JUDGMENT NO. 238 - YEAR 2014

ITALIAN REPUBLIC
IN THE NAME OF THE ITALIAN PEOPLE

THE CONSTITUTIONAL COURT

Composed of:

President Giuseppe TESAURO; Judges: Sabino CASSESE, Paolo Maria NAPOLITANO, Giuseppe FRIGO, Alessandro CRISCUOLO, Paolo GROSSI, Giorgio LATTANZI, Aldo CAROSI, Marta CARTABIA, Sergio MATTARELLA, Mario Rosario MORELLI, Giancarlo CORAGGIO, Giuliano AMATO,

Delivered the following

JUDGMENT

in the cases concerning the constitutionality of Article 1 of Law No. 848 of 17 August 1957 (Execution of the Statute of the United Nations, signed in San Francisco on 26 June 1945) and of Article 1 (*recte*: Article 3) of Law No. 5 of 14 January 2013 (Accession by the Italian Republic to the United Nations Convention on Jurisdictional Immunities of States and their Property, signed in New York on 2 December 2004, as well as provisions for the amendment of the domestic legal order), brought by the Tribunal of Florence through Orders Nos. 84, 85 and 113 of 21 January 2014, and published in the Official Gazette of the Italian Republic Nos. 23 and 29, First Special Series, Year 2014.

Having regard to the appearance of S.F., A.M. and others, and B.D., as well as the intervention of the President of the Council of Ministers;
having heard in the public hearing of 23 September 2014 the Judge-Rapporteur Giuseppe Tesauro;
having heard Mr Joachim Lau, attorney for S.F., for A.M. and others, and for B.D., and Ms Diana Racucci, state attorney for the President of the Council of Ministers.

Conclusions in Point of Fact

1. By means of three identical orders adopted on 21 January 2014 (Orders Nos. 84, 85, and 113/2014), the Tribunal of Florence raised the question of constitutionality:

1) of the "norm created in our legal order by the incorporation, by virtue of Article 10, para. 1 of the Constitution", of the international custom, as found by the International Court of Justice (ICJ) in its Judgment of 3 February 2012, insofar as it denies the jurisdiction [of civil courts] in the actions for damages for war crimes committed *jure imperii* by the Third Reich, at least in part in the State of the Court seized;

2) of Article 1 of Law No. 848 of 17 August 1957 (Execution of the United Nations Charter, signed in San Francisco on 16 June 1945), insofar as, through the incorporation of Article 94 of the U.N. 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 *jure imperii* by the Third Reich, at least in part in Italian territory;

3) of Article 1 (*recte*: Article 3) of Law No. 5 of 14 January 2013 (Accession by the Italian Republic to the United Nations Convention on Jurisdictional Immunities of States and their Property, signed in New York on 2 December 2004, as well as provisions for the amendment of the domestic legal order), insofar as it obliges the national judge to comply with the Judgment of the ICJ, even when it established the duty of Italian courts to deny their jurisdiction in the examination of actions for damages for crimes against humanity, committed *jure imperii* by the Third Reich in Italian territory, in relation to Articles 2 and 24 of the Constitution.

These norms are questioned in relation to Articles 2 and 24 of the Constitution. They are said to conflict with the principle of absolute guarantee of judicial protection, enshrined in Article 24 of the Constitution, as they preclude the judicial examination of the case and compensation for damages for the gross violations of human rights suffered by the victims of war crimes and crimes against humanity, committed in the territory of the Italian State (which has the duty to ensure judicial protection) by another State in the exercise of its sovereign powers (*jure imperii*). The principle of absolute guarantee of judicial protection is a supreme principle of the Italian constitutional order and, as such, constitutes a limit to the introduction [in the domestic legal order] of generally recognized norms of international law (under Article 10, para. 1 of the Constitution), as well as of norms contained in treaties establishing international organizations furthering the ends envisaged by Article 11 of the Constitution, or deriving from such organizations.

1.1 The referring judge indicates that he was seized:
with regard to the first case, by Mr F.S., in order to obtain compensation from the Federal Republic of Germany for damages suffered during World War II. F.S. was abducted by German military forces in Italian territory and deported to Mauthausen on 8 June 1944. He was only set free on 25 June 1945, after untold sufferings;
with regard to the second case, by the legitimate heirs of Mr L.C., in order to obtain compensation from the Federal Republic of Germany for damages suffered by L.C. during World War II. L.C. was abducted in Italian territory by German military forces on 8 September 1943 and deported to Germany to slave labor. He was killed in one of the concentration camps of Kahla (Thuringia) in Germany and, according to the International Red Cross, was buried in a mass grave together with six thousand prisoners reduced to slavery;
with regard to the third case, by Mr D.B., in order to obtain compensation from the Federal Republic of Germany for damages suffered during World War II. D.B. was abducted by German military forces in Italian territory on 9 September 1943. [He was taken prisoner] in Verona (where he had been hospitalized) and deported to slave labor. He was segregated in the Zeitz concentration camp, a subcamp of Buchenwald, and was then transferred to the Hartmannsdorf Stammlager IVF concentration camp, and then again to Granschutz, where he was eventually set free by Allied forces at the end of the war.
The referring judge recalls that the Federal Republic of Germany filed appearances in the cases and raised the lack of jurisdiction of Italian judicial authorities. [The Federal Republic of Germany] requested that the judge apply the Judgment of the ICJ of 3 February 2012 and therefore did not accept to proceed to examine the merits of the case. Hence, the referring judge raised the aforementioned question of constitutionality of the norms that required the Tribunal to deny its jurisdiction.

1.2. – The Tribunal of Florence notes that the subject-matter of the cases is the examination of whether the [Italian] legal order (which conforms to generally recognized norms of international law) requires that the courts of the State in which the international crime has been committed deny the examination of actions for damages even in cases of war crimes and crimes against humanity, in breach of fundamental rights, perpetrated in [Italian] territory by a foreign State, although in the exercise of sovereign powers.

The referring judge points out that the nature of the acts forming the subject-matter of the claims, amounting to international crimes, and their potential to breach fundamental rights are uncontested. He also recalls that, before the ICJ rendered its Judgment, the Court of Cassation had affirmed the non-absolute character of the immunity of foreign States from civil jurisdiction recognized by international law. [The Court of Cassation had indeed] held that immunity can be limited even when the State exercises its sovereign powers, insofar as the acts complained of constitute crimes against humanity, which are considered international crimes (Judgments No. 5044/2004 and No. 14202/2008).

