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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

Ouverture

On 22 October 2014, the Italian Constitutional Court (CC) delivered the judgment no. 238 of 2014. This ruling reignited the fire of *Ferrini* (a 2004 judgment of the Italian Supreme Court), which kept burning under the ashes, after the intervention of the International Court of Justice (ICJ) had seemingly put it off for good. It is only possible to appreciate the import of the CC's judgment in perspective, as the last (or latest) act of a legal melodrama that would be entertainingly captivating if it were not real.

The decision followed the International Court of Justice (ICJ)'s judgment in the *Germany v. Italy (Greece intervening)* of February 2012, and Italy's attempts to implement it. Ultimately, the CC took the bold decision to declare the unconstitutionality of the legislative measure through which Italy had brought itself in line with its international legal obligations, and of the statute ratifying the UN Charter, insofar as it required obedience to the ICJ's decision. In essence, the CC knowingly resolved that compliance with the ICJ's decision is not worth pursuing, as it entails an inevitable forfeiture of the fundamental rights of Italian citizens.

Commentaries will probably abound, wavering between enthusiasm and abhorrence, as it is habitual with civil disobedience. In my view, it is not possible to evaluate this judgment univocally. As a legal fact or act, it can be assessed with some degree of accuracy (*certitude*) on the basis of existing principles and parameters. Alternatively, it can be considered a legal event, a turning point (a *tournant*), which by definition escapes existing categories and lays the foundation of new ones. Only time will tell whether this decision will have proven to be a *tournant*. Here, my modest task is to side with caution and comment the judgment as a legal act operating in the *here and now*. If you ask me whether this judgment will make history, I can but quote this passage:

– *Admettez-vous cette certitude, que nous sommes à un tournant?*

– *Si c'est une certitude, ce n'est pas un tournant. Le fait d'appartenir à ce moment où s'accomplit un changement d'époque (s'il y en a), s'empare aussi du savoir certain qui voudrait le déterminer, rendant inapproprié la certitude, comme l'incertitude. Nous ne pouvons jamais moins nous contourner qu'en un tel moment : c'est cela d'abord, la force discrète du tournant.* [Maurice Blanchot, *L'entretien infini*, (Paris, Gallimard, 1969)]

The comment on the *Finale* comes after a concise account of the previous Acts, stop me skip it if you think you've heard this one before.

Act I – *Ferrini* take 1

The Italian Supreme Court (SC), Civil Section, sitting *en banc*, ruled in 2004 that state immunity from foreign civil jurisdiction did not prevent Italian courts from hearing tort claims brought by Italian citizens against Germany. These claimants sought compensation for international law crimes committed in Italy by the Nazi forces, during World War 2. This unprecedented conclusion was

based on a composite and diverse reasoning, which the SC took pains to spell out to justify the non-application of the customary principle of State immunity in the case at bar.
Essentially, the SC held that sovereign immunity cannot cover the breach of *jus cogens* rules – at least in civil courts – regardless of whether the wrongful acts are *jure imperii*. The *Ferrini* judgment expressly balanced the rationales of sovereign immunity (the stability of international relations) and of *jus cogens* norms (the prevention of the most horrendous crimes). The SC afforded primacy to the latter over the former, a finding dictated by considerations of minimum legal civilisation. In addition, the SC accorded special weight to the so-called tort exception, according to which sovereign immunity cannot apply to conduct, giving rise to tort liability, which is committed in the State of the forum.
The SC in *Ferrini* concocted a double-track excuse to disregard sovereign immunity. On the one hand, *jus cogens* is not derogable and, therefore, breaches thereof cannot be swept under the rug of immunity. On the other hand, there seems to be a growing consensus that the courts of a State can exercise their jurisdiction over torts occurred in that State's territory, even if the tortfeasor is a sovereign State acting *jure imperii*.
Ferrini opened the floodgates: plaintiffs started suing Germany in Italian courts on a regular basis. The Italian judges, loyal to their Supreme Court, systematically rejected Germany's jurisdictional objections and condemned it to compensation.

