

Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles

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Abstract

Several national courts, while generally complying with international judgments, insist on preserving the area of fundamental (constitutional) principles, i.e. an area where the State’s inclination to retain full sovereignty acts as an unbreakable “counter-limit” to the limitations deriving from international law. Unsurprisingly, the emerging clash of legal systems (domestic and international) sometimes results in an *aporia*, which as such does not lend itself to any formal solution. Bearing in mind the 2014 Italian Constitutional Court decision challenging the International Court of Justice (ICJ) judgment in *Jurisdictional Immunities of the State*, it is argued that, where this clash arises, national courts increasingly tend to mitigate its effects by

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adopting a strategy of “reasonable resistance”, viz., by identifying some common and strict parameters, under which recourse to counter-limits would be more tolerable also from the standpoint of international law. Put differently, such a circumstance, while representing a threat to the supremacy of international law in any event, is also a (tacit) confirmation of the ongoing existence of this supremacy and of the consequent need for national courts to disregard it only if strictly necessary.

I. Introduction

It is open to discussion whether domestic courts may duly refrain from giving effect to an international judgment, should the latter sharply conflict with fundamental (constitutional) principles. By a decision of 22.10.2014,¹ the Italian Constitutional Court answered the question in the affirmative. Accordingly, it regarded the ICJ judgment in *Jurisdictional Immunities of the State*² as inconsistent with the right to judicial protection under Article 24 of the Constitution.³ On the other hand, from the standpoint of international law, a decision of this kind is hardly acceptable.

It is a settled rule of international law that a State may not rely on the provisions of its “internal law” as justification for failing to comply with international obligations. This rule is equally true in the presence of a national fundamental (constitutional) principle.

International practice largely supports such a conclusion. The most clarifying decision in this regard is that delivered by the Permanent Court of International Justice in *Treatment of Polish Nationals*.⁴ In line with this decision, “a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force”.⁵ The same principle has been endorsed in Article 27 of the Vienna Convention on the Law of Treaties (VCLT/Vienna Con-

¹ Constitutional Court, Judgment No. 238 of 22.10.2014. An English translation is available at <www.cortecostituzionale.it>.

² *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, Judgment of 3.2.2012, ICJ Reports 2012, 99.

³ “Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law. Defence is an inviolable right at every stage and instance of legal proceedings. The poor are entitled by law to proper means for action or defence in all courts. The law shall define the conditions and forms of reparation in case of judicial errors.”

⁴ *Treatment of Polish Nationals and Other Persons of Polish Origin and Speech in the Danzig Territory*, Advisory Opinion of 3.2.1932, PCIJ Series A/B No. 44.

⁵ *Treatment of Polish Nationals* (note 4), at 24.

vention),⁶ whereby “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.⁷ Last, but not least, the International Law Commission’s (ILC) Articles on State Responsibility are to a great extent relevant.⁸ Both Article 3⁹ and Article 32¹⁰ express the above concept.

Of course, the supremacy of international law may be derogated from in some specific cases. However, these are exceptions that do nothing but prove the rule. One of the main examples is that provided for in Article 46 of the Vienna Convention itself.¹¹ This article echoes “a fundamental tension between sovereignty and democracy, on the one hand, and the efficiency of international law, on the other”¹²: while the first part of the provision (in line with the aforementioned Article 27)¹³ reiterates that a State may not invoke internal law to elude its international obligations, the second part clarifies that this rule only applies if the international obligation is legally

⁶ Vienna Convention on the Law of Treaties, 23.5.1969, 1155 UNTS 331. With the exception of Costa Rica (“With regard to Article 27, it interprets this article as referring to secondary law and not to the provisions of the Political Constitution.”) and Guatemala (“A reservation is hereby formulated with respect to Article 27 of the Convention, to the effect that the article is understood to refer to the provisions of the secondary legislation of Guatemala and not to those of its Political Constitution, which take precedence over any law or treaty.”), no other State formulated a reservation to this Article. On this Article see e.g. *A. Schaus*, Comment on Article 27 VCLT, in: O. Corten/P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, Vol. II, 2011, 688 et seq.; *K. Schmalenbach*, Comment on Article 27 VCLT, in: O. Dörr/K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, 2012, 453 et seq.

⁷ Some of the most recent judgments giving application to this article are those of the ICJ in *Question Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 22.7.2012, ICJ Reports 2012, 422, para. 113 (“The Court observes that, under Article 27 of the Vienna Convention on the Law of Treaties, which reflects customary law, Senegal cannot justify its breach of the obligation provided for in Article 7 paragraph 1 of the Convention against Torture by invoking provisions of its internal law.”), and of the African Court of Human Rights in *Tanganyika Law Society, The Legal and Human Rights Centre & Rev. Christopher R. Mtikila v. The Tanzania*, Judgment of 14.6.2013, ILM 52 (2013), 1327, para. 108. As to national practice, see the examples mentioned *infra* section II., 3.

⁸ Articles on Responsibility of States for Internationally Wrongful Acts, in: Report of the International Law Commission on the Work of Its Fifty-third Session, UNGAOR, 56th Sess., sup. No. 10, at 43, UN Doc. A/56/10 (2001).

⁹ “The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”

¹⁰ “The responsible State may not rely on the provisions of its internal law for failure to comply with its obligations under this Part.”

¹¹ Vienna Convention on the Law of Treaties (note 6).

¹² *M. Bothe*, Commentary on Article 46 VCLT, in: O. Corten/P. Klein (note 6), 1100 et seq.

¹³ Vienna Convention on the Law of Treaties (note 6).

valid, that is to say, the consent of a State to be bound must have been expressed by an organ entitled to do so. Accordingly, the exception in question only relates to provisions regarding the competence to conclude treaties.¹⁴

Moving from these assumptions, the organization of the article will be as follows. Section II. investigates the concept of “counter-limits”, i.e. the idea whereby supremacy of international law, including international judgments, may be challenged by domestic courts, should a national fundamental (constitutional) principle require safeguarding. To this end, judicial practice is still fairly scant and can be assessed neither according to the country of origin, nor to the international tribunal, the judgment of which has been contested. Hence, this practice will be classified, depending on the purpose that counter-limits are actually intended to serve. Counter-limits, unless absorbed by the doctrine of direct effect (section II., 1.), mainly serve a) as a mere excuse to elude the implementation of an international judgment (section II., 2.); b) as a tool to contest the operative part of an international judgment (section II., 3.); and c) as a tool to contest the reasoning part of an international judgment (section II., 4.). Section III. inquires into the main techniques that may help reconcile supremacy of international law with counter-limits. Finally, section IV. suggests a possible appraisal of the relevant national case law. It is argued that the decision of a domestic court to resort to counter-limits, rather than being a matter of purely judicial discretion, is reasonable and tolerable only under some strict conditions.

