Questions relating to the request for the indication of provisional measures in the case Germany v Italy

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1. *Introduction*

The question of international law that I was entrusted to analyze concerns the procedural aspects and prospects in particular of the request for the indication of provisional measures in the case brought by Germany before the International Court of Justice (ICJ) on 29 April 2022.[1] As is well known, the question as to whether jurisdictional State immunity is still applicable, even in cases concerning grave violations of human rights had already been at stake before the Court ten years ago, with the Court having decided 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'.[2] The Court based its decision on the fact that the rules of *ius cogens*, of which the most basic human rights are part, and those of state immunity are not in conflict because they operate on different levels: the rules on state immunity 'are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State'.[3] Thus the substantive question before national courts, namely whether Germany is obliged to pay reparation for grave human rights violations committed against Italian nationals during the Second World War, is not concerned by the rules on state immunity, because this

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[1] *Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-Owned Property (Germany v Italy)* Application of 29 April 2022.

[2] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, Judgment of 3 February 2012 [2012] ICJ Rep 99 para 91.

[3] ibid para 93.

procedural rule only prevents any decision of Italian courts against Germany on the subject matter, the grave violations of human rights. As judgments of the ICJ are binding upon the parties to the case (Article 59 of the ICJ Statute), the Italian Parliament took the necessary measures to implement the Judgment of 2012, adopting Law no 5 of 14 January 2013. However, subsequent to this, the Tribunal of Florence, having been seized with three further civil proceedings, declined to declare them inadmissible in accordance with Law no 5/2013. Instead, it brought the question of the compatibility of Law no 5/2013 with the Italian Constitution before the Italian Constitutional Court (ItCC). This led to the famous judgment no 238 of 22 October 2014,[4] which has been commented on extensively.[5] In this decision the ItCC found that the customary international law rule on state immunity, that the ICJ had confirmed to exist, was not compatible with the Italian Constitution because it was in conflict with inviolable principles and rights of the Italian legal order.[6] On the basis of this judgment, Italian courts and tribunals were obliged to admit and decide cases against Germany[7] concerning claims for reparation for grave violations of international humanitarian law, brought by Italian individuals subject to forced labour in Germany between 1st September 1939 and 8 May 1945. In order to enforce the national judgments which had awarded financial compensation to the claimants and with a view to the fact that on the basis of the judgment of the ICJ, Germany did – of course – not pay voluntarily, Italy initiated measures of constraint against German property situated in Italy, which led to a new application by the Federal Republic of Germany of 29 April 2022. In its application Germany asked the Court to adjudge i. whether Italian domestic courts, relying on their novel reading of the Italian constitutional law, could entertain civil claims against Germany, ii. whether Italian domestic courts could take measures of constraint based on judicial decisions rendered in

[4] *Sentenza 238/2014* is published on the website of the Italian Constitutional Court with an English translation and also in V Volpe, A Peters, S Battini (eds), *Remedies Against Immunity?* (Springer 2021) 401 ff.

[5] Cf references in A Peters, V Volpe, 'Reconciling State Immunity with Remedies for War Victims in a Legal Pluriverse' in *Remedies against immunity* (n 4) 13.

[6] Cf on this topic C Tams, 'A Dangerous Last Line of Defense: Or, a Roman Court Goes Lutheran' in *Remedies against Immunity?* (n 4) 237 ff.

[7] G Boggero, K Oellers-Frahm, 'Between Cynicism and Idealism: Is the Italian Constitutional Court Passing the Buck to the Italian Judiciary' in *Remedies Against Immunity?* (n 4) 281 ff.

violation of Germany's sovereign immunity and iii. whether there was any justification, under international law, for the particular measures of constraint taken against German State-owned properties located at Rome. Alongside its application, Germany had brought a request for the indication of provisional measures of protection aimed, *inter alia*, at preventing German properties being subject to public auction and preventing further measures of constraint from being taken. Although the request was withdrawn for reasons that will be addressed later,[8] it may be not futile to consider it and to draw attention to the critical aspects which have some relevance for the case as such and which – under certain circumstances which also will be analyzed later[9] – may end up coming back to the Court.

