*Implementation of ICJ decisions—sovereign immunity—international crimes—victims' right to judicial protection—fundamental principles of national constitutions—customary international law*

SIMONCIONI v. GERMANY. Judgment No. 238/2014, Gazzetta Ufficiale (spec. ser.), No. 45, Oct. 29, 2014.

Corte costituzionale della Repubblica Italiana, October 22, 2014.

With Judgment No. 238/2014,[1] the Italian Constitutional Court (hereinafter Court) quashed the Italian legislation setting out the obligation to comply with the sections of the 2012 decision of the International Court of Justice (ICJ) in *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)* (*Jurisdictional Immunities* or *Germany v. Italy*)[2] that uphold the rule of sovereign immunity with respect to compensation claims in Italian courts based on grave breaches of human rights, including—in the first place—the commission of war crimes and crimes against humanity. The Court found the legislation to be incompatible with Articles 2 and 24 of the Italian Constitution, which secure the protection of inviolable human rights and the right of access to justice (operative paras. 1, 2).

The Court also held that the customary rule of state immunity for acts *jure imperii*, to the extent that it was interpreted by the ICJ as covering the commission of international crimes and comparable egregious violations of human rights, had never been incorporated into the Italian legal system. Given the absence of such a rule in the Italian legal order, a declaration of unconstitutionality was unnecessary and, accordingly, the Court stated that this specific constitutional challenge was formally ill-founded (para. 3.5 & operative para. 3).

The Court's decision paves the way for the resumption in Italian courts of compensation proceedings brought against Germany by a multitude of surviving victims (or their heirs) of humanitarian law violations perpetrated by the Nazi regime during World War II (WWII). More generally, the decision may spur any civil action in Italian courts against foreign states accused of grave breaches of human rights, at least whenever such breaches cannot be made good by alternative remedies. The courts will be unable to comply with the ICJ *Jurisdictional Immunities* judgment and be bound, instead, to deny state immunity in such circumstances. Therefore, the settlement of the international dispute between Germany and Italy seems distant, and further interventions by the ICJ or other international bodies may be expected, especially in the aftermath of the Italian government's acceptance of the ICJ's compulsory jurisdiction.[3]

[1] Simoncioni v. Repubblica Federale di Germania, Corte cost., 22 ottobre 2014, n. 238, Gazzetta Ufficiale [G.U.] (ser. spec.) n. 45, 29 ottobre 2014, I, 1 [hereinafter Judgment], *available at* http://www.gazzettaufficiale.it, *translated at* http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf. For an early account of the case, see INT'L L. DOMESTIC CTS. [ILDC] 2237 (reported by Alessandro Chechi). Citations to the judgment below refer to the paragraphs in its section on legal considerations, *Considerato in diritto*. Translations from the Italian are by the author.

[2] Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), 2012 ICJ REP. 99 (Feb. 3) [hereinafter Germany v. Italy] (reported by Alexander Orakhelashvili at 106 AJIL 609 (2012)).

[3] The declaration under Article 36(2) of the ICJ Statute was deposited by the Italian government on November 25, 2014. *See* Declarations Recognizing the Jurisdiction of the Court as Compulsory, *at* http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3.

The case had been referred to the Court by the Tribunal of Florence by means of three identical orders dated January 21, 2014.[4] The underlying proceedings involved compensation claims advanced by certain WWII victims (or their heirs) of deportation for slave labor at the hands of the Nazis. A few days after the claimants filed their applications with the tribunal, the ICJ delivered its judgment in the *Jurisdictional Immunities* case, finding—by a majority of 12-3—that Italy had violated Germany's right to immunity by allowing compensation claims to be brought against it for violations of humanitarian law during the war.[5] By way of reparation, the ICJ ordered Italy to ensure, "by enacting appropriate legislation, or by resorting to other methods of its choosing," that the judicial decisions breaching Germany's jurisdictional immunities "cease to have effect."[6]

Shortly thereafter, various Italian courts complied *proprio motu* with the ICJ's determinations by dismissing the pending WWII cases against Germany, while refusing to refer questions of constitutional legality to the Court.[7] Moreover, in January 2013, the Italian parliament approved Law No. 5/2013, which, in addition to authorizing accession to the United Nations Convention on Jurisdictional Immunities of States and Their Property, envisaged specific norms (in Article 3) aimed at securing compliance with ICJ judgments that had found Italy deprived of jurisdiction over particular acts of foreign states.[8] Although broadly drafted, the immediate rationale of Law No. 5/2013 was the need for a stable and predictable solution to the "crisis" generated by the litigation against Germany and the unfavorable ICJ judgment.