Act II – a fieldtrip to The Hague

Germany rushed to The Hague to end this trend, asking the ICJ to find Italy in breach of its international obligations. The ICJ, on 3 February 2012, upheld the application: the Italian courts had disregarded the rules on State immunity, both by exercising jurisdiction against Germany and by authorising the enforcement in Italy of Greek judgments delivered in similar proceedings (Greece intervened in the proceedings, but by the time of the decision Greek courts had already stopped exercising jurisdiction over Germany).
The reasoning of the ICJ was based mainly on the absence of a new rule of customary law that limited the principle of State immunity from foreign civil jurisdiction for acts *jure imperii*. Rejecting Italy's suggestion that an exception might exist, the ICJ upheld the rule. It found that general state practice in support of the territorial tort exception was insufficient to consider it a new rule of custom; in fact, the Italian position was virtually isolated in the international community. Moreover, the ICJ rejected the notion that, merely because the prohibition of international crimes is *jus cogens*, it should override the principles of immunity. The grant of immunity being independent of the gravity of the wrongful act, it must apply also to breaches of *jus cogens*. This conclusion entails no normative conflict: whereas the rules on international crimes are substantive, those on immunity are merely procedural. Immunity only prevents the exercise of jurisdiction in certain *fora*, but it does not displace jurisdiction, nor does it – even less – exempt from criminal or civil responsibility.
Because there is no conflict of norms, arguments based on *lex superior* were rejected. Because there was no evidence of state practice, arguments based on a new custom serving as *lex specialis* were rejected.
The operative part of the judgment called upon Italy to repair the damage done. Specifically, the ICJ ordered Italy to "ensure that the decisions of its courts and those of other judicial authorities infringing [Germany's immunity] cease to have effect" (par. 139) and to make good of all breach already occurred. Whereas the *what* of the order was clear (restoration of the *status quo*), the choice

of means to implement (the *how*) was left – as per usual – to the State's discretion, and so was the identification of the State entities expected to act (the *who*). However, the Court had learned the *Avena* lesson and aptly reminded Italy that it would be ill-advised to try to dodge compliance simply because "some of the violations may have been committed by judicial organs, and some of the legal decisions in question have become final in Italian domestic law" (par. 137).
If ever indirectly, the ICJ therefore hinted to the *who* and *how* of compliance. Italian judges were expected to bring their actions in line with international law. Moreover, the finality of judgments could not hinder compliance with the ICJ's ruling: Italy was ordered to figure out a way to re-open or revise proceedings concluded with a final judgment.

Act III – The *faux Finale*

[In adventure stories, a classic narrative trope is the staging of what appears to be a very sad ending: the hero is defeated or imprisoned, the quest is over and the villain reigns unabashed. The *faux* finale (or pre-finale) enhances by contrast the glory of the happy ending, which develops from an unexpected plot-twist]
Shortly after the ICJ's decision, the SC sanctioned the official failure of the *Ferrini* breakaway (my comments on the story are here, in brief, and here, in full). A few months later, the Italian legislator passed a law which allowed the overriding of final civil judgments when revision is necessary to comply with a judgment of the ICJ. Net of all speculations, this was a pattern of self-effacing compliance with the ICJ's decision.
In the *Albers* case (judgment of August 2012), the SC, First Criminal Division, faced a dilemma: to follow the *Ferrini* precedent or to obey the ICJ? In short, the SC opted for unconditional surrender to the ICJ's orders. In a fit of pride, it questioned the ICJ's formalistic distinction between substantive and procedural norms, noting that it ends up granting impunity to the gravest of crimes and frustrating the effectiveness of *jus cogens* norms. However, the SC bowed to the authority of the ICJ's judgment and conceded that no relevant consensus in the international community had formed – yet – around the doctrines put forward in *Ferrini*. As a result, the ICJ's plain remark that there was no custom to invoke was technically unquestionable. On the axiomatic level, the SC noted that the decision of the ICJ maybe failed to endorse "highly plausible legal solution," but required compliance nonetheless.
The last question for the SC was whether the Italian judiciary was indeed expected to comply with the international judgment directly, by overturning an established course of action in pending proceedings. Or was compliance rather a concern for the legislator and the executive alone? In other words, the SC weighed the appropriateness of "going *Medellin*." The reference is of course to the widespread practice registered in the US, where federal and state courts alike declared themselves free from an obligation to implement ICJ's decisions in the absence of revision of state or federal legislation (if you need more background, see here). The SC put on record a declaration regarding the unfettered autonomy of the Italian judiciary, then turned to more practical considerations. Namely, because Italy's international responsibility had been engaged by the acts of the judiciary, it was just fair for the judiciary to take action to spare the States from further troubles of non-compliance. The SC therefore upheld the jurisdictional objections of Germany and quashed the lower judgments without remand. It also refused to entertain a question of constitutionality.
Spontaneous implementation by national judges in pending proceedings fell short of fixing the harm to Germany's immunity caused by previous final judgments. The legislator took the matter into its own figurative hands and passed Law no. 5 of 14 January 2013 (ratifying United Nations

