JUDGMENT NO. 238 YEAR 2014

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

In proceedings concerning the constitutionality of Article 1 of Law no. 848 of 17 August 1957 (Execution of the Charter of the United Nations, signed in San Francisco on 26 June 1945) and of Articles 1 and 3 of Law no. 5 of 14 January 2013 (Adhesion 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, and relevant provisions adapting the national legal system), initiated by the *Tribunale di Firenze* by three referral orders of 21 January 2014, respectively registered as no.s 84, 85 and 113 in the Register of Referral Orders 2014, and published in the Official Journal of the Republic no.s 23 and 29, first special series 2014.

Given the entries of appearance by S.F., A.M. and others and by B.D., and the intervention of the President of the Council of Ministers;

Having heard the Judge Rapporteur Giuseppe Tesauro at the public hearing of 23 September 2014;

Having heard Counsel Joachim Lau for S.F., for A.M. and others and for B.D., and State Counsel Diana Ranucci for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– The *Tribunale di Firenze* has raised questions on the constitutionality of certain legal provisions that require it to decline jurisdiction, as argued by the respondent party, in relation to three claims for compensation filed against the Federal Republic of Germany (hereinafter, FRG) for damages suffered during World War II by three Italian nationals, who had been captured on Italian territory by German military forces and deported to Germany for forced labour in concentration camps.

In particular, the *Tribunale di Firenze* raised questions on the constitutionality of: 1) the norm "arising in our legal order by means of the reception, as per Article 10(1) of the Constitution", of the customary rule of international law on State immunity from the civil jurisdiction of other States,

as interpreted by the International Court of Justice (hereinafter, ICJ) in the *Germany* v. *Italy* judgment handed down on 3 February 2012, insofar as it includes, among the *acta jure imperii* excluded from its jurisdiction, also war crimes and crimes against humanity infringing inviolable human rights perpetrated in Italy and in Germany against Italian nationals between 1943 and 1945 by the armed forces of the Third Reich; 2) of Article 1 of the law incorporating the Charter of the United Nations (Law no. 848 of 17 August 1957, on the "Execution of the Charter of the United Nations, signed in San Francisco on 26 June 1945"), insofar as it obliges Italian courts to comply with the ICJ's judgment, even if that judgment has established an obligation for Italian courts to decline jurisdiction in civil claims for compensation arising out of crimes against humanity committed *jure imperii* by the Third Reich upon Italian territory; 3) of Article 1 (*recte* Article 3) of Law no. 5 of 14 January 2013 (Adhesion 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, and relevant provisions adapting the national legal system), which obliges [national] courts to comply with the ICJ judgment and, for this reason, to decline jurisdiction in the future for all *acta jure imperii* of the foreign State, even when such acts consist in serious violations of international humanitarian law and fundamental rights, as did the war crimes and crimes against humanity perpetrated in Italy and in Germany against Italian nationals between 1943 and 1945 by the armed forces of the Third Reich, as well as to permit the revocation of judgments that failed to recognise such immunity and that have already become final.

The legal provisions mentioned above are challenged on the basis of Articles 2 and 24 of the Constitution: due to the fact that they prevent judicial ascertainment and evaluation of the claim for compensation arising from the serious violations of fundamental rights suffered by the victims of war crimes and of crimes against humanity committed by another State. For this reason, they are alleged to contrast with the principle of the inviolable guarantee of the judicial protection of rights Article 24 of the Constitution). This is a supreme principle of the Italian constitutional order and thus constitutes a limit to the entry of both generally recognised international law (Article 10(1) of the Constitution) and of provisions of treaties instituting international organisations that have the purposes indicated in Article 11 of the Constitution, or of [treaties] deriving from such organisations and that are subjects of incorporating law.

The referring judge begins his referral with the observation that the ICJ, with the Judgment issued on 3 February 2012, confirmed the validity of the rule of international customary law that establishes State immunity from the civil jurisdiction of other States for all acts considered *jure imperii*, without distinction, thus excluding that a customary exception may have arisen for *acta jure imperii* that can be qualified – as expressly recognised in this case, in relation to the acts of

deportation, forced labour and massacres perpetrated in Italy and in Germany against Italian nationals between 1943 and 1945 by the Third Reich's armed forces – as war crimes or crimes against humanity that violate fundamental individual rights; and [that the Court] denied the existence of a conflict between peremptory rules (as is the international law protecting human rights) and procedural rules (as is State immunity from the jurisdiction of other States), because [these two bodies of law operate] on different levels.

However, although recognising the ICJ's "absolute and exclusive competence" in interpreting provisions of international law, the Florence court questions the conformity, to the Constitution, of both the national provision corresponding to the rule of customary international law – which encounters the limit of the fundamental principles and inviolable rights guaranteed by the Constitution, among which the right to the judicial protection of inviolable rights – and of the relevant internal provisions. Indeed, the referring judge specifies that it is necessary to take due account of the fact that "to confer, upon international immunity, the absolute nature confirmed by the International Court of Justice means precluding, for the individuals in question, any possibility for their rights to be ascertained and protected, rights which in this case have already been denied in the German internal legal system" (Referral Orders no. 84 of 2014, p. 7; no. 85 of 2014, p. 7; no. 113 of 2014, p. 7). As a consequence, the referring judge also formulates doubts as to the constitutionality of the provisions of the statute incorporating the Charter of the United Nations (Article 1 of Law no. 848 of 1957), and of the statute establishing the adhesion [of the Italian Republic] to the Convention of New York (Article 3 of Law no. 5 of 2013), insofar as said provisions, akin to the aforementioned rule of customary international law, oblige courts to decline jurisdiction in compliance with the ICJ judgment.

