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Civil disobedience to international law: national fundamental rights resistance and the power of international constitutionalism

Disobbedienza civile al diritto internazionale: la resistenza nazionale in base ai diritti fondamentali, e la forza del costituzionalismo internazionale

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Abstract: To the delight of Westphalian international law pluralists, recent decisions by national and regional courts have sharply challenged the authority of international organizations and tribunals. The U.S. Supreme Court, in *Medellín* (2008), rejected the power of the International Court of Justice (ICJ) to stick its own provisional measures in the wheels of Texan criminal justice. In the famous *Kadi* case (2008), the Court of Justice of the European Union (CJEU) challenged the applicability of Security Council anti-terrorism sanctions for their violation of European fundamental administrative justice rights. More recently (2014), the Italian Constitutional Court rejected the ICJ's decision requiring Italy to respect the international customary law protection of Germany's sovereign

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immunity from civil claims brought in Italian courts. Such national disobedience poses a challenge to the international constitutionalist ideal, by which state compliance with international law is assumed to promote human rights and the rule of law. But not all expressions of national disobedience to international law are homologous, and this paper will defend a kind of limited, “civil” disobedience to international law, where national fundamental rights, ultimately international in character, are at stake.

Key Words: constitutionalism, fundamental rights, *Jurisdictional Immunities*, *Kadi*, Italian Constitutional Court

Riassunto: Alcune sentenze recenti di corti nazionali e regionali hanno contestato l’autorità di organizzazioni e corti internazionali. Tale disobediienza nazionale mette in dubbio l’ideale del costituzionalismo internazionale, secondo cui la conformità degli stati nazionali al diritto internazionale implica un rafforzamento dei diritti umani e del rule of law. Quest’articolo sostiene che non tutte delle espressioni di disobediienza nazionale al diritto internazionale sono omologhe, e che tale disobediienza potrebbe essere giustificabile, quando intrapresa per rafforzare i diritti fondamentali.

Parole chiave: Corte costituzionale, diritto internazionale, costituzionalismo, diritti fondamentali, *Kadi*

1 Introduction

Our paradigms of international law vary depending upon where we stand. In this paper, I will try to navigate between the often nationalistic, Westphalian dualist approach of my country of origin, the United States, and the

more international, constitutional and monistic approach of Europe, where I live. I seek to make sense of recent decisions, by the Italian Constitutional Court and the Court of Justice of the European Union (CJEU), which – contrary to this general tendency – take an aggressively dualistic, anti-constitutionalist approach to international law. I want to examine how different they may be, actually and potentially, from apparently similar U.S. rejections of international law, and to consider what they mean for a constitutionalist ideal of international law more generally.

2 Human-centered and state-centered visions of international law

Let's start in Italy, where many citizens suffered serious human rights violations by the occupying German forces during the Second World War. Germany eventually paid reparations to many categories of victims, like prisoners of war and Jews. But others, though massacred or deported to slavery, never qualified to get any. One of them, Luigi Ferrini, brought a civil suit against Germany in an Italian court, asking for damages in compensation for slavery and crimes against humanity, which are essentially *jus cogens* violations. Unsurprisingly, the Italian lower courts threw out his case as soon as Germany asserted its right to sovereign immunity. But, inspired by the *Pinochet* precedent of the British House of Lords, which carved out a *jus cogens* exception to functional immunity, and also by Belgian attempts to displace personal immunities according to the same logic, Ferrini persisted on appeal, arguing that there was a *jus cogens* exception to sovereign immunity as well. The Italian Supreme Court of Cassation finally agreed with him. It gave the lower courts leave to hear his case, and empowered them, in another case,

to confiscate German property in Italy, in order to satisfy a separate judgment against Germany.

Hoping to put a stop to this, Germany then sued Italy before the International Court of Justice (ICJ) for violation of international customary law in disrespecting its right of sovereign immunity. In 2012, the ICJ delivered its decision in the *Jurisdictional Immunities* case.²

In his opinion supporting Italy's right to disrespect German sovereign immunity for crimes against humanity, Judge Cançado Trindade put forward a powerfully humanistic vision of international law and justice. According to this vision, the whole point of pursuing an international public order is precisely to protect human beings from crimes against humanity. States, therefore, do not get to determine the content of this ultimate international order. It is instead rooted in human rights that are "anterior and superior" to them. States can certainly disturb this order. And, in the best of cases, they can restore this order too, by paying reparations to victims on their own accord, or at least by enabling victims to sue other delinquent states in their courts for civil compensation. In promoting this human-centered ideal of an international rule of law, the agents of international law must challenge states and discipline them; they ought to resist states' arrogant claims of sovereignty. International law's core doctrine, the rule of law, ultimately serves the even deeper value of protecting the rights of human beings, including the right to justice.³

2 *Jurisdictional Immunities (Germany v. Italy)*, Judgment, 3 February 2012, I.C.J. Reports (2012) 99.

