

Italian courts and the evolution of the law of State immunity: A reassessment of Judgment no 238/2014

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1. *Introduction*

In Judgment no 238/2014, the Italian Constitutional Court made no secret of its aspiration to bring change to the law of State immunity. This aim was stated in a way that some may see as typically Italian: by seeking inspiration, if not legitimacy, from past glories. In a telling passage, the Court recalled the pioneering role played by the early 20th century Italian courts in the development of the restrictive immunity doctrine and went on to suggest a comparison between itself and those courts of yore. By reviewing the compatibility of State immunity with constitutional fundamental principles, the Court wished to cause ‘a further reduction of the scope of this norm’. Granted, this reduction would have ‘effects in the domestic legal order only. At the same time, however, this may also contribute to a desirable – and desired by many – evolution of international law itself’.¹

The historical events to which the Court referred are well-known. The evolution of the law of State immunity is traditionally described as one of progressive erosion of absolute immunity,² a process set in motion by a defiant inception of the restrictive doctrine at the hands of the courts

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¹ Judgment no 238 of 22 October 2014, official English translation <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf>, para 3.3. The informed reader will recognize the influence of the writings of Benedetto Conforti: cf eg B Conforti, ‘The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity’ (2011) 21 *Italian YB Intl L* 133.

² LF Damrosch, ‘The Sources of Immunity Law – Between International Law and Domestic Law’ in T Ruys, N Angelet (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019) 40, 42.



of Italy and Belgium. It should be acknowledged that some consider this story to be spurious, maintaining that absolute immunity was never actually a norm of international law.³ But be that as it may, the Italian and Belgian courts were the first to apply the distinction between acts *jure imperii* and *jure gestionis*, later to become the classic restatement of the restrictive doctrine, in suits against foreign States.⁴ Originating from domestic law, the distinction used to govern the exercise of jurisdiction by the civil judges over the public administration.⁵ At some point, the Italian and Belgian courts started treating foreign States as they treated their own. Thus, to be fair to Judgment no 238, the Italian courts did play a role in shaping the content of State immunity however one looks at the issue. Fast-forward one century and the new evolution envisioned by the Constitutional Court would arguably consist in the carving out of an area of non-immunity where gross violations of human rights take place: the so-called ‘humanitarian exception’.

Germany’s recent application against Italy, which has brought the effects of Judgment no 238 before the International Court of Justice (ICJ),⁶ provides an opportunity to attempt a reassessment of this judgment’s contribution to the law of State immunity. Was it a pioneer of yet-to-come international law or, possibly, of international law that has since come into being? This article takes a skeptical view. It argues that Judgment no 238 has not and likely will not trigger changes to international law. It also suggests that the prospective end of the quarrel with the ICJ

³ See eg L Gradoni, ‘Consuetudine internazionale e caso inconsueto’ (2012) 95 *Rivista di Diritto Internazionale* 704, 712-14; R van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 62. See also *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Foreign and Commonwealth Affairs and Libya v Janab* [2017] UKSC 62 para 52. *Contra, ex multis* S Sucharitkul, ‘Immunities of Foreign States Before National Authorities’ (1976) 149 *Recueil des Cours de l’Académie de Droit International* 87, 206; X Yang, *State Immunity in International Law* (CUP 2012) 7-10.

⁴ For references to case law see *infra*, section 2.

⁵ See eg O Ranelletti, ‘Per la distinzione degli atti di imperio e di gestione’ in *Studi in onore di V Scialoja*, vol I (Hoepli 1905) 712. The distinction first appeared in French law: eg T Ducrocq, *Cours de droit administratif* (2nd edn, Durand 1863) 90.

⁶ *Certain questions of jurisdictional immunity and enforcement of judgments (Germany v Italy)*, Application instituting proceedings and request for provisional measures (29 April 2022) <www.icj-cij.org/public/files/case-related/183/183-20220429-APP-01-00-EN.pdf>.



could improve the Italian courts' chances of giving again a meaningful contribution to the evolution of State immunity.

2. *Judgment no 238/2014 and State practice*

Because State immunity is a norm of customary international law,⁷ measuring changes requires looking at the constituent elements of custom: State practice and *opinio juris*.⁸

As far as the former element goes, the approach taken by Judgment no 238, although not as 'isolated'⁹ as it was in 2014, still finds very limited support from other jurisdictions. Only courts in Brazil¹⁰ and South Korea¹¹ have similarly developed a 'humanitarian exception' to immunity based (also) on constitutional grounds in the course of proceedings relating to events occurred during or around World War II.¹² The South Korean precedent, however, was quickly overshadowed by a subsequent decision, rendered by the same Seoul court, that upheld immunity in an identical claim.¹³ The US Supreme Court, for its part, quoted with approval from *Jurisdictional Immunities* in the 2021 *Philipp* judgment,

⁷ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment [2012] ICJ Rep 99 para 56.

⁸ Statute of the International Court of Justice 1945 art 38(1)(b).

