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JURISDICTIONAL IMMUNITIES AND JUDICIAL PROTECTION: THE DECISION OF THE ITALIAN CONSTITUTIONAL COURT NO. 238 OF 2014

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SUMMARY: 1. Introductory remarks. — 2. The determination of international law by domestic courts. — 3. Balancing competing interests: the principle of judicial protection. — 4. Compliance with international law and compliance with the ICJ ruling. — 5. The implications of the Constitutional Court's decision. — 6. Castling in one's legal order ?

1. Sovereign immunities are constantly under attack by national courts. Designed to discharge an essential function under international law, namely to prevent the lawfulness of sovereign acts from being adjudicated by domestic courts, they interfere, by nature, with the right of individuals to judicial protection recognised by national Constitutions and by an increasing number of human rights treaties. Not surprisingly, this relationship proves to be particularly troublesome and is the subject of an incessant stream of case law and scholarly works.

This unresolved tension has been at the root of the dispute on compensation to be paid by Germany to Italian military internees and to other victims of particularly hideous crimes committed by the German Reich between 1943 and 1945.

It is common knowledge that, in a long line of decisions, Italian courts refused to grant immunity to Germany and upheld a number of claims for compensation submitted by the victims or their heirs. This refusal was manly grounded on the existence of peremptory norms protecting fundamental individual rights which, in the view of the Italian courts, prevail over the "ordinary" law of sovereign immunities and make it inapplicable.

However, in its judgment on *Jurisdictional Immunities of the State* (1), released on 3 February 2012, the ICJ found that the Italian judicial decisions amounted to a violation of international law and ordered that the effect of these decisions be removed and the immu-

(1) *Germany v. Italy (Greece intervening)*, *I.C.J. Reports 2012*, p. 99 ff.

nities of Germany restored. While admitting that the unlawfulness of the conduct performed by the German Reich had been recognised by Germany "at all stages of the proceedings" (2), the ICJ firmly rejected the idea that the emergence of peremptory rules of international law protecting individuals has had the effect of curtailing the scope of the rules on sovereign immunities.

It is against this background that the decision of the Constitutional Court No. 238 of 22 October 2014 must be assessed (3). The Constitutional Court found that the rules of international law which grant immunity to a foreign State even for conduct allegedly in breach of fundamental individual rights are inconsistent with Articles 2 and 24 of the Italian Constitution. The first article is a general provision concerning the inviolability of individual fundamental rights; the second one establishes the right to judicial protection.

Further, the Court found that Article 94 of the UN Charter is inconsistent with the Italian Constitution insofar as it requires Italy to comply with the ICJ judgment of 3 February 2012 and declared null and void to the same extent the statutory provisions enacted to implement the Charter. The same fate was met by the statutory provisions enacted in 2013 to give specific effect to the ICJ's judgment.

2. The Constitutional Court abstained from reviewing the content and scope of the international law on sovereign immunities. In this matter, the Court fully relied on the determination made by the ICJ. In the words of the Constitutional Court, international law constitutes a set of external rules, primarily designed to govern the conduct of States in their mutual relations, which must be determined primarily by international courts, whose holdings are, therefore, binding on domestic courts (4).

Deference to the ICJ was however offset by the strict dualist approach adopted in the subsequent parts of the judgment. Once the Constitutional Court accepted the determination of international law made by the ICJ, it went on to assess the lawfulness of these rules in the light of a purely domestic standard of review (5).

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(2) *Ibidem*, para. 60.
(3) *Infra*, p. 237 ff.
(4) See para. 3.1. of the decision.
(5) After the judgment of the ICJ in the *Jurisdictional Immunities* case, this solution has been advocated by CONFORTI, *The Judgment of the International Court of Justice on the Immunity of Foreign States: a Missed Opportunity*, *The Italian Yearbook of International Law*, 2011, p. 133 ss.

The implications of this choice are perverse. From a theoretical viewpoint, it has created a deep cleavage between international law, considered as the realm of interstate interests, and the constitutional legal order, where human rights concerns take priority over every other consideration. From a judicial policy perspective, it can have rendered more difficult for the Constitutional Court to attain its stated objectives, namely to trigger a process of change in the international law of immunities, and to promote its development towards a regime more in accordance with the human rights inspiration of modern Constitutions.

The Constitutional Court expressly advocated the need to promote such a process. It referred at length to the role plaid by domestic courts in promoting the process which led, around the turn of the 20th century, to a curtailment of the scope of sovereign immunities and to a regime whereby States are entitled to immunity only for sovereign non-commercial operations (*acta iure imperii*), to the exclusion of commercial acts performed by States in their private capacity (*acta iure gestionis*) (6). In the view of the Constitutional Court, time is ripe to rule out that States are entitled to immunity in cases regarding serious violations of human rights.

