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THE ITALIAN FUND FOR THE VICTIMS OF THE THIRD REICH: CRITICAL REFLECTIONS AND A PROPOSAL FOR FUTURE REPARATION INITIATIVES

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Introduction

On 30 April 2022, the Italian Government issued Decree-Law n. 36 on "Additional urgent measures for the implementation of the National Recovery Plan". This miscellaneous document provides, at article 43, for the creation of a Fund for the reparation of the prejudice suffered by the victims of war crimes and crimes against humanity as a result of the violation of fundamental rights of persons, perpetrated on Italian territory or otherwise harming Italian citizens by the Third Reich's Army between 1 September 1939 and 8 May 1945[1]. The establishment of the Fund, approved by the Parliament with the conversion of Decree-Law n. 36 of 30 April 2022 into law[2], is the last episode of a long-lasting saga between Italy and Germany on State immunity and reparations for crimes committed during the second world war. The creation of the Fund as envisaged by the Italian executive and legislative branches, however, fails to solve the dispute between the two States as it leaves open the issue of State immunity from civil jurisdiction, a rule of customary international law which "bars the bringing of proceedings in the courts of the territorial State (the *forum* State) against another State"[3].

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[1] Decree-Law n. 36, 30 April 2022, in "Rivista di diritto internazionale", n. 3, 2022, pp. 947ff., art. 43(1).
[2] Law n. 79, 29 June 2022.
[3] H. Fox, P. Webb, *The Law of State Immunity*, Oxford, OUP, 2013, p. 83.

The initiative taken by the Italian Government and Parliament provides the occasion to reflect on how a State can grant full judicial protection and compensation to victims without breaching the immunity of the foreign State responsible for the violations. The paper will first provide a background of the legal dispute between Italy and Germany. Based on examples of domestic compensation mechanisms, the paper will then set out an alternative path which could have been taken in the design of the Italian Fund, which might be useful for future reparation initiatives in Italy and abroad. The paper approaches the issue from the perspective of public international law.

1. *Background of the dispute between Italy and Germany: from Italian courts to the International Court of Justice… twice*

With the 1947 Peace Treaty with the Allied Powers, Italy agreed to waive all non-contractual claims against Germany and German nationals on its own behalf and on behalf of all Italian nationals[4]. Notwithstanding this provision, in 1961 Italy and Germany concluded a treaty by which Germany agreed to make a lump-sum payment for the benefit of Italian nationals who were subjected to Nazi measures of persecution on grounds of race, faith or ideology[5]. Based on article 3 of the 1961 Treaty, the payment amounted to a final settlement between the two States, albeit with no prejudice to any rights of Italian nationals under German compensation legislation. In 1963, Italy set up a claims commission to distribute the amount received by Germany[6]. The Italian compensation scheme, however, left out the victims of the massacres committed by the armed forces of the Third Reich on Italian

[4] Treaty of Peace with Italy, 10 February 1947, in "United Nations, Treaty Series", vol. 49, p. 3ff., art. 77(4). Nowadays, a trend towards the limitation of States' power to waive individual reparations claims can be detected under the law of State responsibility. On the subject, see: A. Bufalini, *On the Power of a State to Waive Reparation Claims Arising From War Crimes and Crimes against Humanity*, in "ZaöRV", vol. 77, 2017.

[5] Treaty Concerning Compensation for Italian Nationals Subjected to National-Socialist Measures of Persecution, 2 June 1961 (executed in Italy with Law n. 404, 6 February 1963), art. 1.

[6] Presidential Decree n. 2043, 6 October 1963, on rules for the distribution of the sum paid by the Government of the Federal Republic of Germany.

territory, alongside most Italian Military Internees (IMIs)[7]. Likewise, Italian victims did not obtain compensation under German legislation[8]. At the same time, the pursuit of justice through domestic criminal trials in Italy was not successful, as the episode of the *armoire of shame* clearly shows[9].