The referring judge notes, however, that the Court of Cassation changed its jurisprudence after the Judgment of the ICJ of 3 February 2012. In that Judgment, the ICJ held that "customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict", even if [the foreign State] is accused of serious violations of international human rights law. The Court of Cassation aligned itself with the ruling of the ICJ and held that Italian courts lacked jurisdiction, since "the doctrines put forward by the Court of Cassation in Judgment No. 5044/2004 have remained isolated and have not been upheld by the international community, of which the ICJ is the highest manifestation. Therefore the principle (…) can no longer be applied" (Judgments No. 32139/2012 and No. 4284/2013).

In line with this orientation, [the Legislator] passed Law No. 5 of 14 January 2013 (Accession by the Italian Republic to the United Nations Convention on Jurisdictional Immunities of States and their Property, signed in New York on 2 December 2004, as well as provisions for the amendment of the domestic legal order), which explicitly excludes (in Article 3) the jurisdiction of Italian courts for war crimes committed by the Third Reich, including in instances of ongoing proceedings.

The Tribunal of Florence points out that the ICJ maintained that it was not necessary to examine the interference between fundamental human rights and the principle of sovereignty of the State accused of an unlawful act. The ICJ held that there was no conflict between substantive *jus cogens* norms and norms considered to have a formal or procedural character (such as the norms of immunity), since they operate at different levels. Hence, the referring judge submits that, while on the one hand Italian courts cannot interpret the imperative and non-derogable character of *jus cogens*, since the International Court of Justice has exclusive and absolute competence over the matter, on the other hand Italian courts cannot be denied the competence to assess whether the indiscriminate grant of immunity to States – to the detriment of the victims [of gross human rights violations] – complies with the Italian Constitution, as well as with complementary sources thereof (including supranational sources). In other words, [Italian courts have competence to assess] whether or not the receptiveness [of the Italian legal order] to external legal orders (as enshrined in Articles 10, 11, and 117 of the Constitution) is to some extent limited, with the consequence of affecting, in the case at issue, the preliminary question raised by the Federal Republic of Germany.

According to the referring judge, it can be doubted that the immunity of States (European Union States in particular) still allows, by effect of international customs existing prior to the entry into force of the Constitution and of the Charter of Fundamental Rights of the European

Union, for the indiscriminate denial of judicial protection of fundamental rights violated by war crimes and crimes against humanity, in breach of inviolable human rights.
The ICJ itself acknowledged that this situation results in the concrete and irreversible violation of judicial protection of the rights infringed, and nevertheless it considered that the violation of substantive *jus cogens* norms (fundamental human rights infringed by a widespread practice of war crimes and crimes against humanity) does not conflict with the norms of international law of state immunity of procedural nature. In light of this, the Tribunal of Florence questions that, as far as domestic law is concerned, the principle of sovereign equality of States (in particular, its corollary in matters of immunity) can justify the sacrifice of judicial protection of fundamental rights, in cases where judicial protection is invoked against a State – different from the State of the Court seized – which committed an international crime, albeit in the exercise of sovereign powers.
[The referring judge acknowledges] that, following the ruling of the ICJ, which does not leave any discretion on the matter, domestic courts do not have competence to establish whether or not the criminal acts committed by the Third Reich in occupied Italian territory can be considered *jure imperii* under international law. Nevertheless, the referring judge submits that the absolute character of international immunity cannot entail that the individuals affected are denied any possibility of judicial examination and remedy, both of which, in the case at issue, are also denied by the German legal order.
The Tribunal of Florence recalls that, since an early Judgment (No. 48/1979), the Constitutional Court has upheld that, in case of conflict between generally recognized norms of international law (incorporated in the Italian legal order by virtue of Article 10, para. 1 of the Constitution) and fundamental principles of the Italian legal order, the latter shall prevail.
In a later decision (Judgment No. 73/2001), this Court – as the referring judge recalls – reaffirmed the principle that "the tendency of the Italian legal order to be open to generally recognized norms of international law and international treaties is limited by the necessity to preserve its identity; thus, first of all, by the values enshrined in the Constitution".
Therefore, [the referring judge contends that] the fundamental principles of 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), as well as of norms contained in treaties establishing international organizations furthering the ends envisaged by Article 11 of the Constitution, or deriving from such organizations.
Considering that the principle in Article 24 of the Constitution is one of the supreme principles of the Italian constitutional order, since it is "instrinsically connected to the principle of democracy itself and to the duty to ensure a judge and a judgment to anyone, anytime and in any dispute" (Judgment No. 18/1982), the referring judge questions the constitutionality of the customary norm [of immunity]. [According to the referring judge], the norm of customary international law at issue (as defined by the ICJ) cannot prevail over the supreme principle of absolute guarantee of judicial protection, when fundamental rights were violated as a result of a crime against humanity, committed in the State of the Court seized, even if that crime was committed by another State in the exercise of sovereign powers.
In short, according to the referring judge, Italian courts cannot follow the ruling of the ICJ and therefore deny their jurisdiction. Italian courts cannot leave the protection of individuals to the dynamics of the relationships between the political organs of the States involved, since these organs have not been able to come up with a solution for decades. If judicial adjudication and compensation for the perverse actions perpetrated by the Third Reich were denied, the right to an effective remedy would be irretrievably sacrificed.
Moreover, the referring judge clarifies that he had to raise the question of constitutionality as a result of the ruling of the Constitutional Court in Judgment No. 311/2009. [In that

Judgment, this Court held] that when international law conflicts with the Constitution, "the referral to the international norm does not operate, and thus the international norm does not constitute a parameter under Article 117, para. 1 of the Constitution." Therefore, since "there can be no effect on the lawfulness of the external norm itself, this results (…) in the unconstitutionality (…) of the law of adaptation (Judgments Nos. 348 and 349/2007)".

In light of the above, the Tribunal of Florence refers the question of constitutionality to this Court. The Tribunal considers that the question of constitutionality of the domestic norm (created by virtue of Article 10, para. 1 of the Constitution, in conformity with the international custom, the formation of which took place before the entry into force of the Italian Constitution) which, in case of actions for damages for war crimes, denies the jurisdiction of the State where the unlawful acts had, at least in part, detrimental effects, is not manifestly ill-founded.

The referring judge further notes that Article 94 of the United Nations Charter – which provides that "each Member of the United Nations undertakes to comply with the decision of the ICJ in any case to which it is a party" – has been incorporated into the domestic legal order through of a law of ratification – sub-constitutional in nature – but by virtue of a constitutional norm (i.e., Article 11 of the Constitution). Hence, it has binding effects in the domestic legal order only to the extent that it is compatible with the Constitution. Accordingly, the referring judge submits that the question of constitutionality also concerns Law No. 848/1957, insofar as it incorporates the United Nations Charter, in particular Article 94, and thus obliges all state organs to comply with the judgments of the ICJ, including the Judgment of 3 February 2012.

