

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 17, 2014
CORRESPONDENTS' REPORTS

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ITALY¹

Cases — The Constitutional Court excluded the duty of Italian judges to comply with the ICJ decision on 'Jurisdictional Immunity of the State'

- Decision No 1136 of 21 January 2014 of the of the Court of Cassation, United Sections, *Questione Giustizia* <http://www.questionegiustizia.it/doc/Cassazione_Germania_1136-14.pdf>
- Order of 21 January 2014 of the Court of Florence, *Questione Giustizia* <http://www.questionegiustizia.it/doc/ordinanza_trib_firenze_21_1_14_nazisti.pdf>
- Decision No 238 of 22 October 2014 of the of the Constitutional Court (English version), *Italian Constitutional Court official website* <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf>

An important 2014 judgment of the Constitutional Court further clarified the relationship between Italian domestic law and international law on the subject of protecting individuals from war crimes and crimes against humanity. This decision was prompted by certain changes which occurred in Italian legislation and jurisprudence following the 2012 judgment of the ICJ in the *Jurisdictional Immunities of the State (Germany v Italy)* case.² Immediately after the decision, Italian national authorities took appropriate steps to comply with the ICJ decision and recommendations. In its decision, the ICJ had invited parties to renew efforts to solve the issues which remained unsettled.³ In light of this invitation, the Italian government reopened negotiations with Germany with a view to seeking an agreement on compensation for the damages suffered by Italian military internees. They, and other Italian citizens, were victims of heinous crimes committed by the Third Reich during the Second World War, and are not entitled to obtain redress under German law.⁴ Shortly after the 2012 decision, a number of decisions were made by Italian judges conforming to the ruling by the ICJ that the exercise of the domestic courts' jurisdiction over such compensation claims against Germany violates the international customary rule on the immunity of states from the civil jurisdiction

¹ This Report was prepared by Rachele Cera, Andrea Crescenzi, Valeria Eboli, Ornella Ferrajolo, and Rosita Forastiero on behalf of the Institute for International Legal Studies of the National Research Council (ISGI-CNR), Rome, Italy. Valentina Della Fina, senior researcher at the ISGI-CNR, coordinated the Institute's team of researchers.

² *Jurisdictional Immunities of the State (Germany v. Italy) (Judgment)* [2012] ICJ Rep 2012, 99.

³ *Ibid* 144, [104].

⁴ See Correspondents Report – Italy (2012) 15 *YIHL*, 1-4, <<http://www.asser.nl/media/1424/italy-yihl-15-2012.pdf>>.

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of other states.⁵ Lastly, Parliament passed Law No 5/2013, whose Article 3 implements the ICJ decision by establishing a duty on the domestic courts to decline to exercise their jurisdiction by examining any actions against Germany.⁶

However, application of Law No 5/2013 has revealed some legal contradiction, as seen in two representative pronouncements, one from the Supreme Court of Cassation and the other from the Court of Florence, which were both delivered, coincidentally, on 21 January 2014.

The first one (Judgment No 1136 of the Supreme Court, United Sections)⁷ marked the final conclusion of the *Ferrini* case, which the same Court decided for the first time ten years ago (Judgment No 5044/2004).⁸ At the time, the Supreme Court ruled that Germany did not enjoy immunity from the civil jurisdiction of Italy, because of the seriousness of the crimes involved in the case. It is from that decision that the aforementioned stance of the domestic courts concerning non-recognition of state immunity originated and, thus, lay the foundations for the later dispute with Germany. One consequence of Judgment No 5044/2004 was, most precisely, that the Court of Florence, which had initially declined its jurisdiction on the *Ferrini* case, and to which the Supreme Court had deferred to the latter for reconsideration, affirmed – this time – its competence to decide on the merits (Judgment No 480 of 2011). This decision was challenged through a recourse to cassation by the Federal Republic of Germany; and this gave the Supreme Court an opportunity to reexamine the controversial issue, after the 2012 ICJ decision and Law No 5/2013 intervened.

In its Judgment No 1136 of 2014, the Supreme Court observed, as a first step, that the relevant legal framework had completely changed as a result of Article 3 of Law No 5/2013. The Court considered whether the new legal framework was consistent with the Constitution. In its view, however, no doubt arose in this regard; and this because UN Members have a duty to comply with the ICJ decisions under Article 94 of the UN Charter. This obligation has not only become part of Italy's domestic legal order, by virtue of Law No 848/1957 (authorizing UN Charter ratification and implementation);⁹ but it is also in line with Article 11(2) of the Constitution, on which is grounded Italy's membership at the UN (and any international organizations).¹⁰ From this, it derived that

⁵ Ibid, 4-6. The ICJ did not uphold the assumption from many Italian courts that the immunity of states from the civil jurisdiction of other states is not without limits under international law and, in particular, no immunity is granted for acts that, though being done *jure imperii*, may be qualified as serious violations of human rights and humanitarian law.

⁶ See Correspondents Report – Italy (2013) 16 *YIHL*, 1-5, <<http://www.asser.nl/media/1402/italy-yihl-16-2013.pdf>>.

⁷ Decision No 1136 of 21 January 2014 of the Court of Cassation, United Sections, published in *Questione Giustizia*, <http://www.questionegiustizia.it/doc/Cassazione_Germania_1136-14.pdf>.

⁸ Decision No 5044 of 11 March 2004 of the Court of Cassation, United Sections, published in <<http://www.altalex.com/index.php?idnot=7471>>. See also A Gianelli, 'Crimini internazionali ed immunità degli Stati dalla giurisdizione nella sentenza *Ferrini*' (2004) *Rivista di diritto internazionale*, 643-684; P De Sena, F De Vittor, 'State Immunity and Human Rights: the Italian Supreme Court Decision on the *Ferrini* Case' (2005) 16 *European Journal of International Law*, 89-112.

⁹ *Implementation of the Statute of the United Nations, done at San Francisco on 26 June 1945*, Law No 848 of 17 August 1957, published in *Gazzetta Ufficiale* No 238 of 25 September 1957, ordinary supplement No 2380, <<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1957-08-17;848>>.

¹⁰ Article 11 (2) of the *Constitution* reads: 'Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organizations furthering such ends' (English text published on the Senate official website: <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>).

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nothing else remains to this Court than adhering to the content of the applicable norms and, thus, to annul the decision of the Court in Florence.¹¹

These same issues were meanwhile under examination in another proceeding before the Court of Florence (II Civil Section), which commenced some days before the release of the 2012 ICJ judgment. The factual and legal situation were similar to the *Ferrini* case: a compensation claim had been brought against Germany by the heirs of an Italian citizen who was the victim of war crimes committed by the Third Reich in the territory of Italy, during the Second World War. Germany did not deny that the facts of the case qualified as grave violations of international humanitarian law and recognized, as well, that the Federal Republic bears responsibility for those crimes. It raised an exception, however, regarding the lack of jurisdiction by Italy and requested the Court in Florence to deny its competence, in execution of the ICJ judgment. This prompted the Presidency of the Council of Ministers of Italy to intervene in the case, in support of Germany's request.¹²

The Court of Florence was not at variance with the Supreme Court, and took into account the recent developments at the international level and in national legislation; however, it drew different conclusions with regard to their compatibility with the Constitution, and requested the Constitutional Court to consider the matter.¹³ In its order of 21 January 2014, the Court focused on a key element of the matter, i.e. the '*jus cogens*' argument, which emerged from the first decision of the Court of Cassation on the *Ferrini* case and further judgments of Italian courts:

[T]he protection of fundamental human rights is guaranteed under international law through norms from which no derogation is permitted; these norms are at the top of the international legal order; as such, they must prevail over any other norms, including of a customary nature.¹⁴

Having regard to this principle, the Court of Florence noted that Italian courts have never denied that a customary rule exists in international law under which states are exempt from the civil jurisdiction of other states. This norm coexists, however, with another norm of general international law, which is that protecting individuals from international crimes is not only a customary obligation, but also a peremptory one. Respect for hierarchy among legal rules requires, logically, that a *jus cogens* principle prevails over a non-peremptory customary rule.¹⁵ This reasoning did not require judges to demonstrate that a further norm exists in international law, which specifically allows derogation from state immunity in the case that the actions of a state consist in war crimes or crimes against humanity.¹⁶ The Court of Florence recognised that the Supreme Court has since abandoned this line of reasoning, in order to comply with the 2012 ICJ judgment. In an order delivered in 2013, the Supreme

¹¹ Decision No 1136/2014, 4.

