberate political choice not to surrender the perpetrators. Nonetheless, an implicit delegitimization of the Italian trials can be read between the lines of some of the decisions which denied the surrender. For instance, some of these decisions were based on the belief that the Italian unitary model for the modes of individual responsibility — which does not distinguish between perpetrator, accomplice and instigator, leaving the distinction only for the sentencing phase — extends individual responsibility by including types of conduct that would not be included in the German model. This happened in the case of Johann Robert Riss, sentenced to life imprisonment for the massacre of Padule del Fucecchio. In rejecting the request for execution of the sentence in Germany, presented by the Italian Ministry of Justice, the *Landgericht* of Kempten affirmed that moral participation in the crimes (*concorso morale*), 'a special Italian form of participation … extraneous to German criminal law', would automatically derive participation in the crime merely from the position held, while 'the mere belonging to a unit and the position as a non-commissioned officer, according to German criminal law standards, are not sufficient to affirm participation in a crime'.[49] Besides exceeding the court's mandate in accepting or rejecting the request for execution — which does not imply a review of the foreign trial — this decision is an example of absolute superficiality in the legal comparison and analysis of the Italian judgment.

One may also wonder why German prosecutors — especially those who collaborated with the Italian military prosecutors during the trials and who were therefore aware that the trials were *in absentia* — in most cases waited until the conviction and non-surrender before trying to open investigations in Germany. Moreover, one may highlight the opportunity of a quicker and central coordination by the *Zentrale Stelle* in Ludwigsburg. A contrast is to be

provided by the nephew of one of the criminals of Sant'Anna di Stazzema (who, when alive, had always denied the massacre) who in 2015 decided to visit the places of the massacre and listen to the stories of the survivors, cf. P. Kirby, 'My SS Family: German Meets Survivors of Italy WW2 Massacre', *BBC News*, 16 July 2015, available online at https://www.bbc.com/news/world-europe-33143473.

49 Langericht Kempten (Allgäu) 19 February 2015, 2 StVK 1076/14.

found with the most recent trials related to concentration camps. In fact, since the *Demjanjuk* trial,[50] Germany has conducted a new series of trials of concentration camp personnel, bringing to court even centenarians.[51] In those trials, individual responsibility is determined by the role covered in the structure of the concentration camp — from the accountant to the guard, up to the secretary — without an individual causation directly linked to the extermination.

This is certainly an operation that has taken place more recently, at a time when the remaining defendants are very few. At the same time, it happened in a historical and political phase in which Germany has presented itself on the international stage as a guarantor of human rights and as the best forum for punishing the perpetrators of international crimes committed in every part of the world, starting with Syria, by means of universal jurisdiction.[52] This, however, raises the suspicion of a double standard rooted in the collective perception (albeit probably subconscious, but only implicitly and at the level of prioritization) of the Holocaust — or genocide in general — on the one hand, and war crimes and crimes against humanity on the other. In other words, the long social process of dealing with the Holocaust — not only in Germany — as a universal and unique crime that therefore needs to be confronted with,[53] might have unwillingly reinforced an old cliché. This cliché implies that, in contrast, war crimes and crimes against humanity are indeed sad and tragic, yet sort of 'accidents', an 'inevitable tragedy of wars'[54] to be found in the histories of all peoples and all conflicts.

50 Cf. G. Werle and B. Burghardt, 'Zur Gehilfenstrafbarkeit bei Massentötungen in nationalsozialistischen Vernichtungslagern: Der Fall Demjanjuk im Kontext der bundesdeutschen Rechtsprechung', in C. Fahl et al. (eds), *Festschrift für Werner Beulke zum 70. Geburtstag* (C.F. Müller, 2015) 339–353; B. Burghardt, 'Die Strafsache ,,Oskar Gröning''vor dem Bundesgerichtshof', 1 *ZIS* (2019) 21–40; C. Roxin, 'Beihilfe zum Mord durch Dienst im Konzentrationslager Auschwitz', 17 *Juristische Rundschau* (2017) 83–92; B. Burghardt, 'Das Strafverfahren gegen Reinhold Hanning als Beispiel für die Spätverfolgung von NS-Verbrechen', in F. Jeßberger, M. Vormbaum and B. Burghardt (eds), *Strafrecht und Systemunrecht. Festschrift für Gerhard Werle zum 70. Geburtstag* (Mohr Siebeck, 2022) 525–541.