Finally, the *Tribunale di Firenze* specifies that the provisions challenged are all provisions the constitutionality of which is autonomously relevant in the referred proceedings, as they address principles that would be capable of excluding its exercise of jurisdiction even if considered individually.

In addition, the referring court limits the issues raised to the jurisdiction concerning cognisance of the claim for compensation, and not also to that concerning execution.

Given the identical nature of the claims and arguments submitted, the three cases are heard and disposed of with a single judgment.

2.– As a preliminary matter, the Constitutional Court must evaluate the arguments that the questions of constitutionality raised by the *Tribunale di Firenze* are inadmissible.

2.1.– In its first objection, the *Avvocatura generale dello Stato* argues that the jurisdictional immunity invoked in the present case is the subject of a generally recognised rule of customary

international law that arose prior to the entry into force of the Italian Constitution, and, for this reason, cannot be subjected to a review for constitutionality. [The *Avvocatura* argues that t]his Court, in Judgment no. 48 of 1979 (see para. 2 of the *Considerations of fact*), has stated that a verification of the compatibility of customary international law with the Constitution is possible only for those norms that have arisen after the entry into force of our Constitution.

This objection is unfounded.

In the case cited by the *Avvocatura*, this Court specifically evaluated the constitutionality of the rule of international customary law on diplomatic immunity, after expressly defining it as a "more than centenary custom followed by States in their mutual relations" and stating that "the construction of the question, as formulated by the referring judge, which refers to the execution order within Law no. 804 of 1967 relating to Articles 31(1) and 31(3) of the Vienna Convention [on Diplomatic Relations of 1961], is apparently only formally correct because, as concerns the relevant issue, the treaty provision merely recognises the rule of general international law described above. The core of the question must therefore be considered with reference to the latter rule, and the true subject of the judgment, which the Court's examination must address, concerns the compatibility of the national provisions recognising the general international custom with the constitutional principles invoked" (para. 3 of the *Conclusions on points of law*).

In a subsequent passage, this Court added: "It is necessary in any case to state, more broadly, in relation to the generally recognised rules of international law arising after the entry into force of the Constitution, that the mechanism of automatic recognition established in Article 10 of the Constitution cannot, in any way, permit the violation of the fundamental principles of our constitutional order, operating as it does in a constitutional system based upon [the principles of] popular sovereignty and constitutional rigidity" (para. 3 of the *Conclusions on points of law*).

Regardless of the correctness of the *Avvocatura*'s interpretation of Judgment no. 48 of 1979, this Court intends to confirm specifically what was clearly established in Judgment no. 1 of 1956: "The assumption that the new institution of "unconstitutionality" can refer only to laws enacted subsequently to the Constitution, and not also to those enacted prior to it, cannot be upheld, both because, from a literal point of view, both Article 134 of the Constitution and Article 1 of Constitutional Law no. 1 of 9 February 1948 concern questions of the constitutionality of laws, without operating any distinction, and because, from a logical point of view, it is undeniable that the relationship between ordinary laws and constitutional laws, and their respective ranking in the hierarchy of sources [of law] does not change at all, regardless of whether the ordinary laws are enacted before or after constitutional laws".

Therefore, today it is recognised that the principle established in the aforementioned Judgment no. 1 of 1956, according to which reviews for constitutionality can address provisions issued after and before the republican Constitution, also applies to the provisions of generally recognised international law relevant to the mechanism of automatic recognition established in Article 10(1) of the Constitution, regardless of whether they arose before or after the Constitution.

Likewise, it is not possible to exclude, from reviews for constitutionality, the rule that is the subject of the reference, in Article 10(1) of the Constitution, to customary international law only because Article 134 of the Constitution does not expressly envisage this specific hypothesis. This provision establishes a centralised system of constitutionality review for all statutes, measures and provisions that, although endowed with the same effectiveness as formal ordinary and constitutional statutes, were created according to procedures other than the legislative process, including those mentioned immediately above. Only those measures having lower ranking and force than law are excluded from the scrutiny reserved to this Court. In other words, there are no reasons, on the logical and systematic level, to deny reviewing international customary law for constitutionality, or to limit such review only to international customary law that arises subsequently to the Constitution, considering that the latter category enjoys the same effectiveness as that recognised to the customs that arose before [the Constitution], and encounters the same limit – respect of the characterising elements of the constitutional order, i.e. its fundamental principles and inviolable individual rights.

The first objection raised by the President of the Council of Ministers is therefore unfounded.

2.2.– The second objection is based on the assumption that the lack of jurisdiction cannot be found on the basis of the scope of the international rule on State immunity for acts considered *jure imperii*, because otherwise there would be an "inadmissible reversal of the logical precedence between the two distinct evaluations, procedural and on the merits."

This objection too is unfounded, for the simple reason that an objection concerning jurisdiction necessarily requires an evaluation of the claims on the basis of the question submitted, as formulated by the parties.

2.3.– As a further preliminary matter, it must be reaffirmed that the arguments submitted by the private party seeking to extend the *thema decidendum* through the invocation of further constitutional provisions, are inadmissible.

