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SYMPOSIUM VERFASSUNGS- UND VÖLKERRECHT IM SPANNUNGSVERHÄLTNIS

Let Not Triepel Triumph

How To Make the Best Out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order

ANNE PETERS — 23 December, 2014

(This article has previously been published on EJIL: talk!)

The Italian Constiutional Court's decision no. 238 of 22 Oct. 2014 (unofficial translation into English) already inspired a flurry of comments in the blogosphere (see in EJIL talk! Christian Tams (24 Oct. 2014) and Theodor Schilling (12 Nov. 2014); on the Verfassungsblog amongst others Filippo Fontanelli (27 Oct. 2014); on Opinio Juris (19 Nov. 2014); on the Völkerrechtsblog Felix Würkert (11 Dec. 2014)); see also Karin Oellers-Frahm, „Das italienische Verfassungsgericht und das Völkerrecht: Eine unerfreuliche Beziehung", Heidelberg Journal of International Law 2015, issue 1.

In that *Sentenza*, the Corte refused to give effect to the ICJ's judgment (in) *Jurisdictional Immunities of the State* (Germany v. Italy) of 3 February 2012, in which the ICJ had upheld the principle of state immunity against allegations of serious human rights violations of German state organs committed during the Second World War.

Sentenza No. 238 is important not only because it concerns the persisting tension between respecting (state) immunity and protecting human or fundamental rights (see for a recent publication Anne Peters/Evelyne Lagrange/Stefan Oeter/Christian Tomuschat (eds), Immunities in the Age of Global Constitutionalism (Leiden: Brill 2015)), but – maybe even more importantly – because it concerns the relationship between international law (in the shape of a judgment by the ICJ) and domestic law, as applied by a domestic (constitutional) court.

Just the latest item in the sequence of domestic courts' resistance against decisions of international bodies

The Corte relied on its established case-law on the effects of European Union law, notably on the doctrine of *controlimiti* in order to erect a barrier to the "introduction" of the ICJ judgment into the domestic legal order: "As was upheld several times by this Court, there is no doubt that the *fundamental principles of the constitutional order* and inalienable human rights constitute a 'limit to the introduction (...) of generally recognized norms of international law' (...) and serve as 'counterlimits' [*controlimiti*] to the entry of European Union [and now international] law" (*Sentenza* No. 238, in "The law", para. 3.2.).

The Italian *controlimiti*-approach to European or international court decisions is by no means an outlier. Quite to the contrary, the *Sentenza* No. 238 is just one more building block in the wall of "protection" built up by domestic courts against "intrusion" of international law, relying on the precepts of their national constitution. Ironically, this front of resistance (which now deploys effects "against" Germany) had been spearheaded by the German Constitutional Court (*Bundesverfassungsgericht*, BVerfG). In the 1970s, that Court mounted critique against an insufficient respect for human rights by the then European Community (BVerfGE 37, 271 (1974) – *Solange I*) and threatened to scrutinize EC-acts against the yardstick of domestic fundamental rights and to refuse to allow their application in Germany. In 2004, the BVerfG denied a strictly binding effect of the ECHR and ECtHR-judgments, and instead (only) ordered German authorites and courts to "take into account" the Convention and Strasbourg judgments, and only within the confines of the German Basic Law (BVerfGE 111, 307 (2004) – *Görgülü*).

How do these domestic decisions resemble each other and in what respects do they differ, on a purely technical level and in their tone? *Sentenza* No. 238 repeats that any international norm (or international judgment) which stands in conflict with "***principi fondamentali dell' ordinamento costituzionale***" may not be applied by domestic institutions. The German BVerfG in *Görgülü* had marked the boundary of applicability of judgments of the ECtHR with exactly the same wording ("*tragende Grundsätze der Verfassung*").

