

# The Legal Implications of *Sentenza* No. 238/2014 by Italy’s Constitutional Court for Italian Municipal Judges: Is Overcoming the “Triepelian Approach” Possible?

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## Abstract

This paper follows up on the effects of Judgment No. 238/2014 by the Italian Constitutional Court. On grounds of both the substantive and procedural legal ambiguity of the ruling, Italian municipal courts have been confronted with the dilemma of either upholding State immunity and complying with the International Court of Justice’s (ICJ) judgment, or denying State immunity and following the decision of the Constitutional Court. It is contended that the Constitutional Court would have had jurisdiction to carry out a reassessment of customary international law on State immunity without taking for granted the appraisal by the International Court of Jus-

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tice. On this basis, it could have avoided to resort to the so-called “counter-limits” doctrine for refraining from giving application to international law, finding instead that State immunity for international crimes committed on the territory of the forum State can be denied under both international and domestic constitutional law. Even if this did not amount to full adherence to Art. 59 of the ICJ’s Statute in procedural terms it would have meant compliance with the substance of international law at issue. Yet, an attempt to overcome the “Triepelian approach” of the Constitutional Court has recently been made along most original, albeit problematic lines by Italian municipal courts.

## I. Introduction

Much has already been written about Decision No. 238/2014 of 22.10.2014 by the Italian Constitutional Court.<sup>1</sup> Yet, a year after the judgment, it is still not fully clear what the municipal courts in Italy are expected to do: Continuing upholding State immunity so as to abide by the *res judicata* effect of the ruling by the ICJ without triggering the international responsibility of Italy or exercising civil jurisdiction against Germany and complying with the ruling of the Constitutional Court? As the case-law of some ordinary courts shows, Italian judges are confronted precisely with this dilemma and have so far opted for different and fairly original solutions for accommodating this conflict.

In particular, it will be contended that the use of the so-called “counter-limits doctrine” (*dottrina dei controlimiti*) has placed the judges before an awkward alternative, whereas it would have been more advisable to decide the same way, but according to a consistent interpretation of domestic constitutional law with international customary law (II.); secondly, it will be clarified to what extent the judges are allowed to depart from the ruling of the Italian Constitutional Court on grounds of the *inter partes* effects de-

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<sup>1</sup> See *inter alia* contributions by *P. Faraguna*, Corte costituzionale contro Corte internazionale di Giustizia: i controlimiti in azione, available at <<http://www.forumcostituzionale.it>>, 2.11.2014; *P. Passaglia*, Una sentenza auspicabilmente storica: la Corte limita l’immunità degli Stati esteri dalla giurisdizione civile, available at <<http://www.diritticomparati.it>>, 2.10.2014; *A. Guazzarotti*, Il paradosso della ricognizione delle consuetudini internazionali. Note minime a Corte. cost. No. 238 del 2014, available at <<http://www.forumcostituzionale.it>>, 5.11.2014; *F. Fontanelli*, I know it’s wrong but I just can’t do it right. First impressions on Judgment no. 238 of 2014 of the Italian Constitutional Court, available at <<http://www.verfassungsblog.de>>, 27.10.2014; *R. Pavoni*, *Simoncioni v. Germany*, AJIL 109 (2015), 400 et seq.

terminated by the ill-foundedness (or inadmissibility?) of the first question referred to it by the Tribunale di Firenze (III.). Finally, it will be showed that, contrary to the dualist approach taken by the Italian Constitutional Court, in recent case-law Italian ordinary judges are attempting to reconcile domestic law with international law (IV.). It will be concluded that all solutions provided by the Italian judiciary, albeit creative, are rather problematic from the standpoint of international law (V.).

## II. Was the Italian Constitutional Court Incompetent to Carry Out a Reassessment of Customary International Law?

The “Triepelian approach”<sup>2</sup> of Decision No. 238/2014 by the Italian Constitutional Court has put municipal judges before a difficult alternative: either upholding German immunity so as not to engage the international responsibility of the Italian State or exercising civil jurisdiction against Germany so as to comply with the ruling of the Italian Constitutional Court.

In fact, on the one hand, the Italian Constitutional Court denied to be competent for (re)interpreting, that is to say for appraising again the state of international customary law, since

“the referring judge excluded from the subject-matter brought before this Court any assessment of the interpretation given by the ICJ on the norm of customary international law of immunity of States from the civil jurisdiction of other States”<sup>3</sup>

and also because the interpretation provided by the ICJ

“is particularly qualified and does not allow further examination by national governments and/or judicial authorities, including this Court”.

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<sup>2</sup> So *A. Peters*, Let Not Triepel Triumph: How to Make the Best Out of Sentenza No. 238/2014 of the Italian Constitutional Court for a Global Legal Order, available at <<http://www.ejiltalk.org>>, 22.12.2014, according to whom the distinction between inside and outside resonates the good old 19<sup>th</sup> century dualism as formulated by *Heinrich Triepel*, according to which international law and domestic law are “two circles which at best touch each other but which never intersect”. On the origins of Italian dualism see *A. P. Sereni*, The Italian Conception of International Law, 1943, 321 et seq.

<sup>3</sup> Unofficial translation from Italian into English provided by the Italian Constitutional Court on its website <<http://www.cortecostituzionale.it>>.

In this respect, therefore, the Italian Constitutional Court did not question the interpretation according to which no exception to the bar of State immunity exists under international law for international crimes performed on the territory of the forum State.

On the other hand, however, as asked by the Tribunale di Firenze, the Italian Constitutional Court reviewed the compatibility of the customary international norm of State immunity – a norm which ranks as high as the Constitution through the automatic adaptation of Art. 10 para. 1 Italian Constitution (IC) – with the right to a judge (Art. 24), in conjunction with the principle of protection of fundamental human rights (Art. 2), finding that the rule of State immunity, as defined in its scope by the ICJ, conflicts with the aforementioned constitutional standards and therefore it has neither entered the Italian legal order nor it has any effect therein.

Now, if the existence of an exception to the rule of State immunity from jurisdiction for acts occasioning international crimes by armed forces in an armed conflict on the territory of the forum State had been ascertained by the Italian Constitutional Court, ordinary courts could have alleged the inapplicability of the ICJ's judgment on grounds of international law.<sup>4</sup> In this case, however questionable the acceptance of such an exception to the bar of State immunity under international law might be, Italian judges would be deemed to exercise civil jurisdiction against Germany in conformity with both international substantive law and constitutional law. By contrast, however, no exception has been formulated by the Italian Constitutional Court which required civil jurisdiction had to be exercised by the referring judge on the basis of customary international law as long as it does not contravene the aforementioned constitutional standards. By using the “counter-limits doctrine”, the Court merely wished to “contribute to a desirable – and desired by many – evolution of international law itself”, thereby deliberately accepting to commit a violation of international law.

