

## SOME WH QUESTIONS ABOUT THE ITALIAN CONSTITUTIONAL COURT'S JUDGMENT ON THE RIGHTS OF THE VICTIMS OF THE NAZI CRIMES

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1. The news has now spread literally worldwide that with judgment no. 238 of 22 October 2014 (hereafter: the ICC judgment), the Italian Constitutional Court (ICC) deemed that the international customary law of State immunity from the civil jurisdiction of other States, as established by the International Court of Justice (ICJ) just two years earlier in a dispute that also on that occasion involved Germany and Italy and regarded similar war crimes, does not hold or have any effect within the Italian legal order<sup>1</sup>.

This customary law, indeed, according to the ICC, can only be valid in Italy after the 'amputation' of the part coming into conflict with the '*controlimite*' (counter-limit) that Italian constitutional law places on it, which consists of the right of victims and their families to judicial protection against acts that qualify as war crimes and crimes against humanity in breach of the inviolable rights and dignity of the human person (art. 24 It. Const., read in conjunction with Art. 2 It. Const.<sup>2</sup>).

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<sup>1</sup> The ICC judgment can be read at [http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S238\\_2013\\_en.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf).

The ICJ judgment can be read at <http://www.icj-cij.org/docket/files/143/16883.pdf>.

<sup>2</sup> Art. 24, par. 1, It. Const. provides that: "All persons are entitled to take judicial action to protect their individual rights and legitimate interests"; art. 2 It. Const. states that: "The Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups within which human personality is developed. The Republic requires that the fundamental duties of political, economic and social solidarity be fulfilled".

In other words, the customary rule enters the Italian system reduced in scope, and substantially transformed into a different rule imposing immunity for *jure imperii* acts of States from the civil jurisdiction of other States, *but excluding* it for acts such as deportation and forced labour of civilians in time of war, similar to those discussed in the court of Florence, which had raised the questions.

This ICC judgment has already broken all records thanks to the extraordinary amount of initial comments<sup>3</sup>, not to mention the

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<sup>3</sup> See, first of all, the rich debate that has grown on blog of the *Italian Society of International Law (SIDI)* at [www.sidi-isil.org/sidiblog/](http://www.sidi-isil.org/sidiblog/) (with interventions so far by L. Gradoni, *Corte Costituzionale italiana e Corte internazionale di giustizia in rotta di collisione sull'immunità dello Stato straniero dalla giurisdizione civile*; P. De Sena, *Spunti di riflessione sulla sentenza 238/2014 della Corte costituzionale*; M. Longobardo, *"Il non-essere non è e non può essere": brevi note a margine della sentenza n. 238/2014 della Corte costituzionale rispetto all'adattamento dell'ordinamento italiano al diritto internazionale consuetudinario*; P. De Sena, *Norme internazionali generali e principi costituzionali fondamentali, fra giudice costituzionale e giudice comune (ancora sulla sentenza 238/2014)* and L. Gradoni, *Giudizi costituzionali del quinto tipo. Ancora sulla storica sentenza della Corte costituzionale italiana* and Id., *Un giudizio mostruoso. Quarta istantanea della sentenza 238/2014 della Corte costituzionale italiana*). See also *Questions of International Law (QIL)*, at [www.qil-qdi.org](http://www.qil-qdi.org), whose *Zoom out II - 2014 on the theme of Colliding legal systems or balancing of values? International customary law on State immunity vs fundamental constitutional principles in the Italian Constitutional Court decision no 238/2014* was introduced by M. Arcari and has so far received contributions by P. 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*; R. Kolb, *The relationship between the international and the municipal legal order: reflections on the decision no 238/2014 of the Italian Constitutional Court* and C. Pinelli, *Decision no. 238/2014 of the Constitutional Court: Between undue fiction and respect for constitutional principles*. Among the many other comments on first reading that have appeared on the web, see also at least: A. 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*, at [www.ejeltalk.org](http://www.ejeltalk.org); N. Krisch, *The Backlash against International Courts*, in *VerfBlog*, at [www.verfassungsblog.de](http://www.verfassungsblog.de); F. Würkert, *No Custom Restricting State Immunity for Grave Breaches - Well Why Not?*, *ibid.*; F. Fontanelli, *Damage-assessment on the Building of International Law after the Italian Constitutional Court's Decision No. 238 of 2014: No Structural Damage, just Wear and Tear*, *ibid.*; H. Birkenkötter, R. Kunz and D. Schmalz, *Of Global Cities and Gallic Villages: Tensions between Constitutional and International Law*, *ibid.*; D. Roughton and A. Hoffmann, *Constitutional Rights vs. State Immunity: Implementation of an ICJ Decision on Sovereign Immunity Declared Unconstitutional*, in [www.hsfnotes.com/publicinternationallaw](http://www.hsfnotes.com/publicinternationallaw); R. Caponi, *Sovereign Immunity and*

