A clever and dangerous move – or: a Roman Court goes Lutheran

verfassungsblog.de/a-clever-and-dangerous-move-or-a-roman-court-goes-lutheran/

Christian J. Tams Fr 12 Mai 2017

Fr 12 Mai 2017

2 ½ years after it was rendered, *Sentenza 238/14* of the Italian Constitutional Court remains an intriguing decision and continues to divide opinion. Was this a heroic act in defence of fundamental values, or a foolish, pointless exercise in 'token resistance'? While the language is more guarded, many of the papers presented at a German-Italian Workshop at the Villa Vigoni are inspired by one or the other assessment.

The following short comment recognises the controversies prompted by the Judgment. My focus is not on the outcome, though, but on the Constitutional Court's reasoning – and on two features of that reasoning in particular. With the benefit of hindsight, *Sentenza 238/14* to me seems a clever and dangerous decision: *clever* because in the long debate between remedies and immunity, the Constitutional Court opened up a new line of argument; and *dangerous* because its line of argument has undesirable side-effects. After a brief introduction to the debate, I will deal with both aspects in turn.

One of international law's 'big debates'

By late 2014, when the Italian Constitutional Court rendered its decision, international lawyers had been through two decades of intense debates about the relationship between remedial rights and principles of state immunity in cases of war crimes and human rights breaches. State immunity, in the usual course of events, precludes domestic courts from sitting in judgment over acts of a foreign State without that State's consent. The principle comes with exceptions, but traditionally, it protected the conduct of a foreign State's security forces. For decades, the traditional approach had been questioned by those arguing that international law should not grant States impunity for egregious wrongs – eg because immunity would have to yield to superior rules of international law (such as rules prohibiting torture or war crimes), or because the recognition of a right to a remedy implied a waiver of immunity. By 2014, when the Italian Constitutional Court rendered its judgment, these and many other arguments had been tested in dozens of settings. They did not, of course, go away. But it is probably fair to say that they showed signs of wear and tear. The cause endured, but it had not made much headway. In fact, in 2012, in its judgment in the *Jurisdictional Immunities* case, the International Court of Justice found that Italian courts had acted unlawfully when rejecting Germany's claim to immunity for war crimes – which a prominent commentator considered to be the "final nail in the coffin of attempts to circumvent State immunity in domestic civil proceedings" (*O'Keefe*).

A clever move

All this forms the backdrop to the Constitutional Court's *Sentenza 238/14* – but no more than that. For rather than reengaging with the long-standing international law debate, the Constitutional Court changed tack. It sidestepped debates about the scope of immunity under international law and expressly accepted (albeit grudgingly, one can assume) the ICJ's reading of international law: in the words of the Constitutional Court, the international legal rules of immunity had been "defined by the ICJ", and as rules of international law, they reached into the Italian legal order, "as interpreted in the international legal order". Not even an echo, then, in *Sentenza 238/2014*, of the clarion calls of earlier Italian decisions, which had refused to give effect to immunity rules if these "would hinder the protection of values whose safeguard is to be considered … essential to the whole international community" (*Ferrini*).

Instead of rehearsing international law debates, the Constitutional Court approached the matter as a question of foreign relations law: its decision is about the effects of immunity, as "defined by the ICJ", within the Italian Constitutional order. No doubt that order is open to rules of international law, but it also enshrines human rights and a constitutional right to a remedy – there is a "conflict between the norm of international law … incorporated

and applied in the domestic legal order, as interpreted in the international legal order, and norms and principles of the Constitution". It is that conflict (rather than the international law debate between human rights and immunity) that the Constitutional Court addresses: it prefers home games to away games. And on its Italian home ground, the ‘human rights cause' triumphs: the Italian constitutional right to an effective remedy in case of infringements of "the inviolable rights of the person" was not to be construed in light of immunities "as interpreted in the international legal order"; it has an autonomous existence and is limited by competing constitutional principles only (which in the case at hand gave way).

