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JUDGMENT No. 238/2014 OF THE CONSTITUTIONAL COURT AND FOLLOW-UP: SOME OBSERVATIONS ON APPROACHING TO THE “COUNTER-LIMITS” DOCTRINE IN A CONSTRUCTIVE MANNER

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SUMMARY: 1. Premise. – 2. Judgment No. 238/2014 of the Constitutional Court on the non-enforceability in Italy of the decision of the International Court of Justice (ICJ) on “Jurisdictional Immunities of the State”. – 3. An overview of the relevant legal issues. – 4. Follow-up of Judgment No. 238 in Italian jurisprudence. – 5. Legal pluralism, the “counter-limits” doctrine and human rights – 6. References.

1. *Premise*

The *Focus* section of the *Survey* second issue (2014-2015) deals with [Judgment No. 238 of 22 October 2014 of the Italian Constitutional Court](#). This Judgment has already been the subject of many comments in legal literature. Indeed, it ranges among those decisions of the Constitutional Court (a low number) that have addressed, over the years, the topic of the relationship between International and national law in a novel perspective or, at least, an unusual one. This makes that none of the other cases and materials in the relevant period might be, although interesting, of comparable importance to the *Survey*, whose special subject is the application of international law in the Italian legal order. Moreover, early impact of Judgment No. 238 has emerged by some decisions of other national courts in 2015. As still poor and fragmented may be this practice, it is enough to give an idea of the consequences of this Judgment, which many jurists have regarded as “historic”, with more concern than enthusiasm, however.

Having said this, I will summarize the content of Judgment No. 238/2014 in paragraph 2. The Constitutional Court hold that the [decision of the International Court of Justice of 3 February 2012 on the case *Jurisdictional Immunities of the State* \(Germany v. Italy; Greece](#)

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intervening) is not domestically enforceable because of its incompatibility with certain supreme principles of the Italian legal order. Judgment No. 238 is thus included in a number of Constitutional Court's decisions according to which the entering of international and EU law into the domestic legal order may encounter limits, in order to safeguard the fundamental principles of the Constitution (so called "counter-limits" doctrine). The line of reasoning of the Court in Judgment No. 238 is relevant to both unwritten international law (to which the domestic legal order automatically conforms by virtue of Article 10.1 of the Constitution) and treaty law (most specifically, Article 94 of the UN Charter, under which UN Member States have a legal obligation to comply with the ICJ decisions).

I will then try to provide an overview of the issues involved as highlighted by scholars (paragraph 3). Some comments have pointed out that the Judgment was inspired from an exaggerated legal "dualism" while others stressed on technicalities, such as the operation of Article 10.1 of the Constitution as interpreted by the Court. Further, the Court's decision on the merits has been criticized for being in too harsh contradiction with international law.

Initial follow-up of Judgment No. 238 in Italian jurisprudence is the subject of paragraph 4. This follow-up consists, so far, of few cases in which national courts did not recognize to foreign States exemption from Italy's civil jurisdiction in presence of war crimes or crimes against humanity and, thus, disregarding the ICJ decision of 2012. These cases further showed that a clear distinction should be made, with regard to the *vexata quaestio*, between the stance of the judiciary, on one hand, and the *opinio iuris* of the Italian government and Parliament, on the other.

The paper ends with a reflection on two issues (paragraph 5). One is the question of whether Judgment No. 238/2014 is, really, so much innovative as compared with earlier decisions of the Constitutional Court. Second, one should wonder if the ruling of the Court has been, ultimately, so much in contradiction with international law, given that it aims at realizing the protection of human rights to the maximum possible extent. One provisional conclusion might be that not necessarily this Judgment represents a break in the dialogue between international and national law or, the relevant courts. In other words, it seems possible approaching to the legal pluralism and the "counter-limits" doctrine in a constructive and not divisive manner.

2. *Judgment No. 238/2014 of the Constitutional Court on the non-enforceability in Italy of the decision of the International Court of Justice (ICJ) on “Jurisdictional Immunities of the State”*

With Judgment No. 238/2014, the Constitutional Court decided on the questions of constitutional legitimacy that the Court of Florence had submitted to it, through four identical orders of 21 January 2014. The Court of Florence was the judge on the merits of many proceedings on compensation claims brought against Germany by Italian nationals (or their relatives) who were the victims of Nazi crimes committed in Italy during the Second World War. Starting from the leading case *Ferrini v. Germany* (Judgment No. 5044/2004 of the Court of Cassation), Italian courts have asserted many times the possibility of derogating from the general rule of international law granting immunity from civil jurisdiction to foreign States under such circumstances. Later, the ICJ decided on the dispute arisen on this subject between Germany and Italy. For the ICJ, the jurisdictional immunities States enjoy under general international law does not suffer limitation, also in the case that the acts done by a State in the exercise of its sovereign powers (*acta iure imperii*) consist in war crimes or crimes against humanity. It derived that contrary decisions from Italian courts were in breach of Italy’s international obligations under general international law. The ICJ then required Italy to dismiss any of such proceedings for lack of jurisdiction, and to review final judgments issued against Germany to revoke their effects.

The Court of Florence questioned, however, the constitutionality of implementing in Italy the ruling of the ICJ, which did not allow, in its views, adequate protection of the plaintiffs’ rights. It is worth noting that the constitutionality assessment under Article 134 of the Constitution not only covers ordinary laws, but also the provisions of the Constitution, laws revising the Constitution and, once incorporated into the domestic legal order, norms originating in international law. With regard to these norms, the task of the Constitutional Court is assessing their consistency with the fundamental principles of the Constitution, such the principle of protecting inalienable human rights. The Court has highlighted many times that principles embedding fundamental values of the Italian legal order may not suffer derogation for any reason (see, among others, Judgment No. 1146/1988; cf. also [BIN, 2016](#), paragraph 2).