The question to be answered here is whether the Italian Constitutional Court could have decided otherwise by assessing itself the current state of customary international law relating to State immunity so as not to put municipal courts in an unpleasant situation as regarding the implementation of the judgment. Among competing arguments preference should be given to the one referring to the legal order of the norm at hand, i.e. the international

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<sup>4</sup> Italy could also file an application before the ICJ for requesting its annulment on grounds of a manifest and essential error of law in the identification of international customary law. As for the possible means of annulment see *K. Oellers-Frahm*, Judicial and Arbitral Decisions, Validity and Nullity, in: MPEPIL, 2013, § E, 16 et seq. See also *M. K. Bultermann/M. Kuijper*, Compliance with Judgments of International Courts, 1996; *C. Schulte*, Compliance with Decisions of the International Court of Justice, 2004.

legal order while the one based on referral to another legal order, i.e. the domestic legal order, should apply only a subsidiary argument. In other words, one could say that, if the conflict can be settled under international law and without fragmenting it, there is no use to resort to another argument based on national law for reaching the same result. Thus, it has to be examined whether the Italian Constitutional Court was competent to survey again the state of customary international law and, if so, whether the latter lent itself to a different interpretation than that provided by the ICJ.

It is doubtful that the self-proclaimed incompetence by the Italian Constitutional Court is well-founded. With regard to the first question which was brought before the Italian Constitutional Court by the Tribunale di Firenze, it has to be stressed that it is true that, in accordance with Art. 27 of the Law No. 87 of 11.3.1953 on Functioning of the Constitutional Court and a longstanding case-law of the Italian Constitutional Court, the Court has to act in accordance with the *non ultra petita* principle, that is to say to render a decision within the limits placed upon it by the referring judge. However, it is a fairly well-established practice of the Court, which also acts on the basis of the *iura novit curia* principle, to elucidate the terms of the subject-matter so as to restrict or extend it.<sup>5</sup> In the present case, the question of what is the actual state of international customary law is one which logically precedes the one of its compatibility with domestic constitutional law and might therefore have been itself subject to judicial review by the Italian Constitutional Court. Hence, the Court could have reshaped the *petitum* focusing in the first place on how the Hague Court had interpreted customary international law and only thereafter reviewing its compatibility with constitutional fundamental principles and rights.

As pointed out by some authors,<sup>6</sup> there was indeed for the Italian Constitutional Court a quite appropriate legal precedent to refer to the so-called

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<sup>5</sup> See *inter alia*: T. Martines, *Diritto costituzionale*, 2010, 490; R. di Maria, *Il principio di corrispondenza tra chiesto e pronunciato nel giudizio di legittimità costituzionale. L'insopprimibile iato fra giudizio principale e giudizio incidentale*, in: E. Bindi/M. Pierini/A. Pisaneschi (eds.), *I principi generali del processo comune ed i loro adattamenti alle esperienze della giustizia costituzionale*, 2008, 53 et seq.; F. Dal Canto, *Il giudicato costituzionale nel giudizio sulle leggi*, 2002, 133 et seq.; A. Ruggeri/A. Spadaro, *Lineamenti di giustizia costituzionale*, 2001, 289.

<sup>6</sup> M. I. Papa, *Il ruolo della Corte costituzionale nella ricognizione del diritto internazionale generale esistente e nella promozione del suo sviluppo progressivo. Osservazioni critiche a margine della sentenza n. 238/2014*, available at <<http://www.rivistaaic.it>> No. 3/2015, 6 et seq.; G. Guarino, *Corte costituzionale e Diritto internazionale: diritto internazionale e diritto interno un amore contrastato?*, in: *Studi in Onore di Giancarlo Laurini*, 2015, 713; R. Pavoni (note 1), 406. See however, *contra*, R. Bin, *L'adattamento dell'ordinamento italiano al diritto*

*Russel* case (Decision No. 48/1979). Therein, the *petitum* resulted to being subject to a slight modification by the Court which did not rule on a norm of treaty law, as required by the referring judge, but on the customary international norm itself, *rectius* on the domestic norm incorporating a generally recognized norm of international law.<sup>7</sup> Here, on the contrary, the Court maintains it would have not even been allowed to “exercise such control”, because

“international custom is external to the Italian legal order, and its application [...] must respect the principle of conformity, i.e. must follow the interpretation given in its original legal order, that is the international legal order”.

This view is not entirely convincing. First, it ought to be emphasized that the Court deviated from its 1979 precedent, affirming its competence to rule on the compatibility with domestic constitutional law of an international customary norm as such and not of an international customary norm as incorporated into domestic law, thus implying it had jurisdiction to exert some sort of direct control on international custom external to the Italian legal order and, hence, also to review the actual state of customary international law. Second, it needs to be recalled that municipal courts, including constitutional and supreme courts, are both judicial bodies administering international law, i.e. assessing State practice and *opinio juris* as well as bodies whose rulings are deemed to be sources of international law.<sup>8</sup> In particular when talking about jurisdictional immunities, one has to admit – as the ICJ itself did in its 2012 ruling –<sup>9</sup> that they have been developed to a great extent from the practice of national courts.<sup>10</sup> Hence, one cannot really affirm that the International Court of Justice, however qualified and valuable its interpretation might be, has general and exclusive jurisdiction for ascertaining the state of international customary law, so as that, after issuing a

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internazionale non scritto dopo la sentenza n. 238/2014, available at <<http://www.forumcostituzionale.it>>, 11.1.2016, 7.

<sup>7</sup> Italian Constitutional Court, Judgment of 18.6.1979, No. 48, Para. 3.

<sup>8</sup> As the International Law Commission (ILC) has acknowledged, State practice is found “in the conjunct of internal law, municipal court decisions, practice of the executive branch, diplomatic practice and treaty practice”. ILC-A/CN.4/659, 14. Cf. also in the literature: *H. Lauterpacht*, Decisions of Municipal Courts as a Source of International Law, in: BYIL 10 (1929), 65 et seq.; *M. Akehurst*, Custom as a Source of International Law, BYIL 47 (1974-75), 8 et seq.; *I. Brownlie*, Principles of Public International Law, 7<sup>th</sup> ed. 2008, 6. Contra see in the past: *L. Oppenheim*, The Science of International Law: Its Task and Method, AJIL 2 (1908), 337 et seq. Traditionally domestic court decisions were treated as mere facts. Cf. PCIJ, Certain German Interests in Polish Upper Silesia (Merits), 1926, PCIJ, Serie A., No. 7, 19.

<sup>9</sup> ICJ, Jurisdictional Immunities of the State (*Germany v. Italy*, Greece intervening), Judgment of 3.2.2012, No. 143, para. 55, 77, 83 et seq.

<sup>10</sup> So also *A. Nollkaemper*, National Courts and the International Rule of Law, 2011, 267.

judgment, all domestic courts should abide by a judgment issued by the ICJ. According to Arts. 34-38 of its Statute, the ICJ has only a limited jurisdiction and can adjudicate a dispute only upon consent of the parties. In other words, there is no such thing as a hierarchical and centralized judiciary system under international law and the Hague Court cannot be considered as an international constitutional court, whose assessment of customary international law is binding once and forever upon the international community as a whole, but as Art. 59 sets out, “the decision of the Court has no binding force except between the parties and in respect of that particular case”. Only in this respect – from a procedural, but not from a substantive legal point of view – Italy is bound by the *res judicata* effect of the Court's judgment.

