The impact of Article 43 of Decree-Law no 36/2022 on enforcement proceedings regarding German State-owned assets

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1. *Introduction*

Article 43 of the Italian Decree-Law no 36 of 30 April 2022, later converted into law under Law no 79 of 29 June 2022, addresses the concerns raised by Germany, including before the International Court of Justice, regarding the seizure of German State-owned property located in Italy on the basis of judgments through which Germany was ordered to compensate the victims of war crimes and crimes against humanity committed by the Third Reich's armed forces between 1939 and 1945.

The provision precludes both the institution and the continuation of enforcement proceedings arising from the above judgments. It also establishes a Fund for the redress of victims of crimes committed on Italian territory, or which otherwise harmed Italian citizens, for those who had obtained a final judgment against Germany. By contrast, access to the Fund is precluded for foreign citizens who were victims of war crimes and crimes against humanity committed by the Third Reich outside Italian territory, irrespective of whether they have obtained judgment against Germany, notably even where that foreign judgment is recognised and enforceable in Italy.

The purpose of this contribution is to assess whether, and to what extent, the measures contemplated in Article 43 of the Decree-Law are such that the rights of victims of war crimes and crimes against humanity committed by the Third Reich will ultimately enjoy effective protection.

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2. *Enforcement proceedings on German State-owned property in Italy*

Italian courts have on numerous occasions awarded damages to the victims of war crimes and crimes against humanity committed by Third Reich forces in Italy during World War II. They have likewise declared on various occasions that foreign judgments rendered against Germany in connection with crimes committed by the Third Reich qualify for recognition and enforcement in Italy.

Germany, however, has never complied with those judgments. Judgments creditors, for their part, have instituted enforcement proceedings, but they have been unable to receive compensation through such proceedings, due to the fact that customary international law makes property owned by a State for government non-commercial purposes immune from foreign measures of constraint, and due to the fact that it has proved difficult to identify German property located in Italy which is owned for commercial purposes.

In its Judgment no 238/2014,[1] the Italian Constitutional Court acknowledged Italy's duty to comply with the ruling of 2012 whereby the International Court of Justice[2] (ICJ) held that Italy had infringed the jurisdictional immunities of Germany under customary international law, but it subjected that duty to the 'fundamental principle of judicial protection of fundamental rights', as enshrined in the Italian Constitution. For this reason, the Italian Constitutional Court affirmed that insofar as the international law of immunity of State from the civil jurisdiction of other States includes acts considered *jure imperii* which have violated international law and fundamental human rights, it is in conflict with the aforementioned principle of Constitution, and therefore does not enter the Italian legal system and does not have any effect therein. The Judgment of the Italian Constitutional Court was only concerned with the States' immunity from adjudication. The Court did not discuss whether, and to what extent, the Italian Constitution also affected the implementation in Italy of the customary rule whereby a foreign State's assets are

[1] Italian Constitutional Court (2014) Decision n 238. English translation available at <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf>.

[2] ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [2012] ICJ Rep 144.

exempt from measures of constraint.[3] Several attempts have since been made by creditors to enforce judgments awarding compensation. For the purposes of assessing the impact of Article 43 of Decree-Law no 36/2022 on pending enforcement proceedings, a distinction should be made between enforcement proceedings brought by foreign citizens based on foreign judgments that would otherwise qualify for enforcement in Italy, and enforcement proceedings brought by Italian citizens, based on judgments issued by Italian courts.

The proceedings brought by the Sterea Ellada Region – representing Greek national victims of the Distomo massacre[4] – against Trenitalia and Rete Ferroviaria (the Italian railways operator), as third-party debtors of Germany and Deutsche Bahn (the German railways operator) provide an illustration of the first set of proceedings. Deutsche Bahn is involved in the proceedings because it is owned by Germany, and is therefore, according to the creditor, equally responsible for the obligations of Germany. The involvement of the Italian companies reflects, rather, their business relationship with Deutsche Bahn and the fact that the latter owes monies to the former under this relationship. The proceedings were particularly complex and will not be discussed here in detail.[5] What matters for the present analysis is that Deutsche Bahn has been opposed to the enforcement on the ground, inter alia, that obligations of Germany should be regarded as distinct from its own, and that, in any case, monies

[3] See *Conclusions in point of law* para 1 'the referring judge limits the questions raised to the issue of the jurisdiction to examine the claim for compensation for damages, and does not include the issue of enforcement action'.

