Jurisdictional Immunity of States: The Italian Constitutional Court v. the International Court of Justice?

Brief notes on the Judgment no. 238 of 22 October 2014 of the Italian Constitutional Court

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I. An international controversy with domestic impact (or a domestic issue with international implications?)

On 22 October 2014, the Italian Constitutional Court issued a historical judgment on one of the most controversial issues in international law, i.e. the immunity of foreign states. Indeed, the judgment immediately attracted tremendous attention among scholars and became the subject of both praise and criticism for its boldness and original approach.[1]

The Court declared the unconstitutionality of two legislative provisions[2] concerning the jurisdictional immunity of States, through which Italy had sought to implement the findings of the International Court of Justice (ICJ) in the Germany v. Italy case of 2012.[3]

The case – which deals specifically with the jurisdictional immunity of the German Federal Republic in civil claims brought by Italian victims of grave violations of international humanitarian law committed by the Third Reich during World War II – only impacts directly on the state's civil responsibility (within the reparations proceedings) and related civil jurisdiction of Italian courts. However, its wider implications can be appreciated at the system level, domestically and internationally.

The analysis of the complex aspects of constitutional and international law, regarding the apparent clash between the conclusions reached in 2012 by the ICJ and eventually by the Italian Constitutional Court, is beyond the scope of this brief comment and is an issue that shall be addressed by the competent experts.[4] However, the path followed by the Italian judicial authorities, revolving around the protection of fundamental human rights, appears to also be relevant to the critical debate on immunities in international criminal law. In order to fully appreciate the importance of this judgment, it is worth recalling the backdrop to the dispute that resulted in the case. Our timeline starts exactly ten years ago, with the Ferrini judgment of 2004 by the Italian Supreme Court.

II. Italian civil courts jurisprudence on Germany's responsibility for war crimes (pre-ICJ judgment)

The international law principle of jurisdictional immunity of foreign States and its impact at the domestic level was authoritatively interpreted by the Italian Supreme Court for the first time in 2004, following an inconsistent wave of judgments delivered by the Italian lower courts. In some of these cases, Italian judges ordered Germany to pay reparations to Italian victims of war crimes committed by the Third Reich, while in others the judges declared their lack of jurisdiction.

In the Ferrini case (Judgment no. 5044/2004), the Italian Supreme Court, sitting en banc ("a Sezioni Unite"), found that the jurisdictional immunity of foreign states recognised in international customary law is not an absolute principle and can encounter a limit when the state's conduct is integrating international crimes (as war crimes or crimes against humanity), even when committed by the state, jure imperii (i.e. in the exercise of its sovereignty).[5] According to Ferrini, the protection of fundamental rights is the aim of non-derogable, erga omnes norms, prevailing over any other provision at the international level, even those having customary status. Such norms cannot be subject to any degree of limitation and imply the universality of jurisdiction as a conse-

[1] Constitutional Court, Judgment of 22.10.2014 – no. 238/2014. The official text of the Judgment (in Italian), as well as some of the first comments to it, are available at: http://www.giurcost.org/decisioni/2014/0238s-14.html (10.2.2015). My first note on the Judgment (in Italian) is available on the e-Journal Diritto Penale Contemporaneo, while an unofficial English summary is made available by the e-Journal Questions of International Law, at the link: https://dl.dropboxusercontent.com/u/39082100/Italian%20Constitutional%20Court%20Judgment%20238-2014.pdf (10.2.2015). Numerous comments have been published so far in legal blogs, inter alia by: *Gradoni*; *De Sena* (both available at the blog of the Italian Association of International Law: http://www.sidi-isil.org/sidiblog/?p=1186 [10.2.2015]); *Fontanelli*; *Passaglia*; *Faraguna* (all three available at: http://www.dirittocomparati.it/2014/10/corte-costituzionale-e-corte-internazionale-di-giustizia-il-diritto-alla-penultima-parola-sulla-sent.html [10.2.2015]).