forthcoming spate of more in-depth critiques, and the numerous meetings and interdisciplinary seminars it has brought about, especially among internationalists and constitutionalists throughout Italy and elsewhere.

Moreover, it is set to become the most famous ICC judgment outside of Italy, at least in recent years. And it could happen not only because of the subject-matter itself – the subject-matter of the relationship between customary international law and fundamental rights protected in national constitutions is naturally of global interest – but also because of the solution that the ICC judgment provides, leaving no commentator indifferent, triggering either love at first sight or (rather more frequently) strong criticism.

The explanation for this heated and contrasting reaction is certainly the fact that the ICC judgment provides *an extremely rigid answer* to the difficult question of how to balance the constitutional rights of the victims of atrocious acts of violence with the need to

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*Fundamental Human Rights after Italian Constitutional Court no. 238 2014*, in [www.academia.edu](http://www.academia.edu); Id., *A Fresh Start: How to Resolve the Conflict between the ICJ and the Italian Constitutional Court*, in [www.tinyurl.com/iccvsicj](http://www.tinyurl.com/iccvsicj); A. 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)*, in *Consulta on line, Studi 2014*, at [www.giurcost.org/studi](http://www.giurcost.org/studi); A. Guazzarotti, *Il paradosso della ricognizione delle consuetudini internazionali. Note minime a Corte cost. n. 238 del 2014*, in [www.forumcostituzionale.it](http://www.forumcostituzionale.it); L. Gradoni, *Corte costituzionale italiana "controvento" sull'immunità giurisdizionale degli Stati stranieri?*, *ibid.*; P. Faraguna, *Corte costituzionale contro Corte internazionale di giustizia: i controlimiti in azione*, *ibid.*; S. Lieto, *Il diritto al giudice e l'immunità giurisdizionale degli Stati nella sentenza della Corte costituzionale n. 238 del 2014*, *ibid.*; S. Leone, *Sul dispositivo della sentenza n. 238 del 2014: una soluzione preordinata ad accentrare il sindacato sulle consuetudini internazionali presso Palazzo della Consulta*, *ibid.*; A. Tanzi, *Sulla sentenza cost. 238/2014: cui prodest?*, *ibid.*; F. 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*, in [www.diritticomparati.it](http://www.diritticomparati.it); P. Passaglia, *Una sentenza (auspicabilmente) storica: la Corte limita l'immunità degli Stati esteri dalla giurisdizione civile*, *ibid.*; P. Faraguna, *Corte costituzionale e corte internazionale di giustizia: il diritto alla penultima parola (sulla sentenza n. 238 del 2014)*, *ibid.*; Id., *La sentenza n. 238 del 2014: i controlimiti in azione*, in *Quad. cost.*, 2014; S. Leone, *La sentenza n. 238 del 2014: una soluzione preordinata ad accentrare il sindacato sulle consuetudini internazionali*, *ibid.* and again L. Gradoni, *La sentenza n. 238 del 2014: Corte costituzionale italiana "controvento" sull'immunità giurisdizionale degli Stati stranieri?*, *ibid.*

uphold customary international law, maintaining that *either* the victims of Italian war crimes and their descendants are given the possibility of taking legal action against Germany for damages, in violation of international customary law requiring State immunity, *or* their rights and their dignity as human beings must be considered violated forever. Indeed, the ICC reasoning leaves no room for any other solutions grounded on different factors, such as the forms of collective compensation already advocated by the same ICJ judgment that, without going through the courts, might, at least in theory, protect the dignity of the people involved.