For the same reasons, the referring judge also questions Article 3 of Law No. 5/2013, which regulates the duty of the national judge to comply with the ruling of the ICJ that denied the jurisdiction of Italian courts in the examination of action for damages for crimes considered *jure imperii*, committed by the Third Reich in Italian territory.

Lastly, the Tribunal of Florence clarifies that the constitutionality of each questioned provision bears independent relevance in the main judgment, as any of these norms, even taken individually, can exclude the exercise of its jurisdiction.

2. The President of the Council of Ministers, represented and defended by the *Avvocatura Generale dello Stato* [the Office of the State attorney, hereafter '*Avvocatura*'], intervened in the cases. The President requested that the question of constitutionality be declared inadmissible and/or ill-founded.

Firstly, the *Avvocatura* contends that the question raised is inadmissible, because it entails a constitutional review of the customary norm of immunity, the formation of which took place before the adoption of the Constitution. [According to the *Avvocatura*], this norm cannot be subject to constitutional review in light of consistent jurisprudence of the Constitutional Court, which is said to have stated that constitutional review of customary international norms is only allowed in the case of norms formed after the Constitution entered into force (in alleged support of this argument, Judgments Nos. 48/1979, 471/1992, 15/1996, and 262/2009 are recalled).

The President of the Council of Ministers further contends that the issue of jurisdiction logically needs to be addressed preliminary to the examination of the merits of the case. The establishment of jurisdiction of the territorial State merely on the basis of a claim filed for compensation for damages, caused by acts in breach of substantive *jus cogens* norms, results in an "unacceptable reversal of the relationship of logical priority between distinct procedural and substantial judicial assessments".

In the merits, the *Avvocatura* calls attention on the fact that the Constitutional Court (allegedly) affirmed that Article 10, para. 1 of the Constitution incorporates generally

recognized norms of international law and thus grants them the status of constitutional law. This Court is said to have resolved the alleged conflict between immunity and the right of judicial protection, protected by Article 24 of the Constitution, by applying the principle of *lex specialis*, i.e. by recognizing that the limitation to the principle provided by Article 24 of the Constitution can be justified in light of the prevailing interests implied in the need to accord immunity from territorial jurisdiction to foreign States. Given the reasonableness of the scope of the right of defence in view of the need to respect the immunity of the foreign State, the questions of constitutionality of the impugned provisions are said to be ill-founded.
[The *Avvocatura* further contends that] the duty to respect the immunity of the foreign State is confirmed by other (impugned) provisions, in particular by Article 94 of the UN Charter (incorporated into the Italian legal order by Law No. 848/1957), which obliges each Member State to comply with the decisions of the ICJ, as well as by Article 3 of Law No. 5/2013, which complements [Article 94 of the UN Charter] itself.
The duty of Italy to conform to customary international law, as well as to the decisions of the ICJ (as established in the aforementioned Article 94 of the UN Charter) is said [by the *Avvocatura*] to be confirmed by Article 11 of the Constitution as well, since this Article obliges Italy to respect customary international law, the content of which is defined by the ICJ in the judgments Italy has to comply with under the UN Charter.

3. – The claimants in the main proceedings filed appearances in all three cases (Orders Nos. 84, 85, and 113/2014) and have requested that the Constitutional Court accept the questions raised by the Tribunal of Florence.

3.1. – Firstly, the defense of the claimants in the main proceedings recalls that the actions for damages were only filed after sixty-seven years because of the moratorium the Federal Republic of Germany and the Allies had agreed upon. Italy was bound to respect the moratorium as well, by virtue of Article 18 of the Peace Treaty. The defense further notes that, since the end of the moratorium, requests for compensation have been rejected by the Federal Republic of Germany, which has also denied any other form of redress for the crimes committed by the Third Reich and its government.
With specific regard to the questions raised by the Tribunal of Florence, the defense of the claimants in the main proceedings makes a number of preliminary observations.
The defense recalls that on 26 June 1945, in San Francisco, in response to serious human rights violations, the States of the international community undertook to respect human rights and fundamental freedoms, without distinction as to race, sex, language, or religion (Article 1, para. 3 and Article 55 (c) of the UN Charter). Among these rights was the right of access to justice (Article 14 of the International Covenant for Civil and Political Rights of 19 December 1966), which later became a cornerstone of the international system of protection of human rights (UN General Assembly Resolution No. 60/147 on "Basic principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law"). Therefore, the conflict between human rights protection and the principle of non-interference in internal affairs (to which the issue of jurisdictional immunity of States is connected) cannot be resolved to the detriment of fundamental rights.
Hence, the defense contends that Law No. 5/2013 is unconstitutional not only because it is in violation of Article 24 of the Constitution, but also because it conflicts with international law, which protects fundamental rights, including the right of access to a court with jurisdiction over the matter.

Therefore, the defense of the claimants requests that the Constitutional Court accept the questions of constitutionality raised by the Tribunal of Florence, also in order to avoid that the ICJ be accused of exceeding its competence.
The defense further contends that, according to current international law, Italian courts have jurisdiction. Therefore, the questioned provisions conflict with Articles 10 and 117 of the Constitution as well, insofar as they exclude the jurisdiction of Italian courts in cases of actions for damages for crimes against humanity committed by German military forces during World War II. As far as [the questioned provisions] affect the right of private parties to bring cases before a court of law in order to protect their rights under civil and administrative law, they conflict with customary and conventional international law.
In light of the above, the defense of the actors in the main proceedings requests that the Constitutional Court declare the unconstitutionality of Law No. 5/2013 for contravening Articles 24, 11, and 117 of the Constitution, and thus recognize the jurisdiction of Italian courts (thereby also excluding any indirect effects of the Judgment of the ICJ of 3 February 2012).

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4. – At the public hearing, the parties to the proceedings and the President of the Council of Ministers requested that the Court uphold the submissions laid down in their written pleadings.

