

**Judgment 238/2014 of the Italian Constitutional Court:
In search of a way out**

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1. In Judgment 238/2014 the Constitutional Court unhesitatingly gave precedence to the right to jurisdictional protection over compliance with international law. The high costs of the judgment in terms of respect for international law – and of the constitutional values enshrined in Articles 10 and 11 of the Italian Constitution – are apparent. Yet, taking into account the situation created by the judgment of the International Court of Justice, the risk of reaching such a breaking point was a real one. This risk should have led political organs to give greater consideration to the interests of the victims when giving execution to the judgment of the International Court of Justice. Apparently, nothing was done in this regard.

2. More than the outcome, it is the poor reasoning behind it that is striking. Given the complexity of the case, one would have expected the Court to engage in a thorough assessment of the weight to be given to the competing interests at stake in the light of the concrete circumstances of the case. By balancing such interests, the Court could have helped to shed some light on the leeway afforded by the Constitution to the political organs in order to find a way out of this situation. In fact, while the Court acknowledged that ‘balancing is one of “the ordinary tasks that this Court is asked to undertake in all cases within its competence”’,¹ nothing of the sort was attempted. When reading the judgment

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¹ Judgment no 238 (2014), English translation provided by the Italian Constitutional Court, <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf>, para 3.1.



one is left with the impression that any limitation to the right of jurisdictional protection was excluded from the outset. In the Court's reasoning the intangibility of the right of jurisdictional protection was a consequence of the indissoluble link existing between the substantive human rights of the victims and the procedural right to a judge. As the Court put it, '[i]t would indeed be difficult to identify how much is left of a right if it cannot be invoked before a judge in order to obtain effective protection'.² While attaching the utmost importance to jurisdictional protection, the Court failed to assess the possible role of alternative forms of protection. No consideration was given to the specific remedies sought by the victims – compensation – nor to the fact that mass claims for reparation, particularly when arising out of an international armed conflict affecting hundreds of thousands of victims, are normally addressed at the intergovernmental level through lump sum settlement. It would be vain to search in the judgment for an answer to the question of whether, and to what extent, a sacrifice to the right of jurisdictional protection would be justified if alternative, non-judicial means of redress were available to the victims. Despite the serious implications of the judgment, no attempt was made to delineate a possible way out. The most that the Court was prepared to concede was that the international rule on State immunity could justify a sacrifice of the principle of judicial protection if it 'is connected – substantially and not just formally – to the sovereign functions of the foreign State, i.e. with the exercise of its governmental powers'.³ In sum, nothing short of a change in the law of State immunity could make it possible to reconcile the competing interests at stake.

3. At this point, the real issue is how to sort out this situation. The only reasonable alternative to individual access to justice appears to lie in the initiatives that the Italian Government can take, primarily at the international level but possibly also at the domestic level, to protect the rights of the victims. It is submitted that, at least in its reasoning, the Constitutional Court, instead of targeting exclusively the way in which international law regulates State immunity, should have focused more on the role of Italian political organs in securing such protection.

² Judgment no 238 (n 1) para 3.4.

³ Judgment no 238 (n 1) para 3.4.

4. In a significant *obiter dictum* of its judgment in the case concerning the *Jurisdictional Immunities of the State*, the International Court of Justice noted that, while granting immunity to Germany had the effect of precluding judicial redress for the Italian nationals concerned, their claims ‘could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue’.⁴ The basic thrust of this statement is that negotiation can be an alternative form of protection of the rights of the victims and that State action at the international level can substitute for individual access to justice. When interstate negotiation represents the only means of securing redress for the victims of grave breaches of human rights, a diplomatic initiative by the State of nationality of the victims is not simply desirable. It may be argued that the State of nationality has also some duties. The law of diplomatic protection is an evolving area of international law and the trend is more and more in the direction of regarding diplomatic protection as an important instrument for the enforcement of the rights of the injured individuals rather than a discretionary right of a State. There are signs to that effect in the case law of the International Court of Justice and of other international tribunals.⁵ The existence of such a trend is now also reflected in the work of the International Law Commission. Article 19 of the Articles on Diplomatic protection provides, *inter alia*, that a State entitled to exercise diplomatic protection should ‘give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred’ and should ‘take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought’.⁶ Ironically, in its comments on the work of the International Law Commission, Italy had made a proposal aimed at giving even greater protection to the rights of nationals when they are victims of grave breaches of human rights. According to that proposal, in a case of this kind the State would have a legal duty to exercise diplomatic protection on behalf of the injured person. Italy also proposed to insert a provision to the effect that, in

⁴ *Jurisdictional Immunities of the State (Germany v Italy, Greece intervening)* [2012] ICJ Rep 144.