3 *Jurisdictional Immunities (Germany v. Italy)*, Judgment, 3 February 2012, I.C.J. Reports (2012) 99, Dissenting Opinion of Judge Cançado Trindade, ¶150. For further articulations of this view, see Cançado Trindade, 'L'humanité comme sujet du droit international: nouvelles réflexions', 62 *Revista da Faculdade de Direito da UFMG* (2012) 57 and Cançado Trindade, 'Os tribunais

According to Judge Cançado Trindade, the rival, state-centered view of the international order is a distorted one; it rests upon a myth of civilization that poorly conceals the violent barbarism lying behind the veil of state sovereignty. He writes that myopic “State-centric thinking, to the exclusion of human beings” has had disastrous, catastrophic consequences.⁴ For this reason, he argues that Italy ought to be able to override Germany’s sovereign immunity for “grave violations of human rights and of international humanitarian law, for war crimes and crimes against humanity... To insist on pursuing a strictly inter-State approach in the relationships of responsibility leads to manifest injustice.”⁵ And, to allow States to perpetrate grave violations of human rights, and then to get away with them by asserting their sovereign immunity, is the very essence of lawlessness.⁶ State immunities cannot be contrived to shield states that have committed atrocities from paying for the disorder that they have sowed. State-centric doctrines of immunity notwithstanding, he concluded that Italian courts were right to insist on providing access to justice for victims of Nazi Germany’s atrocities.

Judge Cançado Trindade’s human-centered vision of international law did not prevail in the final majority decision of the ICJ. His opinion was a dissenting one, and he readily acknowledges that there lies a wide abyss between its vision and that put forward in the majority opinion.⁷ The ICJ’s majority decided instead to protect Germany’s sovereign immunity, to protect Germany from Italian civil responsibility

internacionalis contemporâneos e a busca da realização do ideal da justiça internacional’, 57 *Revista da Faculdade de Direito da UFMG* (2010) 37.

4 *Ibid.*, at ¶163.

5 *Ibid.*, at ¶179.

6 *Ibid.*, at ¶219.

7 *Ibid.*, at ¶288.

for Nazi atrocities. The majority recognized that Germany had committed both war crimes and crimes against humanity against Italians, on Italian territory no less. But it still denied Italian courts the power to bring justice to Italian victims, otherwise deprived of other forms of reparation. Looking at the practice and *opinio juris* of States, the ICJ found no exception to the right of state sovereign immunity from foreign civil jurisdiction, even for war crimes and crimes against humanity. The Court was conspicuously unmoved by Italy's argument that the *jus cogens* status of Germany's violations ought to override its claim to immunity. The ICJ considered sovereign immunity instead as a purely procedural matter. Consequently, a state's customary law right to sovereign immunity cannot be affected by the enormity of the crimes motivating the improper jurisdiction. According to the majority, there was nothing in the substantive rules of *jus cogens* that entitled Italian victims of German violations to seek enforcement and justice.⁸ The Court thus ordered Italy to take measures to ensure that its courts would respect Germany's sovereign immunity.

What happened next gives us a fine opportunity to reflect upon the scope, nature and status of public international law, and its bearing upon states. It pushes us to consider the value of states' respect and disrespect for their obligations under public international law, and the different modes for expressing this. More specifically, the ICJ's decision, and its Italian aftermath, challenge the cosmopolitan, constitutionalist ideal of international law, which envisions the rightful reign of higher, international, universal norms over potentially delinquent and essentially self-interested states.

8 *Jurisdictional Immunities*, *supra* note 1, at ¶95.

3 The international constitutionalist ideal, and tensions between its formal monism and substantive humanism

The constitutionalist ideal aspires to the progressive achievement of an enlightened, post-Westphalian, hierarchically supreme international law, able to impose real constraints upon states. In this proudly internationalist view, advanced by such thinkers as the late Antonio Cassese, the only conceivable reason that states would “resist international rules in the name of their sovereign prerogatives [is] in order to pursue their short-term national interests.”⁹ Constitutionalists see international laws as issuing from a beneficent international community. The consensus of this community, necessary to enunciate such rules in the first place, effectively filters out the less-enlightened, uncivilized, anti-humanistic interests; it is assumed able of endorsing only rules imbued with a humanistic, human rights promoting content, the best ones for furthering the international public good.

