ZOOM OUT

The question:

Colliding legal systems or balancing of values? International customary law on State immunity *vs* fundamental constitutional principles in the Italian Constitutional Court decision no 238/2014

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It is by no means an exaggeration to suggest that decision no 238 rendered on 22 October 2014 by the Italian Constitutional Court presents with all the features to become one of the leading cases of international, as well as constitutional law.

In fact, this decision represents the latest development (and perhaps not the final one) in the seemingly never ending dispute involving Germany and Italy on the applicability of State immunity to grave breaches of human rights and humanitarian law. As is widely known, the issue arose from a series of decisions of Italian courts (the first of which was the 2004 decision of the *Corte di Cassazione* in the *Ferrini* case) denying to Germany immunity from jurisdiction in lawsuits concerning reparations demanded by Italian nationals, who during the WWII were subjected by Nazi occupation forces to deportation, forced labour and other mistreatment amounting to war crimes and crimes against humanity. The finding of Italian courts that the acts involved, as breaches of *jus cogens* obligations, cannot be covered by the traditional customary rule on State immunity was, however reversed by the 2012 judgment of the International Court of Justice (ICJ) in the Germany/Italy dispute. In that judgment the World Court considered that, even if the conduct of Germany amounted to a breach of *jus cogens* rules, the applicability of the customary international law on State immunity was not affected; thereby concluding that Italy violated the obligation to respect the immunity which Germany enjoyed under international customary law by allowing civil claims in Italian courts against Germany; and further held

that Italy had to ensure that the decisions of its courts infringing the immunity of Germany cease to have effect.

In January 2014, the Tribunal of Florence raised before the Italian Constitutional Court a question of constitutionality under three distinct headings. They concerned respectively: *i*) the constitutional legitimacy of the norm created in the Italian domestic system by the incorporation, under Article 10, para 1, of the Constitution, of the international custom as ascertained by the ICJ in its 2012 judgment, insofar as it grants immunity from jurisdiction in actions for damages for war crimes and crimes against humanity; *ii*) the constitutional legitimacy of the Italian law of execution of the United Nations Charter, insofar as it incorporated Article 94 of the UN Charter, which obliges Italy to comply with the judgment of the ICJ establishing the duty of Italian courts to deny jurisdiction in lawsuits concerning crimes of war and crimes against humanity; *iii*) the constitutional legitimacy of the 2013 Italian law adopted following the ICJ judgment, insofar as it obliges the national judges to comply with the ICJ ruling and to deny their jurisdiction in the examination of actions for damages for war crimes and crimes against humanity.

In the October 2014 decision under consideration, the Italian Constitutional Court declared ill-founded the first question of constitutionality, arguing that the mechanism of 'referral by incorporation' provided for in Article 10 of the Constitution cannot operate in respect of the international customary rule on State immunity as ascertained by the ICJ, which cannot be admitted and applied into the Italian domestic order because of the conflict with the fundamental principles of Article 2 and 24 of the Constitution, respectively recognizing and guaranteeing the inviolable rights of the human person and the individual right to access to justice. On the same assumption, the Constitutional Court also declared the constitutional illegitimacy of the law of execution of the UN Charter so far as it concerns the execution of Article 94 of the Charter, and of the relevant provisions of the 2013 law, to the extent that they oblige the Italian judiciary to comply with the 2012 ICJ judgment.

It is clear that, besides the intricate legal issues surrounding the case at hand, the major challenge posited by the reasoning of the Italian Constitutional Court lies in the idea that a State can maintain some leeway, by invoking some essential principles of its internal (constitutional) order, in deciding how and when international law obligations can be admitted or not in the domestic legal system. It is no surprise that the

decision 238/2014 has reignited the evergreen debate between the supporters/detractors of monism or dualism, and that this decision has been equated by some quarters to some recent judicial decisions indicated as outstanding examples of a rigid dualistic approach to the question of the relationship between international and domestic legal orders, such as the US Supreme Court decision in *Medellin*, or the *Kadi* judgment of the EU Court of Justice.

Some of those concerns above seem to be justified by the fact that the *Kadi* judgment is expressly referred to in the context of the decision no 238/2014. However, one must not underestimate the passages where the Italian Constitutional Court vindicates that the aim of its constitutional review is 'to preserve the inviolability of fundamental principles of the domestic legal order, or at least to minimize their sacrifice', at the same time recalling that 'balancing is one of [its] ordinary tasks that this Court is asked to undertake'. This seems to reveal an attempt to settle the issue of the compatibility between State immunity and fundamental human rights through a principled and reasoned approach, based on the balancing of the interests at stake, as such going well beyond a rigid dualistic stance. It would also be unwarranted to postulate the refusal or indifference of the Constitutional Court for the international legal order, insofar as the Court discloses its awareness that its principled attempt to limit the scope of State immunity in cases of severe breaches of human rights and humanitarian law 'may also contribute to a desirable – and desired by many – evolution of international law itself'.

To sum up, decision no 238/2014 seems to involve a bundle of critical legal questions that go well beyond the issue of the relationship between international and domestic law – with all the constitutional intricacies related thereto – to touch upon larger issues such as the methods and technics for solving normative conflicts, the process of formation and modification of international customary rules and the role of domestic courts in this process. In order to provide its readers with insights into those multiple legal questions, QIL has chosen to organize an open-ended and enlarged debate on decision no 238/2014, by devoting to this landmark case its second Zoom-out and inviting the participation of scholars from both an international and constitutional law background.