It is in this context, absent any other available remedy, that the Italian victims of the Third Reich started filing civil actions for damages against Germany before Italian courts. In the leading 2004 *Ferrini* judgment, the Court of Cassation held that the customary rule of State immunity from civil jurisdiction could not be applied with respect to grave breaches of peremptory norms of international law[10]. Since then, Italian courts consistently lifted Germany's immunity from civil jurisdiction in actions for damages related to the crimes committed by the Third Reich in 1943-45[11]. After that measures of constraint were taken against German State-owned property on Lake Como[12], Germany brought an application against Italy before the International Court of

[7] F. FOCARDI, L. KLINKHAMMER, *Quale risarcimento alle vittime del nazionalsocialismo? L'accordo globale italo-tedesco del 1961*, in "Italia Contemporanea", n. 254, 2009.

[8] Under the early legislation (lastly amended with the Final Federal Compensation Act of 14 September 1965), domicile in Germany was a necessary requirement for eligibility. Under the Foundation "Responsibility, Remembrance and Future" (Law of 2 August 2000), which provided compensation to former forced labourers, the IMIs were refused compensation because they formally enjoyed the status of prisoners of war.

[9] For a comprehensive account of the Italian (failed) prosecutions of Nazi criminals, see: P. CAROLI, *Transitional Justice in Italy and the Crimes of Fascism and Nazism*, Abingdon, Routledge, 2022.

[10] Cass. Sez. Un., 11 March 2004, in "Foro it.", vol. 130, 2007, pp. 935ff. On this widely commented judgment, see, *ex plurimis*: P. DE SENA, F. DE VITTOR, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, in "The European Journal of International Law", n. 1, 2005; C. FOCARELLI, *Denying Foreign State Immunity for Commission of International Crimes: The Ferrini Decision*, in "The International and Comparative Law Quarterly", n. 4, 2005; A. GATTINI, *War Crimes and State Immunity in the* Ferrini *Decision,* in "Journal of International Criminal Justice", n. 3, 2005.

[11] On this case law, see, *ex multis*: G. SERRANÒ, *Immunità degli Stati stranieri e crimini internazionali nella recente giurisprudenza della Corte di Cassazione*, in "Rivista di diritto internazionale privato e processuale", n. 3, 2009.

[12] These measures were taken to satisfy a Greek judgment of the First Instance Court of Leivadia condemning Germany to pay damages to the victims of the massacre of Distomo. The *exequatur* was allowed in Italy by: Cass. Sez. Un., 29 May 2008, in "Foro it.", vol. 132, 2009, pp. 1567ff.

Justice (ICJ), claiming that Italy had breached its sovereign immunity from civil jurisdiction and from measures of execution. In the 2012 *Jurisdictional Immunities* judgment, the ICJ famously held that there is no exception under customary international law to jurisdictional immunity for acts of sovereign authority, not even if the conduct of the foreign State amounts to a grave breach of peremptory norms of international law, for which victims have no other means of redress[13].

The Italian Government and Parliament sought to abide to the ICJ's judgment by, *inter alia*, adhering to the UN Convention on Jurisdictional Immunities of States and Their Property (UNCSI)[14], and by allowing to reopen finalized judgments that condemned Germany to pay for damages[15]. In contrast, in 2014 the Italian Constitutional Court found that the rule of State immunity as identified by the ICJ could not enter the Italian legal order because in breach of Articles 2 and 24 of the Constitution, whose combined reading protects the justiciability of fundamental rights[16]. By the same token, the Italian Constitutional Court annulled the law incorporating Article 94 of the UN Charter[17], and the law of adhesion to UNCSI, to the extent that they obliged Italy to comply with the judgment of the ICJ. Since the Constitutional

[13] ICJ, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, 3 February 2012, I.C.J. Report 99 (2012). The judgment generated extensive literature. See, *ex multis*: A. CIAMPI, *The International Court of Justice between "Reason of State" and Demands for Justice by Victims of Serious International Crimes*, in "Rivista di diritto internazionale", n. 2, 2012; B. CONFORTI, *Judgment of the International Court of Justice on the Immunity of Foreign States: a Missed Opportunity,* in "Italian Yearbook of International Law", vol. 21, 2011; M. KRAJEWSKI, C. SINGER, *Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights*, in "Max Planck Yearbook of United Nations Law", vol. 16, 2012.