⁹ R Kolb, 'The Relationship between the International and the Municipal Legal Order: Reflections on the Decision no 238/2014 of the Italian Constitutional Court' (2014) 2 QIL – Questions of Intl L 5, 6.

¹⁰ Supremo Tribunal Federal, Judgment of 23 August 2021 (*Changri-la* case) <<http://portal.stf.jus.br/processos/downloadPeca.asp?id=15347973404&ext=.pdf>>.

¹¹ Seoul Central District Court, Case no 2016 Ga-Hap 505092, 8 January 2021, English translation <https://womenandwar.net/kr/wp-content/uploads/2021/02/ENG-2016_Ga_Hap_505092_23Feb2021.pdf>, on which see M Gervasi, 'Immunità giurisdizionale degli Stati ed eccezione umanitaria: in margine alla recente giurisprudenza sudcoreana sul sistema delle «donne di conforto»' (2022) 105 *Rivista di diritto internazionale* 167.

¹² For broader discussions of earlier developments in the relationship between immunity and fundamental human rights see F De Vittor, 'Immunità degli Stati dalla giurisdizione e tutela dei diritti umani fondamentali' (2002) 85 *Rivista di diritto internazionale* 573; P De Sena, F De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case' (2005) 16 *Eur J Intl L* 89.

¹³ M Yadav, 'South Korea court dismisses suit for compensation by victims of Japanese occupation sexual slavery' *Jurist* (23 April 2021) <www.jurist.org/news/2021/04/south-korea-court-dismisses-suit-for-compensation-by-victims-of-japanese-occupation-sexual-slavery/>.

agreeing that ‘a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law’.¹⁴ At first glance, any parallel with the early 20th century development of State immunity would seem to be far-fetched. After the Italian and Belgian breakthroughs, many countries followed suit; had they not done so, today we would probably recall the time Italian courts violated, not changed, the law of State immunity.¹⁵

In all fairness, though, it is too soon to tell whether the relevant State practice will ever reach the critical threshold for custom transformation. The first rulings adopting the restrictive immunity doctrine occurred – to the best of this author’s knowledge – in Belgium in 1879¹⁶ and in Italy in 1882.¹⁷ But in the 1920s domestic case law was still heavily split between the camps of absolute and restrictive immunity, as was also legal scholarship.¹⁸ The US only transitioned to restrictive State immunity in 1952;¹⁹ the UK, with much judicial disagreement, in the course of the 1970s.²⁰ All members of the socialist bloc were adamant in their support for absolute immunity,²¹ and China still is to this day.²² Therefore, when speaking of State practice, it is plausible to assume that our current position is not unlike that of a lawyer wondering, in 1910, if restrictive immunity

¹⁴ *Federal Republic of Germany et al v Philipp et al*, Judgment of 3 February 2021, 11, quoting *Jurisdictional Immunities* (n 7) para 91.

¹⁵ Of course, so long as absolute immunity was the law, the Italian courts *did* violate State immunity by applying the restrictive doctrine: FM Palombino, *Introduzione al diritto internazionale* (2nd edn, Laterza 2021) 30.

¹⁶ Cour d’appel de Gand, *Rau, Vanden Abeele and Cie v Duruty*, 1879 (1932) 26 AJIL Supp 612-13.

¹⁷ Corte di Cassazione di Torino, *Morellet v Danish Government* (1883) 35 *Giurisprudenza italiana* 125.

¹⁸ Cf eg L van Praag, ‘L’immunité de juridiction des États étrangers et l’examen de leurs actes de puissance publique par les tribunaux internes’ (1923) 50 *Revue de droit international et de législation comparée* 436, favoring absolute immunity, and A Weiss, ‘Compétence et incompétence des tribunaux à l’égard des états étrangers’ (1923) 1 *Recueil des cours* 521, favoring restrictive immunity.

¹⁹ Tate Letter, 19 May 1952, (1952) 26 US Department of State Bulletin 984.

²⁰ Case law was split until the enactment of the UK State Immunity Act (SIA), 1978. The House of Lords embraced restrictive immunity at common law in *I Congreso del Partido*, 1981, 64 ILR 308.

²¹ C Osakwe, ‘A Soviet Perspective on Foreign Sovereign Immunity: Law and Practice’ (1982-1983) 23 *Virginia Journal of International Law* 13.

²² This extends to the Hong Kong SAR: *FG Hemisphere Associates v. Democratic Republic of the Congo* [2011] 14 HKCFAR 395.



was just a temporary fashion: we are too early in the game. Yet with a sizeable difference: the Italo-Belgian practice took roughly a century to establish itself without having to fight an uphill battle with a previous international judgment to the contrary.²³ It is self-evident that the very existence of *Jurisdictional Immunities* complicates things further.

