

CASE NOTE

THE ITALIAN CONSTITUTIONAL COURT'S RULING AGAINST STATE IMMUNITY WHEN INTERNATIONAL CRIMES OCCUR: THOUGHTS ON *DECISION NO 238 OF 2014*

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I INTRODUCTION

On 22 October 2014, the Italian Constitutional Court ('the Court') rendered an historical judgment¹ about the constitutional legitimacy of the Italian legislation that has been adopted in order to implement the decision of the International Court of Justice ('ICJ') in the *Jurisdictional Immunities of the State* case ('*Jurisdictional Immunities*').² According to the Court, Italian judges' duty to deny their jurisdiction in trials relating to damages caused by Nazi crimes is unconstitutional because it prevents the victims' next of kin from obtaining access to justice. In order to overcome this obstacle, the Court declared that:

¹ Corte costituzionale [Italian Constitutional Court], No 238, 22 October 2014.

² *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening) (Judgment)* [2012] ICJ Rep 100 ('*Jurisdictional Immunities*'). See also Annalisa Ciampi, 'The International Court of Justice between "Reason of State" and Demands for Justice by Victims of Serious International Crimes' (2012) 95 *Rivista di diritto internazionale* 374; Benedetto Conforti, 'The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity' (2011) 21 *Italian Yearbook of International Law* 135; Lorenzo Gradoni and Attila Tanzi, 'Immunità dello Stato e crimini internazionali tra consuetudine e bilanciamento: note critiche a margine della sentenza della Corte Internazionale di Giustizia del 3 febbraio 2012' (2012) 67 *La Comunità internazionale* 203; Fabrizio Marongiu Buonaiuti, 'La sentenza della Corte internazionale di giustizia relativa al caso *Germania c Italia*: profili di diritto intertemporale' (2012) 6 *Diritti umani e diritto internazionale* 335; Riccardo Pisillo Mazzeschi, 'Il rapporto fra norme di ius cogens e la regola sull'immunità degli Stati: alcune osservazioni critiche sulla sentenza della Corte internazionale di giustizia del 3 febbraio 2012' (2012) 6 *Diritti umani e diritto internazionale* 310; Kimberley N Trapp and Alex Mills, 'Smooth Runs the Water Where the Brook Is Deep: The Obscured Complexities of *Germany v Italy*' (2012) 1 *Cambridge Journal of International and Comparative Law* 153; Nerina Boschiero, 'Jurisdictional Immunities of the State and Exequatur of Foreign Judgments: A Private International Law Evaluation of the Recent ICJ Judgment in *Germany v Italy*' in Nerina Boschiero et al (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (TMC Asser Press, 2013) 781.

- (i) The Italian legal system refuses to implement the international customary rule regarding state immunity at a domestic level when it is invoked in a trial concerning international crimes;
- (ii) Article 1 of *Italian Law No 848* of 17 August 1957 (*‘Law No 848/1957’*)³ is unconstitutional, so far as it concerns the execution of art 94 of the *Charter of the United Nations* (*‘UN Charter’*),⁴ to the extent that it obliges the Italian judge to comply with the *Jurisdictional Immunities* decision; and
- (iii) Article 3 of *Italian Law No 5* of 14 January 2013 (*‘Law No 5/2013’*),⁵ which specifically obliges judges to deny their jurisdiction in order to implement the ICJ’s judgment, is unconstitutional and, consequently,⁶ null and void.⁶

The Court strongly affirmed that access to justice is a fundamental right, protected by the Italian Constitution, which cannot be derogated from. Consequently, when state immunity is invoked not to protect typical sovereign functions, but to prevent the justiciability of international crimes, access to justice cannot be sacrificed to state immunity.

Decision No 238, because it creates contradictions between domestic and international law, will be at the centre of an animated debate among scholars and practitioners. The Italian Government and judges are now obliged to implement the Court’s judgment, despite the fact that such implementation violates the ICJ’s decision and the rules of international law there outlined. Moreover, Germany could start a new proceeding against Italy on the grounds that the Court’s judgment denies Germany state immunity. Alternatively, Germany could defer the matter to the UN Security Council, which in turn could decide to enforce the ICJ’s decision against Italy on the basis of art 94 of the *UN Charter*.⁷

This case note will examine the Court’s judgment and emphasise its rationale, which is based on a strong human rights approach. In doing so, it will attempt to

³ *Esecuzione dello Statuto delle Nazioni Unite* [Execution of the Charter of the United Nations] (Italy) Law No 848, 17 August 1957, art 1.

⁴ *Charter of the United Nations* art 94.

⁵ *Adesione della Repubblica italiana alla Convenzione delle Nazioni Unite sulle immunità giurisdizionali degli Stati e dei loro beni, fatta a New York il 2 dicembre 2004* [Accession by the Italian Republic to the United Nations Convention on Jurisdictional Immunities of States and their Property] (Italy) Law No 5, 14 January 2013, art 3 (*‘Law No 5/2013’*).

⁶ Corte costituzionale [Italian Constitutional Court], No 238, 22 October 2014, *dispositif*.

⁷ See generally Attila Tanzi, ‘Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations’ (1995) 6 *European Journal of International Law* 539; Alain Pillepich, ‘Article 94’ in Jean-Pierre Cot, Alain Pellet and Mathias Forteau (eds), *La Charte des Nations Unies, Commentaire article par article* (Economica, 3rd ed, 2005) vol 2, 1987. For a commentary on the possible reactions of Germany after the Italian decision, see Lorenzo Gradoni, ‘Corte costituzionale italiana “controvento” sull’immunità giurisdizionale degli Stati stranieri?’ (2014) *Quaderni costituzionali* 905.

limit as much as possible any references to the Italian domestic legal system and the subtleties of the constitutional control mechanism.⁸