Conclusions in Point of Law

1. The Tribunal of Florence questions the constitutionality of certain provisions that require that the Tribunal deny its jurisdiction (as argued by the defendant) with regard to three proceedings brought against the Federal Republic of Germany (FRG). [These proceedings were initiated] by three Italian citizens in order to obtain compensation for damages suffered during World War II, when they were captured by German military forces and deported to Germany to slave labor in concentration camps.
More specifically, the Tribunal of Florence questions the constitutionality of:

1) the norm "created in our legal order by the incorporation, by virtue of Article 10, para. 1 of the Constitution", of the international custom of immunity of States from the civil jurisdiction of other States, as interpreted by the International Court of Justice (ICJ) in its Judgment *Germany v. Italy* of 3 February 2012, insofar as it considers war crimes and crimes against humanity, in breach of inviolable human rights, committed in Italy and Germany against Italian citizens in the period 1943 to 1945 by Third Reich troops, to be acts *jure imperii* and thus excluded from the jurisdiction of civil courts;

2) Article 1 of the Law of Adaptation to the Charter of the United Nations (Law No. 848 of 17 August 1957 on the "Execution of the Statute of the United Nations, signed in San Francisco on 16 June 1945"), insofar as it obliges the national judge to comply with the Judgment of the ICJ, even when it established the duty of Italian courts to deny their jurisdiction in the examination of action for damages for crimes against humanity, committed *jure imperii* by the Third Reich in Italian territory;

3) Article 1 (*recte*: Article 3) of Law No. 5 of 14 January 2013 (Accession by the Italian Republic to the United Nations Convention on Jurisdictional Immunities of States and their Property, signed in New York on 2 December 2004, as well as provisions for the amendment

of the domestic legal order), which obliges the national judge to comply with the judgment of the ICJ and thus to deny their jurisdiction in future cases concerning acts committed *jure imperii* by a foreign State, even when those acts costitute gross violations of international humanitarian law and of fundamental rights, such as the war crimes and crimes against humanity committed in Italy and in Germany against Italian citizens in the period 1943 to 1945 by Third Reich troops, [and which also obliged the national judge] to allow the revision (*revocazione*) of final judgments that did not recognize the immunity.

The aforementioned norms are questioned in relation to Articles 2 and 24 of the Constitution. They are said to conflict with the principle of the absolute guarantee of judicial protection, enshrined in Article 24 Constitution, since they preclude the judicial examination of the action for damages for the gross violations of human rights suffered by the victims of war crimes and crimes against humanity, committed by another State, albeit in the exercise of sovereign powers (*jure imperii*). The principle of absolute guarantee of judicial protection is a supreme principle of the Italian constitutional order and, as such, constitutes a limit to the introduction [in the domestic legal order] of generally recognized norms of international law under Article 10, para. 1 of the Constitution, as well as of norms contained in treaties establishing international organizations furthering the ends envisaged by Article 11 of the Constitution (or deriving from such organizations) and subject of laws of adaptation.
The referring judge notes that the ICJ upheld, in its Judgment of 3 February 2012, the ongoing existence of the customary international norm that establishes the immunity of States from the civil jurisdiction of other States, for all acts indiscriminately considered *jure imperii*. The ICJ thus excluded the formation of an exception with regard to acts *jure imperii* that can be considered war crimes or crimes against humanity, in breach of fundamental human rights – as expressly recognized in the case at issue with regard to the episodes of deportation, slave labor, and massacres, committed in Italy and in Germany against Italian citizens in the period from 1943 to 1945 by Third Reich troops. The ICJ also denied the existence of a conflict between substantive *jus cogens* norms (international human rights law) and procedural norms (immunity of States from the jurisdiction of other States), as they operate at different levels.
Nevertheless, the Florentine judge, albeit recognizing that the ICJ has 'absolute and exclusive competence' as to the interpretation of international law, questions the constitutionality of the domestic norm corresponding to the customary international norm – which is limited by the fundamental principles and constitutionally guaranteed inviolable rights, including the right to judicial protection of inviolable rights – as well as of the relevant incorporation provisions.
The referring judge points out that it cannot be ignored that "if international immunity is given an absolute character, as upheld by the ICJ, the individuals affected are denied any possibility of judicial examination and remedy, both of which, in the case at issue, are also denied by the German legal order" (Referring Orders No. 84/2014, page 7; No. 85/2014, page 7; No. 113/2014, page 7).
Accordingly, [the referring judge] raises analogous concerns over the constitutionality of the provisions contained both in the Law of Adaptation to the United Nations Charter (Article 1 of the Law No. 848/1957), and in the Law of Accession to the New York Convention (Article 3 of the Law No. 5 of 2013), insofar as they require, similarly to the aforementioned customary international norm, that the judge deny their jurisdiction in compliance with the Judgment of the ICJ.
Lastly, the Tribunal of Florence clarifies that the constitutionality of each questioned provision bears independent relevance in the main judgment, as any of these norms, even taken individually, can exclude the exercise of its jurisdiction.

Moreover, the referring judge limits the questions raised to the issue of the jurisdiction to examine the claim for compensation for damages, and does not include the issue of enforcement action.
As the claims and the arguments are identical in all three cases, they shall be discussed and decided jointly.

2. – Preliminarily, this Court shall assess the objections to admissibility of the questions of constitutionality raised by the Tribunal of Florence.

2.1. – With the first objection, the *Avvocatura* submits that the immunity from jurisdiction at issue here is subject to a generally recognized norm of customary international law the formation of which took place before the entry into force of the Italian Constitution, and therefore cannot be subject to constitutional review. This Court is said to have stated, in its Judgment No. 48 of 1979 (see para 2. of the Conclusions in Point of Fact) that constitutional review of customary international norms is only allowed in the case of norms formed after the Constitution entered into force.
The objection is ill-founded.
As a matter of fact, on the occasion mentioned by the *Avvocatura*, this Court examined precisely the constitutionality of the customary international norm of immunity of diplomatic agents, which expressly defined a "centuries-old custom of States in their reciprocal relations". [The Court also] stated that "The question as it was raised by the referring judge – concerning the execution order contained in Law No. 804/1967, in relation to Article 31, paras. 1 and 3 of the Vienna Convention – appears to be only formally correct because, in the relevant part, the conventional provision is merely declaratory of the norm of general international law described above. The [legal] basis for the question must thus be determined in relation to that latter norm, and the actual subject-matter of the proceedings before the Court concerns the compatibility between the domestic norm of adaptation to the international custom and the abovementioned constitutional principles" (para. 3. of the Conclusions in Point of Law).
Later in that Judgment, the Court added: "At any rate, it should be noted, more generally, with regard to the generally recognized norms of international law that came into existence after the entry into force of the Constitution, that the mechanism of automatic incorporation envisaged by Article 10 of the Constitution cannot allow the violation of the fundamental principles of our constitutional order, as it operates in a constitutional system founded on popular sovereignty and on the rigidity of the Constitution" (para. 3. of the Conclusions in Point of Law).
Regardless of whether the interpretation of the Decision No. 48/1979 made by the *Avvocatura* is correct or not, this Court wishes to specifically confirm what it clearly noted in its Judgment No. 1 of 1956:
"The assumption that the new notion of 'unconstitutionality' concerns only laws subsequent to the Constitution, and not laws prior to it, cannot be accepted. From a textual standpoint, both Article 134 of the Constitution and Article 1 of Constitutional Law No. 1 of 9 February 1948 address questions of constitutionality of laws, without any distinction. From a logical standpoint, it is undeniable that the relationship between ordinary laws and constitutional laws, as well as their respective status in the hierarchy of sources remain unchanged, irrespective of whether ordinary laws are subsequent or prior to constitutional laws".
Hence, it must be recognized today that the principle set out in Judgment No. 1/1956, according to which the control of constitutionality concerns both norms subsequent to the republican Constitution and those prior to it, also applies to generally recognized norms of