At the same time, it should be mentioned that the State practice threshold for changes in the law of State immunity to occur is probably lower than generally assumed. The dominant view sees areas of non-immunity as exceptions to a default rule of immunity. This has the important consequence that every exception – including the fabled ‘humanitarian’ one – must be ascertained as a separate customary norm requiring general acceptance in State practice; if practice is inconsistent, immunity must be upheld.²⁴ However, given that immunities are norms prohibiting an otherwise possible exercise of jurisdiction by the territorial State,²⁵ a preferable view is that immunity constitutes an exception to the default rule of territorial jurisdiction.²⁶ Areas of non-immunity are not carved out by discrete customary norms; they are no more than a residual category comprising all proceedings which fall outside the scope of immunity rules. We may keep calling them ‘exceptions’, as State immunity instruments do, but this should carry no implication as to the method of custom ascertainment.²⁷ The customary norm that should be ascertained is the one *prohibiting* the exercise of jurisdiction – that is, the rule of immunity – not the one *permitting* it.

²³ G Gaja, ‘Alternative ai controlimiti rispetto a norme internazionali generali e a norme dell’Unione europea’ (2018) 101 *Rivista di diritto internazionale* 1035, 1043.

²⁴ *Ex multis*, B Conforti, M Iovane, *Diritto internazionale* (12th edn, Editoriale scientifica 2021) 284; Yang (n 3) 37-41.

²⁵ *Case Concerning the Arrest Warrant of 11 April 2000*, Judgment [2002] ICJ Rep 3, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, paras 3-4.

²⁶ R Higgins, ‘Certain Unresolved Aspects of the Law of State Immunity’ (1982) 29 *NILR* 265, 271; I Sinclair, ‘The Law of Sovereign Immunity: Recent Developments’ (1980) 176 *Recueil des cours* 113, 215.

²⁷ Schreuer, *State Immunity: Some Recent Developments* (Grotius 1988) 7. All State immunity instruments, both domestic and international, lay down a general rule of immunity followed by an exhaustive list of exceptions. See eg the 1972 European Convention on State Immunity (ECSI), ETS 74; the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCIS, not yet in force); the UK SIA, 1978; the US Foreign Sovereign Immunities Act 1976; or the 2010 Japanese Act on Civil Jurisdiction over Foreign States.



This point may be better explained by looking at the not-yet-in-force UN Convention on Jurisdictional Immunities of States and Their Property (UNCISI). Like other instruments, also the UNCISI enumerates a list of ‘exceptions’ where immunity should not apply.²⁸ However, there are two reasons why this feature should not be seen as reflecting the status of general international law. First, generally speaking, it is widely recognized that not all provisions of the UNCISI codify custom.²⁹ Many, if not most, ‘sought to resolve differences rather than to recognise existing consensus’.³⁰ Secondly, and more specifically, the International Law Commission (ILC) expressly clarified that the listing of ‘exceptions’ was just a drafting technique from which one should draw no conclusion as to the status of customary law.³¹ In *Benkharbouche*, when addressing the question whether certain provisions of the UNCISI and of the UK State Immunity Act (SIA) reflected custom, the UK Supreme Court started from the premise that the rule to be ascertained was not the ‘exception’ to State immunity but the obligation to grant immunity over a given claim.³² On this basis, in lack of an ‘international consensus [...] sufficient to found

²⁸ See Part III of the UNCISI, titled ‘Proceedings in which State immunity cannot be invoked’.

²⁹ R van Alebeek, ‘Part III: Proceedings in Which State Immunity Cannot Be Invoked’ in R O’Keefe, CJ Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP, 2013) 153, 163.

³⁰ *Benkharbouche* (n 3) para 32. Similarly, Sweden, Supreme Court, *Russian Federation v. Sedelmayer*, 1 July 2011, Case No Ö 170-10, para 12. It should be noted, however, that the Italian Court of Cassation has liberally relied on the UNCISI as a purported codification of customary international law: see eg *Embassy of Spain to the Holy See v De la Grana Gonzales*, 18 April 2014, No 9034, ILDC 2436 (IT 2014), re Art 11 UNCISI; *Nomentana Hospital srl v State of Libya*, 16 September 2021, No 25045, ILDC 3318 (IT 2021), re the whole UNCISI. This line of precedents has been influenced by decisions of the European Court of Human Rights: see eg *Cudak v Lithuania*, Application No 15869/02, 23 March 2010. For criticism see P Rossi, ‘Controversie di lavoro e immunità degli Stati esteri: tra codificazione e sviluppo del diritto consuetudinario’ (2019) 102 *Rivista di diritto internazionale* 5.

³¹ TD Grant, ‘Article 5’ in O’Keefe, Tams (n 29) 99, 99-101, with references to the *travaux*. The same view was expressed by Special Rapporteur S Sucharitkul, ‘Developments and Prospects of the Doctrine of State Immunity: Some Aspects of Codification and Progressive Development’ (1982) 29 *NILR* 252, 261.