II. The Counter-Limits Argument *vis-à-vis* the Implementation of International Judgments

The principle of supremacy of international law emerged in a historical phase when international law and national law dealt with very different matters.¹⁵ However, over the years, fields traditionally belonging to State domestic jurisdiction (such as the protection of human rights) have begun to be regulated by international provisions as well. Accordingly, most national legal systems, while being open to international law, increasingly insist on preserving an area where the State’s inclination to retain full sover-

¹⁴ For further exceptions to the rule enshrined in Article 27 see *A. Nollkaemper*, Rethinking Supremacy of International Law, *ZöR* 65 (2010), 65 et seq., at 72.

¹⁵ On the principle of supremacy see e.g. *A. Peters*, Supremacy Lost: International Law Meets Domestic Constitutional Law, *Vienna Online Journal on International Constitutional Law* 3 (2009), 170 et seq.; *A. Nollkaemper* (note 14), at 73.

eignty may hinder the implementation of an international norm or act. That is the rationale behind the “counter-limits” doctrine.¹⁶

By counter-limits, reference is made to those national fundamental principles, whose safeguarding acts as an unbreakable counter-limit to the limitations deriving from international law. Such a doctrine can be traced back to the case law of the Italian¹⁷ and German¹⁸ constitutional courts in the early 1970s and is closely connected to the need for these courts to limit the infiltration of European Union (EU) law into their domestic legal orders.¹⁹ Many constitutional courts endorsed it later on, and this in order to limit also the application of international law, despite with the exception of rules of *jus cogens*. Hence, it is not surprising that a similar doctrine has been developed in national case law as a tool to contest an international judgment.²⁰

In this last regard, some authors claim that “national judicial decisions exclusively reflect the perspective of the national legal system that resolves upcoming conflicts between international obligations and national law on the basis of its own rules”.²¹ Accordingly, should a national court state that an international judgment is not valid insofar as it violates a constitutional norm, this would not contradict the general acceptance of the principle of supremacy. This opinion is not entirely convincing, for reasons different from (or additional to) those generally given by scholars and which refer to the risk of undermining the effectiveness and unity of international law.²²

¹⁶ *A. v. Bogdandy*, Pluralism, Direct Effect and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law, I.CON 6 (2008), 397 et seq., at 412, (“There should always be the possibility, at least in liberal democracies, to limit, legally, the effect of a norm or an act under international law within the domestic legal order if it severely conflicts with constitutional principles.”).

¹⁷ Constitutional Court, Judgment No. 183 of 27.12.1973.

¹⁸ *Solange I*, BVerfGE 37, Judgment of 29.5.1974.

¹⁹ For an overview of this doctrine see *G. Martinico*, Is the European Convention Going to Be “Supreme”? A Comparative-Constitutional Overview of ECHR and EU before National Courts, EJIL 23 (2012), 402 et seq., at 419 et seq.

²⁰ On the relationship between domestic and international adjudicators, also in terms of contestation, see recently *A. Nollkaemper*, Conversations among Courts: Domestic and International Adjudicators, in: C. P. R. Romano/K. J. Alter/C. Avgerou (eds.), *The Oxford Handbook of International Adjudication*, 2014, 523 et seq.

²¹ See *K. Schmalenbach* (note 6), at 461.

²² See e.g. *A. Nollkaemper* (note 14), at 71 (“[T]he question of conformity of national law with international obligations is a matter of international law because, first, it undermines the effectiveness of international law and, second, States can incur responsibility at the international level for failing to abide by their international obligations.”); *G. Bartolini*, A Universal Approach to International Law in Contemporary Constitutions: Does It Exist?, *Cambridge Journal of International and Comparative Law* 4 (2014), 1288 et seq., at 1319 (“[T]he difficulties of accepting solutions that favour the primacy of constitutional values over international sources are [...] obvious. The potential risks are twofold: (1) jeopardizing the basic principle

As the analysis of the judicial practice on counter-limits will highlight, domestic courts challenging international judgments do so not only on the basis of a purely national law assessment, but also in such a way as to render their decisions more tolerable from the standpoint of international law itself. In adopting this perspective, they increasingly rely on a complex and coherent argumentation,²³ the purpose of which is to justify the departure from the principle of supremacy and, in the end, to (tacitly) confirm its on-going existence.

1. Cases Where the Counter-Limits Argument Is Absorbed by the Doctrine of Direct Effect

Against this background, attention must firstly be paid to two specific cases, i.e. those cases where resort to counter-limits is either (a) absorbed by the use of other doctrines, particularly that of “direct effect” or (b) it serves as a mere excuse to elude the implementation of an international judgment.

As to (a), it is worth noticing that counter-limits, if construed in a narrow sense, only operate if the international decision *to be limited* is regarded as *legally valid* in the forum State. *Legal validity* (in terms of domestic enforcement of international obligations) implies that a general or specific domestic rule explicitly or tacitly renders the international decision binding on an equal footing with internal law. Such a contention seems to be self-evident and suggests the idea (underpinning, for instance, Article 46 of the Vienna Convention)²⁴ according to which the supremacy of international law, as well as doctrines aimed at contesting it, would basically be relevant only in the presence of a legally valid international obligation. This statement, however, needs further explanation.

The fact that an international decision creates a binding international obligation on the part of the debtor State is not always sufficient for it to be applied domestically. This is the case of decisions that are not regarded as

of the supremacy of international law thus represents a risk for the maintenance of its normative role and its effectiveness; and (2) fragmenting international law, chiefly because of the difficulties in identifying core constitutional principles and domestic legal orders that are entitled to demand such a constitutional right to resistance, sometimes exclusively attributed to ‘liberal democracies’.”) A. 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, ejiltalk.org.

