On human dignity and State sovereignty: The Italian Constitutional Court's 238/2014 judgment on State immunity for international crimes

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> Révolte. Si l'homme échoue à concilier la justice et la liberté, alors il échoue à tout - Et c'est la religion qui a raison ? Non, s'il accepte l'approximation.
> (Albert Camus. *Carnets II (1942-1951)*, Gallimard, Paris 1964, p. 153)

Abstract
Judgment 238/2014 of the Italian Constitutional Court has flatly contravened the decision of the ICJ on Jurisdictional Immunity of States (Germany v. Italy: Greece intervening) of 2012, ruling that the customary norm on State immunity from civil suits before a foreign court as ascertained in the ICJ decision never entered the domestic legal order, because it is incompatible with core principles of the Italian Constitution. In execution of the Constitutional Court ruling, in 2015, some Italian tribunals have condemned Germany to pay damages to former Italian military internees victim of international crimes during World War II, thus integrating an international wrongful act on the part of Italy. The 238/2014 judgment has been criticised from many angles. Much criticism was addressed to its alleged dualist approach that seemed to insulate Italy. The paper argues that the 2014 judgment of the Italian court is rather a reasoned response to the ICJ decision, grounded on principles common to the Italian and the international law, and a call for a consistent application of State obligations concerning the effective implementation of human rights. From this perspective it constitutes a valuable contribution towards a principled and open-minded debate over the structure and function of international law.

1. Introduction

The aim of this contribution is to present the aftermath (at least in Italy) of the well-known and much-debated judgment of the International Court of Justice (ICJ) of February 3, 2012, on *Jurisdictional Immunity of States – Germany v. Italy*.[1] Professor Perrakis participated as the Agent of the Greek government in the hearing of the case and took the floor on September 2011 in support of Italy. In 2014, the Italian Constitutional Court, instead of paying deference to the ICJ and so closing the Italian-German *affair*, chose to raise the stake and to challenge the Hague's dictum. [2] This paper argues that the Italian Constitutional Court's decision, far from representing a manifestation of national particularism framed in the classic cleavage between "dualism" and "monism", and a step backward in the interstate dialogue, should instead be seen as a fresh contribution towards a principled "constitutional" approach to international law. The starting point will a be a short reconstruction of the background that lead to the adoption of the 2012 ICJ decision in the *Immunity of States* case, and a summary of the most recent developments the ICJ jurisprudence have had in Italy. After an initial acquiescence to the ICJ ruling, and the termination of some civil proceedings against Germany initiated by victims of World War II atrocities (war crimes, crimes against humanity, serious violations of human rights) committed by the Third Reich

[1] I.C.J. Reports *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)
* (Judgment) 2012 3 February 2012 p. 99 (International Court of Justice) .
[2] Gazzetta Ufficiale (serie spec.) *Judgment No. 238* (Judgment) 29 ottobre 2014 45, I 22 October 2014 1 (Italian Constitutional Court) . The English translation referred to in this contribution can be retrieved online at http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf (last accessed: January 30, 2016).

in Italy, the reaction of some judges led to the proposition of a case before the Constitutional Court. An Italian tribunal challenged the constitutionality of the rule on State immunity as expressed in the ICJ decision (para. 2). The Italian Constitutional Court awarded in 2014 an important judgment, stating that the rule on State immunity from the civil jurisdiction of other States has not produced any effect in the Italian legal system, because it breached inviolable rights of the Italian Constitution (para. 3). The decision was positively welcomed in Italy, and some courts in 2015 ruled that Germany had to pay damages to former Italian military internees. It has also been severely criticised, and para. 4 illustrates the most contentious aspects. The following paragraphs try to demonstrate that the judgment of the Constitutional Court should not be interpreted as a manifestation of chauvinistic dualism, but rather as complementing – and of course challenging – the 2012 ICJ ruling, by exploring aspects of the topic that the ICJ had deliberately and with insufficient justification expunged from its analysis, and, therefore, contributing to a more comprehensive understanding of the overall subject. The Constitutional Court's approach to the matter may disclose a certain disillusion on the part of the judiciary towards the capacity of the political branch of tackling effectively sensitive human rights issues, and the case of the Italian military internees of the Second World War is a painful and shameful evidence that also free and democratic European States for decades have failed to settle an obvious case of denied justice.

2. The *Ferrini* legacy and the ICJ ruling. Compliance and rejection (2012-2014)

The 2012 judgment of the ICJ stemmed from the *Ferrini* jurisprudence of the Italian Supreme Court[3]. In a series of judicial cases, upheld by the Court of Cassation, Italian tribunals affirmed the responsibility of the German State for civil damages owed to some World War II Italian deportees whose miseries were largely disregarded in the post-war reparation schemes negotiated by the two concerned States. Such jurisprudence was considered by Germany in breach of the international law norm on the immunity of States from the jurisdiction of courts in another State[4]. The ICJ ruled in favour of the applicant, Germany, finding that the Italian courts' proceedings whereby Germany was sued for tort liability by Italian victims of Nazi-related crimes were in breach of a well-established international custom. It does not seem necessary to summarise the contents of the ICJ case. Suffice here to recall the conclusions of the ICJ on the main points of the controversy as articulated in the judgment. The majority of the ICJ ruled that "customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict" (para. 78); that "a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict" (para. 91); and that "even on the assumption that the proceedings in the Italian courts involved violations of *jus cogens* rules, the applicability of the customary international law on State immunity was not affected." (para. 97) Moreover, the judgment adds that "[t]he Court is not unaware that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned. It considers however that the claims arising from the treatment of the Italian military internees […] together with other claims of Italian nationals which have allegedly not been settled […] could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue" (para. 104). All in all, according to the ICJ, "Immunity cannot […] be made dependent upon the outcome of a

[3] *Ferrini c. Repubblica Federale di Germania
* (Judgment No. 5044) Rivista di diritto internazionale 11 marzo 2004 539 (Corte di Cassazione, Sez. Un. Civ.) .

