EDITORIAL

FROM DEFERENCE TO DISOBEDIENCE: THE UNCERTAIN FATE OF CONSTITUTIONAL COURT DECISION NO. 238/2014

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This Volume of the Italian Yearbook opens with a focus on the decision of the Italian Constitutional Court No. 238 of 22 October 2014, which declared unconstitutional the provisions of Italian law implementing the judgment rendered by the International Court of Justice (ICJ) in Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening).¹ In the same judgment, the Court also declared unconstitutional the section of Italian Law No. 848 of 17 August 1957 which implements Article 94 of the UN Charter and the unqualified obligation it places on Italy to comply with judgments of the ICJ. The contributions that follow are intended to provide readers of the IYIL with a variety of views and perspectives on this judgment. They range from an enthusiastic embracing of the decision to a cautious evaluation of its merits in terms of balancing the need for respect of international law (and immunity) with the right of access to justice for victims of gross human rights violations. The focus also includes sharp criticism of the judgment and also a view from “the other side”, i.e. Germany, with incisive overview of the diplomatic background of the dispute and comparative analysis of constitutional attitudes toward immunity.

In introducing these comments I would like to recall that this judgment, like all judgments, should be read “in context”, beyond the specific object of the dispute and the specific claims of the parties. And indeed in this case the context is particularly important and still holds some surprises. First, the decision of the Constitutional Court is the foreseeable consequence of the ICJ judgment in which Italy had been found responsible for breach of international law for having allowed access to its own courts to victims of atrocities committed by German armed forces in Italy in the final stages of World War II. The surprise here is in realizing that two members of the European Union had to bring such a sensitive question as the reparation to victims of now remote Nazi crimes before the ICJ instead of resolving it within the walls of their common European “home” in the spirit of the commitment to the rule of law, shared values and respect for human dignity. Second, even more surprising is the fact that after seventy years since the commission of the crimes no reparation has been provided to a whole class of victims (or their heirs) simply because they did not fit into any of the formal categories of victims who have

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¹ Judgment of 3 February 2012, ICJ Reports, 2012, p. 99 ff..
otherwise benefitted from reparation schemes. What justification may the Italian Government and the Italian Parliament invoke for failing to take up this case, and how can Germany justify its obstinate opposition to closing the legal “black hole” in relation to these victims in spite of the full acceptance of the historical responsibility for the crimes? Third, claims of victims of war crimes and crimes against humanity committed by German armed forces in Italy have not come out of the blue. Since the famous 2004 decision of the Italian Court of Cassation in the Ferrini case\(^2\) Italian courts have taken a firm position on the point that in case of crimes of war and crimes against humanity, constituting breaches of *jus cogens*, access to justice and remedial action for the victims were to take precedence over the rule of jurisdictional immunity of the respondent State due to the peremptory character of the human rights involved.

During the ten years that have passed since the inception of this jurisprudence no diplomatic or legislative action has been undertaken in order to defuse this potentially explosive issue. And yet in other situations and at other times the possibility of the exercise of jurisdiction by national courts over similar claims has worked as a catalyst for doing justice by the adoption of reparation schemes at the diplomatic level. Suffice it to recall the sequel to *Princz v. Federal Republic of Germany*\(^3\) and the string of lawsuits brought in the United States against German firms implicated in forced labour practices in the Third Reich which led to Germany establishing (with the contribution of private firms) the “Remembrance, Responsibility and Future” foundation to provide compensation to victims of forced labour. In contrast nothing similar has happened in Italian-German relations since the critical 2004 Ferrini judgment. The road taken, unfortunately, was that of allowing the judicial bombshell to explode with the result of the inter-State litigation before the ICJ; a zero-sum game that has led us to this point.

The context in which this case must be evaluated becomes even more complex, and even contradictory, when we note that on 25 November 2014 the Italian Government deposited its declaration of acceptance of the compulsory jurisdiction of the ICJ, thus confirming its full faith and trust in the role of the ICJ as arbiter of the interpretation and implementation of international law. This is a commendable act confirming Italy’s commitment to international law, but it is in stark contrast with the judgment of the Constitutional Court which, only one month earlier had contested, in substance if not in form, the ICJ’s findings on the customary law of State immunity and declared its execution in the Italian legal order unconstitutional. I am afraid that it is not helpful to Italy’s role in international relations when its constitutional organs speak with such discordant voices in the public arena.

\(^3\) 26 F.3d 1166 (D.C.Cir. 1994).