

FOCUS: NATIONAL AND INTERNATIONAL LAW IN ITALY: THE END OF AN IDYLL?

THE NATIONAL CONSTITUTION TRUMPS INTERNATIONAL LAW

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The judgment of the Italian Constitutional Court (CC) of 22 October 2014 comes as a shock to the international legal community. After the International Court of Justice (ICJ) had declared, in its decision of 3 February 2012¹, that Italian courts are debarred from entertaining individual suits brought against Germany on account of war crimes committed during World War II, the issue of enforcing such claims before domestic courts outside Germany seemed to have become obsolete. Italy faithfully complied with the judgment by enacting Law No. 5 on 14 January 2013. Pursuant to Art. 3 of this law, in all pending proceedings the judge had to raise *ex officio* the lack of jurisdiction; decisions already having acquired the force of *res judicata* could be challenged on that ground, even beyond the reasons listed in Article 395 of the Italian Code of Civil Procedure for the purpose of revision (*revocazione*). By annulling this provision and thus depriving Germany of its main defense, the CC has embarked on a course with unforeseeable consequences.

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¹ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*.

In the past, there were several cases where a decision of the International Court of Justice (ICJ) was not heeded by the respondent State. Mention can be made of the final judgment in *Nicaragua v. United States of America*², the *LaGrand* case³, the *Avena* case⁴ and the recent dispute between *Nicaragua and Colombia*⁵. However, while in those earlier instances the ICJ's function consisted of giving a voice to the dictates of the international legal order, meeting with stubborn resistance on the most diverse grounds, for the first time now a national judge has claimed that a pronouncement of the ICJ does not meet with the higher standards of a national human rights regime. The CC confines itself to applying Italian domestic law, following the logic of dualism, and it emphasizes indeed that its verdict is strictly and exclusively rooted in the principles of the Italian Constitution (Cost.). However, it indirectly criticizes the ICJ for not rising to the level of human rights protection which, according to its view, is required within the famous group of '*nations civilisées*' in accordance with Article 38(1)(c) ICJ Statute. Indeed, it affirms that the right to a judge counts '*among the great principles of legal civilization in every democratic system of our time*'. This is tantamount to saying that the ICJ has ignored a general principle of international law. Quite a lot of judicial haughtiness underlies this assertion.

It must be acknowledged that the CC may have drawn some inspiration from the jurisprudence of the German Federal Constitutional Court. Asserting that it is the guardian of the German constitutional order, it has consistently stated in its decisions on the impact of European integration law in Germany that core values of the Basic Law may not be affected by European legislation, thus embracing a doctrine which is very similar to the

² ICJ, 27 June 1986, ICJ Reports 1986, p. 14.

³ ICJ, 27 June 2001, ICJ Reports 2001, p. 466.

⁴ ICJ, 31 March 2004, ICJ Reports 2004, p. 12. For a comprehensive assessment see B. Simma, *Eine endlose Geschichte? Artikel 36 der Wiener Konsularkonvention in Todesstrafenfällen vor dem IGH und amerikanischen Gerichten*, in P.-M. Dupuy et al. (eds.), *Common Values in International Law? Essays in Honour of Christian Tomuschat* (2006) 423-448.

⁵ Non-execution of the judgment of 19 November 2012 in *Territorial and Maritime Dispute*.

Italian doctrine of '*controlimiti*'⁶. However, it has never declared the inapplicability in Germany of such statutory regulations. The case of *Kadi*, mentioned by the CC (at the end of para. 3.4), where the CJEU refused to enforce a resolution of the UN Security Council, has also substantially different features in that the Luxembourg judges invoked the rule of law against decisions adopted by a political body which deliberately had departed from the common rules of procedural fairness⁷.

It is amazing how little effort the CC has invested in trying to demonstrate that indeed a violation of Art. 24 Cost. must be deemed to be present. First of all, it is wrong to state that the persons injured by the activities of the authorities of the Third Reich were denied the right to seize a judicial body to pursue the rights they believe to hold⁸. Many suits were brought before German tribunals. Those actions were never rejected as being inadmissible, they failed because they were considered unfounded on the merits. The right to a judge cannot be equated with a right to win the case submitted to judicial cognizance, which is apparently the view of the CC. The German judges held consistently that the specific regime of State responsibility under German law does not apply to military activities in armed conflict, following thereby the example of the US legislation which does not recognize any entitlement to reparation for activities of the US Armed Forces in armed conflict⁹. Second, they held, which until today is still the prevailing view in the doctrine of international law, that violations of humanitarian law entail undeniably State responsibility but do not give rise to individual reparation claims¹⁰. Accordingly, the contention that piercing the veil of State

⁶ See, in particular, the Maastricht judgment, 12 October 1993, BVerfGE 89, 155, and the Lisbon judgment, 30 June 2009, BVerfGE 123, 267.

⁷ Case C-402/05 P, 3 September 2008. The CC does not mention the second *Kadi* case, C-584/10 P, 18 July 2013.

⁸ The CC wrongly refers to the Reply of Germany of 5 October 2010 where just the contrary is stated.