The subject of "incidental" judgments of constitutionality is limited to the provisions and parameters indicated in the Referral Orders (Judgment no. 32 of 2014; but see also Judgments no. 271 of 2011 and no. 56 of 2009). Therefore, it is not possible to consider the challenges raised, on the basis of Article 117(1) of the Constitution and the provisions of international law thereby

invoked, by the parties to the referred proceedings who also filed appearances in the judgments before this court.

2.4.– Finally, it must be noted that, although in the operative parts of all three referral orders, Article 1 of Law no. 5 of 2013 is listed as one of the challenged provisions, it is possible to clearly deduce, from the overall context of the three orders, that the claims do not concern the aforementioned Article 1, which authorises the adhesion to the United Nations Convention on the Jurisdictional Immunities of States and Their Property of 2 December 2004, but rather Article 3 of that same law, insofar as it gives effect – by means of the ordinary incorporation procedure – to the statements made by the ICJ in its judgment of 3 February 2012.

Therefore, in line with a constant body of constitutional case law, according to which the *thema decidendum*, as concerns the provisions challenged, must be identified having due consideration of the reasoning expressed in the orders, or in any case of the overall context of the referring order (see, among many, Judgments no. 258 of 2012 and no. 181 of 2011; Order no. 162 of 2011), it is Article 3, and not Article 1, of Law no. 5 of 2013, to be the subject of the review for constitutionality.

3.– On the merits, the question of the constitutionality of the norm "arising in our legal order by means of the reception, as per Article 10(1) of the Constitution", of the customary rule of international law on State immunity from the civil jurisdiction of other States, is unfounded, in the terms specified below.

3.1.– First of all, it must be acknowledged that from the *thema decidendum* submitted to this Court, the referring judge excluded any evaluation of the interpretation, by the ICJ, of the international customary rule on the immunity of States from the civil jurisdiction of other States.

On the other hand, the Court could not engage in such a scrutiny. Indeed, this is a rule of international law, that is therefore external to the Italian legal order, and the application of which by the administration and/or the courts by virtue of the reference in Article 10(1) of the Constitution must occur on the basis of the principle of conformity, i.e. in observance of the interpretation formulated in its originating legal order, which in this case is the international legal order. In this case, the relevant rule was interpreted by the ICJ, precisely when deciding the dispute between Germany and Italy on the jurisdiction of Italian courts with respect to actions attributable to the FRG.

With the Judgment of 3 February 2012, the ICJ affirmed that it is currently not possible to identify sufficient elements in international practice to conclude that a derogation exists from the rule on State immunity from the civil jurisdiction of other States for acts considered *jure imperii*, in relation to war crimes and crimes against humanity – which it held to exist in the present case, as

admitted by the FRG itself –, which infringe inviolable individual rights. The same Court also expressly recognised (Judgment, p. 144, para. 104) – and the same was confirmed by the FRG's legal representatives, who excluded the existence of other forms of judicial redress for the victims of the aforementioned crimes (FRG reply, 5 October 2010, p. 11, para. 34) – that the lack of jurisdiction of the Italian courts entails a sacrifice of the fundamental rights of the individuals who suffered the consequences of the crimes perpetrated by the foreign State; the ICJ also identified, at the international law level, the initiation of a new negotiation process as the only means to resolve the matter.

It must be recognised that, at the level of international law, the ICJ's interpretation of the customary rule on State immunity from the civil jurisdiction of other States for acts considered *jure imperii* is an especially qualified interpretation, which does not allow for review on part of national administrations and/or courts, including this Court. This principle was clearly established in Judgments no. 348 and 349 of 2007 on the interpretation of the European Convention of Human Rights and Fundamental Liberties (ECHR) given by the ECtHR.

Indeed, the referring court does not address the merits of the ICJ's interpretation of the international rule on immunity for acts considered *jure imperii*. It acknowledges, albeit with concern, that that is the current scope of the international customary rule, because the ICJ has defined it as such. Moreover, the referring court reports that it is not contested that the acts attributed to the FRG are illicit acts, qualified by the FRG itself and the ICJ as war crimes and crimes against humanity, which infringe inviolable human rights – an issue that falls, in any case, within the merits of the referred claim and is therefore extraneous to the *thema decidendum* entrusted to this Court.

Nevertheless, it is clear that it is necessary to verify and resolve the alleged conflict between the international rule to be introduced into and applied within the national legal order – as interpreted in the international legal order – a rule that enjoys a status equivalent to constitutional ranking by virtue of the reference in Article 10(1) of the Constitution, and constitutional norms and principles that contrast with such rule to an extent that cannot be overcome by means of interpretation.

This is the case with characterising and inviolable principles of the State's constitutional order, and, therefore, with the principles governing the protection of fundamental individual rights. In these cases, it is for national courts, and in particular, exclusively for this Court, to engage in a verification of the compatibility with the Constitution, in specific cases, that can guarantee the inviolability of fundamental principles of the national legal order or reduce their sacrifice to a minimum.

Precisely this is the *thema decidendum* that the *Tribunale di Firenze* has submitted to this Court, in raising the questions of constitutionality specified in the introductory paragraph to this Judgment: to ascertain the compatibility of the international rule on State immunity from the civil jurisdiction of other States, as interpreted by the ICJ, with a fundamental principle of our constitutional order, the right to a judge (Article 24), in conjunction with the principle established to protect fundamental individual rights (Article 2). The possibility to engage in a verification of compatibility remains in any case intact, even between provisions – as occurs in this case – that are both of constitutional ranking, since balancing falls within "the ordinary operations that this Court is required to carry out in proceedings falling within its jurisdiction" (Judgment no. 236 of 2011).

