A Dangerous Last Line of Defence: Or, A Roman Court Goes Lutheran

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Abstract The chapter addresses questions of international law implicated by *Sentenza* 238/2014. It begins by revisiting the longstanding debate about state immunity and its limits, arguing that notwithstanding decades of discussion, a 'grave breaches' exception has never had more than marginal support in positive international law. Against that background, it comes as no surprise that the Italian Constitutional Court (ItCC), in Judgment 238/2014, did not assert the existence of a grave breaches exception as a matter of international law. Instead, the ItCC relied on what might be termed a 'foreign relations law' approach, holding that Italian constitutional law required it not to give domestic effect to the international law of state immunity. This 'foreign relations law' approach offers a last line of defence for those seeking to limit the reach of rules of state immunity. As is set out in this chapter, it is an effective line of defence because international law does not 'by itself, possess the force to amend or repeal internationally unlawful domestic (. . .) acts' (Antonio Cassese). At the same time it is a dangerous line, as it risks weakening international law generally and not just in the area of immunity. This chapter suggests that, when read as a foreign relations law decision, *Sentenza* 238/2014 is not as such unusual: it is one of many decisions accepting some form of 'constitutional override' that limits the effects of international law within domestic legal orders. However, *Sentenza* 238/2014 stands out because—unlike other decisions—it seems to refuse international law any place in the construction of constitutional law: in the ItCC's 'separatist treatment' (Kolb) international law is denied a directive function ('*Orientierungswirkung*'); it is not factored into the equation. Seen in that light, *Sentenza* 238/2014 (counter-intuitively, for a 'Roman' decision) has a 'Lutheran' quality; it is informed by a stubborn 'here I stand, I can do no other'

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aspect, which limits the potential for a constructive dialogue between domestic and international judiciaries.

I. Introduction

This chapter situates Judgment 238/2014[1] in the wider debate on immunity and human rights. It does so by analysing the argumentative strategy adopted by the Italian Constitutional Court (ItCC) and assessing how it could influence the development of international law. My key argument is that the judgment's influence is likely to be limited, and that this is largely for the better. More specifically, Judgment 238/2014 contributes fairly little to the long-standing debates about the scope of immunities enjoyed, under international law, by states responsible for grave breaches of international law.

To set the stage, I begin by revisiting those long-standing debates and argue that notwithstanding decades of discussion and fervent support among some commentators, a 'grave breaches' exception has only ever been endorsed by a small number of states and international organizations (section II). Against that background, it comes as no surprise that the ItCC, in Judgment 238/2014, did not assert the existence of a grave breaches exception as a matter of international law. Instead, the ItCC relied on what might be termed a 'foreign relations law' approach,[2] holding that Italian constitutional law required it not to give domestic effect to the international law of state immunity (section III). This foreign relations law approach offers a last line of defence for those seeking to limit the reach of rules of state immunity. As is set out in section IV, this approach is an effective line of defence, as international law does not 'by itself, possess the force to amend or repeal internationally unlawful domestic (. . .) acts'.[3] At the same time, it is a dangerous line, as it risks weakening international law generally and not just in the area of immunity. The chapter suggests that, when read as a foreign relations law decision, Judgment 238/2014 is not as such unusual: it is one of many decisions accepting some form of 'constitutional override' that limits the effects of international law within domestic legal orders. However, it stands out because—unlike decisions of other domestic courts preserving the possibility of a constitutional override—it seems to refuse international law any place in the construction of constitutional law: in the ItCC's 'separatist treatment',[4]

[1] *Corte Costituzionale*, Judgment of 22 October 2014, No 238/2014.

[2] Put simply the term 'foreign relations law' is used to denote 'the domestic law of each nation that governs how this nation interacts with the rest of the world' without, however, itself making a determination of the state's international rights and obligations, Curtis A Bradley, 'What is Foreign Relations Law?' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: OUP 2018).

[3] Antonio Cassese, 'Towards a Moderate Monism', in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford: OUP 2012), 187–199, 199.

[4] Robert Kolb, *The Law of Treaties: An Introduction* (Cheltenham: Edward Elgar 2016), 180.

international law is denied any 'directive function' ('*Orientierungswirkung*'); it is not factored into the equation.[5] Seen in that light, Judgment 238/2014 (perhaps counter-intuitively, for a 'Roman' decision) has a 'Lutheran' quality; it is informed by a stubborn 'here I stand, I can do no other' mindset, which limits the potential for constructive dialogue between domestic and international judiciaries (section V).[6] Section VI briefly comments on the implications of this 'Roman-Lutheran' approach to international law.

II. Immunity and Grave Breaches of International Law: The State of Play in Late 2014

Much of the initial reaction to Judgment 238/2014 viewed it as yet another contribution to the debate about immunity and grave breaches of international law affecting the rights of individuals.[7] That, no doubt, is the substantive focus of the

[5] According to Kolb, Judgment 238/2014 adopts a stance of 'robust dualism' (ibid); see also Filippo Fontanelli, 'The Italian Constitutional Court's Challenge to the Implementation of the ICJ's Germany v Italy Judgment', *iLawyer*, (30 October 2014), available at http://ilawyerblog.com/italian-constitutional-courts-challenge-implementation-icjs-germany-v-italy-judgment/, asserting that the judgment 'produced the most spectacular display of dualism this side of *Medellin*'.

[6] On this 'multi-level' judicial dialogue and its benefits for both the international and the domestic legal orders, see Antonios Tzanakopoulos, 'Judicial Dialogue in Multi-level Governance: The Impact of the Solange Argument', in Ole K Fauchald/André Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Oxford: Hart 2012), 185–215; ILA, 'Mapping the Engagement of Domestic Courts with International Law', Final Report of the Study Group on Principles on the Engagement of Domestic Courts with International Law, (Johannesburg, 2016), available at http://www.ila-hq.org/index.php/study-groups?studygroupsID=57; see also the collection of essays in Christian J Tams/Antonios Tzanakopoulos, 'International Law and Practice: Symposium on Domestic Courts as Agents of Development of International Law', *Leiden Journal of International Law* 26 (2013), 531–540; Alessandro Bufalini, 'Judgment 238/2014 and the Importance of a Constructive Dialogue', *VerfBlog*, (12 May 2017), available at http://verfassungsblog.de/judgment-2382014-and-the-importance-of-a-constructive-dialogue/.