II THE COMPLEX HISTORY OF THE ITALIAN JURISPRUDENTIAL AND LEGISLATIVE APPROACH TO STATE IMMUNITY

The Court's judgment can be seen as the last word in a very long and problematic legal story. For the purposes of this essay, the decision of the *Corte di cassazione* [Italian Supreme Court] ('Supreme Court') in *Ferrini v Germany*⁹ ('*Ferrini*') is taken as the starting point of the story. In *Ferrini*, the Supreme Court denied state immunity to Germany for the crimes committed by the Nazi army in the north of Italy during World War II; these crimes consisted of illegal deportations and denials of the status of war prisoners. According to the Supreme Court, these actions amount to serious violations of *jus cogens* norms. Consequently the Supreme Court held that, since the rule on state immunity is not peremptory, it could not be invoked by Germany.¹⁰ The ICJ rejected this idea in a case pursued by Germany against Italy, which was based on *Ferrini* and similar decisions.¹¹ The ICJ emphasised that there is no relationship between the procedural rule on state immunity and the international norms violated *in concreto*:

The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict.¹²

The ICJ's decision was followed by a number of other Italian judgments, both of the Supreme Court and of lesser tribunals, recognising the international

⁸ For some early comments on this point, see Lorenzo Gradoni, 'Giudizi costituzionali del quinto tipo: Ancora sulla storica sentenza della Corte costituzionale italiana' on *Società Italiana di Diritto Internazionale*, *SIDIBlog* (10 November 2014) <<http://www.sidi-isil.org/sidiblog/?p=1135>>; Antonio Ruggeri, 'La Corte aziona l'arma dei "controlimiti" e, facendo un uso alquanto singolare delle categorie processuali, sbarra le porte all'ingresso in ambito interno di norma internazionale consuetudinaria (a margine di *Corte cost n 238 del 2004*)' (Research Paper, Consulta Online, 17 November 2014) <<http://www.giurcost.org/studi/ruggeri42.pdf>>.

⁹ Corte di cassazione [Italian Supreme Court], No 5044, 11 March 2004, reprinted in (2004) 87 *Rivista di diritto internazionale* 539.

¹⁰ *Ibid.* For a commentary, see Alessandra Gianelli, 'Crimini internazionali ed immunità degli Stati dalla giurisdizione nella Sentenza *Ferrini*' (2004) 87 *Rivista di diritto internazionale* 643; Massimo Iovane, 'The *Ferrini* Judgment of the Italian Supreme Court: Opening Up Domestic Courts to Claims of Reparation for Victims of Serious Violations of Fundamental Human Rights' (2004) 14 *Italian Yearbook of International Law* 165; Andrea Bianchi, '*Ferrini v Federal Republic of Germany*' (2005) 99 *American Journal of International Law* 242; Pasquale De Sena and Francesca De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case' (2005) 16 *European Journal of International Law* 89; Carlo Focarelli, 'Denying Foreign State Immunity for Commission of International Crimes: The *Ferrini* Decision' (2005) 54 *International and Comparative Law Quarterly* 951; Andrea Gattini, 'War Crimes and State Immunity in the *Ferrini* Decision' (2005) 3 *Journal of International Criminal Justice* 224.

¹¹ See, eg, Corte di cassazione [Italian Supreme Court], No 1072, 13 January 2009, reprinted in (2009) 92 *Rivista di diritto internazionale* 618.

¹² *Jurisdictional Immunities* [2012] ICJ Rep 100, 139 [91].

decision and denying Italian courts jurisdiction in similar cases.¹³ The Italian Parliament also intervened, by adopting *Law No 5/2013*,¹⁴ with which Italy acceded to the *United Nations Convention on Jurisdictional Immunities of States and Their Property* ('*UN State Immunity Convention*').¹⁵ Article 3 of *Law No 5/2013* stated that Italian judges had to comply with the ICJ judgment, denying them jurisdiction to hear similar cases or to reopen trials in which they had affirmed the judgment:

[W]here the International Court of Justice, in a judgment settling a dispute in which Italy is a party, excluded the possibility of subjecting a specific conduct of another State to civil jurisdiction, the judge hearing the case, *ex officio* and even where he has already passed a decision which is not final but has the effect of *res judicata* with regard to the existence of jurisdiction, shall ascertain the lack of jurisdiction in every stage and instance of the proceeding ... Decisions constituting *res judicata* contrary to the above mentioned ICJ judgments, even where the latter have been passed subsequently, can be reconsidered not only in the cases provided by Article 395 of the *Italian Code of Civil Procedure* ['*Revocazione*'], but also due to lack of civil jurisdiction. In such circumstances Article 396 of *Italian Code of Civil Procedure* shall not apply.¹⁶

At the same time, the Italian Government attached an interpretative declaration to the *UN State Immunity Convention*. According to this declaration, no article of the treaty could be interpreted as denying state immunity for acts of armed forces:

Italy states its understanding that the *Convention* does not apply to the activities of armed forces and their personnel, whether carried out during an armed conflict as defined by international humanitarian law, or undertaken in the exercise of their official duties.¹⁷

This declaration clearly demonstrated the willingness of the Italian Government to comply with the ICJ's decision. Although Italian judges were

¹³ See Corte di cassazione [Italian Supreme Court], No 32139, 9 August 2012, reprinted in (2012) 95 *Rivista di diritto internazionale* 1196; Corte di cassazione [Italian Supreme Court], No 1136, 12 November 2013. For a survey of these decisions, see Giuseppe Nesi, 'The Quest for a "Full" Execution of the ICJ Judgment in *Germany v Italy*' (2013) 11 *Journal of International Criminal Justice* 185, 188.

¹⁴ *Law No 5/2013* art 3.

¹⁵ *United Nations Convention on Jurisdictional Immunities of States and Their Property*, GA Res 59/38, UN GAOR, 59th sess, 65th plen mtg, Agenda Item 142, UN Doc A/RES/59/38 (16 December 2004) annex. For a commentary, see Eileen Denza, 'The 2005 *UN Convention on State Immunity* in Perspective' (2006) 55 *International and Comparative Law Quarterly* 395; Francesca De Vittor, 'Recenti sviluppi in tema di immunità degli Stati dalla giurisdizione: la *Convenzione di New York* del 2 dicembre 2004' in Alessandra Lanciotti and Attila Tanzi (eds), *Le immunità nel diritto internazionale: Temi scelti* (Giappichelli, 2007) 153.