Arguably, this result could be more easily attained if presented as the outcome of a process of change already pending at the international level, even if not fully accomplished. When domestic courts started exercising jurisdiction with regard to *acta iure gestionis*, they did not generally conceive of their decisions as being in breach of pre-existing law. They acted in the conviction that the classical rules on sovereign immunities ought to be adapted to the supervening circumstance of States actively engaged in commercial transactions (7).

Yet, the question arises as to whether a different option was open for the Constitutional Court. In the presence of a binding holding of the ICJ, which does not leave much room for discretion in its implementation, the Court must have believed that the only possible course of action was to fashion its case in a strictly domestic law perspective.

In the subsequent paragraphs, the line of reasoning of the Court will be followed, with a view to seeing whether a different decision was possible, highlighting the human rights motives which plead for an adjustment of the regime of sovereign immunities, without necessarily outlawing that regime and opening a confrontation with the ICJ whose outcome is hardly predictable.

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(6) See para. 3.3. of the decision.

(7) See, for example, Cassazione (full Court), 13 March 1926, *Romania v. Gabriele Trutta*, *Rivista*, 1929, p. 252 ff., at pp. 253, 255.

3. Constitutional review of international law is always a sensitive exercise as it may entail a breach of obligations in force and ultimately endanger the credibility of the State in the international arena. Not surprisingly, in modern legal orders, sophisticated techniques have been developed with a view to preventing or settling possible conflicts.

In this search the Italian Constitutional Court has given a major contribution. The Court has often construed the constitutional system as referring to international law as the natural and necessary legal environment for the external action of the State. In this perspective, compliance with rules of international law represents a constitutional interest by itself, to be balanced, in case of conflict, with other competing constitutional interests. Moreover the Constitutional Court has consistently held that the review of international rules ought to consider these rules not in their abstract normative value, but rather in the light of the role they discharge in their own legal order and of the interests and values they are designed to attain (8).

No serious attempt to use these techniques was endeavoured in the current case. In a cursory passage of the decision, the Court compared the paramount importance to be attributed to the principle of judicial protection, considered as an indispensable corollary of substantive fundamental rights, with the smaller relevance recognised to the interest of the State to comply with sovereign immunities in the international legal order. The more so — the Court has insisted — where, as in the instant case, immunity is not invoked to protect States from external interferences in the exercise of functions typically connected to the statehood, but rather to shield particularly heinous conducts, by no means connected to the exercise of these functions (9).

In spite of its intuitiveness, this argument is not fully convincing.

A balance among heterogeneous interests could hardly be made in the abstract. Rather, an attempt should be made by gauging the relevance of the various interests in each particular case. Such a line of analysis would have probably led the Court to admit that the weight of each of the two interests at stake is not necessarily constant and, rather, varies according to the circumstances.

In particular, far from having an absolute and immutable character, the principle of judicial protection tends rather to assume, by virtue of its remedial character, the normative value of the substantive interest

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(8) For further references, see CANNIZZARO, *Diritto internazionale*[2], Torino, 2014, p. 457 ss.

(9) Para. 3.4. of the decision.

it is aimed to secure (10). To determine the proper value of that principle, therefore, it is not sufficient to connect it to a previous violation of fundamental rights. This value must rather be assessed by reference to the concrete underlying interest, which the claimant purports to realise (11).

In the case at hand, judicial protection was aimed to obtain compensation, namely one of the secondary consequences of a previous and irremediable breach, consisting in the monetary equivalent of the damage suffered. The right to compensation does not necessarily have the same normative value as the fundamental right which it is designed to replace (12).

On a different vein, the existence of alternative procedures for obtaining redress for the injured individuals ought to be considered, at the international level as well as at the domestic level.

At the international level, the right to compensation is typically subject, like other non-inalienable rights, to interstate transactions, which may determine alternative forms of satisfaction for the injured individuals. The State which has committed the breach and the State acting in diplomatic protection can agree on partial forms of satisfaction and can even transfer one another the duty to compensate.