Being so trenchant, then, when the ICC judgment meets with approval, it is very popular, and when it does not, it is baffling.

The most serious objection is that such a black and white solution is unworthy of the elegant balances that the Italian constitutional case law usually produces, which are unfortunately little known or appreciated abroad because the official website of the ICC does not provide an English translation of all its judgments<sup>4</sup>. So, for those who take the critical line, if our judgment really does become the most famous Italian constitutional decision outside the national borders, it will do so undeservedly, because there are many other ICC judgments more apt than this to bring valuable insights and points for reflection before other national and international supreme courts, thus enriching their reasoning when addressing similar issues.

Nevertheless, to be optimistic, all the hype around this judgment could also serve some purpose. It might serve, for example, as a reminder that national constitutional courts still exist, and in particular that the Italian one still has a role to play (I shall return to this topic in a moment); that distinct national constitutional identities still survive in the world and in Europe; and that in order to defend these identities the highest national courts are absolutely right to claim their own space and to make

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<sup>4</sup> The few sentences translated since 2006 can be found at [http://www.cortecostituzionale.it/ActionPagina\\_1240.do](http://www.cortecostituzionale.it/ActionPagina_1240.do). It also seems, to my knowledge, that there are no unofficial collections of important Italian constitutional judgments other than one which has unfortunately had very limited distribution: C. Pettinari, *Cases and Materials on the Italian Constitutional Court* (2009).

their voices heard, even though they do not always do so when they are right in the specific case at stake.

Granted this necessary preamble, in the brief remarks that follow I naturally do not wish to recall all the numerous issues that the ICC judgment raises, and which have already been widely addressed in scholarship, and in particular I shall not be going into the many problems of international law that it raises, as they fall outside my competence.

I prefer rather to try to respond from a constitutionalist perspective, which is more within my reach, and as simply as possible, to three of the main questions that a reader of the ICC judgment might ask: *a) What happened?* How did we come to a constitutional ruling like the one in question? (para. 2); and then, *b) why?* What features of the issues raised by the judge of Florence make - and could not fail to make - this constitutional decision so peculiar in the outline of the ICC case law itself, going a long way to justifying the attention that scholars have give to it? (para. 3); and, finally, *c) what might happen next?* What effects could the ICC judgment produce not in the international community - it is certainly not my place to look into these aspects - but in the Italian legal system, with regard to the ordinary courts, including the judge of Florence, and the parties to their proceedings? (para. 4).

2. I must say right from the start that I cannot describe here the earliest attempts by the Italian victims of Nazi war crimes and their families to obtain out-of-court compensation for damages suffered. Suffice it to say that such attempts are crucial in order to understand the whole story, as the ICJ judgment in fact underlines, and which unlike the ICC judgment dwells on them at length, because they show that the Italian government has had, and continues to have, its fair share of responsibility in the failure to satisfy the demand for justice advanced by Italian citizens.

I will, on the other hand, recall in brief the events following the failure of the out-of-court route and the subsequent emergence of the claims of the Italian victims before the courts of their country.

When, around ten years ago, some of the civil proceedings initiated against Germany came before the Italian Supreme Court, surprisingly, this court did not conform to international customary law that would require it to declare that there could be

no judicial solution. The famous and widely commented on Ferrini judgment of the joint sections of the Supreme Court of Cassation of 2004<sup>5</sup> in fact advised the international community to accept a new version of the customary law that would take into account the absolute primacy of the fundamental values of freedom and human dignity, reformulating it as follows: immunity from the civil jurisdiction of foreign States does not extend to their *jure imperii* acts, which can be considered to be crimes against humanity. This conclusion was then repeated in similar cases in 2008<sup>6</sup> and 2011<sup>7</sup>. In these judgments, the reasoning is, if possible, even more explicit. According to the Italian Supreme Court of Cassation, the international human rights law "outweighs" the customary rule on immunity of States, because "it is a higher ranking norm", "of a superordinate nature" and "has assumed, also in the international order, the role of fundamental principle, because of the axiological meta-value of its content". In the last judgment of the series, the Supreme Court of Cassation explicitly states that the case law initiated by the Ferrini judgment must be confirmed because it "constitutes unquestionable progress in terms of the configuration of jurisdictional immunity to the new international order" that places human rights at the pinnacle.