51 This refers to the case of a guard at the Sachsenhausen concentration camp, Josef Schütz, who was brought to trial for the first time in 2021, and sentenced on 13 June 2022, at the age of 101, to 5 years of imprisonment. In December 2022, Irmgard Furchner, 97-year-old and former secretary of the Stutthof concentration camp, was sentenced to 2 years of imprisonment; a similar trial should soon begin in Stuttgart. See M. Vormbaum (ed.), *Late Prosecution of Nazi Crimes*, forthcoming.

52 See L. Morris, 'Why Germany is Becoming A Go-To Destination for Trials on the World's Crimes', Washington Post, 6 March 2021, available online at https://www.washingtonpost.com/world/europe/germany-war-crimes-justice/2021/03/05/b45372f4-7b78-11eb-8c5e-32e47b42b51b_story.html; information on the Koblenz trial of Syrian criminals is available at https://www.ecchr.eu/thema/syrien/; on universal jurisdiction in Germany, J. Geneuss, *Völkerrechtsverbrechen und Verfolgungsermessen. § 153f StPO im System völkerrechtlicher Strafrechtspflege* (Nomos, 2013).

53 For a critical analysis of the political role of the historical memory of the Holocaust in post-1989 Western Europe, Caroli, *supra* note 3, at 209. On Germany, *ibid.*, at 204.

54 M. Battini, *La mancata Norimberga italiana* (Laterza, 2003), at 45.

7. What about Fascist Crimes and their Victims?

As outlined above, this latest legislative action arose as a matter of urgency driven by the need to protect Germany's property in Italy. However, indirectly, it provokes the singular solution whereby the Italian state provides the victims of Nazi crimes with an individual compensation, which was not provided for the victims of crimes of Fascism and the Italian Social Republic (RSI). This could, albeit unintentionally, have the effect of opening a path of social and institutional *Vergangeheistbewältigung* with the crimes of the Fascist regime and the RSI, which has historically been prevented, among other factors, also by a narrative that depicts the Republic as 'born from the Resistance' and, conversely, Fascism and the RSI as 'non-self', a defeated enemy and not a product of the Italian society. This narrative implicitly and ironically seems to imply that all Fascists disappeared with the Liberation and that the Fascist regime, with its crimes, was a tumour, a parenthesis that usurped the Italian institutions from the outside (for 20 years), without finding support in the society of 'good Italians'.[55] Again, this payment by Italy could be seen as a 'change of mind' by the Italian state in relation to how to invest the large sums paid out by Germany in 1961. At that time, in fact, in line with the forward-looking attitude of the reconstruction, infrastructure investments for the development of the country were preferred to compensation for victims on an individual basis.[56]

A further reflection is required at this point. Since 2014, the Italian legal system has recognized a right to compensation for victims of international crimes, which prevails even over the immunity of states under international law. In 2022, Italy has now intervened as a substitute for the debtor in order to guarantee the satisfaction of the victims' claims. In a system that gives so much importance to the victims' right to compensation, it is difficult to imagine that compensation for the many foreign populations that equally suffered very serious violations of international law by the Italian army — from Ethiopia to Libya, from Spain to Yugoslavia and Greece — could be precluded in the future. It should be borne in mind that, after the war, the government actively and successfully committed itself to avoiding the extradition and prosecution of Italian war criminals at all costs, even at the price of curbing the criminal prosecution of Nazi criminals.[57] And the operation was successful: none of those criminals were ever extradited nor prosecuted, despite the numerous extradition requests received and the international obligation of surrender on the basis of the peace treaties. In recent years, the Presidency of the Republic has shown a timid intention to pay reparations in order to build a collective memory. President Oscar Luigi Scalfaro was the first President of the Republic to visit Ethiopia in 1997 and to admit the sins of the Italians, also

55 A confirmation of this paradigm can already be found in the structuring of the criminal offences for the punishment of fascism, see Caroli, *supra* note 3, at 107.

56 In this sense, S. Cassese, 'Recollections of a Judge', in Volpe et al., *supra* note 27, 353–358, at 354.

57 Caroli, *supra* note 3, at 47.

arranging for the return of the Axum obelisk. In 2016, President Sergio Mattarella shook hands with the last living Ethiopian partisans and laid a wreath in memory of the victims of the Italian repression. In 2020, the heads of state of Italy and Slovenia jointly commemorated the victims of both countries, and President Mattarella entrusted to the Slovenian President the keys to the *Narodni Nom*, headquarters of the organizations of the Slovenes of Trieste, set on fire by the Fascists in 1920.[58] Nonetheless, Italian crimes abroad are still unknown to most of the population.[59]

After the discovery of the 'armoire of shame', the problem of the possible prosecution of Italian citizens, even if they were mentioned in the files found, did not arise. In 2011, the then military prosecutor of Rome, Marco De Paolis, opened an investigation into the massacre of Domenikon, 'the Marzabotto of Thessaly', declared a 'martyr city' by the Greek government. In this reprisal during the night between 16 and 17 February 1943, the Italian Royal Army's 24th Infantry Division *Pinerolo* killed, and later threw into mass graves, 150 unarmed male civilians.[60] The investigation was closed in 2016, following the verified death of the suspects.