[4] On the *Ferrini* jurisprudence cf., among others: Pasquale De Sena and Francesca De Vittor. 'State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case' (2005) 16(1) European Journal of International Law 89;Andrea Gattini. 'War Crimes and State Immunity in the "Ferrini" Decision' (2005) 3(1) Journal of International Criminal]ustice 224-242.

balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claimed" (para. 106).[5]

After the issuance of the ICJ judgment, the Italian Government and Parliament, presumably in an effort to reaffirm the harmony between Italy and Germany in their bilateral relations and in the European Union context, adopted consequential measures aimed at securing the full execution of the ICJ's decision. In particular, on 14 January 2013, the Parliament passed Law No. 5/2013, on the accession of Italy to the United Nations Convention on Jurisdictional Immunities of States and their Property[6]. Article 3 of this Law provided that when the ICJ in a judgment involving Italy as a party has excluded the jurisdiction of the Italian civil courts over specific acts attributed to a foreign State 8any reference to the German-Italian dispute is all but accidental…), the domestic court seized with a controversy concerning those acts must acknowledge, also of its own motion, at any stage of the procedure and even if a previous non-final judgment had determined the opposite, that it lacks jurisdiction over such a case. In other words, Art. 3 made it mandatory for any court in Italy to terminate any dispute for damages initiated on the basis of the *Ferrini* precedent and to refrain from taking up any tort case whereby Germany was the defendant in a dispute concerning the perpetration of war crimes during World War II. This position was not only taken by the political branch. A few months after the publication of the ICJ ruling, the Italian Court of Cassation complied with it by partially quashing a judgment of the Rome military court of appeals that had convicted some German nationals responsible for the massacre of more than 350 civilians perpetrated in Fivizzano and Fosnovo (Tuscany) in 1944, namely with respect to the tort reparations imposed upon Germany as the defendant[7]. It may be added that a similar eagerness to conform to the authoritative pronouncement of the ICJ was shown also by an international body like the European Court of human rights. In *Jones v. United Kingdom*, confronted with a problem of balancing on one hand the right to access a (British) court to claim damages for alleged acts of torture that the applicant had endured in Saudi Arabia, and on the other the principle of State immunity from jurisdiction, the European Court fully endorsed the ICJ positions (that in its turn echoed the European Court's *Al-Adsani* jurisprudence[8]), stopping short from discussing the "Italian exception".[9]

The tribunal of Florence, with an order of 21 January 2014[10], however, challenged the constitutionality of the provision just mentioned introduced with Law 5/2013, as well as of other norms that required the State to abide by the ICJ judgment, namely art. 1 of Law 17 August 1957 No. 848, on the accession to the United Nations. The tribunal doubted of its constitutionality inasmuch as it introduced art. 94 of the UN Charter, providing binding force to the ICJ judgment for the States that were parties to a dispute before the Court. Most interestingly, the question of constitutionality raised by the tribunal attacked also the international customary norm on State immunity, introduced in the Italian legal system by the dispositive of automatic incorporation of

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[5] On the ICJ judgment cf Benedetto Conforti. 'The Judgment of the International Court of Justice on the Immunity of Foreign States : a Missed Opportunity' (2012) 21 The Italian Yearbook of International Law 135-142;Lorenzo Gradoni and Attila 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*' (2012) LXVII La comunità internazionale 203 .

[6] Annalisa Ciampi. 'L'Italia attua la sentenza della Corte internazionale di giustizia nel caso Germania c. Italia' (2013) 96(1) Rivista di diritto internazionale 146-149 .

[7] *Judgment No. 32139* 30 May 2012 (Corte di Cassazione, Sez. Pen. I) .

[8] *Al-Adsani v. the United Kingdom [GC]* (no. 35763/97) 2001-XI (ECHR)

[9] "198. […] it is not necessary for the Court to examine all of these developments in detail since the recent judgment of the International Court of Justice in *Germany v. Italy* – which must be considered by this Court as authoritative as regards the content of customary international law – clearly establishes that, by February 2012, no *jus cogens* exception to State immunity had yet crystallised" (*Jones and Others v. the United Kingdom* (nos. 34356/06 and 40528/06) 2014 (ECHR)).

[10] Fulvio Maria Palombino. 'Quali limiti alla regola sull'immunità degli Stati? La parola alla Consulta.' (2014) 97(2) Rivista di diritto internazionale 501-508 .

general international law set forth in art. 10(1) of the Constitution[11]. The initiative of the judge in Florence paved the way to the adoption by the Constitutional Court of judgment 238/2014, and to a spectacular reversal in the attitude insofar taken by the Italian authorities *vis-à-vis* the ICJ ruling.

3. The Constitutional Court judgment No. 238/2014

The judgment of the Constitutional Court has been extensively commented, in Italy and abroad. Only a synthetic and partial summary of the ruling can be provided here. The main conclusion reached by the Court is that the principle of absolute immunity of a foreign State from civil proceedings cannot be enforced in Italy whenever the Defendant State has admittedly committed through its agents crimes against humanity, war crimes, and serious violations of fundamental human rights in the territory of the forum's State. The judges reject the possibility that any customs providing for such an unconditioned immunity of the State from civil proceedings before a foreign court may have been incorporated into the Italian legal order via art. 10(1) of the Constitution, eventually concluding that the alleged contrast between the constitutional provisions on individual rights and the international customary law norm has no grounds, because the principle of blanket State immunity, whatever may be its status under international law, has not, indeed, produced any effects in the domestic legal system. Conversely – and consistently with this central assumption – the Court invalidated the legislative measures that directly or indirectly appeared to be functional to the execution of the ICJ judgment and that had stripped the Italian courts of any civil jurisdiction over Germany. This is the case of the above-mentioned art. 3 of law 5/2013 – almost an ad hoc provision directly spurred by the ICJ decision -, and of art. 1, Law 848/1957, on the Italian accession to the UN, entailing among other things the recognition of the binding nature of the ICJ rulings in any controversy to which Italy is a party (art. 94 UN Charter). The provision of law 848/1957 is constitutionally unsound, however, only insofar as it is the legal basis to make the 2012 ICJ decision enforceable in Italy.
The Italian Constitutional Court found that the interpretation provided by the ICJ of the scope of the State immunity principle was incompatible, in particular, with art. 24(1) of the Constitution. Art. 24 states that "Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law". This provision is strictly connected to art. 2 Const., on the recognition and guarantee of the "inviolable rights of the person, both as an individual and in the social groups where human personality is expressed". Jointly, the two articles are seen by the Court, in the light of the peculiarity of the case, as embodying the supreme value of human dignity. According to the Constitutional Court, "Immunity from jurisdiction of other States can be considered tenable from a legal standpoint, and even more so from a logical standpoint, and thus can justify on the constitutional plane the sacrifice of the principle of judicial protection of inviolable rights guaranteed by the Constitution, only when 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 […] Respect for fundamental principles and inviolable human rights, identifying elements of the constitutional order, is the limit that indicates (also with a view to achieving the goal of maintaining good international relations […]) the receptiveness of the Italian legal order to the international and supranational order […] The immunity of the foreign State from the jurisdiction of the Italian judge granted by Articles 2 and 24 Constitution protects the [sovereign] function [of State]. It does not protect behaviours that do not represent the typical exercise of governmental powers, but are

