

**ITALIAN CONSTITUTIONAL COURT JUDGMENT 238/2014 DECLARES CUSTOMARY
INTERNATIONAL LAW ON STATE IMMUNITY INAPPLICABLE IN THE ITALIAN LEGAL ORDER AS
FAR AS WAR CRIMES AND CRIMES AGAINST HUMANITY ARE CONCERNED**

The Judgment in brief

On 22 October 2014, the Italian Constitutional Court ('the Court') rendered a Judgment concerning the constitutional legitimacy of certain Italian norms which had been adopted by Italy in order to give application to the International Court of Justice's 2012 Judgment on *Jurisdictional Immunities of the State (Germany v. Italy)*. In the *dispositif*, the Constitutional Court first declared Article 3 of Italian law 5/2013 constitutionally unlawful. While Law 5/2013 in general concerned the ratification of the UN Convention on Jurisdictional Immunities (a ratification which stands), the Italian Parliament had introduced Article 3 as an explicit adaptation mechanism to the ICJ Judgment of 2012, requiring Italian Courts to decline jurisdiction in any cases where the International Court of Justice had decided that Italian civil Courts should not adjudge upon the conduct of other States; Courts were also required to revoke any decision previously rendered in contrast with the ICJ Judgment if so requested by the parties. Second, the Court declared the 1957 Italian law of ratification of the UN Charter constitutionally unlawful,

"with respect to the execution given to Article 94 of the Charter, only to the extent in which it obliges Italian Courts to comply with the Judgment of the International Court of Justice of 3 February 2012, which requires them to decline their jurisdiction in relation to the acts of a foreign State which consist in war crimes and crimes against humanity, impairing inviolable human rights".

Third, the Court found that there was no need to decide whether customary international law concerning state immunity for war crimes and crimes against humanity was unlawful under domestic constitutional law, because such a rule, despite its undoubted existence in general international law in light of the authoritative construction by the International Court of Justice, could not be deemed as existing in the Italian legal order, since its conflict with basic principles of the Italian legal order rendered impossible any domestic reception through Article 10 of the Italian Constitution, which is otherwise designed to automatically transpose customary international law into domestic Italian law.

Reasoning of the Court

1. The Constitutional Court recognizes that it is not called to assess whether, under general international law, the rule on state immunity exists in the form that the International Court of Justice described. The ICJ gave what must be regarded as a "particularly qualified interpretation, which does not allow further examination by governments and/or national judges, including this Court", also in light of recent confirmative pronouncements of the European Court of Human Rights.
2. By virtue of Article 134 of the Italian Constitution, the Constitutional Court is the only Court tasked with the judicial review of any norm of Italian domestic law in order to check for its compliance with the Italian Constitution, and especially with its fundamental principles and inviolable human rights. This includes any domestic law which is in fact arising from the transposition or implementation in the domestic legal order of international law, be it customary international law (generally received through Article 10 of the Italian Constitution) or other limitations of the country's sovereignty accepted by treaty (for instance EU law).
3. The fundamental principles of the Italian constitutional order and of inalienable human rights constitute "a limit to the reception of international rules generally recognized [ie customary international law] to which the Italian legal order conforms under Article 10(1) of the Constitution", in the sense that rules in breach of such fundamental principles cannot be received in the domestic legal order.

4. The rule concerning the immunity of States from the domestic jurisdiction of other States is very old and has been progressively limited in the context of *acta iure gestionis* thanks also to the approach taken since the beginning of the Twentieth Century by Italian and Belgian Courts. In a constitutional legal order such as the Italian one, the Constitutional Court is the only body entitled to evaluate whether immunity rules are compatible with basic principles, “with the effect of producing a further reduction of the scope of the [immunity] rule, with effects only in the domestic legal order but such as to also participate in the evolution of international law which is needed, and urged by many”.
5. In this context, the Constitutional Court recalls Articles 2 and 24 of the Constitution. Article 2 provides that “The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled”. Article 24 provides that “Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law. Defense is an inviolable right at every stage and instance of legal proceedings. The poor are entitled by law to proper means for action or defense in all courts. The law shall define the conditions and forms of reparation in case of judicial errors”.
6. According to consolidated interpretation of these basic principles of the Italian constitutional order, there is a right to have access to justice in order to protect one’s fundamental human rights. The right to judicial protection is “among the great principles of legal civilisation in every democratic system of our times”.
7. The Constitutional Court takes note of Germany’s own admission in proceedings before the ICJ that war crimes and crimes against humanity were committed, and that, as confirmed by Germany’s counsel before the ICJ, no Court is available to redress victims of such crimes. That such crimes existed was also confirmed by the ICJ.
8. Such a right to a judicial remedy would thus, in the present circumstances, clearly be violated, without any corresponding constitutionally protected value which may be balanced with it, since it is established that the acts in question by Germany were unlawful: “The immunity of a foreign state from the jurisdiction of the Italian judge permitted by Articles 2 and 24 Constitution protects the function, not also conduct outside the typical exercise of governmental power, because it is explicitly deemed and qualified as illegitimate, as it breaches inviolable rights, as recognized, in this case, by the ICJ itself and, before it, by the Federal Republic of Germany”. In other words, for the Constitutional court, the function of state immunity is not to protect the unlawful exercise of state power, as in that case the violation of Article 24, otherwise admitted in normal cases of state immunity, would be disproportionate.
9. It follows from the contrast from the immunity rule and basic principles of Italian constitutional law that the rule, insofar as it extends immunity to war crimes and crimes against humanity, is not transposed in the Italian legal order by Article 10, so that “it has not entered the Italian legal order and does not have, therefore, any effect therein”. The rule on state immunity is thus transformed in the Italian legal order and effectively includes an exception for crimes against humanity and war crimes.
10. Such a contrast also determines the constitutional illegitimacy of the implementation provisions of the ICJ Judgment, as well as the corresponding obligation, under Article 94 of the UN Charter, to comply with it. With reference to such specific judgment, the obligation of Article 94 of the UN Charter is not applicable in domestic Italian law.
11. This is, of course, without prejudice to all the other effects of the UN Charter and other international provisions, which still have force of domestic law in the Italian legal order.