

**Decision no. 238/2014 of the Constitutional Court:  
Between undue fiction and respect for constitutional principles**

*Cesare Pinelli\**

1. Decision no 238/2014 of the Italian Constitutional Court raises a vast array of both international and constitutional law issues: to begin with, how Article 10, para. 1<sup>1</sup>, of the Italian Constitution has been interpreted and, secondly, whether the Court struck the right balance between Article 10 and Article 24<sup>2</sup> and its interaction with Article 2<sup>3</sup>.

2. To understand the aforementioned issues, an account of the main circumstances of the case is necessary.

In the *Ferrini* case (2004), the Italian Supreme Court - Civil Section ruled that state immunity from foreign civil jurisdiction did not prevent Italian courts from hearing tort claims brought by Italian citizens against Germany when seeking compensation for international law crimes committed by the Nazi forces in Italy during World War II. This unprecedented conclusion was grounded on the assertion that, in civil courts, a breach of *jus cogens* rules cannot be overlooked simply due to the existence of sovereign immunity and regardless of whether the wrongful acts are *jure imperii*. Thus, in the name of the seeking to prevent the most horrendous crimes, the *Ferrini* judgment sought to balance the rationale of sovereign immunity and of *jus cogens* norms. In

\* Professor of Public Law, University of Rome 'La Sapienza'.

<sup>1</sup> 'The Italian legal system conforms to the generally recognised principles of international law'.

<sup>2</sup> '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'.

<sup>3</sup> 'The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed'.



addition, it accorded special weight to the so-called tort exception, according to which sovereign immunity cannot apply to conduct, which gives rise to tort liability, which is committed on the territory of the forum State.

Subsequently, Germany filed an appeal against Italy in the International Court of Justice (ICJ). On 3 February 2012, in *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, the ICJ held that the customary law on State immunity from foreign civil jurisdiction for acts *jure imperii* was not only still generally recognized – both in State practice and by national judges (with the sole exception of Italian courts) – but that it amounted to a procedural rule preventing the exercise of jurisdiction in certain *fora*, without conflicting as such with the material rules of *jus cogens*. Accordingly, the ICJ called upon Italy to ‘ensure that the decisions of its courts and those of other judicial authorities infringing [upon Germany’s immunity] cease to have effect’ (para 139).

In the aftermath of that judgment, the Italian Parliament passed Law no 5 of 14 January 2013 which, besides ratifying the 2004 United Nations Convention on the ‘Jurisdictional Immunities of States and Their Property’, provided a statutory basis for the judicial implementation of *Jurisdictional Immunities*. Paragraph 1 of Article 3 requires Italian judges to decline jurisdiction in pending proceedings when the ICJ has ordered Italy to do so. Paragraph 2 introduced grounds for reopening final judgments other than those provided for in Articles 395 and 306 of the Code of Civil Procedure, whenever such judgments clash with a judgment of the ICJ barring Italy from exercising jurisdiction, even when it comes after the domestic judgment.

Meanwhile, the Tribunal of Florence had accepted jurisdiction over three civil claims against Germany for crimes committed in Italy during World War II. After the ICJ’s decision and the adoption of Law no 5 of 2013, that Tribunal took the case to the Italian Constitutional Court, questioning the compatibility of: 1) the customary rule mirroring the international custom of immunity, automatically incorporated in the internal system through the mechanism provided in Article 10, para 1, of the Constitution; 2) the statute ratifying the UN Charter, insofar as it compels Italy to obey the ICJ under Article 94 of the Charter; and 3) the already reported Article 3 of Law no 5 of 2013 with Articles 24 and 2 of the Italian Constitution. The referring judge specified that these



questions did not concern the interpretation of international law reflected in the ICJ's ruling, but the constitutionality of the abovementioned domestic measures.