¹⁶ *Law No 5/2013* art 3. The English translation of this paragraph has been quoted from Fulvio Maria Palombino, 'Italy's Compliance with ICJ Decisions vs Constitutional Guarantees: Does the "Counter-Limits" Doctrine Matter?' (2012) 22 *Italian Yearbook of International Law* 187, 197.

¹⁷ *Multilateral Treaties Deposited with the Secretary-General: United Nations Convention on Jurisdictional Immunities of States and Their Property* (2 December 2004) United Nations Treaty Collection <https://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=III-13&chapter=3&lang=en>.

already under the duty to implement the ICJ's ruling even without a specific new domestic legislation, art 3 of *Law No 5/2013* should be read in this context.¹⁸

The ICJ's ruling on this matter also affected other national and international decisions, such as the European Court of Human Rights' judgment in *Jones v United Kingdom*.¹⁹ For this reason, some scholars believed that the last word about the relationship between state immunity and access to justice and reparation had been had, even if the ICJ's judgment had not convinced many observers.²⁰ On the other hand, other scholars thought that the Italian Constitutional Court could have some role to play due to its commitment to the protection of human beings.²¹ This latter position has been shown to be correct, as will be explained soon.

III THE ITALIAN CONSTITUTIONAL COURT'S *DECISION NO 238* REGARDING THE CUSTOMARY NORM OF STATE IMMUNITY

The Court rendered a decision about the compatibility of the state immunity rule and the Italian legislation implementing the ICJ's ruling when the Tribunal

¹⁸ See Mirko Sossai, 'Are Italian Courts Directly Bound to Give Effect to the *Jurisdictional Immunities* Judgment?' (2011) 21 *Italian Yearbook of International Law* 175, 182; Maria Luisa Padelletti, 'L'esecuzione della sentenza della Corte internazionale di giustizia sulle immunità dalla giurisdizione nel caso *Germania c Italia*: una strada in salita?' (2012) 95 *Rivista di diritto internazionale* 444, 445–6; Annalisa Ciampi, 'L'Italia attua la sentenza della Corte internazionale di giustizia nel caso *Germania c Italia*' (2013) 96 *Rivista di diritto internazionale* 146, 147.

¹⁹ *Jones v United Kingdom* (European Court of Human Rights, Trial Chamber, Application Nos 34356/06 and 40528/06, 14 January 2014). For some early comments, see Riccardo Pisillo Mazzeschi, 'Le immunità degli Stati e degli organi statali precludono l'accesso alla giustizia anche alle vittime di torture: il caso *Jones* dinanzi alla Corte europea dei diritti umani' (2014) 8 *Diritti umani e diritto internazionale* 215; Philippa Webb, '*Jones v UK*: The Re-integration of State and Official Immunity?' on European Journal of International Law, *EJIL: Talk!* (14 January 2014) <<http://www.ejiltalk.org/jones-v-uk-the-re-integration-of-state-and-official-immunity/>>; Lorna McGregor, '*Jones v UK*: A Disappointing End' on European Journal of International Law, *EJIL: Talk!* (16 January 2014) <<http://www.ejiltalk.org/jones-v-uk-a-disappointing-end/>>; Micaela Frulli, '*Jones v UK*: On Analogies and Inconsistencies in the Application of Immunity Rules' on European Journal of International Law, *EJIL: Talk!* (21 January 2014) <<http://www.ejiltalk.org/jones-v-uk-on-analogies-and-inconsistencies-in-the-application-of-immunity-rules/>>. For a survey of the European Court of Human Rights case law before this decision, see Marcella Distefano, 'Immunità degli Stati e art 6 della *Convenzione europea dei diritti dell'uomo*: coerenza sistemica e garanzie di non impunità' in Alessandra Lanciotti and Attila Tanzi (eds), *Le immunità nel diritto internazionale: Temi scelti* (Giappichelli, 2007) 117; Alessandra Lanciotti and Antonio Panetta, 'L'immunità dello Stato straniero dalla giurisdizione e il diritto dell'individuo di accesso alla giustizia per violazione dei suoi diritti fondamentali' in Luisa Cassetti (ed), *Diritti, principi e garanzie sotto la lente dei giudici di Strasburgo* (Jovene, 2012) 335.

²⁰ See Andrea Bianchi, 'Il tempio e i suoi sacerdoti: Considerazioni su retorica e diritto a margine del caso *Germania c Italia*' (2012) 6 *Diritti umani e diritto internazionale* 293, 307; Andrea Bianchi, 'On Certainty' on European Journal of International Law, *EJIL: Talk!* (16 February 2012) <<http://www.ejiltalk.org/on-certainty/>>.

²¹ See Natalino Ronzitti, 'L'Italia nel sottoporre a giudizio la Germania ha violato l'immunità giurisdizionale degli Stati', *Guida al diritto* (Milan), 10 March 2012, 93; Benedetto Conforti, *Diritto internazionale* (Editoriale Scientifica, 10th ed, 2014) 349.

of Florence,²² dealing with three civil proceedings commenced by the next of kin of previous victims, requested a judgment on this matter from the Court. In Italy, only the Constitutional Court can declare that a law is not constitutional, and such decisions create obligations for all the organs of the state. A decision of the Court on the constitutional legitimacy of a law can be triggered in two ways: the national or regional governments can directly ask the Court for a judgment, or individual citizens can request such a decision during a trial in which the norm that is suspected of being unconstitutional would be applied by a judge.²³

In the present case, the Court first ruled on the general framework of the implementation of the state immunity rule in the Italian legal system. Obviously, apart from the Italian accession to the *UN State Immunity Convention*, the state immunity rule is part of customary international law,²⁴ and therefore the Court had to reflect on the Italian mechanism of implementing customary rules. According to art 10(1) of the *Italian Constitution*, '[t]he Italian legal system conforms to the generally recognised rules of international law'.²⁵ Constitutional jurisprudence has previously clarified that this expression refers to international customary rules in general, but excludes international treaties.²⁶