Further, the establishment of a direct parallel between the ICJ and the European Court of Human Rights (ECtHR) does not make much sense, since the Strasbourg Court has been explicitly set up to interpret the legal provisions of a specific treaty, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and not customary international law.<sup>11</sup> Moreover, as the Italian Constitutional Court recently recognized in its Decision No. 49/2015, the Strasbourg interpretation of the Convention is not to be accepted unquestioningly by domestic judges,<sup>12</sup> but, on the contrary, they must be allowed to check whether or not a certain interpretation of the Convention is an expression of a well-established case-law (*diritto consolidato*) of the Strasbourg Court. If this is true for treaty law and for courts specifically set up to ensure its enforcement in the domestic legal orders of the State parties, it should *a fortiori* apply when it comes to international customary law, which is a source of law typically molded by States and their municipal courts.

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<sup>11</sup> It makes however sense from the standpoint of domestic constitutional law. In fact, as elucidated by *Pollicino*, the judge-rapporteur, *Giuseppe Tesaurò*, as an academic, aimed at establishing a parallel between violations of customary international law and violations of international treaty law. Yet, in practice, the parallel does not work well, since the Court eventually treated the external rule in contrast with the Constitution differently, depending upon whether the contrast relates to customary law (ill-founded) or international treaty law (unconstitutional). See *O. Pollicino*, From Academia to the (constitutional) Bench: An Heterodox Reading of the Last Move (Decision No. 238/2014) of the Italian Constitutional Court on the Relationship between Constitution and International (Customary) Law, *Diritto Pubblico Comparato ed Europeo* 4 (2015), *forthcoming*.

<sup>12</sup> See Italian Constitutional Court, Judgment of 26.3.2015, No. 49, para. 7, whereby “it would be mistaken [...] to conclude that the ECHR has turned national legal operators, including first and foremost the ordinary courts, into passive recipients of an interpretative command issued elsewhere in the form of a court ruling, irrespective of the conditions that gave rise to it”. (unofficial translation from Italian into English provided by the Italian Constitutional Court). <<http://www.cortecostituzionale.it>>.

While the Italian Constitutional Court would have been competent to carry out itself a thorough examination of the current state of customary international law, it is nonetheless difficult to state with certainty that the result of this survey would have been any different from that carried out by the International Court of Justice. Since it would go beyond the scope of this paper to dwell upon the exact assessment of customary international law on State immunity, it might be briefly recalled that the identification of the current state of international custom carried out by the ICJ was pretty accurate,<sup>13</sup> since there is yet no sign of neither a widespread and uniform State practice nor of an *opinio juris* supporting an exception to State immunity for international crimes committed on the territory of the forum State. Yet, on account of the previous case-law relied upon by Italian and Greek tribunals,<sup>14</sup> as well as drawing upon the dissenting opinions of the judges of both the ICJ and the ECtHR,<sup>15</sup> it might be argued that the Court might have been able to object to the interpretation provided by the ICJ.

From the point of view of those authors supporting the reasoning of the International Court of Justice, this appraisal would have amounted in any case to a wrongful interpretation of international substantive law. However, it cannot be ignored that the Italian practice on State immunity would have appeared more sound and coherent to other States<sup>16</sup> and, more importantly,

<sup>13</sup> For a comment on the ruling mostly following the reasoning of the Hague Court see *inter alia*: G. Boggero, Senza immunità (dello Stato), niente responsabilità (dell'individuo), Diritto Pubblico Comparato ed Europeo (DPCE) 1 (2013), 383 et seq.; K. Oellers-Frahm, State Immunity vs. Human Rights: Observations Concerning the Judgment of the ICJ in the Jurisdictional Immunities of States Case (*Germany v. Italy*), in: D. Hanschel/S. Graf Kielmansegg/U. Kischel/C. Koenig/R. A. Lorz (eds.), Mensch und Recht – FS für Eibe Riedel zum 70. Geburtstag, 2013, 389 et seq.; M. McMennamin, State Immunity before the International Court of Justice Victoria University of Wellington Law Review 44 (2013), 189 et seq.; A. Dickinson, *Germany v. Italy* and the Territorial Exception. Walking the Tightrope, Journal of International Criminal Justice 11 (2013), 147 et seq.; R. van Alebeek, Jurisdictional Immunities of the State (*Germany v Italy*): On Right Outcomes and Wrong Terms, GYIL 55 (2012), 281 et seq.

<sup>14</sup> Italian Court of Cassation, Judgment No. 5044/2004 (*Ferrini*) of 11.3.2004, and Judgment No. 1072/2008 (*Milde*), 13.1.2009; Greek Supreme Court (*Areios Pagos*), *Prefecture of Voiotia v. Federal Republic of Germany*, Judgment of 4.5.2000, No. 11/2007, ILR 129, 514.

<sup>15</sup> See ICJ, *Germany v. Italy (Greece Intervening)*, Dissenting Opinions by Judge Cançado Trindade (para. 52), by Judge Yusuf (para. 48-54) and by Judge Ad-Hoc Gaja (para. 8-12), ICJ Reports, 2012; ECtHR, Joint Dissenting Opinion by Judges Rozakis, Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, (para. 1-4). In the literature see *inter alia*: L. Gradoni/A. Tanzi, Immunità dello Stato e crimini internazionali tra consuetudine e bilanciamento: note critiche a margine della sentenza della Corte Internazionale di Giustizia del 3 febbraio 2012, in: La Comunità Internazionale 2 (2012), 212 et seq.

<sup>16</sup> A. Tanzi, Sulla sentenza Cost. 238/2014: cui prodest?, available at <<http://www.forumcostituzionale.it>>, 26.11.2014.



the Italian Constitutional Court would have not jeopardized the uniform and effective application of customary international law on grounds of domestic constitutional law,<sup>17</sup> if it had at least attempted to reconcile the latter with the former. As it will be pointed out in Section IV., the same concerns expressed here are shared by several Italian municipal courts which have found comfort in previous rulings of the Italian Court of Cassation, that an exception to the rule of State immunity from jurisdiction exists for crimes committed by armed forces during an armed conflict on the territory of the forum State under general international law.