Convention on the Jurisdictional Immunities of States and Their Property). Besides transposing the UN Convention into Italian law, the act provided a statutory basis for the judicial implementation of *Germany v Italy*. Paragraph 1 of Art. 3 requires Italian judges to decline jurisdiction in pending proceedings when the ICJ has ordered Italy to do so. Paragraph 2 introduced grounds for reopening (*revocazione*) judgments other than those provided for in the Code of Civil Procedure (Artt. 395 and 306). In particular, final judgments can be impugned when they clash with a judgment of the ICJ barring Italy from exercising jurisdiction (even when the ICJ's ruling comes after the domestic judgment).

The resulting scenario for the supporters of *Ferrini* was one of defeat on all fronts. Italy's conduct was a paradigm of international legal zeal: judiciary, legislative and executive powers were outdoing each other in complying with Italy's obligation in the field of State immunity.

***Entr'acte* – The plot-twist**

The Tribunal of Florence had accepted to hear three civil claims against Germany for crimes committed in Italy during WW2. After the ICJ's decision and the adoption of Law no. 5 of 2013, the Tribunal was required by law to declare the lack of jurisdiction. Instead, the Florentine judge raised a question of constitutionality before the CC, questioning the compatibility of Italian law with Art. 24 of the Italian Constitution, according to which "[a]nyone may bring cases before a court of law in order to protect their rights under civil and administrative law." In other words, the judge asked the CC whether compliance with the ICJ, as required by Italian law and codified in the new 2013 statute, entailed an unacceptable restriction of the right of access to justice under the Constitution.

The referring judge repeatedly specified that she did not intend to question the interpretation of international law reflected in *Germany v. Italy*. In fact, international law did not feature at all in the referral. The question regarded specifically the constitutionality of certain domestic measures (which transpose the customs on immunity, the UN Charter, and the ICJ's judgment): it required an assessment of the compatibility between two domestic sources. As I mused in a previous comment on *Albers*:

[i]f international *jus cogens* cannot trump sovereign immunity, one could try to invoke domestic peremptory safeguards to escape compliance with detestable international obligations, as in the *Kadi* case.

The CC's decision concerned precisely a try of this sort.

Act IV – the *Finale*

As anticipated, the CC agreed with the Tribunal of Florence and struck down the norms of Italian law that codified the obligations to implement the ICJ's judgment in *Germany v. Italy*. This outcome required some preliminary housekeeping.

First, the CC clarified a 1979 precedent (*Russel*) which had seemingly established the notion that customs pre-dating the Constitution would be constitutional by definition. This doctrine was inferred by implication (*a contrario*) from the Court's (otherwise redundant) *dictum* that "as regards international norms enjoying general recognition that entered into force after the Constitution, the mechanism of automatic incorporation . . . cannot in any way permit breach of the fundamental principles of our constitutional order." In 2014, the Court discarded this remark as a mere *obiter*, and held that all customs – which enter automatically the Italian legal order under Art. 10 of the Constitution – are subject to constitutional review. Perhaps, the remark still retains an added value:

pre-1948 customs are reviewable only for conflict with the core values of the Constitution, whereas post-Constitution customs must respect every bit thereof. At any rate, immunity customs can be reviewed for breach of fundamental rights.

Second, the CC did not question the ICJ judgment and the accuracy of the reconstruction of current customs provided therein. Custom, the CC noted, is a source of the international legal order, and national judges must conform to its interpretation adopted at the international level. The same duty applies to the judgments of the ECtHR, which must be followed in the domestic interpretation of the Convention (judgments no. 348 and 349/2007).