²² The Tribunal of Florence issued three ordinances on this issue, with identical content. See Tribunale di Firenze [Tribunal of Florence], Ordinance No 84, 21 January 2014, reported in Florence, *Gazzetta Ufficiale 1a Serie Speciale — Corte costituzionale*, 28 May 2014, 82–91; Tribunale di Firenze [Tribunal of Florence], Ordinance No 85, 21 January 2014, reported in Florence, *Gazzetta Ufficiale 1a Serie Speciale — Corte costituzionale*, 28 May 2014, 91–101; Tribunale di Firenze [Tribunal of Florence], Ordinance No 113, 21 January 2014 reported in Florence, *Gazzetta Ufficiale 1a Serie Speciale — Corte costituzionale*, 9 July 2014, 43–52.

²³ On the Italian model of judicial review, see generally Tania Groppi, 'The Italian Constitutional Court: Towards a "Multilevel System" of Constitutional Review?' (2008) 3 *Journal of Comparative Law* 100.

²⁴ On the origin and development of the state immunity customary rule, see Rolando Quadri, *La giurisdizione sugli Stati stranieri* (Giuffrè, 1941), reprinted in Rolando Quadri, *Scritti giuridici* (Giuffrè, 1988) vol 1, 239; Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 *British Yearbook of International Law* 220; Riccardo Luzzatto, *Stati stranieri e giurisdizione nazionale* (Giuffrè, 1972); Sompong Sucharitkul, 'Immunities of Foreign States before National Authorities' (1976-I) 149 *Recueil des cours* 87; Isabelle Pingel-Lenuzza, *Les immunités des Etats en droit international* (Bruylant, 1997); Natalino Ronzitti and Gabriella Venturini (eds), *Le immunità giurisdizionali degli stati e degli altri enti internazionali* (CEDAM, 2008); Lanciotti and Panetta, above n 19; Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford University Press, 3rd ed, 2013).

²⁵ *Costituzione della Repubblica Italiana* [Italian Constitution] art 10(1) [author's trans]. In Italian, art 10(1) states: 'L'ordinamento italiano si conforma alle norme internazionali generalmente riconosciute'.

²⁶ See Corte costituzionale [Italian Constitutional Court], No 15, 29 January 1996; Corte costituzionale [Italian Constitutional Court], No 348, 22 October 2007; Corte costituzionale [Italian Constitutional Court], No 349, 22 October 2007. See also Tullio Treves, *Diritto internazionale: Problemi fondamentali* (Giuffrè, 2005) 660–1. Previously, Luigi Condorelli had interpreted the article restrictively, stating that only the customary rules about which there was no doubt in the international community were dealt with in art 10(1). See Luigi Condorelli, 'Il "riconoscimento generale" delle consuetudini internazionali nella Costituzione italiana' (1979) 62 *Rivista di diritto internazionale* 4. By contrast, Rolando Quadri would take a more expansive interpretation, due to the fact that the clause *pacta sunt servanda*, the basis of the binding character of treaties, is a customary principle. Following his opinion, art 10(1) could also be applied to international treaties. See Rolando Quadri, *Diritto Internazionale Pubblico* (Liguori, 5th ed, 1968) 64–8.

According to art 10(1), the entire Italian legal system, including the *Constitution*, must conform to general international law.²⁷ Consequently, in the Court's past jurisprudence, it affirmed that an ordinary law in conflict with an international customary rule is void and that international customary norms prevail also over the *Italian Constitution*, except for the fundamental principles stated therein.²⁸

In the present case, the Court asserted that the right of access to justice is a fundamental human right. The Court also stated that, founded on arts 2 and 24 of the *Italian Constitution*, this right represents the cornerstone of human rights protection, because only through access to an independent judge can all other rights be effectively protected:

This Court has repeatedly observed that the fundamental principles of the constitutional order include the right to appear and to be defended before a court of law in order to protect one's rights guaranteed by Article 24, ie the right to a judge. This is especially true when the right at issue is invoked to protect fundamental human rights.

In the present case, the referring judge aptly indicated Articles 2 and 24 of the Constitution as inseparably tied together in the review of constitutionality required of this Court. The first [Article 2] is the substantive provision, in the fundamental principles of the Constitutional Charter, that safeguards the inviolability of fundamental human rights, including — this is crucial in the present case — human dignity. The second [Article 24] is a safeguard of human dignity as well, as it protects the right of access to justice for individuals in order to invoke their inviolable right[s].

*Although they belong to different fields, the substantial and the procedural, the two provisions share a common relevance in matters of constitutional compatibility of the norm of immunity of States from the civil jurisdiction of other States. It would indeed be difficult to identify how much is left of a right if it cannot be invoked before a judge in order to obtain effective protection.*²⁹

For this reason, the international rule on state immunity cannot prevail *sic et simpliciter* over the individual right of access to justice. In the Court's view, a 'balancing' between state immunity and access to justice is theoretically possible.³⁰ The former could prevail, but only if the acts that are the subject of a specific trial are typical sovereign acts and thus protected by the state immunity

²⁷ See Corte costituzionale [Italian Constitutional Court], No 73, 22 March 2001. See also Antonio La Pergola, *Costituzione e adattamento dell'ordinamento interno al diritto internazionale* (Giuffrè, 1961) 292; Luigi Sico, 'Adattamento del diritto interno al diritto internazionale generale' in Giuffrè (ed), *Enciclopedia del diritto: Aggiornamento II* (Giuffrè, 1998) 32, 38; Beatrice I Bonafè, 'Adattamento del diritto interno al diritto internazionale' in Sabino Cassese and Mauro Catenacci (eds), *Dizionario di diritto pubblico* (Giuffrè, 2006) vol 1, 98, 101; Enzo Cannizzaro, *Corso di diritto internazionale* (Giuffrè, 2011) 458; Andrea Gioia, *Manuale breve: Diritto internazionale* (Giuffrè, 4th ed, 2013) 473. According to Antonio Cassese, whose opinion differed, the status of an international customary norm in the Italian legal system could change depending on its subject. See Antonio Cassese, 'Art 10' in Giuseppe Branca (ed), *Commentario della Costituzione: Principi fondamentali* (Zanichelli, 1975) 485.