²³ In a more general perspective, on the justification of judicial decision see, also for the literature cited therein, E. T. Feteris, *Fundamentals of Legal Argumentation. A Survey of Theories of Judicial Decisions*, 1999.

²⁴ Vienna Convention on the Law of Treaties (note 6).

self-executing, but need implementing legislation to become enforceable. Apparently, should this circumstance occur, the counter-limits argument could not be relied on, in the sense that the consistency of the decision with national fundamental values is not in question, but rather its aptitude to produce *direct effects* under municipal law.

Still, in some cases, domestic courts use “direct effect” in the same way as the counter-limits argument, viz., as a tool to protect national values from review based on international law.²⁵ This is unsurprising and echoes the constitutional dimension of the doctrine, which rests on the fact that it affects various constitutional issues, such as the separation of powers between domestic institutions.²⁶ In this regard, the judgment of the United States (US) Supreme Court in *Medellín* may be mentioned.²⁷

Article 36 (1) (b) of the Vienna Convention on Consular Relations requires contracting parties to allow foreign detainees to contact a consular officer of their home State as well as to inform them about their rights.²⁸ In *Avena*,²⁹ the ICJ held that the United States (US) had violated the aforementioned article, by failing to inform 51 Mexican nationals (all sentenced to the death penalty by State courts) of their conventional rights. Accordingly, the judgment stated that those individuals were entitled to review and reconsideration of their convictions by a US State court. Further, the US President *Bush* issued a Memorandum, whereby the United States would have discharged its international obligations under *Avena* “by having State courts given effect to the decision”.³⁰

The main argument relied on by the Supreme Court to avoid compliance with the ICJ decision derived from a constitutional impediment. Remarkably, although the *Avena* judgment created an international obligation on the part of the United States, it was not considered as automatically binding

²⁵ A. Nollkaemper, The Duality of Direct Effect of International Law, EJIL 25 (2014), 105 et seq. It is worth noticing that EU Courts resort to the direct effect doctrine for the same purpose, i.e. with a view to protecting the Union’s constitutional principles. In this regard, see A. Tancredi, On the Absence of Direct Effect of the WTO Dispute Settlement Body’s Decisions in the EU Legal Order, in: E. Cannizzaro/P. Palchetti (eds.), International Law as Law of the European Union, 2011, 249 et seq.

²⁶ A. v. *Bogdandy* (note 16), at 403 (“Many authors argue that direct effect hinges largely on the determinedness of the international provision in question. This understanding is not convincing, either. First, determinedness is a most undermined criterion. More important in our context, the approach does not do justice to the coupling role and *the constitutional function of the doctrine of direct effect.*” emphasis added).

²⁷ *Medellín v. Texas*, 552 U.S. 491 (2008).

²⁸ Vienna Convention on Consular Relations, 22.4.1963, 596 UNTS 261.

²⁹ *Avena and other Mexican Nationals (Mex. v. U.S.)*, Judgment of 31.3.2004, ICJ Reports 2004, 128.

³⁰ Memorandum from President *George W. Bush* to the Attorney General (28.2.2005).

domestic law, because none of the relevant treaty sources – the Optional Protocol to the Vienna Convention, the United Nations (UN) Charter, or the ICJ Statute – “creates binding federal law in the absence of implementing legislation, and because it is uncontested that no such legislation exists”.³¹ This perspective was in line with the constitutional principle of separation of powers, and more squarely with the idea whereby the Congress, rather than the Executive and the Judiciary, is the sole responsible for ensuring compliance with international law. The Supreme Court further framed the issue by noting that, on the one hand, the ICJ judgment did not address itself to the Judicial Branch, and, on the other hand, the President’s authority to represent the United States before the UN, the ICJ and the Security Council does not also include the power to create domestic law.³²

In technical terms, the constitutional impediment invoked in the decision in *Medellín* did not imply recourse to counter-limits. Notwithstanding it, the use of direct effect to contest the ICJ judgment fulfilled the same safety valve role, i.e. to protect a fundamental principle such as the separation of powers and, as a result, to impede both the Judiciary and the President from enforcing the judgment in question.

2. Cases Where Resort to Counter-Limits Serves as a Mere Excuse to Elude the Implementation of an International Judgment

A different use of counter-limits can be observed in cases where recourse to them serves as a mere excuse to elude the implementation of an international decision. One example in this sense is the French courts’ resistance to the implementation of the European Court of Human Rights (hereinafter ECtHR) judgment in *Poitrinol v. France*.³³

According to the former French Code of Criminal Procedure, where an accused failed to appear in court, he/she shall lose the right of appeal.³⁴

³¹ *Medellín v. Texas* (note 27), at 10.

³² In this regard see *T. Cruz*, *Defending U.S. Sovereignty, Separation of Powers, and Federalism in Medellín v. Texas*, *Harv. J. L. & Pub. Pol’y* 33 (2010), 25 et seq.; *W. P. Nagan/B. Goodman*, *Inflated Federalism and Deflated International Law: Roberts CJ v. The ICJ*, *Global Jurist*, 2012.

³³ *Poitrinol v. France*, 23.11.1993, Series A No. 277.

³⁴ One may refer, *inter alia*, to Article 410, which states as follows: “An accused on whom a summons has been served personally in the proper manner must appear unless he provides an excuse that is accepted as valid by the court before which he has been summoned. An accused shall be under the same obligation where it is established that, even though the sum-

Even though this circumstance was regarded by the ECtHR as a violation of the right to a fair trial, for a long time French courts refused to set aside their procedural rules. To this aim, they invoked the alleged contradiction between the ECtHR interpretation of Article 6 of the European Convention (“the right to a fair trial”)³⁵ and several vague and unspecified fundamental principles of the forum State. Yet, this vagueness is clear evidence that counter-limits sometimes play a different role: to vest domestic courts with greater flexibility in the execution of an international judgment. Such a situation results from the subsequent development of the case.

In 1999 the Court of Cassation began to change its approach to some extent, thereby implicitly recognizing the former political use of counter-limits and anticipating a legislative amendment, which was adopted the following year.³⁶

3. The Counter-Limits Argument as a Tool to Contest the Operative Part of an International Judgment

Getting to the very heart of the matter, national courts resort to counter-limits in the presence of an international judgment, the implementation of which actually affects fundamental (constitutional) principles of the forum State.