[4] See Court of Leivadia (30 October 1997) no 137; Greek Supreme Court (4 May 2000) no 11. On the *exequatur* of the judgment of the Court of Leivadia see Decree of the President of the Court of Appeal of Florence (16 June 2006); Court of Appeal of Florence (25 November 2008); Court of Cassation (20 May 2011) no 11163. On the *exequatur* of the judgment of the Greek Supreme Court see Decree of the President of the Court of Appeal of Florence (5 May 2005); Court of Appeal of Florence (22 March 2007); Court of Cassation (29 May 2008) no 14199. In general for compensation of Greek victims and the so-called 'Distomo Case' see G Berrino, 'La questione dei risarcimenti alle vittime dei crimini commessi dal Terzo Reich durante la II guerra mondiale: uno sguardo alla Grecia passando dall'Italia (e non solo)' (2019) 12 Lo Stato 207.

[5] See CM Mariottini, 'Case Note. Deutsche Bahn AG v. Regione Sterea Elladá', (2020) 114 (3) AJIL 486; G Berrino, 'La Corte di Cassazione torna sul tema delle immunità giurisdizionali degli Stati stranieri e dei loro beni', (2020) 103 Rivista di Diritto Internazionale 844.

that the creditor intends to seize are exempt from seizure because they are intended for government purposes.

The second group of pending enforcement proceedings include the seizure, based on final Italian judgments,[6] of property located in Rome, such as the German Archaeological Institute, the German Cultural Institute, the German Historical Institute, and the German School. Germany lodged its opposition against the enforcement and requested a stay of the proceedings on the ground that the assets concerned serve government purposes and are accordingly immune from measures of constraint. The Tribunal of Rome dismissed the request. It relied for this on the principles laid down by the Italian Constitutional Court in Judgment no 238 of 2014, noting that the principle of effective judicial protection implies that, where a judgment has found that a foreign State is liable for serious violations of fundamental human rights, nothing should prevent that judgment from being enforced. In these circumstances, the Tribunal added, it is immaterial whether the assets targeted by the creditor served a government non-commercial purpose, or not.[7]

Germany filed a complaint against the decision before a collegial chamber of the same Tribunal. The chamber dismissed the complaint, but it did so on the ground that Germany had failed to prove that the assets were intended for government purposes. Had the government purpose of the assets been established, the chamber clarified, a seizure would not be permitted.[8]

All of the above proceedings ultimately involve a conflict between the claim by Germany that the assets it owns in Italy should be exempt from enforcement, and the claim by creditors that, without enforcement, their right to compensation would remain theoretical and ineffective. This conflict, too, some argued, could be brought, sooner or later, before the Italian Constitutional Court.[9]

[6] Court of Appeal of Bologna, *Giorgio v Germany*, Judgment no 2120 (2018); Court of Appeal of Rome, *Cavallina v Germany*, Judgment no 5446 (2020).

[7] Tribunal of Rome, order 12 July 2021. A similar reasoning had been suggested by O Lopes Pegna, 'Giù le mani da Villa Vigoni: quale tutela «effettiva» per le vittime di gravi violazioni dei diritti umani?' (2018) 101 Rivista di Diritto Internazionale 1237, 1240-1241.

[8] Tribunal of Rome, order of 3 November 2021.

[9] On this point see *ex multis* P Pustorino, 'La sentenza n. 238 del 2014 della Corte costituzionale: limiti e prospettive nell'ottica della giurisprudenza italiana' (2015) 9 Diritti Umani e Diritto Internazionale 51, 52-56; K Oellers-Frahm, G Boggero, 'Between Cynicism and Idealism: Is the Italian Constitutional Court Passing the Buck to the Italian

This is where Article 43 of Decree-Law no 36/2022 comes into the picture.