Nevertheless, in 2012 the ICJ, upon a request by Germany, rejected the innovative suggestion of the Italian Supreme Court of Cassation and interpreted the customary law in force in traditional terms<sup>8</sup>. A few months later, the Supreme Court of Cassation,

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<sup>5</sup> Cass., joint sections, no. 5044 of 2004, (known as the *Ferrini* judgment), in *International Law Reports (ILR)*, Vol. 128, 2006. On this much commented judgment see at least P. De Sena and F. De Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, in *EJIL* (2005), Vol. 16, No. 1, 89.

<sup>6</sup> Among the 2008 judgments, one remembers Cass., joint sections, no. 14199 of 2008, from which the phrase in quotation marks reproduced in the text is taken.

<sup>7</sup> Cass., I section, no. 11163 of 2011.

<sup>8</sup> The ICJ judgment is well known. See, among the many comments, contributions in the book *Immunities in the Age of Global Constitutionalism*, edited by A. Peters, E. Lagrange, S. Oeter and C. Tomuschat, (2014); M. Krajewski and C. Singer, *Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights*, in *Max Planck Yearbook of United Nations Law*, edited by A. von Bogdandy and R. Wolfrum, Vol. 16, (2012); PC Bornkamm, *State Immunity Against Claims Arising from War Crimes: The Judgment of the International Court of Justice in Jurisdictional Immunities of the State*, in 13 *Ger. Law J.*, (2012), No. 6, 773; M. McMennamin, *State Immunity before the*

ruling on a criminal case, aligned itself with the rule of immunity for all *jure imperii* acts, including war crimes<sup>9</sup>. The Italian Parliament also adapted to the ICJ judgment, adopting with unusual promptness a law in 2013 requiring judges to declare their lack of jurisdiction in on-going civil proceedings and making it possible to revoke judgments that already become final allowing civil action against Germany<sup>10</sup>.

The matter does not, however, end here. A few months later, a court of first instance of Florence, in sharp contrast to the Supreme Court and the political organs, questioned whether it had to follow the ICJ judgment, and thus turned to the ICC with four identical referral orders, three of which have been decided in our judgment, while one is still waiting to be judged.

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*International Court of Justice: Jurisdictional Immunities of the State (Germany v. Italy)*, in 44 *Victoria U. Wellington L. Rev.*, (2013) 189 ff.; M. Kaldunski, *The Law of State Immunity in the Case Concerning Jurisdictional Immunities of the State (Germany v. Italy)*, in 13 *The Law and Practice of International Courts and Tribunals*, Issue 1, (2014) 54; D. Raju and B. Jasar, *Intervention before the International Court Of Justice - A Critical Examination of the Court's Recent Decision in Germany v. Italy*, in 6 *NUJS L. Rev.*, (2013) 63; S. Talmon, *Jus cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished* in 25 *Leiden Journal of International Law*, (2013) 979.

<sup>9</sup> Cass., I criminal section, no. 32139 of 2012 (known as the *Albers judgment*), annotated by F. Fontanelli, *Criminal Proceedings against Albers*, in 107 *Am. J. Int'l L.*, no. 3, (2013) 632. On this occasion, the previous rulings of the Supreme Civil Court were described in a very polished way as "an attempt, dictated by the need to affirm principles of legal culture, which in the absence of its 'validation' by the international community of which the Hague Court is the maximum representative, has not been, or has not yet been, provided by its necessary sharing, and that, for this inevitable reason, it cannot be extended to further applications". This was followed in 2013 by a new judgment of the joint sections on the regulation of civil jurisdiction: they also surrender to the Hague Court's ruling, and declare the lack of jurisdiction of the Italian courts against Germany, which was the defendant in a different damages case resulting from the detention, torture and subsequent murder of an Italian citizen by the Nazi criminal Priebke during the Fosse Ardeatine massacre (Cass., joint sections, no. 4284 of 2013). On each of these developments see also V. Filfak, *Domestic Courts Enforcement of Decisions and Opinions of the International Court of Justice*, Legal Studies Research Paper Series, University of Cambridge, Faculty of Law, paper No 32/2014, April 2014, 15.