From an international law perspective, the Constitutional Court’s change of tack is certainly clever. Clever because it takes the argument to a different level. And clever also because it shields *Sentenza 238/2014* from the obvious criticism: that the Italian Constitutional Court thought it knew international law better than the ICJ, and than the many other domestic and international courts that had upheld immunity in similar proceedings. The Constitutional Court does not make such a claim; it claims to know Italian constitutional law better – and who would fault it for that?

A dangerous last line of defence

Cleverness comes at a price, though. In opting to go constitutional, the Italian Constitutional Court plays havoc with international law. It does so in two respects: as regards its outcome, and as regards the process by which that outcome was reached. The first point is fairly straightforward: by refusing to give effect to the duty to respect the immunity of foreign States, as concretised in a binding ICJ judgment, the Constitutional Court pushes Italy towards breaching international law, and this in a setting in which the content of international law had been concretised in a binding ICJ judgment. The fact that many will sympathise with the Constitutional Court’s conduct does not make that breach any less blatant.

The second point is less obvious, but systematically more relevant. By construing constitutional law in isolation from international law, and by giving it primacy, the Constitutional Court adopts what has been described a 'Triepelian approach’ (*Anne Peters*); one that could result in a ’shattering schism between internal and international law' (*Robert Kolb*). Underlying these and similar statements is a feeling that by opting to decide the case on constitutional grounds, the Constitutional Court, despite perhaps good intentions, has played with fire.

Upon reflection, the stark language of ‘schisms’ and ‘Triepel’ probably overstates matters. For the Constitutional Court to emphasise the primacy of constitutional law over international law is not as such unusual. Most domestic legal systems, even those that profess openness towards the international or supranational level, preserve the option of some constitutional override: an override that domestic legal order can eg ensure by according rules of international law a status below the constitutional level; by insisting that while domestic law ought to be construed in light of international law principles, but only as long as such enlightened construction does not fall foul of overarching constitutional principles; or by limiting the number of international law rules that can be invoked before domestic courts. High-profile decisions from *Solange/Görgülü* to *Medellin* to *Kadi* are attempts to strike the right balance, but they all insist on the possibility of some constitutional override. All of them assume that constitutional law determines just how intrusive international law should be – and that, in case of a clash between domestic and international law, "any change in the national law remains contingent upon the will of the failing state" (*Antonio Cassese*). Perhaps, in fact, this is international law’s real achilles heel in the era of inward looking obligations: that, outside niche areas, it does not, "by itself, possess the force to amend or repeal internationally unlawful domestic … acts" (id.). But cases like *Kadi* and perhaps now *Sentenza 238/2014* are likely to give even some die-hard internationalists pause. They force international lawyers to confront a tricky question: what should be done with the international law we do not like? Perhaps some constitutional override option is a necessary safety valve.

If few domestic courts or domestic legal orders are free from protectionist leanings, *Sentenza 238/2014* stands out for its bluntness. The constitutional override comes without niceties, has an almost Lutheran directness to it ('Here I stand, I can do no other') that one does not usually associate with Rome. International law is refused effect without regrets, and without any balancing or even the pretense of a constructive dialogue. International law and constitutional law are neatly separated: the former accepts immunity, the latter does not. In the ’separatist treatment' (Kolb) offered by the Constitutional Court, international law is denied any 'directive function'

('*Orientierungswirkung*'). In the discussion of constitutional law, international law no longer features, at least not expressly: not as part of a balancing exercise (weighing the need to grant an effective remedy against the need to comply with international law); not as part of a 'Solange construction' in which non-compliance with international law remains an option, but is the exception to the default position.

The problem with *Sentenza 238/2014*, then, is not that it insists on the primacy of constitutional law over international law, but that it refuses to factor international law into its constitutional law reasoning. Whilst the principle of a constitutional override may be necessary, the process by which the Constitutional Court overrode international law is highly problematic. More than anything else, it is the refusal to balance – the 'Here I stand, I can do no other' – that is problematic. Conflicts between remedial rights and State immunity will not be solved through Lutheran tough-mindedness.

SUGGESTED CITATION Tams, Christian J.: *A clever and dangerous move – or: a Roman Court goes Lutheran, VerfBlog,* 2017/5/12, http://verfassungsblog.de/a-clever-and-dangerous-move-or-a-roman-court-goes-lutheran/.