3. *Everything changes?*

On 29 April 2022, Germany instituted new proceedings before the ICJ against Italy. It complained of the on-going violation of its right to jurisdictional immunity as a sovereign State, notably because of the measures of constraint that Italian authorities were taking, or were threatening to take, with respect to German assets located in Italy. The application came with a request for the indication of provisional measures.[10] The request, however, was withdrawn a few days later following the adoption of Decree-Law no 36/2022.[11] The latter move, Germany explained, addressed the 'central concern' expressed in the request, since Article 43 of the Decree-Law required that Italian courts immediately lift measures of enforcement previously taken, and provided that no further measures of constraint be taken against German property used for non-commercial purposes. According to the Italian Constitution, Decree-Laws, which are temporary measures adopted by the Government to address urgent situations, are submitted to the Italian Parliament for their conversion into law.[12] The conversion may involve some changes. Decree-Law no 36/2022 in fact underwent some modifications upon its conversion into law. That is why it is convenient to distinguish, in the analysis

Judiciary?' in V Volpe, A Peters, S Battini (eds), *Remedies against Immunities?* (Springer 2021) 281, 299-302.

[10] *Certain Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-owned Property (Germany v Italy)* (29 April 2022) <www.icj-cij.org/public/files/case-related/183/183-20220429-APP-01-00-EN.pdf>. See K Oellers-Frahm, 'Questions Relating to the Request for the Indication of Provisional Measures in the Case Germany v Italy' in this Zoom-in. See also G Berrino, 'Un'istantanea del nuovo ricorso della Repubblica federale tedesca alla Corte internazionale di giustizia per violazione delle immunità giurisdizionali da parte dello Stato italiano' SIDI Blog (16 May 2022) <www.sidiblog.org/2022/05/16/unistantanea-del-nuovo-ricorso-della-repubblica-federale-tedesca-alla-corte-internazionale-di-giustizia-per-violazione-delle-immunita-giurisdizionali-da-parte-dello-stato-italiano>.

[11] See Order of the President of the ICJ (10 May 2022) <www.icj-cij.org/public/files/case-related/183/183-20220510-ORD-01-00-EN.pdf>.

[12] See art 77 of the Italian Constitution.

of some passages, between the original wording of the Decree-Law and its modified (ie, final) version.

Article 43 establishes an *ad hoc* Fund providing relief for prejudice suffered by victims of crimes committed by Third Reich forces between 1939 and 1945 on Italian territory, or which otherwise harmed Italian citizens, in continuity with the 1961 Agreement between Italy and Germany on the settlement of certain property-related, economic and financial questions.[13]

Pursuant to Article 43(2), access to the Fund is granted to those who obtained a final judgment awarding damages for such a prejudice, provided that the judgment in question results from proceedings brought either before the date on which the Decree entered into force, or before the date provided by Article 43(6), which identifies a 180-day timeframe to propose new claims, starting from the entry into force of the Decree (the original wording of the provision contemplated a 30-day timeframe, which the Parliament extended).

Article 43(3) stipulates that – notwithstanding any contrary provisions in the Italian code of civil procedure[14] – the above judgments are not enforceable unless they have become final. Moreover, no enforcement proceedings based on such judgments may be started or pursued, and any pending enforcement proceedings must be discontinued. In practice, the provision deprives creditors of all means of enforcement against Germany, making payment through the Fund the only possible form of relief. The Parliament further stressed this idea by clarifying, in

[13] On 2 June 1961, Germany and Italy concluded in Bonn two lump-sum agreements: Agreement on compensation for Italian nationals subjected to National-Socialist measures of persecution; the Agreement on the settlement of certain property-related, economic and financial questions. The latter, which entered into force on 16 September 1963, provided in art 1 that Germany paid compensation to Italy for 'outstanding questions of an economic nature'. In art 2 was established: '(1) The Italian Government declares all outstanding claims on the part of the Italian Republic or Italian natural or legal persons against the Federal Republic of Germany […] to be settled to the extent that they are based on rights and circumstances which arose during the period from 1 September 1939 to 8 May 1945. (2) The Italian Government shall indemnify the Federal Republic of Germany […] for any possible judicial proceedings or other legal action by Italian natural or legal persons in relation to the above-mentioned claims'. The German and Italian version of the Agreement is published in Bundesgesetzblatt II 26 June 1963 No 19, 668.