¹² It should be noted that the Italian government has never embraced the jurisprudence of national courts concerning non-recognition of state immunity for those acts that consist in serious breaches of fundamental human rights, and which are qualified as war crimes or crimes against humanity. The defense of Italy in the proceeding before the ICJ was principally centered on a so called 'last resort' argument.

¹³ Order of 21 January 2014 of the Court of Florence, Civil Section II, published in *Questione Giustizia*, <http://www.questionegiustizia.it/doc/ordinanza_trib_firenze_21_1_14_nazisti.pdf>.

¹⁴ *Ibid* 3.

¹⁵ *Ibid* 4.

¹⁶ *Ibid* 3.

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Court noted, most precisely, that ‘its previous findings have remained in isolation, as they were not confirmed by the international community, through the ICJ’; and the consequence was that the underlying principle no longer applied.¹⁷ Later, Law No 5 of 2013 intervened to require judges to decline their competence in any proceedings against Germany. However, it seemed to the Court of Florence that there was still room for going beyond the legal limitation resulting from the prescriptions above; and held the following in relation to one further issue, which only the domestic courts of Italy are competent to decide:

On one hand, the Italian judge has no competence to interpret the effects of a *jus cogens* principle under international law, as this is a matter for the ICJ. The Italian judge has however the duty of assessing whether the fact of recognizing, in the case at hand, an absolute state immunity – to the detriment of persons who had been seriously injured – is or not consistent with the fundamental principles of the domestic legal order, as these principles result from the relevant constitutional provisions and further [international and EU] law sources....The observations that follow are linked to some debatable arguments in the judgment of the ICJ; they are dutifully limited, however, to consider certain aspects, which strictly concern the domestic legal order. From this standpoint, the Italian judge, who has the duty of ensuring full respect for fundamental human rights, cannot be satisfied by the ruling of the ICJ that no conflict arises between the immunity customary rule and a *jus cogens* principle. The ICJ has grounded its decision on the argument that the two sets of rules operate at different levels; from hence it has derived the conclusion that a violation of a peremptory norm with a substantive character...is not in contradiction with the customary rule on state immunity, which has procedural character, as it only aims at regulating the exercise of national courts’ jurisdiction in respect of foreign states.

The ICJ has not excluded that certain norms of *jus cogens* exist in international law. It has excluded, however, that these norms are in conflict with the state immunity rule, by reason of the fact that the norms at issue are, respectively, of a substantive character and a procedural one; and, further, because a procedural norm curtailing the state immunity rule [whenever the commission of war crimes and crimes against humanity is involved] has not consolidated, yet, in international practice.

This Court has to consider, however, one further issue, which falls in the realm of national law...This issue is that of evaluating whether judicial protection of fundamental human rights can be sacrificed to the principles of state sovereignty and state immunity; and this in the case that the state of the Court seized is not the same state that has committed a crime in exercising sovereign functions.¹⁸

This line of reasoning led the Court in Florence to analyze the relationship that exists between Italian domestic legal order and international customary law as follows:

It is true that, under Article 10, para. 1 of the Constitution, the domestic legal order of Italy conforms to generally recognized norms of international law, and this implies that national legislation must be consistent with international custom. Furthermore, Article 117 of the Constitution, as redrafted [in 2001], requires that customary norms of

¹⁷ Order No 4284/2013 of the Supreme Court of Cassation, United Sections, published in G Palmisano and O Ferrajolo (eds), *Italy and International Law: Survey of Italian cases and materials on International law* (2012-2013) 1 <<http://www.larassegna.isgi.cnr.it/en/docs/order-of-the-court-of-cassation-united-sections-no-4284-of-21-february-2013/>>.

¹⁸ Order of 21 January 2014 of the Court of Florence, above n 13, 5-7.

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international law are taken into consideration, as an 'interposed' parameter of constitutionality ['parametro interposto di costituzionalità'] for assessing the legitimacy of national laws under the Constitution.¹⁹

On other hand...international customary norms remain subjected to the authority of the Constitution ... as they pertain to the category of laws, and enactments having force of law, that are subjected to the review of constitutionality provided by Article 134, para. 1 of the Constitution.²⁰ ...

In its judgment No 73 of 22 March 2001, para. 3.1, the Constitutional Court stated that "The tendency of Italian legal order to be open to international custom and treaties encounters certain limits due to the safeguard of the national legal order's identity, and especially it encounters limits deriving from the Constitution...These limits are given by 'the fundamental principles of the constitutional order' and 'inalienable human rights'..."

These same concepts emerge from the Supreme Court's jurisprudence according to which customary rules of international law are not exempt from the constitutionality review.²¹

One further aspect that the Court in Florence has taken in careful consideration is so called 'last resort' argument, which was also a legal argument of the defense of Italy in the proceeding before the ICJ. This relates to the fact that the claimants had no means to obtain redress for the serious injuries they have suffered as a result of war crimes and crimes against humanity, if not by making recourse to their national domestic courts (and also considering that those crimes were committed, at least in part, in the territory of Italy). Had the Court in Florence declined its competence in application of the ICJ judgment and Law No 5/2013, the claimants would had been deprived – contrary to the Constitution – of their right to a judicial remedy. As it has been noted by the Court in Florence, access to justice is not only an inalienable right in itself (Article 24 of the Constitution) but is also inseparable from the other inalienable human rights (which are protected by Articles 2 and 3 of the Constitution). And this is true in the constitutional order of Italy and, equally, under national constitutions of other European countries, including Germany. The rationale for underlying Article 24 of Italian Constitution means that the enjoyment by the individuals of their human rights cannot be effective if no judicial remedy is available if those rights have been violated.²² For the Court of Florence, this was a further good reason for doubting that the implementation of the 2012 ICJ judgment is consistent with the Constitution:

This Court recognizes that the jurisdictional immunity of states does not encounter any limit under international law in the case that a foreign state has committed crimes against humanity in exercising its sovereign functions (*iure imperii*). On other hand...it is possible to find limits into the constitutional order of the Italian Republic as it has been built up, and inspired from the legal tradition of countries pertaining to a same [European] geo-political area; a tradition common to the parties of the case. The

¹⁹ Article 117(1) of the *Constitution* reads: 'Legislative powers shall be vested in the State and in the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations'.

²⁰ Article 134(1) of *Constitution* gives the Constitutional Court the competence of passing judgments 'on the constitutional legitimacy of laws and enactments having force of law issued by the State and the Regions'.

²¹ Order of 21 January 2014 of the Court of Florence, above n 13, 8-9.

²² *Ibid* 10.

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fundamental values [of the European legal order] cannot be sacrificed to comply with a decision of the ICJ, which grounds its decisions on the law of the entire international community. ...

As a conclusion, it is doubtful that the Italian judge, acting under the authority of the domestic legal order...or, of the European legal order...may legitimately adhere to the response from the ICJ to the 'last resort' argument. The response has been that access to justice in order that a court may be satisfied and condemn the aberrant conducts of the Third Reich shall be denied, and redress for the victims should be obtained through negotiations among those same political authorities that have been unable to agree on a solution, for decades. ...