3. The Constitutional Court rejected the first issue on the ground that the customary international rule never entered the Italian legal order, since it runs counter to the fundamental rights enshrined in Articles 24 and 2 of the Constitution. For that very reason, it conversely declared the unconstitutionality both of the act through which Italy complied with its international legal obligations and of the statute ratifying the UN Charter, insofar as it required obedience to the ICJ's decision. Notwithstanding their common rationale, namely that compliance with the ICJ's decision entails an inevitable forfeiture of the fundamental rights of Italian citizens, the three cases were thus solved in a different manner. In particular, why did the Court reject the first complaint, despite agreeing with the referring judge on the merits?

It is worth premising that, in the Italian constitutional review system, the Court may reject a certain issue when it finds that the impugned rule can be interpreted in compliance with the Constitution. In our case, however, the Court claimed that the customary international rule did not even enter the Italian legal order, and should thus be considered as non-existent, because it violates fundamental rights that cannot be breached even by constitutional rules or international customs. In other words, according to the Court, Article 10 of the Constitution provides for the incorporation of international customs into Italian law, as long as they do not breach fundamental principles and inviolable rights. This is what occurred, in the Court's view, with respect to the impugned rules of State immunity.

The inner consistency of such a conclusion, and its compliance with other statements contained in the decision, will be examined in light of the Court's reasoning, and particularly with respect to the assertion that its own review consists of 'balancing norms of constitutional rank', namely the immunity of a State *iure imperii* from the jurisdiction of a foreign State, and the abovementioned fundamental rights.

4. The Court's reasoning is founded on three pillars. The first opens with the observation that a doctrine tending to erode the application of absolute immunity emerged at the beginning of the 20th century through the decisions of national judges, Italian and Belgian in particular, according to which *acta jure gestionis* entailed 'an unfair restriction of the rights of private contracting parties' and were thus not immune from foreign jurisdiction (para. 3.3). If ordinary judges felt entitled to challenge the legality of international customs back then, when Italy did not have a rigid Constitution (that is to say one of higher rank than statutes), the Court held that it would not hesitate today to review these customs under a rigid Constitution that recognizes judicial review of legislation and of similar acts or norms, including international customs (para. 2.1).

This method of reasoning, being founded on the argument *a fortiori*, does not add anything to the Court's competence under the Constitution in force. In this regard, the mere circumstance that the legality of international customs was challenged by judges that were deprived of the Court's powers appears irrelevant.

The other two pillars seem, on the contrary, to be crucial in providing a solution to the case. While the former concerns the fundamental rights at stake, the latter refers to the scope of the immunity rule.

The standards of the guarantee of 'the inviolable rights of the person' (Article 2 of the Constitution) and of access to justice (Article 24) appear inseparable to the Court, because 'it would be indeed difficult to tell how much of a right is left, if it cannot be invoked before a judge to seek an effective remedy' (para 3.4). Such a deep connection, which is far from novel in the Court's case-law (see, *inter alia*, decisions no 26/1999, 29/2003, 386/2004, 120/2014), justifies the repeated assertion that 'the duty to ensure a judge and a judgment to anyone, anytime and in any dispute' has to be enumerated among 'the supreme principles of our constitutional order', namely those principles that cannot be violated, even by norms of constitutional rank (see decisions no 18/1982 and 82/1996). In particular, decision no 18/1982 declared the illegitimacy of some rules of execution of the 1929 Treaty with the Holy See ('Concordato'), whose rank is deemed equivalent to that of constitutional rules.

This part of the Court's reasoning concerns only the domestic order, although the seemingly ironic consideration that 'it would be indeed difficult to tell how much of a right is left, if it cannot be invoked before

a judge to seek an effective remedy' might be viewed as a reply to the ICJ's statement that procedural rules, such as those concerning the State's immunity from foreign jurisdiction, do not conflict with material rules, including the norms of *jus cogens*. The Constitutional Court thus seeks to demonstrate that the ICJ's formal approach to the issue at stake means a loss of the effective judicial guarantees that should never be disentangled from the enjoyment of a certain right.