2. *The prospects of the request for provisional protection*

As is well known, under Article 41 of its Statute the ICJ may indicate provisional measures if it considers that circumstances so require. These 'circumstances' concern several aspects which shall be addressed in the following passage.

2.1. *The jurisdiction of the Court*

The first, and usually most controversial question, concerns the jurisdiction of the Court. Although the Court is the principal judicial organ of the United Nations (Article 92 UNC) and although 'All members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice' (Article 93 (1) UNC) this does not mean that the Court is competent to settle any dispute between member states of the UN. Instead, the jurisdiction of the Court has to be recognized explicitly: it relies on the consent of the states. According to Article 36 of the ICJ Statute that recognition may take the form of a special provision to this effect in international treaties or conventions (Article 36 (1) Statute), or a general submission expressed in a declaration recognizing the Court's jurisdiction in relation to any other state accepting the same obligation

[8] See *infra* 2.4.2.
[9] See *infra* 2.4.2.

(Article 36 (2) Statute), furthermore states may agree to submit a particular dispute to the Court (*Compromis*) or they may *ad hoc* recognize the jurisdiction of the Court after a case has been brought against them (*forum prorogatum*).[10] Very often the defendant raises the objection that the jurisdictional basis invoked by the applicant is not applicable between the parties or does not cover the dispute at stake so that the Court has first to take a decision on this point, which usually takes some time. In the case, however, where a request for the indication of provisional measures is brought before the Court, there is, in general, not the time for an in-depth examination of the jurisdiction due to the alleged urgency of the protection needed. Therefore, the Court does not have to find definitively in favour of the existence of a jurisdictional basis, but only *prima facie*, that is to say that the dispute *may* be covered by the jurisdictional link invoked in the application. This question would, however, in the present case, not pose any problem because the jurisdictional basis invoked, the European Convention for the Peaceful Settlement of Disputes of 1957, has been in force between the Parties since 18 April 1961. It had already formed the jurisdictional basis in the case of 2012 and that it covered the dispute at stake had never been contested.

2.2. *The plausibility of the case*

The second 'circumstance' concerns the plausibility of the case. As provisional measures are designed to preserve the rights which may be adjudged on the merits, there must be at least some prospect of success on the merits of the case.[11] This question seems more complicated in the present case, because it might well be asked whether the question has not already been decided in 2012, thus whether this is a 'new' case, or whether instead it only concerns questions around the non-implementation of the 2012 judgment. If the latter, the case would be inadmissible because the disputed question has already been settled with binding force

[10] Cf K Oellers-Frahm, 'Article 92' in B Simma et al (eds) *The Charter of the United Nations A Commentary* vol 2 (3 edn OUP 2012) 1933.

[11] The requirement of plausibility was introduced under this terminus in 2009 in the case *Questions relating to the obligation to Prosecute or Extradite (Belgium v Senegal)* [2009] ICJ Rep 151 ff; until then this aspect was or related to the question of jurisdiction or to the question whether there existed a link between the measures requested and the merits of the case.

and the implementation of its decisions is not a concern for the Court. Accordingly, the application would not have any prospect of success, would thus not be plausible, so that there could not be any justification for the indication of provisional measures. In that alternative the Court could only dismiss the case as such because the situation would not demand another judgment, but rather immediate and effective implementation of the 2012 judgment.[12]

In its application Germany had affirmed that there was a new dispute (para 10 of the Application) with regard to the following questions: i. whether Italian domestic courts, relying on their novel reading of the Italian constitutional law, could entertain civil claims against Germany; ii. whether Italian domestic courts could take measures of constraint based on judicial decisions rendered in violation of Germany's sovereign immunity and iii. whether there was any justification, under international law, for the particular measures of constraint taken against four German State-owned properties located in Rome. The decisive question is thus whether the 2012 Judgment has already decided these questions, which refer in particular to questions of immunity from execution. This aspect was, in fact, addressed by the Court in its Judgment of 2012, where it stated (para 113) that there exists a difference between State immunity from jurisdiction and State immunity from execution, the latter one going further than jurisdictional immunity. But the Court did not go into more detail in order to define immunity from execution and limited its considerations to the findings that in any case state-owned property used for non-commercial purposes cannot be subject to measures of constraint (para 118), a statement that is in fact, not controversial. It reflects the distinction to be made in the context of *jurisdictional* immunity between