<sup>10</sup> Law no. 5, January 14, 2013. On this point see G. Nesi, *The Quest for a 'Full' Execution of the ICJ Judgment in Germany v. Italy*, in 11 *J. of Int'l Criminal Justice*, (2013) 185.

The hub of the doubts of the judge of Florence is art. 10, first paragraph, It. Const., which provides that “The Italian legal system conforms to the generally recognised rules of international law”. For many years, in fact, consolidated constitutional jurisprudence has claimed that through the ‘open door’ of art. 10, first paragraph, It. Const., customary international law becomes part of Italian law on the same level as constitutional norms<sup>11</sup>, unless – as the ICC itself states on European Union law when it talks of ‘*controlimiti*’<sup>12</sup> – that customary international law is in conflict with the fundamental principles of the Italian constitutional order or breaks the inalienable rights of the human person<sup>13</sup>. According to the judge of Florence then, the international customary law which imposes the immunity of Germany in civil proceedings pending before it clashes with the ‘*controlimite*’ consisting in the right to judicial protection in the event of a serious violation of fundamental rights. Thus a series of questions arose, effectively stemming from three different ‘norms’, each of which was put to the ICC for its decision.

The ICC basically upholds the opinion of the judge of Florence on all three points. But it should be noted that it does so without putting into question the content and the scope of the customary rule on State immunity, unlike the Supreme Court of Cassation in the Ferrini case, simply stating that this rule, *as it is*, i.d. as ascertained by the ICJ, cannot be incorporated in Italy precisely because of the existence of a ‘*controlimite*’.

In the first operative part of the judgment, the ICC declares unconstitutional the Italian law of 2013 that sought to compel the Italian courts to respect the ICJ judgment.

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<sup>11</sup> The wording of Article 10, first section of the Constitution was proposed at the Constituent Assembly by Tommaso Perassi, who at that meeting had already given to the mechanism envisaged by that article the name “permanent transformer” of international practice in a domestic binding rule (Committee on the Constitution, plenary session, January 24, 1947). This definition would first be taken up in Italian scholarship by Perassi himself (T. Perassi, *Lezioni di diritto internazionale*, 1959) and later by many other authors.

<sup>12</sup> ICC, no. 98 of 1965, and then ICC, no. 183 of 1973 and no. 170 of 1984 until the final formulation contained in the ICC, no. 232 of 1989.

<sup>13</sup> The view that there are ‘*controlimiti*’ also to the entry of international customary norms into Italian law appeared for the first time in the so-called Russel case (ICC, no. 48 of 1979).

In the second operative part of the judgment, the ICC declares unconstitutional the Italian law of 1957 which – pay attention! – implements the Charter of the United Nations<sup>14</sup> but “*exclusively to the extent that it obliges the Italian judge to comply with*” the ICJ judgment of 2012.

Lastly, in the third operative part of the judgment, the ICC rules on the most sensitive question, which regards not an Italian law, but the “norm” – as the ICC calls it in general terms – “created in our legal order by the incorporation, by virtue of Article 10, para. 1 of the Constitution”, of the customary international law of State immunity from the civil jurisdiction of other States.

The issue is resolved through what is known in the technical jargon of Italian constitutional justice as the *sentenza interpretativa di rigetto* (literally: the “interpretative judgment of rejection”). It is resolved, in other words, by declaring the question raised by the judge of Florence “*ill-founded, under the terms set out in the reasoning*”, i.e. it is resolved by rejecting the question *on condition that* the international norm entered in Italy is now read in such a way as to remove any conflict with the Constitution.

So, according to the ICC judgment, as I said above, the international customary rule on State immunity from the civil jurisdiction of other States that must be considered to have entered Italian law is one that *does not* infringe the constitutional ‘*controlimite*’ because, while generally imposing the immunity of States for acts *jure imperii*, it *does not*, however, cover acts such as deportation, forced labour, and killings recognized as crimes against humanity.