international law automatically incorporated by Article, para. 1 of the Constitution, irrespective of whether they formed before or after the Constitution.
Likewise, the norm subject to the referral made by Article 10, para. 1 of the Constitution to customary international law, cannot be excluded from constitutional review only because Article 134 of the Constitution does not explicitly envisage this specific possibility. According to that provision, all laws, acts and norms that have the same legal effects as formal laws (ordinary or constitutional), but came into being through means other than the legislative process – including the aforementioned [customary international] norms – are subject to centralized constitutional review. The scrutiny of this Court is excluded only for acts that are hierarchically below the law, and do not enjoy the same legal force as the law.
In short, there is no reason, from a logical and systematic standpoint, to exclude the constitutional review of international customs, or to limit it to customs subsequent to the Constitution. The latter have the same legal force as customs previously formed, and both [types of customary law] are limited by the respect of the identifying elements of the constitutional order, i.e. the fundamental principles and inviolable human rights.
The first objection raised by the defense of the President of the Council of Ministers is therefore ill-founded.

2.2. The second objection 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 an "unacceptable reversal of the relationship of logical priority between distinct procedural and substantial judicial assessments".
This objection is not well-founded either, simply because an objection concerning jurisdiction necessarily requires an examination of the arguments put forward in the claim, as formulated by the parties.

2.3. – Also, preliminarly, it has to be reaffirmed that the statements of the private party that aimed at broadening the subject-matter of the cases by invoking additional constitutional parameters, are inadmissible.
The subject-matter of an incidental constitutional review consists of the provisions and the parameters as indicated in the referring orders (Judgment No. 32/2014; but also Judgments No. 271/2011 and 56/2009). Therefore, the questions [of constitutionality] raised by the claimants in the main proceedings (who appeared in the cases before this Court) in relation to Article 117, para. 1 of the Constitution, as well as to the norms of international law invoked by means of Article 117 itself, cannot be taken into consideration.

2.4. – Lastly, it is appropriate to point out that, although the operative part of all three referring orders indicates Article 1 of Law No. 5/2013 as one of the questioned provisions, it is clear from the whole context of the three orders that the complaint does not concern Article 1, which contains the authorization to the accession to the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004, but rather Article 3 of the same Law, insofar as it incorporated – with ordinary adaptation procedure – the ruling of the ICJ as laid down in its Judgment of 3 February 2012.
Therefore, Article 3 of Law No. 5/2013 – and not Article 1 – is subject to constitutional review. This is in line with consistent costitutional jurisprudence, according to which the subject-matter of the dispute must be identified – with regard to the questioned provision – keeping in mind the motivation of the orders and the context of the referral (*ex plurimis*, Judgment No. 258/2012 and No. 181/2011; Order of the Court No. 162/2011).

3. – In the merits, the question of constitutionality of the norm "created in our legal order by the incorporation, by virtue of Article 10, para. 1 of the Constitution" of the international custom of immunity of States from the civil jurisdiction of other States, is ill-founded under the terms set out below.

3.1. – First, it should be noted that the referring judge excluded from the subject-matter brought before this Court any assessment of the interpretation given by the ICJ on the norm of customary international law of immunity of States from the civil jurisdiction of other States. The Court, indeed, cannot exercise such a control. International custom is external to the Italian legal order, and its application by the government and/or the judge, as a result of the referral of Article 10, para. 1 of the Constitution, must respect the principle of conformity, i.e. must follow the interpretation given in its original legal order, that is the international legal order. In this case, the relevant norm has been interpreted by the ICJ, precisely with a view to defining the dispute between Germany and Italy on the jurisdiction of the Italian judge over acts attributable to the Federal Republic of Germany (FRG).

In its Judgment of 3 February 2012, the ICJ stated that, for the time being, there are insufficient elements in international practice to infer the existence of a derogation from the norm of immunity of States from the civil jurisdiction of other States for acts *jure imperii* in case of war crimes and crimes against humanity, in breach of fundamental human rights. [That such crimes were committed] was established by the ICJ and was also admitted by the FRG itself.

The same Court also expressly recognized (see Judgment, page 144, para. 104) that the lack of jurisdiction of the Italian judges entails the sacrifice of fundamental rights of the individuals who suffered from the consequences of crimes committed by the foreign State. This was confirmed by the defense of the FRG as well, which excluded the existence of other judicial remedies for the victims of the aforementioned crimes (Reply of the FRG, 5 October 2010, page 11, para. 34). The ICJ pointed out that the opening of new negotiations is the only means available to settle the dispute in international law.

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 States 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 European Convention on Human Rights and Fundamental Freedoms (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 recalls that it is uncontested that the acts attributed to the FRG 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 the 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.

This is the case of the qualifying essential principles of the state constitutional order, including the principles of protection of fundamental human rights. 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.
And this is precisely the subject-matter brought before this Court by the Tribunal of Florence when it raised the questions of constitutionality cited above. The Tribunal asked to review the compatibility of the international norm of immunity of States from the civil jurisdiction of other States, as interpreted by the ICJ, with 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). It is indeed possible to review the [constitutional] compatibility even when both norms – as in the case at issue – have constitutional status, since balancing is one of "the ordinary tasks that this Court is asked to undertake in all cases within its competence" (Judgment No. 236/2011).

3.2 – 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" (Judgment 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), as well as limits to the entry of the Law of Execution of the Lateran Pacts and the Concordat (Judgments No. 18/1982, No. 32, No. 31 and No. 30/1971). In other words, they stand for the qualifying fundamental elements of the constitutional order. As such, they fall outside the scope of constitutional review (Articles 138 and 139 Constitution, as was held in Judgment No. 1146/1988).
In a centralized constitutional review system, it is clear that this assessment of compatibility pertains to the Constitutional Court alone, and not to any other judge, even with regard to customary international law. The truth is, indeed, that the competence of this Court is determined by the incompatibility of a norm with constitutional law – this obviously includes a fundamental principle of the State's constitutional order or a principle that guarantees inviolable human rights. The examination of this contrast is a task of the constitutional judge alone. In this centralized constitutional review system, any different solution goes against the exclusive competence given by the Constitution to this Court, which stated in its very first case that "The declaration of unconstitutionality of a law can be made only by the Constitutional Court according to Article 136 of the Constitution itself" (Judgment No. 1/1956).
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 with regard to the right 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 the guaranteeing function assigned to the Constitutional Court (Judgment No. 120/2014).