[14] Pursuant to art 282 of the Italian code of civil procedure, first instance judgments are, as a rule, provisionally enforceable between the parties to the proceedings.

the final version of Article 43(3) that judgments against Germany may not be enforced otherwise than through the Fund.

According to Article 43(5), redress through the Fund has the result of extinguishing all claims for damages. The Decree-Law requires that the Ministerial Decree be adopted within 180 days of the entry into force of the Decree-Law itself to regulate the operation of the Fund in detail.

The original draft of Article 43 prompted several comments.[15] The changes brought about by the Italian Parliament upon the conversion of the Decree-Law into law reflect the concerns raised by some of the commentators.[16] One key concern will be discussed here, namely whether Article 43 ultimately provides the victim of war crimes and crimes against humanity with a sufficient degree of judicial protection, in particular as far as pending enforcement proceedings are concerned. The question refers both to victims of crimes committed on Italian territory, or crimes which otherwise harmed Italian citizens, as well as to foreign citizens who were victims of crimes perpetrated outside Italy. As regards the latter, it is worth noting that the original version of Article 43 did not address the situation of foreign citizens having suffered as victims of crimes committed abroad, and was silent on foreign judgments. The final wording of Article 43(3), instead, clarifies that the shield created around Germany extends to claims based on foreign judgments ordering Germany to provide reparation for the prejudice caused by Third Reich forces between 1939 and 1945. Now, how does Article 43 affect pending enforcement proceedings?

Arguably, Germany, and possibly the Italian State Attorney, will seek to have these proceedings terminated. Those 'creditors' who were victims of crimes perpetrated by the Third Reich on Italian territory, or who are otherwise creditors of Italian nationality who were victims of crimes committed by the Third Reich, for their part, may request that the judges in

[15] For an overview of the main issues raised by art 43 see 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' SIDI Blog (25 May 2022) <www.sidiblog.org/author/giovanni-boggero>.

[16] For instance, the concern about the tight timeframe originally provided by Decree-Law to propose new claims against Germany. On this point see *ex multis* G Boggero (n 15); L Gradoni 'Is the Dispute between Germany and Italy Coming to an End (Despite Being Back at the ICJ)?' EJIL Talk (10 May 2022) <www.ejiltalk.org/is-the-dispute-between-germany-and-italy-over-state-immunities-coming-to-an-end-despite-being-back-at-the-icj>.

charge of such proceedings ask the Italian Constitutional Court to assess whether Article 43 of the Decree-Law complies with right to effective judicial protection enshrined in the Constitution. Foreign victims having obtained foreign judgment for crimes committed abroad could submit a similar request. In actuality the situation of these foreign victims is different from that of the first category of creditors, since, based on Article 43(1), they have not access to the Fund.

4. *The effectiveness of judicial protection: A persistent issue?*

The starting point here is the introduction, in Article 43(3), of an *ad hoc* basis for dismissal of pending enforcement proceedings.

The following issues arise as regards the position of the creditors who were victims of crimes committed by the Third Reich on Italian territory, or who were otherwise Italian citizens harmed by the crimes perpetrated by the Third Reich and who were holders of a final judgment against Germany.