3.2.– Indeed, there is no doubt – as has been confirmed several times by this Court – that the fundamental principles of the constitutional order and unalienable individual rights are a "limit to the effectiveness […] of generally recognised international law to which the Italian legal order conforms pursuant to Article 10(1) of the Constitution" (Judgments no. 48 of 1979 and no. 73 of 2001), and operate as "*controlimiti*" ["counter-limits"] to the entry of European Union law (see, *inter alia*, Judgments no. 183 of 1973, no. 170 of 1984, no. 232 of 1989, no. 168 of 1991, no. 284 of 2007), as well as limits to the effectiveness of provisions of the Lateran Treaty and the Concordat (Judgments no. 18 of 1982, no.s 32, 31 and 30 of 1971). In other words, [such principles and rights] constitute the identifying and inviolable features of the constitutional order, which for this very reason are removed even from constitutional amendment (Articles 138 and 139 of the Constitution; see Judgment no. 1146 of 1988).

In a centralised system of constitutional review, it is settled that this verification of compatibility can be performed only by the Constitutional Court, to the exclusion of any other court, even in relation to international customary law. Indeed, the jurisdiction of this Court arises when a norm contrasts with a constitutional norm and, naturally, with a fundamental principle of the State's constitutional order or a principle protecting an inviolable individual right; the evaluation of such a contrast is not for any court other than the Constitutional Court. In a centralised system of review, all alternative solutions clash with the jurisdiction that the Constitution reserves to this Court, it being firmly established in its case law, from the very beginning, that "A declaration of unconstitutionality of a law can only be pronounced by the Constitutional Court, in conformity with Article 136 of the Constitution itself" (Judgment no. 1 of 1956). This Court has reaffirmed, also recently, that verifications of compatibility with the fundamental principles of the constitutional order and of the protection of human rights are within its own exclusive jurisdiction (Judgment no. 284 of 2007); furthermore, precisely with regard to the right of access to a judge (Article 24 of the Constitution), [it has emphasised] that the respect of fundamental rights, akin to the implementation

of inderogable principles, is ensured by the safeguarding role conferred upon the Constitutional Court (Judgment no. 120 of 2014).

3.3.– The customary international rule on State immunity from the civil jurisdiction of other States, which was originally absolute, because it covered all State conduct, has more recently – i.e. in the first part of the last century – undergone, due to the national case law of the majority of States, a progressive evolution towards the identification of a limit consisting in the *acta jure gestionis*, a formulation that is easily comprehensible. It is well-known that it was mainly a merit of Italian case law (see, among many, *Tribunale di Firenze*, 8 June 1906, *Riv. Dir Int.* 1907, 379; *Cass*. 13 March 1926, *idem* 1926, 250; *Corte d'appello di Napoli*, 16 July 1926, *idem* 1927, 104; *Corte d'appello di Milano*, 23 January 1932, *idem* 1932, 549; *Cassazione* 18 January 1933, *idem* 1933, 241) and of Belgian case law (see, among many, *Cass.* 11 June 1903, *Journ. Dr. Int. Privé* 1904, 136; *App. Bruxelles* 24 June 1920, *Pasicrisie belge* 1922, II, 122; *App. Bruxelles*, 24 May 1933, *Journ. Dr. Int.* 1933, 1034), if this limit was also progressively extended to the rule concerning immunity (the so-called "Italo-Belgian argument"). Ultimately, pursuant to the activity of national jurisdictions, the scope of the rule of international customary law was curtailed, such that immunity from the civil jurisdiction of other States is granted only for acts considered *jure imperii*. This has the principal aim of excluding the benefit of immunity at least in cases where the State acts as a private party, to avoid what appeared to be an iniquitous limitation of the rights of private contracting parties.

This process of progressive definition of the international rule's content is now long established in the international community (Judgment no. 329 of 1992); and it is necessary to give the appropriate weight to the – certainly – significant fact that the evolution described above was prompted by the case law of national courts, which are naturally empowered to evaluate their own spheres of jurisdiction, leaving international organs to recognise practices for the purposes of identifying customary law and its evolution.

While such a curtailment of immunity in the context of rights protection has arisen, also for the Italian legal system, pursuant to ordinary courts' review within an institutional context characterised by a flexible constitution – in which the recognition of rights was supported only by limited protections –, it must be stated that in a republican constitutional order based on the protection of rights, and on the correlated limitation of the power functional to such protection, [a limitation] guaranteed by a rigid Constitution, such review is for this Court. This Court alone has the task of ensuring observance of the Constitution and, *a fortiori*, of its fundamental principles, and therefore of performing the necessary evaluation of the compatibility of the international rule on State immunity from the civil jurisdiction of other States with the aforementioned principles, which has

the effect of leading to a further curtailment of the scope of the abovementioned rule; a curtailment that is limited to the sphere of national law, but that is also such as to contribute to a desirable – as expressed by several parties – evolution of international law itself.

