

EDITORIAL

FROM DEFERENCE TO DISOBEDIENCE: THE UNCERTAIN FATE OF CONSTITUTIONAL COURT DECISION NO. 238/2014

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This Volume of the Italian Yearbook opens with a focus on the decision of the Italian Constitutional Court No. 238 of 22 October 2014, which declared unconstitutional the provisions of Italian law implementing the judgment rendered by the International Court of Justice (ICJ) in *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*.¹ In the same judgment, the Court also declared unconstitutional the section of Italian Law No. 848 of 17 August 1957 which implements Article 94 of the UN Charter and the unqualified obligation it places on Italy to comply with judgments of the ICJ. The contributions that follow are intended to provide readers of the IYIL with a variety of views and perspectives on this judgment. They range from an enthusiastic embracing of the decision to a cautious evaluation of its merits in terms of balancing the need for respect of international law (and immunity) with the right of access to justice for victims of gross human rights violations. The focus also includes sharp criticism of the judgment and also a view from “the other side”, i.e. Germany, with incisive overview of the diplomatic background of the dispute and comparative analysis of constitutional attitudes toward immunity.

In introducing these comments I would like to recall that this judgment, like all judgments, should be read “in context”, beyond the specific object of the dispute and the specific claims of the parties. And indeed in this case the context is particularly important and still holds some surprises. First, the decision of the Constitutional Court is the foreseeable consequence of the ICJ judgment in which Italy had been found responsible for breach of international law for having allowed access to its own courts to victims of atrocities committed by German armed forces in Italy in the final stages of World War II. The surprise here is in realizing that two members of the European Union had to bring such a sensitive question as the reparation to victims of now remote Nazi crimes before the ICJ instead of resolving it within the walls of their common European “home” in the spirit of the commitment to the rule of law, shared values and respect for human dignity. Second, even more surprising is the fact that after seventy years since the commission of the crimes no reparation has been provided to a whole class of victims (or their heirs) simply because they did not fit into any of the formal categories of victims who have

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¹ Judgment of 3 February 2012, ICJ Reports, 2012, p. 99 ff..

otherwise benefitted from reparation schemes. What justification may the Italian Government and the Italian Parliament invoke for failing to take up this case, and how can Germany justify its obstinate opposition to closing the legal “black hole” in relation to these victims in spite of the full acceptance of the historical responsibility for the crimes? Third, claims of victims of war crimes and crimes against humanity committed by German armed forces in Italy have not come out of the blue. Since the famous 2004 decision of the Italian Court of Cassation in the *Ferrini* case² Italian courts have taken a firm position on the point that in case of crimes of war and crimes against humanity, constituting breaches of *jus cogens*, access to justice and remedial action for the victims were to take precedence over the rule of jurisdictional immunity of the respondent State due to the peremptory character of the human rights involved.

During the ten years that have passed since the inception of this jurisprudence no diplomatic or legislative action has been undertaken in order to defuse this potentially explosive issue. And yet in other situations and at other times the possibility of the exercise of jurisdiction by national courts over similar claims has worked as a catalyst for doing justice by the adoption of reparation schemes at the diplomatic level. Suffice it to recall the sequel to *Princz v. Federal Republic of Germany*³ and the string of lawsuits brought in the United States against German firms implicated in forced labour practices in the Third Reich which led to Germany establishing (with the contribution of private firms) the “Remembrance, Responsibility and Future” foundation to provide compensation to victims of forced labour. In contrast nothing similar has happened in Italian-German relations since the critical 2004 *Ferrini* judgment. The road taken, unfortunately, was that of allowing the judicial bombshell to explode with the result of the inter-State litigation before the ICJ; a zero-sum game that has led us to this point.

The context in which this case must be evaluated becomes even more complex, and even contradictory, when we note that on 25 November 2014 the Italian Government deposited its declaration of acceptance of the compulsory jurisdiction of the ICJ, thus confirming its full faith and trust in the role of the ICJ as arbiter of the interpretation and implementation of international law. This is a commendable act confirming Italy’s commitment to international law, but it is in stark contrast with the judgment of the Constitutional Court which, only one month earlier had contested, in substance if not in form, the ICJ’s findings on the customary law of State immunity and declared its execution in the Italian legal order unconstitutional. I am afraid that it is not helpful to Italy’s role in international relations when its constitutional organs speak with such discordant voices in the public arena.