In view of these developments, Germany appeared in the cases pending before the Florence Tribunal asking it to comply with the ICJ's judgment by declaring its lack of jurisdiction. The Italian executive intervened, through its Office of State Attorneys (Avvocatura generale dello Stato), in support of Germany's position. The tribunal, however, was persuaded that serious issues of constitutional legality involving the customary norm affording sovereign immunity for international crimes and the legislation on the implementation of ICJ decisions were at stake, and accordingly referred the questions of constitutionality to the Court.[9]

[4] Simoncioni v. Repubblica Federale di Germania, Trib. Firenze, 21 gennaio 2014, G.U. (ser. speciale) n. 23, 28 maggio 2014, I, 82; Alessi v. Repubblica Federale di Germania, Trib. Firenze, 21 gennaio 2014, *id.* at 91; Bergamini v. Repubblica Federale di Germania, Trib. Firenze, 21 gennaio 2014, *id.*, n. 29, 9 luglio 2014, I, 43.

[5] Germany v. Italy, *supra* note 2, operative para. 139(1). By a majority of 14-1, the ICJ also found that Italy had violated Germany's right to immunity from enforcement by taking measures of constraint against German property used for governmental purposes, *id.*, operative para. 139(2), as well as Germany's right to jurisdictional immunity by declaring enforceable in Italy the decisions of the Greek courts that had awarded damages and costs against Germany in the proceedings involving the WWII Distomo massacre, *id.*, operative para. 139(3). The relevant Greek case is *Prefecture of Voiotia v. Germany*, Case No. 137/1997 (Livadeia Ct. 1st Instance Oct. 30, 1997) (reported by Ilias Bantekas at 92 AJIL 765 (1998)), *on appeal*, Case No. 11/2000 (Sup. Ct. May 4, 2000), ILDC 287 (reported by Maria Gavouneli & Ilias Bantekas at 95 AJIL 198 (2001)).

[6] Germany v. Italy, *supra* note 2, operative para. 139(4).

[7] Repubblica Federale di Germania v. De Guglielmi, App. Torino, 14 maggio 2012, n. 941, ILDC 1905; Criminal Proceedings Against Albers, Cass., sez. I pen., 9 agosto 2012, n. 32139, ILDC 1921 (reported by Filippo Fontanelli at 107 AJIL 632 (2013)); Frascà v. Repubblica Federale di Germania, Cass., sez. un. civ., 21 febbraio 2013, n. 4284, ILDC 1998; Ferrini (Oriella) v. Repubblica Federale di Germania, Cass., sez. un. civ., 18 aprile 2013, n. 9412. The Tribunal of Florence itself had been particularly active in dismissing applications filed against Germany in the aftermath of *Germany v. Italy*. *See*, *e.g.*, Manfredi v. Repubblica Federale di Germania, Trib. Firenze, 28 marzo 2012, 95 RIVISTA DI DIRITTO INTERNAZIONALE [RDI] 583 (2012).

[8] Legge 14 gennaio 2013, n. 5, Art. 3 (authorizing accession to United Nations Convention on Jurisdictional Immunities of States and Their Property, GA Res. 59/38, annex (Dec. 2, 2004) (not yet in force)).