This Court recognizes that a national norm has derived, with a sub-constitutional rank, from Article 10, para. 1 of the Constitution...and this norm conforms to the customary rule [on state immunity] as found by the ICJ in its judgment on the case *Federal Republic of Germany v Italy*. With regard to the compatibility of this same norm with Italian Constitution, there are however doubts, which do not seem to be manifestly unfounded...

This Court is further satisfied that Article 94 of the UN Charter, establishing that "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party", has become part of the domestic legal order by virtue of the Law concerning [UN Charter] ratification; and this norm has a sub-constitutional rank as being linked with Article 11 of the Constitution. The result is, however, that this norm applies into the domestic legal order, only provided that, and to the extent in which, it is consistent with the Constitution. ...

It derives from what precedes that the question of constitutionality extends to Article 3 of Law No 5 of 14 January 2013, which was passed by Parliament, pending the present proceeding, to repeat the cogency of aforementioned obligation of the Italian judge. The provisions in Article 3 are indeed consistent with the state immunity rule as found by the ICJ; however, the question of constitutionality of this norm is not manifestly unfounded.²³

On these grounds, the Court of Florence requested the Constitutional Court to review the constitutionality – in relation to Article 24 and Articles 2 and 3 of the Constitution – of following norms:

- a. The customary rule on state immunity, as it became part of the domestic legal order by virtue of Article 10, para. 1 of the Constitution and as found by the ICJ in its judgment of 3 February 2012, insofar as it denies the jurisdiction of national courts in the actions for damages for war crimes committed *iure imperii* by the Third Reich, at least in part in the state of the Court seized;
- b. Article 1 of law No 848 of 1957, insofar as, through the incorporation of Article 94 of the UN Charter, it obliges the national judge to comply with the judgment of the ICJ, which established the duty of Italian courts to deny their jurisdiction in the examination of actions for damages for crimes against humanity committed *iure imperii* by the *Third Reich*, at least in part in Italian territory; and

²³ Ibid 11-14.

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c. Article 3 of law No 5/2013, insofar as it explicitly establishes the existence of aforementioned obligation of the Italian judges.²⁴

It should be noted that 2012 ICJ judgment has been criticized by international law experts as well. And this especially because that judgment lacks a careful analysis of the relationship between *jus cogens* and the customary norm on the jurisdictional immunity of states - a rather complicated issue of international law, which deserved more attention.²⁵ For this reason, there was keen anticipation of the decision of the Constitutional Court. In addition, there was concern about the fact that the constitutionality questions raised by the Court in Florence involved the application of Article 10(1) of the Constitution and Law No 848/1957, i.e. two pillars of the relationship of the domestic legal order with international customary law and the UN Charter, respectively.

The Constitutional Court's judgment on the case was No 238 of 22 October 2014.²⁶ In this judgment, the Court summarized, first, the legal arguments put forward by the referring judge – already reported – and the preliminary objections raised by the President of the Council of Ministers, who had intervened in the case, through the Office of the state Attorney ('Avvocatura Generale dello Stato', hereinafter *Avvocatura*). These objections were aimed at requesting the Constitutional Court to declare that the constitutionality questions submitted to it were inadmissible, or ill-founded. One objection deserves special attention, as it testifies of a complete alignment from Italian government to the ruling of the ICJ:

The second objection [raised by the *Avvocatura*] is founded on the assumption that the lack of jurisdiction cannot be assessed on the basis of the scope of the international norm of state immunity for acts considered *jure imperii*, since otherwise this would result in "unacceptable reversal of the relationship of logical priority between distinct procedural and substantial judicial assessment".²⁷

For the Constitutional Court, however, '[t]his objection [was] 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.'²⁸

With regard to the merits, the Constitutional Court has confirmed that the domestic courts must refrain from interpreting norms of international law, once the ICJ has given its own interpretation (a principle the Court affirmed for the first time, with regard to the

²⁴ Ibid 16. It should be noted that the Court of Florence raised the question of constitutionality of these norms, through adopting three identical orders (No 84, 85 and 113/2014), which were all released on 21 January 2014.

²⁵ Cf R 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) Società Italiana di Diritto Internazionale (Italian Society of International Law) <<http://www.sidi-isil.org/wp-content/uploads/2010/02/Pisillo-Mazzeschi-La-sentenza-della-CIG-del-3-febbraio-sulle-immunit%C3%A0.pdf>>, 4. See also M L Padelletti, 'L'esecuzione della sentenza della Corte internazionale di giustizia sulle immunità dalla giurisdizione nel caso *Germania c. Italia*: una strada in salita?' (2012) Società Italiana di Diritto Internazionale (Italian Society of International Law) <<http://www.sidi-isil.org/wp-content/uploads/2010/02/Padelletti-sulle-immunit%C3%A0-della-Repubblica-Federale-di-Germania-dalla-giurisdizione-italiana.pdf>>.

²⁶ Decision No 238 of 22 October 2014 of the of the Constitutional Court (quotations are from the English text of the decision, published on the Constitutional Court official website, <http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf>).

²⁷ Ibid [2.2].

²⁸ Ibid.

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interpretation of the European Convention on Human Rights, in its fundamental judgments No 348 and 349 of 2007):²⁹

It has to be recognized that, at the international law level, the interpretation by the ICJ of the customary law of immunity of States from the civil jurisdiction of other state for acts considered *jure imperii* is particularly qualified and does not allow further examination by national governments and/or judicial authorities, including this Court. This principle was clearly stated in Judgments Nos. 348 and 349/2007 in relation to the interpretation of the norms of the ECHR given by the Strasbourg Court.

As a matter of fact, the referring judge does not question the interpretation given by the ICJ of the international norm of immunity for acts considered *jure imperii*. The judge notes (with concern) that the scope of the norm has been so defined by the ICJ. Further, he recall that it is uncontested that the acts attributed to the FRG [Federal Republic of Germany] are unlawful, and that they have been qualified by the FRG itself and the ICJ as war crimes and crimes against humanity, in breach of fundamental human rights – nevertheless, this issue belongs to merits of the main claim and therefore falls outside the subject-matter brought before this Court.

That said, it is nevertheless clear that another issue has to be examined and resolved, namely the envisaged conflict between the norm of international law (a norm that is hierarchically equivalent to the Constitution through the referral of Article 10, para. 1 of the Constitution) incorporated and applied in the domestic legal order, as interpreted in the international legal order, and norms and principles of the Constitution, to the extent that their conflict cannot be resolved by means of interpretation... In those situations it is up to the national judge, and in particular exclusively to this Court, to exercise the constitutional review, in order to preserve the inviolability of fundamental principles of the domestic legal order, or at least to minimize their sacrifice.³⁰

The Constitutional Court then turned to consider the issue of whether the principle of state immunity may be limited in Italian domestic law because of central constitutional values. It referred in this regard to the well-established principle that the entry of international law in the Italian domestic legal order may encounter limits depending on respect for inalienable human rights and constitutional fundamental principles (so called 'counter-limits' doctrine). In the Court's words:

As was upheld several times by this Court, there is no doubt that the fundamental principles of the constitutional order and inalienable human rights constitute a "limit to the introduction...of generally recognized norms of international law, to which the Italian legal order conforms under Article 10, para. 1 of the Constitution" (Judgments No 48/1979 and No 73/2011) and serve as "counter-limits" [*controlimiti*] to the entry of European Union law (*ex plurimis*: Judgments No 183/1973, No 170/1984, No 232/1989, No 168/1991, No 284/2007).