### III. An Ill-Founded or Inadmissible Question? On Why Municipal Courts Could Now Decide Otherwise

A further aspect which makes the judgment of the Italian Constitutional Court appear less solid than its supporters wish is the unscrupulous use of the constitutional procedural machinery.<sup>18</sup> In fact, as it is commonly known

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<sup>17</sup> So, for instance *R. Kolb*, *The Relationship between the International and the Municipal Legal Order: Reflections on the Decision No. 238/2014 of the Italian Constitutional Court, Questions of International Law II* (2014), 6, who speaks of “murder of international law through municipal law”. Similarly *A. Chechi*, *Introductory Note to Judgment No. 238/2014*, *ILM* 54 (2015), 471 et seq., who accused the Court of “jeopardising the coherence of international law”. On the legitimacy of resorting to the so-called “counter-limits doctrine” see *inter alia: A. von Bogdandy*, *Pluralism, Direct Effect and the Ultimate Say. On the Relationship Between International and Domestic Constitutional Law*, *I.CON* 6 (2008), 412, who argues that “there should always be the possibility, at least in liberal democracies, to limit, legally, the effect of a norm or an act under international law within the domestic legal order if it severely conflicts with constitutional principles. This corresponds to the state of development of international law.” See also *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 II* (2014), 30 et seq., who denies “that customary international law has developed to the point where a State may invoke its constitutional provisions concerning access to justice as a legal excuse for failure to perform conflicting international obligations”. On counter-limits as a tool of “reasonable resistance” to be used under strict legal conditions: *A. Peters*, *Supremacy Lost: International Law Meets Domestic Constitutional Law*, *Vienna Online Journal on International Constitutional Law* 3 (2009), 194 and *F. M. Palombino*, *Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles*, *ZaöRV* 75 (2015), 527; *M. Lando*, *Intimations of Unconstitutionality: The Supremacy of International Law and Judgment 238/2014 of the Italian Constitutional Court*, *M.L.R.* 78 (2015), 1037 et seq.

<sup>18</sup> So also *A. Ruggeri*, *La Corte aziona l’arma dei “controlimiti” e, facendo un uso alquanto singolare delle categorie processuali, sbarra le porte all’ingresso in ambito interno di norma internazionale consuetudinaria (a margine di Corte cost. No. 238 del 2014)*, *Consulta Online*, 2014, 1 et seq.

under Italian constitutional procedure law, the judgments with which the Court declares ill-founded applications challenging the constitutionality of a law, so called “*sentenze di rigetto*”, are due to have legal effects only between the parties (*inter partes*), and are not expected to be binding on all public authorities and persons (*erga omnes*), as it is the case only for rulings sustaining the challenge and declaring unconstitutional a law or act having the force of law, so called “*sentenze di accoglimento*”. In this latter case, in fact, the law in question automatically loses effect from the day after publication of the Court’s decision, in accordance with Art. 136 IC.

In the present case, the first question asked by the referring judge of Florence concerning the compatibility of the domestic norm incorporating a generally recognized norm of international law with domestic constitutional law was rejected as ill-founded since the customary norm had not been incorporated into the Italian legal order by means of Art. 10 para. 1 IC to an extent which would give rise to a conflict with the fundamental principles of the Constitution. In other words, according to the Constitutional Court, the referring judge had to construe the general recognized norm on State immunity differently, so as to keep it in conformity with the Constitution (so-called “*sentenza interpretativa di rigetto*”).<sup>19</sup> Yet, if the international custom has not been incorporated into the domestic legal order by means of Art. 10 para. 1 IC, the question arises how the Court could ever undertake a balancing operation of a formally non-existent norm with fundamental principles and rights of the Constitution.<sup>20</sup> In order to prevent such a logical short-cut, the Italian Constitutional Court should have rejected the question as inadmissible.<sup>21</sup> However, by doing so, the Court would not

<sup>19</sup> On this point see *E. Lamarque*, Some WH Questions About the Constitutional Court Judgment on the Rights of the Victims of the Nazi Crime, *Italian Journal of Public Law* 6 (2015), 205. In general, on this specific type of judgment under Italian constitutional procedure law see *V. Onida/M. D’Amico*, Il giudizio di costituzionalità delle leggi. Materiali di giustizia costituzionale. Il giudizio in via incidentale, 1998, 273.

<sup>20</sup> This raises another serious problem with regard to Art. 134 IC which strictly requires the Constitutional Court to decide *inter alia* “on disputes concerning the constitutionality of laws and acts with the force of law adopted by state or regions”. In the present case, the Italian Constitutional Court does not rule on a law or on act with the force of law, but directly on custom (a factual source of law – “*fonte-fatto*”) which has not been incorporated in a statute or any other formal act with the force of law. So for instance *M. Luciani*, I controlimiti e l’eterogenesi dei fini, in: *Questione Giustizia* No. 1/2015, 86 et seq.

<sup>21</sup> So also *A. Chiusolo*, Immunità giurisdizionale e diritti inviolabili: una nuova frontiera per la “giuristocrazia”?, available at <<http://www.forumcostituzionale.it>>, 14.7.2015, 22; *L. Gradoni*, Giudizi costituzionali del quinto tipo. Ancora sulla storica sentenza della Corte costituzionale italiana, available at <<http://www.sidi-isil.org>>, 2014; *S. Lieto*, Il diritto al giudice e l’immunità giurisdizionale degli Stati nella sentenza della Corte costituzionale No. 238

have been able to retain for itself the power to rule on the compatibility of general international law with domestic constitutional standards; by contrast, every Italian court would have been in a position to autonomously provide an interpretation on the consistency of domestic law with international law, thus possibly even complying with the judgment of the ICJ.<sup>22</sup>

Yet, it must be pointed out that in a later challenge of constitutionality relating to similar issues of war-reparations for crimes committed by German armed forces on the Italian territory during the Second World War and referred to the Italian Constitutional Court by the very same Tribunale di Firenze, the Italian Constitutional Court astonishingly declared that the question was “obviously inadmissible on grounds of the non-existence (*ab origine*) of the subject-matter”, while simultaneously reaffirming its competence to rule on the compatibility of general international law with the Constitution (Order No. 30/2015 of 3.3.2015). In other words, the Court on the one hand acknowledged the flaws of a declaration of ill-foundedness as spelled out in Decision No. 238/2014, but on the other hand made a further harmful error, since the inadmissibility of a question of constitutionality under Italian law implies that ordinary courts are themselves entitled to provide an interpretation of customary international law in conformity with the Italian Constitution.

To put it bluntly, the “treatment” used by the Court in 2015 is worse than the “disease” it created back in 2014. With its Order, the Court has *de facto* acknowledged that a centralized balancing exercise should have never taken place in Decision No. 238/2014, since the municipal courts were competent to carry it out. Moreover, it failed to see that, by declaring ill-founded (or inadmissible) the last of the three questions of constitutionality, the Italian judiciary, and possibly even the referring judge,<sup>23</sup> will not be le-

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del 2014, available at <<http://www.forumcostituzionale.it>>, 2014, 4; *M. Luciani* (note 20), 88 et seq.

<sup>22</sup> So also *R. Perona*, Ancora sui “controlimiti” all’immunità degli stati, un anno dopo: sulla “infondatezza nei sensi di cui in motivazione” di Corte cost. No. 238/2014 e la “manifesta inammissibilità” di Corte cost. No. 30/2015, available at <<http://www.diritticomparati.it>>, 29.10.2015, § 5.