[9] On the same date as the Florence Tribunal published its orders referring the cases here in question to the Constitutional Court, the Italian Court of Cassation handed down two decisions, which, by unconditionally complying

Preliminarily, the Court made clear that, in accordance with the Florence Tribunal's reasoning, its review was confined to the issues of constitutional legality concerning immunity from suit *stricto sensu*, and therefore did not extend to the rules on immunity from execution (para. 1). It then affirmed its implied authority to scrutinize customary norms incorporated into the Italian legal order,[10] and held that, despite some uncertainty arising from one of its precedents,[11] "no logical and systematic reasons" existed for excluding customary rules *predating* the 1948 Italian Constitution, such as that relating to foreign state immunity, from its jurisdiction (para. 2.1). Whether or not those rules predated or postdated the Constitution, their legality depended on their compatibility with "the elements that make up the identity of the constitutional order, namely, its fundamental principles and inviolable human rights" (*id.*).

By contrast, the Court rejected *in limine* its competence to review the ICJ's interpretation—in *Germany v. Italy*—of the norms of international law on sovereign immunity. According to the Court, international law norms must be applied domestically "on the basis of the principle of consistent interpretation, that is, by respecting how they are interpreted in the international legal order" (para. 3.1). Moreover, it observed, "at the level of international law, the ICJ's interpretation of the customary norm on state immunity for acts iure imperii is especially authoritative [*particolarmente qualificata*] and not subject to review by any domestic courts and/or administrative authorities" (*id.*). As a result, the Court's task was confined to examining cases involving those "conflicts between international rules—as interpreted in the international legal order—and principles of the Constitution that cannot be overcome by means of hermeneutic tools" (*id.*).

In essence, although the Court emphasized that all customary obligations are subject to the fundamental principles of the Italian Constitution, the interpretation of the former by the ICJ and other international bodies could not be questioned. This blind acceptance of the ICJ's interpretations of international norms by domestic courts seems unwarranted, at least when posed in such absolute terms as those used by the Court. That methodology was not suggested by the obligation of Italy under Article 94(1) of the UN Charter to abide by ICJ judgments in cases to which it is a party. Indeed, as noted, the Court did not hesitate to declare Italy's domestic rules implementing that obligation unconstitutional, insofar as they commanded observance of the *Germany v. Italy* judgment and despite the binding force of the latter under international law. This attitude also appears at variance with the Court's vindication of the historic role played by domestic courts (especially Italian and Belgian courts) in the emergence of

with the 2012 ICJ judgment and refusing constitutional references, ended some of the most well-known WWII-related lawsuits against Germany instituted in Italy. *See* Repubblica Federale di Germania v. Ferrini, Cass., sez. un. civ., 21 gennaio 2014, n. 1136, ILDC 2724; Allasio v. Repubblica Federale di Germania, Cass., sez. un. civ., 21 gennaio 2014, n. 1137. Judgment No. 1136/2014 relates to the proceedings for deportation and forced labor brought in 1998 by Luigi Ferrini, which resulted in the 2004 landmark decision in *Ferrini v. Repubblica Federale di Germania*, Cass., sez. un. civ., 11 marzo 2004, n. 5044, 87 RDI 539 (2004) (reported by Andrea Bianchi at 99 AJIL 242 (2005)) (after Ferrini passed away, the lawsuit was continued by his heirs). Judgment No. 1137/2014 refers to a collective claim advanced by several victims of Nazi-era deportation and subjection to slave labor (or their heirs). For the Court's original order asserting jurisdiction in this case, see *Repubblica Federale di Germania v. Mantelli*, Cass., sez. un. civ., 29 maggio 2008, n. 14201, ILDC 1037 (reported by Carlo Focarelli at 103 AJIL 122 (2009)).

[10] Customary rules are given effect in the Italian legal system by the first sentence of Article 10 of the Constitution, which reads: "The Italian legal order conforms to the generally recognized norms of international law."