³² *Benkharbouche* (n 3) paras 38-39. See also para 34: ‘[i]f the foreign state is not immune, there is no relevant rule of international law at all’.



a rule of customary international law',³³ immunity grounds listed in those two instruments were found to exceed the scope of State immunity as required under general international law. This was the case, for example, with the provision – which may be found in both the SIA and the UNCSI – according to which a State is immune from claims brought by one of its employees where the employee is a national of the employer State when the proceedings are instituted.³⁴ The Supreme Court acknowledged that the UK was 'not unique in applying this principle', which was reflected in the practice of at least thirteen other countries, but held that 'this [was] hardly a sufficient basis on which to identify a widespread, representative and consistent practice of states, let alone to establish that such a practice is accepted on the footing that it is an international obligation'.³⁵ In other words, State practice being conflicting, immunity was *not* to be upheld.

Thus the prospects may look somewhat rosier for the birth of the 'humanitarian exception'. An inconsistent State practice may well be a sign of the lack of an international law obligation to grant immunity in certain proceedings: '[w]here the existence of a general practice accepted as law cannot be established, the conclusion will be that the alleged rule of customary international law does not exist'.³⁶ Whether or not this conclusion is warranted, however, depends largely upon *opinio juris*, to which the next section turns.

3. *Judgment no 238/2014 and opinio juris*

The element of *opinio juris* is key to determine whether a State behavior inconsistent with an established customary rule should be marked as a sterile violation or regarded as a stepping stone to the possible evolution of custom. As the ICJ put it in *Nicaragua*,

³³ *Benkharbouche* (n 3) para 73, referring to s 16(1)(a) of the UK SIA, which provides for blanket immunity over claims brought by employees of diplomatic and consular missions.

³⁴ S 4(2)(a) UK SIA; Art 11(2)(3) UNCSI, but only if the employee is not a permanent resident of the State of the forum.

³⁵ *Benkharbouche* (n 3) para 66.

³⁶ ILC, Draft conclusions on identification of customary international law, with commentaries, 2018, 125.



‘In order to deduce the existence of customary rules, [...] instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, [...] the significance of that attitude is to confirm rather than to weaken the rule.’³⁷

Accordingly, as was said before, an inconsistent State practice may lead to the emergence of new ‘exceptions’ to immunity, provided however that *opinio juris* is equally inconsistent; this implies that an obligation to grant immunity does not exist. By contrast, consistency of *opinio juris* favoring immunity over a given claim indicates that conflicting judicial decisions, however numerous, should properly be regarded as mere breaches of immunity.

From this perspective, Judgment no 238/2014 raises doubts as to its capacity to influence the evolution of the law of State immunity. In a key passage of the judgment, the Court refused to question the content of international law as described by the ICJ in *Jurisdictional Immunities*, stating that ‘the interpretation by the ICJ of the customary law of immunity of States [...] is particularly qualified and does not allow further examination by [...] this Court’.³⁸ And, as is well-known, it went on to challenge the content of State immunity purely on constitutional grounds, on the basis of what Italian legal jargon calls the doctrine of ‘counter-limits’ (*controlimiti*).³⁹ The remainder of the decision was entirely devoted to discussing an ‘envisaged conflict between the norm of international law [...], as interpreted in the international legal order, and [...] a fundamental principle of our constitutional order, namely the right to a judge (Article 24), in conjunction with the principle of protection of fundamental human rights (Article 2)’.⁴⁰

Strategy-wise, for a judgment wishing to change the law of State immunity, adopting this approach was arguably a poor choice. The Court

³⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment [1986] ICJ Rep 14 para 186.

³⁸ Judgment no 238 (n 1) para 3.1.

³⁹ On which see D Amoroso, ‘Italy’ in FM Palombino (ed), *Duelling for Supremacy: International Law vs National Fundamental Principles* (CUP 2019) 184.

⁴⁰ Judgment no 238 (n 1) para 3.1.



confirmed that the international norm at issue was customary and conceded that its decision violated international law (though without the slightest expression of concern for the possible consequences of this violation⁴¹). It thus expressed clear *opinio juris* in favor of the law as photographed by the ICJ, in fact contributing to the entrenchment of existing custom.⁴² The difference from the early Italian cases applying restrictive State immunity could not be more striking. Those courts did not generally purport to be violating current international law. Rather, they constantly affirmed to be applying the law as it was:⁴³ they expressed both practice and *opinio juris*.

Of course, it might have been a different matter if the stance taken by the Constitutional Court had been embraced by the executive and put forth on the international level as Italy's official position on the status of international law. Yet, this is not what happened. In post-2014 proceedings against Germany before Italian courts, the executive has continued to plead for a dismissal on immunity grounds.⁴⁴ Italy's *opinio juris* also seems to be left untouched by the Decree-Law No 36 of 30 April 2022, which has created a Fund, financed by Italy, for the reparation of victims of war crimes and crimes against humanity committed by the Third Reich in Italy or against Italian nationals during World War II.⁴⁵ Reparations awarded by final judgments rendered against Germany in pursuance of the principles laid down in Judgment no 238 of 2014 will be paid through

⁴¹ F Salerno, 'Giustizia costituzionale *versus* giustizia internazionale nell'applicazione del diritto internazionale generalmente riconosciuto' (2015) 35 Quaderni costituzionali 33, 41. On such consequences see A Tanzi, 'Sulla sentenza Cost. 238/2014: *cui prodest?*', Forum di Quaderni Costituzionali (26 November 2014) <www.forumcostituzionale.it/wordpress/wp-content/uploads/2014/12/nota_238_2014_tanzi.pdf>.