<sup>23</sup> See *E. Lamarque*, Gli effetti della pronuncia interpretativa di rigetto della Corte costituzionale nel giudizio a quo, *Giur. Cost.* (2000), 737; *L. Carlassare*, Perplexità che ritornano sulle sentenze interpretative di rigetto, *Giur. Cost.* (2001), 189 et seq.; *A. Bonomi*, Le interpretative di inammissibilità “processuali” e “di merito”: natura decisoria o effetto preclusivo?, available at <<http://www.forumcostituzionale.it>>, 8.12.2013, 7 et seq. and 13 et seq. Yet, it must be borne in mind that the same authors believe that the referring judge is bound to apply the interpretation endorsed by the Italian Constitutional Court when the latter implies that its interpretation is the only one which can be deemed to conform with the Constitution. So *A. Bonomi* (note 23), 17 et seq., mentioning *V. Onida/M. D’Amico* (note 19), 368. See also *M. Luciani*, Le decisioni processuali e la logica del giudicato costituzionale, 1984, 123.

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gally bound by the interpretation of the Italian Constitutional Court but merely by its persuasive authority<sup>24</sup> and are therefore free to undertake a different balancing exercise, including one which comes to the conclusion that State immunity for cases of international crimes committed in an armed conflict on the territory of the forum State is in conformity with the Constitution.<sup>25</sup>

This is all the more true, if one considers that, contrary to what happened to the Law of Adaptation to the United Nations Charter No. 848 of 17.8.1957, the Italian Constitutional Court did not rule on the constitutionality of the domestic provision incorporating into the Italian legal order Art. 39 para. 1 of the European Convention for the Peaceful Settlement of Disputes (1957), which was the jurisdictional basis for the ICJ to adjudicate and which stipulates that “each of the High Contracting Parties shall comply with the decision of the International Court of Justice or the award of the Arbitral Tribunal in any dispute to which it is a party”. Unlike Art. 94 para. 1 of the Charter of the United Nations, in fact this provision has not yet been declared unconstitutional by the Italian Constitutional Court to the extent to which it allows customary international norms contrary to fundamental principles and rights of the Constitution to enter the Italian legal order.<sup>26</sup> In its judgment No. 2468 of 6.7.2015, the Tribunale di Firenze did not even challenge its constitutionality before the Italian Constitutional Court, but it assumed that the non-automatic adaptation of Italy to customary international norms, as ascertained with Decision No. 238/2014,

“prevents also other provisions to be binding on Italy and its organs to comply with all decisions of the ICJ being in violation with the counter-limits established by the Italian Constitutional Court”.<sup>27</sup>

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<sup>24</sup> P. Caretti/*U. de Siervo*, *Istituzioni di diritto pubblico*, 2006, 401; G. Zagrebelsky/*V. Marcenò*, *Giustizia costituzionale*, 2012, 389. Ordinary courts tend indeed to conform to the interpretation endorsed by the Italian Constitutional Court. See the last inquiry by E. Lamarque, *Il seguito delle decisioni interpretative e additive di principio della Corte costituzionale presso le autorità giurisdizionali*, available at <<http://www.cortecostituzionale.it>>, 2007, 20 et seq.

<sup>25</sup> So for instance G. Silvestri, *Sovranità vs. diritti fondamentali*, in: *Questione Giustizia* No. 2/2015, 62; E. Lamarque (note 19), 209 et seq.; S. Leone, *Sul dispositivo della sentenza No. 238 del 2014: una soluzione preordinata ad accentrare il sindacato sulle consuetudini internazionali presso Palazzo della Consulta*, available at <<http://www.forumcostituzionale.it>>, 2014, 4.

<sup>26</sup> So in the literature already E. Lamarque (note 19), 210.

<sup>27</sup> Translation of this and the following passages from the ordinary court judgments by the author.

In other words, the Tribunale considers that even if the declarations of inadmissibility or ill-foundedness have no binding effect on the Italian judiciary as a whole and must therefore not be regarded as *res judicata*, they have nonetheless acquired a persuasive authority almost equal to that of rulings having mandatory authority. This interpretation was backed also by the Corte di Cassazione in its ruling issued on 28.10.2015.<sup>28</sup> Yet, it appears that the Tribunale messed up the grounds and applies the “counter-limits doctrine” to a provision of treaty law (and not to customary international law itself) which deserves to be declared unconstitutional by the Constitutional Court as had happened with regard to Art. 94 para. 1 of the Charter. In other words, the Tribunale has found that a *lex specialis* to the latter, i.e. a provision of the Law of Adaptation of the European Convention for the Peaceful Settlement of Disputes No. 644 of 8.10.1973, is also unconstitutional without referring the challenge of constitutionality to the Italian Constitutional Court, which is the only competent organ for such a declaration of “consequential unconstitutionality”.<sup>29</sup> At present, municipal courts could theoretically still apply Art. 39 para. 1 of the European Convention for the Peaceful Settlement of Disputes, thus abiding by the *res judicata* effect of the ICJ’s judgment.

To conclude, the uncertainty in the follow-up to the ruling would have been avoided only if the Court had sustained the challenge of constitutionality by the referring judge, thereby declaring unconstitutional the international custom on State immunity incorporated in the internal legal order by means of Art. 10 para. 1 IC, insofar as it provided for a norm contrary to the fundamental principles and rights of the Constitution (so-called “*sentenza interpretativa di accoglimento*”<sup>30</sup>).

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<sup>28</sup> Italian Court of Cassation, Judgment of 28.10.2015, No. 21946, § 4.1. So already *A. Chiusolo* (note 21), 22 et seq. See also *M. Luciani* (note 20), 89. See also in the past *M. Esposito*, Datio in solutum: una sentenza interpretativa di rigetto può costituire un equipollente di una sentenza di accoglimento?, *Giur. Cost.* (2004), 1560 et seq.

<sup>29</sup> By “consequential unconstitutionality” one has to understand the unconstitutionality of norms other than those mentioned in the order with which the judge *a quo* referred the question to the Constitutional Court. They become null and void as a consequence of the declaration of unconstitutionality of the norms explicitly challenged. For this notion see in English *G. F. Ferrari* (ed.), *Introduction to Italian Public Law*, 2008, 202.

<sup>30</sup> According to *R. Bin* (note 6), this would have been unprecedented and outrageous, since it assumes a state-centric and thus ultra-monist perception of the relationship between international law and domestic law.

#### IV. Municipal Courts' Implementation of Italian Constitutional Court's Decisions: Reconciling Constitutional Law with International Law?