In the views of the Court of Florence, there were various norms relevant to the cases pending before it, whose constitutionality was doubt in the perspective of executing the ICJ decision. One is the customary rule of international law concerning State immunity from civil jurisdiction as

interpreted by the ICJ, i.e. not allowing civil actions against Germany for the damages suffered by Italian nationals in consequence of Nazi crimes. Another is Article 1 of Law No. 848 of 1957, which has implemented in Italy the UN Charter; insofar it obliged the Italian courts to comply with the decision of the ICJ. Finally and for the same reason, the Court of Florence questioned the constitutionality of certain provisions of [Law No. 5 of 2013](#) authorizing the ratification and implementation of the UN Convention on Jurisdictional Immunities of the States and Their Property. Passed by Parliament soon after the issuing of the ICJ Judgment of 2012, Law No. 5/2013 laid down special measures to enforce domestically the decision of the ICJ. Without expressly mentioning Germany, Article 3 of this Law established a duty of Italian judges to decline exercising their competence in any proceedings against foreign States whenever the ICJ has excluded Italy's jurisdiction over these cases. In turn, paragraph 2 of Article 3 complemented Article 395 of the Code of Civil Procedure on the revision of final judgments, by providing that any final judgments in contrast with a decision of the ICJ may be revised.

In examining these questions, the Constitutional Court underlined that it did not intend further discussing the content of the customary rule of international law concerning the jurisdictional immunities of the State, because this was a matter for the ICJ. On this point, the Court referred to its previous decisions. In so-called "twin" Judgments No. 348 and 349 of 2007, concerning the application in Italy of the European Convention on Human Rights (ECHR), the Constitutional Court held that the provisions of the ECHR apply in Italy according to the ECHR Court's interpretation. If this is not possible, due to the manner in which the implementing provisions are formulated, the judge has to defer to the Constitutional Court a question concerning possible infringement of Article 117.1 of the Constitution. This Article provides that national law must conform to Italy's obligations resulting from international law and EU legislation. For the Court, this means that, once incorporated into the domestic legal order, unwritten international law, treaty provisions and the EU legislation become parameters of constitutionality in the same vein of the Constitution. By virtue of the *renvoi* made to these norms by Article 117.1, these operate as "interposed parameters of constitutionality" ("parametri interposti di costituzionalità").

In Judgment No. 238/2014, the Constitutional Court found that the principles it elaborated with regard to the ECHR and the ECHR Court apply, also, to international law at large, as interpreted by the ICJ. Being highly qualified, the interpretation of international law by the ICJ may

not be challenged by Italian judges, including the Constitutional Court (Judgment No. 238/2014, *Conclusions in Point of Law*, § 3.1.). On these grounds, the Court deemed itself incompetent to re-open discussion about the content of the international customary norm concerning the jurisdictional immunities of the State. However, it also affirmed that it has an exclusive competence to assess whether this norm, as interpreted by the ICJ, is or not consistent with the supreme principles of the Constitution.

Having taken such “dualistic” approach, the Court did not need to address, at variance with the ICJ, the problem raised by the coexistence in international law of both a peremptory norm prohibiting war crimes and a customary norm (not peremptory) granting State immunity from other States’ jurisdiction. The Judgment of the ICJ is not so helpful to know which of these two norms should prevail over the other. As it is known, the answer of the Italian Court of Cassation in the *Ferrini* case was that a peremptory norm should logically prevail over a non-peremptory one. For the ICJ, however, the prohibition of international crimes is a substantive principle of international *ius cogens*, while the customary norm on State immunity has procedural character. The two norms apply, consequently, for different purposes and on two different planes. The procedural one is, however, of preliminary application. This prevented Italian courts from examining the claims against Germany, regardless a peremptory norm was relevant to the merits (on these disputable conclusions, see [PISILLO MAZZESCHI, 2012](#)).

In the proceeding before the Constitutional Court, the Italian government intervened, asking the Court to declare the submitted questions inadmissible. One of the government’s preliminary exceptions was that the application of the procedural rule on State immunity had “logical priority” over the exam of the claims; that is, the government has completely adhered to the views of the ICJ. It is a matter of fact that the government has never endorsed the already mentioned stance of some Italian courts. In the proceeding before the ICJ, Italy did not contend that the immunity States enjoy under international law covers any acts done by a State *iure imperii*, including wrongful acts qualifying as international crimes. Rather, Italy argued that a derogation from this general rule was allowed, in this particular case, for various reasons, and especially because Germany did not fulfil its own obligation of indemnifying certain categories of Italian victims of Nazi crimes. These and their relatives did not have, therefore, other means at their disposal to obtain compensation than making recourse to their own national courts (so called “last resort” argument). On the alleged priority of the

procedural rule, the Constitutional Court took, however, symmetrically opposite decision to that of the ICJ: the exception was ill founded, “simply because an objection concerning jurisdiction necessarily requires an examination of the arguments put forward in the claim, as formulated by the parties.” (Judgment No. 238, § 2.2.).

With regard to the core question, the Constitutional Court made recourse to the “counter-limits” doctrine, emerged by a number of its previous decisions. Accordingly, limits in the adaptation of the domestic legal order to general international law may derive from the need of protecting inalienable human rights and other fundamental principles of the Constitution (Judgments No. 148/1979, *Russel*, and No. 73/2001, *Baraldini*; see also *infra*). The Court remarked many times that the same “counter-limits” doctrine also operates with regard to EU legislation (*ex multis*, Judgments No. 183/1973, No. 170/1984, No. 232/1989, No. 168/1991, No. 284/2007). It is true that the Italian legal order is open to international law, and the principles affirmed in Judgments No. 348 e No. 349 of 2007 are significant in this regard. Nonetheless, the norms originating from unwritten international law or treaty law are subjected to assessment of their constitutionality *ex* Article 134 of the Constitution, to preserve the supreme constitutional values.

For the Court, the argument from the referring judge that a customary norm on State immunity as interpreted by the ICJ is in breach of Article 24 of the Constitution, was well founded. Under this Article, all the individuals have the right to access justice for the protection of their rights and legitimate interests. This provision, also set forth in human rights treaties, is among the fundamental principles of the Italian Constitution. What is more, the right to a judge was linked, in the case, to serious violations of inalienable human rights protected under Article 2 of the Constitution. No effective protection of these rights is possible if no judicial remedies are available (Judgment No. 238, § 3.4).

Certainly, the Court was aware that the rule granting foreign States immunity from Italy’s jurisdiction also has constitutional relevance. Usually, conflicts among constitutional principles are resolved through balancing all the involved principles. For the Court, such course of action was not possible however, because recognizing that Germany’s immunity from jurisdiction is “absolute” (that is without any limitation), meant, under the particular circumstances of the case, completely sacrificing the right of the plaintiffs to obtain redress. Most importantly, it seemed to the Court that balancing the two principles was not necessary. The rationale behind the norm on jurisdictional immunity is preserving the freedom of foreign States in performing public functions.