5. The third pillar of the Court's reasoning is focused on the immunity rule. Restrictions of access to justice, so the argument goes, are justified only in order to protect another constitutional value, as is generally the case in the field of sovereign immunities preserving the integrity of international relations. However, the Court held that, in the case of immunity for international crimes, the absolute sacrifice of the victims' right to access to justice is unjustifiable. More precisely, the Italian constitutional order does not contemplate any prevailing public interest that would support the restrictions of the rights under Articles 2 and 24 of the Constitution. This is because, in the case of sovereign immunity, such restrictions 'must be connected – substantially and not just formally – to the sovereign function of the sovereign State, through the typical exercise of its governmental powers' (para 3.4). Nor could the maintenance and development of peaceful inter-state relations, as provided for in Articles 10 and 11 of the Constitution, force the Italian constitutional system to breach fundamental principles and inviolable rights. Immunity cannot protect acts that bear no relation with the typical exercise of public powers, are expressly considered and found to be wrongful because of a breach of inviolable rights (as in the present case), that are, in spite of this, deprived of any judicial remedies (as was acknowledged by the ICJ itself with respect to Germany's conduct). Therefore, the sacrifice of two supreme constitutional principles is hugely disproportionate to the goal of avoiding interference with the governmental powers of a foreign State. This conclusion is necessary when, as in the present case, governmental powers resulted in acts that can be, and were, qualified as war crimes and crimes against humanity breaching inviolable human rights. As such, these acts fall outside the lawful exercise of governmental powers (para 3.4).

The notion that the customary rule of immunity from jurisdiction prevails over access to justice as long as it is connected ‘substantially and not just formally’ to governmental functions appears as a further response to the ICJ’s ruling. Once again, the Constitutional Court maintains that the ICJ’s formal approach is ill-founded, since it puts any State’s act, including war crimes and crimes against humanity, under the ‘immunity’ label. This is a particularly weak point in the ICJ’s reasoning in *Jurisdictional Immunities*. The ICJ regularly classified these crimes as acts committed by ‘armed forces during an armed conflict’, thus taking into account the subjective fact that these crimes had been committed by the German State, rather than the nature of these acts. This deliberate classification was strongly criticized by Judge Cançado Trindade in his dissenting opinion: ‘It is not at all State immunity that cannot be waived. There is no immunity for crimes against humanity. In cases of international crimes, of *delicta imperii*, what cannot be waived is the individual’s right of access to justice, encompassing the right to reparation for the serious violations of the rights inherent to him as a human being. Without that right, there is no credible legal system at all, at national or international levels’. The Italian Constitutional Court clearly shares such opinion.

6. At this point, we can evaluate the Court’s statement that the customary international rule never entered the domestic system, the effect of which was to reject the Tribunal of Florence’s petition.

The consistency of such a statement appears *prima facie* doubtful. The consideration of the customary international rule as non-existent in the Italian legal order corresponds to the fact that the Court had already re-defined the issue at stake, or the *thema decidendum*. Unlike the referring judge, whose question considered whether ‘the norm that had been produced in our legal order through the adaptation under Article 10, para 1, of the Constitution’ of the customary international rule as interpreted by the ICJ in *Jurisdictional Immunities*, contrasts with Articles 24 and 2 of the Constitution, the Court declares surreptitiously that the scrutiny directly concerns the customary international rule (para 3.1). A few lines later, however, it adds that that scrutiny consists of ‘balancing norms of constitutional rank’. The former statement contrasts sharply with the latter, to the extent that the operation of balancing two norms



presupposes that both pertain to the same legal order. Furthermore, if the customary international rule did not exist in the domestic order, how could the Court exert its judicial review powers over it? And, no less importantly, how could the referring judge impugn a non-existent rule before the Court?

The notion that the scrutiny concerned the existence of the customary international rule in the domestic legal order should have brought the Court to declare the issue inadmissible, without examining it on the merits. Otherwise, if the Court was convinced, as it certainly was, that that rule violated the fundamental principles laid down in Articles 24 and 2 of the Constitution, it should not have re-defined the *thema decidendum*, thus accepting the referring judge's request to examine the national customary rule produced by the automatic adaptation as provided in Article 10 of the customary international rule. There is no alternative, in my opinion, it is a case of *tertium non datur*. The rejection of the application corresponds to that *fact*, since it presupposes the existence of the impugned norm in the domestic order, and, on the other hand, declares that such rejection depends on the consideration that that norm 'cannot enter', and therefore does not exist in, the domestic order.