[11] Russel v. S.r.l. Immobiliare Soblim, Corte cost., 18 giugno 1979, n. 48, G.U. (ser. speciale) n. 175, 27 giugno 1979 (ill-foundedness of a question of constitutionality involving the diplomatic immunity of a military attaché of the Canadian Embassy in Rome).

limits to the rule of sovereign immunity. According to the Court, "it is quite significant that this evolution of the rule in question was due to the jurisprudence of national courts" (para. 3.3). As a matter of fact, "it is natural that such courts be entitled to consider whether they have jurisdictional competence, whereas the identification of practice for the purposes of ascertaining customary norms may be left to international bodies" (*id.*). As far as the Court was concerned, this approach implied its exclusive power to establish whether the rule of state immunity was compatible with the fundamental principles of the Italian Constitution. The exercise of such power, the Court observed, "has the effect of producing a further reduction in the scope of that rule, an effect limited to national law, but also capable of contributing to the evolution of international law itself, as this Court and many others hope" (*id.*).

Therefore, the Court refused to reopen the international legal issues adjudicated by the ICJ, implicitly accepted that its decision was liable further to engage the responsibility of the Italian state, and regarded its role as one confined to the progressive development of international law. The pitfall in this reasoning is that the Court's decision might come to be regarded as a comparatively insignificant piece of state practice, that is, one not denoted by the international *opinio juris* necessary for the emergence of customary international law.

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The foregoing considerations did not prevent the Court from tacitly criticizing the 2012 ICJ judgment.[12] For one thing, it dismissed an admissibility objection of the Italian government that reiterated an ICJ argument by contending that the Court was barred from determining whether it is appropriate to grant immunity on the basis of the gravity of the unlawful acts imputed to a foreign state, since doing so would implicate the merits of the dispute, whereas sovereign immunity is a preliminary matter that does not concern the seriousness of the wrongs at stake.[13] The Court rightly responded that this was a false problem, as "jurisdictional objections necessarily require a prima facie assessment of the claims (*petitum*) on the basis of the way the parties have formulated their application" (para. 2.2).

The Court also disavowed the ICJ's formalistic dismissal of a conflict between the procedural rule of state immunity and substantive *jus cogen*s norms concerning the protection of human rights, such as those outlawing international crimes.[14] The ICJ's assumption was that the procedural individual rights to judicial protection and reparation for war crimes were either nonexistent in customary law or extraneous to *jus cogens*. In any event, they were unhelpful to Italy's arguments, as the quest for effective protection of *jus cogens* rights did not entail displacing the rule of state immunity. By contrast, the Constitutional Court confirmed that the right of access to justice is a supreme principle of the Italian constitutional order, a fortiori when it is exercised with a view to the protection of fundamental human rights. The procedural nature

[12] This perspective may also explain the Court's citation (para. 3.4) to the landmark 2008 *Kadi* judgment of the Court of Justice of the European Union (ECJ). *See* Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 2008 ECR I-6351 (reported by Miša Zgonec-Rožej at 103 AJIL 305 (2009)). For one thing, the Court's methodology largely echoed that of the ECJ in *Kadi* (exclusive power to review "domestic" measures implementing international law acts, not the latter as such). But most important, the same methodology did not prevent the ECJ from giving weight to the absence of adequate protection in the UN system for the rights of individuals blacklisted for their alleged involvement in terrorist activities. *See id.*, paras. 320–25.

[13] Germany v. Italy, *supra* note 2, para. 82 (speaking in this connection of "a logical problem").

[14] *Id.*, paras. 93–95.

of the former vis-à-vis the substantive character of the latter was immaterial, it noted, in terms of reviewing the constitutional compatibility of the rule of state immunity: "It would indeed be truly difficult to identify what would be left of a right if it could not be vindicated before a court in order to obtain effective protection" (para. 3.4). Assuredly, this position was not regarded as a peculiarity of the Italian legal order: "The right to a judge and to effective judicial protection of inviolable rights is certainly among the grand principles of legal civilization of every democratic system of our times" (*id.*). This is a telling sample of the creeping "educational" function that the Court felt entitled to perform vis-à-vis the international and UN legal orders (including the ICJ), by indicating a path that those orders should follow if they want to embrace a meaningful process of democratization.