[14] United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI), 2 December 2004 (not yet into force), ratified with Law n. 5, 14 January 2013.

[15] Law n. 5, 14 January 2013, art. 3.

[16] Constitutional Court, 22 October 2014, in "Foro it.", vol. 138, 2015, pp. 1152ff. The judgment was widely commented. See*, ex multis*: E. CANNIZZARO*, Jurisdictional Immunities and Judicial Protection: the Decision of the Italian Constitutional Court No. 238 of 2014*, in "Rivista di diritto internazionale", n. 1, 2015; 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,* in "Questions of International Law", Zoom-out n. 2, 2014; A. TANZI, *Un difficile dialogo tra Corte Internazionale di Giustizia e Corte Costituzionale*, in "La comunità internazionale", n. 1, 2015.

[17] Law n. 848, 17 August 1957.

judgment, Italian courts have been denying the jurisdictional immunity of Germany and other foreign States in case of serious violations of human rights and/or humanitarian law[18]. The pending authorization for sale by auction of four German properties in Rome, foreseen for May 25, 2022[19], prompted Germany to file a new application against Italy and a request for provisional measures before the ICJ, so as to shield its property in Italy from measures of forced execution[20]. It is precisely to address Germany's concerns over its properties that the Italian Government instituted the Fund for the victims of the Third Reich, just the day after the German application to the ICJ.

2. *The establishment of the Italian Fund and the unresolved issue of Germany's immunity from civil jurisdiction*

Article 43 of Decree-Law n. 36 establishes a mechanism placing exclusively on Italy the financial burden of the reparations to be awarded to the victims of the Third Reich. Besides setting up the Fund, whose concrete modalities of operation had to be determined by the Government through a Decree to be issued at the latest on 27 October 2022 (but not appeared yet, as of February 27, 2023)[21], this provision prescribes that the executive procedures based on Italian titles awarding damages or deriving from foreign judgments condemning Germany to pay compensation for the damage caused by the forces of the Third Reich cannot be brought or pursued, and that pending enforcement proceedings shall be lifted[22]. Satisfied by the protection afforded against future

[18] The Court of Cassation lifted the immunity of Serbia (Cass. Sez. I Pen., 15 September 2015) and of Iran, this latter in an *exequatur* proceeding related to a U.S. judgment (Cass. Sez. I Civ., 10 December 2021, in "Rivista di diritto internazionale privato e processuale", n. 3, 2022, pp. 650ff.).

[19] On Italian case law on Germany's immunity from measures of execution, see: G. BERRINO, *The impact of Article 43 of Decree-Law no 36/2022 on enforcement proceedings regarding German State-owned assets*, in "Questions of International Law", Zoom-in n. 94, 2022.

[20] ICJ, Application Instituting Proceedings and Request for Provisional Measures, *Certain Questions of Jurisdictional Immunity and Enforcement of Judgments (Federal Republic of Germany v. Italian Republic)*, 29 April 2022.

[21] Decree-Law n. 36, 30 April 2022, art. 43(4).

[22] Decree-Law n. 36, 30 April 2022, art. 43(3).

seizures, Germany withdrew its request for provisional measures – but not its application – before the ICJ[23].

While avoiding infringements on Germany's immunity from enforcement, article 43 paves the way to further denials of Germany's immunity from civil jurisdiction[24], because a prerequisite to access the Fund is a final judgment ascertaining the damage suffered by victims[25], instituted either before the entry into force of the Decree-Law, or before the deadline set forth in the Decree-Law as converted into Law (i.e., by October 27, 2022). Therefore, while the onerous step to pay in the place of Germany finally ensures that Italian victims can obtain an effective remedy in terms of compensation, it does not solve the legal dispute between Germany and Italy. In fact, it is not excluded that the litigation before the ICJ will continue having as its main object Germany's immunity from civil jurisdiction. Although the Italian Fund for the victims of the Third Reich was aimed, in part, at satisfying finalized judgments against Germany, or judgments to be rendered in pending proceedings, an alternative procedure could have been established at least in relation to new proceedings.