3.3 – The customary international norm of immunity of States from the civil jurisdiction of other States was originally absolute, since it included all state behaviors. More recently, namely 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* (an easily understandable expression) as the relevant limit. And it is well known

that this limit to the application of the norm of immunity was progressively established mainly thanks to Italian judges (*ex multis*, Tribunal of Florence, 8 June 1906, Rivista di Diritto Internazionale 1907, 379; Court of Cassation, 13 March 1926, *idem* 1926, 250; Court of Appeal of Naples, 16 July 1926, *idem* 1927, 104; Court of Appeal of Milan, 23 January 1932, *idem* 1932, 549; Court of Cassation, 18 January 1933, *idem* 1933, 241) and to Belgian judges (*ex multis*, Court of Cassation, 11 June 1903, Journal de Droit International Privé 1904, 136; Court of Appeal of Brussels, 24 June 1920, Pasicrisie Belge 1922, II, 122; Court of Appeal of Brussels, 24 May 1933, Journal de Droit International 1933, 1034) – the so-called 'Italian-Belgian theory'.
In short, national judges limited the scope of the customary international norm, as immunity from civil jurisdiction of other States was granted only for acts considered *jure imperii*. The purpose was mainly to exclude the benefit of immunity at least when the State acted as a private individual, as that situation appeared to be an unfair restriction of the rights of private contracting parties.
This process of progressive definition of the content of the international norm has long been established in the international community (Judgment No. 329/1992). It is of significant importance that the evolution as described above originated in the national jurisprudence, as national courts normally have the power to determine their competence, and leave to international organs the recognition of the practice for the purposes of identifying customary law and its evolution.
Since such a reduction of immunity for the purposes of protection of rights took place, as far as the Italian legal order is concerned, thanks to the control exercised by ordinary judges in an institutional system characterized by a flexible Constitution (in which the recognition of rights was supported by limited guarantees only), the exercise of the same control in the republican constitutional order (founded on the protection of rights and the consequent limitation of powers, as guaranteed by a rigid Constitution) falls inevitably to this Court. It falls exclusively to this Court to ensure the respect of the Constitution and particularly of its fundamental principles, and thus to review the compatibility of the international norm of immunity of States from the civil jurisdiction of other States with those principles. The result is a further reduction of the scope of this norm, with 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.

3.4 – Furthermore, such a control is essential in light of Article 10, para. 1 of the Constitution, which requires that this Court ascertain whether the customary international norm of immunity from the jurisdiction of foreign States, as interpreted in the international legal order, can be incorporated into the constitutional order, as it does not conflict with fundamental principles and inviolable rights. [On the contrary], if there were a conflict, "the referral to the international norm [would] not operate" (Judgment No. 311/2009). Accordingly, the incorporation, and thus the application, of the international norm would inevitably be precluded, insofar as it conflicts with inviolable principles and rights.
This is exactly what has happened in the present case.

This Court has repeatedly observed that the fundamental principles of the constitutional order include the right 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 of 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 right[s].

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.

As early as in Judgment No. 98/1965 concerning European Community law, this Court held that the right to effective judicial protection "is one of the inviolable human rights protected by Article 2 Constitution. This is also clear from the consideration given to this principle in Article 6 of the ECHR" (Para. 2 of the Conclusions in Point of Law). More recently, this Court unequivocally defined the right to judicial protection as "one of the supreme principles of our constitutional order, instrinsically connected to the principle of democracy itself and to the duty to ensure a judge and a judgment to anyone, anytime and in any dispute" (Judgment No. 18/1982, as well as No. 82/1996).

With an eye to the effectiveness of judicial protection of fundamental rights, this Court also noted that "the recognition of rights goes hand in hand with the recognition of the power to invoke them before a judge in judicial proceedings. Therefore, "the recourse to a legal remedy in defense of one's right is a right in itself, protected by Articles 24 and 113 of the Constitution. [This right is] inviolable in character and distinctive of a democratic State based on the rule of law. (Judgment No. 26/1999, as well as No. 120/2014, No. 386/2004, No. 29/2003). Further, there is little doubt that the right to a judge and to an effective judicial protection of inviolable rights is one of the greatest principles of legal culture in democratic systems of our times.

Nonetheless, precisely with regard to cases of immunity from jurisdiction of States envisaged by international law, this Court has recognized that, in cases involving foreign States, the fundamental right to judicial protection can be further limited, beyond the limitations provided by Article 10 of the Constitution. However, this limit has to be justified by reasons of public interest potentially prevailing over the principle of Article 24 Constitution, one of the "supreme principles" of the constitutional order (Judgment No. 18/1982). Moreover, the provision that establishes the limit has to guarantee a rigorous assessment of the [public] interest in light of the concrete case (Judgment No. 329/1992).

In the present case, the customary international norm of immunity of foreign States, defined in its scope by the ICJ, entails the absolute sacrifice of the right to judicial protection, insofar as it denies the jurisdiction of [domestic] courts to adjudicate the action for damages put forward by victims of crimes against humanity and gross volations of fundamental human rights. This has been acknowledged by the ICJ itself, which referred the solution to this issue, on the international plane, to the opening of new negotiations, diplomatic means being considered the only appropriate method (para. 102, Judgment of 3 February 2012).

Moreover, in the constitutional order, a prevailing public interest that may justify the sacrifice of the right to judicial protection of fundamental rights (Articles 2 and 24 Constitution), impaired as they were by serious crimes, cannot be identified.

Immunity from jurisdiction of other States can be considered tenable from a legal standpoint, and even more so from a logical standpoint, and thus can justify on the constitutional plane the sacrifice of the principle of judicial protection of inviolable rights guaranteed by the Constitution, only when it is connected – substantially and not just formally – to the sovereign functions of the foreign State, i.e. with the exercise of its governmental powers.

Respect for fundamental principles and inviolable human rights, identifying elements of the constitutional order, is the limit that indicates (also with a view to achieving the goal of maintaining good international relations, inspired by the principles of peace and justice, for whose realization Italy agrees to limitations of sovereignty by virtue of Article 11 of the Constitution) the receptiveness of the Italian legal order to the international and supranational order (Articles 10 and 11 of the Constitution), as this Court has repeatedly upheld (with regard to Article 11 of the Constitution, Judgment No. 284/2007, No. 168/1991, No. 232/1989, No. 170/1984, No. 183/1973; with regard to Article 10, para. 1 of the Constitution, Judgment No. 73/2001, No. 15/1996, No. 48/1979; also, Judgment No. 349/2007). This in itself rules out that acts such as deportation, slave labor, and massacres, recognized to be crimes against humanity, can justify the absolute sacrifice in the domestic legal order of the judicial protection of inviolable rights of the victims of those crimes.