While Article 43(5) stipulates that 'payment' through the Fund extinguishes any claim for compensation, Article 43(3) provides that enforcement proceedings come to an end, by operation of law, upon the entry into force of the Decree-Law. This means that not only may the enforcement proceedings be dismissed, but the substantive rights to compensation also cease to exist, at least in respect of Germany. In fact, if the payment through the Fund were not made – eg, because the resources allocated to the Fund proved insufficient – creditors would be barred from bringing fresh proceedings against Germany, because Article 43(3) also makes it impossible to start new enforcement proceedings. Besides, it is far from certain that the creditors concerned would be entitled to enforce abroad any judgment against Germany they might have obtained in Italy.[17]

[17] See ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (n 2) where it was confirmed that any petition for an *exequatur* on a foreign judgment issued against a third country shall be subject to ascertaining whether – if the judges had been called upon to rule on an identical dispute compared to the one subject to the foreign judgment – they would have had to acknowledge the immunity of the petitioning country (see paras 127-130). On this point see N Boschiero, 'Jurisdictional Immunities of the State and Exequatur of Foreign Judgments: A Private International Law Evaluation

The only domestic remedy the victims would have in that case, at that point, would be to appeal against the (administrative) decisions under which the payment would be denied. The issue of constitutional legitimacy for incompatibility with the principle of judicial protection might be raised from the courts.

Moreover, the issue of constitutionality could perhaps even now be raised by the court in charge of enforcement proceedings on the ground that the judicial protection afforded to those concerned is insufficient.

A similar move, it is contended, would hardly be successful at this stage. Considering the current uncertainty about the way in which Article 43 will be implemented, if courts were to question the constitutionality of this aspect, they would base their question on a 'doubt' that, for now, would be only abstract and hypothetical.

The same issues raised so far could indeed arise if payments through the Fund were only partial. According to Article 43, the purpose of the Fund is to provide 'relief' to victims. The meaning of the term, in this context, is unclear.[18] The question arises as to whether, following a final judgment on damages, the whole amount stated in the judgment should be paid through the Fund, or not. For the time being, there do not seem to be unified elements to answer this question.[19] If a lump sum payment were chosen, and all claims were extinguished, the effectiveness of judicial protection would be at issue again.

In this regard, another issue arises. Article 43(3) makes *all* enforcement proceedings moot, regardless of whether the assets concerned are intended for commercial or non-commercial purposes.

The broad scope of the provision reflects the fact that, before the ICJ, Germany argued not only that property located in Italy should be exempt from measures of constraint, but also that judgments against Germany

of the Recent ICJ Judgment in Germany v. Italy' in N Boschiero, T Scovazzi, C Pitea, C Ragni (eds), *International Courts and the Development of International Law, Esssays in Honour of Tullio Treves* (TMC Asser Press 2013) 781 ff. In addition, Italian judgments could not be enforced in another State because it would be necessary for the judgments to be enforceable in Italy.

[18] See on this point G Berrino, 'Il «ristoro» per i cittadini italiani vittime di crimini di guerra e contro l'umanità commessi dalla Germania durante il secondo conflitto mondiale' (2022) Rivista di Diritto Internazionale (forthcoming).

[19] ibid.

should not be enforced insofar as they were rendered in breach of Germany's immunity from adjudicatory jurisdiction. Thus, while the assets that serve a non-commercial purpose would be shielded in any case, for this is what customary international law requires, doubts might arise in respect of assets intended for commercial use, since nothing in customary law prevents the latter from being the object of measures of constraint. Victims who were unable to obtain a full payment through the Fund might want to seize such assets, but Article 43 would preclude any initiative to that effect, thereby limiting the effectiveness of the judicial protection of their claims beyond what the rules on immunity from measures of constraint require.

This limitation equally affects enforcement proceedings based on judgments obtained by foreign citizens. In addition, however, foreign citizens, unless they claim reparation in respect of crimes committed on Italian territory, do not rank among those entitled to access the Fund. Their right to effective judicial protection is limited in a particularly severe manner.

5. *Article 43 and effective judicial protection: first impressions on the balancing test*

It is not entirely clear, at this stage, how Article 43 of Decree-Law no 36/2022 will ultimately be implemented. The picture will not be complete until the Ministerial Decree contemplated in Article 43 is adopted.

Subject to that *caveat*, one can already assess the extent to which Article 43 provides the victims of war crimes and crimes against humanity committed by Third Reich force in Italy, or those crimes otherwise harming Italian citizens, with effective judicial protection.