This argument has been used to contest both (a) the operative part of the judgment (which is the only one to possess the authority of *res judicata*) and (b) the reasoning part, as long as it entails a certain interpretation of a rule of international law. Basically, the two situations remain different and may lead to different consequences. Yet, the circumstances whose presence is required domestically for counter-limits to be applied tend to always be the same. First, the principle demanding protection must be clearly identified by the domestic court involved. Second, that same court is expected to

mons was not served on him personally, he was made aware by the means provided for in Articles 557, 558 and 560 that he had been properly summoned. If these conditions are satisfied, an accused who fails to appear and has not been excused from doing so shall be tried as if he were present.”

³⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, 4.11.1950, ETS No. 5, 213 UNTS 221.

³⁶ See Law No. 516 (15.6.2000), 138 J.O. 9038 (16.6.2000). On this point and more generally in the sense of a “political” use of the counter-limits argument by the French courts, see N. Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law*, 2010, 119 et seq.

justify coherently why it is best placed to strike a balance between all values at stake.

Should a domestic court contest the operative part of an international decision, it would entail non-performance of an international obligation and engage the international responsibility of the forum State. One example in this line of thought is the Italian case law following the ICJ judgment in *Jurisdictional Immunities of the State*.³⁷

This judgment is the consequence of a series of decisions delivered by Italian courts (including the well-known *Ferrini* case)³⁸ denying immunity to Germany for war crimes that took place at the end of World War II. According to these decisions, the rules violated by Germany were *jus cogens* rules, i.e. rules prevailing over the customary law on immunity. However, on 3.2.2012, the ICJ found this argument unconvincing and considered the denial of immunity by Italian courts to be a breach of Italy's obligations towards Germany under international law; hence, in the *operative part of the judgment*, Italy was required to ensure (by enacting appropriate legislation or by resorting to other methods of its choosing) that the above decisions ceased to have effect.³⁹

It is against this background that the judgment of the Italian Constitutional Court No. 238 of 22.10.2014 must be evaluated.⁴⁰ First of all, due to the lack of a judicial alternative remedy available to the victims of Nazi crimes, the Court found that the immunity rule, as interpreted by the ICJ, is inconsistent with Articles 2⁴¹ and 24⁴² of the Constitution, that is to say

³⁷ *Jurisdictional Immunities of the State* (note 2).

³⁸ Court of Cassation, Civil Joint Sections, *Ferrini v. Germany*, Appeal decision, No. 5044/2004, ILDC 19 (IT 2004) (Italy).

³⁹ On the entire matter see *F. M. Palombino*, Italy's Compliance with ICJ Decisions vs. Constitutional Guarantees: Does the "Counter-Limits" Doctrine Matter?, *Ital. Y.B. Int'l L.* 22 (2012), 187 et seq.

⁴⁰ Constitutional Court (note 1). For a comment on the judgment see e.g. *B. Conforti*, La Court constitutionnelle italienne et le droits de l'homme méconnus sur le plan international, *RGDIP* 2 (2015), 19 et seq.; *R. Kolb*, The Relationship between the International and the Municipal Legal Order: Reflections on the Decision No. 238/2014 of the Italian Constitutional Court, *Quest. Int'l L.* 6 (2014), 5 et seq.; *P. de Sena*, The Judgment of the Italian Constitutional Court on State Immunity in Cases of Serious Violations of Human Rights or Humanitarian Law: A Tentative Analysis under International Law, *Quest. Int'l L.* 6 (2014), 17 et seq.; *A. Peters* (note 22); *E. Cannizzaro*, Jurisdictional Immunities and Judicial Protection: The Decision of the Italian Constitutional Court No. 238 of 2014, *Riv. Dir. Int.* 98 (2015), 126 et seq.; *F. M. Palombino*, Quale futuro per i giudizi di costituzionalità delle norme internazionali generali? Il modello rivisitato della sentenza interpretativa di rigetto, *Riv. Dir. Int.* 98 (2015), 151 et seq.

⁴¹ "The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled."

with the right of access to justice in order to safeguard one's fundamental human rights. Accordingly – the Court pinpointed –, insofar as the rule applies to serious violations of these rights, it did not enter the Italian legal order⁴³ (by means of Article 10, para. 1, of the Constitution)⁴⁴ and does not have any effect therein.⁴⁵

By the same token, both the Law incorporating Article 94, para. 1, of the UN Charter,⁴⁶ (i.e. Law No. 848/1957)⁴⁷ and the Law giving effect to the 2012 ICJ judgment (i.e. Law No. 5/2013)⁴⁸ were declared null and void. In-

⁴² See note 3.

⁴³ The idea whereby fundamental principles represent an unbreakable limit to the infiltration of international law into the Italian legal order had been already advanced by the Constitutional Court. One may mention Judgment No. 73 of 22.3.2001. Its para. 3.1 (conclusions on points of law) states as follows: “The tendency of the Italian system to be open to generally recognized international rules and to international treaties is limited by the necessity to preserve its identity; thus, first of all, by the values enshrined in the Constitution.” For a comment on this judgment see G. Cataldi, Italian Practice Relating to International Law – Judicial Decisions, Ital. Y.B. Int'l L. 10 (2001), 298 et seq.

⁴⁴ According to this Article, “the Italian legal system conforms to the generally recognized principles of international law”.

⁴⁵ This despite the fact that the customary rule in question emerged before the entry into force of the Constitution itself (para. 2.1, conclusions on points of law). The Court's main precedent on this issue apparently came to the opposite solution. See Constitutional Court, Judgment No. 48 of 12.6.1979, para. 2 (conclusions on points of law).

⁴⁶ As is well-known, according to this Article “[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party”.

⁴⁷ Law No. 848 (17.8.1957), Gazz. Uff. 238 (25.9.1957).