[7] See, eg, Theodor Schilling, 'The Dust Has Not Yet Settled: The Italian Constitutional Court Disagrees with the International Court of Justice, Sort of', *EJIL:Talk!*, (12 November 2014), available at https://www.ejiltalk.org/the-dust-has-not-yet-settled-the-italian-constitutional-court-disagrees-with-the-international-court-of-justice-sort-of/; Andrea Pin, 'Tearing Down Sovereign Immunity's Fence: The Italian Constitutional Court, the International Court of Justice, and the German War Crimes', *OpinioJuris*, (19 November 2014), available at http://opiniojuris.org/2014/11/19/guest-post-tearing-sovereign-immunitys-fence-italian-constitutional-court-international-court-justice-german-war-crimes/; Felix Würkert, 'No Custom Restricting State Immunity for Grave Breaches: Well Why Not?', *VerfBlog*, (11 December 2014), available at http://verfassungsblog.de/no-custom-restricting-state-immunity-grave-breaches-%E2%80%92-well-not-2/; Anne 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', *EJIL:Talk!*, (22 December 2014), available at https://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/; Remo Caponi,

decision: the ItCC declared unconstitutional domestic rules intending to give effect to international law principles of immunity, insofar as they covered certain grave breaches of international law, and to the decisions of the International Court of Justice (ICJ), insofar as they concerned the application of the *Jurisdictional Immunities* Judgment of 3 February 2012. In taking a stand on these matters, the ItCC joined a major, decades-long debate that had, in fact, been one of international law's *grands débats* of the 1990s and 2000s: whether sovereign immunity should shield a state, and its representatives, from civil claims in foreign courts with respect to conducts that (if established) would amount to grave breaches of international law, notably violations of fundamental human rights.[8]

Many contributions to this controversy, until recently, followed a fairly predictable script. Those arguing that sovereign immunity could not—or no longer—be invoked, argued for a reform of international law that should recognize an immunity exception for grave breaches.[9] Those defending immunity, even for grave breaches,

'A Fresh Start: How To Resolve the Conflict between the ICJ and the Italian Constitutional Court', *VerfBlog*, (28 January 2015), available at http://verfassungsblog.de/fresh-start-resolve-conflict-icj-italian-constitutional-court/.

[8]See, eg, Adam C Belsky/Mark Merva/Naomi Roht-Arriaza, 'Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law', *California Law Review* 77 (1989), 365–415; Andrea Bianchi, 'Denying State Immunity to Violators of Human Rights', *Austrian Journal of Public and International Law* 45 (1994), 195–229; Mathias Reimann, 'A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v Federal Republic of Germany', *Michigan Journal of International Law* 16 (1995), 403–432; Andreas Zimmermann, 'Sovereign Immunity and Violations of Jus Cogens: Some Critical Remarks', *Michigan Journal of International Law* 16 (1995), 433–440; Richard Garnett, 'The Defence of State Immunity for Acts of Torture', *Australian Year Book of International Law* 18 (1997), 97–126; Susan Marks, 'Torture and the Jurisdictional Immunities of Foreign States', *Cambridge Law Journal* 56 (1997), 8–11; Andrea Bianchi, 'Immunity versus Human Rights: The *Pinochet* Case', *European Journal of International Law* 10 (1999), 237–277; Alexander Orakhelashvili, 'State Immunity and International Public Order', *German Year Book of International Law* 45 (2002), 227–268; Lee M Caplan, 'State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory', *American Journal of International Law* 97 (2003), 741–781; Thomas Giegerich, 'Do Damages Claims Arising from *Jus Cogens* Violations Override State Immunity for the Jurisdiction of Foreign Courts?', in Christian Tomuschat/Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Leiden: Brill 2006), 203–238; Lorna McGregor, 'State Immunity and Jus Cogens', *International and Comparative Law Quarterly* 55 (2006), 437–446; Alexander Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong', *European of Journal International Law* 18 (2008), 955–970; Sevrine Knuchel, 'State Immunity and the Promise of *Jus Cogens*', *Northwestern Journal of International Human Rights* 9 (2011), 149–183.

[9]See, eg, Reimann, 'A Human Rights Exception' 1995 (n 8); Knuchel, 'State Immunity' 2011 (n 8); Lorna McGregor, 'Torture and State Immunity: Distorting Sovereignty', *European Journal of International Law* 18 (2008), 903–919; Andrew Clapham, 'The Jus Cogens Prohibition of Torture and the Importance of Sovereign State Immunity', in Marcelo Cohen (ed), *Promoting Justice, Human Rights and Conflict Resolution Through International Law: Liber Amicorum Lucius Caflisch* (Leiden: Brill 2007), 151–169.

claimed that no such exception was recognized in international law—that the case for it had not been made out.[10] Just as the script was predictable, so too were the roles assigned to the discussants: the call for reform was one of progress and optimism that emphasized the centrality of human rights;[11] to this the sceptics typically responded by insisting on the careful application of the sources of law and by warning against overzealousness. Less predictable were the manifold arguments advanced in support of an immunity exception; these were diverse and at times both ingenious and creative. They were also frequently used in combination with one another in order to present as far as possible a strong case against the granting of state immunity.

For the sake of simplicity, they can be grouped into five broad and overlapping categories:

1. Normative hierarchy/ius cogens: sovereign immunity would have to yield to superior rules of international law recognized as peremptory from which no derogation is permitted (such as rules prohibiting torture or war crimes);[12]
2. A duty to exercise jurisdiction deriving from other fields of international law, such as international conventions to which the state is party: immunity would be superseded by state obligations to exercise jurisdiction, or to give effect to the human right to an effective remedy;[13]
3. Refusal to extend immunity to egregious acts: state conduct amounting to grave breaches could not be qualified as an 'official' or 'sovereign act' benefiting from immunity, or in any case such behaviour would constitute an 'implied waiver' on behalf of the state; alternatively, reliance on immunity would be considered abusive and ineffective;[14]

[10]For example, Zimmermann, 'Sovereign Immunity and Violations' 1995 (n 8); cf Giegerich, 'Damages Claims Arising from *Jus Cogens*' 2006 (n 8).