At this stage, a specification is needed. The lifting of foreign States' immunity in case of serious violations of international law is normally the best solution to grant access to justice to victims who have no other remedy available. It is the hope of the author that other States will follow the commendable trend, initiated by the Italian judiciary and followed also abroad[26], towards further restrictions of the scope of State immunity

[23] ICJ, Order of 10 May 2022 on the Request for the Indication of Provisional Measures in the case concerning *Certain Questions of Jurisdictional Immunity and Enforcement of Judgments (Federal Republic of Germany v. Italian Republic)*.

[24] In this sense, see: L. GRADONI, *Is the Dispute between Germany and Italy over State Immunities Coming to an End (Despite Being Back at the ICJ)?*, in "EJIL: Talk!", 10 May 2022.

[25] Decree-Law n. 36, 30 April 2022, art. 43(2).

[26] See the recent case law of South Korea (Seoul Central District Court, 34th Civil Chamber, 8 January 2021, commented in A. BUFALINI, *Immunità degli Stati dalla giurisdizione e negoziazioni fra Stati: sulla vicenda delle comfort women coreane*, in "Diritti umani e diritto internazionale", n. 3, 2021, pp. 699ff.) and Brazil (Supreme Federal Tribunal, 1 March 2021, commented in A.T. SALIBA, L. LIMA, *The Law of State Immunity before the Brazilian Supreme Court: What is at Stake with the 'Changri-la' Case?*, in "Brazilian Journal of International Law", n. 1, 2021, pp. 53ff.), lifting, respectively, the immunity of Japan and Germany for crimes committed during the second world war. Lately, the domestic courts of Ukraine have denied immunity from jurisdiction to the Russian Federation in actions for

from civil jurisdiction in favour of the justiciability of fundamental human rights. It must be reminded, however, that the denial of jurisdictional immunity is not an end in itself, but serves the purpose of access to justice. The establishment of a compensation fund by the *forum* State makes a compromise solution between access to justice and the immunity of the foreign State possible, as will be shown in the next section.

3. *An alternative path forward to implement a compensation fund*

Our reflection is based on a very simple intuition: to avoid a formal breach of the immunity from civil jurisdiction of a foreign State, this latter should not be a named party in the proceedings. Putting this intuition into practice, if the *forum* State institutes a fund to pay for compensation in the place of the responsible State, it should also set up a special, compulsory procedure to access such a fund, whereby victims would sue directly against the fund, rather than against the foreign State. The next subsection will briefly discuss how such special procedure should look like, taking inspiration from compensation initiatives in Italy and abroad. The following one will explain, beyond the surface of our intuition, why the immunity from jurisdiction of the foreign State would not be breached, based on the concept of "indirect impleading".

3.1 *Establishing a claims commission in charge of reviewing applications to the compensation fund*

States can create a special procedure enabling victims to sue directly against a compensation fund either by establishing an *ad hoc*, non-adversary procedure before ordinary courts, with civil proceedings aimed at seeking a declaration of victims' status; or by setting up an *ad hoc* claims commission. While non-adversary proceedings are often provided within national systems of civil procedure[27], the establishment of an *ad hoc* commission is to be preferred for many reasons, including

damages related to international crimes. See: I. Badanova, *Jurisdictional Immunities v Grave Crimes: Reflections on New Developments from Ukraine*, in "EJIL: Talk!", 8 September 2022.

[27] See e.g., the proceedings with only one party, such as, in Italy, the recourse for a

to bypass the overload of civil courts, which is a serious problem in Italy, and because of the benefits of a central management of the fund, such as the potential to harmonize the standard on awarded damages.