⁴² E Cannizzaro, 'Jurisdictional Immunities and Judicial Protection: The Decision of the Italian Constitutional Court No. 238 of 2014' (2015) 98 Rivista di Diritto Internazionale 126, 127-28; P Palchetti, 'Can State Action on Behalf of Victims Be an Alternative to Individual Access to Justice in Case of Grave Breaches of Human Rights?' (2014) 24 Italian YB Intl L 53, 56-57. For a more favorable assessment see L Gradoni, 'La sentenza n. 238 del 2014: Corte costituzionale italiana «controvento» sull'immunità giurisdizionale degli Stati stranieri?' (2014) 34 Quaderni costituzionali 905.

⁴³ Cannizzaro (n 42) 128; Gradoni, 'Consuetudine' (n 3) 712.

⁴⁴ T Scovazzi, 'Come se non esistesse' (2021) 104 Rivista di Diritto Internazionale 167, 170-177; K Oellers-Frahm, 'A Never-Ending Story: The International Court of Justice – The Italian Constitutional Court – Italian Tribunals and the Question of Immunity' (2016) 76 ZaöRV 193, 195-197.

⁴⁵ The Decree-Law was converted into law with amendments by Law No 79 of 29 June 2022 <www.gazzettaufficiale.it/eli/gu/2022/06/29/150/sg/pdf>.

the Fund.⁴⁶ The Decree-Law, which was mainly intended to defuse challenges to Germany's immunity from enforcement proceedings, does not directly address the issue of immunity from adjudicative jurisdiction. It is true that it presupposes the Italian decisions delivered in breach of the law of State immunity and puts them into effect, but at the same time it keeps silent on the legality of those judgments from the standpoint of international law. This is arguably the maximum the Italian government could do without acting in breach of Judgment no 238 and, thus, contrary to the Constitution.⁴⁷

In light of Judgment no 238's failure to accompany its holdings on State immunity with a corresponding expression of *opinio juris*, it may be said that the Constitutional Court largely fired at a wrong target. What it ultimately did was take issue with a norm of international law different from immunity, namely the one (Article 94 of the UN Charter) making ICJ judgments binding; which was indeed declared unconstitutional 'to the extent that it obliges the Italian judge to comply with the Judgment of the ICJ of 3 February 2012'.⁴⁸ To question in the reasoning part the content of State immunity as ascertained by the ICJ, while at the same time complying with the ICJ judgment out of its binding character, would have probably been more in line with the Constitutional Court's stated objective, in that it would have voiced relevant *opinio juris* and laid the groundwork for future case law.⁴⁹

For the above reasons, the scholarly and practical significance of Judgment no 238 may ultimately lie more in its contribution to the issue

⁴⁶ On the Decree-Law see P Franzina, 'Jurisdictional Immunities: Germany v. Italy, Again' EAPIL Blog (4 May 2022) <<https://eapil.org/2022/05/04/jurisdictional-immunities-germany-v-italy-again/>>.

⁴⁷ L Gradoni, 'Is the Dispute between Germany and Italy over State Immunities Coming to an End (Despite Being Back at the ICJ)?' EJIL: Talk! (10 May 2022) <www.ejiltalk.org/is-the-dispute-between-germany-and-italy-over-state-immunities-coming-to-an-end-despite-being-back-at-the-icj/>.

⁴⁸ Judgment no 238 (n 1) operative part para 2.

⁴⁹ Cf Court of Cassation, First Criminal Section, *Albers et al*, 9 August 2012, No 32139 paras 5-6, declining jurisdiction over the civil claims in compliance with *Jurisdictional Immunities*, while voicing perplexity at the reasons why the ICJ held that no '*jus cogens* exception' to immunity existed under international law.



of the relationship between domestic and international courts, and particularly the dynamics of ‘disobedience’,⁵⁰ than in its role for the evolution of State immunity itself. The decision may be giving new impetus to the practice of invoking domestic law principles to expressly disregard international obligations – a practice, of course, predating 2014 and in no way limited to matters of immunity.⁵¹ From this alternative standpoint, it has been argued in scholarship that Judgment no 238 may contribute to causing a different (and perhaps unanticipated by its drafters) evolution in international law, namely the emergence of a new circumstance precluding wrongfulness allowing States to invoke fundamental principles of domestic law to justify breaches of their international obligations.⁵² This would constitute an exception to the well-established principle which prevents a State from invoking its internal law to disregard international law.⁵³ Regardless of the actual desirability of such a development, which would run the risk of jeopardizing the supremacy of international law and causing fragmentation,⁵⁴ it appears doubtful that Judgment no 238 may be regarded as contributing to the birth of this hypothetical exception. The reason lies once again in the lack of *opinio juris*: the Court attempted

⁵⁰ See FM Palombino, ‘Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles’ (2015) 75 *ZaöRV* 503.