[12] Cf the statement of the Court in the *Bosnian Genocide* case: after the indication of provisional measures in April 1993 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))* (Request for the Indication of Provisional Measures: Order) [1993] ICJ Rep 3) Bosnia had some months later brought a further request for the indication of additional provisional measures which was dismissed by the Court because 'the perilous situation demands not an indication of provisional measures additional to those indicated by the Court's order of 8 April…, but immediate and effective implementation of these measures' (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))* (Further Request for the Indication of Provisional Measures: Order) [1993] ICJ Rep 325 at 349 para 59).

the conduct of a State performed in the exercise of its sovereign power (*acta iure imperii*) and that relating for example to commercial activities (*acta jure gestionis*), the latter one being not covered by immunity. With regard to immunity from *execution* the distinction regards the use of the property, namely whether it is used for non-commercial governmental purposes – in which case it is covered by immunity - or for usual commercial purposes, in which case it is not protected by immunity.[13] In the 2012 case it was not contested that the Villa Vigoni, which then was concerned, served non-commercial governmental purposes so that the Court refrained, as per its usual practice, from making further remarks on questions of immunity from execution, because this was not necessary to decide the case at hand.

In the present case four German State-owned properties or parts thereof (Deutsches Archäologisches Institut, Goethe Institut, Deutsches Historisches Institut and Deutsche Schule) have already been subject to measures of constraint and a date for an auction for public sale has been scheduled. According to Germany, this constitutes a violation of international law, first as it relies on Italian judgments delivered in violation of State immunity and second as the property is subject to governmental non-commercial use. This is evidently a new dispute which offers sufficient prospect of success and thus the request fulfils the requirement of plausibility.

2.3. *Requirement of a link between the measures requested and the subject matter of the application*

Closely connected to the 'circumstance' of plausibility is the one requiring that there exists a link between the measures requested and the subject matter of the claim, namely that the measures requested are able to preserve the rights which are to be adjudged on the merits. This aspect does not need much comment in the present case, as the subject matter concerns the finding that enforcement against state properties is illegal and the measures requested are aimed at preventing any enforcement measures against such properties.

[13] Boggero, Oellers-Frahm (n 7) 296.

2.4. *Irreparable damage and urgency*

The last two 'circumstances' that require the indication of provisional measures concern irreparable damage and urgency which are usually closely linked together.

2.4.1. *Irreparable damage*

The damage that endangers the rights which are to be preserved by the indication of provisional measures must be irreparable in order to justify provisional protection. This prerequisite has two elements: first it refers to the question of whether prejudice is in prospect, e.g. whether the occurrence of a certain event is probable and what the consequences to be expected are if it occurs. It refers thus to future events so in this context the probability of the realization of the event is also decisive. The other element, and a situation that is present in most cases, is that the events causing prejudice have already occurred or are still occurring so that the Court must decide whether provisional protection is needed in order to prevent further damage.

Whether damage is irreparable is not generally defined, but depends on the actual situation. As a rule, it may be said that it would be a damage that cannot be 'made good simply by the payment of an indemnity or by compensation or restitution in some other material form'.[14] The ICJ usually refers to the condition that irreparable damage should not be caused to the rights which are the subject of the dispute, considering thus the particular situation. While this aspect does not need detailed explanation where the risk of bodily injury or death, in particular in situations of military actions, is at stake, the situation may be different where property is concerned. Without going into further details[15] it may be said that in the present case the risk of irreparable damage is serious because the public auction of the properties could not otherwise be compensated, for example by financial means. The sale of the properties or parts thereof would irreparably obstruct the functioning of the four Institutes and a finding

[14] This statement was made as long ago as 1927 by the Permanent Court of International Justice (PCIJ) in the *Sino-Belgian Treaty* case PCIJ, Series A, No 8, 7.