[11]Judge Cançado Trindade's dissenting opinion in the *Jurisdictional Immunities case* before the ICJ is a powerful example in point: 'Individuals are indeed subjects of international law (not merely "actors") and whenever legal doctrine departed from this, the consequences and results were catastrophic. Individuals are *titulaires* of rights and bearers of duties which emanate directly from international law (the *ius gentium*). Converging development, in recent decades, of the international law of human rights, of international humanitarian law, and of the international law of refugees, followed by those of international criminal law, give unequivocal testimony to this (...). The doctrine of sovereign immunities (...) unduly underestimated and irresponsibly neglected the position of the human person in international law' (paras 180–181).

[12]For academic claims to this effect, see Orakhelashvili, 'State Immunity and International Public Order' 2002 (n 8); Orakhelashvili, 'State Immunity and the Hierarchy of Norms' 2008 (n 8); Bianchi, 'Immunity versus Human Rights' 1999 (n 8).

[13]Orakhelashvili, 'State Immunity and the Hierarchy of Norms' 2008 (n 8); McGregor, 'State Immunity and *Jus Cogens*' 2006 (n 8), 439.

[14]Caplan, 'State Immunity' 2003 (n 8); Belsky/Merva/Roht-Arriaza, 'Implied Waiver' 1989 (n 8); Bianchi, 'Immunity versus Human Rights' 1999 (n 8).

4. A justified response: the denial of immunity could be considered lawful as a reprisal or countermeasure to the previously unlawful conduct of the defendant state;[15]
5. Acceptance of an exception in international practice: cutting across these substantive considerations, the simplest argument has always been that international practice had come to accept an immunity exception, either for all grave breaches or at least for those qualifying as territorial torts.[16]

By October 2014, when the ItCC rendered its decision, all of these arguments were well known and had been tried out, mostly unsuccessfully, dozens of times.[17] They did not, of course, go away. But it is probably fair to say that they showed significant signs of wear and tear.[18] No doubt, 'the cause endured, the hope still lived, the dream would never die';[19] but in seeking to translate their claims into winning legal arguments, supporters had made limited headway. So rare had been their successes, and so frequent and resounding their defeats, that the project of a grave breaches exception seemed to have either lost steam or stalled altogether. To illustrate:

1. The concept of an immunity exception for grave breaches of international law had not been, by 2014, recognized in an international treaty. In the course of the international community's most significant law-making project on jurisdictional

[15]Giegerich, 'Damages Claims Arising from *Jus Cogens*' 2006 (n 8); Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions* (Oxford: OUP 2011), 194; Antonios Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts', *Loyola of Los Angeles International and Comparative Law Review* 34 (2012), 133–168, at 149 and note 53 therein.

[16]McGregor, 'State Immunity and *Jus Cogens*' 2006 (n 8), 438.

[17]For example, in *Princz v Germany*, 26 F 3d 1166 (DC Cir, 1 July 1994); ECtHR, *Al-Adsani v The United Kingdom*, Judgment of 21 November 2001, Application No 35763/97; ICJ, *Arrest Warrant of 11 April 2000 (DRC v Belgium)*, Judgment of 14 February 2002, ICJ Reports 2002, 3; Court of Appeal of Ontario, *Bouzari v Islamic Republic of Iran*, (2004) 71 OR (3d) 675; *Al-Adsani v The Government of Kuwait and Others* (No 2), CA 29 March 1996, (1996) 107 ILR 536; *Corte di Cassazione*, Judgment of 11 March 2004, No 5044/04 (*Ferrini*); Maria Gavouneli/Ilias Bantekas, '*Prefecture of Voiotia v Federal Republic of Germany*, Case no 11/2000', *American Journal of International Law* 95 (2001), 198–204; *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* [2006] UKHL 26; ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment of 3 February 2012, ICJ Reports 2012, 99.

[18]To my surprise, this is often not recognized, at least not expressly. In response to this, the following section sets out my view in rather blunt terms. It draws on points made forcefully by Roger O'Keefe in 'State Immunity and Human Rights: Heads and Walls, Hearts and Minds', *Vanderbilt Journal of Transnational Law* 44 (2011), 999–1045; see also Andrea Bianchi, 'On Certainty', *EJIL:Talk!*, (16 February 2012), available at https://www.ejiltalk.org/on-certainty/.

[19]To adapt the terms of a brave, defiant concession speech: see Ted Kennedy, Concession Speech at the Democratic National Convention in New York City, 12 August 1980, available at www.americanrhetoric.com/speeches/tedkennedy1980dnc.htm.

immunities, the UN Convention on Jurisdictional Immunities of States and Their Property (UN Convention),[20] the drafters considered the introduction of a limited immunity exception for grave breaches affecting peremptory norms,[21] but decided the time was not 'ripe' enough to do so.[22]

2. Regional human rights courts, like the European Court of Human Rights (ECtHR), faced with claims by victims alleging grave breaches amounting to, inter alia, torture and war crimes, as well as an impairment of their right of access to justice, repeatedly accepted the right of contracting states to uphold immunity. This was neither affected by the peremptory character of the norms allegedly breached nor by the victims' right of access to justice and an effective remedy. In particular, the ECtHR construed Article 6 of the European Convention on Human Rights and Fundamental Freedoms in light of (and limited by) the principles of sovereign immunity, therefore not requiring the recognition of a grave breaches exception. In a series of cases, the ECtHR accepted that Article 6 was not disproportionally restricted by the grant of sovereign immunity and largely deferred to the judgment of the contracting states.[23]
3. Relatively little pressure towards admitting a 'grave breaches' exception came from domestic legislation; state immunity statutes on balance do not offer much support for a 'grave breaches exception'.[24] Reforms at the domestic level mainly aimed to align national law with the UN Convention and in some instances to

[20]UN Convention on Jurisdictional Immunity of States and Their Property (2 December 2004), UN Doc A/RES/59/38, UN Doc A/59/49, 486 (not yet in force).

[21]ILC, Report of the Working Group on Jurisdictional Immunities of States and Their Property, Report on the Work of the Fifty-first Session (1999), UN Doc A/54/10, paras 471–484.

[22]The proposal was not taken up by the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property in its reports. See, Report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property (GAOR 57th session, Suppl No 22, A/57/22, 4–15 February 2002); Report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property (GAOR 58th session, Suppl No 22, A/58/22, 24–28 February 2003); Report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property (GAOR 59th session, Suppl No 22, A/59/22, 1–5 March 2004). See also, Convention on Jurisdictional Immunities of States and Their Property, Report of the Chairman of the Working Group, UN Doc A/C.6/54/L.12 (12 November 1999), para 47; cf McGregor, 'State Immunity and Jus Cogens' 2006 (n 8); see also Andreas Zimmermann, chapter 'Would the World Be a Better Place If One Were to Adopt a European Approach to State Immunity?', in this volume.