3.4.– Moreover, a similar verification is indispensable in light of Article 10(1) of the Constitution, which obliges this Court to ascertain whether the generally recognised rule of international law on the immunity from the jurisdiction of foreign States, as interpreted in the international legal order, may enter the constitutional order, because it does not contrast with fundamental principles and inviolable rights. Indeed, the occurrence of the latter scenario "excludes the operationality of the reference to the rule of international law" (Judgment no. 311 of 2009), with the inevitable consequence that the international rule, insofar as it conflicts with inviolable principles and rights, cannot be effective in the Italian legal system and cannot, therefore, be applied.

This is precisely what happened in the present case.

This Court has repeatedly stated that one of the fundamental principles of the constitutional order is the right to act in court to defend one's own rights, which is recognised by Article 24 of the Constitution – in other words, the right to access a judge. All the more so, then, this holds true when such right is enforced to protect fundamental human rights.

In this case, it is no coincidence that the referring court jointly indicated Articles 2 and 24 of the Constitution, which, in the review for constitutionality requested of this Court, are inextricably linked. The former Article is the substantive norm, ranking among the fundamental principles of the Constitution, and has the purpose of safeguarding the inviolability of fundamental individual rights, among which principally, in this case, is dignity. The second Article too presides over human dignity, as it protects the individual's right to access justice in order to invoke one's own inviolable rights.

Their different levels (substantive and procedural) does not allow for a division of their significance in terms of the constitutionality of the rule on State immunity from the civil jurisdiction of other States. Indeed, identifying what remains of a right would be an arduous task, if such a right could not be invoked before a court to obtain its effective protection.

Ever since Judgment no. 98 of 1965 concerning EU law, this Court has established that the right to judicial protection "is among the inviolable individual rights enshrined in Article 2 of the Constitution, is also clear from the treatment accorded to it in Article 6 of the European Convention of Human Rights (para. 2 of the *Conclusions on points of law*). More recently, this Court did not hesitate to ascribe the right to judicial protection "within the supreme principles of our constitutional order, in which ensuring a judge and a judgment to all and always, for any dispute, is

intimately linked to the very principle of democracy" (Judgments no. 18 of 1982 and no. 82 of 1996). In the context of the effectiveness of the protection afforded to inviolable rights, this Court has also noted that "the recognition of the entitlement to rights must necessarily be accompanied by the recognition of the power to enforce them before a judge in proceedings of jurisdictional nature": therefore, "the legal action to defend one's rights (…) is itself the content of a right, protected by Articles 24 and 113 of the Constitution, and to be included among those rights that are inviolable and characterise a democratic state observing the rule of law" (Judgments no. 26 of 1999, no. 120 of 2014, no. 386 of 2004 and no. 29 of 2003). Likewise, it is not possible to challenge the observation that the right to access a judge and to effective judicial protection of inviolable rights is surely among the great principles of legal civilisation in all democratic systems of our times.

However, precisely with regard to cases, introduced by international law, of immunity from the jurisdiction of States, this Court has recognised that in relations with foreign States, the fundamental right to judicial protection may be subject to a further limit, in addition to those imposed by Article 10 of the Constitution. However, this limit must be justified by a public interest that can be recognised as potentially pre-eminent with respect to a principle – such as that enshrined in Article 24 of the Constitution – that is one of the "supreme principles" of the constitutional order (Judgment no. 18 of 1982); furthermore, the rule that establishes the limit must ensure a rigorous evaluation of such an interest, in light of the requirements of each actual case (Judgment no. 329 of 1992).

In the case at hand, insofar as the international customary rule on immunity from the jurisdiction of foreign States, having the scope defined by the ICJ, excludes the court's jurisdiction to hear claims for compensation filed by victims of crimes against humanity and of serious violations of fundamental human rights, such rule entails a complete sacrifice of the right to judicial protection of these victims' rights: this much is recognised by the ICJ itself, which remands the solution of the issue, on the international level, to possible new negotiations, identifying the diplomatic context as the sole appropriate context (para. 104 of the Judgment of 3 February 2012). Nor is it possible to find, within the constitutional order, a public interest such as to justify sacrificing the right to judicial protection of fundamental rights (Articles 2 and 24 of the Constitution), infringed by courses of conduct recognised as serious crimes.

If immunity from the jurisdiction of other States is to make logical sense, and is to justify, on the constitutional level, sacrificing the constitutionally guaranteed principle of judicial protection of inviolable rights, such immunity must be– substantively, and not only formally – related to the sovereign function of the foreign State, with the ordinary exercise of its governing power.

Even in view of the aim of maintaining good international relations based on the principles of peace and justice, in pursuit of which Italy consents to limitations of its sovereignty (Article 11 of the Constitution), the limit to the opening of the Italian legal order to the international and supranational legal system (Articles 10 and 11 of the Constitution) consists, as this Court has repeatedly stated, of the observance of fundamental principles and inviolable individual rights, characterising elements of the constitutional order (in relation to Article 11 of the Constitution: Judgments no. 284 of 2007, no. 168 of 1991, no. 232 of 1989, no. 170 of 1984, no. 183 of 1973; in relation to Article 10(1) of the Constitution: Judgments no. 73 of 2001, no. 15 of 1996, and no. 48 of 1979; see also Judgment no. 349 of 2007). This is enough to exclude that acts such as deportations, forced labour and massacres, recognised as crimes against humanity, can justify the complete sacrifice of the protection accorded to the inviolable rights of the victims of those crimes, within the national legal system.