⁴⁸ Law No. 5 (14.1.2013), Gazz. Uff. 24 (29.1.2013). Specifically, Article 3 of this Law stated as follows: “1. For the purposes of Article 94 para. 1 of the UN Charter, signed in San Francisco on 26 June 1945 and implemented by Law No. 848 of 17 August 1957, where the International Court of Justice, in a judgment settling a dispute in which Italy is a party, excluded the possibility of subjecting a specific conduct of another state to civil jurisdiction, the judge hearing the case, *ex officio* and even where he has already passed a decision which is not final but has the effect of *res judicata* with regard to the existence of jurisdiction, shall ascertain the lack of jurisdiction in every stage and instance of the proceeding. 2. Decisions constituting *res judicata* contrary to the above mentioned ICJ judgments, even where the latter have been passed subsequently, can be reconsidered not only in the cases provided by Article 395 of the Italian Code of Civil Procedure [“Revocazione”], but also due to the lack of civil jurisdiction.” In brief, Article 3 of the Law took into account three different hypotheses, i.e. cases where: (i) the issue of jurisdiction has not yet been settled by a final decision; (ii) the issue of jurisdiction has been settled by a final decision, but the proceeding is still pending on the merits; (iii) there has been a final decision on both jurisdiction and merits. With regard to the first two hypotheses, the judge was required to ascertain the lack of jurisdiction, while in the third case, the interested party could ask for the proceeding to be reopened through the remedy provided for in Article 395 of the Code of Civil Procedure. Following the declaration of unconstitutionality of Article 3, the Italian Supreme Court (Civil Joint Sections) has regarded as inadmissible two requests for reconsideration brought by Germany on the basis of this article (Judgment No. 9097 and Judgment No. 9098 of 6.5.2015).

deed, the laws in question required Italian courts to comply with this judgment and consequently to decline their jurisdiction in relation to acts of a foreign State consisting of war crimes and crimes against humanity.⁴⁹

The decision here scrutinized is particularly meaningful for a reason which is not hard to grasp. The Constitutional Court did not limit itself to resorting to counter-limits, but clearly expounded why it was both (a) *necessary* and (b) *reasonable* to do so.

Regarding the necessity to do so, recourse to counter-limits was seen as inherent to every legal system.⁵⁰ It is not by chance – in the words of the Court – that the European Court of Justice, in *Kadi v. Council of the European Union*,⁵¹ refrained from giving effect to the Security Council Resolution 1333 (2000).⁵² And this as a reaction to its sharp inconsistency with the principle of effective judicial protection under EU law.

At the same time, two factors rendered the use of counter-limits reasonable. First, the immunity rule as interpreted by the ICJ clearly affected certain well-defined constitutional rights. Second, whereas at international law level, and thus in the relationship between States, the interpretations by the ICJ are particularly qualified and do not allow “further examination by national governments and/or judicial authorities”,⁵³ at domestic law level the same is not equally true. Should these interpretations sharply contrast with fundamental constitutional principles, it is up to the national judge (and, within the Italian legal system, to the Constitutional Court alone)⁵⁴ to assess and resolve the contrast in terms of weighing and balancing⁵⁵ and to do so in such a way as to preserve the “inviolability of [the above] principles, or at least to minimize their sacrifice”.⁵⁶

⁴⁹ Constitutional Court (note 1), para. 4.1 (conclusions on points of law).

⁵⁰ Constitutional Court (note 1), para. 3.4 (conclusions on points of law).

⁵¹ See Joined Cases C-402/05 and C-415/05, ECR 2008, I-6351.

⁵² SC Res. 1333 (19.12.2000).

⁵³ Constitutional Court (note 1), para. 3.1 (conclusions on points of law).

⁵⁴ “In a centralized constitutional review system, it is clear that this assessment of compatibility pertains to the Constitutional Court alone, and not to any other judge, even with regard to customary international law. The truth is, indeed, that the competence of this Court is determined by the incompatibility of a norm with constitutional law – this obviously includes a fundamental principle of the State’s constitutional order or a principle that guarantees inviolable human rights. The examination of this contrast is a task of the constitutional judge alone. In this centralized constitutional review system, any different solution goes against the exclusive competence given by the Constitution [Article 134] to this Court” (para. 3.2, conclusions on points of law).

⁵⁵ Constitutional Court (note 1), para. 3.1 (conclusions on points of law).

⁵⁶ Constitutional Court (note 1), para. 3.1 (conclusions on points of law). To go into detail, according to the Constitutional Court, the immunity rule may impose some limitations on the right to judicial protection; however, this limitation should be justified by reasons of a

More generally, in comparison to other judgments where counter-limits have been applied, the Court went much further in resorting to them. Support for this proposition may be found in that passage of the decision that refers to the customary rule on State immunity and the role played by domestic courts in limiting its scope to *acta iure imperii*, thereby avoiding an unfair restriction of an individual's rights.⁵⁷ In the same line of thought, indeed, the Constitutional Court vested its decision with a sweeping effect, i.e. not only to further reduce the scope of the immunity rule at domestic level, but "to also contribute to a desirable – and desired by many – evolution of international law itself".⁵⁸

Further cases where domestic courts contest the operative part of an international decision can be observed in the Latin-American practice concerning the implementation of the Inter-American Court of Human Rights (hereinafter IACtHR) judgments. One example lies in decision No. 1939, passed by the Venezuelan Supreme Tribunal of Justice on 18.12.2008.⁵⁹

On 5.8.2008 the IACtHR found that Venezuela, by leaving the decision concerning the removal of judges at the sole discretion of the Supreme Court, had violated the judges' right to an impartial and independent court under Article 8(1) and Article 25(1) of the American Convention on Human Rights;⁶⁰ hence, it did not limit itself to awarding monetary compensation, but equally ordered Venezuela, as a reparation measure, to reincorporate the dismissed judges.⁶¹

On this premise, the Venezuelan Solicitor General requested the Supreme Tribunal itself to determine whether Venezuela had to enforce the IACtHR judgment. Hitherto the answer was in the negative.

Article 23 of the Venezuelan Constitution provides that human rights treaties ratified by Venezuela enjoy constitutional status and prevail in do-

public interest potentially prevailing over the principle under Article 24 of the Constitution (that is to say one of the supreme principles of the constitutional order). In the case under consideration, a public interest of this kind could not be identified. See para. 3.4 (conclusions on points of law).

⁵⁷ Reference is made to the Italian and Belgian case-law of the first half of the Twentieth Century. See para. 3.3 (conclusions on points of law).

