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SYMPOSIUM VERFASSUNGS- UND VÖLKERRECHT IM SPANNUNGSVERHÄLTNIS

Damage-assessment on the building of international law

After the Italian Constitutional Court's decision no. 238 of 2014: no structural damage, just wear and tear

FILIPPO FONTANELLI — 15 December, 2014

A reply to Felix Würkert

This symposium invites reflections on the intercourse between national courts and international law, in light of the recent judgment of the Constitutional Court of Italy (no. 238 of 2014, of 22 October 2014). I briefly examine this judgment's impact on international law in two respects. First, whether it can point to a new principle of international law. Second, whether it undermines international law as such.

I have elsewhere summarised the main aspects of the ruling, and criticised its inward-looking approach. The Italian judges deliberately avoided engaging with international law and therefore their ruling serves, at most, as cheap-talk for the purpose of further negotiation with Germany, all tbd. From a substantive point of view, the reasoning of the Constitutional Court is not outlandish, I have reckoned. Indeed, the Italian court took pains to break immunity down to its essential elements, and questioned the putative priority of serene international relations over access to justice. The Italian court gave up the *jus cogens* argument, which was appealing instinctively but technically far from compelling. The proportionality analysis, instead, is a value judgment that can be criticised only *on the merits*. The shift managed to realign the values at stake. Rather than comparing the gravity of the crimes with the function of immunities, the Italian Constitutional Court compared the procedural effect of immunity with the procedural right of the victims. This linear interplay lends itself better to judicial review and to proportionality *à la* Alexy (and the gravity of war crimes enters from the back-door, indicating the disproportionately modest value of the value pursued *in casu*).

The ECtHR, in *Jones v UK* and, earlier, in *Al-Adsani*, had virtually refrained from real proportionality-testing, ultimately using respect of sovereign immunity (*qua* international law) as a trump card: immunities recognised by international law inherently restrict access to justice. The Constitutional Court broke this axiomatic assumption and plunged into a proper balancing.

Felix Würkert wondered whether this deliberate rebellion against international law-as-we-know-it could mark the

start of a normative process. In other words, whether the Italian Constitutional Court has in fact provided a preview of international law-as-we-*will*-know-it. I think the question is legitimate and some thoughts are in order to answer it.

First, the Italian ruling cannot possibly hope to persuade the international community about the correctness of its conclusion under international law, because it expressly avoided a re-consideration of the international legal custom. Unlike the previous *Ferrini* judgment, the Constitutional Court's decision confined itself to deploy judicial authority *in foro domestico*. There is ample literature of how effective national courts can be in shaping international law through interpretation. This judgment did not try to do that, thus it cannot succeed.

Second, the Italian ruling could be relevant, quite apart from its (lack of) persuasive reading of international norms, as state practice. Regardless of its willingness to engage with international law, the ruling could qualify as relevant practice for the identification of an international law custom, and/or as subsequent practice to shed light on treaty obligations, or as application of a domestic rule capable of mirroring a general principle of law (here, the two latter hypotheses are unlikely to matter much). I side-line for a moment a clever remark (made here by Gradoni, who refers to the ILC's works, para. 50): the current contradiction between the acts of the Italian executive, legislator and judiciary with respect to the same rule weakens the relevance of the state practice expressed by the acts of these bodies. Let us pretend that Italy's position is unambiguous, and firmly conveyed by the judgment no. 238 of 2014 of its constitutional tribunal.

A notorious problem about the formation of customary law is the paradox whereby it is only in force when sufficient state practice is established, not before. As a result, early instances of state practice, which could ultimately prove critical to reach the threshold, are illegal at the time of their commission. This paradox prompts pioneering states to either (hypo 1) indulge in deliberate lies, claiming that their conduct is *already* part of common practice (see *Ferrini*, or Italy's defence in The Hague); or (hypo 2) leave international law alone, and hope that their example will be picked up as soon as possible.

The former process relies on a hopeful *fictio* that is too easy to debunk. In the novel *La Chartreuse de Parme*, Stendhal relates the story of the edification of the prison tower where the main character is about to land jailed. The prince who ordered the building of the tower "conceived the strange notion of persuading his subjects that it had already been in existence for many years" and therefore forbade all citizens refer to the building works, which took place before everyone's eyes. The full passage reads as follows:

Le prince mécontent de sa femme, qui fit bâtir cette prison aperçue de toutes parts, eut la singulière prétention de persuader à ses sujets qu'elle existait depuis longues années … Il était défendu de parler de cette construction, et de toutes les parties de la ville de Parme et des plaines voisines on voyait parfaitement les maçons placer chacune des pierres qui composent cet édifice pentagone.