The immunity of foreign States from the jurisdiction of Italian courts permitted by Articles 2 and 24 of the Constitution protects the exercise of governing power; it does not protect those courses of conduct that do not fall within the usual exercise of governing power, but that can, rather, be expressly considered and qualified as illegitimate because they infringe inviolable rights, as recognised in this case by the ICJ and by the FRG (*supra*, para. 3.1.), and that remain nevertheless without any judicial redress. This is [also] acknowledged by the ICJ judgment, insofar as it declares that it "is 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 expressing the hope that [new] negotiations will be initiated.

Therefore, given the centrality of individual rights in the Italian legal order, a centrality enhanced by the opening of the constitutional order to external sources (Judgment no. 349 of 2007), the fact that judicial examination is precluded for the protection of the fundamental rights of the victims of the crimes in question renders wholly disproportionate the sacrifice of two supreme principles enshrined in the Constitution, in favour of the aim of not impinging upon the exercise of State governing power. This occurs precisely when this power has manifested itself, as in the present case, with courses of conduct that can be and are qualified as war crimes and crimes against humanity infringing inviolable human rights, and that are, as such, extraneous to the legitimate exercise of governing power.

Finally, it must be specifed that the right to access a judge enshrined in the Italian Constitution, as in all democratic legal systems, requires an effective protection of individual rights (on the effectiveness of the judicial protection of rights *ex* Article 24 of the Constitution, see, among many,

most recently, Judgments no. 182 of 2014 and no. 119 of 2013; see also Judgments no. 281 of 2010 and no. 77 of 2007).

At first, as mentioned above, this Court recognised that the system of judicial review established for EU law appeared to correspond to a system of judicial protection equivalent to that required by Article 24 of the Constitution (Judgment no. 98 of 1965). Subsequently, it expressed a different evaluation with regard to the practice, followed by the EU Court of Justice (ECJ), of deferring the favourable effects of a judgment referred for a preliminary ruling in relation to the parties' rights; this frustrated the function of the preliminary ruling, remarkably reduced the effectiveness of the judicial review applied for and therefore failed to meet, in this respect, the requirements of the right to a judge established by the Italian Constitution (Judgment no. 232 of 1989, which led the EU Court of Justice to change its case law upon the subject).

It is also significant that the EU Court of Justice, with reference to the challenge to a Regulation of the Council that provided for the freezing of the assets of persons on a list of alleged terrorists compiled by the Sanctions Committee of the United Nations Security Council, first of all rejected the argument advanced by the then-Court of First Instance. The ECJ essentially established the jurisdiction of the EU courts, and affirmed their duty to ensure the review of all Union measures for legitimacy, including those that implement resolutions of the United Nations Security Council. The Court then stated that the obligations deriving from an international agreement cannot violate the principle of the respect of fundamental rights, a principle that must characterise all Union measures. The result was the annulment of the European regulation, insofar as necessary, due to the violation of the principle of effective judicial protection and to the absence, in the United Nations system, of an adequate mechanism to ensure the respect of fundamental rights (EU Court of Justice, Judgment of 3 September 2008, Cases C-402 P and 415/05 P, para.s 316 ff., 320 ff.)

3.5.– In this case, the inexistence of any possibility of effective protection of fundamental rights through a judge, found, as mentioned above, by the ICJ and confirmed by the FRG before that court, clearly reveals the alleged contrast of the international rule, as interpreted by the aforementioned ICJ, with Articles 2 and 24 of the Constitution.

Where the international rule on State immunity in question also includes actions considered *jure imperii* that violate international law and fundamental individual rights, such contrast obliges this Court to declare that the reference in Article 10(1) of the Constitution does not apply to that rule, insofar as it extends immunity to claims for compensation arising out of acts corresponding to such serious violations. As a consequence, the part of the rule on the jurisdictional immunity of States that conflicts with the abovementioned fundamental principles has not entered the Italian legal order, and does not, therefore, have any effect therein.

The question formulated by the referring judge regarding the norm "arising in our legal order by means of the reception, in accordance with Article 10(1) of the Constitution" of the customary rule of international law on State immunity from the civil jurisdiction of other States is therefore unfounded. Indeed, the international rule to which our legal system has conformed by virtue of Article 10(1) of the Constitution does not include the immunity of States from civil jurisdiction in relation to claims for compensation arising out of the crimes in question, which infringe inviolable human rights, and which, for this very reason, are not deprived of the necessary effective judicial protection.

4.– The question of constitutionality raised in relation to Article 1 of the statute incorporating the Charter of the United Nations (Law no. 848 of 17 August 1957) must be evaluated in different terms. This provision is challenged for allegedly violating Articles 2 and 24 of the Constitution, insofar as – in its execution of the United Nations Charter, and in particular of Article 94 of the latter, which establishes that "each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party" – it expressly obliges national legal orders to comply with ICJ judgments even when, as in the case at hand, it obliges Italian courts to decline jurisdiction for acts of that State that amount to serious violations of international humanitarian law and of fundamental rights, as do war crimes and crimes against humanity.

4.1.– The question is well-founded, within the limits specified below.