This cosmopolitan view mistrusts state sovereignty, for pursuing only short-term parochial interests, and for its long association with massive violations of peace, security and human rights. It follows from this view that otherwise self-interested states have a duty (both ethical and legal) to submit to international law. The international order of the rule of law and the protection of human rights thus demands a critical approach to the supposedly sovereign national state, in order to recognize human dignity as the basis of

9 Cassese, ‘Towards a Moderate Monism: Could International Rules Eventually Acquire the Force to Invalidate Inconsistent National Laws?’, in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012) 187, at 189, 199.

international law.¹⁰ According to the constitutionalist view, good cosmopolitan public citizens ought to recognize the inherent supremacy of the international order over conflicting state claims.

In this monistic order, the legitimacy of national law depends in fact upon its conformity to international law; states are not free to posit competing values. Within the international constitutionalist paradigm, there is little room for the view that state resistance to international law might be a form of civil disobedience, pursued not for short-term parochial interest, but in the name of the humanistic values underpinning international law itself. In this view, there is little hope that national judges might also understand and prioritize cosmopolitan values.

Such international constitutionalism is held up, especially in Europe, as the antidote to a pernicious U.S. exceptionalism. According to this view, the U.S. exceptionalist approach to international law is motivated above all by a disdain for it.¹¹ The ensuing sense of freedom from the constraints of international law helped the U.S. to legitimize, at least in its own eyes, such travesties as its unauthorized invasion of Iraq and torture of detainees. The paradigmatic judicial expression of such Westphalian exceptionalism is the

10 Kumm, 'The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law', 20 *Indiana Journal of Global Legal Studies* (2013) 605, at 610-11. See also Caçado Trindade, Kant na Haia: a abordagem constitucional do direito internacional pela Corte Internacional de Justiça (1945-1990), 52 *Revista da Faculdade de Direito da UFMG* (2008) 299 and Bodanese Rodegheri, 'Cosmopolitismo e proteção internacional dos direitos humanos: perspectiva da união europeia e da necessidade de diálogo com os cidadãos', 66 *Revista da Faculdade de Direito da UFMG* (2015) 457.

11 See, for example, Glennon, 'Why the Security Council Failed', *Foreign Affairs* (May/June 2003). Retrieved March 11, 2016, from <https://www.foreignaffairs.com/articles/iraq/2003-05-01/why-security-council-failed>; J. Goldsmith and E. Posner, *The Limits of International Law* (2007).

U.S. Supreme Court's decision in *Medellín v. Texas*.¹² Here, the U.S. Court rejected, in the strongest terms, the ICJ's authority to direct U.S. state courts to review the convictions of 51 Mexican citizens, sentenced to death without having had proper consular contacts at the time of their arrest. The Supreme Court acknowledged that under the UN Charter, the U.S. had an "international law obligation" to comply with the ICJ's decision in the *Avena* case.¹³ But it deflated the significance of the international law obligation into something like a very weak presumption of proper action, easily overcome by a state's change of will. In the U.S. Supreme Court's interpretation, Article 94(1) of the UN Charter provided only that a Member State "undertakes to comply" with decisions of the ICJ. And the Court cleverly read this "undertakes" as injecting a large dose of state discretion *not to comply!* It had the audacity to locate the evidence for this hyper-Westphalian interpretation in Art. 94(2) itself: the UN Charter, in reposing the power to enforce ICJ decisions in the Security Council, actually gives Member States the option NOT to comply, and so to take their chances in dodging Security Council enforcement. And since the U.S. can veto any Security Council enforcement measure anyway, it clearly could have had no intention to oblige itself to comply automatically.

Not only did the *Medellín* court greatly privilege U.S. state sovereignty over countervailing international obligations. But it did so in order to displace the serious human rights claims – specifically, the temporary reprieve from the death penalty – underlying the U.S. and Mexico's dispute over the Vienna Convention on Consular Relations.¹⁴ In fact,

12 552 U.S. 491 (2008).

13 *Ibid.*, at 8.

14 A more recent example of the U.S. Supreme Court's disinterest in

Medellín himself was executed by the State of Texas a few months after the Supreme Court's decision extinguished his chance of further appeals.

Insofar as we want to criticize this Westphalian approach, international constitutionalism appears as a salutary check upon a lawless U.S. exceptionalism, just as it does upon human rights outlaws in the post-colonial world. But, what should happen when the international order that international constitutionalism wants to buttress itself privileges state sovereignty, or international institutional power, over humanistic values? To answer this, we have to disentangle the formal aspect of this ideal – international legal supremacy, monism – from its substantive human rights content. Which locus of power – the international or national – ought to prevail, because it is best equipped to serve peace, security, justice and human rights, is not a given. Whether or not the commands issuing from the international realm deserve our states' allegiance may or must ultimately depend upon what policies and protections they would yield.¹⁵

international norms can be seen in its rejection of President Obama's executive measures to limit carbon emissions and thus enable the U.S. to respect the 2015 Paris Climate Agreement (*State of West Virginia, et al. v. EPA*, U.S. Supreme Court, No. 15A773).