The referring court of Florence had quoted a previous constitutional judgment pointing to the "***identità***" of the Italian legal order. There, the Corte had "reaffirmed the

principle that 'the tendency of the Italian legal order to be open to generally recognized norms of international law and international treaties is limited by the necessity *to preserve its identity*; thus, first of all, by the values enshrined in the Constitution'" (*Sentenza* No. 238, facts, para. 1.2., quoting Judgment No. 73/2001). This is exactly what other European courts have done before (albeit with regard to EU law): the Spanish Constitutional Court (declaration DTC 1/2004 of 13 December 2004, Sec. II para. 3), the French *Conseil constitutionnel* (décision no 2006-540 DC of 27 July 2006, para. 19) and the German Constitutional Court (2 BvE 2/08 of 30 June 2009, para. 340 – *Treaty of Lisbon*). (See also Constitutional Court of Lithuania, case no 17/02-24/02-06/03-22/04 on the priority of the state constitution over EU law, 14 March 2006, sec. III. para. 9.4.).

Just like the US Supreme Court's *Medellín* decision (*Medellín v. Texas*, 552 U.S. 491 (2008)), *Sentenza* No. 238 is directed against an ICJ judgment. *Medellín* also had to do with constitutional principles, namely with federalism and the separation of powers: the domestic issue here was that the US President had ordered implementation of the ICJ *Avena* judgment in the different states. *Medellín* was however not concerned with respect for fundamental rights of individuals. Another difference is that *Medellín* held that an ICJ judgment was not in itself self-executing but needed a federal law to be implemented domestically. *Sentenza* No. 238 was not concerned with self-executingness, because Italy had, in the statute incorporating the UN Convention on State Immunity, which was adopted after the ICJ judgment, inserted a specific provision which obliged Italian judges to adapt themselves to judgments of the ICJ (Law no. 5 of 14 January 2013). Exactly that provision (Art. 3) was now declared unconstitutional.

Sentenza No. 238 is in some way a follower of the ECJ *Kadi* decision (ECJ, 3 September 2008, *Kadi and Al Barakaat*, joint cases C-402/05 P and C-415/05 P, ECR 2008, I-6351), which the Corte quotes. But unlike *Kadi*, which mounts resistance against the Security Council and thus against a partly unelected and not fully representative body, *Sentenza* No. 238 is directed against the International Court of Justice, a body of elected judges who represent all regions of the world (is it enough to consider it representative?). Generally speaking, this Court has so far enjoyed a high degree of acceptance. The de facto-disobedience to the ICJ seems less justified as a matter of principle, and implies more serious damage to the normativity of the international legal system than disobeying the Security Council.

Just like *Kadi*, *Sentenza* No. 238 insists on the fact that it has nothing to do with "outbound" compliance of the state (Italy) with international law, but only concerns the internal compatibility of two Italian laws with the Italian constitution: "The result is a further reduction of the scope of this norm, *with effects in the domestic legal order only*." (in "The law", para. 3.3., emphasis added). Put differently, the Corte neatly distinguishes "internal" and "external" effects of an international norm: "The impediment to the incorporation of the conventional norm [Article 94 of the United Nations Charter] to our legal order – albeit exclusively for the purposes of the present case – *has no effects on the lawfulness of the external norm* itself, and therefore results in the declaration of unconstitutionality of the special law of adaptation, insofar as it contrasts with the abovementioned fundamental principles of the Constitution" (in "The law", para. 4.1, emphasis added). So technically (in a dualist world view), the case is not about supremacy but about incorporation: "Accordingly, the *incorporation*, and thus the

application, of the international norm would inevitably be precluded, insofar as it conflicts with inviolable principles and rights. This is exactly what has happened in the present case." (in "The law", para. 3.4, emphasis added).

The pretense that the "internal" unconstitutionality basically does not concern international law, and that the decision does not formally accord any priority or supremacy to internal law is as unpersuasive as it has been in the ECJ *Kadi* judgment (ECJ, *Kadi*, paras 287-288 and 299). That distinction between inside and outside resonates the good old 19th century dualism as formulated by Heinrich Triepel, according to which international law and domestic law are "two circles which at best touch each other but which never intersect" (Heinrich Triepel, Völkerrecht und Landesrecht (Leipzig: Verlag von C. L. Hirschfeld 1899), p. 111, my translation).