More broadly, the Court's findings, though formally grounded in domestic law, can substantively be taken to reflect a different vision of the current state of the area of international law in question vis-à-vis that espoused by the ICJ. The Court's main conclusions are largely consistent with the "last resort" argument unsuccessfully put forward in *Jurisdictional Immunities* by Italy, namely, that immunity is lost when a state is accused of gross violations of human rights *and* no effective alternative means of redress exists for the victims other than a suit against that state before the courts of the forum.[15]

The Court accepted that the right of access to justice may be subject to limits, and hence to a balancing exercise, when it comes to intercourse with foreign states. In other words, that right may well be outweighed by a legitimate public interest, such as the maintenance of sound international relations. The resulting restriction must, however, be proportionate to the objective pursued. The restriction flowing from the immunity rule affirmed by the ICJ did not meet that test owing to two cumulative circumstances: first, that rule unduly precluded the exercise of jurisdiction over conduct amounting to war crimes and crimes against humanity, such as deportation, forced labor, and mass killings; *and*, second, it did so in a situation where the victims were deprived of any alternative means of redress other than a suit in the forum state.

On the first point, the Court declared that state immunity could prevail over fundamental constitutional rights only if it was connected—"in substance, and not only in form"—with the sovereign functions of foreign states: "Immunity of foreign states . . . is not permitted by the Italian Constitution when it protects acts unrelated to the typical exercise of governmental authority, that is, unlawful acts impairing inviolable rights recognized as such by the ICJ itself and by Germany before the ICJ" (para. 3.4). To be sure, the Court was not second-guessing the ICJ about the classification of the crimes at issue as acts *jure imperii*.[16] It only stated that, irrespective of that classification under international law, the rule of immunity for conduct involving international crimes could not trump the principles of the Italian Constitution concerning the protection of fundamental rights, *whenever* such rights may not be secured by alternative judicial remedies. Crucially, this absence of alternative remedies had been acknowledged by the ICJ itself, in a passage of the *Germany v. Italy* judgment[17]—quoted verbatim by the Court—that had accordingly called upon the parties to carry on negotiations aimed at resolving the question of unredressed Nazi crimes (*id.*). Hence,

[15] *Id.*, para. 98.
[16] *Id.*, para. 60.
[17] *Id.*, para. 104.

> the fact that judicial review for the purpose of protecting the fundamental rights of the victims of the crimes at issue is precluded makes the sacrifice of two supreme constitutional principles wholly disproportionate vis-à-vis the objective of noninterference with the exercise of states' governmental authority, whenever the latter took shape, as in the present case, through conduct amounting to war crimes and crimes against humanity. (Para. 3.4)

On that basis, the Court declared that the relevant portion of the customary rule on sovereign immunity never entered the Italian legal system and was therefore ineffective in that system ab initio (para. 3.5).

This judgment marks the first time ever that the Court has determined that a customary rule of international law is incompatible with the Italian Constitution. By contrast, for the reasons already mentioned and on the strength of its settled jurisprudence upholding the subordination of treaties to the Constitution, the Court rapidly came to the conclusion that Law No. 848/1957 on the incorporation of the UN Charter into the Italian legal order was unconstitutional, insofar as it imposed—via Article 94(1) of the Charter—the duty to comply with the (pertinent sections of the) *Jurisdictional Immunities* judgment ("For the rest, it is obvious that Italy's undertaking to respect all international obligations arising from its accession to the UN Charter, including the duty to abide by ICJ decisions, remains unaltered" (para. 4.1)). The fact that the Charter, in view of its objectives and legal force, is undeniably a treaty of a special nature, as the Italian Constitution also acknowledges,[18] was not given any particular weight.

The Court had even less trouble finding Article 3 of Law No. 5/2013 unconstitutional for breaching the fundamental principle on the judicial protection of human rights. But the Court's reasoning here was especially controversial. First, the declaration of unconstitutionality unnecessarily catches Article 3 as a whole. As indicated above, this provision broadly required respect for *any* ICJ decision that Italy lacks jurisdiction over "specific acts" of foreign states, not only over war crimes and other serious human rights violations.[19] Second, and more important, only this part of the Court's judgment attached significance to the "territorial nexus," namely, that (at least a portion of) the crimes at issue had been committed on Italian territory. The Court thus remarked that, since the scope of Article 3 encompassed ICJ decisions upholding state immunity for international crimes by foreign armed forces on the territory of the forum, the article had even gone beyond the express provisions of the UN Convention on Jurisdictional Immunities of States and Their Property, to which Italy had acceded by virtue of an authorization contained in Law No. 5 itself (para. 5.1). In the Court's view, this interpretation was confirmed by the declaration deposited by Italy when it acceded to the Convention in May 2013, which stated that "the Convention does not apply to the activities of armed forces and their personnel, whether carried out during an armed conflict . . . , or undertaken in the exercise of their official duties."[20]