[2] More precisely, the two provisions are: (1) Art. 3 of Law no. 5/2013 (statute implementing the UN Convention on jurisdictional immunity of States, 2.12.2004); and (2) Art. 1 of Law 848/1957 (statute giving execution to the UN Charter, insofar as it required automatic obedience by Italy to the ICJ's 2012 judgment). See infra.

[3] ICJ, Judgment of 3.2.2012 – General List No. 143 (Jurisdictional Immunities of the State [Germany v. Italy, Greece intervening]); hereinafter in general referred to as ICJ Judgment.

[4] For a first debate on the critical issues from a strictly international law perspective, including the ways still open to Italy to comply with the ICJ Judgment and the possible consequences of an Italian inaction, see, inter alia, the entry by *Schilling* and related comments (online available at: http://www.ejiltalk.org/the-dust-has-not-yet-settled-the-italian-constitutional-court-disagrees-with-the-international-court-of-justice-sort-of/ [10.2.2015]) and *Fontanelli* (online available at: http://ilawyerblog.com/italian-constitutional-courts-challenge-implementation-icjs-germany-v-italy-judgment/ [10.2.2015]).

[5] For an in depth comment, see *De Sena/de Vittor*, The European Journal of International Law 2005, 89.

quence. This would also be valid in the civil proceedings originated by the commission of grave international crimes. In order to justify jurisdiction over foreign states in relation to serious human rights violations, the Italian Court made recourse to an extension of the international legal regime provided for international crimes committed by individuals. The Court introduced an analogy between the loss of functional immunity of an official who had committed international crimes, and the exception to the rule of State immunity (given the same rationale behind the two).[6] In sum, the protection of the inviolable rights of the person, being a fundamental principle of the international legal order, makes irrelevant the absence of any express exception to the principle of immunity.[7]

Notably, the Ferrini judgment was followed by a wealth of other decisions in the following years (13 in 2008 alone), whereby the Italian civil courts ordered the German state to pay reparations to victims of the war crimes committed by the Third Reich during World War II on (even only partially) Italian soil.[8] The Italian courts went as far as adopting constraint measures against German state property in Italy (in particular, by ordering the seizure of Villa Vigoni).

III. Germany v. Italy before the International Court of Justice

In the face of this situation, Germany brought the matter before the International Court of Justice (ICJ). The application, filed by Germany in December 2008, requested that the Court deliberate the dispute concerning the respect of Germany's jurisdictional immunity, which originated from the violation of international law obligations allegedly committed by Italy through its judicial practice.

On 3 February 2012, the ICJ by majority (12 to 3 votes) found that Italy had violated its obligation to respect the immunity which Germany enjoys under international law by allowing civil claims to be brought against it, based on violations of international humanitarian law committed by the German Reich in 1943-1945. The Court found that "even on the assumption that the proceedings in the Italian courts involved violations of jus cogens rules, the applicability of customary international law on State immunity was not affected".[9] State practice from other countries demonstrates that a state's entitlement to immunity is not dependent upon the gravity of the act it is accused of, or the peremptory nature of the rule which it is alleged to have violated.[10]

As it is well known, the Court held that Italy lacked any jurisdictional power over Germany and that the Italian tribunals should have declared themselves incompetent in the civil proceedings for tort reparations to Italian victims, even if originated by the commission of war crimes and crimes against humanity as acta jure imperii. However, it is worth noting that the ICJ also wanted to emphasise that its conclusion was addressing only the immunity of the state itself, leaving untouched the question of whether, and to what extent immunity might apply in criminal proceedings against state officials.[11]

In sum, the Court required Italy to implement all necessary legislative and other measures to annul any validity and effect of the previous decisions taken by the Italian courts in violation of the immunity of the German state.

IV. Italian legislative and judicial implementation of the ICJ judgment

The ICJ decision of 2012 – notwithstanding the numerous previous decisions delivered by the Italian tribunals – seemed to mark the end of the controversy regarding the jurisdictional immunity of foreign states, particularly as regards the legal and diplomatic incident between Germany and Italy.[12] The Italian state, indeed, proved to be more than willing to comply with the ICJ findings, both at the legislative and (foremost) judicial level.