In 2012, a criminal investigation was opened in Barcelona, Spain.[61] The object was the conduct of 21 voluntary pilots, members of the *Baleari* squadron, under the command of general Vincenzo Velardi. They allegedly took part in several bombings that hit the civilian population of Barcelona and Catalonia, from 13 February 1937 to 29 January 1939, killing 4736 people, wounding more than 7000 and destroying 1808 buildings. These bombings were allegedly directed solely against civilian targets: that is to say, against the most densely inhabited neighbourhoods of Barcelona. After two international letters rogatory and the interrogation in Italy of the only pilot whose name was known to the Spanish authorities — Luigi Gnecchi, heard in 2015, at the age of 101 — the proceedings were closed while still in the preliminary investigative phase following Gnecchi's death in 2016. At first, the Italian government did not answer to the international letters rogatory and later refused to provide the complete list of volunteer pilots, on the grounds that the archives had not been digitalized. Finally, in 2020, a list was sent containing a hundred names of pilots, all of whom were deceased.[62] In 2018, another

58 References to all the initiatives mentioned can be found in P. Caroli, *Il potere di non punire. Uno studio sull'amnistia Toglliatti* (Naples, 2020), at 260.

59 Cf. Caroli, *supra* note 3, at 13 note 24.

60 In 2009 an official apology was delivered by the Italian ambassador to Greece, Gianpaolo Scarante, who attended the commemoration. V. Sinapi, *Domenikon 1943. Quando ad ammazzare erano gli italiani* (Mursia, 2021); L. Santarelli, 'Muted Violence: Italian War Crimes in Occupied Greece', 9 *Journal of Modern Italian Studies* (2003) 280.

61 N. 632/2012. The fact that the amnesty does not apply to foreigners is not expressly stated in the 1977 amnesty law. According to the plaintiff association *AltraItalia*, based in Barcelona, and to the judge, the war was formally a civil war. Hence Italy was not engaged in a war against Spain. This would exclude the applicability of the amnesty to the extent established by the decision of 2012 in the *Manos Limpias* case; cf. Caroli, *supra* note 3, at 47.

62 *Ibid.*, at 50 note 173; J. Garcìa Bueno, 'Los 100 pilotos que bombardearon Barcelona, al descubierto cuando ya han muerto todos', El Paìs, 22 February 2020, available online at https://elpais.com/ccaa/2020/02/21/catalunya/1582306590_305401.html.

Spanish investigation was closed, in relation to the bombing of the city of Durango in 1937.[63] The motivation was the failure to demonstrate that the names indicated by the plaintiff actually corresponded to those of the aviators concerned.

In light of the foregoing analysis, the following questions arise: what would happen if, for example, the victims' association *AltraItalia* — which filed the criminal complaint in Barcelona — initiated a civil case in Italy in 2023? What would happen if the families of the victims of Domenikon or of the terrible crimes committed in Ethiopia did so? Could an Italian judge ever deny them the right to compensation in light of such — even constitutional — jurisprudence? And in that case, would the Italian government behave like Germany, or would it show the same care as it has done in relation to the Italian victims of Nazi crimes? If a fund is created for the victims of Nazism, should not *a fortiori* one exist for the victims of Fascism, both Italian and foreign?

8. Conclusion

Without the reconstruction of the overall context of the criminal prosecution of Nazi crimes, it would have been difficult to understand the meaning of a claim for financial reparation against Germany 80 years after the facts. To this day, the Italian government has not yet taken the necessary steps to implement the previous decision to establish the fund. Moreover, as mentioned, in the following months the Constitutional Court will have to decide on the constitutionality of the new law. Beyond the specific issue raised — limited to a violation of the right to judicial remedy and to a fair trial — at least seven possible forms of unconstitutionality can be proposed, as mentioned, although not all of them are convincing. They can be summarized as follows:

1. violation of the right to judicial remedy;
2. violation of binding international law;
3. discrimination between victims of Nazism with or without judicial assessment;
4. discrimination between Italian victims and foreign victims of Nazism (in particular, the Greek victims who had tried to obtain enforcement of their judgments in Italy);
5. discrimination against the victims of Fascism and the RSI (for them there is no individual compensation through an ad hoc fund; moreover, since there is no continuity from the Kingdom of Italy, the RSI and the Italian Republic, the judicial path seems to be precluded);

63 The investigation was closed in spite of an attempt to submit the issue to the Spanish Constitutional Tribunal. See M. Ormazabal, 'Durango pide amparo al Constitucional para que no quede impune el bombardeo fascista del 1937', El Paìs, 18 July 2018, available online at https://elpais.com/ccaa/2018/07/18/paisvasco/1531929555_967129.html.

6. discrimination with respect to foreign victims of fascism (who could in the future act against the Italian state and obtain judicial satisfaction);
7. discrimination with respect to similar cases against states other than Germany (where Italian judges have accepted other claims for compensation against foreign states in relation to war crimes or crimes against humanity, for example Serbia and Iran).[64]

There are also many other implications, which unfortunately cannot be thoroughly dwelt on here. Two main ones come to mind. First, there is the fact that a sort of public recognition as a victim of Nazism will be linked to the prior obtaining of a judgment that ascertains it, with all that this implies in terms of the relationship between historical truth and judicial truth, among history, memory and law.[65] The official status of a victim is in fact dependent on a previous judgment rendered by a judge. Second, it should be remembered that we live in times of 'tribunalization of history',[66] of 'juridicized history',[67] of memory wars fought through law and memory laws.[68] All over the world compensation, public apologies[69] and transitional measures are demanded

64 Boggero and Oellers-Frahm, *supra* note 27, at 292.

65 In the vast body of literature that examines the differences between judicial truth and historical truth, suffice here to recall P. Calamandrei, 'Il giudice e lo storico', 17 *Rivista di diritto processuale civile* (1939) 105–128; C. Ginzburg, *The Judge and the Historian* (Verso, 1999); M.R. Damaška, 'Problematic Features of International Criminal Procedure', in A. Cassese et al. (eds), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) 175, at 180; D. Pastor, '"Recht auf Wahrheit?" durch den Strafprozess?' in W. Hassemer, E. Kempf and S. Moccia (eds), *In dubio pro libertate. Festschrift für Klaus Volk zum 65. Geburtstag* (Beck, 2009) 541–558; P. Häberle, *Wahrheitsprobleme im Verfassungsstaat* (Nomos, 1995); T. Weigend, 'Should We Search for the Truth, and Who Should Do it?' 36 *North Carolina Journal of International Law* (2011) 389–416; K. Volk, *Die Wahrheit vor Gericht: wie sie gefunden und geschunden, erkämpft und erkauft wird* (Bertelsmann, 2016). On the relationship between history and memory, see E. Traverso, *Il passato: istruzioni per l'uso* (Ombre Corte, 2006), at 25; P. Nora, 'Entre histoire et mémoire. La problématique des lieux', in P. Nora (ed.), *Les lieux et la mémoire. I. La République* (Gallimard, 1984) XIX.

66 A. Melloni, 'Per una storia della tribunalizzazione della storia', in O. Marquard and A. Melloni, *La storia che giudica, la storia che assolve* (Laterza, 2008) 5–68.

67 G. Resta and V. Zeno-Zencovich, 'La storia "giuridificata"', in G. Resta and V. Zeno-Zencovich (eds), *Riparare, risarcire, ricordare* (Editoriale Scientifica, 2012) 11–42.

68 N. Koposov, *Memory Laws, Memory Wars. The Politics of the Past in Europe and Russia* (Cambridge University Press, 2018); U. Belavusau and A. Gliszczynska-Grabias (eds), *Law and Memory: Towards Legal Governance of History* (Cambridge University Press, 2017); E. Fronza, *Memory and Punishment: Historical Denialism, Free Speech and the Limits of Criminal Law* (Asser Press, 2018).