In para. 104 of its judgment, the ICJ, after observing that the grant of immunity would leave the individual claims unsettled, expressly invited the parties to re-open the negotiations, "with a view to resolving

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(10) As the European Court of Human Rights has consistently held, the right of access to a court is not absolute and may be subject to limitations. These limitations must pursue a legitimate aim and be proportionate to it. However, they cannot restrict or reduce the access to a court to such an extent that the very essence of the right is impaired. In a recent case, the Court found that limitations deriving from the application of international law on sovereign immunities are proportionate *per se*, without indulging to an inquiry as to whether these limitations impaired the very essence of that right (*Jones and others v. United Kingdom*, Applications nos. 34356/06 and 40528/06). In a particularly infelicitous part of the decision, the Court decided that the grant of immunity to foreign State officials in cases concerning civil claims for torture did not amount to a violation of Article 6 of the European Convention of human rights although, in its words, "State practice on the question is in a state of flux, with evidence of both the grant and the refusal of immunity *ratione materiae* in such cases". See PUSTORINO, *Immunità dello Stato, immunità degli organi e crimine di tortura: la sentenza della Corte europea dei diritti dell'uomo nel caso* Jones, *Rivista*, 2014, p. 497 ss.

(11) This perspective seems to be suggested by NIGRO, *Immunità degli Stati esteri e diritto di accesso al giudice: un nuovo approccio nel diritto internazionale?*, *Rivista*, 2013, p. 812 ff., at p. 843 ff., who, however, gives importance only to the type of conduct shielded by the grant of immunity.

(12) This argument has been developed by CONSOLO and MORGANTI, *Immunità e crimini di guerra: la Consulta decreta un* plot-twist*, abbraccia il dualismo e riapre alle azioni di danno*, *Corriere giuridico*, 2015, forthcoming.

the issue". Arguably, the possible efforts made by the Italian government to give effect to that invitation and to solve the issue at the diplomatic level should have plaid a role in the constitutional review of the international law on immunities. It is not unreasonable to assume that the State has the constitutional duty to act on behalf of its citizens on the international plane, in order to seek full redress for damages caused to them by unlawful international action.

Finally, in a case concerning claims for compensation for harm allegedly caused to Italian nationals, the process of balancing should have considered, even as a remedy of last instance, the possibility to have the individuals injured compensated by the Italian State, in order to safeguard its space of manœuvring at the diplomatic level. In a modern constitutional order, individuals cannot be called to bear the economic consequences of the fulfilment of a State's interest. To offset the drawbacks of the pursuit of collective interests, such as the interest of the State to choose and to pursue freely its political course in the international arena, a collective assumption of that cost seems to be unavoidable.

4. Even the interest in complying with a rule of international law varies considerably according to a number of elements, including its nature and function, the possible implication of non-compliance, and so forth (13).

This consideration explains why the reference to the type of conduct shielded by immunities, although by itself not unreasonable, is not necessarily conclusive. A more accurate assessment should take into account, in particular, the notable difference between the respect owed to the customary rule on sovereign immunities and the respect owed to a final judgment of the ICJ. Disrespect with a binding decision of the ICJ has the effect of disrupting the confidence in the principal judicial organ of the UN and, more in general, in the judicial settlement of disputes.

In a short passage that will probably remain one of the most controversial of its decision, the Constitutional Court has declared the unconstitutionality of Article 94 of the UN Charter insofar as it imposes on the Italian courts the obligation to comply with the ICJ judgment of

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(13) See para. 57 of the ICJ judgment in the *Jurisdictional Immunities* case: "the Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order".

2012. This ruling has been taken without any further inquiry on the legal force of the provisions of the UN Charter within the Italian legal system. It seems that the Constitutional Court has simply transposed the grounds of unconstitutionality of the law of sovereign immunities to the compulsory force of the ICJ decision and, ultimately, to the mechanism of the UN Charter designed to secure compliance therewith.

Yet, the interest in complying with international obligations flowing from the UN Charter appears to be particularly intense. Even if the Charter has been implemented within the Italian domestic order by a provision having the force of an ordinary law, its normative status is much higher. The idea is widely accepted, in legal scholarship and in the constitutional case law, that the Charter contributes to attain one of the major objectives of the Italian Constitution established by its Article 11, namely to set up a world order ensuring peace and justice among Nations. Article 11 has thus the effect of raising considerably the bar of what is required in order to declare unconstitutional a provision of the UN Charter, up to a level which is hardly surmountable (14).

5. Although the effect of a decision of unconstitutionality is strictly limited to the norms under review, the spill-over effect of this particular ruling may be more pervasive by far.