Consequently, the CC accepted to exercise its mandate to review only the constitutionality of domestic law, namely 1) the norm mirroring the international custom of immunity, automatically incorporated in the internal system; 2) the statute ratifying the UN Charter, insofar as it compels Italy to obey the ICJ under Art. 94 of the Charter; 3) Law no. 5 of 2013, Art. 3 (see above).

The CC set the scene evoking the doctrine of the *controlimiti* ("counter-limits") (3.2). Fundamental principles of the constitutional order and inalienable human rights raise a barrier to the entry of contrary supra-national obligations into the Italian system (international customs, EU law obligations, the Lateran Pacts). These values incarnate the constitutional identity of Italy and, as such, cannot be amended not even through a process of constitutional reform (see Artt. 138-139 of the Constitution).

1) The internal law transposing the international customs

The analysis of the internal effects of the international custom opens with a meaningful flashback. The CC observed that the restrictive doctrine regarding immunity, according to which *acta jure gestionis* are not immune from foreign jurisdiction, developed mainly through the aggregate contribution of national courts, among which the Italian ordinary judges had a leading role at the beginning of the XX Century. The emergence of the doctrine through the decisions of national judges strived to erode the application of absolute immunity, which entailed "an unfair restriction of the rights of private contracting parties" (3.3). If ordinary judges felt entitled to challenge the fairness of international customs then, when Italy did not have a rigid Constitution (that is, of higher rank than statutes), the CC held that it could not hesitate today in a similar scenario, because respect for fundamental right is now required by a Constitution that, in certain parts, is immutable.

Art. 10 of the Constitution provides for the incorporation of international customs into Italian law, but the incorporation does not operate with respect to customs that breach fundamental principles and inviolable rights. This is what occurred, in the CC's view, with respect to the rules of State immunity impugned. The relevant standards of review are Art. 2 of the Constitution (guaranteeing "the inviolable rights of the person") and Art. 24 on access to justice. The two standards are inseparable, because "it would be indeed difficult to tell how much of a right is left, if it cannot be invoked before a judge to seek an effective remedy" (3.4).

Restrictions of the access to justice are only justified to protect another constitutional value, as it is mostly the case in the field of sovereign immunities, which preserve the integrity of international relations. However, the CC held that in the case of immunity for international crimes the absolute sacrifice of the victims' access to justice is unjustifiable. More precisely, the Italian constitutional order does not contemplate any prevailing public interest that could excuse the restrictions of the rights under Artt. 2 and 24 of the Constitution. This is because, in the case of sovereign immunity, such restriction "must be connected – substantially and not just formally – to the sovereign function of the sovereign State, through the typical exercise of its governmental powers" (3.4). The

maintenance of peaceful inter-state relations cannot force onto the Italian constitutional system the breach of fundamental principles and inviolable rights.

Artt. 2 and 24 of the Constitution accept the principle of State immunity from the jurisdiction of the Italian judges to protect the function of governmental powers. Immunity cannot protect also acts that bear no relation with the typical exercise of public powers, are expressly considered and found to be wrongful for breach of inviolable rights [as in the present case] and are, in spite of this, deprived of any judicial remedies[, as was acknowledged by the ICJ itself with respect to Germany's conduct].

Therefore, since the victims of the crimes at stake have no judicial remedy for the breach of their fundamental rights, … the sacrifice of two supreme constitutional principles is hugely disproportionate to the goal of not interfering with the governmental powers of a foreign State. This conclusion is necessary when, as in the present case, governmental powers resulted in acts that can be, and were, qualified as war crimes and crimes against humanity breaching inviolable human rights. As such, these acts fall outside the lawful exercise of governmental powers. (3.4)

The reasoning of the CC, in essence, boils down to the seasoned argument that international crimes cannot qualify as acts *jure imperii*. The only difference from the reasoning in *Ferrini* and from the arguments brought before the ICJ is that, this time, the CC is not trying to convince anyone that this view informs the application of customary principles on sovereign immunity. The more modest conclusion is that, in Italy and in Italy only, the Constitution requires taking this view and, as a result, "closing" the domestic legal system to international customs that are incompatible with it.