[18] The UN Charter is par excellence one of those treaties pursuing "peace and justice among nations" with respect to which Italy accepts limitations to its sovereignty, as per Article 11 of the Constitution.

[19] *See* text at note 8 *supra*.

[20] Italy, Declaration, United Nations Convention on Jurisdictional Immunities of States and Their Property (May 6, 2013), *in* MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, *at* http://treaties.un.org. Almost identical statements were made by Finland, Norway, and Sweden on becoming parties to the UN Convention. It is regrettable, but unsurprising, that the Court did not prefer to give weight to another part of the Italian declaration, according to which "Italy understands that the Convention will be interpreted and applied in

Yet the purpose of this declaration was diametrically opposite to the Court's inference. It was aimed at clarifying that the noncommercial territorial tort exception laid down in Article 12 of the UN Convention does not reach personal injuries and death occasioned in the territory of the forum by the military activities of foreign states. It therefore buttresses an armed forces exception to the tort exception, in line with the 2012 *Jurisdictional Immunities* judgment,[21] where the ICJ stated—inter alia—that the similar declarations made by Norway and Sweden on ratifying the Convention supported the proposition that customary law continued to require immunity for the activities of those forces, regardless of any nexus with the territory of the forum.[22]

Whether the latter proposition properly reflects customary law is questionable. It seems safe to regard the section of the *Jurisdictional Immunities* judgment dealing with the tort exception as the weakest part of the ICJ's reasoning. The ICJ was confronted with undeniably contradictory practice on whether military activities fall within the scope of that exception. It solved the problem by endorsing controversial interpretations (for instance, vis-à-vis the legal value of the declarations discussed earlier), while reading some key elements of practice selectively and concealing yet other important manifestations of it.[23] In the decision reported here, the Court might well have taken issue, on a priority basis, with that section of the ICJ judgment. The Court's methodological choice to abstain from openly engaging with the interpretations of the ICJ is therefore all the more regrettable.

A narrower focus on the territorial nexus of the crimes in question would also have allowed the Court to set a well-defined limit to the scope of its decision. It could have characterized the allegedly customary immunity rule unincorporated in the Italian legal system as involving unredressed human rights violations *committed on Italian territory*. Such a ruling would rest on safer ground as far as international law is concerned and accordingly be spared much of the criticism that legal scholarship will predictably level against Judgment No. 238 in the months ahead.

Conversely, *on its face*, the breadth of the principle endorsed by Judgment No. 238 is striking. Any grave breaches of human rights committed by state agents that cannot be made good by alternative legal remedies may be brought before the Italian courts, which, on the basis of this judgment, would be bound to deny state immunity. Only immunity from enforcement is apparently left out of the Court's ruling. Italy's highest judicial body has therefore formally opened the floodgates to transnational and extraterritorial human rights litigation against foreign states. The coming challenge for Italian courts will probably involve an attempt to circumscribe the scope of Judgment No. 238, which would limit their jurisdiction vis-à-vis claims against foreign states, for instance, by requiring some type of link between the wrong at stake and the Italian legal system.

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accordance with the principles of international law and, in particular, with the principles concerning the protection of human rights from serious violations." *Id.*

[21] Germany v. Italy, *supra* note 2, para. 78.

[22] *Id.*, para. 69.

[23] *See, e.g.*, Riccardo Pavoni, *An American Anomaly? On the ICJ's Selective Reading of United States Practice in* Jurisdictional Immunities of the State, 2011 ITALIAN Y.B. INT'L L. 143.