[23]ECtHR, *Al-Adsani v The United Kingdom* (n 17), paras 53–67; ECtHR, *Fogarty v The United Kingdom*, Grand Chamber Judgment of 21 November 2001, Application No 37112/97, paras 33–39; ECtHR, *McElhinney v Ireland*, Grand Chamber Judgment of 21 November 2001, Application No 31253/96, paras 34–38; ECtHR, *Kalogeropoulou and Others v Greece and Germany*, Judgment of 12 December 2002, Application No 59021/00.

[24]See, eg, Foreign Sovereign Immunities Act, 28 USC §§1330, 1602–1611; UK, State Immunity Act 1978, 17 ILM (1978) 1123; Canada, State Immunity Act 1982, 21 ILM (1982) 798; Australia, Foreign States Immunity Act 1985, 25 ILM (1986) 715.

facilitate judicial proceedings against states accused of supporting terrorism.[25] Yet, to my knowledge, there was not in the years prior to 2014 any concerted attempt by states to enshrine a grave breaches exception via domestic law. This is worth noting because it sets apart the controversies about immunity from, for example, debates about universal jurisdiction, where claims towards effective remedies have resulted in law reforms at the national level—the gradual assertion, by states, of extraterritorial jurisdiction over international crimes being the most prominent example.[26]

4. Domestic courts asked to adjudicate on claims brought in response to grave breaches by a foreign state upheld in their overwhelming majority that foreign state's immunity: in so doing they rejected arguments based on ius cogens, on the right to an effective remedy, on abuse of rights, or on the nature (official or otherwise) of the impugned conduct. As for ius cogens in particular, the overwhelming majority of courts across jurisdictions accepted the superiority argument in principle but did not think it relevant. In line with the ECtHR's jurisprudence, courts in Canada,[27] Australia,[28] England,[29] New Zealand,[30] France,[31] and the US,[32] among others, did not consider there to be a clash, in the main because in their view, despite the presumably peremptory nature of the rules violated, the remedial rights of victims did not qualify as peremptory themselves. Domestic courts in Greece and, notably, Italy took a different

[25]That was the case with the 'Flatow' amendment to the US FSIA, which was introduced to allow suits against state sponsors of terrorism in US courts. See FSIA, 28 USC §1605A.

[26]In a survey published in 2012, Amnesty International concluded that '147 (approximately 76.2 %) out of 193 states [whose legislation was assessed] have provided for universal jurisdiction over one or more of [the] crimes' recognized under international law (which Amnesty took to mean war crimes, crimes against humanity, genocide, torture); see Amnesty International, *Universal jurisdiction: A Preliminary Survey of Legislation Around the World: 2012 Update*, available at https://www.amnesty.org/en/documents/ior53/019/2012/en/.

[27]Court of Appeal of Ontario, *Bouzari v Islamic Republic of Iran*, (2004) 71 OR (3d) 675; Supreme Court of Canada, *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 SCR 176.

[28]New South Wales Court of Appeal, *Zhang v Zemin* [2010] NSWCA 255.

[29]UK Court of Appeal, *Al-Adsani v The Government of Kuwait and Others* (No 2), CA 29 March 1996, (1996) 107 ILR 536; UK House of Lords, *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (The Kingdom of Saudi Arabia)* [2006] UKHL 26.

[30]New Zealand, High Court, *Fang and Others v Jiang Zemin and Others*, (21 December 2006), 141 ILR 702.

[31]Court of Cassation, *Réunion Aérienne v Socialist People's Libyan Arab Jamahiriya*, (Civil Chamber I, 9 March 2011), Case no 09-14743 150 ILR 630.

[32]*Princz v Germany*, Judgment of 1 July 1994 (n 17).

(heretical or progressive—depending on one's perspective) view,[33] but they too faced domestic opposition.[34]

5. Finally, in its *Jurisdictional Immunities* Judgment, the ICJ rejected arguments advanced in support of an immunity exception for grave breaches. It did so after a rather detailed perusal of international practice (which, in view of the Court, did not support an immunity exception, not even for territorial torts) and following a full analysis of the various arguments set out above.[35]

None of this, however, settled the debate (what debate is ever settled in international law?). And of course, the largely negative response did not invalidate the arguments set out in support of an immunity exception: they remain plausible, and who knows, they might one day find greater acceptance.[36] However, even from the briefest summary just offered, it should be clear that to argue for an immunity exception as a matter of existing international law—at the time of the ItCC's decision in October 2014—was the argumentative equivalent of embarking on a very steep, and very long, uphill struggle. The argument had been made in dozens of settings, and almost invariably rejected—by states, by international courts, and by a large majority of domestic courts and tribunals called upon to address claims. What is more, the argument had been rebuffed comprehensively in its different manifestations, from the ius cogens variant to the 'abuse of rights' doctrine. Support for it was never more than marginal. Decisions such as *Ferrini* or *Prefecture of Voiotia* met with approval in some sectors but clearly deviated from a fairly solid mainstream approach. Viewed from that perspective, the 2012 ICJ Judgment could plausibly be described at the time as the 'final nail in the coffin of attempts to circumvent state immunity in domestic civil proceedings'.[37]

III. Judgment 238/2014 of 22 October 2014: Changing Tack

Several years after the *Jurisdictional Immunities* Judgment, we know that it was not the 'final nail'. But the grand controversy of the past two decades does yield important lessons. It testifies to the resilience of traditional concepts of international

[33] *Corte di Cassazione*, *Ferrini* (n 17); Maria Gavouneli/Ilias Bantekas, 'Prefecture of Voiotia v Federal Republic of Germany' 2001 (n 17), 198–204; *Corte di Cassazione*, Judgment of 24 July 2008, No 31171/2008 (*Lozano*); *Corte di Cassazione*, Judgment of 21 October 2008, No 1072/2008 (*Milde*).

[34] Greek Special Supreme Court (*Anotato Eidiko Dikastirio*), *Margellos and Others v Federal Republic of Germany*, Decision of 17 September 2002, Case No 6/2002.