For the Court, war crimes and crimes against humanity do not qualify, in a substantive manner, as *acta iure imperii*. Otherwise, one should admit that States can lawfully commit serious human rights' violations, if this is in the performance of their sovereign powers (Judgment No. 238, § 3.4). It is clear from the observations above that the Constitutional Court has approached to the core issue of the dispute between Germany and Italy with much less formalism than the ICJ. Indeed, the line of reasoning of the Constitutional Court seems very close to that of the Court of Cassation in the *Ferrini* case.

Looking at the Court's conclusions, these upheld all substantive arguments from the referring judge. The Court was satisfied, most in particular, that applying a customary norm on State immunity as interpreted by the ICJ would have infringed Articles 2 and 24 of the Constitution. Technically speaking, however, the Court rejected the related constitutionality question, because "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." (§ 3.5) Consequently, this particular content of the customary norm has not entered the Italian legal order, and has no effects therein (Judgment No. 238, § 3.5).

For the Constitutional Court the other submitted questions were well founded. Having regard to Article 1 of Law No. 848/1957, which implemented the UN Charter, its illegitimacy under the Constitution is limited to the domestic application of this particular decision of the ICJ, and does not prejudice respect for any obligations resulting from the Charter, including under Article 94 (Judgment No. 238, § 4.1). The Court declared unconstitutional also the provisions of Law No. 5/2013, already mentioned, aimed at imposing upon the Italian judge the obligation to decline to exercise its competence in respect of Germany, or to revise final judgments against it in accordance with the ICJ decision (§ 5.1).

The Constitutional Court confirmed the conclusions above at the beginning of 2015, when it examined, with some delay due to procedural issues, the last of the four Orders from the Court of Florence (Order No. 143 of 21 January 2014). The Court rejected all the submitted questions, with the following arguments: it had already decided the questions concerning Article 1 of Law No. 848/1957 and Article 3 of Law No. 5/2013 through Judgment No. 238/2014; these questions were, thus, deprived of substance. On the other hand, the question concerning the legitimacy of a customary norm on State immunity as interpreted by the ICJ was unsubstantiated *ab origine*, because a norm with such content

could not enter, and has not entered, actually, the Italian legal order ([Order No. 30 of 11 February 2015 of the Constitutional Court](#)).

3. *An overview of the relevant legal issues*

Some commentators promptly reported on the difficulties of enforcing in Italy the ICJ decision ([PADELLETTI, 2012](#); see also *infra*). Not surprisingly, the Italian Parliament reputed it necessary to pass special implementing measures through Law No. 5/2013, although a general principle allowing non-exercise of Italy's jurisdiction to comply with international law was already existent in Italian legislation (Article 11 of Law No. 218/1995). Major problems were expected from the need of implementing that part of the ICJ's decision that imposed upon Italy the obligation of revising final judgments against Germany, or revoking the effects of the exequatur of similar decisions issued by Greek courts (see LOPES PEGNA, 2012). Similarly, the implementation of the ICJ decision soon appeared as a difficult test with regard to the "counter-limits" doctrine that has emerged, over the years, by the jurisprudence of the Constitutional Court (cf. PALOMBINO, 2012). [Judgment No. 32139/2012 of the Supreme Court of Cassation](#) provided an early example of these concerns. Though reversing, in tribute to the ICJ, the conclusions it had reached in the *Ferrini* case, the Supreme Court deplored that a principle of legal civilization was no longer applicable in the case.

Despite perplexity about the ICJ decision, Judgment No. 238 of the Constitutional Court also has appeared disconcerting. Seemingly, it has marked a break in the dialogue that normally exists between national and international law. On a theoretical level, some have reputed the ruling of the Constitutional Court the result of an excess of legal "dualism" leading to exacerbate differences between international law and the Italian Constitution. Some comments seem, in turn, exaggerated (KOLB, 2014). One interesting opinion is, by contrast, that the Court should have challenged the decision of the ICJ in the light of international law, and not the Italian Constitution (*ex multis*, CANNIZZARO, 2015). Allegedly, such a course of action would have helped further developments in international law, in view of preventing jurisdictional immunity, hopefully, to cover international crimes.

In reality, the Constitutional Court took into account possible relevant developments in international law, when it observed that the immunity of foreign States from other States' jurisdiction was absolute, in the past (cf. Judgment No. 238, § 3.3). The content of the relevant customary norm has changed over the years, mainly in consequence of the jurisprudence

of national courts, especially in Italy and Belgium. In this way, the principle has become universally accepted stating that immunity covers only the acts done by foreign States in the performance of their sovereign functions. The Constitutional Court did not say, expressly, that a similar process is ongoing, or accomplished with regard to the exclusion of immunity for war crimes and crimes against humanity. In his [Dissenting opinion to the ICJ Judgment](#), Judge Cançado Trindade put forward this interpretation; which is not supported by the jurisprudence of international courts, however ([GRADONI, 2014](#), p. 194; [DE SENA, The Judgment, 2014](#), p. 25).

The practice of Italy on the relevant point is, in turn, uncertain or contradictory. As already noted, the stance of the judges on the merits, which the Supreme Court of Cassation initially endorsed in the *Ferrini* case (2004), has remained in isolation. It still faces different *opinio iuris* from the government and the Parliament (see *infra*). One can hardly admit that this situation would have changed, if the Constitutional Court contested the ICJ interpretation of the customary norm on State immunity from the perspective of international law. More importantly, the choice to call into question the interpretation of the ICJ meant, for the Constitutional Court, abandoning the principle that the national courts must apply the domestic provisions originated from norms of international law in conformity with the interpretation given to the latter by international bodies. After setting out this principle with regard to the ECHR and the ECHR Court (see *supra*), the Court has enlarged its scope of application to include interpretation of international law from the ICJ. Interpreting the international norms ‘unilaterally’, i.e. in accordance with the parameters laid down in national legislation was, in the past, a disputable practice of Italian courts (GIULIANO, SCOVAZZI, TREVES, 1991, p. 340 s.). It seems, indeed, that the Constitutional Court took the right way, when it decided to not abandon, but reinforce and enlarge the application of the opposite principle.

Finally yet importantly, challenging the interpretation from the ICJ in the perspective of international law would have not avoided possible responsibility of Italy *vis-à-vis* Germany. Such responsibility derives, in fact, from non-recognition of the immunity of Germany before Italian courts in accordance with the ruling of the ICJ, irrespective of whether differences among the views of the ICJ and of the Constitutional Court concern the interpretation of the relevant customary norm, or its domestic implementation (see also *infra*).