There are many examples of victims-centred mechanisms aimed at providing remedies to victims of human rights violations and/or breaches of international humanitarian law, especially in societies in transition following civil wars or dictatorships[28], but even in "normal" times[29]. Administrative compensation programmes must be distinguished from truth and reconciliation commissions. These latter are quasi-judicial bodies set up in transitional justice contexts with the objective to unveil the truth about past abuses and to reconcile society. Famous examples include the Argentinian CONADEP, instituted after the dictatorship of 1976-1983, and the Truth and Reconciliation Commission of post-apartheid South Africa. Truth and reconciliation commissions, in their quality of quasi-judicial bodies, usually only have the power to recommend reparative measures, but not to order them[30]. In contrast, national reparation programmes work through commissions which issue binding decisions on victims' claims. Reparation commissions are either established as follow-ups to the recommendations of truth commissions[31], or as autonomous mechanisms[32].

declaration of absence after two years of disappearance, disciplined under article 722 of the Code of Civil Procedure.

[28] Transitional justice has, indeed, a strong restorative justice imprint, focused on repairing the harm suffered by victims. See: N. TURGIS, *La justice transitionnelle en droit international,* Bruxelles, Bruylant, 2014, p. 383.

[29] Proximate examples are two administrative reparation programmes realized, respectively, by Italy and Switzerland: the Italian compensation system for persons irreversibly damaged because of transfusions or compulsory vaccinations (Law n. 210, 24 February 1992); and the recent Swiss mechanism for children unjustly separated from their mothers (*Loi fédérale sur les mesures de coercition à des fins d'assistance et les placements extrafamiliaux antérieurs à 1981*, 30 September 2016).

[30] An exception in this regard is the Moroccan Equity and Reconciliation Commission, which was entrusted with the power of ordering individual compensation. See: D. ODIER-CONTRERAS GARDUÑO, *Collective Reparations: Tensions and Dilemmas between Collective Reparations with the Individual Right to Receive Reparations*, Cambridge, CUP, 2018, p. 269.

[31] See e.g., reparation programmes in Chile, Guatemala and Peru. For a comprehensive overview, see: N. ROTH-ARRIAZA, *Reparations in International Law and Practice,* in M.C. BASSIOUNI (ed.), "The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization and Post-Conflict Justice", Antwerp, Intersentia, 2010, vol. 2.

[32] See the example of Argentina, discussed in: A. GUALDE, N. LUTERSTEIN, *The*

The case of Italy is obviously different from the typical situations where truth commissions are established. While truth commissions are set up by the State which is responsible for the wrongdoing, Italy has decided to offer compensation for another State's unlawful conduct[33]. Moreover, the main objective pursued by the Italian victims of the Third Reich is not to discover the truth about past wrongs: the unlawful conduct of Germany during World War II is well documented, and the German State has already admitted responsibility for those same acts at the inter-State level. What really matters in the Italian case is that victims obtain meaningful recognition as such, which can be achieved through individual compensation. Therefore, the most appropriate model for an Italian claims commission for the victims of the Third Reich would have been that of a compensation programme, detached from the work of a truth commission. In contrast, the establishment of a truth commission would be desirable with respect to the crimes committed in former colonies and under the Fascist regime, and might be more appropriate also for other States willing to come to terms with their past.

A thorough analysis of compensation mechanisms falls outside the scope of this paper. It is important, however, to underline the features of a successful claims commission, based on current international standards. First, victims and their representative associations should be part of the compensation mechanism. An early, virtuous example in this respect is the aforementioned claims commission set up by Italy in 1963, which involved the delegates of victims' associations[34].

Argentinean Reparation Programme for Grave Violations of Human Rights Perpetrated during the Last Military Dictatorship, in C.F. Ferstman, M.G. Goetz (eds.), "Reparations for Victims of Genocide, War Crimes and Crimes against Humanity", Leiden/Boston, Brill/Nijhoff, 2020.