[11] Art. 10 (1): "The Italian legal system conforms to the generally recognised principles of international law". The peculiarity of a judgment of constitutionality focusing on a non-written norm (an international law custom) endowed with supra-legislative legal force is stressed in Antonio 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. n. 238 del 2014)' (2015) (1) Consulta OnLine 15 Jan. 2016 <http://www.cortecostituzionale.it/documenti/file_rivista/25522_2014_238.pdf> accessed 1/30/2016 .

explicitly considered and qualified unlawful since they are in breach of inviolable rights […]. Therefore, in an institutional context characterized by the centrality of human rights, emphasized by the receptiveness of the constitutional order to external sources […], the denial of judicial protection of fundamental rights of the victims of the crimes at issue (now dating back in time), determines the completely disproportionate sacrifice of two supreme principles of the Constitution."[12]

As it was the case with the judgment of the Court of Cassation mentioned above[13], that promptly dismissed civil claims for damages against Germany on the basis of the ICJ decision, courts in Italy have been eager to embrace the new doctrine expressed by judgement 238/2014. Tribunals in Firenze and Piacenza, in particular, have pronounced judgments to the effect of asserting their competence to adjudicate tort claims against Germany for atrocities carried out in Italy by the German armed forces during World War II, and have also indicated the sums that the German government has to correspond to the claimants still alive or to their heirs.[14] The amount awarded to the two plaintiffs in the Firenze trials was of 30,000 and 50,000 euros respectively. In one case, the tribunal offered a friendly settlement consisting of a paid internship in Germany to the benefit of a young member of the claimant's family, for an equivalent of 15,000 euros, but the German government remained silent, and so did the Italian one.

The issuance of these decisions (not final yet) materialise a wrongful act under international law that can be attributed to Italy, and that may call for some further initiative at the international stage, including a recourse by Germany to the Security Council, based on the failure of Italy "to perform the obligations incumbent upon it under a judgment rendered by the Court", to the effect that the Security Council "may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment".[15]

From the viewpoint of the Italian plaintiffs, the prospects of having their reparation claims eventually enforced are uncertain, to say the least. Not only because of the adamant position of Germany, that has carefully avoided any involvement in the Italian trials where its liability has been challenged,[16] but also in the light of the recent accession of Italy to the UN Convention on State immunity.[17] The provision of article 21 of the UN Convention (on the properties of a State that are intended for exclusive government non-commercial purposes, and that include bank accounts in the use of diplomatic missions or consular posts) has been operationalized into art. 19-bis of Law 19 November 2014, n. 162, making it extremely hard nowadays to implement post-judgment measures of execution against German properties located in Italy.[18] Even the mentioned trial judgments that condemn Germany to pay damages are silent about the enforcement of such measures.

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[12] *Supra*, note 2, para. 3.4 of the *conclusions in point of law*.

[13] *Supra*, note 5.

[14] *Simoncioni c. Germania e Italia, Judgment No. 2469/2015* (N.R.G. 8879/2011) 6 July 2015 (Tribunale di Firenze, Sez. I);*Bergamini c. Germania e Italia, No. 2468/2015* (N.R.G. 14049/2011) 6 July 2015 (Tribunale di Firenze, Sez. I);*Judgment n. 722/2015* (N.R.G. 1931/2011) 28 September 2015 (Tribunale di Piacenza, Sez. civ.) .

[15] Charter of the United Nations.San Francisco, 26 June 1945. (Entry into force: 24 October 1945, in accordance with article 110. Registration with the Secretariat of the United Nations: ex officio, 26 June 1945.), art. 94(2).

[16] A short "reminder" was however sent to the tribunal of Florence after the first hearing following the trial's resumption, whereby the Federal Republic of Germany maintained that the pending trial was a violation of the international law principles as established by the ICJ, and that thereafter it ceased to participate in the judicial procedure. See *supra*, n. 14, cases *Bergamini* and *Simoncioni.*

[17] United Nations Convention on Jurisdictional Immunities of States and Their Property New York, 2 December 2004 (Adopted during the 65th plenary meeting of the General Assembly by resolution A/59/38 of 2 December 2004. Not yet in force.). It has been pointed out, generally in support of the ICJ conclusions in the *International Immunity* case, that the 2004 Convention does not provide for any exception to the immunity of States from foreign jurisdiction based on the *ius cogens* nature of the obligations they have infringed. The issue however was an object of debate during the preparatory works and is the object of interpretative declarations submitted by some States Parties.

[18] Federica Persano. 'Il rapporto fra immunità statale e tutela dei diritti fondamentali dell'individuo nella sentenza N. 238/2014 della Corte Costituzionale italiana' (2015) (3) Responsabilità Civile e Previdenza 813 .