3. My feeling is that the undeniable peculiarity of the problems at hand cannot but have affected the choices – in many respects open to criticism and rightly criticized – made by the ICC.

First of all it should be said, generally speaking, that few cases are able to stir emotions like those relating to Nazi horror.

It is also likely that within the constitutional panel itself there were people particularly sensitive to the issue due to their

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<sup>14</sup> Law no. 848, August 17, 1957.

age, having been born before World War II, or thanks to their family histories. This is a situation common to many Italians<sup>15</sup>.

The case also has a unique and remarkable symbolic dimension.

In Europe, constitutional justice as we know it today can be said to have come into being following World War II as a reaction to Nazi genocide, because those *historical facts* had proved that earlier national constitutions had not, in reality, been able to protect the individual rights they set out against the excessive power of political majorities, and entire minorities had not only been deprived of the right to life, but also of their very dignity as human beings. Precisely to prevent a repetition of what had happened, therefore, it was deemed insufficient simply to create new constitutions superordinate to the ordinary laws, but it was felt necessary to include provision for special constitutional tribunals, to which the power was given to countermand the wishes of political majorities if these were found to violate human rights. In particular, and not surprisingly, this is precisely what the Italian and German constitutions of 1948 and 1949 respectively were to do.

Ultimately, it would have proven difficult for the ICC, even from the ideal point of view, not to answer the call of the judge of Florence which particularly concerned protection for the victims of Nazi crimes.

It had already happened, albeit rarely, that the ICC had had to address a matter of international customary law. But – and this is the point – never before the ICC had to handle an international customary law whose scope had been already assessed by the ICJ. And it had never before happened that the customary law, as reconstructed by the ICJ, in addition to being the parameter used to assess the domestic law at issue, had also become the subject per se of constitutional review, from the point of view of '*controlimiti*'. Quite unlike all previous cases therefore, one of the

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<sup>15</sup> For example, both my maternal grandparents were partisan leaders in Piedmont (in the North of Italy), and my mother, born in 1941, still remembers when, at the age of three, hidden in a dark pit by the country folk who were looking after her, she heard the voices of German soldiers who had come to look for her so as to be able to capture her parents, but after questioning the farmers they moved on, thankfully without returning.

sensitive implications for the ICC was that it had to evaluate the work of the ICJ, albeit in the light of domestic parameters.

In other words, in this occasion only the issue of '*dangerous relationships*' among courts came up. And we are well aware that this is a common problem that has now plagued all the supreme courts for some years, and especially constitutional courts<sup>16</sup>.

It cannot be forgotten, in fact, that, at least since the beginning of the new millennium, the ICC, like all of its 'peers' in Europe, has found itself plunged into an increasingly complex world – the world of the "courts of Babel"<sup>17</sup> and of the multi-level protection of the fundamental rights – where it is daily forced to fight to preserve its role, so as not to be unduly worn down by other courts.

In effect, its position is threatened both from 'inside', because the ordinary courts and the supreme ordinary and administrative courts in particular are now able to carry out most of its functions regarding control over the law, and from 'outside', because the two European courts in Strasbourg and Luxembourg, for different reasons that cannot be examined here, constitute dangerous competitors and put at risk the continued operativeness of the centralized system of constitutional review<sup>18</sup>.

Even in terms of the 'dangerous liaisons' between courts, therefore, in our case it must have been the absolute peculiarity of the *historical facts* discussed at all levels that bore weight, namely the deportation, forced labour, and the killings recognized as crimes against humanity committed by the Nazi regime.

From this point of view, the Italian expression "*talk to the daughter-in-law so that the mother-in-law will understand*" is apposite. It means one should intervene in a situation of particular tension

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<sup>16</sup> The literature on the subject is now extensive. For a clear and wider-angng overview of the major problems, see, exhaustively M. Cartabia, *Fundamental Rights and the Relationship Among the Court of Justice, the National Supreme Courts and the Strasbourg Court*, in *50ème anniversaire de l'arrêt du 5 février 1963, Van Gend en Loos. Actes du colloque*, (2013) 155.

<sup>17</sup> S. Cassese, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale*, (2009).