[33] A certain degree of co-responsibility from the part of Italy, however, cannot be excluded, especially with reference to the 1938 racial laws. See, in this respect, a recommendation document issued during the Italian chairmanship of the International Holocaust Remembrance Alliance (IHDA), *Riconoscere e combattere la distorsione della Shoah: raccomandazioni per quanti rivestono responsabilità politiche*, 2021, available online at the following address: https://www.miur.gov.it/documents/20182/0/IHRA_Recommendations_HolocaustDistortion_ITALIAN_def.pdf/718e2e82-b07a-6f4f-5dd0-14f9ab1b74cb?version=1.0&t=1625149703273.

[34] The represented associations were: *Associazione nazionale ex deportati politici nei campi nazisti*; *Associazione nazionale ex internati*; *Unione delle Comunità israelitiche italiane* (Presidential Decree n. 2043, 6 October 1963, art. 7(e)).

Second, a claims commission should be able to conduct hearings, so as to give voice to victims and to grant procedural fairness[35]. Third, to avoid re-traumatization[36], the procedure should be carried out in a victim-centred manner, as required under the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation[37]. Forth, to grant full judicial protection to victims, the decisions of the claims commission must be appealable before ordinary courts[38].

3.2 *Why the findings of a claims commission would not breach State immunity from jurisdiction*

At first sight, the establishment of an *ad hoc* procedure to access a compensation fund might seem to cut off altogether the problem of the immunity from jurisdiction of the foreign State, for two reasons. First, because State immunity from *jurisdiction* is often conflated with State immunity from *civil jurisdiction*, and a claims commission is clearly not a civil court. Under the customary international law of State immunity, however, immunity protects a foreign State from the

[35] On the ability to participate in proceedings and express one's own viewpoint as an element of procedural fairness, see: V.G. Flango, *Evolving Judicial Roles*, in D. Weisburd, G. Bruinsma (eds.), "Encyclopedia of Criminology and Criminal Justice", New York, Springer, 2014.

[36] A negative example was the aforementioned early German compensation programme for the victims of the Nazi regime, due to the inquisitorial approach adopted by German administrative authorities. In many cases, victims were even faced with those same Nazi officials who had formerly persecuted them. See: Y. Danieli, *Massive Trauma and the Healing Role of Transitional Justice: an Update*, in C.F. Ferstman, M.G. Goetz (eds.), "Reparations for Victims of Genocide, War Crimes and Crimes against Humanity", cit.; R. Ludi, *Reparations for Nazi Victims in Postwar Europe,* Cambridge, CUP, 2012, p. 117.

[37] *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, General Assembly Resolution n. 60/147, 16 December 2005, principle VI, par. 10.

[38] See, for example, the Italian and Swiss examples of claims commissions mentioned above. In the Italian case, decisions are taken by local health commissions, which can be appealed before administrative courts, and, if unsuccessful, before civil courts. In the Swiss system, decisions on victims' claims are taken directly by the Ministry of Justice, in consultation with a Commission including representatives of victims. Adverse decisions can be challenged before the Ministry, and, if the appeal is unsuccessful, before ordinary courts.

jurisdiction of every domestic organ, "however named, entitled to exercise judicial functions"[39]. By ascertaining victims' status and their right to access the compensation fund, a special claims commission would clearly decide on questions of fact and law, thus exercising judicial functions potentially barred by immunity.

Second, based on our aforementioned intuition, a claims commission could be said not to trigger immunity because the foreign State is not a named party in the proceedings. The issue, however, is not as simple as it might seem. Immunity issues may arise not only when the foreign State is a named defendant in a judicial proceeding, but also when it is "indirectly impleaded", meaning that it is mentioned in a judgment without being a party to the proceeding. According to article 6(2)(b) UNCSI – a codification convention not entered into force yet, but still significant because stemming from the work of the International Law Commission (ILC) and adopted by consensus by the UN General Assembly –, a proceeding before a court of a State shall be considered to have been instituted against another State if that other State "is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State"[40]. Article 6 UNCSI, however, does not clarify the exact meaning of the expression "property, rights, interests or activities".