Moreover this Court has reaffirmed, even recently, that it has exclusive competence over the review of compatibility with the fundamental principles of the constitutional order and principles of human rights protection (Judgment No 284/2007). Further, precisely

²⁹ Decisions No 348 and No 349 of the Constitutional Court, both delivered on 22 October 2007, are published, with commentaries, in *Consulta on line*, respectively at: <http://www.giurcost.org/decisioni/2007/0348s-07.html> and <http://www.giurcost.org/decisioni/2007/0349s-07.html>.

³⁰ Decision No 238 of 22 October 2014 of the of the Constitutional Court, [3.1].

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with regard to the rights of access to justice (Article 24 Constitution), this Court stated that the respect of fundamental human rights, as well as the implementation of non-derogable principles are safeguarded by guaranteeing function assigned to the Constitutional Court (Judgment No 120/2014).³¹

The Court noted that the immunity of states from the civil jurisdiction of other states had been absolute in the past, but held that ‘in the first half of the last century, this norm undertook a progressive evolution by virtue of national jurisprudence, in the majority of states, up until the identification of *acta jure gestionis* as the relevant limit’.³² It therefore held that a further curtailment of the scope of the state immunity rule may derive from the exercise of the Constitutional Court’s competence of reviewing the constitutionality of customary norms of international law as per Article 10(1) of Constitution. As is evident, effects of the constitutional review are circumscribed to the domestic application of the state immunity rule: ‘at the same time, however, this may also contribute to a desirable – and desired by many – evolution of international law in itself’.³³

The Court then turned to consider the possible conflict between the recognition of an absolute state immunity in the case (in execution of the 2012 ICJ decision) and the protection of fundamental principles of the constitutional order:

This Court has repeatedly observed that the fundamental principles of the constitutional order include the rights to appear and to be defended before a court of law in order to protect one’s rights guaranteed by Article 24, i.e. the right to a judge. This is especially true when the right at issue is invoked to protect fundamental human rights.

In the present case, the referring judge aptly indicated Articles 2 and 24 of the Constitution as inseparably tied together in the review of constitutionality required to this Court. The first [Article 2] is the substantive provision, in the fundamental principles of the Constitutional Charter, that safeguards the inviolability of fundamental human rights, including – this is crucial in the present case – human dignity. The second [Article 24] is a safeguard of human dignity as well, as it protects the right of access to justice for individuals in order to invoke their inviolable rights.

Although they belong to different fields, the substantial and the procedural, the two provisions share a common relevance in matters of constitutional compatibility of the norm of immunity of states from the civil jurisdiction of other states. It would indeed be difficult to identify how much is left of a right if it cannot be invoked before a judge in order to obtain effective protection.³⁴

The Constitutional Court was aware of the fact that the customary rule on state immunity, as incorporated in the domestic legal order, is aimed at protecting a public interest of the state, because this norm derives from the fundamental international law principle of state sovereignty. It further noted that, in the case that a conflict arises among principles protected by the Constitution, it must be solved through balancing all the constitutional principles involved. It seemed however to the Court that balancing the principles involved was, on one hand, not possible and, on the other, unnecessary in the case. This was because, first,

³¹ Ibid [3.2].

³² Ibid [3.3]. ‘*Acta jure gestionis*’ means ‘acts by right of management’.

³³ Ibid.

³⁴ Ibid [3.4].

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implementing the ICJ decision entailed an 'absolute sacrifice' of the right to a judicial protection of fundamental human rights impaired by serious crimes. Second, a prevailing public interest justifying such a sacrifice could not be identified in the constitutional order, because the acts of the Third Reich, though regarded as being *jure imperii*, were not committed – substantially speaking, and not formally – in the exercise of sovereign functions:

The immunity of the foreign state from the jurisdiction of the Italian judge granted by Articles 2 and 24 of the Constitution protects the [sovereign] function [of states]. It does not protect behaviors that do not represent the typical exercise of governmental powers, but are explicitly considered and qualified unlawful, since they are in breach of inalienable rights, as was recognized, in the present case, by the ICJ itself and – before this Court – by the FRG.

Therefore ... 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. They are indeed sacrificed in order to pursue the goal of not interfering with the exercise of the governmental powers of the state even when, as in the present case, state actions can be considered war crimes and crimes against humanity, in breach of inviolable human rights, and as such are excluded from the lawful exercise of governmental powers.³⁵

Turning to the conclusions drawn by the Constitutional Court, all the legal arguments put forward by the referring judge were upheld. However, the basic principle that Italian domestic legal order conforms to international custom was preserved. The Constitutional Court ruled that, technically speaking, the question of constitutionality of the customary norm on state immunity as interpreted by the ICJ and incorporated in the domestic legal order through Article 10(1) of Constitution, was ill-founded:

In the present case, the impossibility of effective judicial protection of fundamental rights, acknowledged by the ICJ and confirmed before [this] Court by the FRG, makes apparent the contrast between international law, as defined by the ICJ, and Articles 2 and 24 of the Constitution.

This contrast, insofar as the international law of immunity of states from the civil jurisdiction of other states include acts considered *jure imperii* that violated international law and fundamental human rights, obliges this Court to declare that, to the extent that international law extends immunity to actions for damages caused by such serious violation, the referral of Article 10, para. 1 of the Constitution does not operate.

Consequently, insofar as the law of immunity from jurisdiction of states conflicts with the aforementioned fundamental principles [of the Constitution], it has not entered the Italian legal order and, therefore, does not have any effect therein.³⁶

The conclusions of the Constitutional Court regarding the constitutionality of Law No 848/1957 were different, but equally aimed at ensuring that the decision would not affect the ordinary effects of the UN Charter provisions and of ICJ decisions at the national law level, except for the case at hand:

³⁵ Ibid.

³⁶ Ibid [3.5].

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The question is well-founded under the terms set out below.

Article 1 of Law No 848/1957 gave “full execution” to the United Nations Charter ... The ICJ was established (Article 7) as the United Nations Organization’s principal judicial organ (Article 92), whose decisions are binding on each member state in any case to which it is a party (Article 94). This binding force produce effects in the domestic legal order through the Special Law of Adaptation (authorization to ratification and execution order). It constitutes one of the cases of limitation of sovereignty the Italian state agreed to in order to favour those international organizations, such as the UN, that aim to ensure peace and justice among the Nations (Article 11 of the Constitution), always within the limits, however, of respect for the fundamental principles and inviolable rights protected by the Constitution... hence, the obligation to comply with the decisions of the ICJ, imposed by the incorporation of Article 94 of the United Nations Charter, cannot include the judgment by which the ICJ obliged the Italian state to deny its jurisdiction in the examination of actions for damages for war crimes and crimes against humanity, in breach of fundamental human rights, committed *jure imperii* by the Third Reich in Italian territory.

In any case, the conflict between the Law of Adaptation to the United Nations Charter and Articles 2 and 24 of the Constitution arises exclusively and specifically with regard to the judgment of the ICJ that interpreted the general international law of immunity from the jurisdiction of foreign states as to include cases of acts considered *jure imperii* and classified as war crimes and crimes against humanity, in breach of inviolable human rights.

In any other case, it is certainly clear that the undertaking of the Italian state to respect all of the international obligations imposed by the accession to the United Nations Charter, including the duty to comply with the judgments of the ICJ, remain unchanged.³⁷

Lastly, the Court ruled that also the question of constitutionality of Article 3 of Law No 5/2013 was well-founded:

This [the provision in Article 3] is essentially a provision of ordinary adaptation that executes the judgment of the ICJ of 3 September 2012. In other words, this article specifically regulates the obligation of the Italian state to comply with all of the rulings by which the ICJ excluded certain conducts of a foreign state from civil jurisdiction. It requires that the judge[s] declare *ex officio* at any stage of the proceeding their lack of jurisdiction, and also provides for an additional ground for the revision [*revocazione*] of final judgments when they conflict with the ruling of the ICJ.