Further developments spurred by the Constitutional Court jurisprudence include some rulings of the Court of Cassation. The Penal Branch of the Italian Supreme Court found that the Republic of Serbia has to pay damages, jointly with the convicted individuals, to the civil parties in a criminal procedure against former officers of the Socialist Federal Republic of Yugoslavia. The militaries, on January 7 1992, ordered to shoot down a helicopter of the European observation mission operating on the border between today's Croatia and Bosnia and Herzegovina, resulting in the killing of three Italian observers and one French colleague. According to the Court, and in the light of the 2014 Constitutional Court jurisprudence, the principle of State immunity has no effect in Italy "in connection with a State conduct that is prejudicial to the fundamental rights of the person and likely to materialize international crimes, as established by the Rome Statute of the International Criminal Court", namely war crimes. [19]
Italy however is not likely to try any civil suit against a State arising out of international crimes. In particular, an Italian court cannot enforce judgments issued by American courts on the basis of the provision of the American Foreign Sovereign Immunities Act (currently codified at 28 U.S.C. § 1605A) that removes the immunity of designated foreign states sponsors of terrorism. The Joint Sections of the Civil Branch of Cassation Court rejected the exequatur of two judgments (including in the Flatow case) issued by the District Court for the District of Columbia establishing that some terrorist attacks perpetrated in Israel and in the Gaza Strip that killed American citizens had been ordered by Iran, a State designated as sponsor of international terrorism, thus granting the plaintiffs money damages. The Court of Cassation acknowledged that terrorist attacks may constitute crimes against humanity, but it rejected the exequatur, because the jurisdiction of the American court was based on a link (the plaintiff's forum) that is not admissible under the Italian system.[20]

4. Criticisms

The 238/2014 judgment has been criticised under many aspects.[21] From an international law perspective, the harsher criticism comes from those who consider the decision a case of unilateralism prevailing over universalism. As Anne Peters put it, the Italian Court pronouncement "gives priority to one (state's) national outlook about what constitutes a proper legal order over the universal standard pronounced by the international court"[22]. More strongly, it was maintained "contrary to the previous *Ferrini* judgment, the present judgment only claims judicial authority within the Italian legal order. This contradiction, coupled with the superficial appearance of self-restraint vis-à-vis international law and the ICJ, not only undermines the coherence and credibility of the Constitutional Court, but also deprives it from actively participating in genuine international legal discourse. In other words, the Constitutional Court attempted to insulate the Italian legal system, and therefore, itself, from international obligations, in contradiction to efforts of the executive and legislative authorities. The Court cannot, at the same time, attempt to shape the international legal debate on state immunity. As a result, the attitude of the Constitutional Court can hardly be deemed constructive for international law."[23] And even tougher remarks (and sometimes out of place) were advanced by an Author decrying that with judgment 238/2014 "the separation of the legal orders is pushed to its paroxysm", and that the Court "condemns Italy to become unable

[19] *Judgment No. 43696* 2015 September 14 (Corte di Cassazione, Penal Branch, section I)
[20] *Judgment No. 21946* 2015 October 28 (Corte di Cassazione, Civil Branch, Joint Sections) ;*Judgment No. 21947* 2015 October 28 (Corte di Cassazione, Civil Branch, Joint Sections) .
[21] For an introduction to the background of the case, in a forward-looking perspective, cf. Francesco Francioni. 'Access to Justice and Its Pitfalls' (2016) Journal of International Criminal Justice .
[22] Anne Peters, Let Not Triepel Triumph – How To Make the Best Out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order (22 December 2014) <http://www.ejiltalk.org/let-not-triepel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i/> accessed 1/30/2016 .
[23] Raffaela Kunz. 'The Italian Constitutional Court and 'Constructive Contestation'' (2016) (1) Journal of International Criminal Justice .

sine die and possibly *seacula seaculorum* [*sic*] to implement the ICJ judgment", committing "what may then be termed a sort of judicial putsch".[24]
It has been remarked that, although based on strong axiological and logical premises, the decision of the Italian court failed to analyse with the necessary latitude the competing international law opinions and practices on sovereign immunity and *ius cogens*, as the ICJ did (coming to conclusions that are still open to criticism though)[25]. The Constitutional Court's decision is ultimately a late and merely symbolic recognition of the human rights of the victims of Nazi atrocities. Despite its ambition to promote a shift in the international *opinio iuris*, and possibly induce a *revirement* in the ICJ jurisprudence, it is very unlikely that such objectives will ever be achieved.[26] On the one hand, the aggrieved individuals so far received only cosmetic justice; on the other, the prospect of promoting at the international level a different balancing between the State immunity rule and *ius cogens* principles has been weakened by the overall ambiguity of the positions so far expressed by the Italian authorities[27]. In the meantime, before a new rule closer to the Italian interpretation crystallise on the international stage, it is argued that judgment 238/2014 has the potential to disrupt the trust assigned by States to the ICJ as the interpreter of international law and the guardian of the international legal order. And also, the credibility of the UN is potentially shattered, as for the first time a norm of the UN Charter, art. 94(1) on the binding force of ICJ decisions, is deemed to be "unconstitutional".[28]
Unlike the Court of Justice of the EU in the *Kadi* case[29], the Italian Constitutional Court has not attacked a measure adopted by a political body for not taking in due consideration the human rights implications of a certain course of action, namely the right to a judicial revision of a measure affecting individual rights, but has mandated the domestic courts not to implement a judgment issued by a judicial body, the ICJ, at the end of a contentious procedure in which Italy fully participated. All in all, with this decision, Italy seems to have started a "mini-war" against the pillars of the international legal order, with little chance of winning any prizes.[30]

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[24] Robert Kolb. 'The relationship between the international and the municipal legal order: reflections on the decision no 238/2014 of the Italian Constitutional Court' (2014) II QIL-Questions of International Law 5-16 .
[25] Pasquale 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' ibid17-31;Paolo Palchetti. 'judgment 238/2014 of the Italian Constitutional Court: In search of a way out' ibid44-47;Paolo Palchetti. 'Can State Action on Behalf of Victims be an Alternative to Individual Access to Justice in Case of Grave Breaches of Human Rights?' (2015) 24(1) The Italian Yearbook of International Law Online 53-60 .
[26] Attila Tanzi. 'Un difficile dialogo tra Corte Internazionale di Giustizia e Corte Costituzionale' (2015) (1) La Comunità Internazionale 13-36 .
[27] Pasquale 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 *QIL QDI* Volume II (http://www.qil-qdi.org/judgment-italian-constitutional-court-state-immunity-cases-serious-violations-human-rights-humanitarian-law-tentative-analysis-international-law/ edn 2014) 17-31 The Author points out however that "the Constitutional Court (as the 'guardian of the Constitution') has the last word within the Italian legal system; its stance can be therefore legitimately deemed to be the current, official Italian position concerning the legal regime of state immunity in cases of serious violations of human rights or humanitarian law" (p. 27).
[28] Enzo Cannizzaro. 'Jurisdictional immunities and judicial protection: The decision of the Italian Constitutional Court No. 238 of 2014' (2015) 98(1) Riv Dir Intern 126 : "Castled in its own legal order, the Constitutional Court has fashioned a decision that, in spite of its impeccable dualist logic, will hardly serve its objectives but can seriously imperil the authority of international law and the *Völkerrechtsfreundlichkeit* of the Italian Constitution." (p. 133).
[29] European Court Reports 2008 I-06351 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities.***
** (Joined cases C-402/05 P and C-415/05 P.) 3 September 2008 (Court of Justice of the EU (Grand Chamber)) (Kadi) .
[30] "With this C[onstitutional C[ourt]'s decision, and limitedly to this particular case and its proximate consequences, Italy is – literally – on its own against all" (FIlippo Fontanelli, 'I Know It's Wrong but I Just Can't Do Right. First Impressions on Judgment no 238 of 2014 of the Italian Constitutional Court' (2014) (28 October 2014) <Diritti comparati <www.diritticomparati.it/2014/10/i-know-its-wrong-but-i-just-cant-do-right-first-impressions-on-judgment-no-238-of-2014-of-the-italian-constitutional.html>> accessed 30/1/2016).