The Court's consolation that "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." (*Sentenza* No. 238, in "The law", para. 4) does not help much for managing the practical problem at stake.

What can Germany do in the short term?

Which venues are open for Germany to react lawfully against *Sentenza* No. 238? First, Germany might have recourse to the UN Security Council under Art. 94(2) UN Charter. This provision is applicable as soon as a UN member states "fails to perform the obligations incumbent upon it under a judgment rendered" by the ICJ. The admission of

complaints against Germany by Italian courts constitute such a failure, because it disregards the procedural barrier to domestic judicial proceedings against a state protected by immunity. Decisions of Italian courts are imputable to Italy (cf. Art. 4 of the ILC articles on state responsibility).

A *lex specialis* to Art. 94(2) UN Charter seems to be Art. 39 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, the convention which was the jurisdictional basis for the ICJ proceedings that had led to the 2012 judgment. Under Art. 39, Germany could appeal to the Committee of Ministers of the Council of Europe, which could with a 2/3 majority "make recommendations with a view to ensuring compliance with the (…) decision" directed at Italy.

Instead (in any case after failure of diplomatic representations), Germany might institute a new complaint against Italy for violation of state immunity, as authoritatively spelled out by the ICJ judgment. Remember that the ECtHR in *Case of Jones and others v. UK* (appl. nos. 34356/06 and 40528/06, judgment of 14 Jan. 2014) had held that the judgment of the ICJ in *Germany v. Italy* "must be considered (…) as authoritative as regards the content of customary international law" (para. 197).

Res iudicata does not stand against the institution of ICJ-proceedings, because the disregard of the ICJ judgment of 2012 constitutes a new issue. Also, the possibility of having recourse to the Security Council under Art. 94(2) of the UN Charter does not preclude such a complaint, because the two venues are in nature distinct (calling on the Security Council is a political path as opposed to a judicial path) and can be resorted to cumulatively. (On 25 Nov. 2014, one

month after the *Sentenza* No. 238, Italy declared its general recognition of the jurisdiction of the ICJ under the optional clause of Art. 36(2) ICJ Statute), implicitly inviting a second proceeding.)

Sentenza No. 238 itself does not yet constitute an internationally wrongful act, because it does not in itself disregard state immunity. What counts are the lower courts' reconsiderations of the claims, their decisions on holding them admissible by setting aside state immunity. Arguably, already the re-opening of those proceedings, not only decisions on their merits or the execution of a judgment, constitute internationally wrongful acts. The content of Italian state responsibility would then be primarily restitution in kind which would in our case mean to somehow strike down the proceedings against Germany.

Moreover, any execution of a substantive judgment would in addition violate post-judgment immunity against execution. The relevant parts of the pertinent provision of Art. 19 of the UN Convention on State Immunity of 2004 seem to express customary international law. The most attractive German object of execution, the Villa Vigoni, is protected, because it serves governmental objectives in a wider sense, including cultural policy, and it has a non-commercial character (ICJ, Jurisdictional Immunities, para. 119). Art. 60 sentence 2 of the ICJ-Statute does not prevent a new proceeding before the ICJ, because this provison is not applicable (Cf. ICJ, *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals* (Mexico v. United States of America), judgment of 19 January 2009). The issue is not a one of clarifying the meaning of the ICJ judgment of 2012. There is no "dispute as to the meaning or scope" of that judgment.

Another pertinent provision is Art. 30 of the European Dispute Settlement Convention of 1957 which deals with the situation that the state found in breach of international law by the ICJ does not or cannot honour the ICJ judgment: "[I]f the municipal law of that party [in our case Italy] does not permit or only partially permits" to make good the breach of international law found by the ICJ, "the Court (..) shall, if necessary, grant the injured party equitable satisfaction." But such a potential new decision by the ICJ could only confer "equitable satisfaction", and this is not what serves Germany.

