

**Journal of International Criminal Justice**

jicj.oxfordjournals.org

J Int Criminal Justice (2016) doi: 10.1093/jicj/mqw029
 First published online: July 3, 2016

The most recent version of this article [mqw029] was published on 2016-07-21

The Italian Constitutional Court Judgment No. 238 and the Myth of the 'Constitutionalization' of International Law

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Abstract

This article investigates three major international law issues raised by Judgment No. 238, which was handed down by the Constitutional Court of Italy in 2014. First, the Constitutional Court rejected the distinction between procedural and substantial norms of international law. This argument had been maintained by both the International Court of Justice and the European Court of Human Rights in order to deny any actual conflict between the (procedural) customary rule on state immunity and (substantial) jus cogens obligations. In giving priority to fundamental rights, the Constitutional Court instead resorted to interpretative devices typical of the doctrine of constitutionalism. Secondly, in the process of balancing the various constitutional principles at stake, the Court concluded that the commission of crimes against humanity could not justify the total sacrifice of the victims' right to a judge. In doing so, the judges relied on arguments developed by the international law doctrine of jus cogens. Thirdly, although Judgment No. 238 does not constitute an internationally wrongful act per se, its application by the Italian judiciary could perhaps entail Italy's international responsibility. Italy could justify itself by adducing respect for the fundamental rights enshrined in the Constitution of Italy or resorting to the doctrine of 'counter-limits'. However, it is doubtful whether these two claims already possess the necessary degree of recognition in international practice. In conclusion, despite the views expressed by influential scholars over a supposed 'constitutionalization' of international law, this article argues that the doctrine of constitutionalism is still applied reluctantly by both international and national courts.

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Online ISSN 1478-1395 - Print ISSN 1478-1387

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