As a matter of fact, in 2013 the Italian Supreme Court, sitting again en banc, made a U-turn, finding that the jurisprudence originated by the 2004 Ferrini case "was not recognised by the international community, of which the International Court of Justice is the maximum expression, so that the principle [of the exception to the jurisdictional immunity in case of war crimes, and related responsibilities of the German State] cannot have any further application".[13]

In parallel, the Italian legislator, required by the ICJ to take appropriate measures, issued an ad hoc legislative amendment, which expressly excluded all cases concerned by the ICJ 2012 ruling from the jurisdiction of domestic courts, even if they were already pending. It also introduced a special remedy, in the form of a special ground to appeal, for those cases which had been adjudicated (and thus closed) before the ICJ 2012 judgment. More precisely, Art. 3 of law no. 5/2013[14] provided that, at every stage of the proceedings, the judges, even acting proprio motu, must declare their lack of jurisdiction when the case pending before them is one of those cases over third state's conducts, for which the ICJ has excluded the jurisdiction of the (Italian) civil courts. The law disposed that when the (Italian) judgment, which is in contrast with the ICJ findings – and irrespective of its being subsequent or antecedent the ICJ 2012 judgment – is already final (res judicata), it can be annulled according to a special procedure introduced in the Italian civil procedure code specifically for this type of cases. Thus, by 2013, subsequent to

[6] *De Sena/de Vittor*, The European Journal of International Law 2005, 89 (104).
[7] For some broader reflections on the issue, see *Frulli*, The Italian Yearbook of International Law 19 (2009), 91.
[8] See among others, Italian Supreme Court, Judgment of 29.5.2008 – no. 14202/2008, en banc (Cass. S.U. civ).
[9] ICJ, Judgment of 3.2.2012 – General List No. 143, para. 97.
[10] ICJ, Judgment of 3.2.2012 – General List No. 143, para. 84.
[11] ICJ, Judgment of 3.2.2012 – General List No. 143, para. 91.
[12] See *Bianchi*, ejiltalk of 16.2.2012, available at: http://www.ejiltalk.org/on-certainty/ (10.2.2015).
[13] Italian Supreme Court, Judgment of 21.2.2013 – no. 4284/2013, en banc (Cass. S.U. civ).
[14] Containing the domestic implementation of the 2004 UN Convention on jurisdictional immunity of States and their properties.

these legislative measures, and the Supreme Court's new jurisprudence, the question of the judicial immunity of states, and in particular of the German state before Italian civil tribunals, seemed to be finally settled. The ICJ had clearly reaffirmed the primacy of the principle of the judicial immunity of states over the protection of rights of war crimes victims, and the Italian government showed to be ready to fix the "injustice" done to the German state by means of some Italian judges.

The controversy, however, was far from being settled from the victims' perspective. Notably, it was the same ICJ that recognised in its 2012 judgment that "the Court is not unaware that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned. It considers however that the claims […] which have allegedly not been settled – and which formed the basis for the Italian proceedings – could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue".[15]

V. The question reaches the Constitutional Court

Not surprisingly, it did not take long for doubts to arise again in Italy about the actual application of the immunity principle, as interpreted by the ICJ. But differently from before, this time the controversy took the form of a mere internal question, and, in particular, a question related to the constitutionality of the solution adopted by the Italian state, following the ICJ judgment, to implement the international principle of state immunity within the Italian legal order.

At the beginning of 2014, the Tribunal of Florence, before which several cases related to the responsibility of Germany for war crimes against Italian citizens were still pending, decided to bring the question before the Constitutional Court. There the issue at hand was whether the internal norm that excluded the jurisdiction of the Italian courts in the proceedings on the reparations of victims of war crimes, committed against Italian citizens on (at least partly) Italian soil, was constitutional. In this specific instance, the underlying case was concerning the claim brought by the descendants of an Italian citizen, Luigi Capissi, who was captured on Italian soil by the Wehrmacht the 8 September 1943 and deported to Germany where he was first imprisoned and coerced to forced labour, and eventually killed in a concentration camp in Khala-Thuringia, where he was buried (with other six thousand prisoners) in a mass grave.