A further set of arguments relate to the fact that the Constitutional Court, though considering that the assessment of the questions submitted to it

involved various constitutional principles and, in such event, it has to balance all principles involved, has not tried to do so, in the end. For the Court, balancing the principle of State immunity and the right of the plaintiffs to a judicial remedy was impossible and unnecessary (see *supra*). As is evident, the Court deemed that applying the Judgment of the ICJ meant irremediably disregarding the individuals' rights that were at stake. Judgment No. 238 lacks sufficient explanation of this point, however ([TANZI, 2015](#)). In addition, the Court did not take into consideration whether an alternative solution was available. Negotiations between Germany and Italy (also recommended by the ICJ, in its Judgment, § 104) was one avenue; and another was suggesting the Italian Government to take diplomatic or other action *vis-à-vis* Germany to obtain redress for the victims. It has been wondered why the Court neglected these alternative solutions.

An answer to the question might be that the outcome of bilateral negotiations is very uncertain, as have shown some further cases decided in 2015 (see *infra*). With regard to diplomatic protection, its ability of effectively realizing the plaintiffs' rights remains doubtful. As is known, the States are free, under international law, to make or not recourse to diplomatic protection. Further, any decision on the allocation of the compensation received is at the discretion of the national governments. On this vein, changes are under consideration in the relevant norms of international law, and in Italian legislation to improve the effectiveness of the diplomatic protection from the perspective of guaranteeing effective redress to the persons concerned (cf. [PALCHETTI, 2014](#)). For the moment, it does not seem that diplomatic protection can ensure equivalent protection of human rights as compared with the availability of judicial remedies.

A further aspect is that the Constitutional Court has not the power of imposing upon the Government re-opening negotiation with Germany, making efforts to establish an international claim commission, or to take diplomatic protection of damaged Italian nationals. In the same way, the Government cannot impose upon the judiciary declining its competence in the proceedings against Germany, in view to comply with the ICJ decision. If the Constitutional Court had limited itself to recommend the Government a given behavior, this recommendation would have been almost ineffective; not to speak of complete uselessness *vis-à-vis* Germany (on a possible "monitory" judgments, see [RUSSO, 2014](#)).

As a conclusion, the fact that the Court has not examined alternative solutions depended, reasonably, by non-availability of means for effectively protecting the rights of the plaintiffs if not by declaring that

the decision of the ICJ is not enforceable in Italy ([DE SENA, Spunti, 2014](#), p. 201 ss.). Having said this, the decisive argument for not balancing all the involved principles was to the Court that foreign States could not pretend immunity, in light of the supreme principles of the Constitution, for *acts iure imperii* consisting in serious violations of human rights or humanitarian law ([PINELLI, 2014](#), p. 40).

With regard to the gravity of the relevant facts, some perplexity arise from the fact that the objective of all civil actions brought against Germany is obtaining pecuniary compensation. Consequently, declining Italy's jurisdiction in the related proceedings would have not meant sacrificing the judicial protection of fundamental rights (such the right to life, to personal security, and so on) but only rights to compensation. In addition, the claimants are, in many cases, not the victims of Nazi crimes but their relatives ([CANNIZZARO, 2015](#)). As right may be these observations, it remains that these civil proceedings originated from grave and systematic violations of international humanitarian law (deportation and internment of civilians in German camps, subjecting them to forced labor and other ill-treatment, non-recognition of their status of war prisoners under the relevant conventions). Failing recognition by Germany of the claimants' rights, the actions on compensation brought against Germany before Italian courts are the only means available to survivors, or the heirs to make judicially ascertained the commission of those crimes, and bring some justice to the victims.

The gravity of the crimes that were at stake has overshadowed, to certain extent, a further legal aspect, i.e. the possibility of invoking the so-called "tort exception" (or "*exception territoriale*"); a point discussed in the [Dissenting Opinion of Judge Gaja to the Judgment of the ICJ](#). As is known, this exception results from Article 12 of the UN Convention on the Jurisdictional Immunities of the States and Their Property (not yet in force). Accordingly, a State cannot invoke immunity from the jurisdiction of another State in a proceeding relating to pecuniary compensation for death or injury to persons, if these damages were caused by an act or omission attributable to the State and occurred "in whole or in part" in the territory of the State where the action is brought. In Judgment No. 238, the Constitutional Court has mentioned many times that the grave breaches of humanitarian law involved in the case were committed "in whole or in part on the Italian territory". It has put no emphasis on this circumstance, however. For example, the Court declared unconstitutional Article 1 of the Law implementing the UN Charter in so far it obliges Italian judges to recognize immunity for acts of a foreign State constituting war crimes and crimes against humanity,

and thus in breach of inalienable human rights. No mention is made in the text of the place where these crimes occurred.

One further debated point is technical in nature. Many have disagreed with the Constitutional Court's interpretation of Article 10.1 of the Constitution ([DE SENA, *Spunti*, 2014](#), p. 227 ss.; [GRADONI, 2014](#) p. 185). In the views of the referring judge, the customary norm on State jurisdictional immunity as interpreted by the ICJ had entered the domestic legal order; and the question to be resolved was whether this norm was or not consistent with the Constitution. For the Constitutional Court, by contrast, Article 10.1 could not operate, and has not operated, actually, with regard to that customary norm, because of the incompatibility of the latter with Articles 2 and 24 of the Constitution. In other words, a "counter-limit" deriving from the safeguard of the supreme values enshrined in Articles 2 and 24 operated in a preventive manner and, thus, preventing the entering of this particular normative content into Italy's domestic legal order. It emerges from the previous jurisprudence that the Constitutional Court utilized both the lines of reasoning above in a number of earlier decisions. Judgment No. 238 seems to embed, however, a hybrid solution. This, because the Court held, on one hand, that the international customary norm as interpreted by the ICJ does not make part of the Italian legal order. On the other hand, the Court considered whether balancing the content of this norm with the judicial protection of inalienable human rights was possible, or necessary. However, balancing different principles requires, of course, that these principles pertain to the same legal order ([PINELLI, 2014](#), p. 38 s.). In the end, such line of reasoning makes that Judgment No. 238 is not so inspired to legal pluralism, as it might appear ([PISILLO MAZZESCHI, 2015](#), p. 24 s.).