The Parliamentary proceedings clearly show that this article was adopted (shortly after the judgment of the ICJ of 3 February 2012) in order to ensure explicitly ad immediately respect [of that judgment] and to “avoid unfortunate situations such as those created by the dispute before the Court of The Hague” (Acts of the Chamber of Deputies No 5434, Third Commission - Foreign Affairs, meeting of 19 September 2012).

The duty of the Italian judge – established in the questioned Article 3 – to comply with the ruling of the ICJ of 3 February 2012...contrasts – as has been extensively demonstrated above with regard to the other questions [of constitutionality] ... – with the fundamental principle of judicial protection of fundamental rights guaranteed by Article 2 and 24 of the Constitution.

³⁷ Ibid [4.1].

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Therefore, Article 3 of law No 5/2013 has to be declared unconstitutional.³⁸

Generally speaking, the Constitutional Court's decision has been well received.³⁹ Some commentators have regretted that the Court has not reopened a debate about the possibility of founding limits in the state immunity rule under international law, whenever 'sovereign' acts consist in war crimes and crimes against humanity.⁴⁰ It is a matter of fact, however, that the statement of principle that domestic courts must interpret and apply international law, and especially international human rights law in conformity with the interpretation given by the competent international courts, is a landmark in Italian jurisprudence. From another viewpoint, Judgment No 238/2014, though partly surprising – in that it has excluded a duty of the domestic courts to comply with the 2012 ICJ judgment (despite Article 94 of the UN Charter) – is much less innovative than it may appear, because it grounds its basis on the 'counter-limits' doctrine, which is not new in the developed constitutional jurisprudence in Italy and in other countries.

ORNELLA FERRAJOLO⁴¹

Cases – A New Call for Criminalizing Torture

• Court of Cassation, Judgment of 17 July 2014.

Once again Italian judges have had to address a well-known gap in the Italian legal system. In Italy torture is not yet criminalized, notwithstanding Italy ratified the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* on 14 January 1989.

The case concerned an Italian priest, Father Franco Reverberi, who currently lives in the province of Parma in central northern Italy, sought for crimes against humanity in Argentina, where he is accused of involvement with the brutal military dictatorship of President Jorge Rafael Videla, which lasted from 1976 to 1981.⁴²

According with Argentinean prosecutors, Reverberi, as police chaplain in San Rafael in late 1970s, witnessed the torture of dissidents under Videla without doing anything to stop it. The allegations against him state that the fact a priest witnessed their suffering made the victims feel even more abandoned and alone. Argentina has asked for international assistance

³⁸ Ibid [5.1].

³⁹ Cf E Cannizzaro, 'Jurisdictional Immunities and Judicial Protection: the Decision of the Italian Constitutional Court No 238 of 2014' (2015) *Rivista di diritto internazionale*, 126-134; R Kholb, 'The relationship between the international and the municipal legal order: reflections on the decision No 238/2014 of the Italian Constitutional Court' (2014) *Questions of International Law, Zoom out*, <http://www.qil-qdi.org/wp-content/uploads/2014/12/02_Constitutional-Court-238-2014_KOLB.pdf>, 5-16.

⁴⁰ 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' (2014) *Questions of International Law, Zoom out*, <http://www.qil-qdi.org/judgment-italian-constitutional-court-state-immunity-cases-serious-violations-human-rights-humanitarian-law-tentative-analysis-international-law/>, 17-31.

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⁴² In December 2010 Videla was sentenced to life in prison for the deaths of 31 prisoners following his coup d'état and in July 2012 he received an additional 50 year prison sentence for the systematic kidnapping of children during his rule.

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to arrest him, The priest's name appears on an Interpol list of suspects accused of human rights violations during the rule of Videla.⁴³

In its judgment of 29 October 2013, the Court of Appeal of Bologna ruled on the Argentinean arrest request. The Court rejected the request for extradition finding that there was insufficient evidence of Reverberi's guilt. In the opinion of the General prosecutor, even if Riverberi was present during torture acts, this does not necessary imply that he was conniving with the torturers. Furthermore, the facts dated back to 1976, while Reverberi was chaplain in 1980.

The refusal to extradite was upheld by Court of Cassation in a judgment handed down on 17 July 2014. However, the Court of Cassation based its conclusion on different reasoning. Rather than denying the allegations against the accused, the Court simply quashed them since the crime was statute barred. In the absence of the crime of torture in the Italian criminal law, the allegations that have an equivalent under Italian domestic law, namely personal injuries and abduction, were time-barred.

The Reverberi case served as a timely occasion for the Court to express its concern on the paradoxical situation that torture, a crime that under certain conditions could be described to a crime against humanity, does not exist as a distinct crime under Italian law. The Court affirmed the need for Italy to introduce the crime of torture, by defining it and establishing the corresponding penalty on the basis of which its status as statute barred could be determined.

It must be noted that numerous bills providing for a specific offence of torture have been tabled in the Italian Parliament during the last three parliamentary terms, but the debate on them stalled because some aspects of the definition of the crime.⁴⁴

Finally, on 23 March 2015, the Chamber of Deputies began the examination of a bill entitled 'Introduction of a distinct offence of torture in domestic law'. The bill, which is the result of the unification of several bills, was given Senate approval on 5 March 2014.⁴⁵

The enactment of an anti-torture law has been pushed by several international bodies, most recently the European Court of Human Rights. In its judgment of 7 April 2015, the Court condemned Italy for the use of torture against demonstrators at the G8 conference in Genoa in 2001 and for failing to have legislation specifically outlawing the use of torture.⁴⁶

Accordingly, on 9 April 2015 the Chamber of Deputies approved with small changes the bill, which has to return to the Senate before its final approval.⁴⁷ Amongst the core provisions, the bill establishes the obligation to extradite those accused of or sentenced for the crime of torture, and doubles the statutory time limits which would bar prosecutions of such a crime.

The approval of the bill will finally fill a legal vacuum described by the human rights organizations as a '25-year breach of Italy's obligations under the UN Convention against Torture', bringing Italy's laws in line with international law.

RACHELE CERA⁴⁸

⁴³ See <http://www.interpol.int/Wanted-.../%28wanted_id%29/2012-333148>.

⁴⁴ A Marchesi, 'Implementing the UN Convention Definition of Torture in National Criminal Law (with Reference to the Special Case of Italy)' (2008) 2 *Journal of International Criminal Justice*, 195-214.

⁴⁵ See, <<http://www.senato.it/service/PDF/PDFServer/BGT/00750920.pdf>>.

⁴⁶ European Court of Human Rights, *Cestaro v Italy* (2015) (Application No 6884/11), Judgment of 7 April 2015.

⁴⁷ See <http://www.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL0029490.pdf>.

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Cases — Extradition — Condition of Extradition from Argentina — Carlos Luis Malatto Case

- Supreme Court of Cassation, Sixty Criminal Section, Judgment No 43170 of 17 July 2014 <<http://www.marinacastellaneta.it/blog/wp-content/uploads/2014/10/43170.pdf>>

The decision of the Court of Cassation concerned the Argentinian request for the extradition of Carlos Luis Malatto, submitted under the *Italo-Argentinean Convention of Extradition*, signed in Rome on 9 December 1987 and entered into force on 1 December 1992.⁴⁹ Argentina requested Carlos Luis Malatto's extradition from Italy on the basis of three different arrest warrants issued on 15 August 2011 by the Federal Tribunal No 2 of the District of San Juan.

As lieutenant of the Argentine *Regimiento de Infantería de Montaña No 22*, Carlos Luis Malatto was indicted for perpetrating a number of offences against human rights during the period of the dictatorship of Jorge Rafael Videla. Specifically, the extradition request concerned murder, offences of participation in a criminal organization, serious injuries, and kidnapping.