The problem, here, is that the Fund will likely provide no more than partial, or lump sum, payments.

Establishing whether lump sum payments guarantee the effectiveness of judicial protection is not easy. Much depends on the concept of effectiveness that one adheres to, namely whether effectiveness should be understood in an absolute manner, i.e., taking as a reference the amount of damages awarded to the victim under the judgment obtained by the latter, or should rather be regarded as implying that the redress must be fair and reasonable.

To begin with, one may wonder whether the fact that the Fund will eventually offer no more than lump sum payments undermines as such the effectiveness of judicial proceedings. In actual fact, not all of the avenues that could lead to a full reparation of the prejudice suffered by victims have been explored. Specifically, nothing seems to suggest that Germany and Italy have started, or may soon be starting, negotiations aimed at providing such reparation.

Thus, as things stand now, one may argue that 'an imperfect solution is preferable to none'.[20] Lump sum payments might then be seen as providing the extent of judicial protection that can be achieved in the circumstances.

But, what if the Italian Constitutional Court were called upon to assess whether Article 43 of the Decree-Law complies with the Constitution?

The Italian Constitutional Court would likely attempt to strike a balance between the competing (constitutional) policies underlying the claims in question. It would seek to safeguard the *res judicata* effect of final judgments, and to ensure respect for international law, as required by Articles 10 and 11 of the Constitution.[21] To some extent, the Constitutional Court would be faced with the same question if it were asked to assess whether the Italian Constitution permits the limiting of the right to judicial protection out of respect for the immunity of States from measures of constraint, as enshrined in customary international law. The picture, however, is different, here, in one remarkable aspect, namely that Article 43 of Decree-Law no 36/2022 does not result, as such, in the 'absolute sacrifice' of the victim's right, since a payment – a partial one, as the case may be – would nonetheless be granted.

[20] In this sense, with regard to a Joint Scheme for reparations between Italy and Germany, see F Fontanelli, 'Sketches for a Reparation Scheme: How Could a German-Italian Fund for the IMIs Work?', in V Volpe, A Peters, S Battini (eds), *Remedies against Immunities?* (n 10) 159, 161.

[21] Art 10 of Italian Constitution establishes: 'The Italian legal system conforms to the generally recognized principles of international law […]'; Art 11 of the Italian Constitution establishes: 'Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world ensuring peace and justice among the Nations. […]'.

A lump sum payment, provided that it is 'reasonable' having regard to the circumstances of the case might thus involve an admissible compression of judicial protection effectiveness.[22]

Based on the partial – as opposed to absolute – sacrifice of the right to judicial protection, and due to the need to protect other fundamental interests, including the interest that Italy complies with general rules of international law, the Constitutional Court would then likely conclude that Article 43 is consistent with the Constitution.

The above reasoning does not really depart from the reasoning that the Italian Constitutional Court itself expounded in Judgment no 238/2014. One decisive factor in the Court's finding, then, was that to uphold immunity from adjudication would entail a 'absolute sacrifice' of the right to judicial protection, and would accordingly be at odds with the Constitution.[23]

The fate of foreign creditors, as explained above, is even more uncertain. They are prevented from enforcing the judgments that they might have obtained abroad, and – at the same time – they cannot benefit from the Fund. The intention of the lawmakers clearly arises from Article 43(1), where, as already underlined, it is stipulated that the Fund is established for prejudice suffered by victims of crimes committed on the Italian territory or which have otherwise harmed Italian citizens, and reference is made to the continuity between the creation of the Fund and

[22] The fact that payments, in order to be considered legitimate, should not necessarily constitute full compensation, but rather be comparable to reasonable and appropriate solutions considering the circumstances of the case, seems to be the trend followed by the ECtHR. See *ex multis D.A. et al c Italie*, App no 6860/2012 (ECtHR, 14 January 2016). See also the Italian Counter-memorial of 22 December 2009 before the ICJ in *Jurisdictional Immunites of the State (Germany v Italy: Greece Intervening)*, where the Italian Defence invoked an argument for 'appropriate' (and effective) reparation to the victims <www.icj-cij.org/public/files/case-related/143/16648.pdf>.