Another objection is that, once the Court had assumed that a customary norm as interpreted by the ICJ does not make part of the domestic legal order, it derived that the related constitutionality question was unsubstantiated and, thus inadmissible. In another opinion, however, in deciding to reject the question as ill founded, through an interpretive judgment, the Court has chosen the best solution. In this way, the Court has left room for taking in the future, where appropriate, a different decision on the same legitimacy question ([PALOMBINO, 2015](#)).

It is clear that declaring unconstitutional, *inter alia*, the provisions through which the UN Charter has been implemented in Italy has raised some concern. As already noted, this decision concerns, only, non-application of the Judgment of the ICJ on "Jurisdictional Immunities of the State" and is without prejudice to the implementation of the UN

Charter as a whole, including Article 94. It remains that the Court has not paid particular attention to the content of Article 11 of the Constitution, when deciding on this particular question (Article 11 reads: “Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organizations furthering such ends”). In this vein, one could further observe that the Court has neglected, to certain extent, the whole set of constitutional provisions (Articles 10.1, 11 and 117.1) from which stems the spirit of openness with which the Italian legal order looks at international law ([TANZI, 2015](#), p. 18 ss.).

Concern about the impact of Judgment No. 238 is justified, in part, by the fact that the ruling of the Constitutional Court is susceptible to weaken the perception of Italy as a State wishing, and able to comply with international law. Problems might arise, indeed, from the application of Judgment No. 238 not only *vis-à-vis* Germany but also other States. With this regard, it is useful to report on certain cases decided in 2015, in which the principles affirmed in Judgment No. 238 were applied by ordinary courts.

4. Follow-up of Judgment No. 238 in Italian jurisprudence

Once resumed the proceedings suspended in the waiting for the decision of the Constitutional Court, Germany repeated its objection concerning the lack of jurisdiction from the Court of Florence under general international law and the ICJ decision of 2012.

Being aware of some contradiction in the relevant legal framework, the Court of Florence made efforts, initially, in view to resolve the contentious issues through the procedure on conciliation set forth in Article 185 of the Code of Civil Procedure. Under this Article, the judge may, at a preliminary phase of the proceeding, make an attempt to reconcile the parties and efforts to this end may be renewed at any further stage. If successful, this procedure ends with a *procès-verbal* where the agreement among parties is recorded and, thus, take the place of a judicial decision. In the case *Alessi and others v Germany*, for example, the Court submitted to the parties the following proposal: the plaintiffs renounced to their action in court, while Germany offered them, as compensation, an opportunity of freely staying in Germany for a period of time, for study and other cultural purposes ([Order of 23 March 2015 of the Court in Florence, Second Civil Section](#)). The Court triggered the procedure considering that the ICJ recommended Germany

and Italy to re-open negotiations with a view of resolving the issued remained unsettled. Further, it wished to prevent decisions possibly disregarding the ruling of the ICJ, a fact that might qualify as wrongful under international law.

In two further Judgments of 6 July 2015 (*Bergamini v Germany* and *Simoncioni v Germany*), the Second Section of the Court noted, as a first step, that there had been no progress in the negotiations at the government level. In addition, the conciliation procedure had been unsuccessful in many of the relevant proceedings. Then, the Court passed to examine the preliminary objection concerning Italy's lack of jurisdiction, which Germany grounded on Article 10.1 of the Constitution, read in conjunction with the ruling of the ICJ. The Italian Government intervened in both the proceedings asking the Court to decline the exercise of its competence, in application of the decision of the ICJ. The Court did not uphold, however, any of the exceptions concerning a lack of jurisdiction, on the grounds of the same arguments that the Constitutional Court had found well established in Judgment No. 238 of 2014: that declining the exercise of jurisdiction in the cases at hand implied an unacceptable sacrifice of Italy's supreme constitutional values.

With regard to the merits, the Court in Florence found it established in both proceedings that Germany was responsible for war crimes and, thus, obliged to pay compensation. It should be remembered that Germany has never contended that it bears responsibility for the crimes committed by the Nazi forces during the Second World War. The Court then examined a further question, which Germany had raised as a further objection and the Italian government had contended. This concerned an alleged obligation of Italy to return Germany any amount that the latter might be ordered to pay in favor of the plaintiffs. For Germany, this obligation was either a consequence of non-respect by Italy of the relevant provisions in the Peace Treaty of 1947 and two bilateral Agreements of 1961 on the indemnification of Italian nationals, or of Italy's failure to comply with the ruling of the ICJ. The Court in Florence was satisfied, with this regard, that a State may not, in principle, invoke a provision in its domestic law as justification for failure to comply with international obligations. This is a principle well established in international law and codified in the Vienna Convention on the Law of Treaties, Article 27. In the Court's views, however, Italy was forced to disregard the ruling of the ICJ "by necessity", which excluded the wrongfulness of this conduct (Article 2045 of the Civil Code). For the Court, if grave breaches of human rights and humanitarian law are involved, the constitutional

obligation to guarantee, also by judicial remedies, the protection of inalienable human rights necessarily prevails over any other obligations of the State (see further [FERRAJOLO, 2016](#), p. 3-5).

Recourses introduced by Germany to have final judgments against it revised, and their effects revoked had the same outcome. We can mention, among others, a case decided by the United Sections of the Court of Cassation in 2015. In 2006, the President of the Court of Appeal of Florence ordered to enforce in Italy decision No. 137/1997 of the Court of Leivadia (Greece), which sentenced Germany to pay pecuniary compensation to the Prefecture of Voiotia as the legal representative of the victims of a massacre of civilians committed there by members of the Nazi Army. Germany challenged this order by recourse to the same Court of Appeal, which was unsuccessful, as also was a further recourse to the Supreme Court (decision No. 11163 of 20 May 2011 of the Court of Cassation, I Civil Section). Consequently, the order became final in 2011. In 2013, Germany filed an application for revision before the Supreme Court *ex* Article 395 of the Code of Civil Procedure read in conjunction with Article 3 of Law No. 5/2013. However, the Prefecture of Voiotia could easily argue, in its counter-claim, that these provisions had been meanwhile declared unconstitutional. On these same grounds, the Supreme Court declared the recourse inadmissible ([Judgment No. 9097 of 24 March 2015](#); see also Judgment No. 9098 of 24 March 2015 of the Court of Cassation, United Sections).