By referring the question to the Constitutional Court, the Tribunal of Florence, while appreciating the validity of the ICJ judgment and its binding effects, affirmed that it is necessary: "to seriously doubt that the [principle of] State immunity – and even more so when it comes to European States – can still allow, even if just as an effect of the application of international customs which predate the entry into force of the [Italian] Constitution or of the EU Charter [of fundamental rights], the unconditional exclusion of any jurisdictional protection of fundamental rights which have been violated by jure imperii acts". Between the lines of the ordinance, the dilemma emerged in front of the Florentine judge: on the one hand, the international jus cogens principle of State immunity, as recognised by the ICJ, and, on the other hand, the fundamental rights of individuals affected by domestic laws of dubious constitutionality, ensuring absolute and reciprocal protection to the single states. The question posed by the judge concerned the mechanisms by which the domestic legal order is open to, and influenced by, the international law principles (according to Art. 10, 11, and 117 of the Italian Constitution), and the limits thereto posed by the jurisdictional protection of the fundamental rights as granted by the Italian system.

In sum, the Florentine judge challenged, from the domestic perspective, the asserted absence of a conflict between the jurisdictional immunity of states, as an international customary norm (having a mere procedural nature, according to the ICJ), and the jus cogens nature of the norms (having substantive nature) providing protection to the fundamental individual rights that were the subject of violations (including by the commission of international crimes).

VI. The judgment of the Italian Constitutional Court

The question posed to the Constitutional Court by the Florentine judge regarded the compatibility of the domestic provisions – in compliance with the ICJ 2012 ruling – with the right of access to justice (as enshrined in Art. 24 of Italian Constitution), in connection with the constitutional protection of the inviolable rights of the person (as recognised in Art. 2 of Italian Constitution).

Art. 2 and 24 of the Constitution are considered inseparably interlinked in the review by the Constitutional Court. Although belonging to different fields – the substantial and the procedural – the two provisions share a common ground on the issue of state immunity from civil jurisdiction of other states: "It would indeed be difficult to identify how much is left of a right if it cannot be invoked before a judge in order to obtain effective protection."[16]

More specifically, the court's reasoning can be divided in three points, each of them relating to the distinct legislative provisions brought before the Court by the Tribunal of Florence for their alleged contrast with the Constitution.

1. With specific regard to Art. 3 of Law no. 5/2013, as recalled by the Constitutional Court in the decision at stake, this article was clearly adopted (shortly after the ICJ Judgment of 2012) by the Italian parliament in order to ensure explicit and immediate respect (of the ICJ Judgment) and to "avoid unfortunate situations such as those created by the dispute before the Court of The Hague".[17] Nevertheless, as upheld by the Constitutional Court, declaring the unconstitutionality of such provision: "the duty of the Italian judge –

[15] ICJ, Judgment of 3.2.2012 – General List No. 143, para. 104.

[16] Italian Constitutional Court, Judgment of 22.10.2014 – No. 238/2014 (Constitutional Court Judgment), para. 3.4; an unofficial translation in English by *Gracis* is available at: http://italyspractice.info/judgment-238-2014 (10.2.2015).