²⁸ Corte costituzionale [Italian Constitutional Court], No 48, 18 June 1979, [3].

²⁹ See Corte costituzionale [Italian Constitutional Court], No 238, 22 October 2014, [3.4] (emphasis added).

³⁰ *Ibid* [3.1].

rule. However, in the past, the Court has declared the prevalence of a similar rule — diplomatic immunity — over the right of access to justice, on the basis that diplomatic immunity is strictly related to the sovereignty of a foreign state and functions directly to maintain peaceful relations in the international community.³¹

On the contrary, according to the Court in the present case, state immunity cannot prevail over access to justice because the facts at the centre of similar trials are international crimes. In these cases, Italian judges do not face a sovereign state's legitimate acts, which are typically protected by state immunity, but rather heinous international crimes that are unequivocally condemned by the international community and that are not an exercise of legitimate sovereign powers:

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

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

Immunity from jurisdiction of other States can be considered tenable from a legal standpoint, and even more so from a logical standpoint, and thus can justify on the constitutional plane the sacrifice of the principle of judicial protection of inviolable rights guaranteed by the *Constitution*, *only when it is connected — substantially and not just formally — to the sovereign functions of the foreign State, ie with the exercise of its governmental powers.*³²

In other words, the Court recognises that state immunity can be invoked only as an instrument to protect a legitimate state function, not as a shield that covers all the *acta iure imperii*. For this reason, the Court cannot declare that state immunity prevails over the fundamental right of access to justice, nor can it make a 'balancing' between the two rights.³³ In similar cases, the Court can only declare that the Italian legal system does not implement the international customary law.

³¹ Corte costituzionale [Italian Constitutional Court], No 48, 18 June 1979, [3].

³² Corte costituzionale [Italian Constitutional Court], No 238, 22 October 2014, [3.4] (emphasis added).

³³ For some critical remarks on this point, see Pasquale De Sena, 'Norme internazionali generali e principi costituzionali fondamentali, fra giudice costituzionale e giudice comune (ancora sulla *sentenza* 238/2014)' on Società Italiana di Diritto Internazionale, *SIDIBlog* (17 November 2014) <<http://www.sidi-isil.org/sidiblog/?p=1186>>.

In reaching this conclusion, the Court does not find that the international norm is unconstitutional. According to a dualist vision,³⁴ international norms are not strictly part of the domestic system, and thus a domestic court is prevented from invalidating them. Therefore the Court affirms that art 10(1) does not function with respect to state immunity when an international crime is at the centre of a trial.³⁵ The state immunity rule, in these cases, simply does not exist in the Italian legal system.³⁶

IV THE DUTY TO COMPLY WITH ICJ DECISIONS AND THE ITALIAN CONSTITUTIONAL JUDGMENT

Having decided that the state immunity rule does not exist in the Italian legal system if invoked in trials about the civil consequences of international crimes, the Court addressed the problem of the binding character of the ICJ's judgment.

First of all, it is necessary to emphasise that the ICJ's decision in the *Jurisdictional Immunities* case is binding for only Italy because Italy was party to the proceeding. In other circumstances, Italian organs, including Italian courts, could have interpreted and applied general international customary law freely, not being formally bound by ICJ precedent.³⁷ Although ICJ jurisprudence is authoritative and states are prone to spontaneously follow its findings and opinions,³⁸ as demonstrated by the fact that the ruling in the *Jurisdictional Immunities* case affected the jurisprudence of many international and domestic courts,³⁹ it should be noted that, strictly speaking, only states that are parties to a specific proceeding are bound to implement judgments of the ICJ, as affirmed by art 94 of the *UN Charter* and art 59 of the *Statute of the International Court of*

³⁴ The Italian Constitutional Court's ('the Court') judgment is affected by a strong dualistic approach: Robert Kolb, 'The Relationship between the International and Municipal Legal Order: Reflections on the *Decision No 238/2014* of the Italian Constitutional Court' [2014] *Questions of International Law, Zoom Out II*, 5 <http://www.qil-qdi.org/wp-content/uploads/2014/12/02_Constitutional-Court-238-2014_KOLB.pdf>.

³⁵ See Giusi Sorrenti, 'La conformità dell'ordinamento italiano alle "norme di diritto internazionale generalmente riconosciute" e il giudizio di costituzionalità delle leggi' in Giovanni Pitruzzella, Francesco Teresi and Giuseppe Verde (eds), *Il parametro nel giudizio di costituzionalità: Atti del Seminario di Palermo, 28-29 maggio 1998* (Giappichelli, 2000) 601, 630; Conforti, *Diritto internazionale*, above n 21, 348.

³⁶ See Marco Longobardo, "'Il non-essere non è e non può essere": brevi note a margine della sentenza n 238/2014 della Corte costituzionale rispetto all'adattamento dell'ordinamento italiano al diritto internazionale consuetudinario' on Società Italiana di Diritto Internazionale, *SIDIBlog* (10 November 2014) <<http://www.sidi-isil.org/sidiblog/?p=1124>>.

³⁷ On the role of the domestic jurisprudence in the application and reconnaissance of international customary law, see Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts' (1993) 4 *European Journal of International Law* 159; Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 *American Journal of International Law* 241; Benedetto Conforti, 'Qualche riflessione sul contributo dei giudici internazionali ed interni al diritto internazionale' in Gabriella Venturini and Stefania Bariatti (eds), *Liber Fausto Pocar: Diritto Individuali e Giustizia Internazionale* (Giuffrè, 2009) vol 1, 217; Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57.

³⁸ This point was stressed also by the Court. See Corte costituzionale [Italian Constitutional Court], No 238, 22 October 2014, [3.1].