On 4 April 2013, the Court of Appeal of L'Aquila issued a first judgment against Carlos Luis Malatto. In its decision, it stressed that during the Argentine military dictatorship period a program of violent repression was implemented, characterized by the mass violation of human rights. The methods used included the arbitrary deprivation of liberty, torture, murders, enforced disappearances and the abduction of infants. Based on the key aspect of the prosecution evidence contained in the arrest warrants, the Court found that the accused participated in the perpetration of these crimes as 'co-author'. In particular, the Court of Appeal considered that the scale and nature of those acts amounted to crimes against humanity because they were part of a widespread and systematic practice as provided for by the *Rome Statute of the International Criminal Court (ICC)*.⁵⁰

Undoubtedly, the Rome Statute has significantly contributed to strengthening the international legal framework with regard to the most serious crimes of concern to the international community including crimes against humanity. Article 7 of the Rome Statute contains an impressive list of such crimes which includes the traditional crimes against humanity, but also defines complex and/or new crimes such as the enforced disappearance of persons.⁵¹ Article 7 of the Rome Statute has crystallized an international customary rule

⁴⁹ Italy ratified the *Italo-Argentinean Convention of Extradition* with Law No 219 of 19 February 1992.

⁵⁰ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

⁵¹ *Ibid*, Article 7(1) states: 'For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as

criminalizing the widespread or systematic practice of enforced disappearance as a crime against humanity.⁵² Whilst originally the International Military Tribunal at Nuremberg linked crimes against humanity to armed conflict, this connection has not been maintained in the Rome Statute, and they may now occur both in times of armed conflict and in times of peace. In other words, Article 7 of the Rome Statute has cemented a modern and autonomous notion of crimes against humanity.⁵³

In the same vein, a specific Convention was negotiated with the purpose of combating impunity for the crime of enforced disappearance. Accordingly, the *Convention for the Protection of All Persons from Enforced Disappearance*, adopted by the UN General Assembly on 20 December 2006, also states that the widespread or systematic practice of enforced disappearances constitutes a crime against humanity.⁵⁴

It should be remembered that, contrary to the recommendations of the UN Secretary-General,⁵⁵ Italy is not a Party to the *Convention for the Protection of All Persons from Enforced Disappearance*.⁵⁶ However, recently a draft bill has been introduced into the Italian Parliament to address this lacuna.⁵⁷

Another aspect of the Court of Appeal of L'Aquila judgment in the Malatto case should be stressed. In particular, the Court acknowledged the non-applicability of statutory limitations to the crimes alleged. The Court recalled the consolidated principle of non-applicability of statutory limitation on war crimes and crimes against humanity as a peremptory norm of general international law. On these grounds, finally, the Italian Court of Appeal granted the extradition of the accused.

The Judgment No 43170 of 17 July 2014 represents the more recent phase of the Malatto case. Ruling on the appeal brought by the accused, the Supreme Court of Cassation annulled without recourse the decision of the Court of Appeal of L'Aquila.

The Court of Cassation's decision is of particular interest as it addressed whether 'serious evidence of guilt' needs to exist in order for extradition to be granted. Indeed, as regards more specifically procedural issues, the Court of Cassation underlined that the extradition

impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'.

⁵² See also O Ferrajolo, 'La Corte penale internazionale tra indipendenza e cooperazione' in O Ferrajolo (ed), *Corte penale internazionale. Aspetti di giurisdizione e funzionamento nella prassi iniziale* (Giuffrè Editore, 2007) 15.

⁵³ See also L Condorelli, 'La Cour pénale internationale: un pas de géant (pourvu qu'il soit accompli)' (1999) 103 *Revue Générale de Droit International Public*.

⁵⁴ *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 20 December 2006, 2716 UNTS 3 (entered into force 23 December 2010). For a deeper analysis of the Convention see K Anderson, 'How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to Be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?' (2006) 7 *Melbourne Journal of International Law*.

⁵⁵ B K Moon, *International Convention for the Protection of All Persons from Enforced Disappearance: Report of the Secretary-General*, UN Doc A/69/214 (31 July 2014). See also UNGA Res 68/166, UN Doc A/RES/68/166 (21 January 2014).

⁵⁶ Italy signed the Convention on 3 July 2007.

⁵⁷ The draft bills on the Ratification and Execution of the International Convention for the Protection of All Persons from Enforced Disappearance adopted by the General Assembly of the United Nations on 20 December 2006 were introduced on 18 July 2014 and on 16 October 2014. See Documents A.C. 2674 and A.C. 1374.

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cannot be granted without previously demonstrating the existence of 'serious evidences of guilt'.

The judges of the Court of Cassation founded their decision on the interpretation of Article 705(1), of the Code of Criminal Procedure (CCP). That provision establishes that when there is not a Convention or the CCP provides otherwise, the Court of Appeal must rule in favor of the extradition if there are 'serious evidences of guilt'.⁵⁸

Within this framework, the Court observed that the Italo-Argentinean Convention of Extradition did not provide otherwise. In accordance with the more recent interpretation of the norm, the Court of Cassation recognized that extradition can be granted after the assessment of 'serious evidences of guilt' which must be appreciated in relation to the documentation attached to the extradition request. Therefore, it is worth noting that the examination of the documents accompanying the extradition request do not have an exclusively formal nature, but also a substantial one.

Judgment No 43170/2014 of the Court of Cassation reflects the overall jurisprudential practice of the last decade. It has shown that the Supreme Court progressively distanced itself from the theory which affirmed that the assessment of the existence of 'serious evidences of guilt' was not required under an extradition treaty.⁵⁹

Given the gap in the documentation produced by Argentina on the Malatto case, the Supreme Court observed that it was not possible to carry out a substantive examination of the documents. In the opinion of the Supreme Court, the Decision of the Court of Appeal of L'Aquila does not demonstrate the existence of 'serious evidences of guilt'. In more general terms, by the arrest warrants and the other documents attached to the Argentinean extradition request, it was impossible to ascertain the existence of 'serious evidences of guilt'.

On these grounds, the Court of Cassation annulled the Decision of the Court of Appeal of L'Aquila and ruled that Carlos Luis Malatto cannot be extradited to Argentina.

ROSITA FORASTIERO⁶⁰

Legislation — Italian Participation in International Missions

- Law No 28 of 14 March 2014 'Conversion into Law, with modifications, of the Decree-Law No 2 of 16 January 2014, 'Extension of Time of the Missions of the Armed and Police Forces, Interventions for Development Cooperation and Support of Reconstruction Processes and Participation to the Initiatives of the International Organizations for the Enhancement of the Peace and Stabilization Processes',⁶¹ <<http://www.gazzettaufficiale.it/eli/id/2014/03/17/14G00039/sg%20>>.

⁵⁸ Article 705(1) of the Italian *Code of Criminal Procedure* states that: 'Quando non esiste convenzione o questa non dispone diversamente, la corte di appello pronuncia sentenza favorevole all'estradizione se sussistono gravi indizi di colpevolezza ovvero se esiste una sentenza irrevocabile di condanna e se, per lo stesso fatto, nei confronti della persona della quale è domandata l'estradizione, non è in corso procedimento penale né è stata pronunciata sentenza irrevocabile nello Stato.'

⁵⁹ See also, inter alia, Supreme Court of Cassation, Judgment No 44852 of 3 October 2007; Supreme Court of Cassation, Judgment No 30896 of 21 May 2008; Supreme Court of Cassation, Judgment No 26290 of 28 May 2013.