[17] Italian Constitutional Court, Judgment of 22.10.2014 – No. 238/2014, para. 5.1.

established in the questioned Art. 3 – to comply with the ruling of the ICJ of 3 February 2012 (which requires that Italian courts deny their jurisdiction in the examination of the action for damages for crimes against humanity, committed jure imperii by a foreign State in Italian territory, without any other form of judicial redress for the fundamental rights violated) contrasts […] with the fundamental principle of judicial protection of fundamental rights guaranteed by Art. 2 and 24 of the Constitution."[18]

Moreover, the Court found that "the absolute sacrifice of the right of judicial protection of fundamental rights – one of the supreme principles of the Italian legal order, enshrined in the combination of Art. 2 and 24 of the republican Constitution – resulting from the immunity from Italian jurisdiction granted to the foreign State, cannot be justified and accepted insofar as immunity protects the unlawful exercise of governmental powers of the foreign State, as in the case of acts considered war crimes and crimes against humanity, in breach of inviolable rights of the person".[19]

2. As to the second provision questioned, Art. 1 of Law no. 848/1957, giving execution to the UN Charter, the Court declared its limited unconstitutionality with respect to the execution given to Art. 94 of the Charter, according to which, each member of the UN undertakes to comply with the decision of the ICJ in any case to which it is a party. The provision was found unconstitutional only to the extent in which it obliges Italian courts to comply with the 2012 ICJ Judgment and to refuse the exercise of jurisdiction in relation to acts of a foreign state that constitute war crimes and crimes against humanity, detrimentally affecting the inviolable rights of the person.

In the view of the Constitutional Court, the conflict between the domestic law of adaptation to the UN Charter and the Constitution arises exclusively and specifically with regard to the 2012 Judgment of the ICJ that interpreted the general international law principle of jurisdictional immunity of states to include acts considered jure imperii and amounting to war crimes and crimes against humanity, in serious breach of the inviolable rights of the person.

Since the judicial protection of fundamental rights is one of the "supreme principles of the constitutional order", according to the reasoning, the questioned provision cannot be opposed to this principle, insofar as it binds the Italian State, and thus Italian courts, to comply with the Judgment of the ICJ of 3 February 2012, which obliges Italian courts to deny their jurisdiction in the examination of damages suits in cases involving the commission of war crimes and crimes against humanity, in blatant breach of the right to judicial protection of fundamental rights.[20] Clearly, in any other case, the Italian State's international law obligations under the UN Charter, including the duty to comply with the judgments of the ICJ, remains unchanged.[21]

3. One of the most interesting parts of the judgment (that we can just flag here) is the line of argumentation followed by the Constitutional Court on the issue regarding the (non-) reception, within the Italian legal order, of the international law norm on the immunity of states from civil jurisdiction in reparation proceedings for war crimes and crimes against humanity. In this regard, the Court found that there was no need to decide on the question brought by the Florentine judge, whether the domestic norm, resulting by the reception of the customary international law principle granting immunity from foreign states' jurisdiction (including for war crimes and crimes against humanity), was in contrast with Italian constitutional law (and in particular Art. 2 and 24 of the Italian Constitution). Notably, the Court found that such a rule – despite its unquestionable existence in general international law and ICJ jurisprudence – could not be considered as having been incorporated by the Italian law. In fact, its conflict with fundamental principles of the Italian legal order rendered any domestic reception through Art. 10 para. 1 of the Italian Constitution – otherwise designed to automatically transpose customary international law into Italian law – inapplicable.

"Consequently, insofar as the law of immunity from jurisdiction of States conflicts with the aforementioned fundamental principles [i.e. the right of access to justice (Art. 24 of Italian Constitution) in connection with the constitutional protection of the inviolable rights of the person (Art. 2 of Italian Constitution)], it has not entered the Italian legal order and, therefore, does not have any effect therein".[22] Remarkably, this reasoning is not new for the Italian Constitutional Court: in the late '70's, the Court introduced the idea of an inherent limit to the direct incorporation of customary international law by the domestic legal order, when the international rules are in contrast with the fundamental principles of the Italian legal order.[23]

VII. An opportunity to rethink the significance of state immunity

As to the consequences of the Constitutional Court Judgment, the finding of unconstitutionality of the above-mentioned provisions imports the contextual affirmation of the jurisdiction of the remittent judge in the civil cases initiated by the Italian victims of the grave violations committed by the German Reich during World War II. It is now up to the competent judge to decide on the merits of the cases and to adjudi-

[18] Italian Constitutional Court, Judgment of 22.10.2014 – No. 238/2014, para. 5.1.