⁵¹ Eg *Medellín v Texas*, 552 US 491 (2008). For thorough analyses see FM Palombino (ed), *Duelling* (n 39).

⁵² R Pisillo Mazzeschi, ‘La sentenza n. 238 del 2014 della Corte costituzionale ed i suoi possibili effetti sul diritto internazionale’ (2015) 9 *Diritti Umani e Diritto Internazionale* 23, 27-28. Cf 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) 2 *QIL – Questions of Intl L* 17, 31, envisioning a possible European regional custom and only referring to constitutional access to justice provisions.

⁵³ 1969 Vienna Convention on the Law of Treaties art 27; 2001 Articles on the Responsibility of States for Internationally Wrongful Acts art 32. This principle also applies vis-à-vis domestic constitutions: see *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory* (Advisory Opinion) 1932 PCIJ (ser A/B) No 44 para 62.

⁵⁴ G Bartolini, ‘A Universal Approach to International Law in Contemporary Constitutions: Does It Exist?’ (2014) 3 *Cambridge J Intl Comparative L* 1287, 1319-20.

no justification under international law of its decision to prioritize constitutional fundamental principles over State immunity.⁵⁵ Therefore, it offered little support to the emergence of a new circumstance precluding wrongfulness.

4. *Judgment no 238 and the normative push for change in the law of State immunity*

Lastly, the chances of Judgment no 238 contributing to the evolution of State immunity may also be evaluated in the light of normative considerations.

Being a byproduct of State behavior, customary international law undergoes changes whenever there exists some form of societal need for change;⁵⁶ that is, when the old law should ‘adapt [...] its content to the changing demands of the international system’.⁵⁷ This was certainly the case when the Italian and Belgian courts first developed the restrictive doctrine. Absolute immunity was regarded as inadequate to deal with the growing role of sovereign States in commerce.⁵⁸ As Higgins has well put it, this development was ‘a self-generated response to the requirements of the contemporary commercial world and to notions of stability and equity in the market place’.⁵⁹ More recently, the scope of State immunity has been progressively eroded in the context of employment disputes, where absolute or quasi-absolute State immunity was previously widespread.⁶⁰ This restriction has been influenced by a widely perceived need to reconcile the safeguarding of the State employers’ ability to perform

⁵⁵ The same is true with the aforementioned Korean and Brazilian precedents (n 10-11) following in the footsteps of Judgment no 238: see L Acconciamesa, ‘L’invocabilità dei principi costituzionali supremi come causa di esclusione dell’illecito internazionale: una questione ancora aperta’ (2022) Quaderni di SIDIBlog (forthcoming) s 2.

⁵⁶ C Focarelli, ‘State Immunity and Serious Violations of Human Rights: Judgment No. 238 of 2014 of the Italian Constitutional Court Seven Years On’ (2021) 1 *Italian Rev of Intl and Comparative L* 29, 55.

⁵⁷ A Bianchi, ‘Denying State Immunity to Violators of Human Rights’ (1994) 46 *Austrian J of Public and Intl L* 195, 202.

⁵⁸ Cannizzaro (n 42) 128.

⁵⁹ Higgins (n 26) 265.

⁶⁰ P Rossi, *International Law Immunities and Employment Claims: A Critical Appraisal* (Hart Publishing 2021) particularly 54-61.



public functions with the protection of employment rights.⁶¹ The question arises whether a similar normative consensus may underpin the evolution envisioned by Judgment no 238/2014. The Constitutional Court certainly thought so, as it described a similar evolution as ‘desirable – and desired by many’.

Clearly, the general proposition that it should be possible to bring civil suits against States violating human rights is supported by relevant normative arguments, such as fostering the protection of the fundamental rights of the human person or using national courts as enforcement mechanisms of international human rights law.⁶² Moreover, it is not entirely correct to assume that States would never be prepared to remove *acta jure imperii*, or parts thereof, from the scope of State immunity.⁶³ This has already occurred several times. The State immunity criteria applied to employment disputes partly straddle the *jure imperii/gestionis* divide. For instance, jurisdiction is frequently affirmed over the economic consequences of layoffs irrespective of whether the nature of the underlying State act is undisputedly sovereign (eg the decision to close a consulate).⁶⁴ The ‘tort exception’ is also considered to be independent of the qualification of the State’s tortious act as private or public.⁶⁵

However, the desirability of a ‘humanitarian exception’ encompassing, as envisioned by the Constitutional Court, grave breaches of human rights occurred in wartime may be diminished by a number of counter-vailing considerations. A most obvious aspect relates to State interests. As has been pointed out, few States would find themselves in the position of not having committed any grave breaches of human rights in wartime

⁶¹ *ibid* 76-149. The Italian case law has played a significant role in the evolution of State immunity in employment matters as well: see R Pavoni, ‘La jurisprudence italienne sur l’immunité des États dans les différends en matière de travail: tendances récentes à la lumière de la Convention des Nations Unies’ (2007) 53 *Annuaire Français de Droit International* 211.