⁵ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2012] ICJ Rep 344.

⁶ ILC, ‘Report of the International Law Commission. Fifty-eighth Session’ (1 May-9 June and 3 July-11 August 2006) UN doc A/61/10 (2006) 94.

cases of grave breaches of human rights, ‘States are obliged to provide in their municipal law for the enforcement of the individual right to diplomatic protection before a competent domestic court or other independent national authority’.⁷

5. It is probably premature to say that, under international law, States have an obligation to exercise diplomatic protection when the fundamental human rights of their nationals are at stake. However, in some States the existence of an obligation of this kind towards national citizens is enshrined in domestic law, sometimes at the constitutional level. Moreover, some domestic judges have accepted to review the conduct of the Government in relation to the exercise of diplomatic protection. By recognizing an individual right to diplomatic protection and the possibility of enforcing this right before domestic courts or other independent national authorities, domestic law can significantly limit the discretion of the Government and ensure that diplomatic protection provides an effective instrument for protecting the rights of individuals who have suffered harm. This possibility should be taken into account when considering a possible way out of the situation created by the judgment of the Constitutional Court. It may be argued that the recognition of an individual right to diplomatic protection can justify a limitation to the right of bringing a case against a foreign State since it provides victims an alternative form of protection. Following this approach, the Italian Parliament could enact a statute introducing a mechanism which ensures that nationals are given the possibility of submitting a request for assistance to the Government, are consulted about the forms of protection and of reparation to be sought, and are informed about the conduct of the negotiations or of the other initiatives taken to protect their interests. This mechanism could concern the specific situation of the victims of Nazi crimes or, preferably, apply more broadly to any case involving grave breaches of human rights. The statute could also provide that, as soon as the mechanism enters into force, domestic proceedings against foreign States enjoying immunity under international law must be brought to an end.

⁷ International Law Commission, ‘Diplomatic Protection - Comments and observations received from Governments’ UN doc A/CN.4/561 (27 January 2006) 38.

6. It may be objected that an individual right to diplomatic protection cannot be regarded as an adequate form of protection because the action of the Government may not necessarily lead to the result desired by the aggrieved individuals. Indeed, it is far from certain that Italy would be able to reach an agreement with Germany over compensation of the Italian victims of Nazi crimes, as Germany appears to oppose to such a solution. The objection misses the point. It suffices to note that individual access to justice would not necessarily afford a greater protection since it is extremely difficult to ensure the enforcements of judgments rendered against foreign States. Having said this, due consideration should be given to the possibility that, at least under certain circumstances, the Italian State could assume the burden of providing some form of redress to the victims. This kind of solution would not imply any waiver of the claim against the foreign State. It would only have the effect of transferring on the State the risk that any attempt to obtain redress from a foreign State through diplomatic protection may be unsuccessful. To a certain extent, shifting the risk from the individual to the State may be regarded as the price to be paid for limiting access to justice by individuals and for concentrating in the hands of the State of nationality the response against the foreign State. It is submitted that, with regard to reparations for Nazi crimes, an initiative of the Italian Parliament aimed at providing some form of compensation would be appropriate for several reasons, one of which is the age of the victims.

7. In the absence of any clear indication in the judgment, it is hard to say whether the introduction of some alternative form of protection, such as granting victims a right to diplomatic protection, would justify a limitation to the right to access to justice, thereby making it possible to grant immunity to foreign States in accordance to international law. While in its judgment the Court has taken a very rigid stance as to the possibility of sacrificing the principle of jurisdictional protection, this position might have been dictated by the particular situation created after the judgment of the International Court of Justice. Arguably, in balancing the principle of jurisdictional protection and the interest in the compliance with international law, the introduction of some alternative way of protecting the rights of the victims could tip the balance in favour of a solution which could lead to a better harmonization of the two conflicting interests.