In assessing the impact of Judgment No. 238/2014 on Italian jurisprudence one should remember that the principles affirmed in this Judgment, and later confirmed in Order No. 30/2015 of the Constitutional Court, are binding on all national courts, which must adhere to them, if relevant, when deciding on any further case. This is at variance with the decisions of the ICJ, which have no binding force except for between the parties and in respect of each particular case (Article 59 of the ICJ Statute). Not surprisingly, the jurisprudence of the United Sections of the Court of Cassation has given examples of wide application of the principles spreading from Judgment No. 238, in 2015. One relevant decision is that on the *Opacic Dobrivoje* case, where the responsibility of Serbia for war crimes was involved. Another case concerns, once again, the *exequatur* of a decision delivered abroad (in the United States) in respect of another foreign State (Iran) accused of international terrorism.

In the *Opacic Dobrivoje* case, some members of the Army of the former Yugoslavia were prosecuted in Italy for the shooting down, occurred in 1992 in Croatia (a then part of the former Yugoslavia), of an Italian

helicopter participating in an EU monitoring mission. The attack caused the death of four Italian soldiers and one French. In 2013, the Assize Court of Appeal of Rome found that the entire chain of command was guilty. It therefore reformed the verdict of first instance, convicted the accused, and sentenced them to twenty-eight years' imprisonment and to pay damages to the heirs of the victims. Serbia, as the successor State of the former Yugoslavia, was declared severally liable with the convicted persons to pay compensation (Assize Court of Appeal of Rome, 22 May 2013).

In challenging this decision before the Court of Cassation, Serbia did not contend that Italian courts were competent to decide if it was proved that the case involved war crimes or crimes against humanity. Serbia was aware that such objection would have been unsuccessful, bearing in mind the ruling of the Court of Cassation in the *Ferrini* case and, more, of the Constitutional Court in Judgment No. 238/2014. It argued, however, that an attack against persons protected under international humanitarian law, if done in isolation, is not a war crime in the meaning of the applicable norms, such Article 8 of the Statute of the International Criminal Court. Further, and at variance with the cases to which Judgment No. 238 of the Constitutional Court refers, other means to obtain redress than bringing civil actions before Italian courts were available to the plaintiffs.

The Court of Cassation rejected these objections. For the Court, the facts of the proceeding fell within the category of war crimes, because it is generally accepted that serious violations of humanitarian law qualify as war crimes, even if not widespread or systematic. With regard to the second objection, the Supreme Court noted that although the Constitutional Court took into consideration the "last resort" argument, the latter was not decisive in its conclusions. The core content of the latter is, merely, that no exemption from civil jurisdiction is granted to foreign States, under the Constitution, for acts that, though done *iure imperii*, are in breach of inalienable human rights ([Judgment No. 43696 of 14 September 2015 of the Court of Cassation, I Criminal Section](#)).

Given these conclusions, it would have been probably useless to consider a further difference – which Serbia did not mention in its recourse –, which existed among the factual circumstances of the case at hand and those of the cases involving Germany's responsibility for Nazi crimes. This was that in the *Opacic Dobrivoje* case the crime was not committed, wholly or in part, on the Italian territory.

As a conclusion, the "counter-limit" that the Constitutional Court individuated in Judgment No. 238 operated also in the *Opacic Dobrivoje* case. This suggests that it would have been better putting in the

Judgment further precision or even restriction on the operation of this counter-limit. To do so, the Constitutional Court had available the *locus commissi delicti* criterion, which is also utilized in Article 12 of the UN Convention on the Jurisdictional Immunities of the State. Another possibility was giving decisive weight to the “last resort” argument and, thus, expressly excluding from the scope of Judgment No. 238 those cases in which other effective remedies are available to the plaintiffs. In this way, the differences between the Italian constitutional order and international law would have been softened.

One further aspect is the question of whether a minimum threshold of gravity of the crimes involved in a given case is a condition to be met for the “counter-limit” may operate. Worth of note, the Court of cassation held, in its decision of 2004 on the *Ferrini* case, that the norm prohibiting international crimes prevailed over the customary norm on the jurisdictional immunity of foreign States because of the particular seriousness of the crimes involved. Gravity consisted in the “intensity” of the crimes and the fact that they were committed “systematically” (Judgment n. 5044/2004, § 9). It is with reference to those same grave crimes that the Constitutional Court issued Judgment No. 238 of 2014. However, the Constitutional Court has not sufficiently underlined – at least, expressly – that the counter-limit operates in presence of most serious international crimes. The consequence has been the non-recognition of Serbia’s immunity from Italy’s jurisdiction in the *Opacic Dobrivoje* case, in which no widespread or systematic violations of humanitarian law were at stake.

The second case, which the United Sections of the Court of Cassation decided through [Judgment No. 21946 of 30 September 2015](#), originated from an application of declaring enforceable in Italy a decision issued by a District Court of the United States. This decision (Judgment No. 97-396 of the District Court for the District of Columbia) imposed upon Iran the obligation of paying compensation to the heirs of a young woman, who was a US citizen, killed in Israel following a terrorist attack from a faction of Hamas in 1995. For the US Court, this attack had been carried out under the direction of the Iranian Republic, and with material support from persons who were at the top of the Iranian Administration at the relevant time. Both the Iranian Republic and the Italian minister for foreign affairs on behalf of the government intervened in the proceeding before the Court of Appeal. They pointed out in their counterclaims that the States and their property are exempt from the other States’ jurisdiction as established under general international law. The Court upheld the objection on the grounds of Article 10.1 of the Constitution

and the ICJ ruling of 2012 on *Jurisdictional Immunities of the State* (Judgment No. 3909 of 8 July 2013 of the Court of Appeal of Rome). When the recourse against this decision was examined by the Court of Cassation, however, the relevant legal framework had changed as an effect of Judgment No. 238/2014 of the Constitutional Court. Consequently, the United Sections ruled that the principle of State immunity was no longer applicable because the relevant facts qualified as crimes against humanity. Most precisely, the wrongful act that caused the death of the US citizen was part of a systematic attack knowingly directed against civilian population, inspired by hate for racial, ethnic, political and religious reasons, and thus susceptible to seriously put at risk international security and the international order (Judgment No. 21946/2015, § 5).