From a municipal law perspective,[31] the judgment has been received with some perplexity because of the atypical course of reasoning adopted by the Court. The judges did not openly affirm the contrast between the international law norm on State immunity for *iure imperii* acts, as enunciated by the ICJ, and the principle of human dignity protected by the Constitution. They rather declared the non-existence, within the Italian legal order, of the disputed customary norm of absolute State immunity. The rule on State immunity, as enunciated by the ICJ in *Germany v. Italy*, has no effects in the domestic sphere because it does not stand the review of constitutionality conducted on the basis of the counter-limits to the reception of international customary law represented by the "fundamental principles of the constitutional order and inalienable human rights", considered as "the qualifying fundamental elements of the constitutional order".[32]
The outcome is that – quite paradoxically – the request to declare the unconstitutionality of the international custom coming from the Florence tribunal was rejected. And there is now the possibility that virtually any Italian tribunal could feel encouraged to disregard international customary law provisions – incorporated into the Italian legal system through art. 10(1) Const. at the rank of constitutional law – as inexistent (and thus unconstitutional and ineffective), because in contrast with some counter-limits identified in the Constitution, that it feels compelled to involve the Constitutional Court in a number of potential cases.[33]

5. "A vision of twilight". Judgment 238/2014 as a constitutionally framed response to the ICJ

It cannot be denied that the Italian Constitutional Court judgment has indeed reached a significant and not merely symbolic achievement: to oppose and resist the ICJ ruling of 2012. Indeed, States and judicial bodies – including the European Court of human rights – have been all too happy to adhere to the rule so neatly illustrated by the ICJ, and to safely overcome the quandary prompted by the *Ferrini* jurisprudence. The Italian Court has demonstrated instead that the case may not be considered entirely settled and the normative dispute pacified.
Although the allegedly strict dualistic stance adopted by the Constitutional Court has grasped so much attention, as demonstrated by the short survey of legal literature provided in the previous paragraphs, maybe the most significant argument elaborated in judgment 238/2014, the gist that moulded the rest of its arguments and marked its contrast with the ICJ, rather lies on the way the Italian Court resolves the dichotomy between substantial (primary) and procedural (secondary) norms.[34] This duality is probably much more powerful and pervasive than the opposition between

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[31] Cf in general Francesco Salerno. 'Giustizia costituzionale versus giustizia internazionale nell'applicazione del diritto internazionale generalmente riconosciuto' (2015) XXXV(1) Quaderni Costituzionali 33-58 .

[32] Judgment 238/2014, *supra*, n. 2. para. 3.2 of the conclusions in point of law. On the use of the doctrine of counter-limits, cf. Ruggeri, cit. *supra*, n. 9, and Deborah Russo. 'La sentenza della Corte costituzionale n. 238 del 2014: la Consulta attiva i "controlimiti" all'ingresso delle norme internazionali lesive del diritto alla tutela giurisdizionale' <http://www.osservatoriosullefonti.it/archivio-rubriche-2014/fonti-dellunione-europea-e-internazionali/1124-la-sentenza-della-corte-costituzionale-n-238-del-2014-la-consulta-attiva-i-qcontrolimitiq-allingresso-delle-norme-internazionali-lesive-del-diritto-alla-tutela-giurisdizionale> accessed 1/30/2016 .

[33] Lorenzo Gradoni, Giudizi costituzionali del quinto tipo. Ancora sulla storica sentenza della Corte costituzionale italiana (Blog entry 10 November 2014) <http://www.sidi-isil.org/sidiblog/?p=1135> accessed 1/30/2016;Pasquale De Sena, Spunti di riflessione sulla sentenza 238/2014 della Corte costituzionale (30 October 2014) <http://www.sidi-isil.org/sidiblog/?p=1108> accessed 1/30/2016;Pasquale 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 *QIL QDI* Volume II (http://www.qil-qdi.org/judgment-italian-constitutional-court-state-immunity-cases-serious-violations-human-rights-humanitarian-law-tentative-analysis-international-law/ edn 2014) 17-31 .

[34] In Jean D'Aspremont, *Epistemic Forces in International Law. Foundational Doctrines and Techniques of International Law Argumentation* (Edward Elgar Publishing, Cheltenham, UK 2015) the Author identifies two entangled interpretative processes in international law: content-determination and law-ascertainment, roughly correspondig to determining primary and secondary (rules of recognition) norms.

dualism and monism, von Triepel and Kelsen. The ICJ has famously stated that the State immunity rule does not give way to the individual's right to claim compensations before foreign domestic tribunals, in spite of the fact that the State has infringed *ius cogens* norms. The reason is that even *ius cogens* provisions (e.g. those concerning international crimes) cannot "trump" the immunity rule, for the simple fact that they belong to different and "parallel" sets of international law norms.[35] According to the ICJ "The application of rules of State immunity to determine whether or not the Italian courts have jurisdiction to hear claims arising out of those violations cannot involve any conflict with the rules which were violated. Nor is the argument strengthened by focusing on the duty of the wrongdoing State to make reparation, rather than upon the original wrongful act. The duty to make reparation is a rule which exists independently of those rules which concern the means by which it is to be effected."[36] On this basis, the ICJ dismissed any relevance of the *ius cogens* argument, an argument that indeed might have produced a rift in the normative framework that the ICJ chose to endorse.