⁶² *Ex multis* Bianchi (n 57) 225-28.

⁶³ As argued by C Tomuschat, ‘The Illusion of Perfect Justice’ in V Volpe et al (eds), *Remedies against Immunity?* (Springer 2021) 55, 61.

⁶⁴ French Cour de cassation, *Mme X v Consulate General of the United States of America in Martinique* (31 March 2009) 07-45.618, *Bulletin* 2009, V, No 92. See Rossi, *International Law* (n 60) 122-36 for further references.

⁶⁵ Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries [1991] II/2 YB Intl Law Commission 45; *Schreiber v Canada (Attorney General)* [2002] 3 SCR 269.



in the (more or less remote) past.⁶⁶ This unsurprisingly creates a shared interest in being shielded from domestic litigation of this kind.⁶⁷ It is probably apt to mention that this is also true for Italy, which is not without a past record of war crimes of its own.⁶⁸ This might be among the reasons why the Italian executive, as seen in the previous section, has continued to plead in favor of Germany's immunity from Italian jurisdiction. It is therefore very doubtful that Italy would decline to plead immunity if victims of past Italian war crimes were to sue it before the courts of their own countries.⁶⁹

A further, and perhaps more decisive, consideration is that national courts may not be regarded as the most appropriate forum. Considering that the potential plaintiffs worldwide may number in the tens of millions, it would be obviously impossible to litigate all relevant cases.⁷⁰ This, in turn, creates a problem of selectivity: awarding compensation just to the fraction of victims having the capacity to withstand a long domestic legal battle may be regarded as only superficially fair. Moreover, domestic litigation may not 'allow for taking into account broader political considerations related to establishing a stable post-war order',⁷¹ including eg the setting of an upper ceiling of compensation. This is why wartime reparations are usually dealt with by means of interstate agreements, which may provide for lump-sum compensation,⁷² or by mass claims processing methods set up at the international level.⁷³

⁶⁶ Focarelli (n 56) 44.

⁶⁷ See eg the remarks by the US Supreme Court in *Philipp* (n 14) 13.

⁶⁸ Kolb (n 9) 16.

⁶⁹ Palchetti, 'Right' (n 72) 43.

⁷⁰ Note also that the existence and extent of an individual right to wartime reparations is debated: see P d'Argent, *Les réparations de guerre en droit international public: la responsabilité internationale des Etats à l'épreuve de la guerre* (Bruylant 2002); M Frulli, 'When Are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The *Marković* Case' (2003) 1 J Intl Criminal Justice 406.

⁷¹ H Kriege, 'Sentenza 238/2014: A Good Case for Law Reform?' in V Volpe et al (eds) (n 63) 71, 72.

⁷² See generally A Gattini, *Le riparazioni di guerra nel diritto internazionale* (Cedam 2003). It has been suggested that the Germany-Italy dispute may be ended by a bilateral agreement setting up a non-judicial mechanism of redress available to the victims: see P Palchetti, 'Right of Access to (Italian) Courts *über alles*? Legal Implications Beyond Germany's Jurisdictional Immunity' in V Volpe et al (eds) (n 63) 39.

⁷³ HM Holtzmann, E Kristjánssdóttir, *International Mass Claims Processes: Legal and Practical Perspectives* (OUP 2007).



These aspects are ripe with implications which cannot be explored in detail in this piece. Still, they highlight important differences between the current circumstances and those which historically led to the emergence of restrictive State immunity. This may cast a shadow over the likelihood of a ‘humanitarian exception’ arising, at least as conceived by Judgment no 238 – ie so broad as to be applicable to *any* grave breaches of human rights including those occurred in wartime.

5. *Italian courts and the evolution of State immunity beyond Judgment no 238/2014*

The previous pages made the argument that Judgment no 238’s ambition to produce changes in the law of State immunity is unlikely to be realized. At the same time, the Constitutional Court was right to emphasize that State immunity evolves over time and that domestic courts play a central role in this process.⁷⁴ It is just that, in order to be able to set a successful model for future jurisprudence, domestic courts should devise solutions normatively desirable to the generality of States and not perceived as disruptive to the smooth conduct of international relations (or possibly to the international legal order at large). That the law of State immunity has a notable potential for incremental improvement is demonstrated by the fact that, under existing international law, there are many more cracks in the supposed glass ceiling than the Constitutional Court believed.