Article 1 of Law no. 848 of 1957 gave "full and complete execution" to the Charter of the United Nations, signed in San Francisco on 26 June 1945, the aim of which is to maintain international peace and security. Among the organs of the United Nations Organisation is the ICJ (Article 7), the principal judicial organ of the United Nations (Article 92), the decisions of which bind each Member State in any case to which it is a party (Article 94). This obligation, that has effect within the national legal order by means of the special incorporating statute (authorisation of the ratification and execution order), is one of the cases of limitation of sovereignty to which the Italian State has consented, in favour of those international organisations – such as the UN – the aim of which is to ensure peace and justice among Nations, as per Article 11 of the Constitution, while holding firm, however, the limit of the respect of fundamental principles and inviolable rights protected by the Constitution (Judgment no. 73 of 2001). The establishment of the duty to conform to the ICJ's judgments, duty which flows from the reception of Article 94 of the Charter of the United Nations, cannot fail to regard also the judgment with which the aforementioned Court obliged the Italian State to decline jurisdiction in civil claims for compensation arising out of war

crimes and crimes against humanity, which infringe inviolable human rights, committed by the Third Reich on Italian territory.

In any case, it is with exclusive and specific regard to the content of the ICJ's judgment, which interpreted the general international rule on immunity from the jurisdiction of foreign States as including acts considered *jure imperii* and qualified as war crimes and crimes against humanity, which infringe inviolable human rights, that the contrast between the statute incorporating the United Nations Charter and Articles 2 and 24 of the Constitution arises. Considering that, as has been recalled several times, the judicial protection of fundamental rights is one of the "supreme principles of the constitutional order", the challenged provision cannot contrast with it (Article 1 of the incorporating statute), insofar as it binds the Italian State, and thus courts, to comply with the ICJ's Judgment of 3 February 2012, which compels them to decline jurisdiction in relation to claims for compensation arising out of crimes against humanity, in stark violation of the right to judicial protection of fundamental rights.

It is entirely obvious that the Italian State's commitment to the respect of all international obligations deriving from the adhesion to the Charter of the United Nations, including the obligation to conform to the ICJ's judgments, remains unchanged.

The impediment to the entry in our legal system of the customary rule, albeit only in part, translates – as the legitimacy of an external norm cannot be affected – into a declaration of the unconstitutionality of the special statute of incorporation, insofar as it contrasts with fundamental constitutional principles (Judgment no. 311 of 2009).

This conforms to the consolidated practice of this Court, as emerges principally from Judgment no. 18 of 1982, in which this Court declared "the unconstitutionality of Article 1 of Law no. 810 of 27 May 1929 (Execution of the Treaty, of the four annexed appendices, and of the Concordat, signed in Rome, between the Holy See and Italy on 11 February 1929), limited to the execution of Article 34(6) of the Concordat and of Article 17(2) of Law no. 847 of 27 May 1989 (Provisions for the application of the Concordat of 11 February 1929 between the Holy See and Italy, in relation to marriage), insofar as the abovementioned measures established that the Court of Appeal could give execution, for civil purposes, to ecclesiastical provisions that grant dispensation from unconsummated marriages, and order an annotation to that effect to be included in the Civil Registry in the margins of the marriage deed" (see also, *inter alia*, Judgments no. 223 of 1996, no. 128 of 1987, no. 210 of 1986 and no. 132 of 1985).

The validity and effectiveness of the remaining part of Law no. 848 of 1957 remain unquestioned.

Therefore, it is necessary to declare the unconstitutionality of Article 1 of Law no. 848 of 1957, limited to its execution of Article 94 of the Charter of the United Nations, solely insofar as it obliges Italian courts to adapt to the ICJ's Judgment handed down on 3 February 2012, which requires them to decline jurisdiction in relation to the acts of a foreign State that consist in war crimes and crimes against humanity infringing inviolable human rights.

5.– Finally, we must examine the question of the constitutionality of Article 3 of Law no. 5 of 2013. On the basis of arguments analogous to those advanced in support of the other questions (*supra*, para. 3 *et seq*.), the referring judge raises, with reference to Articles 2 and 24 of the Constitution, a question on the constitutionality of the aforementioned Article, insofar as it obliges national courts to comply with the ICJ judgment even when, as in the present case, such judgment requires them to decline jurisdiction in civil claims for compensation arising out of crimes against humanity, considered *jure imperii*, perpetrated by the Third Reich upon Italian territory. Indeed, insofar as this Article prevents judicial ascertainment and potential civil liability for the serious violations of fundamental rights suffered by the victims of war crimes and of crimes against humanity perpetrated on the territory of the Italian State, [which is the State] vested with the duty of judicial protection, but committed by another State in the course of an – illegitimate – exercise of its sovereign power, it allegedly contrasts with the principle of judicial protection of inviolable rights enshrined in Articles 2 and 24 of the Constitution.

5.1.– The question is well-founded.