The CC evoked two other precedents, to attenuate the impression of an unprecedented disobedience. In addition, it tried to hang its own decision on the walls of a gallery of *grands arrêts* that shaped the relationship between legal orders through occasional (but strategic) episodes of resistance. The first is its very own judgment no. 232 of 1989 (*Fragd*), whereby the CC criticised the approach of the Court of Justice of the EU (CJEU), and sanctioned the immediate application of the CJEU's preliminary rulings to the parties of the main proceedings. The second is the decision of the *Kadi I* case, in which the CJEU famously annulled the EU measures implementing a resolution of the UN Security Council, finding a breach of fundamental rights that undermined the constitutional foundations of the Union.

The conclusion is an exercise of formalism: because the international custom only entered the Italian system already "purged" of its unconstitutional traits, the question of unconstitutionality was rejected (3.5).

2) The ratification of the UN Charter

The referring judge questioned the constitutionality of Law no. 848 of 1957, Art. 1, which gives full execution to the UN Charter. In her view, this provision allows the operation of Art. 94 of the Charter, which requires compliance with the judgments of the ICJ, and therefore can conflict with Artt. 2 and 24 of the Constitution in circumstances such as those occurred after *Germany v. Italy*.

Without prejudice to Italy's commitments under the Charter at large, the CC declared the unconstitutionality of the implementing statute, exclusively insofar as it requires Italy to comply with the ICJ's decision of 2012. The reasoning on the merit is the same described under 1).

3) Art. 3 of Law no. 5 of 2013

The CC noted the *ratio* of this provision, adopted shortly after the ICJ's judgment. In the *travaux préparatoires*, the Parliamentary Commission in charge of the drafting noted that this provision aimed at "avoiding embarrassing situations like those entailed by the dispute brought before the

Court of The Hague." For the reasons discussed above under 1), this provision was declared unconstitutional too.

Comment – *Je sais, mais quand même…*

Let me stress one thing again: only time will tell whether this judgment will end up in the gallery of the historical judicial *tournants*, alongside *Pinochet* (UK House of Lords), *Kadi I* (CJEU) and *Horncastle* (UK Supreme Court). It could be relegated instead in the archive of the retrograde proclamations of provinciality, like the *Anti-Terror Database* (German Federal Constitutional Court), *Medellin* (US Supreme Court) and the *Slovak Pensions* (Czech Constitutional Court). [NB: Feel free to choose a different re-allocation that serves your taste better if you are touchy]. My comments do not imply criticism or praise of the CC's decision, which is obviously a brave and self-conscious pronouncement.

1. This judgment is an international wrongful act. The CC expressly endorsed non-compliance with the judgment of the ICJ. *Nota bene*: the CC did not just take issue with the specific means Italy chose to implement its obligations; the CC made it very clear that as long as there is a Constitution in Italy no Italian authority will be allowed to comply with *Germany v. Italy* at the expense of the victims. In doing so, the CC consciously exposed Italy to international responsibility for violation of customary law and Art. 94 of the UN Charter. The motivation behind this strategy is irrelevant at the international level. Art. 27 of the Vienna Convention on the Law of Treaties (which codifies a general principle applicable also to customs) states that a State "may not invoke the provisions of its internal law as justification for its failure to perform" international obligations. To be very clear, this judgment is sufficient reason for Germany to seise the ICJ again, and the judgment would be very easy to draft: Italy has confessed a breach, and has promised to breach again, forever. Alternatively, Germany is entitled to take appropriate action, including through counter-measures (see ILC Articles on State Responsibility, Chapter II. Countermeasures cannot be taken during binding dispute settlement proceedings). Moreover, Germany would be entitled to ignore the civil judgments of Italian courts (I quote from the *Frankfurter Allgemaine*: "Embassy in Rome: We need to talk. But we give nothing"). Failure to pay voluntarily would necessarily lead to enforcement proceedings, and one must wonder how many more assets like Villa Vigoni are available on the Italian territory. If plaintiffs were faced with a scarcity of attachable German assets, they would certainly know that enforcement abroad is not an option (the Italian Constitution has no extra-territorial effects, as it were). If I were them, I would try to push the CC a step further – who knows? – arguing that another inveterate custom must now must yield necessarily to the untouchable core of constitutional principles: the non-attachability of diplomatic premises or assets. It would be interesting to see the proportionality test at work in that scenario: access to justice without an effective remedy is useless, the CC said. Would it be acceptable under the Constitution to leave the victims without an *actually effective* remedy, or would it be preferable to make another dent in the old armour of sovereign immunities? Admittedly, this solution would encroach on a proper exercise of governmental power, not just the dubious public function to commit war crimes; but everything is weighable after all (e.g., how much compensation is sufficient?), if substantive and procedural principles are put in the same proportionality fruit bowl, with apples and oranges.