Though rejecting the objection concerning the lacking of Italy's jurisdiction, the Court of Cassation did not declare enforceable the decision the US District Court. This, because the latter was not competent to decide on the case according with the criteria on jurisdictional competence established under Italian legislation. On the grounds of Article 3 of Law No. 218/1995, these criteria are relevant also for enforcing foreign judgments in Italy. To fully meeting this condition it was however necessary that Iran had, at the relevant time, a representative authorized to bring legal proceedings in the US. Certainly, this was not the case, given that diplomatic relations between the US and Iran had remain cut since 1979 (see further [FERRAJOLO, 2016](#), pp. 8-10). This case has highlighted that the principles enshrined in Judgment No. 238/2014 of the Constitutional Court have not superseded the ordinary principles on jurisdiction as established under the Italian legislation. The Supreme Court observed, with this regard, that the Constitutional Court has not laid down "a principle of universal jurisdiction" applicable to the acts done by foreign States *iure imperii* that consist in international crimes. It established, rather, that "the customary norm granting the foreign States exemption from civil jurisdiction does not apply in the proceedings concerning claims on compensation for damages suffered in consequence of war crimes or crimes against humanity committed in the territory of the State where the action is brought" (Judgment No. 21946/2015, § 5). It seems that the Court of Cassation has interpreted the ruling of the Constitutional Court, this time, as including the territorial element among the conditions for asserting the jurisdiction. In any case, this Judgment of the Supreme Court does not leave doubts about the fact that the "counter-limit" indicated by the Constitutional Court works only

after the jurisdictional competence of Italian courts has been established, in accordance with the applicable legislation.

With regard to the US relevant practice, of which mentioned decision against Iran is an example, it is worth noting that the US Congress passed, later, the [Justice against Sponsors of Terrorism Act – JUSTA of 28 Settembre 2016](#). Under Section 3 of JUSTA, the jurisdictional immunity shall not be recognized before US courts in any case in which money damages are sought against a foreign State for physical injury to person or property, or death occurring in the US deriving from a) an act of international terrorism done in the US territory or b) a tortious act of the foreign State, regardless where this act occurred.

By contrast, the policy of the Italian Parliament on preserving the immunity principle has not changed following Judgment No. 238 of the Constitutional Court. Through Article 19 bis of [Law No. 162 of 2014](#), the Parliament passed a provisions under which the bank accounts of the foreign States' diplomatic and consular missions in Italy are exempted, automatically, from execution if the head of the mission has made a declaration concerning the allocation of all amounts for the performance of public functions. This anachronistic norm, which prevents the Italian judges from assessing the relevant point on a case-by-case basis (CONFORTI, 2015) is susceptible to frustrate the objective of the decisions imposing obligations on indemnification upon Germany or other foreign States. Moreover, further questions of constitutionality might arise from the application of the provisions in Article 19 bis. This, because it is not clear whether the “counter-limit” indicated in Judgment No. 238/2014 of the Constitutional Court operates, also, with regard to the exemption of foreign States and their property from execution (PUSTORINO, 2015, p. 52 ff.).

5. Legal pluralism, the “counter-limits” doctrine and human rights

Although much discussed, the decision of 2014 of the Constitutional Court is not new, in reality. It only repeated principles affirmed many times by the Court in earlier decisions and enlarged their scope of application.

In the *Russel* case of 1979, concerning the immunity of diplomatic agents, the Constitutional Court held that the operation of Article 10.1 of the Constitution might not allow, under any circumstance, the entering into the domestic legal order of international customary norms incompatible with supreme constitutional values (Judgment No. 48/1979, § 3). It is true that this precedent refers to customary norms “formed after

the Italian Constitution entered into force” (ibidem); which is not the case of Judgment No. 238/2014. Leaving aside this aspect, however, the practice of the Court concerning so-called constitutional “counter-limits” is homogeneous. Many elements relevant to the case decided in Judgment No. 238 are common, most in particular, to the *Baraldini* case. In that decision, the Constitutional Court pointed out that: “The fundamental principles of the constitutional order and the inalienable human rights ... may impose limits on the entering [into the domestic legal order] of both generally recognized principles of international law ...; and provisions of treaties establishing international organizations with the purposes mentioned in Article 11 of the Constitution, as well as decisions from such organizations” (Judgment No. 73/2001, § 3.1). The Court did not consider Article 11, at least expressly, in Judgment No. 238/2014 (see *supra*). By contrast, the application of this Article will be, probably, a core issue for deciding on a further question of constitutionality, which was submitted to the Court in 2016, with regard – this time – to the EU legislation. The Court of Appeal in Milan and, subsequently, the Court of Cassation both challenged the constitutionality of Law No. 130/2008, on ratification and implementation of the Lisbon Treaty. This, with regard to the internal effects of the Judgment of the EU Court of Justice in the *Taricco* case (Order of 18 September of the Court of Appeal in Milan, II Criminal Section, in [Diritto penale contemporaneo](#), and Order of 16 March 2016 of the Court of Cassation, III Criminal Section, in [Giurisprudenza penale](#)). In the opinion of the referring judges, applying the Judgment of the EU Court would breach the supreme principle of non-retroactivity of criminal law (Article 25 of the Constitution), in so far modification derives from the Judgment, and with retroactive effects, to the regime of statutory limitations on financial crimes as provided under Italian legislation (cf. [MASTROIANNI, 2016](#)).

Judgment No. 238/2014 seems plainly consistent, also, with Judgments No. 348 and 349 of 2007 of the Constitutional Court. The principle stems from these Judgments that the Italian legal order is open to international law as interpreted by the relevant international bodies; except for those “counter-limits” that might arise from the need of preserving fundamental principles of the Constitution. Before the issuing of Judgment No. 238, the Constitutional Court has made an application of these concepts with regard to the decision of the ECHR Court in the case *Maggio and others v. Italy*, concerning the pension of Italian nationals working in Switzerland. The Constitutional Court found it necessary balancing the individual right to social security under the ECHR as

interpreted by the ECHR Court, with other principles guaranteed by the Constitution, and hold that the latter prevailed ([Judgment No. 264/2012 of the Constitutional Court](#)). It is clear that such decision was in contradiction with that of the ECHR Court. Some aspects of Judgment No. 264 have seemed debatable (PUSTORINO, 2013). However, there were no particular consequences at the international or the national level and, in my view, unsurprisingly. As has been observed by a prominent scholar, international law cannot pretend to apply within the State domestic legal order at the point of breaking legal values protected by national constitutions (CONFORTI, 2013, p. 529).