[19] Italian Constitutional Court, Judgment of 22.10.2014 – No. 238/2014, para. 5.1.

[20] Italian Constitutional Court, Judgment of 22.10.2014 – No. 238/2014, para. 4.1.

[21] Italian Constitutional Court, Judgment of 22.10.2014 – No. 238/2014, para. 4.1.

[22] Italian Constitutional Court, Judgment of 22.10.2014 – No. 238/2014, para. 3.4.

[23] Reference is made to the Italian Constitutional Court, Judgment of 18.6.1979 – No. 48/1979. More recently see Italian Constitutional Court, Judgment of 22.3.2001 – No. 73/2001. Therefore, since the international customary law principles in question have not entered the Italian legal order, they fall outside the scope of constitutional review.

cate the Italian victims' claims for reparations. In any case, it is not difficult to imagine that this bold judgment will not be the final chapter of the controversy over state immunity, an issue with obvious political implications that is expected to trigger strong reactions at the political level. Although not satisfactory under several aspects, at the same time the importance of the Constitutional Court Judgment shall not be underestimated. In particular, its effects can be appreciated in terms of the relationship between the protection of the fundamental rights of the person and the reciprocal protection of states' sovereign functions – an issue also addressed by the European Court of Human Rights (ECHR) in its recent judgment in Jones v. United Kingdom, which was the subject of critical appraisal for sacrificing the rights of victims of torture in favour of the state jurisdictional immunity.[24]

Beside the undeniable, though highly questionable, effects of the Constitutional Court findings,[25] it is worth noting, from an international criminal law perspective, the reaffirmation by the Italian judge of the centrality of the protection of human rights for a constitutional democratic system, and the reassertion of the rationale underpinning the principle of states' immunity.

In this sense, the Court found that the immunity from jurisdiction, granted to the foreign state, protects the sovereign function (of states) but does not protect behaviours that do not represent the regular exercise of governmental powers – namely, acts that are explicitly considered as unlawful, for breaching inviolable rights, and may amount to international crimes. The denial of judicial protection of fundamental rights of the victims of the crimes at issue (now dating back in time) determines the "completely disproportionate sacrifice of two supreme principles of the Constitution."[26] They are indeed sacrificed in order to pursue the objective of avoiding interference with the exercise of the governmental powers of the state even when, as in the present case, state actions can be considered war crimes and crimes against humanity, in breach of inviolable human rights, and as such are excluded from the lawful exercise of governmental powers.[27]

As a matter of fact, these fundamental rights are deprived of an effective remedy by granting the state immunity, as acknowledged by the ICJ.[28] Incidentally, while the ICJ expressed hope for the re-opening of negotiations at the diplomatic level, almost three years after its judgment, no steps have been undertaken in this regard by either the German or Italian governments.

In this perspective, the judgment of the Italian Constitutional Court appears to be a demanding exercise of legal acrobatics, aimed at ensuring proper jurisdictional protection to the victims of grave human rights violations and crimes – a task at which the international judge, the domestic legislator and the politics of the involved states have failed so far.

[24] See *Frulli*, ejiltalk of 21.1.2014, available at: http://www.ejiltalk.org/jones-v-uk-on-analogies-and-inconsistencies-in-the-application-of-immunity-rules/ (10.2.2015), and *Meloni*, Diritto Penale Contemporaneo of 28.1.2014, available at: http://www.penalecontemporaneo.it/ (10.2.2015).

[25] See *Gradoni*, SIDI blog of 27.10.2014, available at: http://www.sidi-isil.org/sidiblog/?p=1101 (10.2.2015).

[26] Italian Constitutional Court, Judgment of 22.10.2014 – No. 238, para. 3.4, 5.1.

[27] Italian Constitutional Court, Judgment of 22.10.2014 – No. 238, para. 3.4, 5.1.

[28] ICJ, Judgment of 3.2.2012 – General List No. 143, para. 104.