⁵⁸ Constitutional Court (note 1), para. 3.3 (conclusions on points of law). In these terms, the opinion advanced by *E. Cannizzaro* (note 40), proves unconvincing. And, indeed, according to this author, the strict dualistic approach underlying the Constitutional Court decision may restrict its contribution to the development of the law of sovereign immunities and to the formation of a human right exception.

⁵⁹ Supreme Tribunal of Justice, *Solicitor General of the Republic v. Venezuela*, Final Award on jurisdiction of the Constitutional Chamber, File No. 08-1572, No. 1939, ILDC 1279 (VE 2008).

⁶⁰ American Convention on Human Rights, 22.11.1969, 1144 UNTS 123.

⁶¹ *Aptiz Barbera et al. v. Venezuela*, 5.8.2008, Series C 24.

mestic legal order as long as the rights enshrined therein afford a more favorable protection than that offered by the Constitution or the domestic laws. These treaties are of immediate and direct application by the domestic courts and other State organs. By contrast, in the Supreme Tribunal's opinion,

“[i]nternational judgments or reports issued by the monitoring bodies supervising human rights treaties do not have the same status as the human rights provisions in those treaties. Thus, they do not enjoy constitutional status under Article 23 of the Constitution. These international judgments or reports would be enforced in Venezuela only if they are not in contradiction with the Constitution, respect the national sovereignty of Venezuela, and do not affect the fundamental rights of the State.”⁶²

In light of such remarks, that same court regarded the IACtHR judgment as non-enforceable in Venezuela. Two reasons supported such a conclusion. First, the judgment was in breach of the principle of *res judicata*, i.e. a fundamental national value.⁶³ Second, while the IACtHR takes into account the sole position of the claimant, a Supreme Tribunal is always required to carry out a systemic assessment of all interests at stake. Thus, in the event of a contradiction between a constitutional principle and a treaty provision (as interpreted by an international court), the norm that best protects the collective interest over the individual rights must prevail.⁶⁴ And *res judicata*, as an expression of legal certainty, is precisely intended to serve such a purpose.

With a view to minimizing the importance of this decision, it may be argued that several Latin-American courts, while dealing with the implementation of the IACtHR judgments, vest Article 27 of the Vienna Convention with a far-reaching effect.⁶⁵ One example is the decision passed on 4.6.2001 by the Peruvian Supreme Council of Military Justice in *Barrios Altos*.⁶⁶

In this case, the Court was called upon to confront a judgment of the IACtHR demanding the prosecution of a number of military officers for crimes against humanity on the one hand and two amnesty laws impeding

⁶² *Solicitor General of the Republic v. Venezuela* (note 59), para. 48.

⁶³ *Solicitor General of the Republic v. Venezuela* (note 59), para. 51.

⁶⁴ *Solicitor General of the Republic v. Venezuela* (note 59), para. 43.

⁶⁵ Vienna Convention on the Law of Treaties (note 6).

⁶⁶ Supreme Council of Military Justice, Case No. 494-V-94, Judgment of 4.6.2001 (unpublished). In this regard see *W. Ferdinandusse*, *Direct Application of International Criminal Courts in National Courts*, 2006, 140, 145.

their prosecution on the other hand.⁶⁷ The proceeding at stake ended with the order to investigate and prosecute the crimes, stating as follows:

“Peru is a party to Vienna Convention on the Law of Treaties, which established by its twenty-seventh Article that ‘[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’, in the spirit of which, the *Consejo Supremo de Justicia Militar*, as an integral part of the Peruvian State, must comply with the international ruling in accordance with its terms and in such a manner as to implement the decision it contains in its entirety, vesting it with full effect and eliminating any obstacle presented by substantive or procedural internal law that might stand in the way of its due execution and full performance [...]”

In the same vein one might consider the judgment passed by the Peruvian Constitutional Court on 2.3.2007.⁶⁸ A paragraph in the judgment states that, as regards the nature of the State’s obligation to comply with the IACtHR decisions, it corresponds

“to a basic principle of law on the international responsibility of the State that a State has to comply with its international treaty obligations in good faith (*pacta sunt servanda*) and, as established in Article 27 of the Vienna Convention on the Law of Treaties [...], a party could not invoke the provisions of its internal law as justification for its failure to perform a treaty.”⁶⁹

Accordingly, although Article 102(6) of the Peruvian Constitution allows Parliament to grant amnesty for criminal acts, “this cannot be applied in order to conceal crimes against humanity or to guarantee the impunity of those responsible for committing grave human rights violations”.⁷⁰

However, the above circumstance is foreseeable and does not diminish the relevance of the counter-limits argument in this context. The judgments under discussion concerned *jus cogens* violations, i.e. that part of international law in respect of which counter-limits cannot be contended. Contrariwise, the scenario becomes quite different where a violation of a human right which may not be regarded as “serious” takes place. Evidence of it can be drawn not only from the Venezuelan practice, but also from the case law

⁶⁷ *Barrios Altos v. Peru*, 30.11.2001, Series C 75.

⁶⁸ *Martin Rivas v. Constitutional and Social Chamber of the Supreme Court*, Appeal Judgment, 679-2005- PA/TC, ILDC 960 (PE 2007).

⁶⁹ *Martin Rivas v. Constitutional and Social Chamber of the Supreme Court* (note 68), para. 49.

⁷⁰ *Martin Rivas v. Constitutional and Social Chamber of the Supreme Court* (note 68), paras. 53, 58.

of the Peruvian Supreme Council of Military Justice referred to hereinabove.

By a judgment of 11.6.1999,⁷¹ the Plenary Court of the Council ruled that the IACtHR decision in *Castillo Petruzzi et al.*⁷² lacked impartiality and infringed upon “the Political Constitution of the State, being, therefore, impossible to execute”. Unsurprisingly, also in this case the IACtHR had ascertained a violation of the right to a fair trial under Article 8 of the American Convention,⁷³ viz., a violation that does not involve *jus cogens* rules.

4. The Counter-Limits Argument as a Tool to Contest the Reasoning Part of an International Judgment

While the counter-limits argument is sometimes relied on by domestic courts to contest the operative part of an international judgment, other times that very argument can be aimed at challenging its reasoning part. As already observed above, however, the circumstances that render recourse to counter-limits reasonable and tolerable tend to always be the same: first, the principle demanding protection must be clearly identified by the domestic court involved; second, that same court is expected to justify coherently why it is best placed to strike a balance between all values at stake.