[35] ICJ, *Jurisdictional Immunities* (n 17), 99, paras 52 et seq, especially paras 60–61, 65–79 for the rejection of the territorial tort exception; paras 81–106 for the rejection of the grave breaches exception and the normative conflict between ius cogens and state immunity argument.

[36] See, in that respect, 'Debate: "Remedies against Immunity?"', *Verfblog*, (11 May 2017), available at http://verfassungsblog.de/category/debates/remedy-against-immunity/.

[37] O'Keefe, 'State Immunity' 2011 (n 18), 1032.

law (such as immunity) and to the difficulty of seeking to rewrite international law through domestic judicial activism and academic commentary. As regards the former, in particular, domestic courts can be powerful agents of legal developments,[38] and have been so in the field of immunity.[39] But as regards the debate about immunity and human rights, few domestic courts have embraced that role, and their arguments persuaded few others.

Perhaps more than anything else, the debate about an immunity exception illustrates the weakness of deducing concrete legal consequences from abstract concepts such as ius cogens, abuse of rights, the right to a remedy, or even the international rule of law. While all of these concepts have a sound foundation in international law, deductions from them simply do not take us far; the specific legal consequences are a matter of balancing and debate.

As regards the ius cogens argument, years of debate have demonstrated the fragility of deductive reasoning. Yes, torture and war crimes are prohibited by peremptory norms—and perhaps, in litigation about war crimes committed during World War II, one could even (somehow) argue that they were prohibited with peremptory force in the 1940s. But from this it in no way necessarily follows that the right of victims to seek damages was peremptory in nature too, and less still that the right to seek damages before foreign domestic courts was peremptory. To be sure, such an argument can be made—but it actually has to be made, as this is not a mere matter of deduction from an abstract legal principle. The experience of the last two decades suggests that when the argument was made, it only ever convinced a minority of listeners: perhaps because its implications were undesirable; perhaps because, once admitted, the argument was so difficult to reign in; perhaps because the time was not 'ripe'. Many might have preferred a different result and would have been happier had a more ambitious construction of ius cogens been endorsed by more than a small minority. ('What a pity!', began one of the dissents appended to the ECtHR's *Al-Adsani* judgment). Whatever the reasons for its inability to convince more than a minority, Roger O'Keefe, commenting on decades of legal argument, had a strong point when encouraging proponents of the reform movement to take stock and accept (or at least entertain the possibility) that their initial arguments had been 'heading nowhere'.[40]

Perhaps the ItCC, in Judgment 238/2014, accepted as much. While continuing the struggle against immunity, it opted for a new approach. The Court now sidestepped debates about the scope of immunity under international law; in fact, it accepted (albeit grudgingly, one can assume) the ICJ's construction of international law as set out in *Jurisdictional Immunities*: 'It has to be recognized that, at the international level, the interpretation by the ICJ (. . .) is particularly qualified and does not allow further examination by national governments and/or judicial authorities, including

[38]See the collection of essays in Tams/Tzanakopoulos, 'International Law and Practice' 2013 (n 6).

[39]Rosanne van Alebeek, 'Domestic Courts as Agents of Development of International Immunity Rules', *Leiden Journal of International Law* 26 (2013), 559–578.

[40]O'Keefe, 'State Immunity' 2011 (n 18), 1012.

this Court'.[41] The claim that international law should recognize an immunity exception for grave breaches is all but abandoned: the international rules of immunity have been 'defined by the ICJ', and as rules of international law they reach into the Italian legal order (as the ItCC observes in a remarkable passage) 'as interpreted in the international legal order'.[42] Not even an echo, then, in Judgment 238/2014, of the clarion calls of *Ferrini*, in which the Italian Supreme Court had boldly refused to give effect to immunity rules if these 'would hinder the protection of values whose safeguard is to be considered (. . .) essential to the whole international community'.[43] And no serious attempt, unlike in *Prefecture of Voiotia*, to apply the 'territorial tort' exception to the conduct of armed forces (and to free it from the shackles of the ICJ's restrictive reasoning). The ItCC, while persisting in its struggle for an immunity exception, displays a remarkable argumentative flexibility.

Instead of rehearsing the international law debates, the ItCC approached the matter from the perspective of (Italian) foreign relations law: in its words, it was 'clear that another issue has to be examined and resolved, namely the envisaged conflict between the norm of international law (. . .) incorporated and applied in the domestic legal order, as interpreted in the international legal order, and norms and principles of the [Italian] Constitution'.[44] This is a significant change of tack. As noted by Filippo Fontanelli, the ItCC 'deploy[s] its judicial authority in *foro domestico*'.[45] In rather plainer terms, one might state that the ItCC prefers home games to away games; and on Italian home ground, the 'human rights cause' (battered in The Hague, Strasbourg, London, and elsewhere) triumphed. The Italian constitutional right to an effective remedy in case of infringements of 'the inviolable rights of the person', said the ItCC, was not to be construed in light of immunities 'as interpreted in the international legal order'; it had an autonomous existence and is limited by competing constitutional principles only.[46]

Whether or not that construction is convincing as a matter of Italian law is for others to judge.[47] From an international law perspective, the ItCC's approach calls

[41] ItCC, Judgment 238/2014 (n 1), section 3.1.

[42] Ibid.

[43] See *Corte di Cassazione*, *Ferrini* (n 17), section 9.1.

[44] ItCC, Judgment 238/2014 (n 1), section 3.1.

[45] Filippo Fontanelli, 'Damage Assessment on the Building of International Law after the Italian Constitutional Court's Decision no. 238 of 2014: No Structure Damage, Just Wear and Tear', *VerfBlog*, (15 December 2014), available at http://verfassungsblog.de/damage-assessment-building-international-law-italian-constitutional-courts-decision-no-238-2014-no-structural-damage-just-wear-tear-2/.

[46] As far as competing constitutional principles are concerned, the ItCC briefly mentions immunity but holds that it could only justify restrictions that are 'connected—substantially and not just formally—to the sovereign function of the State'; see ItCC, Judgment 238/2014 (n 1), section 3.4.