³⁹ See above n 19 and accompanying text.

Justice ('*ICJ Statute*').⁴⁰ Therefore, the legal obligation to respect German immunity in cases similar to *Ferrini* flows only from these provisions.

This problem was foremost in the mind of the Italian Constitutional Court judges and therefore the judgment deals with Italian participation in the United Nations, in order to neutralise the effects of the ICJ's decision.

Article 11 of the *Italian Constitution* grants a constitutional status to Italy's membership of the UN. According to art 11,

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 organisations furthering such ends.⁴¹

The drafters of the *Italian Constitution* wrote these lines with Italy's UN membership in mind, in order to provide that the Italian legal system could adhere wholly to the utmost expression of international cooperation.⁴² Thanks to art 11, interpreted from a functional perspective, UN membership has a constitutional status in the Italian domestic system. This constitutional status is also accorded to Italy's participation in other international organisations with similar goals, such as the European Union.⁴³ For this reason, the Court has so far granted to EU Acts (such as regulations and directives) a status superior to ordinary law, while also stating that they cannot violate the fundamental principles of the *Italian Constitution* related to the protection of inviolable human rights.⁴⁴

It is undeniable that the ICJ is a UN body, and therefore the ICJ's decisions would seem to fall into the sphere of art 11.⁴⁵ Accordingly, even considering the ICJ's decisions in proceedings to which Italy is a party, covered by art 11, and

⁴⁰ See Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public* (LGDJ, 8th ed, 2009) 1005; Karin Oellers-Frahm, 'Article 94 *UN Charter*', in Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice* (Oxford University Press, 2nd ed, 2012) 186, 192; Robert Kolb, *La Cour internationale de Justice* (Pedone, 2014) 785.

⁴¹ *Costituzione della Repubblica Italiana* [Italian Constitution] art 11 [author's trans]. The original text of art 11 states:

L'Italia ripudia la guerra come strumento di offesa alla libertà degli altri popoli e come mezzo di risoluzione delle controversie internazionali; consente, in condizioni di parità con gli altri Stati, alle limitazioni di sovranità necessarie ad un ordinamento che assicuri la pace e la giustizia fra le Nazioni; promuove e favorisce le organizzazioni internazionali rivolte a tale scopo.

⁴² See generally Enzo Cannizzaro, *Trattati internazionali e giudizio di costituzionalità* (Giuffrè, 1991) 293; Natalino Ronzitti (ed), *L'articolo 11 della Costituzione: Baluardo della vocazione internazionalistica dell'Italia* (Editoriale Scientifica, 2013).

⁴³ See Corte costituzionale [Italian Constitutional Court], No 14, 24 February 1964, [6]; Corte costituzionale [Italian Constitutional Court], No 183, 18 December 1973, [3]–[5]; Corte costituzionale [Italian Constitutional Court], No 170, 5 June 1984, [3]. See also Giorgio Gaja and Adelina Adinolfi, *Introduzione al diritto dell'Unione Europea* (Laterza, 2nd ed, 2012) 197; Gian Luigi Tosato, 'L'articolo 11 della Costituzione e il diritto dell'Unione Europea' in Natalino Ronzitti (ed), *L'articolo 11 della Costituzione: Baluardo della vocazione internazionale dell'Italia* (Editoriale Scientifica, 2013) 69.

⁴⁴ See Corte costituzionale [Italian Constitutional Court], No 183, 18 December 1973, [9]. The Court clearly states that, in case of a contrast between an EU norm and the fundamental principles enshrined in the Constitution, the Court has to declare unconstitutional the law of execution of the EU treaties, only so far as it concerns the binding character of the specific EU norm in contrast with the said supreme principles.

⁴⁵ Corte costituzionale [Italian Constitutional Court], No 238, 22 October 2014, [41].

therefore stronger than ordinary laws, the Court can neutralise their effects when in conflict with a supreme principle such as access to justice. In the recent judgment, pursuant to this doctrine, the Court declared that the ICJ's decision about state immunity violates victims' right of access to justice, and therefore cannot take effect in the Italian domestic system. It is clear that the Court could not invalidate a decision of the ICJ, but it could declare art 1 of *Law No 848/1957* partially unconstitutional insofar as it requires Italy to comply with the *Jurisdictional Immunities* decision, without any prejudice to Italy's commitments under the *UN Charter* at large.⁴⁶

On this point, it could be observed that the Court simply applied the system envisaged in the case of a conflict between an EU norm, also within the scope of art 11, and a fundamental principle of the *Italian Constitution*. Again, the Court intervened to alter the mechanism of implementation of the *UN Charter* — which is obviously a domestic act, over which the Court has full jurisdiction — and not to alter the external norm.

Lastly, the Court declared unconstitutional and therefore null and void art 3 of *Law No 5/2013*, which is an entirely domestic law meant to specify the obligations arising from art 94 of the *UN Charter*.⁴⁷

It is important to stress that the decision of the Court affects the relationship between Italy and the UN only superficially. All the duties assumed by Italy through its UN membership are still in place, as is the obligation to comply with ICJ decisions in proceedings to which Italy is a party:

In any other case, it is certainly clear that the undertaking of the Italian State to respect all of the international obligations imposed by the accession to the *United Nations Charter*, including the duty to comply with the judgments of the ICJ, remains unchanged ... The remainder of the *Law of Adaptation No 848/1957* continues to be indisputably in full force and effect.⁴⁸

The Court has only barred the binding character of the *Jurisdictional Immunities* decision, noting that it cannot be held part of the Italian legal system due to its entire disregard of the right of access to justice for the victims of Nazi crimes.

V AN EVALUATION OF THE COURT'S DECISION

The decision of the Court is clearly an important judgment at the international level, and therefore must be evaluated as a relevant manifestation of state practice with respect to the non-existence of state immunity when international crimes are the object of a domestic trial. The Court correctly states that its decision could influence the development of general international law on this point, perhaps inverting the course of the most recent domestic and international

⁴⁶ *Ibid* *dispositif* [2].

⁴⁷ *Ibid* *dispositif* [3].