Typical actions where foreign States are indirectly impleaded are actions *in rem* against State-owned property, such as ships[41]: the named respondent is a ship, but since it is owned or controlled by the foreign State, clearly the proceeding seeks to affect this latter's property. Difficulties arise, instead, as to what the expression "rights, interests or activities" of the foreign State exactly means. A definition of rights and interests, albeit specifically in relation to proceedings about foreign States' property, might be inferred from the ILC's commentary to article 13 UNCSI, which concerns ownership, possession and use of property[42]. According to the ILC, "the combination of 'right or interest' is used as a term to indicate the totality of whatever right or interest a State may

[39] UNCSI, art. 2(1)(a).

[40] UNCSI, art. 6(2)(b).

[41] ILC, *Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries* (1991), A/46/10, commentary to article 6, p. 25, par. 12-13.

[42] H. Fox, P. Webb, *The Law of State Immunity,* cit., p. 307.

have under any legal system"[43]. Therefore, only legal rights or interests are included in the definition, to the exclusion of mere political or moral concerns of the foreign State[44]. This interpretation could be extended, by analogy, to proceedings not strictly related to property.

The case law of domestic courts shows that a State not named as a party in a proceeding might be indirectly impleaded also when a finding on its responsibility is a preliminary issue with respect to the resolution of the case at hand, or arises by implication[45]. Such indirect impleading does not necessarily trigger the immunity from jurisdiction of the State not named in the proceeding, provided that this latter's property, rights, interests and activities are not affected. An instance in this respect is the decision of the Brussels Court of Appeal in the case of *Touax v. Belgium*. The proceeding sought to find the responsibility of the Belgian State for the decision, taken jointly with the other members of NATO, to bomb a bridge during the war in Kosovo. Belgium argued that assessing its responsibility would have led the Court to adjudicate also over the conduct of the other NATO Member States, in breach of their immunity from civil jurisdiction. The Brussels Court of Appeal dismissed the argument, stating that a judgment on the lawfulness of the conduct of the other NATO Member States would not have affected their property, rights, interests or activities[46].

Another judgment indicating that indirect impleading does not violate immunity if it does not seek to affect the property, rights, interests and activities of the foreign State not party to the proceeding is the decision by the British Supreme Court in the *Belhaj v. Straw* case. The applicants had sued the UK for having collaborated with the U.S. and Libya in their extraordinary rendition and torture. According to the

[43] ILC, *Draft articles on Jurisdictional Immunities of States and Their Property*, cit., commentary to article 13, p. 47, par. 4.

[44] H. Fox, P. Webb, *The Law of State Immunity*, cit., p. 307.

[45] N. Angelet, *Immunity and the Exercise of Jurisdiction – Indirect Impleading and* Exequatur, in T. Ruys, N. Angelet, L. Ferro (eds.), "The Cambridge Handbook on Immunities and International Law", Cambridge, CUP, 2019.

[46] Brussels Court of Appeal, 16 May 2013, para. 17, annexed in: N. Angelet, *Les juges belges face aux actes des organisations internationales*, in A. Lagerwall (ed.), "Les juges belges face aux actes adoptés par les États étrangers et les organisations internationales : Quel contrôle au regard du droit international ?", Bruxelles, Bruylant, 2016.

Supreme Court, reviewing the conduct of the UK Government implied a decision on the responsibility of the other two States, but this did not breach their jurisdictional immunity because there was "no second order legal consequences" for them[47].

The "legal consequences" referred to by the UK Supreme Court are, as in *Touax v. Belgium*, the consequences within the domestic, not the international, legal order. Based on this case law, for the purposes of not attracting immunity, the indirect impleading of the foreign State must not infringe this latter's rights and interests in the national legal order of the *forum* State, meaning that it must not have consequences in terms of legal liability and the obligation to repair the harm done by paying compensation. Even admitting that an indirect finding of responsibility by a domestic court could trigger jurisdictional immunity also if it sought to affect the legal interests of the foreign State in the international legal system, this aspect would not be problematic if the foreign State had already admitted responsibility at the inter-State level, as Germany did with respect to the crimes committed by the Third Reich[48].