The Constitutional Court has overruled its precedent in *Russel* (15) where it had determined that customary international law in force at the time of adoption of the Constitution could lawfully derogate to its fundamental principles. Albeit technically questionable, this holding was inspired by the ingenuous belief that it was necessary for the new Italian State to accept the fundamental rules of international law, in the expectation that they would soon be replaced by others, more consistent with the ideal inspiration of the new world order. The course now

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(14) To the knowledge of the present writer, there are no other examples of constitutional review of Article 94 of the UN Charter. In *Medellin v. Texas*, 552 U.S. 491 (2008), concerning the effect of the ICJ ruling in *Avena* (*Avena and Other Mexican Nationals, Mexico v. United States of America*, *ICJ Reports 2004*, p. 12 ff.) within the United States legal order, the US Supreme Court eschewed the issue by upholding the view that Article 94 of the UN Charter does not intend to be directly binding for domestic courts but simply formulates "a commitment on the part of U.N. Members to take future action through their political branches to comply with an ICJ decision". The Supreme Court famously went on to say that "(t)he U.N. Charter's provision of an express diplomatic — that is, nonjudicial — remedy is itself evidence that ICJ judgments were not meant to be enforceable in domestic courts".

(15) Decision of 18 June 1979 No. 48, *Rivista*, 1979, p. 797 ff.

adopted by the Constitutional Court thus can significantly enlarge the set of customary rules potentially subject to constitutional review.

Even if the ruling is limited to a specific issue, namely to immunity of foreign States for civil claims arising from conduct that amounts to a serious violation of human rights, it may have a larger scope of application. In an apparently incidental passage, the Constitutional Court, recalling its previous case-law, stated that limitations to the principle of judicial protection are admissible only if they are aimed to attain a superior public interest.

In this passage the Constitutional Court seems to invert the logic of the reasoning followed hitherto. Instead of excluding the grant of immunities with regard to particular heinous conducts, the Constitutional Court seems to point out that immunities can be granted, and that the principle of judicial protection can be disregarded, only in the presence of a superior public interest.

Thus the question arises of what superior public interest is required by the Constitutional Court in order to grant immunities. The most logical inference is that the generic interest of the Italian State to comply with its international obligations should not be sufficient and that a qualified public interest is needed instead. Should one assume that this additional requirement is to be found in the motives that led a foreign State to claim immunity, the consequence would ensue that a foreign State would be entitled to immunity only with regard to lawful conduct (16).

Yet, if this assumption were correct, the dictum of the Constitutional Court, far from being confined to the specific case at hand, would have a very broad scope. It would apply to all the categories of immunities granted by international law and would deeply affect its effectiveness.

6. Castled in its own legal order, the Constitutional Court has fashioned a decision that, in spite of its impeccable dualist logic, will hardly serve its objectives but can seriously imperil the authority of international law and the *Völkerrechtsfreundlichkeit* of the Italian Constitution.

It is a natural tendency to read this decision against the background of the ICJ judgment in the *Jurisdictional Immunities* case, as a

(16) The idea that States are not entitled to immunity from domestic jurisdiction of other States for conduct which violates international law, had been suggested by QUADRI, *La giurisdizione sugli Stati stranieri*, Milano, 1941, at p. 127.

form of reaction thereto. In spite of their profound difference, the two decisions have a common feature. Far from considering the impact of its holdings in the legal order in which they were primarily designed to produce their effects, each court preferred to frame its case in the comfortable categories of its own legal order. Thus, whereas the ICJ did not consider the anxieties raised by the application of sovereign immunities in domestic legal orders, where respect for human rights assumes paramount importance, the Constitutional Court seems to have overshadowed the impact of its ruling on the international intercourse.

Yet, a careful analysis shows that it was well possible for the Constitutional Court to plead for a development of the law of sovereign immunities, and to shape the existence of exceptional circumstances where domestic courts could be entitled to entertain their jurisdiction and grant relief to individuals who were victims of serious violations of fundamental rights, without disrupting the entire international system of immunities and endangering the authority of the ICJ, by proclaiming the unconstitutionality of a provision of the UN Charter. The Constitutional Court preferred to take a different course and adopted a decision fraught with problematic implications, from a theoretical, a symbolical and a practical viewpoint. Even for those who are critical of the ICJ judgment in the *Jurisdictional Immunities* case, this is a particularly bitter outcome.

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Abstract. — In its decision No. 238 of 2014, the Constitutional Court followed a dual track. On the one hand, it proclaimed the exclusive authority of the ICJ to determine the law of sovereign immunities. On the other hand, it found that international law, as determined by the ICJ, is manifestly inconsistent with the constitutional principle of judicial protection, inasmuch as it requires to grant immunity also for serious violations of human rights.

This finding has a number of drawbacks. The Constitutional Court has given paramount relevance to the principle of judicial protection and has correspondingly devalued the constitutional interest in complying with a binding judgment of the ICJ. From a judicial policy perspective, its strict dualist approach will presumably restrict the contribution that the decision may give to the development of the law of sovereign immunities and to the formation of a human right exception.