The immunity of the foreign State from the jurisdiction of the Italian judge granted by Articles 2 and 24 Constitution protects the [sovereign] function [of State]. It does not protect behaviors that do not represent the typical exercise of governmental powers, but are explicitly considered and qualified unlawful, since they are in breach of inviolable rights, as was recognized, in the present case, by the ICJ itself, and – before that Court – by the FRG (see above, para. 3.1). These rights are deprived of an effective remedy, as acknowledged in the ICJ Judgment. The ICJ stated that it was not unaware "that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned" (para. 104), thus hoping for the re-opening of negotiations.

Therefore, in an institutional context characterized by the centrality of human rights, emphasized by the receptiveness of the constitutional order to external sources (Judgment No. 349/347), 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.

Lastly, it has to be noted that the right to a judge established by the Italian Constitution, as in all democratic systems, requires effective judicial protection for individual rights (on the effectiveness of judicial protection of rights under Article 24 Constitution see, *inter alia*, the recent Judgments No. 182/2014 and No. 119/2013; see also Judgment No. 281/2010 and No. 77/2007).

This Court had in the past recognized, as mentioned above, that the judicial control system in the Community legal order appeared to satisfy the requirements of judicial protection equivalent to those set out by Article 24 Constitution (Judgment No. 98/1965). However, this Court evaluated in a different manner the practice of the EU Court of Justice of delaying the beneficial effects of a judgment in the preliminary ruling also for the parties that had invoked the later recognized rights. As a result, the function of the reference for a preliminary ruling was indeed frustrated and the effectiveness of the requested judicial protection was strongly reduced, in violation – for the purposes of the review of this Court – of the requirements of the right to a judge established by the Italian Constitution (Judgment No. 232/1989, which led the EU Court of Justice to change its jurisprudence on that matter).

It is equally important [to recall the ruling of] the EU Court of Justice concerning the action for annullment of a Council regulation that provided for the freezing of assets of individuals included in a list of alleged terrorists drawn up by a body of the United Nations Security Council (the Sanctions Committee). First, the EU Court of Justice rejected the argument of the Court of First Instance that essentially held that the Community judicature lacked

jurisdiction. [On the contrary, the EU Court of Justice] held that [the Community judicature] must ensure the review of the lawfulness of all Union acts, including review of [Union measures] designed to give effect to resolutions of the United Nations Security Council. The Court then held that the obligations imposed by an international agreement cannot prejudice the principle that all Union acts must respect fundamental rights.
As a result, the Community regulation was annulled, insofar as it violated the principle of effective judicial protection, since the United Nations system lacks an adequate mechanism of review of the respect of fundamental rights (EU Court of Justice, Judgment of 3 September 2008, cases C-402 P and 415/05 P, paras. 316 ff., 320 ff.)

3.5. – In the present case, the impossibility of effective judicial protection of fundamental rights, acknowledged by the ICJ and confirmed before that 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 includes 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 violations, 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.
The question posed by the referring judge with regard to the norm "created in our legal order by the incorporation, by virtue of Article 10, para. 1 of the Constitution", of the customary international law of immunity of States from the civil jurisdiction of other States is, therefore, ill-founded. International law, to which our legal order conforms under Article 10, para. 1 of the Constitution, does not include the norm of immunity of States from civil jurisdiction in case of actions for damages for war crimes and crimes against humanity, in breach of inviolable human rights. These rights are therefore not deprived of the necessary effective judicial protection.

4. – Different conclusions can be drawn with regard to the question of constitutionality of Article 1 of the Law of Adaptation to the United Nations Charter (Law No. 848 of 17 August 1957). That provision is said to be in breach of Articles 2 and 24 of the Constitution, insofar as it gives execution to the United Nations Charter, and in particular Article 94, which provides that "each Member of the United Nations undertakes to comply with the decision of the ICJ in any case to which it is a party", and therefore requires that the domestic legal order conform to the Judgment of the ICJ even when it established (as in the present case) the duty of Italian courts to deny their jurisdiction in case of acts of the [foreign] State that constituted serious violations of international humanitarian law and of fundamental rights, as is the case of war crimes and crimes against humanity.

4.1 – 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, signed in San Francisco on 26 June 1945, whose goal was to maintain international peace and security. 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 produces 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 (Judgment No. 73/2001). 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. As has been repeatedly recalled, judicial protection of fundamental rights is one of the "supreme principles of the constitutional order". Accordingly, the questioned provision (Article 1 of the Law of Adaptation) cannot be opposed to this principle, insofar as it binds the Italian State, and thus Italian courts, to comply with the Judgment of the ICJ of 3 February 2012, which obliges Italian courts to deny their jurisdiction in the examination of actions for damages for crimes against humanity, in blatant breach of the right to judicial protection of fundamental 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, remains unchanged.

The impediment to the incorporation of the conventional norm [Article 94 of the United Nations Charter] to our legal order – albeit exclusively for the purposes of the present case – has no effects on the lawfulness of the external norm itself, and therefore results in the declaration of unconstitutionality of the special law of adaptation, insofar as it contrasts with the abovementioned fundamental principles of the Constitution (Judgment No. 311/2009).

This is consistent with the constant practice of this Court, as significantly emerges from Judgment No. 18/1982, where this Court upheld, *inter alia*, "the unconstitutionality of Article 1 of the Law No. 810 of 27 May 1929 (Execution of the Treaty, of the Four Annexes, and of the Concordat, signed in Rome, between the Holy See and Italy, on 11 February 1929), so far as it concerns the execution of Article 34, para. 4, 5 and 6 of the Concordat, and of Article 17 of the Law No. 847 of 27 May 1929 (Provisions for the Implementation of the Concordat of 11 February 1929 between the Holy See and Italy, in Matters of Marriage), to the extent that these provisions state that the Court of Appeal can render enforceable under civil law the ecclesiastical dispensation for the unconsummated marriage, and order the indication in the civil status records, next to the marriage record" (in the same sense, *inter alia*, Judgment No. 223/1996, No. 128/1987, No. 210/1986, and No. 132/1985).

The remainder of the Law of Adaptation No. 848/1957 continues to be undisputably in full force and effect.