[15] Cf K Oellers-Frahm, A Zimmermann, 'Article 41' in A Zimmermann, CJ Tams (eds), *The Statute of the International Court of Justice, A Commentary* (3rd edn OUP 2019) 1160 ff.

on the merits that the auction was illegal could not have the consequence that the situation could be restored to the status *ex ante*. The damage would be irreparable as the transfer of title could not be reversed. As the Italian Government itself had confirmed in an aide-memoire of 6 October 2021 that the four properties serve governmental non-commercial purposes and were thus immune from being subject to enforcement measures, the irreparability of the damage was evident.

2.4.2. *Urgency and the decreto-legge*

Thus, the final and decisive question to be considered concerns the question of whether the indication of the requested provisional measures is urgent. Urgency is, as mentioned above, closely linked to the requirement of irreparable damage. If the damage is imminent, protection is required. The urgency requirement thus clearly includes a time factor: the damage to the rights claimed in the application must be imminent, if this is not the case there is no urgency. In this context, other procedures, in particular diplomatic negotiations, may also play a role, although in general they are no obstacle to the action of the Court, because they are political in character and thus do not prevent a legal assessment of the question. In the present case the requirement of the urgency of provisional protection in order to prevent irreparable damage plays a particularly interesting role. At the moment, 29 April 2022, when Germany filed its application and the request for the indication of provisional measures, urgency was clearly present, since the public auction was scheduled for May 25. But as we all know on 30 April, the day after the application was filed, the Italian Government adopted *decreto-legge* no 36[16] which provided in the relevant passage of Article 43 that Italian courts were required to lift enforcement measures previously taken and that no further measures of constraint could be taken by Italian courts against German property used for governmental non-commercial purposes located on Italian territory. Furthermore, all proceedings enacted with the aim of enforcing judgments according reparation were cancelled. In addition, according to Article 43 para 1 of the *decreto-legge* the Ministry of Finance and Economy would create a fund for satisfying complainants that had

[16] Decreto-legge 30 April 2022, no 36, *Gazzetta Ufficiale della Repubblica Italiana, Serie Generale* no 100 of 30 April 2022, in force 1 May 2022.

been awarded financial reparation in judicial judgments delivered against Germany, so that no further payments would be required from Germany.

This provision seemed to lead to the consequence that not only was there no urgency for indicating provisional measures, but that moreover the case as such is moot because there is no longer any dispute to be decided upon. This consideration was apparently the reason why Germany withdrew its request for provisional measures, - but why did it not also withdraw its application? The reason therefore is evident and plausible. The 'promise' that no reparation measures or claims would ever again be raised against Germany and that Italy itself will satisfy persons that have already been accorded certain amounts in binding decisions is placed in a *decreto-legge*. A *decreto-legge* adopted on the basis of Article 77 of the Italian Constitution is not, if I may say so, or at least not yet, a reliable legal basis because it has to be converted into law by Parliament within 60 days; otherwise it is null and void as from the date of its adoption. Parliament did indeed convert the *decreto-legge*,[17] but some general remarks as trailed in the introduction may be useful in order to assess the effect of a rule not yet definitively in force.

As long as the *decreto-legge* was not converted into law, the situation remained open and it might be asked what would have been the reaction of the Court if Germany had not withdrawn the request for the indication of provisional measures. In this alternative the decision as to whether under the given circumstances urgency still required provisional protection would have been rather problematic since until 29 June 2022 - the time-limit for conversion of the *decreto-legge* into law by Parliament - the circumstance of urgency would be in suspense, but not definitely inexistent. In this situation the Court would probably have dismissed the request for the indication of provisional measures for lack of urgency, but it could