<sup>18</sup> For this view, cf. especially V. Ferreres Comella, *Constitutional Courts and Democratic Values. A European Perspective*, (2009) and, in relation to the Italian case, *Dove va il sistema italiano accentrato di controllo di costituzionalità? Ragionando intorno al libro di Victor Ferreres Comella Constitutional Courts and Democratic Values*, edited by L. Cappuccio and E. Lamarque, (2013).

without going directly to the other party, but talking to someone (usually the weakest), so that others (usually the strongest) understand that the words are addressed to them<sup>19</sup>.

Thus it may be said that the ICC has seized an excellent, and perhaps unique chance to talk to the daughter-in-law - the ICJ - so that the mothers-in-law - the Strasbourg Court and *especially* the Luxembourg Court - understand.

It has, in other words, taken advantage of the question raised the judge of Florence to demonstrate - to the two European courts in particular - that it is able, when necessary, to 'stop' the decisions of external courts.

It has often been said, in fact, thinking of relations with the Court of Justice of the European Union, that the old institution of '*controlimiti*', invented almost fifty years ago by the ICC itself, but in fact never used, would have been fallen into disuse by now. 'Barking dogs don't bite' is another useful Italian expression often used when talking about this issue.

Now, however, the ICC has decided to show that it can bite, but it has done so with a vulnerable, easily biteable, prey from a symbolic point of view, because in the background were the crimes committed by the Nazi regime. A domestic constitutional court could wish for no better occasion to champion human rights, showing at the same time that the protection offered by a powerful international court had been inadequate.

4. So now we come to the last of the three questions, that seems to me to be the crucial one. What effects does the ICC judgment have on the Italian courts? In particular, does it bind them, does it really force them to commit an internationally wrongful act? Or does it merely *invite* them to perform it?

It seems obvious that the internationally wrongful act proposed by the ICC judgment has not yet been committed, but will come into existence only if an Italian ordinary court, before which a civil claim is brought by a victim or a descendant,

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<sup>19</sup> The expression is clearly based on the reality of the families of the past, where the major tensions derived from the proximity or the forced cohabitation of different households and the fact that the woman, queen of the household, had to share her scepter with the other women of the family.

explicitly or implicitly denies Germany immunity, reopening its proceedings<sup>20</sup>.

The effect of the declarations of unconstitutionality contained in the first two parts of the operative part of the ICC judgment does not appear to be clear. All we can say is that the Italian ordinary courts are now no longer bound by the ICJ judgment. But are they also obliged not to comply with that decision? Or are they still *free* to reach a *different balance* between Article 10 with Articles 2 and 24 of the Italian Constitution, and thus make the customary international law – that would require it to declare the immunity of Germany from the Italian jurisdiction – prevail over the protection of the victims' rights?

Let us imagine that negotiations between Italy and Germany are opened again, and that compensation will be paid to all victims of war crimes and their descendants. Could an Italian judge, deeming at this point that the dignity of the victims (art. 2 It. Const.) is sufficiently safeguarded, decide that the international customary law on State immunity should prevail over the right of the victims to take legal action and obtain a fully satisfactory compensation (art. 24 It. Const.)?

As the principle of totality is also applied to ICC judgments, it follows that these two operative parts of the judgment must be interpreted in the light of the reasoning and, consequently, the answer would seem to be negative.

Nevertheless, there is still room, in my opinion, to argue that the two declarations of unconstitutionality *simply authorize or invite* ordinary Italian courts to deny immunity to Germany, but *they alone cannot impose this solution*.

The 'form' of the third part of the operative part of the ICC judgment confirms such a conclusion.

As I said above, in fact, the ICC decision rejects the question asking ordinary judges to give the customary international law entered in Italy a different interpretation, not in conflict with the '*controlimiti*'.

This is a typical – technically speaking – *sentenza interpretativa di rigetto*. And in consolidated Italian practice a

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<sup>20</sup> A. Peters, *Let Not Trierpel Triumph*, cit. at 3, p. 4.

*sentenza interpretativa di rigetto* is never binding on ordinary courts<sup>21</sup>. It is a recommendation, not a command<sup>22</sup>.