A possibly more effective strategy would therefore be for future domestic courts to try to erode the area covered by immunity by invoking, or expanding, existing ‘exceptions’ to state immunity – where ‘existing’ does not necessarily mean ‘universally recognized’ (it should be recalled, as seen in section 2, that an inconsistent State practice is a possible sign of a lack of obligation to grant immunity). The ‘tort exception’, for example, potentially encompasses human rights violations committed in the territory of the forum State.⁷⁵ Its application to peacetime violations (in-

⁷⁴ Domestic case law constitutes ‘the most pertinent state practice’ in State immunity matters: *Jurisdictional Immunities* (n 7) para 73.

⁷⁵ 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’ *VerfBlog* (27 October 2014) <<https://verfassungsblog.de/know-wrong-just-cant-right-first-impressions-judgment-238->

cluding eg instances of torture) would arguably not prove overly controversial, and courts may devise interpretive ways to partly overcome its strict territorial requirement.⁷⁶ Cases of forced labor may perhaps be litigated as employment claims, as is already commonplace in the realm of diplomatic and consular immunities.⁷⁷

An even bolder attempt may be to search new ways to revive the so-called ‘last resort argument’. It is well-known that ICJ dismissed it as unsupported by State practice, concluding that the statement that ‘international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress’ finds ‘no basis’ under customary international law.⁷⁸ Yet, this issue may also be looked at in a different light, namely as having to do not with the content of one particular customary norm (that of State immunity) but with reconciling two competing norms, namely immunity and the right to a court.⁷⁹ Adopting this perspective implies that State practice is not really relevant here, as the issue is not one of custom ascertainment. Also, the relationship between immunity and the right to a court should be distinguished from the one between immunity and fundamental human rights amounting to *jus cogens*. It is well-known that, in 2012, the ICJ brushed off the very possibility of a normative conflict between State immunity and *jus cogens* in that ‘[t]he two sets of rules address different matters’: immunity is procedural in character, ie determines whether national courts may exercise jurisdiction, while *jus cogens* norms relate to the substance of a claim.⁸⁰ The right to a court, by contrast, is a procedural norm

2014-italian-constitutional-court/>. See eg art 12 UNCSI (‘Personal injuries and damage to property’), removing immunity in proceedings which relate ‘to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State [...]’.

⁷⁶ See already Bianchi (n 57) 217; Schreuer (n 27) 62.

⁷⁷ P Webb, ‘The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma?’ (2016) 27 Eur J Int L 745.

⁷⁸ *Jurisdictional Immunities* (n 7) para 101.

⁷⁹ R Pavoni, ‘Human Rights and the Immunities of Foreign States and International Organizations’ in E de Wet, J Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012) 71, 86.

⁸⁰ *Jurisdictional Immunities* (n 7) para 93.



which operates on the same plane as immunity,⁸¹ so that a direct conflict between the two norms can no doubt arise.

Against this backdrop, the question of whether – at least under certain conditions – the right of access to justice may be prioritized over immunity as a matter of international law, rather than of constitutional ‘counter-limits’, still remains far from having been answered conclusively. The Strasbourg Court, after all, has long applied a sort of ‘last resort argument’ in the context of labor disputes to check if treaty-based international organization (IO) immunity is compatible with Article 6 of the European Convention on Human Rights.⁸² Following a similar approach, courts of many jurisdictions – including Italy – have sometimes disregarded express treaty obligations to grant IOs full immunity from suit where employees were deprived of remedies,⁸³ without much fuss being made. It is anyone’s guess if the ICJ would object. But, as has been rightly noted, it should be kept in mind that its refusal to include human rights considerations in its treatment of State immunity in *Jurisdictional Immunities* probably stemmed from an understandable systemic concern: that deciding otherwise ‘would have opened the door to a flow of litigation before municipal courts that might have disrupted the whole system’.⁸⁴ This concern may not be as strong in other cases.

The above shows that international law may pose no obstacle to very innovative domestic judicial decisions, provided they keep within the bounds of reasonableness and normative desirability. Judgment no 238 has constituted a distraction from the pursuance of these developments in the law of State immunity. In the long run, from the standpoint of the Italian courts’ ability to contribute to the progress of international law, the overdue end of the quarrel between Italian courts and the ICJ may prove to be a blessing in disguise.

⁸¹ M Iovane, ‘The Italian Constitutional Court Judgment No. 238 and the Myth of the “Constitutionalization” of International Law’ (2016) 14 J Intl Criminal Justice 595, 599.

⁸² *Waite and Kennedy v Germany*, App No 26083/94 (ECtHR, 18 February 1999).

⁸³ Corte di cassazione, *Drago v International Plant Genetic Resources Institute (IPGRI)* (19 February 2007) No 3718, ILDC 827 (IT 2007). For complete references see Rossi, *International Law* (n 60) 184-211.

⁸⁴ A Bianchi, ‘On Certainty’ EJIL: Talk! (16 February 2012) <www.ejiltalk.org/on-certainty/>.