[17] The decreto-legge was converted into law no 79 of 29 June 2022, *Gazzetta Ufficiale della Repubblica Italiana, Serie Generale* no 150 of 2022. As, however, this law could still be challenged before the ItCC the following considerations might be relevant for the future development of the case. The case is, in fact, still pending before the ICJ and time-limits for filing the written pleadings were fixed in an Order of 10 June 2022. It is worth noting that the time-limits are fixed in a way that leaves enough room for the termination of any national proceedings challenging the law. Germany has to submit its Memorial on 12 June 2023, and Italy its Counter-Memorial on 12 June 2024, time-limits which may even be extended. Thus, it may not seem illusory to presume that at that time the case might have been withdrawn because the dispute has been settled out of court.

have decided to remain seized of the question until the fate of the *decreto-legge* was clarified.

2.5. *The decreto-legge and the case before the ICJ*

The fact that Germany withdrew the request despite the fact that at that moment it was not clear whether the *decreto-legge* would be adopted by Parliament may be considered an expression of confidence concerning the further development and attitude of Italy. Furthermore, withdrawal of a request for the indication of provisional measures while the case remains pending does not minimize the rights of Germany. In the event – which hopefully will not occur – of a successful challenge before the Constitutional Court, Germany may bring a fresh request for provisional protection based on the then new fact that the provisions in Article 43 of the Law are no longer applicable (Article 75 of the Rules of Court). This step is possible at any time 'during the course of the proceedings in the case in connection with which the request is made' (Article 73 para 1 Rules of Court). With a view to the fact that until 29 June 2022 the situation would remain unclear Germany was therefore absolutely right in withdrawing only the request for the indication of provisional measures at that moment and not the application which remains pending. And even if the *decreto-legge* has now been converted into law, this may not be the last word: the question remains as to whether the law converting the *decreto-legge* will be challenged before the Constitutional Court because in particular the strict time-limits for bringing new claims for reparation may be considered unconstitutional. The original text of para 6 of Article 43 read together with para 2 of Article 43 provided that new proceedings for reparation of the war crimes committed by Germany can only be initiated within thirty days after the entry into force of the *decreto-legge*, specifically 1st June 2022, after that date forfeiture of the claim is declared officially by the judge. As Article 43 was included in a *decreto-legge* that concerns in particular further measures provided by Italy in its National Recovery and Resilience Plan which has been adopted in the context of the € 750 billion package of the EU as a response to the economic consequences of the Covid pandemic, it may be difficult for the public to be sufficiently informed of the new prescriptive terms which will have already expired at the moment when the *decreto-legge* is or converted into law or becomes null and void retrospectively. Law No 79 has,

however, extended this time-limit to 180 days, instead of 30, and also terminates enforcement measures of foreign judgments concerning reparation for the same reason against Germany. Other questions of constitutionality of the provisions of Article 43 of the *decreto-legge* may be raised so that the situation is not altogether clear, notwithstanding the conversion of the *decreto-legge* into law; further development depends on the legal steps available to attack it so that the situation remains unclear even in this alternative.

That means for the case before the ICJ that, if no further steps are taken to attack it, this seemingly never-ending dispute on State immunity between Italy and Germany would come to an end. Germany would in that situation discontinue the case, but perhaps ask the Court to indicate in its Order for the removal of the case from the docket the terms and reasons for discontinuance (Article 88 Rules of Procedure). If Germany decided not to discontinue the case, the Court would have to dismiss it because it would be moot as no dispute exists any longer between the applicant and the defendant.

In the other alternative, if the case is continued, it seems rather probable that Germany, as has been mentioned above, will bring a fresh request for the indication of provisional measures which would be successful, because the requirement of urgency of provisional protection would then be present. Furthermore, on the basis of the facts given when the case was filed it also seems probable that the substantive claims on the merits of the case would be successful. In deciding on the merits the ICJ would not even have to go deeper or more generally into questions of immunity from execution than it did in 2012 because in the present case, the situation is as clear as it was in the 2012 case: the four State properties subject to measures of constraint and public sale are used for governmental non-commercial purposes – a fact that Italy had already admitted in an aide-memoire of October 2021 – and thus are evidently immune from measures of constraint. As – with good reasons – 'it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions'[18] – the case at hand does not require the reaching of

[18] *Request for the interpretation of the Judgment of 20 November 1950 in the Asylum Case*, Judgment, [1950] ICJ Rep 395, 402; cf in this context R Kolb, 'General Principles

any further findings on immunity from execution, because in its application Germany had only requested the Court to find that Italy has violated its immunity by taking measures of constraint against the four State owned properties which by their very nature are immune from execution.