69 For a critical insight into the growing role of public apologies and requests for forgiveness as instruments of transitional justice, cf. R.L. Brooks, 'The Age of Apology', in R.L. Brooks (ed.), *When Sorry Isn't Enough. The Controversy over Apologies and Reparations for Human Right Injustice* (NYU Press, 1999) 3–16; J. Tarusarira, 'The Anatomy of Apology and Forgiveness: Towards Transformative Apology and Forgiveness', 13 *International Journal of Transitional Justice* (*IJTJ*) (2019) 206–224; J.K. Olick, *The Politics of Regrets: On Collective Memory and Historical Responsibility* (Routledge, 2013); R.E. Howard-Hassmann, 'Official Apologies', in P. Malcontent (ed.), *Facing the Past* (Intersentia, 2016) 247–264. A database of public apologies in transitional contexts is available online at http://www.humanrightscolumbia.org/ahda/political-apologies.

from each state in order to amend the mistakes of the past, from the repression of minorities[70] to colonialism and settler colonialism.[71] It is therefore legitimate to ask: how far back can one go in amending the past? Is it so wrong to affirm that, however terrible the crimes, in court 'Battles of the past should not be endlessly continued'?[72]

Returning, however, to the subject of the current analysis, the long and shameful story of compensation for the victims of the massacres is an example of the weakness — and perhaps hypocrisy — of politics, both in Italy and in Germany. When the 'armoire of shame' was discovered in 1994, there were many Nazi criminals still alive. However, despite the commissions of inquiry of the military judiciary and of the Parliament,

> these close examinations were not followed by any further action and no significant effects were produced. Essentially, a simple acknowledgment of the facts occurred, preceded by an analysis able to explain the origins and causes of the phenomenon, yet unwilling to intervene with organisational acts and measures suited to creating the conditions for a resolution of a serious judicial emergency, i.e. the situation that had arisen following the discovery of hundreds of proceedings for massacres that the Military Prosecutor's Offices of the Republic would have had to prepare.[73]

At the same time, the two governments did not reflect on the possible consequences of trials against dozens of elderly Germans who had committed war crimes decades previously and were living peacefully in freedom in another European Union (EU) country, with a criminal past often unbeknownst to their own families. In a sort of blame-defection,[74] the responsibility for this belated transitional justice experience was attributed the judiciary alone, maybe with the secret hope that the old age of the perpetrators would lead to a 'natural solution' of the problem. Could this saga not have been the opportunity to pursue a shared path of reckoning with the past — even if it entailed relinquishing punishment of elderly perpetrators — with both Germany and Italy engaging in a Truth and Reconciliation Commission or another transitional justice mechanism? Maybe 60 years after the facts, criminal justice was not the only and the best option. It is widely known that transitional justice has developed many mechanisms that could have provided individual accountability of the perpetrators and given redress to the victims

70 Consider, as a mere example, the Canadian experience: R.L. Nagy, 'The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission', 7 *IJTJ* (2013) 52–73.

71 As a mere example, see A.S.J. Park, 'Settler Colonialism, Decolonization and Radicalizing Transitional Justice', 14 *IJTJ* (2020) 260–279.

72 C. Tomuschat, 'The Illusion of Perfect Justice', in Volpe et al., *supra* note 27, 55–70, at 55.

73 M. De Paolis, 'La punizione dei crimini di guerra in Italia', in S. Buzzelli, M. De Paolis and A. Speranzoni (eds), *La ricostruzione giudiziale dei crimini nazifascisti in Italia. Questioni preliminari* (Giappichelli, 2012) 61–158, at 115.

74 This concept indicates a decision (often unexpressed) through which the political elites entrust courts with difficult problems in order to avoid responsibility for unpopular or unwelcome decisions; cf. C. Guarnieri and P. Pederzoli, *The Judicial System: The Administration and Politics of Justice* (Elgar, 2020), at 152; R. Hirschl, 'The Judicialization of Politics', in G.A. Kaldeira, R.D. Kelemen and K.E. Whitington (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008) 120–141.

without actually sending the perpetrators to jail. The South African example comes to mind. In this case, the state's temporary waiver of prosecuting the political crimes of Apartheid had to be completed by a voluntary acceptance of the confession–amnesty exchange procedure, which took place on national television and which included the participation of the victims. Yet, this would have required a strong political initiative by both Italy and Germany, which, however, was lacking on both sides. The long struggle over civil damages once again shows that both the Italian and the German governments intervened only when urged to do so by the activism of the judiciary.

The Italian legislator — who was never eager to fight for the cause of the victims — is now trying to bring this saga to an end by using Italian money, ironically of EU origin and destined for the development of the country after the Covid-19 crisis. Whilst an optimist may see in this at least a symbolic recognition and a will to close the book of the past, even without the involvement of Germany, a pessimist will see it at most as a 'patch'. The pessimistic view should be preferred. In general terms, this confirms that politics has never really taken responsibility for this belated transitional justice experience and that the justice provided by the Italian military criminal justice system, however partial and belated, was the only form of justice received by the victims.