A few months after Order No. 30/2015 has been handed down, a trend can be observed in the case-law of the Italian judiciary: the procedural inconsistencies of the Constitutional Court's decisions are assessed and offset by ordinary judges so as to avoid insofar as possible both new questions of constitutionality and frictions between constitutional law and international law.<sup>31</sup> In particular, ordinary courts asserted that Italy can disregard the binding force of the ICJ's judgment and be exempt from its international responsibility for three main different and alternative reasons: a) civil jurisdiction against a foreign State ought to be exercised since international crimes committed on the territory of the forum State cannot be qualified as *acta jure imperii* under international law; b) civil jurisdiction against a foreign State ought to be exercised because *jus cogens* norms safeguarding inviolable human rights have a higher rank than the rule of State immunity (so-called *Ferrini* case-law); c) civil jurisdiction against a foreign State ought to be exercised because of an existing exception to State immunity under regional international law, i.e. the law of the European Union, especially its Charter of Fundamental Rights, which does not allow inviolable human rights to be set aside by invoking the sovereign equality of member States.

Ultimately, as it will be pointed out hereunder, Italian judges are neither fully complying with the judgment of the Italian Constitutional Court nor with that of the ICJ, but they are pursuing an approach aimed at adjusting competing claims of authority, as originally suggested by *Peters*.<sup>32</sup>

a) First of all one has to consider the two judgments No. 21946 and No. 43696 delivered on 28. and 29.10.2015 by different chambers of the Corte di Cassazione.

In the former judgment, the Plenary Session for Civil Matters of the Corte incidentally considered that the denial of State immunity based on the "counter-limits doctrine" as prescribed by the Italian Constitutional Court

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<sup>31</sup> By contrast *R. Perona* (note 22), § 8, argues that ordinary courts should nonetheless keep challenging the constitutionality of the international custom by referring a new question before the Italian Constitutional Court so as to induce it to sustain the constitutional challenge to the law, even if the Court in its Order No. 30/2015 has declared applications of this nature inadmissible.

<sup>32</sup> *A. Peters*, (note 2), whereby "domestic (constitutional) courts do and should take into consideration international law in good faith and interpret the domestic constitution in the light of international law".

contributes to the evolution of international law in the terms already proposed by the Corte itself in its *Ferrini* case-law. In other words, the Italian Supreme Court sought to bring the judgment of the Constitutional Court in conformity with its previous case-law, which however drew directly upon customary international law and not upon domestic constitutional standards and which it had already overruled between 2012 and 2014.<sup>33</sup>

In the latter ruling, the Republic of Serbia was denied immunity by the Corte di Cassazione and hence ordered to pay compensation for war crimes committed by its State organs against Italian citizens in the context of the Yugoslavia breakup in 1991. Here the Court, on the one hand, reinstated the validity of its *Ferrini* case-law, but on the other hand, quite curiously, it also emphasized a crucial aspect of the Constitutional Court's reasoning, whereby municipal courts can play a role in advancing the level of protection of fundamental rights under international law only by referring to categories of domestic constitutional law and not by interpreting directly customary international law, a task for which only the ICJ is deemed to be competent.<sup>34</sup>

The two judgments are interesting for the further reason that they account for different findings on the question whether the decision of the Italian Constitutional Court entails the exercise of universal civil jurisdiction. The former ruling concerned a case of recognition and enforcement of a foreign judgment by which State immunity had been denied. The Plenary Session for Civil Matters of the Corte di Cassazione decided to refuse to recognize and enforce a foreign award issued by a U.S. District Court for international crimes allegedly committed by Iranian security services against an American citizen on the territory of the Israeli State. In contrast to the Appeal Court's decision back in 2013, which had upheld State immunity in order to comply with the ICJ's judgment, the Corte di Cassazione considered that this *ratio decidendi* is no longer applicable after Decision No. 238/2014 of the Italian Constitutional Court. Nonetheless, it denied *exequatur* of the foreign judgment, because the judge who handed it down did not have jurisdiction over the matter in accordance with the principles enshrined in Italian law. In fact, Decision No. 238/2014 does not imply that Italian courts enjoy universal jurisdiction for international crimes; the constitutional "counter-limits" against the entry of a customary international norm on State immunity into the municipal legal order are confined to in-

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<sup>33</sup> See *inter alia*: Italian Court of Cassation, Judgment of 21.1.2014, No. 1136; Italian Court of Cassation, Order of 21.2.2013, No. 4284; Italian Court of Cassation, Judgment of 30.5.2012, No. 32139.

<sup>34</sup> Italian Court of Cassation, Judgment of 29.10.2015, No. 43696, para. 5.2.

ternational crimes committed on the territory of the forum State. Recognition and enforcement of foreign judgments on the basis of the principle of universal jurisdiction would be contrary to the Italian notion of “public order”, as was already been acknowledged by the case-law of the Corte di Cassazione between 2008 and 2011.<sup>35</sup> Specularly, the Tribunale di Roma in its ruling No. 11069 of 20.5.2015, embraced again that portion of the *Ferrini* case-law, which allowed the enforcement of foreign judgments issued against Germany by Greek courts for international crimes committed on the territory of the Hellenic Republic.<sup>36</sup>

Yet, in its second judgment, the First Criminal Chamber of the Corte di Cassazione asserted civil jurisdiction against the Republic of Serbia for war crimes committed by Serbian military forces on the territory of the former Federal Republic of Yugoslavia, that is to say outside the territory of the forum State, thus apparently relying on the decision of the Italian Constitutional Court for extending the scope of the Italian jurisdiction to international crimes committed against Italian citizens abroad.<sup>37</sup>

b) In its judgment No. 1462, delivered on 28.9.2015, the Tribunale di Piacenza attempts at resolving the conflict existing between the ruling of the Constitutional Court and international customary law, redefining it as a conflict between different international legal obligations. In fact, the Tribunale explicitly reserves for itself the power to “re-examine” the current state of customary international law, finding that the “Constitutional Court had no competence for doing so and thus could not but taking for granted the determination of the international custom on State immunity as made by the ICJ”, which however “has not the scope and the content assigned to it by the Hague Court”. Following to the principle of non-contradiction, the Tribunale argues that compliance with customary international law cannot imply that an act of State to which immunity from jurisdiction shall apply entails a wrongful act under international law. According to the Tribunale, since the idea of sovereignty has allegedly its roots in the maxim that “the

<sup>35</sup> Italian Court of Cassation, Judgment of 29.5.2008, No. 14199. See the comment by G. Serrano, *Immunità degli Stati stranieri e crimini internazionali nella recente giurisprudenza della Corte di Cassazione*, *Rivista di Diritto Internazionale Privato e Processuale* 45 (2009), 623.

<sup>36</sup> Italian Court of Cassation, *Federal Republic of Germany v. Prefecture of Vojotia*, Judgment of 20.5.2011, No. 11163; Italian Court of Cassation, *Distomo* case, Judgment of 29.5.2008, No. 14199, RDI 87 (2009), 94.

<sup>37</sup> In this case, however, it must be born in mind that private claims against Serbia were brought within the context of criminal proceedings before Italian courts against two former members of the Yugoslavian army. Art. 3 para. 2 read in combination with Art. 10 of the Italian Criminal Code provides in fact for conditional universal jurisdiction against foreigners who commit a crime against Italian citizens abroad.