The challenged provision pertains to Law no. 5 of 2013, with which Italy authorised the adhesion to and the full and complete execution of the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted in New York on 2 December 2004. This Convention, which is due to enter into force thirty days after the thirtieth instrument of ratification is filed, seeks to enshrine, in the form of a convention, the generally recognised principle of customary international law of the jurisdictional immunity of States, delimiting the scope of its operationality by identifying certain exemptions (e.g. those concerning commercial transactions, contracts of employment and personal injury: Articles 10, 11 and 12), with the purpose of ensuring "legal certainty, particularly in dealings of States with natural or juridical persons" (as stated in the Preamble). Therefore, by means of the aforementioned special Law no. 5 of 2013, the Italian legislator provided for the reception of the above Convention within the national legal order, by means of the mentioned provision authorising adhesion (Article 1) and of the formulation of the execution order (Article 2), committing to observe all its principles. However, the legislator also inserted the challenged Article 3, with which it has literally provided that "1. For the purposes of Article 94(1) of the Charter of the United Nations, […], when the ICJ, with a judgment that has

determined proceedings to which the Italian State has been a party, has excluded the subjection of specific courses of conduct of another State to the civil jurisdiction, the court before which the dispute relating to such conduct has been brought must find, *ex officio*, even when it has issued a interlocutory judgment that has acquired the force of *res judicata* and that has recognised the existence of the jurisdiction, the absence of jurisdiction, in any state and degree of the proceedings. 2. The judgments that have the force of *res judicata* and contrast with the ICJ judgment mentioned above, in para. 1, even if handed down subsequently, can be challenged for revocation, other than in the cases established by Article 395 of the Civil Procedure Code, also for lack of civil jurisdiction, and, in this case, Article 396 of the Civil Procedure Code does not apply".

Essentially, this is an ordinary provision of adaptation, having the aim of executing the ICJ's judgment of 3 February 2012. In other words, by means of this Article, it was sought to regulate in detail the Italian State's obligation to conform to all decisions with which the ICJ has excluded the capacity to subject specific behaviour of other States to civil jurisdiction, requiring the judge to declare, *ex officio*, at any state and degree of the proceedings, a lack of jurisdiction; and [this Article] even identified a further ground for revocation of judgments which have acquired the force of *res judicata*, i.e. their contrast with the ICJ judgment.

From an examination of the relevant parliamentary proceedings, it is clear that this Article was adopted, moreover soon after the ICJ's Judgment of 3 February 2012, to expressly and immediately guarantee its observance and "to avoid regrettable circumstances such as those arising with the dispute before the Court of The Hague" (papers of the *Camera*, no. 5434, *Commissione III Affari costituzionali*, session of 19 September 2012). This is without excluding the circumstances in which the ICJ, as in the case of the Judgment of 3 February 2012, has confirmed the immunity from civil jurisdiction of States relating to compensatory actions arising out of actions that can be defined as war crimes and crimes against humanity, infringing inviolable human rights, even when committed by the armed forces of one State within the territory of the forum State. In this way, the challenged provision derogates even from express provisions of the United Nations Convention on the Jurisdictional Immunities of States and Their Property, as confirmed by the interpretative declaration filed together with the Italian Government's adhesion, in which the application of the Convention and of its limitations to the rule of immunity in cases of loss or injury caused by the activity of armed forces on the territory of the forum State, is expressly excluded.

As already seen in detail above in relation to the previous questions (*supra*, para.s 3 and 4), in the absence of any other form of judicial redress of the fundamental human rights that have been violated, the duty of the Italian courts, established by the challenged Article 3, to comply with the ICJ's Judgment of 3 February 2012 – which requires them to decline jurisdiction in the civil action

for compensation of damages arising from crimes against humanity, committed *jure imperii* by a foreign State within the Italian territory – therefore contrasts with the fundamental principle of the judicial protection of fundamental rights, guaranteed by Articles 2 and 24 of the Italian Constitution. As seen above, the complete sacrifice of a supreme principle of the Italian legal order, as is certainly the right to a judge to protect inviolable rights (Articles 2 and 24 of the republican Constitution) – a sacrifice ensuing when the immunity of foreign States from the Italian jurisdiction is recognised – cannot be justified and tolerated when the object of protection is the illegitimate exercise of the foreign State's power of government, as the perpetration of actions considered as war crimes and crimes against humanity, infringing inviolable human rights, must [necessarily] be defined.

Therefore, we must declare the unconstitutionality of Article 3 of Law no. 5 of 2013.

6.– The affirmation of the jurisdiction of the referring court is without prejudice to the merit of the claims of the referred proceedings, the examination of which is reserved to said court.

Indeed, the claims for compensation filed by the claimants is not a part of the *thema decidendum* submitted to this Court's judgment, nor is, for this reason, the evaluation of any element of fact or law that can confirm or exclude its foundation.

FOR THESE REASONS,

THE CONSTITUTIONAL COURT

1) declares the unconstitutionality of Article 3 of Law no. 5 of 14 January 2013 (Adhesion of the Italian Republic to the United Nations Convention on the Jurisdictional Immunities of States and of Their Property, signed in New York on 2 December 2004, and relevant provisions adapting the national legal system);

2) declares the unconstitutionality of Article 1 of Law no. 848 of 17 August 1957 (Execution of the Charter of the United Nations, signed in San Francisco on 26 June 1945), limited to the execution of Article 94 of the Charter of the United Nations, insofar as it requires Italian courts to comply with the International Court of Justice's (ICJ) Judgment of 3 February 2012, which obliges them to decline jurisdiction as regards the actions of a foreign State that consist in war crimes and crimes against humanity infringing inviolable individual rights;

3) declares the unfoundedness, in the terms expressed in the reasoning above, of the question of constitutionality of the norm "arising in our legal order by means of the reception, as per Article 10(1) of the Constitution", of the rule of customary international law on the immunity of States from the civil jurisdiction of other States, raised, with reference to Articles 2 and 24 of the

Constitution, by the *Tribunale di Firenze*, in the referral orders cited in the introductory paragraph of this Judgment.

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