- 15 See A. Nollkaemper, *National Courts and the International Rule of Law* (2011), at 289, arguing that the "supremacy of international law does not need to be understood as blind formalism, but can be construed in substantive terms. It cannot be presumed; it has to be earned on substance. The strength and persuasive power of the principle of supremacy at the domestic level depends of its ability to conform to rule-of-law requirements and to the values that international law proclaims."

4 Contesting formal international monism in the name of substantive humanism: potential acts of international civil disobedience by the Italian Constitutional Court and the Court of Justice of the European Union

We can examine this question by looking more closely at Italy's response to its defeat in the *Jurisdictional Immunities* case. At first, Italy bowed, responsibly and unsurprisingly, to the state-centered logic of the ICJ decision. Its previously path-breaking Supreme Court of Cassation dismissed an analogous civil lawsuit against Germany in deference to the international court, and signaled to the lower courts that they must do the same.¹⁶ Parliament enacted Law no. 5 of 14 January 2013, ratifying the United Nations Convention on the Jurisdictional Immunity of States and Their Property, and implementing it into the Italian domestic order. This law required the domestic courts to decline jurisdiction in ongoing or future cases when the ICJ has ordered Italy to do so. It also empowered the courts to review final judgments in previous cases in which Germany's right to sovereign immunity had been violated.¹⁷ But then the Italian Constitutional Court, asked by the Tribunal of Florence to reconsider Italy's approach to sovereign immunity, went rogue.

What did the Constitutional Court do? In its *Judgment 238 of 2014*, it broke with the Supreme Court of Cassation,

16 *Corte di Cassazione* (Supreme Court of Italy), *Judgments no. 32139 of 2012 and no. 4284 of 2013*.

17 See Fontanelli, *I know it's wrong but I just can't do right: First impressions on judgment no. 238 of 2014 of the Italian Constitutional Court* (2014), available at <http://www.diritticomparati.it/2014/10/i-know-its-wrong-but-i-just-cant-do-right-first-impressions-on-judgment-no-238-of-2014-of-the-italian-constitutional.html> (last visited 3 March 2016).

and declared the national law implementing international sovereign immunity to be unconstitutional. According to the Constitutional Court, the law violated the right to justice, understood as the right to go to court to vindicate individual rights and legitimate interests. The Court interpreted this right as a “sacred and irrepressible principle” of the Italian constitutional system.¹⁸ The supreme constitutional status of the right to justice rendered the domestic law pledging Italy’s allegiance to the UN in general, and the ICJ in particular, as well as to the international customary law regime of sovereign immunity unconstitutional. The Court observed that Germany had committed grave violations of human rights. And it decided that to grant Germany sovereign immunity from civil justice for these violations, in obeisance to international law, would be a disproportionate sacrifice of Italy’s core republican values.

Just like the Court of Justice of the European Union (CJEU) in *Kadi*, of which more later, the Constitutional Court asserted the power to review the internal, fundamental rights legitimacy of norms originating in the international order.¹⁹ The Italian laws implementing Italy’s adherence to the UN Charter, and its obligation to comply with decisions of the ICJ (1957) and the International Convention on Jurisdictional Immunity of States (2012) were thus declared to be unconstitutional, insofar as they obliged Italy to privilege sovereign immunity, even in cases for justice for crimes against humanity and war crimes, over its own fundamental rights.

18 We can ignore for the moment that Italy is the #1 state to be condemned by the European Court of Human Rights for the violation of precisely this right, to a fair and speedy trial, as set forth in Art. 6.1 of the European Convention on Human Rights.

19 *Corte costituzionale* (Constitutional Court of Italy), Judgment no. 238 of 2014, at § 3.4.

How much ammunition does the Italian Court's independence from international law give to Westphalian pluralists or exceptionalists, who contrast with international constitutionalists in arguing that the international realm is lawless, and rightly so? To answer that, we must consider not only *that* the Constitutional Court set the Italian state up to violate international law. We must also consider *how* it did so, and the reasons that it marshaled in its defense.