⁹ Federal Tort Claims Act, 28 U.S.C. § 2680 (j).

¹⁰ In its Conference Resolution 2010/2 of The Hague the ILA proclaimed that victims of armed conflict have a '*right to reparation from the responsible parties*' (art. 6), but specified that this progressive statement has '*no retroactive effect*' (art. 15). Discussion by C. Tomuschat, *Specificities of human rights law and international humanitarian law regarding state responsibility*, in R. Kolb & G. Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (2013) 198-222.

immunity is necessary as a remedy of last resort for the benefit of the aggrieved individuals has extremely weak underpinnings. In order to make its reasoning convincing, the CC would have been compelled to discuss these issues much more in detail.

In particular, one must criticize the CC for its failure to appraise adequately the traditional rule of immunity. It acknowledges that the right to a judge according to Art. 24 Cost. may possibly be restricted by virtue of a '*public interest*' suited to take precedence over the right to a judge, one of the '*supreme principles*' of the Italian constitutional order. But it does not recognize such an interest, in particular because it does not look beyond the abstract terms of its Constitution. According to its dualist logic, it does not perceive the essential functions sovereign immunity in the international legal order. It makes reference to the restrictions of State immunity in commercial matters, trying to suggest that further departures from the original rule with regard to sovereign acts (*acta jure imperii*) would only constitute a logical continuation of a trend already in course. This approach has little value. It is one thing to adjudicate all kinds of commercial disputes, but it is quite another matter to adjudicate disputes where a foreign State has acted in its official capacity. No State is prepared to accept the courts of another State to sit in judgment over it. *Par in parem non habet imperium*. This dictum embodies in a nutshell the wisdom of the international legal order whose building blocks are sovereign States in perfect equality. States may accept to be supervised by international tribunals whose jurisdiction they have accepted, like the ICJ, the ECtHR, or the ECJ. The basic principle of international dispute settlement is consent - which is supposed to provide an unchallengeable basis for a binding decision. In the instant case, Italy does not even comply with its formal pledge to follow the decisions of the ICJ - and now wishes Germany to follow its unilateral determination not to abide by its obligations under international law.

The logic followed by the CC also fails to take into account the specific circumstances of a financial settlement after an armed dispute. Traditionally, such settlements have been arranged on the basis of treaties that provide for lump sum compensation. It is then the task of the recipient government to take care of an equal distribution of the sums received. It should be recalled that this channel of compensation has also been used in the relationship

between Germany and Italy. Notwithstanding Italy's waiver under the Peace Treaty, Germany was prepared, in the sixties of the last century (1961/63), to provide reparation in terms of financial compensation¹¹ – which the CC finds unworthy even to mention. Additionally, the question remains to what extent the determinations of the Potsdam Agreement¹², where the Victorious Allied Powers acted on behalf of all enemy States of Germany, are opposable to Italy. Indeed, the clauses of the Potsdam Agreement on reparations to be made by Germany, originally a unilateral statement by those Powers, became eventually binding for Germany by virtue of the Two-plus-Four Treaty of 1990¹³, which all of the OSCE States recognized as indeed the final settlement with respect to Germany¹⁴. All these complex issues cannot be looked into exhaustively within the framework of this short note. But it is not too early for a general warning. Were international lawyers to share the views of the CC, it would in the future be impossible to conclude comprehensive peace treaties after an armed conflict having caused many casualties, many of them in violation of the rules of humanitarian law. Unfortunately, such departures from the rule of law are a fact of life. Almost all of the armed conflicts of our epoch are marred by phenomena of open disregard for the rule of law. To bring about peace, harmony and reconciliation by a peace treaty always requires tremendous efforts and proves many times fruitless. However, the view of the CC would make peace treaties almost impossible. They could only establish provisional legal frameworks, structurally under the threat of being overtaken and derailed by claims of individuals unhappy about the fact that the damage suffered by them will only be partly made good.

Undeniably, Italy, on whose behalf the CC has rendered its judgment, has committed a breach of international law or is in any event close to committing such a breach. Article 94(1) UN Charter

¹¹ ICJ, 3 February 2012, §§. 24-5.

¹² Of 2 August 1945, reprinted in: I. von Münch (ed.), *Dokumente des geteilten Deutschland* (1968) 32.

¹³ Treaty on the Final Settlement with Respect to Germany, 12 September 1990, 29 ILM (1990) 1186.

¹⁴ Charter of Paris for a New Europe, 21 November 1990, <http://www.osce.org/mc/39516?download=true>: 'We note with great satisfaction the Treaty on the Final Settlement with respect to Germany'.

provides that judgments of the ICJ must be complied with by the parties involved. One may also refer to Article 59 ICJ Statute which contains the same provision in other words. Italy cannot advance any good grounds to justify its conduct. The question only arises whether the judgment of the CC as such constitutes a breach or whether a breach occurs only through the implementation of that judgment through the continuation of the pending proceedings before the Italian civil courts. According to one of the best consolidated rules of international law, codified in Article 27 of the Vienna Convention on the Law of Treaties, no State may invoke rules of its domestic law to evade its international obligations. It would also be somewhat hazardous to contend that the judgment of the ICJ conflicts with a rule of international *jus cogens* - which the CC has not done openly. Where the ICJ, the highest judicial authority of the international community, has pronounced itself on a controversial issue of international law by clarifying the legal position, national judges are precluded from teaching the ICJ a lesson from a position of 'knowing better'. Formally, the CC acknowledges indeed its inability to act as a body of review regarding the application of international law by the ICJ (para. 3.1).