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⁶¹ *Legge 14 marzo 2014, n. 28, Conversione in legge, con modificazioni, del decreto-legge 16 gennaio 2014, n. 2, recante proroga delle missioni internazionali delle Forze armate e di polizia, iniziative di cooperazione allo*

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- ☛ Law No 141 of 1 October 2014 'Conversion into Law, with modifications, of the Decree-Law No 109 of 1 August 2014, 'Extension of Time of the Missions of the Armed and Police Forces, Interventions for Development Cooperation and Support of Reconstruction Processes and Participation to the Initiatives of the International Organizations for the Enhancement of the Peace and Stabilization Processes, as well as provisions on the renewal of the Committees of Italians Abroad',⁶² <<http://www.gazzettaufficiale.it/eli/id/2014/10/3/14G00155/sg>>.

In 2014, the Italian Government adopted decree-laws No. 2 of 16 January 2014 and No. 109 of 1 August 2014, subsequently converted by the Parliament into Law No. 28 of 14 March 2014 and Law No. 141 of 1 October 2014. These laws authorise the extension of international missions carried out by the Italian armed forces and the police, as well as initiatives of development cooperation and support to the reconstruction and participation projects run by international organizations to consolidate peace and stabilization processes.

The decrees regulate mission-related normative profiles and the legal, economic and social security treatment of the military, as well as accountability and penal discipline. The decree of January 2014 regulates the deployment of the various missions for the first half year (1 January 2014-31 June 2014), the decree of August 2014 for the second half (1 July 2014-31 December 2014). The total sum allocated for 2014 amounted to €1,071,810,785.

The practice of issuing decree-laws for the specific purpose of financing international peacekeeping missions is not unusual, due to the fact that Italy does not have a legal framework governing the foreign missions of its military and police forces. It should be noted, however, that the joint Commissions for Foreign Affairs and Defence of the Chamber of Deputies are currently discussing several bills aiming to establish a reference legislation regulating both the economic and legal treatment of the missions' personnel, and the procedures for the deployment of the Italian military abroad.⁶³

The two decrees of 2014, in accordance with established practice, refer to extant regulations even in the absence of a unitary legal framework, as already observed. Specifically, they refer to Law No 108 of 2009 in regard to the treatment of personnel, and to decree-laws No 152 of 2009 and No 209 of 2008 as for penal matters.

Each decree comprises 12 articles, divided into three parts. The first part (articles 1-7) covers the necessary expenditure authorisations for the following items: extension of the deadline for Italian participation in several international missions (in Europe, Asia and Africa); insurance and transport contracts and infrastructure projects; assignation of materiel; civil and military cooperation. Rules regarding personnel, accountability and penal matters are also outlined.

The second part (articles 8-10) covers initiatives of development cooperation and peace and stabilization aid, particularly those aimed at improving the living conditions of civilian

sviluppo e sostegno ai processi di ricostruzione e partecipazione alle iniziative delle organizzazioni internazionali per il consolidamento dei processi di pace e di stabilizzazione, entered into force 18 March 2014, published in *Gazzetta Ufficiale* No 63 of 17 March 2014.

⁶² *Legge 1 ottobre 2014, n. 141, Conversione in legge, con modificazioni, del decreto-legge 1° agosto 2014, n. 109, recante proroga delle missioni internazionali delle Forze armate e di polizia, iniziative di cooperazione allo sviluppo e sostegno ai processi di ricostruzione e partecipazione alle iniziative delle organizzazioni internazionali per il consolidamento dei processi di pace e di stabilizzazione, nonché disposizioni per il rinnovo dei Comitati degli italiani all'estero*, entered into force on 4 October 2014. published in *Gazzetta Ufficiale* No 230 of 3 October 2014.

⁶³ Bills No A.C. 45, A.C. 933 and A.C. 952 were presented in 2013. For the related debate, see <<http://www.camera.it/leg17/126?tab=6&leg=17&idDocumento=45&sede=&tipo=>>>.

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populations and refugees, and at supporting civil reconstruction in specific countries (Afghanistan, Iraq, Libya, Mali, Myanmar, Pakistan, Central African Republic, Syria, Somalia, Sudan, South Sudan, and Yemen).

The same section authorises expenditure for integrated programs of humanitarian mine-clearing, for reconstruction aid and participation in the initiatives of international organizations, and for the consolidation of peace and stabilisation processes in countries with a situation of instability, ongoing conflict or conflict aftermath.

Additional expenditure items include Italian financial participation in UN and NATO trust funds, in European Union's Common Foreign and Security Policy (CFSP) and in European Union's Common Security and Defence Policy (CSDP) initiatives, and in the initiatives led by Organization for Security and Co-operation in Europe (OSCE) and other international organizations, as well as in emergency operational deployments for the safety and protection of Italian citizens and interests abroad.

The last part (articles 11-12) deals with dispositions pertaining the funding and commencement of these measures.

In general, between the first and second half, the number of personnel deployed abroad has decreased from 4,725 to 4,178 units, and expenditure from €619,978,095 to €452,731,694. Appropriations for cooperation interventions remain almost unchanged in the second half (€34.8 million, with an annual total of €69,500,000), although the number of countries in which resources are allocated has increased from 10 to 12 with the addition of Yemen and the Central African Republic.

Overall, in 2014 the allocation of resources for the funding of mission decrees has decreased by 11 per cent compared to 2013, whereas resources allocated for cooperation have increased by 18 per cent.

It must be added that the decree-law of August 2014 has been affected by ongoing developments in the international political scenario. The decree in fact authorises the participation of Italian military personnel in the Central African Republic EU mission (EUFOR RCA2) scheduled by Council Decision of 10 February 2014 (2014/73/CFSP), with funding amounting to €2,987,065, and the deployment of a naval unit of the Navy as part of the maritime escort ensuring safe conditions for the transport of Syrian chemical weapons, as scheduled by UN Security Council resolution 2118 of 27 September 2013, with funding amounting to €1,942,394.

Overall, the NATO-led ISAF Afghanistan mission remains the most expensive (€185 million forecast for the second half, for an annual total of €420,239,136), followed by the UN-led UNIFIL Lebanon mission (€76.2 million for the second half, for an annual total of €157,747,907); a further €24 million have been allocated to anti-piracy operation Ocean Shield, with an annual cost of €49 million. Libya has also taken centre stage in the international missions scenario: €5,182,970 have been allocated for the extension of military personnel participation in EU mission EUBAM Libya, and for the extended deployment of military personnel providing assistance, support and training to the Libyan armed forces (with an annual expenditure of €10,301,815). Lastly, €5,277,671 have been allocated in 2014 to extend the *Guardia di Finanza* involvement in Libya in order to provide running maintenance of the naval units assigned by the Italian government to the Libyan government, as well as training for Libyan Coast guard personnel. Within Europe, conversely, nearly €77 million have been allocated by the Italian government in 2014 to missions in the Balkans, particularly in Kosovo.

As for development cooperation initiatives, the decree of 1 August 2014 has renewed expenditure authorisations for projects aimed at improving the living conditions of

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populations and refugees and for health aid projects, particularly the ones addressing ebola virus outbreaks in affected countries, as certified by the WHO. It has also promoted operations aimed at preventing and fighting violence against women, safeguarding women's rights and work, and promoting children's rights. However, these interventions have not been assigned to a specific expenditure item, as they are included in the general item for development cooperation, for which €34,800,000 have been allocated, with an annual expense of €69,500,000.

ANDREA CRESCENZI⁶⁴

Cases — Dispute between Italy and India

- Communication of the Minister of Foreign Affairs concerning the two navy marines Massimiliano Latorre and Salvatore Girone, 13 February 2014
<https://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=Resaula&leg=17&id=00747740&part=doc_dc-ressten_rs-gentit_idmdaesvddfdmmles&parse=no>
- Communication of the Special Commissioner of the Government for the case concerning the two marines belonging to the Italian Navy “San Marco” Brigade, 26 March 2014
<<http://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=SommComm&leg=17&id=725643>>
- Communication of the Government on the recent developments concerning international issues, with special regard to the engagements of Italy and the case of the two Navy marines, 17 December 2014
<http://documenti.camera.it/leg17/resoconti/commissioni/stenografici/html/0304c0304/au diz2/comunicazioneGoverno/2014/12/17/indice_stenografico.0015.html>

During the year 2014 the Government reported to Parliament on several occasions about the case concerning the two navy marines, Massimiliano Latorre and Salvatore Girone who are held in India.