King can do no wrong”, international crimes and violations of fundamental norms of international law committed by organs of the State, such as those perpetrated by the Third Reich on Italian territory, cannot be covered by immunity.<sup>38</sup> As the municipal court sees it,

“the antinomy between constitutional and international law and also between different norms of international law is only apparent, because the bar of sovereign immunity as invoked by Germany should be seen as limited in its functional scope to those acts which constitute a legitimate exercise of coercive power”.

Unlike the systematic interpretation of international law as relied upon by the Corte di Cassazione in its *Ferrini* case-law,<sup>39</sup> which argued that denial of immunity is grounded in the higher rank of *jus cogens* norms safeguarding inviolable human rights, the Tribunale holds that the acts performed by the State violating basic human rights cannot be qualified as being *jure imperii* and therefore civil jurisdiction against it can be exercised. Consequently, the international responsibility of the Italian State should not be engaged insofar as Italy denies State immunity for safeguarding inviolable human rights.

c) In its judgment No. 2468 delivered on 6.7.2015, the Tribunale di Firenze – which is not to be confused with the judge who referred the question of constitutionality back in 2014 – admitted that the customary norm on State immunity as defined by the ICJ has still binding force under international law so that the domestic judiciary retains the power to decide whether to exercise civil jurisdiction or not and to balance the custom as a source of international law with the rules on State immunity as corrected by the Italian Constitutional Court.

“By checking out the concrete feasibility of the international custom on State immunity there might be room for balancing the principles confirmed by the ICJ and those proclaimed by the Italian Constitutional Court.”

In other words, the Tribunale attempted to reconcile domestic and international law. Even if the balancing exercise turned out to be favorable to the plaintiff, thus basically confirming the substance of the Italian Constitu-

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<sup>38</sup> So in the literature *inter alia*: A. Orakbelashvili, State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong, in: EJIL 19 (2008), 969. In the case-law see already Greek Supreme Court (*Areios Pagos*) (note 14).

<sup>39</sup> See Italian Court of Cassation, *Ferrini v. Federal Republic of Germany*, Judgment of 11.3.2004, No. 5044/2004, ILR 128, 658; Italian Court of Cassation, *Federal Republic of Germany v. Giovanni Mantelli et al.*, Preliminary Order on Jurisdiction of 29.5.2008, No. 14201 et seq., International Law in Domestic Courts 1037 (2008); Italian Court of Cassation, *Milde case*, Judgment of 21.10.2008, No. 1072, International Law in Domestic Courts 1224 (2009).

tional Court's judgment, the Tribunale maintains that the exercise of civil jurisdiction does not per se pose a risk for the sovereignty of Germany since it is merely a judgment having declaratory nature ("*sentenza di mero accertamento e condanna*") and not implying enforcement and execution.<sup>40</sup> Conversely, if State immunity had been upheld, the right to a judge as defined by the Italian Constitution would have definitely been infringed upon. Italy and Germany could hence still engage into negotiations and settle the question by means of an inter-State agreement, as recommended also by the International Court of Justice in paras. 99 and 104 of its ruling, according to the Tribunale. Accordingly, a formal invitation to enter negotiations was made by the referring judge of Florence in its Order of 23.3.2015 when resuming proceedings after the Decision of the Italian Constitutional Court. Therein, the judge observed that

“considering that the dispute at hand implies the tangible risk for Italy of committing an international wrongful act, an attempt of mediation between the applicants and the Federal Republic of Germany as well as between Italy and Germany should be made in accordance with Article 185 of the Code of Civil Procedure,”

thus basically combining domestic law and passages of the ICJ's judgment to call upon the two States to reach an agreement.<sup>41</sup>

Addressing the consequences of a possible non-compliance by Italy with international law, the Tribunale first referred to Art. 32 of the ILC-Draft Articles on State Responsibility, whereby “the responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part”, as well as to Art. 27 of the Vienna Convention on the Law of the Treaties, which stipulates that a State “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. Yet, according to the Tribunale, this principle might be subject to exceptions when the protection of fundamental human rights is at stake and this should in particular be the case when these rights are enshrined not only in the national Constitutions of both States parties to the

<sup>40</sup> Accordingly, in its ruling No. 1278 delivered on 27.1.2015, the Corte di Appello di Milano refused to take measures of constraint on the Villa Vigoni, a property of the Federal Republic of Germany in Italy, otherwise it would have violated its immunity from enforcement. According to the Corte, in fact, immunity from adjudication or from suit and immunity from enforcement are subject to different legal regimes under international law. The judgment No. 238/2014 of the Italian Constitutional Court concerned the question of immunity from adjudication only.

<sup>41</sup> Very critical of this attempt of mediation is *K. Oellers-Frahm, A Never-Ending Story: The International Court of Justice – The Italian Constitutional Court – Italian Tribunals and the Question of Immunity*, in this issue p. 193.

dispute, but also in the Charter of Fundamental Rights of the EU, a supra-national organization to which they both belong. In other words, Italy can allow itself to disregard the binding force of the ICJ's judgment as set out in Art. 59 of the ICJ's Statute and is hence exempt from any responsibility, since the international custom on State immunity is deemed to have a more restricted scope when applied within the legal orders of the member States of the European Union.

A so-called "human rights exception" to State immunity based on regional international law<sup>42</sup> is hence the result of the appraisal of the Tribunale di Firenze, which appears to follow a proposal made by *Nollkaemper* that "decisions to refrain from giving effect in domestic legal orders to international law may be based on rules of domestic law that conform to or give effect to another rule of international law" or also "to a rule of its internal law of fundamental importance that corresponds to international obligations pertaining to the protection of fundamental rights".<sup>43</sup> Here, the corresponding international obligation can only be purported, but what deserves attention is the attempt of an Italian ordinary court to reconcile constitutional law with international law, thus overcoming the "Triepelian approach" of the Italian Constitutional Court.

## V. Concluding Observations

In this paper it has been shown that Decision No. 238/2014 put Italian municipal courts before an awkward choice: either upholding State immunity as defined by the International Court of Justice or implementing the judgment by the Italian Constitutional Court. In fact, the Constitutional Court, even if it acted within its jurisdiction, did not question the accuracy of the description of the current state of customary international law given by the ICJ, nor did it declare the international custom on State immunity unconstitutional. Nonetheless, it might be argued that the Italian judiciary

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<sup>42</sup> According to *P. de Sena* (note 17), 31, "one may therefore wonder if the judgment at issue is also to be deemed a significant contribution to the progressive development of a *regional* customary rule, according to which *European* States may invoke constitutional provisions on access to justice, as a circumstance capable of precluding the wrongfulness of their failure to comply with conflicting international legal duties".