⁴⁸ *Ibid* [4.1].

jurisprudence, which has tended to accept the ICJ's decisions.⁴⁹ In truth, the ICJ affirmed, after a not wholly convincing review of state practice,⁵⁰ that its decision regarded only international law *as it presently stands*,⁵¹ clearly implying that state practice could, in future, modify this rule. The present decision could play a role in this process of modification if it is considered to be not merely a judgment on the relationship between the international and domestic legal order, but a general challenge to the existence of state immunity in suits arising out of international crimes.

It is important to note that the Court tries to avoid referring to the peremptory character of either access to justice or the duty not to commit international crimes. In doing so, the Court seems to distance its position from both the decisions passed by the Supreme Court and the strategy of the Italian defence in the *Jurisdictional Immunities* case.⁵² The Court could have ruled that the duty not to commit international crimes is *jus cogens* at an international level and, therefore, has a higher status in the domestic legal system through art 10(1), as has been suggested.⁵³ However, the Court decided on a different course of action, relying instead on the tools provided by the domestic legal system, and above all the *Italian Constitution*, in order not to replace — or worse, rewrite — the ICJ's judgment.

From the Court's perspective, the decision was not about the victims' right to reparation — a very delicate and slippery subject in contemporary international law.⁵⁴ The ICJ, ruling on the relation between state immunity and reparation, has indicated that Germany and Italy should have found an equivalent solution

⁴⁹ Ibid [3.3]. For a comment, see Pasquale De Sena, 'The Judgment of the Italian Constitutional Court on State Immunity in Cases of Serious Violations of Human Rights or Humanitarian Law: A Tentative Analysis under International Law' (2014) *Questions of International Law, Zoom out II*, 17, 26–7 <<http://www.qil-qdi.org/judgment-italian-constitutional-court-state-immunity-cases-serious-violations-human-rights-humanitarian-law-tentative-analysis-international-law>>.

⁵⁰ *Jurisdictional Immunities* [2012] ICJ Rep 100, 309 (Judge ad hoc Gaja). See also Gradoni and Tanzi, 'Immunità dello Stato e crimini internazionali tra consuetudine e bilanciamento', above n 2, 211–19. For a survey of the international and national jurisprudence that denies state immunity when the damages caused by international crimes are the object of a civil proceeding, see Lanciotti and Panetta, above n 19; Elena Sciso, 'Italian Judges' Point of View on Foreign States' Immunity' (2011) 44 *Vanderbilt Journal of Transnational Law* 1201.

⁵¹ *Jurisdictional Immunities* [2012] ICJ Rep 100, 139 [91].

⁵² For some critical remarks about the reasoning of the Italian Supreme Court on this point, see Carlo Focarelli, 'Diniego dell'immunità alla Germania per crimini internazionali: la Suprema Corte si fonda su valutazioni "qualitative"' (2009) 92 *Rivista di diritto internazionale* 363.

⁵³ See Natalino Ronzitti, 'L'adattamento dell'ordinamento italiano alle norme imperative del diritto internazionale' in Andrea Giardina and Flavia Lattanzi (eds), *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz* (Editoriale Scientifica, 2004) vol 1, 633, 635.

⁵⁴ See International Law Association, 'Resolution No 2/2010 — Reparation for Victims of Armed Conflict' (15–20 August 2010); International Law Association, 'Resolution 1/2014 — Reparation for Victims of Armed Conflict' (7–11 April 2014). See also Andrea Gattini, *Le riparazioni di guerra nel diritto internazionale* (CEDAM, 2003); Emanuela-Chiara Gillard, 'Reparation for Violations of International Humanitarian Law' (2003) 85 *International Review of the Red Cross* 529; Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (Martinus Nijhoff, 2009).

through diplomatic negotiations,⁵⁵ but so far there has been no sign of any serious intention of these two countries to find some effective form of reparation. In fact, the Court could not have decided on an alternative form of satisfaction:⁵⁶ access to justice can be achieved only through the ability of the victims to start a proceeding before an independent judge. There is no other way — no alternative. Even a monetary sum would not be a suitable substitute for access to justice, but only a subsequent form of reparation, which is separate from the fundamental right itself.

On this point, the author shares the opinion of the drafter of this historical decision, the former President of the Court, Professor Giuseppe Tesauro, who affirmed that the Court could not have decided otherwise.⁵⁷

On the other hand, the decision raises some critical issues. First of all, the request of the Tribunal of Florence concerned only the *giurisdizione civile di cognizione* [civil jurisdiction], affirming openly that there is no doubt about the subsistence of the international rule of state immunity in the *giurisdizione civile di esecuzione* [enforcement of domestic judgments]:

Finally, in the present judge's opinion, the issue of constitutionality concerns only the civil jurisdiction of this Tribunal, the sole jurisdictional matter relevant for this specific case, and therefore the doubts of constitutionality are referred [to the Constitutional Court] only within this limited scope. In accordance with the text of the aforementioned New York convention, already ratified by Italy with Article 2 of the *Law No 5/2013*, there is room to argue that, on one hand, Article 24 of the *Italian Constitution* does not allow any obstacles to the justiciability and the condemnation of such serious acts, but on the other it demands that the enforcement of such decisions will be prevented, because such enforcement would be an illicit infringement of other States' sovereignty, in light of the values at the basis of international customary norms not in conflict with the *Constitution*.⁵⁸

In other words, the Tribunal of Florence requested a judgment from the Court on the jurisdiction of an Italian tribunal to judge whether Germany is responsible today for international crimes committed by its army against Italian citizens decades ago. The request never suggested that, in the case of a favourable

⁵⁵ *Jurisdictional Immunities* [2012] ICJ Rep 100, 144 [104]:

In coming to this conclusion, the Court is not unaware that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned. It considers however that the claims arising from the treatment of the Italian military internees referred to in paragraph 99, together with other claims of Italian nationals which have allegedly not been settled — and which formed the basis for the Italian proceedings — could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue.

For a comment, see Nesi, above n 13, 196–7.