2. The reference to *Kadi* has some bootstrapping quality to it. At the time of *Kadi I*,several commentators agreed that the CJEU had no real alternative. Had the CJEU refused to annul the Regulation to honour its international obligations, the risk was that the constitutional tribunals of

the EU Member States would have stepped in to invalidate the implementing measures at the domestic level. According to this plausible reading, the CJEU's judgment meant also to pre-empt the possible reaction of national constitutional tribunals, and to some extent was arguably motivated by this possibility. In the CC's decision, we see a reversal: the *Kadi I* decision is cited as authoritative example of inter-system disobedience, to support the notion that deliberate non-compliance with international law is sometimes appropriate. The convincingness of this precedent is doubtful, insofar as it was premised precisely on the prospect of judgments like the CC's one. In other words, the CC is trying to say that others support its course of action, but it is really pointing to itself as the ultimate authority.

3. This judgment is unlikely to have an impact on international custom. Here I am venturing into the unknown, so feel free to know better. The ideal rule championed by the CC *does already exist*, in international law. Namely, the territorial tort exception to sovereign immunity is codified in Art. 12 of the UN Convention of 2004. If other States want to espouse the position of the CC, it is sufficient for them to ratify the Convention, and this ratification would hardly reinforce the CC's legitimate hope that a custom could arise. It is now relatively clear that the territorial tort exception is a matter of *lex specialis* left to treaty instruments. The ICJ excluded that a custom is even forming, and both the Tribunal of Florence and the CC accepted this conclusion as impeccable. In this perspective, the civil disobedience reflected in the CC's judgment is of a peculiar kind, because it acknowledges its own irrelevance against the injustice it purports to contrast. The CC essentially gave up trying to change the state of injustice registered at the international level, and limited itself to preserve the domestic order from the effects of this injustice. This protective strategy, however, is by definition unfit to change a comma of the wider problem. Make no mistake: I am not claiming that the CC will fail in its attempt at changing international law; I recognise that the CC has clearly excluded to have such a plan, so a success/failure assessment is beyond the point. I am just considering that its decision is very unlikely to produce a positive externality in this direction – whether intentional or not. The nostalgic recount of the heroic years when Italian judges forged the doctrine of restricted immunity suggests, perhaps, an inappropriate parallel.

4. *Je sais, mais quand même…* Italy discharges international obligations through the collective conduct of its public agents, whose different constitutional functions are irrelevant at the international level: Italy is one subject for virtually all international law purposes. Given a rule *x* (respect of sovereign immunity from foreign civil jurisdiction for acts *jure imperii*), Italy has had the following record: compliance (pre-*Ferrini*); breach (*Ferrini* and following); doubt (suspension during the ICJ proceedings); compliance (*Albers*); breach (CC). The decision of the CC appears to come full circle back to *Ferrini*. There is a change, though: the reasoning of Ferrini is domesticated – literally. What is considered intolerable is not so much the breach of international *jus cogens*, but the breach of domestic *jus cogens*. National *jus cogens*, as such, is both irrelevant and inaccessible to the outside international world: it is in a black-box. The CC can shape domestic law in perfect autonomy, as shaman and guarantor of its own Constitution. In this sense, it is tempting to read Italy's erratic behaviour according the psychoanalytic dynamics of belief – disavowal – magical thinking that runs through fetishism. At first, Italy believed (or proclaimed to believe) in the *actual* existence of an exception to State immunity. Then, it experienced a factual refutation of its belief, which forced it to a conscious *disavowal*. However, the belief (*croyance*) survived, yet not about a reality, but about a second-level intangible credence which no empirical experience can disprove because it is based on self-sustaining convictions (indeed, CC and Tribunal of Florence are

repeatedly stressing that they *know* that there is no custom to rely on – "*Je sais bien*"). Resort to the "untouchable core" of the Constitution speaks to the faith of the audience, in a call for identitarian exceptionalism ("*mais quand-même…*"):