Whether these constitutional “counter-limits” should be regarded, also, as a circumstance excluding the international wrongfulness of an action or an omission in breach of the State’s international obligations is, however, a different question. In one opinion, a rule embedding this principle is inherent to international law (CONFORTI, *op. loc. cit.*). Many arguments militate against this interpretation, however (see [TANZI, 2015](#), p. 23 ss.). It is worth noting that a similar debate arose, many years ago, on the question of whether a State may invoke a violation of its internal law regarding the competence to conclude treaties as invalidating the consent it has given to be bound by a treaty. Although cautiously, the rule was later embedded in Article 46 of the Vienna Convention on the Law of Treaties. During the Convention drafting process, however, many reputed that such a derogation from the general principle of the irrelevance of national law on the international level, was not existent; while others considered it as inherent to international law (cfr. [INTERNATIONAL LAW COMMISSION, “Draft Articles on the Law of Treaties with Commentaries”, 1966](#), “Article 46”, p. 240 ss.). There is, thus, no logical reason preventing the opposability of constitutional “counter-limits” in international relations, if a customary rule with this content emerges by the practice. In this perspective, Judgment No. 238/2014 of the Italian Constitutional Court could help further developments in international law not only with regard to the jurisdictional immunity of the State (PISILLO MAZZESCHI, 2015, pp. 27-28).

Given the plurality of existing legal systems, temporary differences among them are quite possible. It might happen that a given conduct, which is wrongful under international law, qualifies as lawful or, even mandatory under national legislation (MORELLI, 1967, p. 73 ff.). Of course, States have to conform national law to their international obligations. In the case at hand, however, the opposite course of action seems desirable. This anomalous situation explains by the fact that

human rights' protection and the prohibition of war crimes and crimes against humanity pertain not only to the Italian constitutional order but also to international law. Differences between the ruling of the Italian Constitutional Court and that of the ICJ are due to a conflict, which does not so exist between Italian and International law as between two norms of international law. Resolving the conflict at the international level would have been better. This was not possible, however. Perhaps, because of too much conservatism from the ICJ ([LANCIOTTI e LONGOBARDO, 2015](#), p. 5), which therefore carries main responsibility for the clash between the international and the internal decisions ([GRADONI, 2014](#), p. 184).

Applying the norms on human rights often implies “dialogue at a distance” between the relevant courts. In Europe, the jurisprudence that has developed, respectively, at the ECHR Court, the EU Court of Justice and the national courts shows similarities as well as differences among their decisions (VILLANI, 2012, p. 4). Of course, the jurisprudence of European courts might be different, in turn, from decisions taken by UN judicial or political bodies (the *Kadi* case is an example).

The existence of many courts – established at global, regional or national level – can give birth to conflicting decisions, if more than one court examine a same case. However, the availability of judicial remedies at different law levels also helps guaranteeing human rights' protection. The ECHR Court has ascertained, for example, that Italy had violated, in some cases, the right to an effective judicial remedy under Article 13 of the ECHR. One of these cases concerned an “extraordinary rendition” operation carried out in Italy by US CIA agents with the complicity of members of the Italian SISMI intelligence (so-called *Abu Omar* case). Ironically, non-respect by Italy of Article 13 of the ECHR (in conjunction with Articles 3 and 8) mainly derived from the ruling of the Constitutional Court that the executive's right to oppose State secrecy in the relevant proceeding prevailed over the right of the judiciary to prosecute all accused persons. This decision was taken by the Constitutional Court in 2009 and 2014, although the facts did not fall, exactly, within the scope of the Laws on State secrecy; and, on other hand, serious violations of inalienable human rights were at stake (see Judgments No 106/2009 and [24/2014 of the Constitutional Court; European Court of Human Rights, IV Section, 23 February 2016, *Nasr e Ghali v Italy*](#)). In an earlier case ([Hirsi Jamaa](#)), the ECHR Court ascertained that Italy had infringed the principle of *non-refoulement* as well as its obligation of recognizing the right of irregular migrants to have access to justice. Bearing in mind these cases, one should admit that

Judgment No. 238/2014 of the Constitutional Court is much more consistent with international law, at least as far as international protection of human rights is concerned.

A parameter that has been suggested for assessing the international consequences of the “counter-limits” doctrine is considering whether or not the relevant decisions from national courts adhere to “universal values” (CATALDI, 2015, p. 47 f.). With regard to Judgment No. 238/2014 of the Italian Constitutional Court, one should admit that differences in respect of the ICJ Judgment on *Jurisdictional Immunities of the State* derive, mainly, from different interpretation of certain norms, which exist in both the concerned legal orders. The same is not true for Judgment No. 264/2012 of the Constitutional Court, which was inspired from concern about the need of preserving the State budget in time of crisis, even at the cost of diminished protection of social rights. At variance from ensuring the availability of judicial remedies to the victims of serious war crimes, this concern is inconsistent with both the object and the purposes of the ECHR, and International customary law as well. These observations cannot lead, for the moment, to exclude the wrongfulness of any decisions of national courts in breach of international obligations. The criterion above is relevant, however, to an important distinction that should be made, in my view, among the decisions of national courts making recourse to the “counter-limits” doctrine. Certain of these decisions clearly qualify as being *contra legem* under international law. By contrast, other decisions should be regarded as being *infra legem* in so far they *a*) are not incompatible, generally speaking, with international law and *b*) aim at filling gaps in the relevant international norms. Judgment No. 238/2014 of the Italian Constitutional Court pertains to the latter category. It is inspired, indeed, from two principles that seem plainly consistent with international law although not reflected, yet, by international custom. The first is the principle that the States should be entitled to disregard the exemption of foreign States from internal jurisdiction for those acts *iure imperii* that consist in war crimes and crimes against humanity. The second is that States should be granted the possibility to derogate from their obligation of implementing international law at the national level in the case that implementation requires sacrificing supreme constitutional values, and especially if these values are universally accepted.

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Quotation: O. FERRAJOLO, Judgment No. 238/2014 of the Constitutional Court and Follow-Up: Some Observations on Approaching to the “Counter-Limits” Doctrine in a Constructive Manner, in *Italy and International Law. Survey of Italian Cases and Materials by the Institute for International Legal Studies of the National Research Council*, edited by G. Palmisano and O. Ferrajolo, No. 2: 2014-2015, Roma, 2016, <http://www.larassegna.isgi.cnr.it/en/focus-judgment-n-2382014-of-the-constitutional-court-and-follow-up-some-observations-on-approaching-to-the-counter-limits-doctrine-in-a-constructive-manner/>