[47] Alessandro Bufalini, 'Judgment 238/2014 and the Importance of a Constructive Dialogue' 2017 (n 6); see also Alessandro Bufalini, chapter 'Waiting for Negotiations', in this volume. Christian Tomuschat, 'No Consensus—but Hope at Villa Vigoni', *VerfBlog*, (18 May 2017), available at http://verfassungsblog.de/no-consensus-but-hope-at-villa-vigoni/.

for two comments. The first is fairly obvious and taken up in many chapters in this volume: by refusing to give effect to sovereign immunity as construed by the ICJ, the Constitutional Court puts Italy on a collision course with international law.[48] Judgment 238/2014 may not itself amount to a breach of international law, but with the highest judicial authority directs Italian state organs towards such a breach, and towards non-compliance with the 2012 ICJ Judgment. The second comment concerns the implications of the ItCC's reasoning for future debates about immunity and human rights. In this respect, the Court's argumentative change of tack is seemingly clever (as it takes the argument to a different level), but also potentially dangerous (as it is based on a problematic understanding of the relationship between domestic and international legal orders). The remainder of this chapter addresses these aspects in turn.

IV. A Clever Move and Its Implications

On the face of it, the Italian Constitutional Court's change of tack is indeed rather clever. It shields Judgment 238/2014 from the obvious criticism: that the ItCC thought it knew international law better than the ICJ, the ECtHR, and the majority of states and other domestic courts. The ItCC does not make such a claim. Rather, it claims to know Italian constitutional law better. And who would fault it for that? Put differently, on the 'home turf' of the Italian Constitution, the scope of immunities depends on the status of international law within the Italian constitutional order. Unless one ignores the ItCC's reasoning,[49] this argumentative move limits the significance of Judgment 238/2014 to the long-standing debate about immunity and grave breaches sketched out above—with two related consequences.

First, based on Italian constitutional law, Judgment 238/2014 is (dare one say) 'immune' from the usual arguments developed in the long-standing international law debates. There is little point in a further round of discussion about the impact of ius cogens, or the scope of the territorial tort exception, or the proper way of characterizing egregious conduct—the ItCC has conceded the international law argument. Second, and conversely, based on constitutional law, Judgment 238/2014 has relatively little to contribute to the international law debate about immunity and

[48]Cf, inter alia, Christian Tomuschat, chapter 'The Illusion of Perfect Justice', Heike Krieger, chapter '*Sentenza* 238/2014: A Good Case for Law-Reform?', and Andreas Zimmermann, chapter 'Would the World Be a Better Place If One Were to Adopt a European Approach to State Immunity?', in this volume.

[49]Some have suggested that where constitutional and international rules are 'con-substantial', domestic decisions addressing questions of foreign relations law should be viewed as international law decisions cloaked in constitutional law language—and treated as contributions to international legal debate: see Tzanakopoulos, 'Domestic Courts in International Law' 2012 (n 15), 143. But this risks to overlook the strategic choice of 'going domestic', which at least in the proceedings before the ItCC seemed a conscious one.

grave breaches. In order to do that it would have had to play the 'away game'. Or rather, in the words of Filippo Fontanelli:

> [T]he 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.[50]

It might still be argued that, irrespective of its (international or constitutional) reasoning, Judgment 238/2014 should matter as international practice: it stands, after all, for the proposition that domestic courts in fact are prepared to accept an immunity exception.[51] Yet that argument only goes so far. The judgment indeed is relevant for the assessment of customary international law; but in an assessment of international practice, it should not carry much weight. It helps assess the practice of precisely one state, and one state that had previously deviated from the international law mainstream at that: Italy.[52] What is more, *Sentenza* 238/2014 is not really a reliable guide to the approach of Italy as such. Over the past decades, Italian practice has been anything but uniform—with parliament and the executive leaning more towards the international law mainstream and the courts remaining divided.[53] In line with recent attempts to clarify the process of custom formation, such domestic discord affects the weight to be accorded to Italy's practice: as noted in the ILC's recent work on custom, 'where different organs or branches within the State adopt different courses of conduct on the same matter or where the practice of one organ varies over time (. . .), that State's contribution to "a general practice" may be reduced'.[54]

That still leaves open the possibility that Judgment 238/2014 is followed by other actors of international law, whose practice would then matter. In this respect, Fontanelli's aforementioned statement needs to be qualified. Perhaps in retrospect Judgment 238/2014 will come to be seen as the beginning of a trend: perhaps we will see a wave of domestic court decisions all relying on constitutional law guarantees, as their 'last line of defence', to keep immunity at bay. While such a possibility cannot be excluded, trends in international practice sketched out above suggest this to be remote. Remote not only because (so far) a clear majority of domestic courts have been inclined to uphold immunity for grave breaches[55] but also because the

[50]Fontanelli, 'Damage Assessment' 2014 (n 45).

[51]Cf ILA, 'Mapping the Engagement of Domestic Courts' 2016 (n 6), paras 5–6.

[52]Ibid, paras 5, 6, and 8.

[53]Cf Paolo Palchetti, chapter 'Right of Access to (Italian) Courts *über alles*?', and Riccardo Pavoni, chapter 'A Plea for Legal Peace', in this volume.

[54]ILC, Report of the International Law Commission on the work of its 70th session (2016), UN Doc A/73/10, 'Identification of Customary International Law', Conclusion 7, para 4 of the commentary; see also ILA, 'Mapping the Engagement of Domestic Courts' 2016 (n 6), para 7.

[55]See n 27 and n 32.

ItCC's reasoning in Judgment 238/2014 is firmly based on Italian constitutional law, and depends on so many premises: the acceptance of a robust constitutional right to a remedy, a refusal to construe that remedial right in light of competing principles such as those protecting immunity, and not least (to foreshadow a point addressed in section V) a preparedness to play havoc with international law. Thus, Italian constitutional law both enables the clever change of tack and limits the probable impact of the decision. In short, whether one looks at its reasoning or its outcome, it seems that precisely because the ItCC opted to 'go constitutional', Judgment 238/2014 will have a limited impact on the international law debate on sovereign immunities.

V. 'Here I Stand, I Can Do No Other': A Problematic Last Line of Defence

The relative loss of influence on future international law debates is not the only price of 'going constitutional'. Judgment 238/2014 also—and the point has been hinted at already—plays havoc with international law. It does so in two respects: its outcome, and the process by which that outcome is reached. Regarding the former, by refusing to give effect to the duty to respect the immunity of foreign states, as concretized in a binding ICJ judgment, the ItCC pushes Italy towards breaching international law,[56] and this in a setting where the international law dispute had been referred to court in an attempt (in the words of the two governments) 'to clarify a complex question'.[57] The fact that many will sympathize with the ItCC's conduct does not make that breach any less blatant.