So, are all Italian civil courts still free to choose whether to comply with the ICJ judgment or the ICC judgment, and therefore declare that Germany is immune (or not)? The answer may be yes.

From this point of view, only the position of the judge of Florence in the civil proceedings reopened after the ICC judgment remains peculiar, because at least in the proceedings from which the question arose the *sentenza interpretativa di rigetto* produces both a negative interpretive constraint not to accept the interpretation deemed by the ICC not to be in conformity with the Constitution, as well as a procedural ban on raising again the same question, in accordance with the ban on appeal against ICC judgments under art. 137, last paragraph, It. Const.<sup>23</sup>.

But at this point another important element comes into play, often neglected by commentators of the ICC judgment, i.e. that there still exists an Italian law – Law no. 411 of 23 March 1958 (*Ratification and implementation of the European Convention for the pacific settlement of disputes, signed in Strasbourg on April 29, 1957*) – which contains a provision similar to art. 94 of the Charter of the United Nations: article 39 of the Convention, stating that “each High Contracting Party shall comply with the decree of the International Court of Justice [...] in any dispute in which it is a party”. This provision is still in force, and binding, only because the judge of Florence has not brought it before the ICC.

The ICC, some might observe, was not required to judge on that rule as it is not included in the *thema decidendum*. But, you might argue, if the ICC had really wanted to do away with all the

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<sup>21</sup> And it does not even produce that alternative obligation envisaged by ancient and authoritative scholarship (L. Elia, *Sentenze «interpretative» di norme costituzionali e vincolo dei giudici*, in *Giur. cost.*, (1966) 1718.; Id., *Gli inganni dell'ambivalenza sintattica*, in *Giur. cost.*, (2002) 1051), whereby ordinary courts, faced with a *sentenza interpretativa di rigetto*, would be required either to follow the interpretation offered by the ICC or to bring the same issue before the ICC in order to finally obtain a declaration of unconstitutionality. Cf. E. Lamarque, *Interpreting Statutes in Conformity with the Constitution: the Role of the Constitutional Court and Ordinary Judges*, in 2 *IJPL* (2010) No. 1, 108.

<sup>22</sup> A. Pizzorusso, *La motivazione delle decisioni della Corte costituzionale: comandi o consigli?*, in *Riv. trim. dir. pubbl.*, (1963) 346.

<sup>23</sup> Kindly allow reference to E. Lamarque, *Corte costituzionale e giudici nell'Italia repubblicana*, (2012) 75.

rules that oblige the Italian courts to respect the ICJ judgment of 2012, it could have also eliminated that provision on the grounds of the so-called 'consequential unconstitutionality', which would allow it to go beyond the limits of the *thema decidendum*, and to declare also "which are the other laws whose illegitimacy is due to the decision taken"<sup>24</sup>.

All this is to show that any Italian court – including the court of Florence, which had raised the questions now already decided upon – wishing to go ahead with a civil case against Germany could not do so even after the ICC decision of 2014, as it *would still have to raise a new question regarding the constitutionality of the 1958 law*, in order to remove the last remaining obstacle to its 'disobedience' to the ICJ judgment of 2012.

This would be a good thing, because in the constitutional proceedings thus established the ICC could seize the valuable opportunity to change tack, perhaps on the basis of new facts, such as possible diplomatic negotiations in progress or concluded with Germany, and thus strike a different and *more flexible balance* between the 'right to a judge' of the victims and the international customary law which requires the immunity of States.

Ultimately, the prospect is quite comforting. It seems possible, and indeed likely, that the blatant defect of the ICC judgment, i.e. the rigidity of its balance, may be amended in the very near future by ordinary Italian courts or, better, by the ICC itself.

And once this to my mind necessary change of direction has been taken, only the most interesting part of this decision will remain, that is the message from the Italian organ of constitutional justice showing its ongoing vitality, now received loud and clear by the entire international community. Not to mention the fact that, if properly toned down, the ICC judgment could also help in the positive evolution of international customary law on State immunity for *jure imperii* acts, so as to do away with it at least for serious violations of human rights that have not found alternative forms of compensation for the victims.

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<sup>24</sup> This is provided for in the law on the functioning of the ICC (art. 27, L. no. 87, March 11, 1953).