The ICJ chose to embrace a rather formalistic stance, sweeping the potentially disruptive clash between pro-State and pro-individuals positions under the carpet of legal technicalities.[37] Procedural norms are seen – *ça va sans dire* – as neutral and "rational", like the "operating system" of a computer machine[38] that supports the various applications but is not supposed to be affected by them. Also the ICJ decision, therefore, could claim to be an expression of *super partes* neutrality and rationality.

It is exactly this impermeability between procedural and substantial rules – namely State immunity and the individual right to seek redress in a court of law – that the Italian Constitutional Court has challenged. An objection formulated by the Government's advocate and echoing the ICJ argument was from the outset rejected by the Court. The State's *Avvocatura* claimed that the case before the Constitutional Court was inadmissible because the question of constitutionality was raised in a trial that should have been terminated as a consequence of the ICJ decision. And indeed, "the referring judge raised the […] question of constitutionality of the norms that required the Tribunal to deny its jurisdiction". By taking up the case, the Constitutional Court would, therefore, incur in an "unacceptable reversal of the relationship of logical priority between distinct procedural and substantial judicial assessments". There can be no conflict between the procedural rules (defending the State) and the substantial norms (protecting the individuals), if no procedure exists where the dispute can be litigated. The Court dismissed this argument in two lines: "This objection is not well-founded […], simply because an objection concerning jurisdiction necessarily requires an examination of the arguments put forward in the claim, as formulated by the parties".[39]

The rest of the judgment is largely about a balancing between the international law norm (whose existence and scope was certified by the ICJ) on State immunity from jurisdiction and the (potentially) conflicting principle of securing human rights and fundamental freedoms. This latter requires that the recognition of individual rights is accompanied by provisions making them available, accessible, acceptable and adaptable[40], and that mechanisms for appeals and redress are

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[35] *Jurisdictional Immunity*, cit *supra*, n. 1, para. 93.

[36] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)
* Volume I.C.J. Reports (Judgment edn International Court of Justice, 2012) p. 99 , para. 94. This part of the ICJ decision has been harshly criticised in Riccardo Pisillo Mazzeschi. 'Il rapporto fra norme di ius cogens e la regola sull'immunità degli Stati: alcune osservazioni critiche sulla sentenza della Corte internazionale di giustizia del 3 febbraio 2012' (2012) (2) Diritti umani e diritto internazionale 310-326 .

[37] Even worse: the State "shielded" from tort responsibility was the successor of the Third Reich, and the individuals denied access to redress were a few surviving victims of egregious atrocities who have never received proper relief neither from Germany nor from Italy.

[38] The analogy is presented in Paul F. Diehl and Charlotte Ku, *The Dynamics of International Law* (Cambridge University Press, Cambridge 2010) .

[39] Judgment 238/2014, *supra* n. 1, para. 2.2 of the *conclusions in point of law*.

[40] On human rights indicators of effectiveness and the 4A-scheme: Jonas Grimheden, 'Indicators for Monitoring Human Rights' in Gudmundur Alfredsson and others (ed), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller* (Martinus Nijhoff Publishers, Leiden, Boston 2009) 421-428 .

also effective, i.e. available, accessible, etc. Primary and secondary rules, therefore, conflate to materialise a normative principle of human rights effectiveness.[41]
Access to adjudication mechanisms (Art. 24 Const.) is thus necessarily associated – the Italian Court argues – to "substantial" fundamental rights, such as those referred to in art. 2 Const. Insofar as the latter are inviolable and non-derogable, thus pertaining to the "dignity" of the person, so ought to be the associated right to an appropriate judicial guarantee. In other words, primary norms need complementary secondary rules to be effective; if a special ranking is attributed to those primary norms, the same has to be granted to the procedural rules that make them justiciable. It is therefore perfectly appropriate to balance the rule on State immunity with the rule on the human right to access a court in case of egregious violations of human rights, namely of violations of international customs protecting human rights as a matter of *ius cogens* obligation. The "different sets of rules" are not so reciprocally impervious, at the end f the day.
This approach is not peculiar to the Italian Court, of course. General Comment 29 of the Human Rights Committee maintains that "It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2 [of the International Covenant on Civil and Political Rights],[42] that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights."[43] A right to judicial appeals is explicitly mentioned among the non-derogable rights in the American Convention on Human Rights.[44] The European Court of Human Rights, despite a consistent (but never unanimous) jurisprudence endorsing State immunity, has over the years increasingly emphasised the principles of access to a court and effective remedies and accordingly expanded the scope of articles 6 and 13 of the European Convention on human rights, and so have done domestic Courts in several States.[45]
In balancing procedural (the State immunity from foreign jurisdiction) and substantial (human rights) norms, via the consideration of the human (procedural) right to redress, the Constitutional Court performed exactly that task the ICJ had declined to undertake. The judgment of the Constitutional Court addresses the conflict – a dilemma indeed – between international law principles and rules shielding State sovereignty on one hand, and the principles and rules safeguarding and promoting human dignity on the other.[46] The former ones are deeply embedded in the "operating system" of International law; the latter figure prominently in many international law