⁵⁶ For alternative solutions envisaged before the Court's decision, see Deborah Russo, 'Il rapporto tra norme internazionali generali e principi della *Costituzione* al vaglio della Corte Costituzionale: il Tribunale di Firenze rinvia alla Consulta la questione delle vittime dei crimini nazisti' [2014] *Osservatorio sulle fonti* 1, 11 <http://www.osservatoriosullefonti.it/component/docman/doc_download/690-osf12014russo>.

⁵⁷ Giuseppe Tesauro (Speech delivered at the 'Crimini internazionali e immunità degli Stati: ritorno al dualismo?' Conference, Università di Roma, Rome, 12 November 2014).

⁵⁸ Tribunale di Firenze [Tribunal of Florence], Ordinance No 84, 21 January 2014 [author's trans].

judgment, the next of kin of those victims could expropriate German goods in order to concretely satisfy their award. The Constitutional Court's response, therefore, concerns exclusively the civil jurisdiction, the power of a judge to examine a question in order to assert who is responsible for what, not the actual possibility of enforcing the judgment and getting reparation.⁵⁹ Due to the sensitivity of this subject, the Court could have more clearly emphasised this point; a common Italian judge, after this judgment, could decide to apply the reasoning of the Court at the phase of the implementation of a judgment in the victims' favour, violating German property rights in Italy. On the other hand, the same judge could be more cautious, requesting another judgment from the Court about the executive jurisdiction; in this case, the Court would face a difficult dilemma over whether to mount the utmost defence of the rights of the human being and challenge the sovereign immunity of German property in Italy.⁶⁰

Secondly, the Court could have tried to 'balance' the right of access to justice with the duty to comply with an international decision, not because it was passed by a UN organ, but because it was the result of a peaceful attempt to settle an international dispute. The first part of art 11 of the *Italian Constitution* states that 'Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes'. Accordingly, Italy is bound to follow peaceful means to settle controversies with other states⁶¹ and, possibly, is under an autonomous obligation to implement the accord or the judgment that resolves the dispute. From this perspective, the first part of art 11 could have been used as the material basis upon which the Court could have 'balanced' access to justice with Italy's desire to safeguard friendly and peaceful relations among states.⁶² In doing so, the Court would have avoided 'balancing' state immunity in the case of international crimes and fundamental rights; instead, it could have ruled on the relationship between two supreme principles, the individual right of access to justice and the commitment to resolve international disputes in the proper, peaceful way. Perhaps this 'balancing' would have resulted in the right of access to justice prevailing in any case. However, the Court should have tried to pursue this avenue, rather than rushing

⁵⁹ For a definition of 'enforcement', see European Commission Directorate General for Justice and Consumers, *Glossary* (16 July 2013) <ec.europa.eu/justice/glossary/>:

The enforcement of a judgment consists of securing compliance with it, if necessary by means of coercion as allowed by the law, including the intervention of the forces of law and order. If you win your case in the courts but the other side does not spontaneously comply with the court's order, you can go to the police or a bailiff, depending on the situation, to have the judgment carried out.

⁶⁰ See Longobardo, above n 36. For Attila Tanzi, the immunity from the enforcement of a victorious civil judgment appears to be a 'nearly unassailable stronghold': Attila Tanzi, 'Sulla sentenza Cost 238/2014: *cui prodest?*' (2014) *Forum di Quaderni Costituzionali Rassegna*, [4] <http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2014/12/nota_238_2014_tanzi.pdf>.

⁶¹ See Antonio Cassese, 'Art 11' in Giuseppe Branca (ed), *Commentario della Costituzione: Principi fondamentali* (Zanichelli, 1975) 565, 575. On the peaceful settlement of international disputes, see generally Tullio Treves, *Le controversie internazionali: Nuove tendenze, nuovi tribunali* (Giuffrè, 1999); Alain Pellet, 'Peaceful Settlement of International Disputes' in Rüdiger Wolfrum et al (eds), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012) vol 8, 201.

⁶² For the material character of the first part of art 11, see Cannizzaro, *Trattati internazionali e giudizio di costituzionalità*, above n 42, 299.

to carve out an exception to state immunity, thereby creating a conflict between domestic and international law.⁶³

VI CONCLUSION

The Court, in passing its historical judgment about state immunity and individual access to justice, primarily protected the fundamental right of the victim's next of kin. It stated that Italian tribunals have jurisdiction in these cases, because the rule on state immunity has no legal effect in the Italian legal system where international crimes have occurred. Accordingly, Italian judges must disregard the *Jurisdictional Immunities* decision and civil proceedings may take place. Regarding the separation of international law and the domestic legal system, the Court has courageously stated that state immunity is no longer a shield for states that perpetrated international crimes.

As previously mentioned, the present decision exposes Italy to international responsibility and other risks at the international level, such as a new ICJ proceeding and/or an intervention of the UN Security Council, although this does not appear to be likely. In the meantime, the Italian Government should withdraw its interpretative declaration to the *UN State Immunity Convention*, in order to align its position with the Court's decision.⁶⁴

It is the opinion of this author that this decision will influence the future approach of international and domestic courts to the state immunity rule and the ICJ's decision on the matter. Auspiciously, this decision will strengthen the so far minority jurisprudence of certain domestic courts that has, even after the *Jurisdictional Immunities* case, stressed that state immunity cannot be invoked to refuse victims of international crimes their right to seek justice and reparation.⁶⁵

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⁶³ See De Sena, 'Norme internazionali generali e principi costituzionali fondamentali', above n 33.

⁶⁴ See Natalino Ronzitti, *Crimini di guerra e risarcimenti* (18 November 2014) AffarInternazionali <<http://www.affarinternazionali.it/articolo.asp?ID=2878>>.

⁶⁵ For examples, see the domestic decisions commented on by Elena Sciso: Elena Sciso, 'L'Italia aderisce alla *Convenzione di New York sulle immunità giurisdizionali degli Stati e dei loro beni*' (2013) 96 *Rivista di diritto internazionale* 543, 549.

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