² *Ferrini v. Federal Republic of Germany*, 11 May 2004, No. 5044.

³ 26 F.3d 1166 (D.C.Cir. 1994).

If we move from the context to the text, the judgment of the Constitutional Court presents some positive aspects as well as weaknesses. I will briefly discuss them in order to introduce the contributions that follow.

First of all, one must commend the bold and honest engagement shown by the Court in confronting the problem of the incompatibility of customary international law on State immunity and constitutional principles protecting the fundamental human rights of the individual and the right of access to justice. In the past, the Italian Constitutional Court had preferred to choose the more comfortable route of the “inadmissibility” of the constitutional review of customary norms of international law introduced into the internal legal order by virtue of Article 10(1) of the Italian Constitution.⁴ This approach had led the Court to base the admissibility test on the questionable distinction between customary norms predating the Constitution, which would not be subject to constitutional review, and customary norms which crystalized subsequent to the adoption of the Constitution, which could be reviewed.⁵ This distinction, based on the implicit presumption that the Italian constituents had recognized existing customary international law as part of the law of the land at the critical time of the enactment of the Constitution, entailed the irrational result that “old” international norms would have a privileged position compared to the “new” norms reflecting the living dynamic evolution of international law and the contemporary necessities of the international society. It is a merit of this judgment to have abandoned this obsolete distinction.

From a more general point of view, this judgment is quite remarkable for the message it conveys on the inherent limits of international law and of the jurisdiction of the ICJ. Beyond the professed deference toward the ICJ as the ultimate interpreter of international law, the judgment insists on a critical point, namely that the application of international law as found and interpreted by the ICJ cannot be pushed to the point of breaching the fundamental principles of the constitutional order, which represent a legal red line (especially when these principles concern the inalienable rights of the human person). In doing so the Constitutional Court unveils a reality that is fraught with ambiguities and contradictions, both in legal scholarship and the practice of contemporary international law. On the one hand, international law is still seen as a system anchored in the Westphalian paradigm of a law functionally destined to guarantee the international “order” and the co-existence and coordination of a plurality of spheres of State sovereignty, to which the norms on sovereign immunity are eminently functional. On the other hand, international law also wants to be responsive to exigencies of “justice” and of cooperation, solidarity and fairness in view of the fulfilment of general interests of

⁴ Approved by the Constituent Assembly on 22 December 1947 and promulgated on 1 January 1948.

⁵ Constitutional Court, *Russel v. Srl Immobiliare Soblim*, 18 June 1979, No. 48.

humanity⁶ (such as respect for human dignity, the maintenance of peace, the protection of the environment and the safeguarding of the variety of cultures). This second conception of international law, more “cosmopolitan” and consistent with the interdependence and globalization of today’s international society, is supported by the emergence of new conceptual categories such as obligations *erga omnes*, the international responsibility of individuals for international crimes, and the peremptory norms of *jus cogens* which presuppose the capacity of the international community as a whole to protect certain aspects of the international public good and not only the rights and interests of States on the basis of reciprocity. The judgment of the Constitutional Court, even though in a somewhat indirect manner, embraces this second conception of international law insofar as it recognizes that respect for the inalienable rights of the human person is the non-derogable condition for the maintenance of an international legal order based on peace and justice (see paragraph 3.4 of the judgment).

Another positive aspect of this judgment lies in its clearing the ground of the formalistic and unconvincing distinction made by the ICJ (and unfortunately also the Strasbourg Court)⁷ between “procedural” and “substantive” matters in order to justify its refusal to consider the possible conflict between the rule on jurisdictional immunities with peremptory norms of international law. The Constitutional Court has rejected this argument and has held that the characterization of the rule of immunity as “procedural” does not preclude the consideration of its impact on norms of international law concerning the protection of fundamental rights and the necessary balancing of the competing individual and State interests involved. This is the correct approach, which is consistent also with the practice followed in all cases involving questions of sovereign immunities and limits thereto. Even in the most common cases of limits deriving from the alleged character *jure gestionis* of the act of the State, courts must engage in a preliminary or incidental evaluation of the substantive relations underlying the dispute in order to decide whether immunity is to be granted or not.