What should everybody (notably courts) do in the long term?

Beyond these conventional, more confrontational means of reacting to the Italian breach of international law as it stands, all parties are advised to better prevent and manage such regime collisions. What is needed is the further development of procedural mechanisms of reciprocal restraint, respect, and cooperation needed for the adjustment of competing claims of authority, in order to realize what has been called a "pluralisme ordonné" (Mireille Delmas-Marty) – as opposed to a dualism à la Triepel.

Domestic (constitutional) courts do and should take into consideration international law in good faith and interpret the domestic constitution in the light of international law. Along this line, the *Corte* could have interpreted the (constitutional) right of access to a court under Art. 24 of the Italian Constitution in the light of ECtHR, *Sfountouris v Germany*, appl. no. 24120/06 (31 May 2011) which implicitly held that access to domestic courts (in Germany) in suits for damages on account of German World War II-crimes appear to satisfy the standards of Art. 6 ECHR (pp. 16-18; this

decision on inadmissibility found a claim based on Art. 1 AP 1 in conjunction with Art. 14 ECHR to be inadmissible ratione materiae).

The *Corte* could have used a more "harmonising" approach à la *Jones*. Here the ECtHR had insisted that both different issue areas of international law, the law of immunities, and human rights law, must be reconciled, acknowledging "the need to interpret the Convention so far as possible in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity" (ECtHR, *Jones* para. 189). This led the ECtHR "to conclude that measures taken by a State which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court" (ibid).

Third, the Corte could have applied the *Bosphorus* strategy (ECtHR, *Bosphorus v. Ireland*, appl. no 45036/98, 30 June 2005). In that approach, courts should employ a legal presumption that a legal act performed by a body rooted in "another" legal system is in conformity with the "own" standards, coupled with the reciprocal recognition of such acts, "as long as" some minimum requirements are not undercut. In this scheme, domestic courts renounce on revisiting (judicial or quasi-judicial) decisions taken by an international body on the basis of the rebuttable presumption that the respective international regime, or another state's domestic legal system (in our case Germany) offers a functionally equivalent legal protection.

Most importantly, conflicts between international law and constitutional law should be resolved by balancing in the

concrete case, not on the basis of a normative hierarchy or the norms' expression in international law as opposed to domestic law. Less attention should be paid to the formal sources of law, and more to the substance of the rules in question. The ranking and effects of the norms at stake should be assessed in a more subtle manner, according to their substantial weight and significance. Such a nonformalist, substance-oriented perspective implies that on the one hand certain less significant provisions in state constitutions would have to give way to important international norms. Inversely, fundamental rights guarantees should prevail over less important norms (independent of their locus and type of codification). The fundamental idea is that what counts is the substance, not the formal category of conflicting norms. (Admittedly, this new approach does not always offer strict guidance, because it is debatable which norms are "important" in terms of substance). Still, such a flexible approach appears to correspond better with the current state of global legal integration than does the idea of a strict hierarchy, particularly in human rights matters. From this perspective, international law, constitutional law, and other states' constitutional law, too, find themselves in a fluent state of interaction and reciprocal influence, based on discourse and mutual adaptation, but not in a hierarchical relationship.

Conclusions

The stability of the inter-state system which state immunity seeks to protect is sustainable only if it is perceived as being fair. The persistence of a de facto non-accountability for state-sponsored crimes undermines this sustainability. Concededly, the widespread unease about upholding immunity even against allegations of serious human rights

violations is particularly pronounced in the context of criminal proceedings against individual officials who are suspect of being personally responsible for ordering or commiting crimes. For example, in a criminal proceeding in Switzerland against a former Algerian minister of defence, instituted for torture, the Swiss Federal Criminal Tribunal granted no immunity *ratione personae* for acts which the minister had allegedly committed when still in office (Swiss Federal Criminal Tribunal, decision of 25 July 2012, BBl. 2011, 140).