The unavoidable consequence of an international tort is the obligation of the responsible State either to prevent any harmful consequences or to make good the ensuing consequences (see Art. 30, 31 of the ILC's Articles on Responsibility of States for internationally wrongful acts). Accordingly, Italy has to do everything in its power to ensure that no injury will be caused to Germany through or as a consequences of the judgment of its CC.

It is the task incumbent on the Italian Government to look for ways and means to attain this objective. Obviously, it finds itself in an awkward position. On the one hand, it is required to fulfil its duties under international law; on the other hand, it is also bound by the demands of its constitutional order as identified by the CC. Under the rule of law, both legal requirements would have to be respected, which is impossible given the circumstances of the instant case. The Italian Government cannot simply ignore the decision of its highest constitutional authority. While judgments emanating from ordinary courts in violation of international law can in the last resort be overruled by a legislative act, such strategy has been blocked by the CC. The CC cannot

have been unaware of this impasse. It would be highly interesting to know whether the judgment was adopted unanimously by the judges. Individual opinions could have given some hints as to how to resolve the imbroglio. Unfortunately, the Statute of the CC does not allow for individual opinions. Every judgment therefore seemingly embodies the full authority of the Court – which precisely in the case at hand does not appear to be a plausible assumption.

It now falls to the diplomats of both sides to look for reasonable answers before severe damage is inflicted on the relations between Germany and Italy – and perhaps also to the European Union. Italy cannot expect that Germany simply bows to the pressure brought to bear upon it by the Italian judiciary. Undeniably, the ball is in the court of Italy but cannot be resolved by its courts. Should the pending proceedings all be resumed and should new claims initiated by war victims be entertained by the Italian civil courts, as encouraged to do so by the CC, a situation of serious legal paralysis would emerge. Hundreds of judgments might acquire the authority of *res judicata* but could not be enforced. In Germany, judgments rendered in open disregard of German jurisdictional immunity are considered to be vitiated by a serious procedural defect which renders them ineligible as a basis for measures of constraint, all the more so since under Art. 25 of the German Basic Law the general rules of international law, including those establishing jurisdictional immunity, are part and parcel of the German legal order with a rank above the ordinary statutes. Obviously, Germany does not challenge the ruling of the ICJ. In Italy, most German State assets are covered by the immunity attaching to objects designed for purposes of governmental activity. In fact, the CC's annulment of Art. 3 of Law No. 5 of 2013 does not affect the immunity from measures of constraint Germany is enjoying. The CC has not openly touched upon this specific aspect. It would be an extremely far-reaching conclusion to contend that the untouchable core of the right to a judge, as laid down in Art. 24 Const., extends also to the stage of execution of judgments obtained and cannot be subjected to any restriction, not even by virtue of the jurisdictional immunity of a

foreign State¹⁵. On the other hand, Germany's refusal to honour judgments rendered against it cannot be challenged before the ECtHR which has already ruled, in cases relating to Italian war victims, that the defense of State immunity stands and has not been set aside by new developments in international practice. The ECtHR concurs therefore fully with the opinion delivered by the ICJ.

Very few ways out of the dilemma come to mind. The most logical inference to be drawn would be for the Italian State to pay financial compensation to all those who feel that they have a legitimate claim against Germany. Italy would then have to examine each and every one of those claims, determining, in this connection, whether any of the alleged entitlements is substantiated. When taking this course of action, Italy would have to ascertain, in particular, what legal relevance must be attributed to the clause in the Italian Peace Treaty of 1947 (Art. 77) according to which Italy renounces, on its part and also on behalf of its nationals, any claims against Germany. This clause was imposed on Italy because its Fascist Government had been an ally of Germany during lengthy periods in World War II. Since the loss of any possible entitlement is thus attributable to the unlawful activities of the Italian State during World War II, it would appear logical that indeed public funds be used for the compensation of the damage suffered by Italian citizens. It corresponds to a pattern often found in national legislation for the reparation of war damages that persons unable to recover the losses suffered receive compensation from public resources. On the other hand, according to a jurisprudence of the French courts, persons unable to get satisfaction for a judgment on account of the hurdle of sovereign immunity protecting the defendant, may claim reparation for the loss endured from the French State¹⁶.

The judgment of the CC will attract the attention of lawyers for many years to come. No easy fix can be envisioned. The best diplomatic skills are required to resolve what today looks unsolvable.

¹⁵ Under the ECHR the right to a judge does indeed apply also to the stage of execution, see case *Hornsby v. Greece*, application 18357/91, 19 March 1997, § 40.

¹⁶ *Cour administrative d'appel de Paris*, 8 December 2008, 113 *Revue générale de droit international public* (2008) 233.