Besides these positive aspects, the judgment under review also presents some weaknesses and contradictions. Besides the surprising declaration of unconstitutionality of the Italian statute implementing the UN Charter, which incidentally is unnecessary because Article 94 of the Charter does not mandate any specific binding form of compliance with ICJ judgments let alone forestalling judicial remedies, the most glaring contradiction in my view is in the professed deference to the ICJ which the judgment recognizes as an especially “well qualified” authority for the finding and interpretation of international law, and its practical refusal to give effect to the ICJ judgment in Italy. This result is justified by a dialectical ar-

⁶ On this see the recent course by GAJA, “The Protection of General Interests in the International Community”, RCADI, 2014, Vol. 364, p. 9 ff.

⁷ European Court of Human Rights, *Jones and others v. United Kingdom*, Applications Nos. 34356/06 and 40528/06, Judgment of 14 January 2014.

tifice that allows the Court to conclude that the international custom on sovereign immunity, as constructed by the ICJ so as to cover international crimes even in the absence of alternative remedies to the victims, has never “entered” the Italian legal order because of the filter operated by Articles 2 and 24 of the Constitution. This approach is consistent with the traditional “dualist” approach based on a rigid separation between international law and domestic law. However, leaving aside the risk that the convoluted reasoning of the Court may be hardly comprehensible to outside observers who are not familiar with the sophisticated formalism of Italian legal scholarship, this methodological approach deprives the Constitutional Court of the opportunity to give its critical contribution to the dynamic evolution of customary international law on State immunity. A better approach would have been to confront the conservative reconstruction given to the customary law of immunity by the ICJ head-on and bring to the level of international law the balancing between the need to respect immunity and the obligation to ensure respect for human rights that the Court has performed at the level of constitutional law. This would have enabled the Court to advance the thesis that in an area of customary international law in constant flux, such as the area of jurisdictional immunities, the benefit of the doubt in cases involving grave breaches of human rights committed in the forum State should not be given automatically to the rule of immunity but to the fundamental principle of State sovereignty in the administration of justice in its territorial sphere. This approach would have contributed to the progressive “reform” of customary international law on immunity at a time when the evolution of international practice is already in the sense of a progressive restriction of the scope of the rule. Not only is the rule now subject to the universally recognized exception of the acts *jure gestionis*, but other exceptions are progressively emerging in matters of labour relations, terrorism, liability for torts committed in the forum, not to mention the abrogation of immunity of State officials prosecuted before international court or tribunals for international crimes. To have deferentially accepted the ruling of the ICJ has considerably diminished the value of this decision of the Constitutional Court as a precedent capable of contributing to the progressive development in international practice of an exclusionary rule of jurisdictional immunity in case of international crimes for which the victim has no viable alternative remedies.

The second point of weakness of the judgment lies in the lack of elaboration on the relevance of the “territorial nexus” that the crimes lamented by the victims had with the forum. Deportation, slavery and massacres of civilians had all occurred or originated in Italy. One would have expected a more in-depth analysis of the “territorial tort exception” by the Court. Such analysis was provided by judge *ad hoc* Gaja in his dissenting opinion in *Jurisdictional Immunities of the State*. The exception to immunity for extra-contractual wrongful acts committed in the territory of the forum State is now widely accepted in case law and in national legislation and practice. It is recognized by Article 12 of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property and has been applied to sov-

oreign acts of a criminal nature in the leading case of *Letelier v. Republic of Chile*,⁸ which, significantly later led to the agreement between Chile and the United States to set up a mixed commission for the determination of compensation for victims. This exception would have been all the more relevant in the context of the robust defence of constitutional values undertaken by the Court. Indeed, there is no doubt that the value of human dignity, like the value of the right to judicial protection for victims of egregious violations of human rights, is ensured first and foremost if it is guaranteed within the sphere of the territorial jurisdiction of the forum State.

⁸ 488 F. Supp. 665 and 748 F. 2d 790.