[23] See (n 2), *Conclusions in point of law* para. 3.4. See also P Palchetti, 'Right of Access to (Italian) Courts *über alles*? Legal Implications Beyond Germany's Jurisdictional Immunity' in V Volpe, A Peters, S Battini (eds), *Remedies against Immunities?* (n 10) 39, 50-51, noting that 'Judgment 238/2014 does not clarify whether or to what extent a sacrifice to the right of jurisdictional protection would be justified if alternative, non-judicial means of redress were available to the victims'; 'Judgment 238/2014 gave no indication on whether an alternative means of redress should in any case ensure to each and every individual victim full compensation or whether instead, in light of the specific circumstances of the case – the fact that the crimes occurred in the course of an international armed conflict affecting hundreds of thousands of victims – it could provide only compensation based on a lump-sum [payments]'.

the 1961 Agreement between Germany and Italy, which exclusively dealt with claims by Italian individuals and Italian legal entities.[24]

The clear wording of Article 43 precludes a constitutionally oriented interpretation of the norm. It is ruled out that it may be possible to argue that access to the Fund should be granted to foreign citizens who have obtained a foreign judgment that is recognized and enforceable in Italy, or a foreign judgment whose *exequatur* has been sought within the timeframe provided for in Article 43(6) for new claims against Germany, on the basis of the lack of coordination between Article 43(3), as converted in Law, and Article 43(1) and (2), which were not subject to amendments during the conversion. The only way for foreign citizens, as defined above, to seek to assert their right to judicial protection is for the constitutional legitimacy of Article 43 to be challenged before the Italian Constitutional Court.

The constitutionality of Article 43 could potentially be challenged before the Italian Constitutional Court on two grounds, namely that foreign citizens incur an absolute sacrifice of their right to judicial protection, and that the treatment of their claims deviates from the treatment of the similar claims brought by Italian citizens, or victims of crimes committed on Italian territory.

As regards the latter aspect, the key issue would be whether the fact that the crimes occurred abroad and the fact that the victim is a foreigner provide a sufficient justification for the described difference in treatment.

Should the Constitutional Court wish to address the two challenges at once and provide for a nuanced answer, it could argue that Article 43 contravenes the Constitution to the extent to which it precludes *any* enforcement proceedings against German assets in Italy based on a foreign judgment. The Constitutional Court might suggest that an appropriate distinction, one capable of bringing Article 43 in line with the Constitution, would consist in stipulating that nothing in the Italian legislation should prevent a foreign citizen from seeking to enforce a foreign judgment through measures of constraint directed at German State-owned property in Italy, provided that such measures comply with the international law on jurisdictional immunities, i.e., that only assets intended for commercial purposes are targeted.

[24] See (n 13).

That said, two problems could still arise in this scenario. First, there would be a risk of returning to the original problem that the Italian Government wished to avoid through Article 43, for this would mean that judgments given against Germany in violation of its immunity from adjudicatory jurisdiction would remain enforceable, albeit within the limits described above, and that, possibly, the ICJ could require Italy to pay a very large sum as compensation for damage caused to Germany.

The second problem would arise if the Fund were not to provide for the payment of the entire amount stated in the judgments obtained by Italian citizens victims of crimes or by other victims of crimes on the Italian territory. In this scenario, if these victims were precluded from seeking measure of constraints on property intended for commercial use, their situation would end up being worse, without appropriate justification, than the situation of foreign citizens who were victims of crimes abroad.

In any case, if Article 43 were declared constitutionally illegitimate insofar as it does not provide access to the Fund to those foreign victims of Third Reich's crimes outside the Italian territory, who obtained the *exequatur* of a foreign judgment in Italy, without specifying that the Article is illegitimate insofar as it does not provide for the possibility for such victims to seize German-owned property for commercial purpose, the timeframe for seeking access to the Fund would necessarily need to be reopened for them as well, so that the Italian Government can fulfil the intent that prompted it to adopt Article 43.