3. *Final considerations*

On the basis of the above considerations a final settlement of the apparently 'never-ending story' between Italy and Germany is in any case imminent: either the regulation provided for in the *decreto-legge* (as converted into law through Law No 79) will be realized and lead to a non-judicial peaceful settlement of the dispute, or the ICJ will have to decide the dispute through a binding judgment, which very likely will state that Italy has acted in violation of international law. Although a judgment in favour of the claims of Germany would not deeply affect the friendly relations between the two States, it would nevertheless throw an unwelcome shadow on these relations. Therefore, the preferable option would be the discontinuance of the case due to the conversion of the *decreto-legge* into law. This way of settling the dispute does not only have the advantage of respect for international law as it stands – even if the fact that State immunity from jurisdiction is problematic in cases where it prevents States from bearing responsibility for grave beaches of human rights[19] – but also for the fact that it precludes further claims against Germany going back to acts committed more than 70 years ago in war-time and seemingly admissible without any time-limitation.

This statement leads finally to a final consideration of more general concern, namely that even if the dispute between Italy and Germany will now come to an end, the most controversial questions underlying not only this dispute, but in general the problem of redress for damage caused by warfare, will still not be answered. These questions, which cannot be analyzed more in detail in this context, concern the fundamental problem of whether reparation or compensation resulting from war-

of Procedural Law' in A Zimmermann, CJ Tams (n 15) 963, in particular 986 ff where the *ne ultra petita* principle and the 'Action *infra petita*' is analyzed in more detail.

[19] S Kadelbach 'State Immunity, Individual Compensation for Victims of Human Rights Crimes, and Future Prospects' in V Volpe, A Peters, S Battini (n 4),143 ff.

related damage should be paid – only – on the basis of a peace treaty or agreement between the States concerned, as was traditionally the case,[20] or whether – and even in addition to lump sum agreements concluded on the inter-State level – individual claims of each and every victim should be admitted.[21] If that question is answered positively, the next problem resulting therefrom would be who can bring a claim, whether there are time-limits for bringing claims and what kind of reparation, compensation or satisfaction should be granted. The German-Italian dispute is only one example of the long-lasting implications of individual claims for redress of war-related damage preventing the conclusion of a deplorable chapter of history due to continuous new claims. This fact alone already supports one aspect of the problem of admitting reparation of war damages on the basis of individual claims and the pertinence of the statement dating back to the time when this way of redress made its appearance in international law, namely that it 'does not provide the ideal legal framework for dealing with responsibility issues of large scale … as a consequence of an armed conflict…'.[22]

These are the questions which lie at the basis of the dispute between Germany and Italy, but which were not before the Court in 2012 and are not now before the Court which was and remains merely concerned with questions of immunity. Nevertheless, they are of high relevance and urgently need an answer, in particular with regard to the numerous armed conflicts of our days.

[20] This practice reflects art 3 of the IV Hague Convention of 1907 and art 91 of the 1977 First Protocol to the four Geneva Conventions of 1949 which refer to post-war interstate agreements.

[21] K Oellers-Frahm, 'Judicial Redress of War-related Claims by Individuals: The Example of the Italian Courts', in U Fastenrath et al (eds), *From Bilateralism to Community Interest, Essays in Honour of Judge Bruno Simma* (OUP 2011) 1055 ff; A Gattini, 'The Dispute on Jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?' (2011) 24 Leiden J Intl L 24 173, in particular 193.

[22] C Tomuschat, 'Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law' in A Randelzhofer, C Tomuschat (eds) *State Responsibility and the Individual* vol 1 (Nijhoff 1999) 3 at 23.