The Italian Court chose not to engage with the merits of the ICJ's statist interpretation of the law on state sovereign immunity.²⁰ It instead made a great gesture of bowing before the ICJ's authority to interpret international law, even disclaiming its own power, as a mere national court, to review it. The Italian Court even acknowledged that it had a duty, both international and constitutional, to implement international customary law, in conformity with the specific interpretation determined by the international legal system. In putting forward, however, its own constitutional rights-based interpretation of the scope of sovereign immunity, the Italian Court asserted its legitimate power as a national court to refine the doctrine of sovereign immunity. And it expressed a hope that it might one day influence international customary law.²¹ In fact, it was national courts that had reduced its scope to just *atti iure imperii* in the first place, excluding its protection in commercial cases so as to recognize the rights of other contracting parties. It is natural that national courts evaluate sovereign immunity, leaving it up to international bodies to recognize the state practice at the core of an evolving international custom.²²

20 Contrast this with the Court of Cassation's 2012 decision in the *Albers* case, which took issue with the ICJ's reasoning, but bowed to its authority, dismissing the relative case against Germany (Fontanelli, 2013).

21 Constitutional Court of Italy, *supra* note 18, at §3.1.

22 Instead, the European Court of Human Rights endorsed the ICJ's expansive

But, despite this internationalist rhetoric, the Italian Court's reasoning was ultimately quite solipsistic. After deferring to the ICJ's authoritative power to define international customary law, the *Corte costituzionale* asserted its own power to have the final say over its meaning in relation to the Italian constitution. And it determined the international law norm of sovereign immunity, even for crimes against humanity, to be extraneous to the Italian legal system, the integrity of which is protected by a doctrine of "counterlimits." This doctrine of national constitutional counterlimits to international law's domestic penetration serves to vaccinate the Italian legal system against international (experienced as "foreign") norms that would infect its fundamental principles.²³ The Court did not seriously aspire to see its interpretation resonate beyond Italian borders. It did not really try to convince anyone that its view ought to inform the international understanding of sovereign immunity by undertaking a serious analysis of customary law.²⁴

view of sovereign immunity as unaffected by underlying *jus cogens* violations, in *Jones v. U.K.* (2014). Judgment 238/2014's greatest potential impact on the development of international law may instead be regressive, in weakening the Art. 27 Vienna Convention principle of the supremacy of international treaty obligations over conflicting state law, in the name of fundamental rights counter-limits to the domestic reception of international law. See Mazzeschi, 'La sentenza n. 238 del 2014 della Corte costituzionale ed i suoi possibili effetti sul diritto internazionale', 9 *Diritti Umani e Diritto Internazionale* (2015) 23, at 39.

23 *Ibid.*, at §3.2.

24 Fontanelli argues persuasively that the pitfall in the Constitutional Court's reasoning is that its decision "might come to be regarded as a comparatively insignificant piece of state practice, that is, one not denoted by the international *opinio juris* necessary for the emergence of customary international law." See also Pavoni, 'INTERNATIONAL DECISION: Implementation of ICJ decisions--sovereign immunity-- international crimes--victims' right to judicial protection--fundamental principles of national constitutions--customary international law', 109 *American Journal of International Law* (2015) 400 at 403.

While its long-term impact on the specific meaning of the international customary law of sovereign immunity remains to be seen, it is not too early to consider its significance for the integrity of the monist, universalist, constitutionalist ideal of international law. This decision has been roundly criticized as a rejection of that ideal, “a high peak of a new form of robust dualism.”²⁵ Peters faults the *Corte costituzionale* for strengthening unilateralism over universalism, giving “priority to one (state’s) national outlook about what constitutes a proper legal order over the universal standard pronounced by an international court. Concededly, the ICJ-standard is unsatisfactory and seems to be biased in favor of the inter-state system. On the other hand it still has the merit of being *universal*.” The Constitutional Court’s rigid dualism, by contrast, risks “reinforcing the perception that international law is only soft law or even no law at all.”²⁶ Just as bad as the substantive dualism of the Court’s position is the aggressively exceptionalist style of its reasoning. Fontanelli slams the Constitutional Court for renouncing the internationalist reasoning of earlier decisions, which asserted a *jus cogens*-grounded rationale for overstepping state sovereign immunity. Instead, it based everything on

25 Kolb, ‘The relationship between the international and the municipal legal order: reflections on the decision no 238/2014 of the Italian Constitutional Court’, 2 *Questions of International Law* (2014) 5, at 6, 11. This robust and radicalized dualism rejects the value of constructive dialogue between national and international courts, and threatens “a shattering schism between internal and international law, the former being pitched against the second in trying to sterilize its effect,” leading to “a sort of murder of international law through municipal law.”

26 Peters, *Let Not Triepel Triumph – How To Make the Best Out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order* (2014), available at <http://www.ejiltalk.org/let-not-triepel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i/> (last visited 4 March 2016).

the “untouchable core” of the Italian constitution, appealing provincially to “the faith of the audience, in a call for identitarian exceptionalism.”²⁷ The Court had a rhetorical choice, to appeal to a national or to an international public. It limited itself, regrettably, to the former. It was neither the first, nor the most important, domestic court to do this.