[41] 'With an eye to the effectiveness of judicial protection of fundamental rights, the Court also noted that "the recognition of rights goes hand in hand with the recognition of the power to invoke them before a judge in judicial proceedings". Therefore, "the recourse to a legal remedy in defense of one's right is a right in itself, protected by Articles 24 and 113 of the Constitution. [This right is] inviolable in character and distinctive of a democratic State based on the rule of law." (Judgment 238/2014, *supra*, n. 1, para. 3.4 of the conclusions in point of law).
[42] International Covenant on Civil and Political Rights New York, 16 December 1966 Multilateral Treaty UNTS 999, p. 171 (Entry into force: 23 March 1976).
[43] General Comment No. 29: States of Emergency (article 4) Human Rights Committee (31 August 2001) CCPR/C/21/Rev.1/Add.11 , para. 15.
[44] American Convention on Human Rights "Pact of San José" San José de Costarica, 22 November 1969 Multilateral Treaty, Organisation of American States OAS Treaty Series No. 36 (Entry into force: 18 July 1978) , Art. 27(2), with reference to Art. 25(1).
[45] Francesco Francioni (ed), *Access to justice as a human right* (Oxford University Press, Oxford; New York 2007);Riccardo Pisillo Mazzeschi. 'Responsabilité de l'état pour violation des obligations positives relatives aux droits de l'homme' (2008) Volume 333 (2008) Recueil des Cours de l'Académie de Droit International de la Hague 175-506;Antonio Cançado Trindade, *Evolution du droit international au droit des gens — L'accès des individus à la justice internationale : le regard d'un juge* (Pedone, Paris 2008) . Cançado Trindade has developed this point in his Dissenting Opinion attached to the 2012 ICJ decision: *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening). Dissenting opinion of Judge Cançado Trindade
* 2012 3 February 2012 (International Court of Justice) .
[46] This reconstruction is convincingly articulated in Gianluigi Palombella. 'Senza identità. Dal diritto internazionale alla Corte costituzionale tra consuetudine, Jus cogens e principi «supremi»' (2015) (3) Quaderni costituzionali 815-830;Gianluigi Palombella. 'The Decision of the Italian C.C. 238/2014 on State Immunity and Access to Justice and the Present International Law' (2016) (forthcoming) Journal of International Criminal Justice .

regimes, and claim to be given priority over State sovereignty norms, namely through the normative dispositive of *ius cogens*. It is no surprise that the ICJ has thus far almost scientifically tried to avoid tackling such norm conflict in its case law.[47]
The Italian Court proved to be less interested than the ICJ in exercising self-restraint for the sake of protecting State sovereignty.[48] The State immunity rule could therefore be balanced against a competing rule aimed at providing access to justice for the victims of egregious violations of human rights and of international crimes. But there was a price to pay. Whereas the issue at stake was essentially pertaining to the realm of international law – the Italian Court's judgment can indeed be approached as a kind of overdue dissenting opinion appended to the 2012 ICC award – it was framed as based on a yardstick provided by the domestic law: joint articles 2 and 24 of the Italian Constitution. It may appear as a typical municipal *vs* international law case, with priority accorded to the domestic rule – and indeed the "precedent" of the *Kadi*[49] jurisprudence has been largely evocated. But the reasoning of the Constitutional Court – despite the language used – does not seem to be confined within the boundaries of the Italian legal system. What the Court maintains based on the Italian Constitution could be retold also with reference to international law standards and principles. The ICJ itself might have articulated its conclusions in the same way as the Italian Court without disposing of those Italian Constitution articles, because the existence of a human right to claim compensation from foreign State before a domestic jurisdiction, whose content and "ranking" depends on the substantial norm violated, is a plausible claim under international law as well.
It is true that the Constitutional Court explicitly and quite emphatically bows to the authority of the ICJ as for the identification of the contents of the international customary rule on State immunity from jurisdiction. But brandishing a positive rule is not enough, from a "constitutional" perspective. A rule ought to be balanced with other rules and principles. The Constitutional Court provides for such a balancing, and concludes that the blanket immunity elicited by the ICJ cannot enter the Italian legal system because it contravenes the fundamental right to a judicial redress in case of *ius cogens* violations.[50] This assessment is operated *before* the supposed international custom corresponding to the ICJ award entered the Italian system, or, more exactly, it is uttered at the threshold between the internal and international law systems,[51] in a "twilight zone" where principles and rules of both orders overlap and dialogue with each other, especially if the concerned municipal order is inspired – as it is the case for the Italian Constitution – to strong receptiveness to the international one. In this inter-normative and inter-institutional dimension, even the conflict between State immunity and *ius cogens* can be articulated in a way that indeed challenges the "operative system" of international law (and of the Italian order as well), but is fully consistent with the mandate and the *raison d'être* of a judicial body that is tasked to uphold the rule of law in a principled and comprehensive a way.

6. The role of the judiciary

[47] On the ICJ reluctance to make reference to *ius cogens* see Erika De Wet, '*Ius Cogens* and Obligations *Erga Omnes*' in Dina Shelton (ed), *The Oxford Handook of International Human Rights Law* (Oxford University Press, Oxford 2013) 541-561 .
[48] One may contend that it is all too easy to be liberal in setting aside the sovereignty claims of… a foreign State. Indeed, the decision of the Italian Court can fire back to Italy as well.
[49] cf *supra*, n. 27.
[50] "In the present case, the customary international norm of immunity of foreign States, defined in its scope by the ICJ, entails the absolute sacrifice of the right to judicial protection, insofar as it denies the jurisdiction of [domestic] courts to adjudicate the action for damages put forward by victims of crimes against humanity and gross violations of fundamental human rights. This has been acknowledged by the ICJ itself, which referred the solution to this issue, on the international plane, to the opening of new negotiations, diplomatic means being considered the only appropriate method (para. 102, Judgment of 3 February 2012). Moreover, in the constitutional order, a prevailing public interest that may justify the sacrifice of the right to judicial protection of fundamental rights (Articles 2 and 24 Constitution), impaired as they were by serious crimes, cannot be identified." (Judgment 238/2014, supra n. 2, para 3.4 of the conclusions in point of law).
[51] Cf Palombella, 'The Decision…', *supra*, n. 43.

A shortcoming of the position taken by the Constitutional Court as reconstructed in the previous paragraph may be that its balancing was undertaken in a purely normative dimension. The Court was aware of the practical concerns stemming from its decision to set aside the State immunity rule, but eventually, it has taken into account only strictly normative parameters. The principle of redress for serious violations of human rights and crimes against humanity takes priority over the State immunity rule because, arguing the other way round would lead to a disproportionate compression of the victims' rights *vis-à-vis* a clear case of violation of *ius cogens* obligations.[52] The Court seems to disregard the impact the judgment can have in the political-diplomatic sphere, the unease that its decision can cause with regard to the international partners of Italy, including the UN, considering the likelihood that the commission of an international wrongful act ensued from its decision – as indeed actually happened. The judgment is also not very clear about the consequences that domestic courts should draw, for example as to whether the prohibition of executing the ICJ judgment should result in a mere affirmation of the liability of Germany, or also into the adoption of measures of enforcement against the properties of the German States,[53] as well as concerning the centralised or diffused mechanism of assessing the existence in the Italian legal system of a rule of general international law potentially in contrast with the Constitution.[54]