The ICJ exposed the *fictio* and refused to uphold it (hypo 1). What is left, now, is the abstract possibility of state practice to form (hypo 2), outside Italy, and replicate the Constitutional Court's message until the current

embarrassing balance (one state against all other states) shifts to a custom-generating ratio. Is there any margin for this process to occur?

The erosion of immunity for breach of international criminal law is a well-known process, which Felix Würkert has summarised. However, it has so far related essentially to the personal liability of the individuals involved, and does not touch upon the civil responsibility of the State to which the conduct is also attributed. To be true, it can be argued that this gulf is a normative oddity, and that State immunity in civil proceedings (better, the lack thereof) should go *pari passu* with personal immunity in criminal trials (ditto).

However, this is not a necessary conclusion, neither normatively nor logically, and presumably implies dissatisfaction with another missing parallel: immunity covers civil responsibility of State officials for conduct entailing criminal responsibility that, in turn, functional immunities do not cover. In other words, currently, individuals can invoke functional immunity in civil proceedings (see *Jones v UK*), not in criminal proceedings (see *Pinochet*), with respect to the same conduct. States and individuals are both immune from tort claims in foreign courts for acts *jure imperii*, as a principle. As long as this paradigm holds, no reference to the development of international criminal law makes a compelling case about the correct regulation of the civil (dark) side of immunities.

The development of the parallelism, in other words, is not already implicit in the folds of international law currently in force. The German Constitutional Court's judgment on necessity and the UK Court of Appeal's judgment in *Belhaj* have little to say about this precise issue and are, in my view,

not particularly encouraging. In the former case, the German court expressly ruled out, for lack of state practice, the application of necessity as customary principle in State-private relationships (see point 3.c). Not only did it not question the extent of sovereign immunities for acts *jure imperii*, but it expressly abode by a conservative method of custom-identification. The UK court, for its part, rebutted the appellants' attempt to rely on "an unprecedented extension of state immunity" (para. 39). That the UK judges refrained from upholding an abnormally expanded immunity (i.e., over acts of local authorities alleged of conspiring with foreign ones) cannot logically be read as evidence of a restriction of the principle.

The shorthand answer to Felix Würkert's provocative title, referring to a new custom and asking "well why not?" would simply be that Italy cannot unilaterally determine an international law custom. If several states were to follow the Italian judges' breakaway, indeed "why not?" I do not think this is still the case, as more and more domestic cases seem to reinforce the notion of State immunity in cases involving torture, and the once close majority in *Al-Adsani* has become a comfortable 6 to 1 majority in *Jones v* UK.

True, international law as it currently stands displays a disturbing *cul de sac*. Individuals can shield themselves behind the States on behalf of which the acts were committed (a notion of fairness). States, on their part, shield themselves behind sovereign immunity (a principle of convenience). Accountability sometimes evaporates during this shell game. Victims seeking for a remedy might feel like a spectator of a game of Bonneteau, or *jeu des trois cartes*, where the Queen of Hearts (the judicial remedy) is promised to be under one of the *cartes* (for instance, the UN Charter,

the constitutional charter, the ECHR), but all attempts to locate it fail inexorably.

Is the Italian Constitutional Court's ruling brave or smug, in certifying that at least one charter (in Italian, *carta*) will assist the victims' attempt to find justice? Is it a *Kadi*-like decision, or rather *Medellin*-like? Because it invoked fundamental rights as the reason for disobedience, it is similar to *Kadi*. *Medellin* was also different in another respect: whereas the US Supreme Court blamed its own inability to comply with the ICJ's ruling on the legislature's inertia, the Italian parliament had indeed made all possible effort to adapt Italian law to the *dispositif* of *Germany v Italy*. The Constitutional Court's disobedience therefore did not arise *from* a misalignment between domestic and international law, but aims at *restoring* such misalignment.

I do not think that this judgment will threaten the solidity of the international legal order built on the UN Charter, nor that it will significantly taint Italy with a dubious reputation of non-complier with international law obligations. The factual and legal matrix of the case is very peculiar and does not lend itself to repetition (but it will be interesting to see whether citizens from former Italian colonies will free-ride the Constitutional Court's doctrine and sue Italy for damages). Similar impasses have been resolved in the past (see the war between the constitutional courts and the Court of Justice of the European Union) or have simply faded out (see the VCCR cases opposing the ICJ to the US). As exciting as it would be to indulge in game-changing predictions now, the most likely scenario is that, as it always does, the situation will adjust somehow, reaching possibly a new equilibrium, but without breaking free from the order of

international law altogether. The rules of the game might be updated, if ever slightly, but the game will be the same.

As Radiguet put it – with a wisdom that strikes considering his age at the time of writing – « l'ordre, à la longue, se met de lui-même autour des choses ».

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All articles of the symposium appear as well on Verfassungsblog.

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