The second point is less obvious, but systemically more relevant. By construing constitutional law in splendid isolation from international law, and by giving it primacy, the ItCC displays an inward-looking mindset that shields constitutional guarantees from international law. This of course has not escaped commentators, including those who might have looked favourably on the outcome of Judgment 238/2014: Anne Peters has criticized the ItCC's 'Triepelian understanding',[58] and

[56]Under Art 94 (1) of the UN Charter, 24 October 1945, 1 UNTS XVI, member states of the UN have to comply with the decisions of the ICJ in a case to which they are party; See also Art 4 of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome), UN Doc A/56/10, 43, UN Doc A/RES/56/83, Annex, UN Doc A/CN.4/L.602/Rev.1, GAOR 56th Session Supp 10, 43; cf Constantin Eustathiadès, *La responsabilité internationale de l'État pour les actes des organes judiciaires et le problème du déni de justice en droit international,* Vol 1 (Paris: Pedone 1936).

[57]Italy–Germany Summit, Trieste, 18 November 2008, Joint Declaration, available at www.esteri.it/mae/en/sala_stampa/archivionotizie/approfondimenti/2008/11/20081119_dichiarazionecongiunta.html.

[58]Peters, 'Let Not Triepel Triumph' 2014 (n 7).

Robert Kolb seems to go further when warning of a 'shattering schism between internal and international law'.[59] Underlying these and similar statements is a feeling that by opting to decide the case on constitutional grounds, the ItCC has taken a new, and highly dangerous argumentative path, which other domestic actors engaging with international law will happily take to avoid international legal constraints.

Upon reflection, the stark language warning of 'schisms' and 'Triepel's triumph' seems unduly dramatic. For a domestic court to emphasize the primacy of constitutional law over international law is not as such unusual. Most domestic legal systems, even those that profess an openness towards the international or supranational level, preserve the option of some constitutional override.[60] To mention but the most obvious override strategies, within many domestic legal orders parts of international law have some status but are ranked below constitutional law (so that they yield in the event of a clash); in others, domestic law (including constitutional law) may have to be construed in light of international law principles but with the caveat that such enlightened interpretations should not fall foul of overarching constitutional principles; still elsewhere, domestic legal systems limit the number of international law rules that can be invoked before domestic courts (for example by requiring them to be recognized by domestic law as 'self-executing'). High-profile decisions from the *Solange* jurisprudence and its follow-up,[61] to *Görgülü*,[62] *Medellin*,[63] and *Kadi*[64] (to name but a few) are attempts to strike the right balance, but they all insist on the possibility of *some* constitutional overrides. All of them, even the internationally-minded ones, assume that constitutional law determines just how intrusive international law should be, and that, where domestic and international

[59]Robert Kolb, 'The Relationship between the International and the Municipal Legal Order: Reflections on the Decision 238/2014 of the Italian Constitutional Court', *Questions of International Law: Zoom-Out* 2 (2014), 5–16.

[60]In this respect, Anne Peters rightly characterizes '*Sentenza* No. 238 [as] just one more building block in the wall of "protection" built up by domestic courts against "intrusion" of international law, relying on the precepts of their national constitution', Peters, 'Let Not Triepel Triumph' 2014 (n 7). For a detailed comparative account, see the contributions to Dinah Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (Oxford: OUP 2011). Antonio Cassese's Hague lectures remain highly instructive, 'Modern Constitutions and International Law', *Recueil des Cours* 192 (1989), 331–476. The different 'avoidance techniques' employed by domestic legal orders are summarized in ILA, 'Mapping the Engagement of Domestic Courts' 2016 (n 6), paras 38–40; See also Raffaela Kunz, chapter 'Teaching the World Court Makes a Bad Case', in this volume.

[61]*Bundesverfassungsgericht*, Order of 29 May 1974, 2 BvL 52/71, BVerfGE 37, 271 (*Solange I*); *Bundesverfassungsgericht*, Order of 22 October 1986, 2 BvR 197/83, BVerfGE 73, 339 (*Solange II*).

[62]ECtHR, *Görgülü v Germany*, Judgment of 26 May 2004, Application No 74969/01.

[63]US Supreme Court, *Medellín v Texas*, 552 U.S. 491 (2008).

[64]CJEU, *European Commission, Council of the European Union, and United Kingdom of Great Britain and Northern Ireland v Yassin Abdullah Kadi and French Republic*, Judgment of 18 July 2013, Joined Cases No C-584/10 P, C-593/10 P, and C-595/10 P, [2013] ECR I-0000 (*Kadi II CJEU*).

law clash, 'any change in national laws still remains contingent upon the will of the failing state'.[65] Perhaps this is international law's real Achilles heel in the era of inward-looking obligations:[66] outside niche areas, international law does not 'by itself, possess the force to amend or repeal internationally unlawful domestic (. . .) acts'.[67] But cases like *Kadi* and perhaps now Judgment 238/2014 should give even some die-hard internationalists pause: it is easy to call for international law to be strong, robust, and intrusive when one likes its prescriptions, and rather more difficult when it prescribes outcomes that are unpopular. In areas such as immunities and draconian sanctions, but also in investment protection, international law has recently appeared on a collision course with constitutionally protected values. In these and other fields, international law deserves engagement rather than 'blind faith'. Constitutional overrides may every now and then serve as a necessary safety valve,[68] and it is certainly a very common technique for protecting international law from itself.

If few domestic courts or domestic legal orders are free from protectionist leanings, Judgment 238/2014 stands out for its bluntness. The constitutional override comes without niceties, with an almost 'Lutheran' directness to it. 'Here I stand, I can do no other' seems to be the motto: international law is refused effect without regrets, and without any balancing or the pretence of a constructive dialogue. International law and constitutional law are neatly separated, and in the ItCC's 'separatist treatment'[69] the former plays no role in the construction of the latter. (In fact, international legal rules are denied any 'directive function' ['*Orientierungswirkung*'[70]], even though they were authoritatively 'defined by the ICJ'[71] in a case directed against Italy). In the discussion of constitutional law, international law no longer features, at least not expressly: neither as part of a balancing exercise (weighing the need to grant an effective remedy against the need to comply with international law), nor as part of a '*Solange II* construction' in which non-compliance with international law remains an option but is the exception to the default position.

[65]Cassese, 'Towards a Moderate Monism' 2012 (n 3), 191.