In a word, the belief must survive its refutation, even if it thereby becomes impossible to grasp and one can see nothing but its utterly paradoxical effects. [Octave Mannoni, 'Je sais bien, mais quand même...' in *Clefs pour l'imaginaire: ou l'Autre scène* (Paris, Le Seuil, 1969), an English translation is available here]

5. What about *Jones v UK*? If the previous remark came across a bit vain, here is a hands-on example to conclude. The CC claims that international law in force today imposes an intolerable obligation to States, i.e., the obligation to deprive their citizens of judicial remedies in domestic courts in civil proceedings relating to international crimes, for no justifiable reason. Because the first half of the claim is factual, only the second half invites scrutiny: if truly there is no justifiable reason for this unfortunate twist of custom, all States of the international community should be concerned. After all, Italy is but one of the legion countries in which access to justice is a fundamental human right. Incidentally, Italy is party to the Council of Europe (CoE) and, by extension, of the European Convention on Human Rights. The 47 CoE members have entrusted the European Court of Human Rights (ECtHR) with the task to ensure that a uniform standard of human rights protection applies across all States. Because they are subject to the ECtHR's jurisdiction, CoE members typically interpret their internal regime on fundamental rights in light of – and in line with – the pronouncements of the Strasbourg Court. In Italy, the duty of "Conventional interpretation" of domestic norms in light of the ECtHR's case lawis clearly established (see again CC's judgments no. 348 and 349 of 2007), and unquestionably applies to the interpretation *of the Constitution* too.

With prodigious timing, the ECtHR indeed delivered on 14 January 2014 (one week *before* the referral of the Florentine Court to the CC) the judgment in the *Jones v. UK* case. Before going to Strasbourg, the applicants had tried to sue the Kingdom of Saudi Arabia for compensation in UK courts, alleging to have suffered torture (an international crime prohibited by *jus cogens* rules) at the hands of Saudi public officials. When their claims were rejected because of Saudi Arabia's immunity, they brought an application against the UK:

[t]he applicants alleged, in particular, that the grant of immunity in civil proceedings to the Kingdom of Saudi Arabia in the case of Mr Jones and to the individual defendants in both cases amounted to a disproportionate interference with their right of access to court under Article 6 of the Convention (par. 3).

The case is *Ferrini*-like as one can be, save for the territorial element (the alleged torture happened in Saudi Arabia, not in the State of the Court). However, I have stressed above that the CC did not give much relevance to the territorial exception, and based its reasoning on the constitutional right to access to court. For all practical purposes, therefore, the ECtHR's judgment was a relevant precedent for the CC's decision. The ECtHR concluded that, in light of *Germany v. Italy*, which certified the status of customary law on sovereign immunity,

the English courts[' upholding of] the Kingdom of Saudi Arabia's claim to immunity in 2006 *cannot therefore be said to have amounted to an unjustified restriction on the applicant's access to a court*. It follows that there has been no violation of Article 6 § 1 of the Convention (par. 198, emphasis added).

The lesson to be drawn here is modest.

- First, the plain outcome of *Jones v. UK* did not stop the Tribunal of Florence from referring a question to the CC, nor did it convince the CC that the limitation of the access to court was acceptable after all. This is not so surprising if you bought the psychoanalytical amateurish parallel (I am trying to contribute to the Lacan-isation of international legal studies): once disavowal has already taken place, further reality-checks and wake-up calls are useless.
- Second, it is clear that Italy has gone down a spiral of isolation from the rest of the international community. Initially, Italy's challenge to customary law was somewhat premised on shared values of justice, such as the rejection of impunity and respect for *jus cogens*. In the CC's judgment, instead, not only has the fight with custom subsided, but the CC enforced a solipsistic reading of access to justice which is not even validated by the ECtHR. To be true, Italy can afford higher protection than required by the Convention, but it is somewhat striking that Italy has built this open mini-war (waged against the UN, the ICJ, Germany and international law at large) on an extraordinarily severe proportionality assessment that was plainly disavowed by the ECtHR. At least the CJEU in *Kadi* could claim to be between a rock (the UN obligations) and a hard-place (the ECtHR's reading of fair trial and access to justice): there was no option but to favour one at the expense of the other. The CC has no ECtHR's support to stand on; the hard place is one that Italy built for itself out of thin air. With this CC's decision, and limitedly to this particular case and its proximate consequences, Italy is – literally – on its own against all.

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