On 13 February 2014, Ms Emma Bonino, the Italian Minister of Foreign Affairs, addressed Parliament pointing out that the case of the marines goes further [than] the bilateral relations between Italy and India, because it concerns the respect of international law and some of its basic principles such as those related to the freedom of navigation, the exclusive jurisdiction of the flag State, the immunity of the agents on duty acting on behalf of a sovereign State and the commitment of the whole international community in the fight on piracy.

The Minister stressed that the two marines were employed in the framework of an anti-piracy mission complying with international law, the relevant UN Security Council resolutions and the Italian legislation executing the international anti-piracy norms. The aforementioned considerations are the reason why Italy does not recognize the jurisdiction of the Indian judges, exercised, in the Minister's view, in violation of the United Nations conventions on the law of the sea and the customary rules on the functional immunity of the organs of the State.

The Minister highlighted that the Indian will to prosecute the marines under the SUA Act makes a substantial difference.⁶⁵ The Minister pointed out that the case could no longer be

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qualified as a bilateral dispute as it concerns the fundamental principles of the rule of law, the application of the anti-terrorism conventions and the two UN Security Council Resolutions authorizing the Operation Ocean Shield and the EU Operation Atalanta,⁶⁶ so that both NATO and EU support the Italian position.

In conclusion, the Minister said that this is the legal interpretation to follow and that Italy will follow in the future, considering that the State is obliged to protect and bring back home its marines.

During the following debate in Parliament it was also pointed out that the application of the *Suppression of Unlawful Acts Act* (SUA Act) would involve a reversal of the burden of proof, so that the two marines would need to prove their innocence. Furthermore all the repeated deferrals appear to be in contrast with the initial Indian commitment to grant a fast and fair process.⁶⁷ In addition, a senator recalled that the merchant ship was acting under the UN Security Council Resolution 1838/2008.⁶⁸

In so far as the application of the SUA Act is concerned, it seems that, even in the affirmative case, there is no actual risk of the death penalty being applied for several reasons. According to the bilateral agreement between Italy and India on the transfer of sentenced persons, ratified by Italy by Law No 183 of 26 October 2012,⁶⁹ the condemned citizens of each State can be transferred to their States of origin for execution of the penalty. Since Italian legal system has banned the death penalty,⁷⁰ in case of capital punishment, it would be de jure transformed in a life imprisonment.

Another relevant document is the communication to the Parliament given by the special Commissioner for the case of the two marines, the plenipotentiary ambassador Mr Staffan De Mistura. On 26 March 2014, he informed the parliamentary chambers about the findings of his mission to India and explained the situation under his point of view. Coming back after seven days in India, he noted that India had stated that it would not prosecute the two marines

⁶⁵ The Act implements the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988* into Indian domestic law. The text of the Indian SUA Act is available at <http://www.nia.gov.in/acts/The_Suppression_of_Unlawful_Acts_Against_Safety_of_Maritime_Navigation_Act_2002.pdf>. The text of the SUA Convention and Protocols are available at <<http://www.imo.org/OurWork/Security/Instruments/Pages/SUA.aspx>>. Under the SUA Act the marines could be indicted on counts of terrorism and, eventually, condemned to the death penalty.

⁶⁶ SC Res 1814, UN SCOR, 5893rd mtg, UN Doc SC/RES/1814 (15 May 2008); SC Res 1851, UN SCOR, 6046th mtg, UN Doc SC/RES/1851 (16 December 2008); SC Res 1838, UN SCOR, 5987th mtg, UN Doc SC/RES/1838 (7 October 2008); SC Res 2184, UN SCOR, 7309th mtg, UN Doc SC/RES/2184 (12 November 2014).

⁶⁷ Intervention of Senator Orellana, Stenographic report of Italian Senate Proceedings, 23 <https://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=Resaula&leg=17&id=00747740&part=doc_dc-ressten_rs-gentit_idmdaesvddfdmmles&parse=no>.

⁶⁸ Intervention of Senator Latorre, Stenographic report of Italian Senate Proceedings, 10 <https://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=Resaula&leg=17&id=00747740&part=doc_dc-ressten_rs-gentit_idmdaesvddfdmmles&parse=no>.

⁶⁹ Law No 183 of 28 October 2012 'Ratifica ed esecuzione dell'Accordo tra il Governo della Repubblica italiana e il Governo della Repubblica dell'India sul trasferimento delle persone condannate, fatto a Roma il 10 agosto 2012'.

⁷⁰ The Italian legal system does not allow for capital punishment. Italy ratified Protocol No 13 to the *European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in All Circumstances*, entered into force on 11 November 2008, by Law No 179 of 15 October 2008, <<http://web.camera.it/parlam/leggi/081791.htm>>. After the Constitutional Law No 1 of 2 October 2007 amending Article 27(4) of the Constitution, the death penalty is banned without any exception. See *Correspondents Report – Italy* (2007) 10 *YHIL*, 364-365.

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under the SUA Act,⁷¹ but he was concerned about the fact that India is still willing to commit the investigations to the National Investigation Agency (NIA).⁷²

The Commissioner then pointed out that the Italian position is that the two marines should not be prosecuted in India, but the case should be internationalized. He stressed that the case should be under international jurisdiction and in particular that the law of the flag is applicable. He also related to the difficulty (at that moment) to go further and to discuss the question with the Indian politicians, who were currently involved in internal elections.

On 17 December 2014, the new Italian Minister of Foreign Affairs, Mr Paolo Gentiloni, again referred to the parliamentary chambers about the international situation, with special regard to the case of the two marines. The communication occurred after the dismissal of the Italian marines' petitions by an Indian Court, which denied the request to send back them to Italy for a short period.⁷³ The Minister of Foreign Affairs stressed in particular that India had violated basic humanitarian values by preventing the marines from returning to Italy, after a long series of delays and deferrals of the hearings, and that Italy has an obligation to react to such a situation.

Therefore, he communicated his intention to recall Italy's Ambassador to India for urgent consultations. He stressed that this did not imply the severance of diplomatic relations but that given the situation, there was a need for in-depth discussions.

In the same framework, the Minister of Defence, Ms Pinotti, also expressed her disappointment and irritation over the decision of the Indian Supreme Court to deny the marines the permission to come back to Italy for a short period.

The internal debates at the institutional level on the case the two navy marines reflect the evolution of the situation, continuously changing, as, after about two years, the two marines are still held in India without an indictment.

Italy continues to deny Indian jurisdiction in relation the case, recalling the principle of functional immunity for the officials acting on behalf of the State, such as the military personnel embarked on board in order to solve the State anti-piracy commitments.

VALERIA EBOLI⁷⁴

⁷¹ See http://articles.economictimes.indiatimes.com/2014-02-24/news/47635780_1_continental-shelf-act-sua-italian-marines-massimiliano-latorre..

⁷² See <http://indianexpress.com/article/india/india-others/italian-marines-case-nia-will-defend-stand/>>.

⁷³ Latorre presented a petition in order to stay for four more months in Italy, where he had already returned for health issues. Girone presented a petition to go back to Italy for three months, including Christmas, to be with his family at home. The president of the Court, H L Dattu, affirmed that the petitions could not be accepted because the investigation related to the death of the two fishermen was still ongoing. http://www.ilmessaggero.it/PRIMOPIANO/CRONACA/maro_corte_suprema_respinge_istanze_latorre_girone/notizie/1070151.shtml.

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