<sup>43</sup> *A. Nollkaemper*, Rethinking Supremacy of International Law, in: ZöR 65 (2010), 76 and 82. See also *A. Tzanakopoulous*, Domestic Courts in International Law: The International Judicial Function of National Courts, *Loy. L. A. Int'l & Comp. L. Rev.* 34 (2011), 143, who speaks of "consubstantial norms", that is to say domestic rules that are in substance reflective of an existing international rule.

has conformed to the interpretation endorsed by the Italian Constitutional Court, while at the same time trying to safeguard the uniform application of international substantive law, thereby attempting to overcome and accommodate the fracture between domestic and customary international law caused by the “Triepelian approach” of the Italian Constitutional Court.

In particular, domestic courts have been coping with the possibility of triggering the responsibility of the Italian State under international law whenever State immunity is denied by Italian courts and, building upon specific passages of the ICJ judgment (paras. 99 and 104), have suggested that Italy can disregard the binding force of the judgment by the International Court of Justice and be exempt from responsibility for different reasons which were outlined above. In particular, State immunity could be set aside either because international crimes were not qualified as being *acta jure imperii* under international law or because *jus cogens* norms safeguarding inviolable human rights have a higher rank (so-called *Ferrini* case-law) or, finally, because of an existing exception under regional international law, i.e. the law of the European Union, especially its Charter of Fundamental Rights, which does not allow inviolable human rights to be set aside by invoking the sovereign equality of member States.

All solutions put forward by the Italian judiciary, albeit creative, are dubious and questionable, first of all because they merely draw upon international substantive law, whereas the *inter partes* binding effect of the ICJ’s judgment is a question of international procedural law. Further, as concerns international substantive law itself, much has already been said in the literature about the consistency of the *Ferrini* case-law<sup>44</sup> as well as on the view that international crimes cannot constitute *acta jure imperii*.<sup>45</sup> The question which still has to be addressed is whether an exception to State immunity can indeed be derived from regional international law, i.e. EU law.

First of all, one could argue that Council Regulation No. 44/2001 (so-called *Brussels I*) on recognition and enforcement of judgments in civil matters covers also legal actions brought against a member State for compensa-

<sup>44</sup> See *inter alia*: A. Gattini, The Dispute on Jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?, LJIL 24 (2011), 173 et seq.; C. Focarelli, Diniego dell’immunità giurisdizionale degli Stati stranieri per crimini, jus cogens e dinamica del diritto internazionale, Riv. Dir. Int. 91 (2008), 738 et seq.; C. Tomuschat, L’immunità des Etats en Cas des Violations Graves de Droits de l’Homme, RGDIP 109 (2005), 51 et seq.

<sup>45</sup> See CJEU, *Lechouritou and others v. Federal Republic of Germany*, Opinion of the Advocate General Dàmaso Ruiz-Jarabo Colomer, 8.11.2006, § 63-66, “if the acts concerned were not *iure imperii* or, by definition, *iure gestionis*, it would only be possible to attribute liability to the persons who actually caused the damage rather than to the authorities to which they belong”.

tion in respect of acts perpetrated by armed forces on the territory of the forum State. However, this view can hardly be supported. In fact, in the *Lechouritou v. Germany* case, the Court of Justice of the European Union (CJEU) pointed out that the aforementioned Regulation does not cover a legal action brought by natural persons in a Contracting State against another Contracting State for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State. In fact, operations conducted by armed forces have to be regarded as resulting from the exercise of public powers (*acta jure imperii*) and therefore do not fall under the scope of the Council Regulation.<sup>46</sup>

Nor can it be said that the fact that the EU Charter of Fundamental Rights has the same value as the Treaties and is legally binding (Art. 6 para. 1 Treaty on European Union [TEU]) has brought about a profound change of the EU legal framework in this respect. The Charter, in fact, reaffirms the rights as they result from the constitutional traditions of the member States and does not extend the competences of the EU, since it only applies when member States are implementing EU law, that is to say when they act within the scope of Union law (Art. 51).<sup>47</sup> In the light of above, it cannot be claimed that Council Regulation No. 44 (2001) ought to be struck down for infringing upon Art. 47 of the Charter to the extent that the judge which shall give *exequatur* to a foreign judgment is not allowed to verify *in concreto* whether or not the bar of immunity deprives the plaintiff of the only legal remedy available.<sup>48</sup> In fact, EU law does not apply to situations in which

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<sup>46</sup> CJEU, *Lechouritou and others v. Federal Republic of Germany*, C-292/05, Judgment of 15.2.2007, §§ 27-46. In favor of the application of the Brussels Convention to so-called human rights claims see however in the literature C. Kessedjian, *Les actions civiles pour violation des droits de l'homme. Aspects de droit international privé*, in: *Travaux du comité français de droit international privé*, année 2002-2004, 2005, 158 et seq. Critical of the CJEU's judgment was N. Boschiero, *Jurisdictional Immunities of the State and Exequatur of Foreign Judgments*, in: N. Boschiero/T. Scovazzi/C. Pitea/C. Tagni (eds.), *International Courts and the Development of International Law*, 2013, 803 et seq.

<sup>47</sup> On the interpretation of Art. 51 of the Charter see A. Ward, *Article 51 – Field of Application*, in: S. Peers/T. Hervey/J. Kenner/A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, 1<sup>st</sup> ed. 2014, 1413 et seq. And on the most recent trends concerning the scope of application of the Charter see the contribution by M. Cartabia, *La tutela multilivello dei diritti fondamentali*, 2014, available at <<http://www.cortecostituzionale.it>>, 5 et seq.

<sup>48</sup> By doing so, the CJEU would establish a more lenient standard of protection than that granted under Art. 6, para. 1 ECHR by the Strasbourg Court. See ECtHR, *Al Adsani v. United Kingdom*, App. No. 35763/97, 21.11.2001; *McElhinney v. Ireland*, App. No. 31253/96, 21.11.2001; *Fogarty v. United Kingdom*, App. No. 37112/97, 21.11.2001. See however E. Voyakis, *Access to Court v. State Immunity*, ICLQ 2 (2003), 310 et seq., who argues that the Strasbourg Court did not really apply any proportionality test. Quite interestingly, Italian

public powers have been exercised by a Contracting Party on the territory of another Contracting Party and the Charter as such is not capable to extend the scope of EU law, as clarified by the CJEU in the case of *Gennaro Currà and others v. Germany*, in which the issue of objection to State immunity was deemed not to fall within the scope of EU law.<sup>49</sup>

Hence, even after the Lisbon Treaty entered into force and the Charter acquired the same value as the Treaties, a municipal court of a member State cannot resort to its own interpretation of Art. 47 of the Charter to deny the immunity of another member State. In any case, it remains questionable whether it would fall within a (supranational) Court competence to scrutinize conditions such as the existence of “alternative legal remedies” which are political questions, dependent upon negotiations between sovereign States.

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courts have so far avoided to apply the “alternative-remedy test” to disputes over employment cases with international organizations. In this respect see *R. Pavoni*, Italy, in: A. Reisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts*, 162 and 167.

<sup>49</sup> CJEU, *Gennaro Currà and others v. Federal Republic of Germany*, C-466/11 Order of 12.7.2012, §§ 12-27.

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