It is often said that the so-called "civil" (rather "public law") proceedings against states (adressed as juridical persons), such as the case underlying *Sentenza* No. 238, should in normative terms be assessed differently from criminal proceedings against individuals, and that – if at all – a human rights exception is more appropriate in the latter context. I hesitate to agree. In cases of torture and the like, the criminals are normally office holders whose actions are imputable to states, so that both tracks (individual criminal responsibility and state responsibility) will normally be pursued in parallel. From the perspective of the victim, it is not self-evident that the claim against a juridical person which seeks a statement of state responsibility and damages should be less worthy of being honoured than the request for a criminal penalty against a perpetrator. For example, the recent important ECtHR case, *Jones v. UK*, was a case on state immunity (involving Saudi Arabia) against allegations of torture. Here the ECtHR observed that "in light of the developments currently under way in this area of public international law, this is a matter which needs to be kept under review" (para. 215). However, in comparison to such type of dispute about torture of current or recent regimes, the issue of the Italian prisoners of war makes a bad case for

two reasins. First, an international law-based entitlement of victims of of violations of the law of armed conflict to financial compensation is still denied by most domestic courts. Second, the claim concerns crimes committed more than one generation ago. Even if we do not accept any formal prescription for the prosecution of such egregious crimes, the lapse of time does weaken the claims.

Is the openness of the question "who decides who decides" and the lack of an ultimate authority – in our context for example a tribunal sitting over and above the ICJ and the Italian *Corte Costituzionale* – a merit of the global order? In theory, such openness constitutes an additional mechanism for limiting power and seems to allow for a heterarchical adjustment of regimes. Within this paradigm, the constitutional resistance of the *Corte Costituzionale* might be interpreted as the pulling of an "emergency brake" whose availability had been the pre-condition for the opening-up of the states' constitutions towards the international sphere in the first place. Along this line, one could argue that – in the absence of a super-arbiter – the Italian courts are entitled to act as "guardians" of rights of the victims or their descendants "as long as" a customary human rights exception to state immunity has not cristallized or until a special agreement between Germay and Italy, on a special indemnation programme or a special claims tribunal, has been concluded.

In the long run, reasonable resistance by national actors – if it is exercised under respect of the principles for ordering pluralism, notably in good faith and with due regard for the overarching ideal of international cooperation – might build up the political pressure needed for promoting the progressive evolution of international law in the direction of

a system more considerate of human rights. Indeed, such domestic resistance has in the past had salutary effects in the sense that it stimulated an improvement of the attacked regime's fundamental rights protection: In reaction to the German Constitutional Court's *Solange I* decision, the EC/EU formalised its scheme of fundamental rights protection culminating in the European Charter of Fundamental Rights and – perhaps – the accession of the EU to the ECHR. Arguably, it has been in reaction to the ECJ's *Kadi* decision and its progeny that the United Nations 1267-sanctions regime was complemented with an ombudsman procedure (UN SC Res 1904 (2009)) which has been gradually improved (UN SC Res. 1989 (2011)).

Superficially, the *Sentenza* No. 238 strengthens the position of the individual against the state. But on a more profound level, it strengthens unilateralism over universalism: It gives priority to one (state's) national outlook about what constitutes a proper legal order over the universal standard pronounced by an international court. Concededly, this ICJ-standard is unsatisfactory and seems to be biased in favour of the stability of an inter-state system. On the other hand it still has the merit of being *universal*. The lack of an ultimate arbiter tends to result in the political dominance of the more powerful actors which are normally the domestic ones such as the Italian Constiutional Court. And a stiff dualism à la Tripel and Tesauro bears the real risk of reinforcing the perception that international law is only soft law or even no law at all.

Despite its staunch dualism, the *Corte* insinuates that (somehow), the two legal circles (to use Triepel's term) may interact: "At the same time, however, this [declaration of unconstitutionality] may also contribute to a desirable – and

desired by many – evolution of international law itself" (ibid., in "The law", para. 3.3.). However: You cannot have the cake and eat it, too.

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