To justify its bold international law disobedience, the Constitutional Court invoked the CJEU’s famous *Kadi* decision of 2008.²⁸ The *Kadi* court had ultimately voided EU norms which, while implementing Security Council sanctions, also violated European fundamental rights. So, in reviewing the internal, fundamental rights legitimacy of norms originating in the international order, the Italian Constitutional Court claimed to only be following the CJEU’s lead.²⁹

The CJEU in *Kadi*, like the Italian Constitutional Court that it may have inspired, had also faced robust criticism for reinforcing a U.S.-style international lawlessness in the long term. According to Weiler, “*Kadi* looks very much like the European cousin of *Medellín*.” Its process of severing the European norms from their international generators, in order to analyze them with reference to European law only, “cannot be the correct way in which supreme jurisdictions should interact with norms originating from the highest

27 Fontanelli 2014, *supra*, note 16. Apologists for the Italian Court’s decision, by contrast, compliment it for: its skillful navigation between two highly integrated legal orders, ultimately striking a balance between them, rather than severing their relationship. See Palombella, ‘The Decision of the Italian C.C. 238/2014 on State Immunity and Access to Justice and the Present International Law’ (May 4, 2015). *Journal of International Criminal Justice*, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=2602193> (last visited 4 March 2016).

28 Joined Cases C-402/05 & 415/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission*, judgment of the Grand Chamber of 3 September 2008.

29 Constitutional Court of Italy, *supra* note 18, at § 3.4.

organs of the International Legal Order – withdrawing into one’s own constitutional cocoon, isolating the international context and deciding the case exclusively by reference to internal constitutional precepts...”³⁰

De Búrca has similarly criticized the CJEU for its embrace of dualism, thereby attenuating the EU’s relationship to international law; it “sits uncomfortably with the traditional self-presentation of the EU as a virtuous international actor in contradistinction to the exceptionalism of the United States.” The Court’s aggressively dualist or pluralist approach to international law,

emphasizing the separateness, autonomy, and constitutional priority of the EC legal order...offers potential encouragement and support to other states and polities to assert the primacy of their autochthonous values over the common goals of the international community.³¹

The CJEU’s distancing of itself from international law, in the name of its own values, makes it seem terribly similar to the U.S. Supreme Court.³²

30 Weiler, ‘Kadi – Europe’s Medellin?’, 19 *European Journal of International Law* (2009) 895, at 895, 896. Decision 238 of 2014 has also been criticized for reinforcing American style exceptionalist values. Lando, ‘Intimations of Unconstitutionality: The Supremacy of International Law and Judgment 238/2014 of the Italian Constitutional Court’, 78 *Modern Law Review* (2015) 1028, at 1036, defends the Italian Constitutional Court against this by making the technical distinction that the U.S. relied on a doctrine of the non-self-executing nature of Art. 94(1) of the UN Charter, while the Italian Court did not. I will argue that the differences between the two run deeper.

31 De Búrca, ‘The European Court of Justice and the International Legal Order After *Kadi*’, 51 *Harvard International Law Journal* (2010) 1, at 3, 7.

32 See also Gattini, ‘Joined Cases C-402 & 415/05 P’, 46 *Common Market Law Review* (2009) 213, at 226-27, who wishes that the CJEU had put human rights first by “making rational use of arguments of international law, opening itself up to dialogue with other international bodies and tribunals, promoting a model of international ‘open network structures’...” By basing its valorization of the right to be heard exclusively upon European law,

5 International civil disobedience and the integration of international law

So, what does such an act of international disobedience do to the integrity of the monist, universalist, constitutionalist ideal of international law? I want to suggest that we can think of both *Kadi* and *Judgment 238 of 2014* as *potential* expressions of a kind of civil disobedience that *could* serve in the end to reinforce an integrated international law. According to this theory of international civil disobedience, a violation of specific international law commands, in service to its own higher law of universal humanitarian values, may be ultimately justifiable from the perspective of a coherent international law itself. We can reframe the core conflict in such cases as one between two international norms, rather than a conflict between international and domestic law. This means that internationally disobedient states, resisting international law in the name of fundamental rights, may also be able to justify themselves in terms of international law.