[66]The term 'inward looking' is used here to denote international obligations that 'specifically enjoin States to undertake certain conduct *within their own domestic legal order*: to adopt a specific legal framework, to accord individual rights, to abstain from taking specific actions', ILA, 'Mapping the Engagement of Domestic Courts' 2016 (n 6), para 12.

[67]Cassese, 'Towards a Moderate Monism' 2012 (n 3), 199.

[68]For a cautious (and important) German perspective on these themes, see Stefan Talmon, 'Die Grenzen der Anwendung des Völkerrechts im deutschen Recht', *Juristenzeitung* 68 (2013), 12–21. As Talmon notes on page 21, referring to Security Council sanctions in particular, 'blind faith in international law ignores the realities' (translated by the author).

[69]Kolb, 'International and Municipal Legal Order' 2014 (n 59).

[70]Cf *Bundesverfassungsgericht,* Order of 19 September 2006, 2 BvR 2115/01, BVerfGK 9, 174 (*Wiener Konsularrechtsübereinkommen*), para 61.

[71]ItCC, Judgment 238/2014 (n 1), section 3.1.

The problem with Judgment 238/2014, then, is not that it insists on the primacy of constitutional law over international law but that it refuses to factor international law into its constitutional law reasoning.[72] The principle of a constitutional override may be fine (though it is international law's Achilles heel), but the process by which the ItCC overrides international law is highly problematic. To speak of 'high peak dualism'[73] may be one way of looking at it. More than anything else, however, it is the refusal of balance—the 'here I stand, I can do no other'—that disturbs and disappoints.

VI. Concluding Thoughts

Judgment 238/2014 is an interesting case because it forces us to question some easy and cheap 'truths' in the way that earlier foreign relations decisions did not. To illustrate, it was easy (and perhaps a bit cheap) to chide the US Supreme Court for its *Medellin* judgment, in which constitutional law trumped an ICJ judgment and resulted in the execution of José Medellin: international law was on the side of progress after all, and so—of course!—it should be robust and intrusive.

Judgment 238/2014 is trickier because opinion is at best mixed on whether international law—as presented in section II—is on the side of progress. Many would say it is not (or, in fact, that it impedes progress), hence the constant incantations that immunity were 'archaic'. But then again, only very stubborn progressivists will be able to ignore the resilience of that archaic notion, and there is no way of denying that in this particular case the archaic notion was confirmed and crystallized in a binding ICJ judgment.

In Judgment 238/2014, as noted in the preceding sections, the ItCC adopted a straightforward approach. Faced with an international legal rule that it considered regressive, it took the debate to its 'home turf'. It conceded the international law arguments and opted to stop international law at the last, constitutional, line of defence, and all this without giving it the benefit of any constructive engagement. All this, as noted above, it did with a stubborn determination: like Martin Luther at the Diet of Worms, it ,'could do no other'.

So, what should be done about Judgment 238/2014? Criticism, protest and scandalization are all obvious responses, and of course they are trusted strategies for dealing with non-compliance and of keeping up the pressure. Since 2014 they

[72]See also Sabino Cassese, chapter 'Recollections of a Judge', in this volume. After all, international law does not contain a rule prescribing its superiority over domestic law in the domestic legal orders of the states. See André Nollkaemper, 'The Effects of Treaties in Domestic Law' in Christian J Tams/Antonios Tzanakopoulos/Andreas Zimmermann (eds), *Research Handbook on the Law of Treaties* (Cheltenham: Edward Elgar 2014), 123–150, at 130.

[73]Kolb, 'International and Municipal Legal Order' 2014 (n 59).

have informed many responses to the judgment and are still being articulated.[74] The preceding sections suggest that criticism and protest remain crucial: the judgment is a fairly blatant case of ignoring the demands of a clearly worded international decision, not an instance of minimalist compliance or muddling through. At the same time, the preceding sections also yield a number of insights that argue for a more nuanced, perhaps cautious, approach. Three of these stand out.

First, while refusing to give effect to international law, Judgment 238/2014 employs a last line of defence that is prima facie effective. International law has no means of compelling 'rogue' domestic courts to fall back in line, not least because it values the judicial independence that makes decisions like this possible. And Judgment 238/2014 is not the only domestic court decision that ignores international law. Domestic disobedience is a fact of international legal life: not welcome but common. This does not mean international lawyers should 'keep calm and carry on'—but suggests that Judgment 238/2014 has to be engaged with, not just scandalized.

Second, while the judgment's 'Lutheran' refusal to engage with international law is unfortunate, it is difficult to take issue with the ItCC's starting-point: domestic legal actors (governments, parliaments, courts) in most countries insist on *some* form of constitutional override, and in an era of inward-looking international law[75] this is plausible. The difference between *Kadi*, *Medellin*, the various *Solanges*, and Judgment 238/2014 is one of degree, not of principle. In this sense, most domestic and regional courts have some 'Triepelian' leanings; some occasionally choose to be more openly 'Triepelian' than others. Again, this is not a plea for a non-committal 'anything goes' but an attempt to more clearly define the focus of debate.

Third, as international lawyers reflect on their strategy of engaging with the rogue decision, they (we) should be mindful of the character of the particular legal rule that is being defended. In section II, I have offered a purposefully robust dismissal of the grave breaches exception to immunities, which in my view has never enjoyed much support among states and international organizations. But of course, whatever its status in international law, the grave breaches exception has wide appeal among groups on whose support international law regularly counts in its pursuit of progressive causes. In Judgment 238/2014, the ItCC failed to give effect to state immunity, but in so doing disregarded a fairly unpopular rule of international law—a discipline that often reflects the hopes of many, and that typically benefits from being a projection of hopes. Perhaps, in fact, it should give international lawyers pause that in Judgment 238/2014 the ItCC effectively gives up on international law as a means of protecting remedial rights of victims.

[74]For examples of primarily critical perspectives, see Christian Tomuschat, chapter 'The Illusion of Perfect Justice', Andreas Zimmermann, chapter 'Would the World Be a Better Place If One Were to Adopt a European Approach to State Immunity?', and Giovanni Boggero/Karin Oellers-Frahm, chapter 'Between Cynicism and Idealism', in this volume.

[75]See n 66.

In offering these three considerations, I do not mean to undermine the international law argument set out in sections II–V of this chapter. But there is some scope for argumentative disarmament, and for moving away from the 'holier than thou' attitude that continues to characterize much of the debate.

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