Notably, the case under consideration firstly occurs with regard to a final international decision condemning the forum State, but delivered within a proceeding whose parties and/or subject matter are not identical to those disputed in a subsequent domestic lawsuit. In technical terms, the *res judicata* doctrine would prevent any problem of enforcement from coming into question; for this doctrine to be applicable, subject matter and parties must indeed be identical in both the former and the latter proceeding.⁷⁴ Nonetheless, a domestic court could anyway have an interest in contesting the reasoning part of the judgment.

Such a questioning is particularly tangible where the judgment enters into a certain interpretation of an international rule, and this rule is binding on the forum State. The decision of the U.S. Supreme Court in *Sanchez-*

⁷¹ Supreme Council of Military Justice, Judgment of 11.6.1999.

⁷² *Castillo Petruzzi et al. v. Peru*, 17.11.1999, Series C 52.

⁷³ American Convention on Human Rights (note 60).

⁷⁴ For an in-depth analysis of this point see *F. M. Palombino*, *Gli effetti della sentenza internazionale nei giudizi interni*, 2008, at 23.

*Llamas*⁷⁵ and its challenging of the ICJ judgments in *LaGrand*⁷⁶ and *Avena*⁷⁷ is fairly illustrative.

In those cases, as it is well known, the ICJ concluded that where a defendant was not notified of his rights under Article 36 of the Vienna Convention on Consular Relations,⁷⁸ application of the procedural default rule (i.e. the rule that requires a State prisoner seeking a writ of *Habeas Corpus* in federal court to have his federal law argument presented to the State courts in compliance with State procedural rules) failed to give “full effect” to the purposes of this article, because it prevented courts from attaching “legal significance” to its violation.

However, according to the Supreme Court, the ICJ’s interpretation of the Vienna Convention could not be accepted, since it overlooked the basic framework of an adversary system, “which relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication. [Accordingly] [p]rocedural default rules are designed to encourage parties to raise their claims promptly and to vindicate the law’s important interest in the finality of judgments.”⁷⁹ In other words, the Supreme Court vindicated in fact a sort of margin of appreciation, which in any case enables it to take account of the special features (in terms of fundamental principles) of the legal order into which the international interpretation must be integrated and of the fundamental values (like that of legal certainty) which this order is intended to protect.

In terms of legal arguments, the decision passed by the German Constitutional Court on 19.9.2006 is equally revealing.⁸⁰ By this decision, the Court (unlike the US Supreme Court) found that the right to a fair procedure (as set forth in the German Constitution) must be guaranteed in line with Article 36 of the Vienna Convention on Consular Relations,⁸¹ and specifically with the way this article was interpreted by the ICJ in *LaGrand*,⁸² therefore, it considered the decision of the Federal Court of Justice (*Bundesgerichtshof*) not to do so⁸³ inconsistent with the above interpretation and

⁷⁵ *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

⁷⁶ *LaGrand (R.F.G. v. U.S.)*, ICJ Reports 2001, 466.

⁷⁷ *Avena and other Mexican Nationals* (note 29).

⁷⁸ Vienna Convention on Consular Relations (note 28).

⁷⁹ *Sanchez-Llamas v. Oregon* (note 75), para. 45.

⁸⁰ 2 BvR 2115/01, Judgment of 19.9.2006. Further details on this judgement, as well as more in general on the German Constitutional Court attitude towards international courts, may be found in *N. Petersen*, Determining the Domestic Effect of International Law through the Prism of Legitimacy, *ZaöRV* 72 (2012), 223 et seq., especially 253 et seq.

⁸¹ Vienna Convention on Consular Relations (note 28).

⁸² *LaGrand* (note 76).

⁸³ BGH, NStZ 22 (2002), 168 (7.11.2001).

remanded the case to this same Court.⁸⁴ Still, the constitutional judge pinpointed that whereas the ICJ interpretations may not be regarded as unconditionally binding, the possibility to deviate from them, should some competing constitutional principle (such as procedural efficiency) demand accommodation, is always admitted.⁸⁵

The same margin of appreciation was claimed with regard to the ECtHR judgments by both the Spanish Constitutional Tribunal in *Moreno Gómez*⁸⁶ and the United Kingdom (UK) Supreme Court in *Horncastle*⁸⁷ and *Pinnock*.⁸⁸

A further situation arises when, regardless of whether international and national proceedings coincide as regards subject matter and parties, the operative part of the international judgment in question limits itself to awarding monetary compensation. In effect, the terms of the question do not change: Assuming that the reasoning part endorses a certain interpretation of an international rule and this rule is binding on the forum State, national courts' interest in contesting it could become actual as well. The practice concerning the value of the ECtHR decisions at domestic level supports this conclusion.

⁸⁴ 2 BvR 2115/01 (note 80), paras. 48 et seq.

⁸⁵ 2 BvR 2115/01 (note 80), paras. 59 et seq. As has been rightly suggested by *P. A. Heinlein*, *The U.S. and German Interpretations of the Vienna Convention on Consular Relations: Is Any Constitutional Court Really Cosmopolitan?*, *Maryland Journal of International Law* 25 (2010), 317 et seq., at 334, “[t]his analysis suggests that both the *Bundesverfassungsgericht* and the U.S. Supreme Court were reasonable in their interpretations and applications of the law. Their decisions are not inconsistent but rather differ on account of the law that each court had to consider.”

⁸⁶ Tribunal Constitucional, Judgment No. 303 of 25.10.1993, para. 8 (conclusions on points of law).

⁸⁷ *R. v. Horncastle et al.* [2009] UKSC 14, para. 11: “The requirement to ‘take into account’ the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process [especially in terms of fundamental principles]. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course.”

⁸⁸ *Manchester City Council v. Pinnock* [2010] UKSC 45, para. 48: “The Court is not bound to follow every decision of the [ECtHR]. Not only would it be impractical to do so: It would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue [...] which is of value to the development of Convention law. Of course, we should usually follow a clear and constant line of decisions [...] But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber [...] Where, however, there is clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.” (emphasis added).