Reinterpreting *Kadi* in this light, we can disentangle the CJEU's violation of the internationalist ideal of Security Council compliance from its substantive respect for human rights. An international constitutionalist should not hesitate

rather than the rich body of international human rights, the CJEU furthered its own, lamentable "texanization." *Ibid.*, at 230, fn 61. But see Bradford and Posner, 'Universal Exceptionalism in International Law', 52 *Harvard International Law Journal* (2011) 1, arguing that the EU is just as exceptionalist as the U.S. is. According to them, all states take an opportunistic approach to international law, using it to promote their own values and interests, human rights and social welfare in the case of Europe, free markets and democracy in the case of the U.S. While they might be right to note that powerful states insist upon the universalization of their domestic values and interests, one could argue that European values may be more universalizable, in that they seek to protect the weakest in society rather than liberate the strong to use military force and to compete economically.

to recognize the great merit the CJEU's decision to bring the EU into conformity with universal human rights. So, for example, one might credit the CJEU for pushing back dialogically against the Security Council, thereby persuading it to accommodate some of the human right norms that it initially neglected.³³ Peters argues that such "constitutional resistance" should be regarded with some indulgence.³⁴ It may look like mere disobedience on the surface, but it ultimately challenges the international order to progress towards a greater sensitivity to and reception of the humanistic values at the core of the cosmopolitan constitutionalist ideal.³⁵ In the end, the Italian court, like the CJEU, can be

33 Nollkaemper, *supra* note 14, at 303 augers that "national institutions can protect the rule of law against weaknesses of international law itself. Ideally, determining whether or not international acts of law-making or law application conform to fundamental rights would be a task for international courts. But in the absence of such courts with adequate jurisdiction, national courts can provide the missing link by assessing international acts against fundamental rights, whether as 'international norms' or in the form of domestic constitutional rights. Rather than seeing filters set up by an active role of national courts as an unwarranted barrier to the full effect of international law, such filters may be complementary to the ambitions of international law itself. National courts need not be faithful but blind enforcers of international law, but may have to fulfil a role as a safety-valve or 'gate keeper'."

34 Peters, 'Are We Moving towards the Constitutionalization of the World Community?', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012) 118, at 127. In fact, the CJEU's position has been reinforced by the ECHR in *Al-Dulimi v. Switzerland* (2013). See also Sheinin, 'Is the CJEU ruling compatible with IL?', in M. Scheinin (ed.), *Terrorism and Human Rights* (2013) 611, at 620-22, rejecting the "narrative of a conflict between a human-rights-oriented European legal order and a human-rights-ignorant UN legal order." "Human rights are universal, not 'European' in nature. Hence the insistence of the European Court of Justice on securing compliance with human rights in the implementation of the 1267 sanctions regime is an affirmation of, and not a departure from, the imperative of the EU having to comply with international law."

35 Cf. Rosenfeld, 'Is Global Constitutionalism Meaningful or Desirable?', *25 European Journal of International Law* (2014) 177, at 197, arguing that it

seen as “fulfilling a ‘legitimate’ function in pushing for a new interpretation of international law based on its role as coauthor of international customary law.”³⁶

It is the presence of this *potential* substantive overlap between national and international fundamental rights that ultimately enables us to distinguish *Kadi* and *Judgment 238 of 2014* from *Medellín*. It is this potential in grounding an appeal to the universal humanitarian values that international law exists to serve, that *could* distinguish the Italian and European acts of international disobedience from U.S. dualistic Westphalianism after all. These decisions, in real contrast to *Medellín*, have a potential to further an international rule of law, grounded in humanistic values. Beneath their strongly dualist surface, they may be quietly attuned to the constitutional ideal, and specifically to a “soft” or “more pluralist” version of it. Sweet’s vision of such a pluralist constitutionalism may be constructed out of the intensive, rights-based interactions between otherwise autonomous legal orders.³⁷ De Búrca’s vision of soft constitutionalism is similarly anchored to an ideal of greater dialogical engagement between national and international actors.³⁸

doesn’t make sense to view this case through the lens of constitutionalism in the first place. The UN Charter model, based on the superiority of the Security Council “may well seem constitutional in form, but in fact comes close to being purely political, as no court has the power to review Security Council decisions and permanent members of the Security Council have a veto power which they can, and often do, use purely strategically. It seems, therefore, that in the case of the UN it would be more salutary to avoid the constitutional framework than to use it.”

36 Roberts, ‘Comparative International Law? The Role of National Courts in Creating and Enforcing International Law’, 60 *International Constitutional Law Quarterly* (2011) 57, at 70-71.