It is true that the Court's case-law concerning the automatic adaptation mechanism provided in Article 10 is far from unambiguous. On occasions, the Court has examined the constitutionality of a domestic customary rule produced from its adaptation as a result of an international custom (decision no 48/79), while on other occasions it examined the question of whether customary international rules that are deemed incompatible with the supreme constitutional principles could 'enter' the domestic order (decision no 73/2001). But, in our case, as I have attempted to demonstrate, both these perspectives are discernible.

7. It follows then that, on formal grounds, the Court has not resorted to a balancing operation. It has rather, directly confronted the customary international rule as interpreted by the ICJ, namely the sole 'existing' customary rule, with the principles laid down in Articles 24 and 2 of the Italian Constitution. This inference further demonstrates that the Court's claim that it was establishing whether the immunity rule 'entered' the domestic legal order amounts to a fictitious pretention, en-

gendering strong contradictions in the entire reasoning. The declaration that the norm on immunity – as resulting from the ICJ’s ruling – simply does not exist might also have unnecessarily exacerbated the tension with the World Court. After all, the declaration that the immunity rule, as adapted to the domestic order, was incompatible with the aforementioned constitutional principles would have at least maintained the presumption of the existence of such rule until the Court’s decision. Accordingly, the challenge to the ICJ’s decision would have been a softer option than the one emerging from the Court’s decision.

Whether the Court balanced on substantial grounds the rules of immunity with the fundamental rights of the victims is a more debatable question. The fact that, contrary to the ICJ, the Constitutional Court appears to be convinced that the procedural rules of immunity should be confronted with the material rules concerning rights, including those of *jus cogens*, paves the way to balance the former with the latter. But this conviction does not suffice *per se* to assert that the Court resorted to such balancing.

An operation of that sort might have occurred, had the Court acceded to the opinion that the prevalence of the immunity rule is dependent on the rights of the victims and the gravity of the acts that were committed by the Nazi. Such an opinion, which was debated during the ICJ’s judgment and then rejected by the majority of the Court, drives effectively a balancing test, being founded on the criterion of gravity.

But, as we have seen, the Constitutional Court does not share such an opinion. It instead takes account of the fact that both the ICJ and the German government do not question the gravity of the alleged acts, being qualified as war crimes and crimes against humanity, and infers from such conviction that these acts cannot fall in the category of acts of a sovereign State, and are therefore excluded from the immunity rule.

Here, in my opinion lies sufficient reason for denying that the Court’s reasoning consists of balancing the rule of immunity with the fundamental rights of the victims. To the extent that all the aforementioned acts are believed to pertain to a certain legal category, namely that of war crimes and crimes against humanity, and should as such be *a priori* excluded from those concerning the exertion of the State’s sovereignty, they cannot be balanced with the fundamental rights of the victims, which cannot be sacrificed anyway *vis-à-vis* war crimes and crimes against humanity. So far, there is no ground for balancing norms – that

implies that a different solution may be reached accordingly to the circumstances of the case.

The Court's dissent from the ICJ's bold assertion that the procedural rules (of immunity) should not be confronted with the material rules (of *jus cogens*) does not therefore lead the Court to balance the former with the latter, but simply to ascertain whether war crimes and crimes against humanity might be protected under the immunity rule, with the effect of denying the applicability of that rule with respect to the rights of the victims.

8. On the merits of the judgment, the Court's decision, in my opinion deserves full appreciation, since its judgment reflects the most cherished values of our civilization as embedded in the principles both of post-totalitarian constitutionalism and of international law. And such appreciation goes beyond the possible criticism that the Court has unnecessarily, and unduly, evoked with the fiction of the 'non-entry' of the international customary rule in the domestic order.