Also, from this perspective, the judgment of the Constitutional Court mirrors the decision of the ICJ. The Hague Court set aside the argument about *ius cogens* obligations using a formalistic reasoning to avoid an intractable issue, and, aware that, in so doing it removed the last opportunity for the former Italian military internees to claim for redress, it expressed the wish that the negotiations between the two states could be reopened. Specularly - as in sort of *contrappasso* – the Court in Rome dismissed the formalistic distinction between primary and secondary rules and found in the core values of the Constitution – largely corresponding to the class of *ius cogens* obligations – the counter-limits to oppose to the enforcement of the State immunity rule in Italy in the specific domain object of the litigation. As for the practical and political implications of the decision and the concerns for international comity that commonly arise in the reasoning of the Constitutional Court as legitimate elements that ought to be given an appropriate weight in a proportionality test of constitutionality, they appear to have been utterly neglected.[55]

Was the Constitutional Court too rigorous in expunging from its purview practical considerations and in rejecting to assume a more pragmatic attitude that could have appeased the ICJ (and the UN)? Could it have managed to break the deadlock by, for example, upholding the ICJ conclusions and mandate the State authorities to take up the invitation to resume negotiations with Germany, or to pass *ad hoc* legislation providing adequate allowances for the persons concerned? On this point, support for the principled and clear-cut position adopted by the Constitutional Court comes from a passage in Prof. Perrakis' *plaidoirie* before the ICJ on September 14, 2013. In his passionate speech are clearly identified the intrinsic limits of a political-diplomatic approach to the matter of individuals' redress in case of international crimes. Frankly speaking, experience shows that States – any States – in these matters are not trustworthy unless they are assisted and overseen by the firm guidance of the judiciary.

Monsieur le président, Mesdames et Messieurs de la Cour, ça relève de l'hypocrisie absolue de prétendre aujourd'hui que la question des réparations devrait être engagée au niveau interétatique. Comment exploiter une procédure diplomatique si les Etats ne veulent pas influencer leurs bonnes relations ? […] En fait, combien de traités de paix ont été signés après de récents conflits (Iraq, Liban, Géorgie – que sais-je) ? De quels traités de paix parle-t-on quand les

[52] Cf *supra*, n. 11 and accompanying text.
[53] Cf *supra*, n. 18 and accompanying text.
[54] Cf *supra*, n. 31 and accompanying text.
[55] From this perspective it might be said that the Italian Court adopted a "civilist approach", rather than a fully "constitutional" one, according to the taxonomy proposed in Robert Uepermann-Wittzak, 'Serious Human Rights Violations as Potential Exceptions to Immunity: Conceptual Challenges' in Anne Peters and others (ed), *Immunities in the Age of Global Constitutionalism* (Brill, Leiden 2014) 236-243 .

conflits modernes, la plupart de temps, ne sont ni déclarés, ni terminés formellement ? Pourquoi les signataires du traité de Moscou n'ont pas abordé la question des réparations dans cet instrument ? Pourquoi, dans le passé, il y avait des réponses «choisies» et «partielles» face aux revendications des victimes ? Que veut-on dire par combien de temps faut-il attendre pour que la question soit résolue ? Certainement jusqu'au moment où les Etats responsables assument pleinement leur responsabilité. Qui doit honorer l'engagement pris depuis plus d'un siècle : «celui qui viole le droit international doit réparer» ? Et si les Etats ayant pris cet engagement n'agissent pas au niveau national ou international, comment réagir ? Que faire ? Comment qualifier donc cette situation présente au niveau international en essayant d'apporter des réponses convaincantes à des victimes comme celles de Distomo ? Comment nier tout effet juridique émanant de l'article 3 [of Convention (IV) respecting the Laws and Customs of War on Land, the Hague, 18 October 1907] quant à un droit aux réparations pour violations graves du droit international humanitaire ? Une logique juridique restrictive pour combien de temps peut-elle résister encore quand la communauté internationale, aujourd'hui même, renvoie devant les assisses de la Cour pénale internationale des chefs d'Etat comme Bashir du Soudan et Kadhafi de Libye pour crimes contre l'humanité, et prend des mesures en faveur des droits de l'homme, des populations vulnérables, des victimes de guerre ? [56]

7. Conclusive remarks

This short analysis has tried to demonstrate that the decision of the Italian Constitutional Court represents indeed a direct challenge to the ICJ ruling in the *International Immunity* case, but is not a threat for the international law order. It does not aim at widening the schism between municipal and international law. Should one look for a judicature asserting the irrelevance of international customary law, exclusive loyalty to the national constitution and disregard for international courts' decision, the Italian courts are definitely not the most obvious example.[57]
Judgment 238/2014 is rather evidence that at least some national courts are increasingly inclined towards a more intense involvement in the international normative arena. They bring into the international law discourse their own style of reasoning and arguing, where the rule of law principle is paramount, whereas some original characters of international law, including sovereign equality of States, fit rather problematically. The realm of international law has grown complex and confrontational. An extra quantum of wisdom, integrity and open-mindedness is required to balance freedom and justice and make them progress.

[56] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening). Public sitting held on Wednesday 14 September 2011, at 10 a.m., at the Peace Palace, President Owada presiding. Verbatim Record* 2011 14 September 2011 (International Court of Justice) (Stelios Perrakis) .

[57] Looking around, one could for example bump into this paragraph: "Even in activities where there are spillovers, such as law on the use of force, American law is probably better than international law. The United States is the world's great power, sometimes called the global hegemon in international relations theory. It stands to gain the lion's share of resources from the peace and prosperity of the world. Its political process has incentives to provide laws that contribute to peace and prosperity, such as appropriate use of force. Moreover, as a hegemon composed of immigrants who remain concerned about the welfare of their former nations, America affords citizens from all over the world some virtual representation in its political process. These guarantees of beneficence for foreigners are surely imperfect, but they seem better than those provided by customary international law. Thus, by insisting that United States courts follow American law and not raw international law, Americans serve both themselves and others around the globe. America helps the world most by remaining true to her own democratic genius." (John O. McGinnis. 'The Comparative Disadvantage of Customary International Law' 30(1) Harvard Journal of Law & Public Policy 7-14 , 30).

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