37 Sweet, ‘The Structure of Constitutional Pluralism’, 11 *I•CON* (2013) 491, at 497.

38 De Búrca, *supra* note 30, at 39.

Still, both the ECJ in *Kadi* and the Constitutional Court in *Judgment 238 of 2014* surely could have done more to highlight the substantive overlap between the domestic fundamental rights that they sought to protect, and international human rights standards.³⁹ While the substance of these decisions may be laudable, their rhetorical style clearly provoked the *Medellín* comparisons that came their way.⁴⁰ While the international constitutionalist ideal will shine bright for those identifying with the power and/or the values of international institutions, we should not wonder when national courts gravitate towards a more dualist or pluralist or Westphalian ideal of international law;⁴¹ we wouldn't in fact expect national courts to "commit suicide, by formally subjugating the national constitutional order" to international law, but rather to "assert their own supremacy within their own domain, and then to engage in the politics of pluralism, including initiating dialogues, both cooperative and conflictual..."⁴² While we do not have to hope that situated national courts will develop a radical empathy for international ones, a sound pluralistic judicial politics would seem to serve their legitimacy well, in the eyes of both their domestic audience and an international one.⁴³

39 Nollkaemper encourages national courts to move beyond constitutional resistance, in order to appeal to international values instead. They could then achieve "a productive dialogue" with international bodies, that could promote the progressive development of international law.

40 De Búrca, *supra* note 30, writes that "the ECJ could have insisted on respect for basic principles of due process and human rights protection under international law... By failing to do so, the ECJ lost an important opportunity to contribute to a dialogue about due process as part of customary international law, which would be of relevance for the international community as a whole and not just the EU."

41 Krisch, *Beyond Constitutionalism: the Pluralist Structure of Postnational Law* (2010), at 23.

42 Sweet, *supra* note 36, at 497.

43 Kumm, *supra* note 9, at 612: "National constitutional legitimacy depends, in

Looking at all of these cases, we can hope that both international institutions and national ones would engage with each other in a more cooperative way. Rather than compromising their respective legitimacy, such constructive engagement might actually enhance it in the long term. If international courts seek to reinforce the legitimacy that a robust and plausible international constitutionalism affords them, they should engage more seriously with the humanistic claims generating such disputes as that between Italy and Germany.⁴⁴ And not just in their dissenting opinions! After *Jurisdictional Immunities*, the generous cosmopolitan view seemed to entail a remarkable, and no longer plausible, “faith in the role of international judges for the realization of a better world based on peace, respect for human rights, and freedom from misery and oppression.” Against the naïve constitutionalist ideal, this decision suggests instead that

international courts are not always the vehicle for advancing international law towards the goal...[of] the development of the human dimension of international law, the minimization of violence, the respect of human dignity, and social justice.⁴⁵

part, on how the national constitution is integrated into and relates to the wider legal and political world...The standards of constitutional legitimacy are to be derived from an integrative conception of public law that spans the national-international divide.”

44 Bianchi, Gazing at the Crystal Ball (again): State Immunity and *Jus Cogens* beyond *Germany v. Italy*, 4 *Journal of International Dispute Settlement* (2013) 457, highlights the International Court of Justice’s tendency to preach to the converted, to international lawyers who already believe in the Court’s enlightened authority. Neither the Judges, nor their audience, are as attuned to human rights values as they are to state sovereignty (unsurprisingly, since the “overwhelming majority acted in their prior professional experience as state’s or international organization’s advisers”). The “reiteration of the rites...is a very effective mechanism for ensuring the social cohesion of the group and reinforcing the professional and personal identity of its members,” but this is hardly likely to move national actors or transnational civil society.

45 Francioni, ‘The Ill Fate of ‘Moderate Monism’ in the ICJ judgment

International institutions could address these concerns more conscientiously, and gain greater legitimacy in the process. It is up to them to reinforce the constitutionalist ideal that sustains them.

So, the Italian Constitutional Court was right to resist. States must have a legitimate function in pushing for a new interpretation of international law, based on their role as coauthor of international customary law. Still, the Italian Court should have done so by engaging in a more productive dialogue with the ICJ, aimed at promoting the progressive development of international law. It could have put forward its own thoughtful interpretation of international customary law, or tried to persuade others of the more universal, humanistic value of its position, rather than limiting itself to an identitarian exceptionalism. It could have drawn upon Judge Cançado Trindade's rich dissenting opinion for solid international law support.

on *The Jurisdictional Immunities of the State*, 23 *European Journal of International Law* (2012) 1125, at 1128-1131. The critique of a naïve cosmopolitan constitutionalism as regressive is echoed by Koskenniemi: "Constitutionalism responds to the worry about the 'unity of international law' by suggesting a hierarchical priority to institutions representing general international law (especially the United Nations Charter). Yet it seems difficult to see how any politically meaningful project for the common good (as distinct from the various notions of particular good) could be articulated around the diplomatic practices of the United Nations organs, or notions such as *jus cogens*...The debate on an international constitution will not resemble domestic constitution-making. This is so not only because the international realm lacks a *pouvoir constituant* but because if such presented itself, it would be empire, and the constitution it would enact would not be one of an international but an imperial realm."

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