A special procedure requiring victims to directly file an application to the claims commission associated to the compensation fund would not affect the property of the responsible foreign State, because the decisions of the commission would be executed against the fund. Likewise, there would be no effect on the rights and interests of the foreign State within the domestic legal order, provided that the decisions of the claims commission could not be opposed against the foreign State within the domestic legal system. To this end, the claims commission should frame its decisions not as direct findings of liability against the foreign State, but as assessments of victims' prejudice and damages. Even if victims were to appeal the adverse decisions of the claims commission before ordinary courts, such appeals would be against the *forum* State for the failure to award compensation, and not against the responsible State. Immunity from jurisdiction would thus be respected, while granting full access to justice to victims.

[47] UK Supreme Court, 17 January 2017, para. 29.

[48] ICJ, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, cit., p. 121, par. 52.

Conclusions

A State might decide to institute a trust fund in favour of the victims of violations of human rights and/or humanitarian law committed by another State for several reasons, including: solidarity with victims, based on the restorative justice approach[49]; a moral duty to compensate victims for the *forum* State's own failure to act in their favour at the international level; a degree of co-responsibility; or even a certain subordination towards the responsible State. Whatever the reason, once a State takes the step to pay, it would be well advised to set up also a special procedure for victims to access the compensation fund without suing directly the foreign State. This approach grants full access to justice to victims while allowing respect for immunities under international law and the smooth maintenance of international relations, the latter being usually a central preoccupation for executive branches, including the Italian one.

Riassunto - Muovendo dalla disputa tra Germania e Italia a proposito delle immunità giurisdizionali degli Stati, il contributo mostra come la recente istituzione, da parte dell'Italia, del Fondo di ristoro per le vittime del Terzo Reich non sia sufficiente a risolvere la controversia tra i due Stati. Prendendo spunto da modelli riparativi adottati a livello nazionale da vari Stati, in particolare con riferimento alla giustizia di transizione, il contributo delinea un modello di *trust fund* a favore delle vittime in grado di coniugare il diritto di accesso alla giustizia con il rispetto dell'immunità dalla giurisdizione dello Stato straniero, utile per future iniziative di riparazione in Italia o all'estero. Per evitare violazioni dell'immunità, lo Stato del foro che intenda subentrare allo Stato straniero responsabile ai fini della riparazione dovrebbe creare una commissione dei reclami con competenza esclusiva sulle domande di accesso al fondo di ristoro, in modo tale che il procedimento non sia intentato dalla vittima contro lo Stato straniero, ma direttamente rispetto al fondo di ristoro. Il contributo spiega perché tale procedura non sia contraria all'immunità dello Stato straniero con riferimento al concetto di *indirect impleading* di cui all'articolo 6(2)(b) della Convenzione ONU sulle immunità giurisdizionali degli Stati e dei loro beni. Le decisioni di una commissione dei reclami non farebbero entrare in gioco l'immunità dalla giurisdizione dello Stato straniero a patto che esse non ledano le proprietà, i diritti e gli interessi di quest'ultimo nell'ordinamento interno dello Stato del foro. A tal fine, le decisioni della commissione – eseguibili sul fondo, fatte salve, dunque, le proprietà dello Stato straniero – dovrebbero essere redatte in forma di accertamento dello *status* di vittima, e non di accertamento della responsabilità dello Stato straniero. Per garantire alle vittime pieno accesso alla giustizia è, invece, necessario che le decisioni della commissione dei reclami siano appellabili davanti alle corti ordinarie.

[49] States often provide compensation on this basis. For instance, the European Convention on the Compensation of Victims of Violent Crimes (24 November 1983, European Treaty Series, n. 116), art. 2(2), obliges the States parties to put in place public funds to grant financial compensation to the victims of violent crime in the event the offender is unknown or cannot be prosecuted or punished.