Hence, Article 1 of the Law of Adaptation No. 848/1957 has to be declared unconstitutional, so far as it concerns the execution of Article 94 of the United Nations Charter, exclusively to the extent that it obliges Italian courts to comply with the Judgment of the ICJ of 3 February 2012, which requires that Italian courts deny their jurisdiction in case of acts of a foreign State constituting war crimes and crimes against humanity, in breach of inviolable human rights.

5. – Lastly, the question of constitutionality of Article 3 of Law No. 5/2013 has to be examined. On the basis of arguments similar to those put forward in support of her other questions (see above, paras. 3 and ff.), the referring judge questions, with regard to Articles 2

and 24 of the Constitution, the constitutionality of the aforementioned Article [3 of the Law No. 5/2013], to the extent that it obliges the national judge to comply with the Judgment of the ICJ even when, as in the case at issue, it requires the national judge to deny their jurisdiction in the examination of the action for damages for crimes against humanity, committed by the Third Reich in Italian territory. [According to the referring judge], that provision conflicts with the principle of judicial protection of inviolable rights, enshrined in Articles 2 and 24 of the Constitution, insofar as it precludes judicial examination and compensation for damages for gross violations of human rights suffered by victims of war crimes and crimes against humanity, committed in the territory of the Italian State (which has the duty to ensure judicial protection) by another State, albeit in the exercise of sovereign powers.

5.1. – The question is well-founded.

The questioned provision falls within the scope of Law No. 5/2013, by which Italy authorized the accession and the full execution of the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted in New York on 2 December 2004. That Convention, which shall enter into force thirty days after the date of deposit of the thirtieth instrument of ratification, aims to incorporate in a treaty the generally recognized principle of customary international law of jurisdictional immunity of States, and to define its scope through the identification of cases in which State immunity cannot be invoked (such as, e.g., commercial transactions, contracts of employment, and personal injuries and damage to property – Articles 10, 11, and 12 respectively), with a view to guaranteeing "legal certainty, particularly in dealings of States with natural or juridical persons" (so reads the Preamble). Hence, the Italian legislator incorporated through Law No. 5/2013 the aforementioned Convention into the domestic legal order and thus became bound to respect all its provisions. Article 1, as mentioned above, provided for the authorization to accession, whereas Article 2 provided for the execution order. Moreover, [the Legislator] included the questioned Article 3, which provides that "1. For the purposes of Article 94, para. 1, of the United Nations Charter, (…) when the ICJ, in a judgment settling a dispute in which Italy is a party, excluded the possibility of subjecting certain specific conducts of another State to civil jurisdiction, the judge before whom a dispute concerning the same conducts has been brought shall declare *ex officio* at any stage of the proceedings their lack of jurisdiction, even when they have already rendered an interlocutory judgment with final effect as to the existence of jurisdiction [*sentenza non definitiva passata in giudicato*] in which they upheld their jurisdiction. 2. The final judgments contrary to the judgment of the ICJ referred to in para. 1, even when the latter has been passed subsequently, can be impugned for revision [*revocazione*] for lack of civil jurisdiction, in addition to the grounds provided for by Article 395 of the Code of Civil Procedure. In such circumstances, Article 396 of the Code of Civil Procedure shall not apply".

This 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 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 and 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).

And this without excluding the cases in which the ICJ, as in the Judgment of 3 February 2012, upheld the immunity of States from civil jurisdiction in cases of actions for damages for acts regarded as war crimes and crimes against humanity, in breach of inviolable human rights, even if they were committed by the armed forces of a [foreign] State on the territory of the State of the court seized.
As such, the impugned law also derogates from the what has been explicitly established in the United Nations Convention on Jurisdictional Immunities of States and their Property. This is confirmed by the interpretative declaration deposited by the Italian government at the time of the accession, which explicitly excludes the application of the Convention and its limitations to the norm of immunity in case of damages or injuries caused by the activity of armed forces in the territory of the State of the court seized.
The duty of the Italian judge – established in the questioned Article 3 – to comply with the ruling of the ICJ of 3 February 2012 (which requires that Italian courts deny their jurisdiction in the examination of the action for damages for crimes against humanity, committed *jure imperii* by a foreign State in Italian territory, without any other form of judicial redress for the fundamental rights violated) contrasts – as has been extensively demonstrated above with regard to the other questions [of constitutionality] (see above, paras. 3. and 4.) – with the fundamental principle of judicial protection of fundamental rights guaranteed by Articles 2 and 24 of the Constitution. As observed above, the absolute sacrifice of the right of judicial protection of fundamental rights – one of the supreme principles of the Italian legal order, enshrined in the combination of Articles 2 and 24 of the republican Constitution – resulting from the immunity from Italian jurisdiction granted to the foreign State, cannot be justified and accepted insofar as immunity protects the unlawful exercise of governmental powers of the foreign State, as in the case of acts considered war crimes and crimes against humanity, in breach of inviolable human rights.
Therefore, Article 3 of Law No. 5/2013 has to be declared unconstitutional.

6. – The declaration of jurisdiction of the referring judge is without prejudice to the merits of the main proceedings, whose examination is a duty of the referring judge.
The claim for damages filed by the applicants is not included in the subject-matter brought before this Court, nor is any assessment of matters of facts or of law that may confirm or deny the validity of their claim.

FOR THESE REASONS

THE CONSTITUTIONAL COURT

1) declares the unconstitutionality of Article 3 of Law No. 5 of 14 January 2013 (Accession of the Italian Republic to the United Nations Convention on Jurisdictional Immunities of States and their Property, signed in New York on 2 December 2004, as well as provisions for the amendment of the domestic legal order);

2) declares the unconstitutionality of Article 1 of Law No. 848 of 17 August 1957 (Execution of the United Nations Charter, signed in San Francisco on 26 June 1945), so far as it concerns the execution of Article 94 of the United Nations Charter, exclusively to the extent that it obliges the Italian judge to comply with the Judgment of the ICJ of 3 February 2012, which requires that Italian courts deny their jurisdiction in case of acts of a foreign State constituting war crimes and crimes against humanity, in breach of inviolable human rights;

3) declares ill-founded, under the terms set out in the reasoning, the question of constitutionality of the norm "created in our legal order by the incorporation, by virtue of Article 10, para. 1 of the Constitution", of the customary international law of immunity of States from the civil jurisdiction of other States, raised in relation to Articles 2 and 24 of the Constitution by the Tribunal through the Orders mentioned above.

So decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 22 October 2014.

Giuseppe TESAURO, President and Drafter

Gabriella Paola MELATTI, Registrar

Deposited in the Registry on 22 October 2014.

Gabriella Paola MELATTI, Director of the Registry