One recent example is judgment No. 264 passed by the Italian Constitutional Court in 2012.⁸⁹ In this case, the Constitutional Court emphasized its duty to take into account the ECtHR case law, but at the same time the right to deviate from it, when a specific fundamental principle comes into consideration and even if the international judgment directly concerns the forum State; accordingly, it challenged the ECtHR judgment in *Maggio* (delivered against Italy and limiting itself to awarding monetary compensation),⁹⁰ because of its failure to consider a number of constitutional principles (such as those of equality and solidarity) linked to the Italian pension system.

More in detail, the main argument adopted to justify this deviation rests on the circumstance that, in contrast to the European Court, a Constitutional (Supreme) Court is always required to carry out “a systemic and not an isolated assessment” of all values at stake, especially where – as in the case at issue – a value which is peculiar to the forum State alone is concerned.⁹¹ An argument of this kind, which has been further developed by the Italian Constitutional Court in a judgment of 2015,⁹² is far from new in the European case law.

For a similar statement in the same vein, one may mention the 2004 German Constitutional Court decision in *Görgülü*.⁹³ According to the Court,

“[i]f, in concrete application proceedings in which the Federal Republic of Germany is involved, the ECtHR establishes that there has been a violation of the Convention [...] the judgment of the ECtHR must be taken into account in the domestic sphere, that is, the responsible authorities or courts must discernibly consider the decision and, if necessary, justify understandably why they nevertheless do not follow the international law interpretation of the law.”⁹⁴

More in detail – in the words of the Court –, the requirement to “take into account” squarely means taking notice of the Convention provision as interpreted by the ECtHR and applying it to the case, provided the applica-

⁸⁹ Constitutional Court, Judgment No. 264 of 28.11.2012. An English translation is available at <www.cortecostituzionale.it>. For a comment on this judgment see *B. Conforti*, *La Corte costituzionale applica la teoria dei controlimiti*, Riv. Dir. Int. 96 (2013), 527 et seq.

⁹⁰ *Maggio v. Italy*, Judgment of 31.5.2011.

⁹¹ Constitutional Court (note 89), para. 5.4 (conclusions on point of law).

⁹² Italian Constitutional Court, Judgment No. 49 of 26.3.2015, especially paras. 6.2 et seq. (conclusions on points of law).

⁹³ 2BvR 1481/04, Judgment of 14.10.2004. An English translation is available at <www.bundesverfassungsgericht.de>.

⁹⁴ 2BvR 1481/04 (note 93), para. 50.

tion does not violate prior-ranking law, in particular constitutional law”.⁹⁵ Should this latter circumstance occur, a departure from a ECtHR judgment is admissible. This applies in particular with regard to those areas of law (such as family law, the law concerning aliens and the law on the protection of personality), in respect of which domestic courts are best placed to strike a balance between all interests at stake:⁹⁶

“Individual application proceedings before the ECtHR, in particular where the original proceedings are in civil law, do not [always] give a complete picture of the legal positions and interests involved. The only party to the proceedings before the ECtHR, apart from the complainant, is the State party affected; the possibility for third parties to take part in the application proceedings (see Article 36.2 of the European Convention on Human Rights) is not an institutional equivalent to the rights and duties as a party to proceedings or another person involved in the original national proceedings.”⁹⁷

Eventually, the questioning of a certain international decision or interpretation may give rise to a twofold consequence. If the domestic court concerned does not conform to it and there is a reasonable chance of triggering a case before that very same international tribunal, that tribunal may either (a) hold against the State or (b), along a logic of mutual accommodation, change its decision or interpretation.⁹⁸ In this latter case, counter-limits can no longer be solely conceived of as the intangible core of constitutional domestic sovereignty; they also act as a “gun on the table”,⁹⁹ which forces the international legal order, and primarily its jurisdictional actors, to engage in confrontations with national legal systems and, by means of dialogue, to contribute to the advancement of international law, especially in its human rights dimension.¹⁰⁰

⁹⁵ 2BvR 1481/04 (note 93), para. 62.

⁹⁶ 2BvR 1481/04 (note 93), para. 58.

⁹⁷ 2BvR 1481/04 (note 93), para. 59. A similar argument was relied on by the German Constitutional Court in 2011, 2 BvR 2365/09, Judgment of 4.5.2011, paras. 91 et seq. An English translation is available at <www.bundesverfassungsgericht.de>.

⁹⁸ A. Nollkaemper (note 20), at 530.

⁹⁹ This expression is to be ascribed to S. Panunzio, *I diritti fondamentali e le Corti in Europa*, in: S. Panunzio (ed.), *I diritti fondamentali e le Corti in Europa*, 2005, 3 et seq., at 28.

¹⁰⁰ An argument of this kind has been advanced by A. Peters (note 15), 194 (“On the long run, reasonable resistance by national courts might compel the international law-makers and appliers to engage in democratization and improve human rights protection against international actors themselves. It might thereby promote the progressive evolution of international law in the direction of a system more considerate of human rights and democracy.”).

III. Possible Techniques to Reconcile Supremacy of International Law with Counter-Limits

Some authors argue that the foregoing practice, if considered in its entirety, should call for the emergence of a new circumstance precluding wrongfulness.¹⁰¹ However, this contention is not convincing because, first, it undermines the very effectiveness of international law and, second, the practice in question is still rather limited. Accordingly, the issue must be addressed in a different way: one has to ask whether supremacy of international law and counter-limits may be reconciled with each other.

Two main techniques seem to serve such a purpose, and this even though neither of them is able to provide a definite answer: the practice of “internal reservations” and the so-called “internationalization of domestic values”.

By “internal reservations”, reference is made to all cases where a State, by ratifying a treaty, formulates a reservation aimed at safeguarding its internal law, i.e. by stating that the application of the treaty must be compatible with the national Constitution or other internal laws.¹⁰²

However, international practice supports the view whereby this kind of reservation can only be considered as valid, provided it is not of an undefined character; otherwise, the “object and purpose test” as codified in Article 19 (c) of the Vienna Convention¹⁰³ would not be respected. That is the case, for example, of Iran’s reservation to the 1989 Convention on the Rights of the Child,¹⁰⁴ stating that it “reserves the right not to apply any provisions or Articles of the Convention that are incompatible with Islamic laws and the internal legislation in effect”. Norway objected:

“A reservation by which a State Party limits its responsibilities under the Convention by invoking general principles of national law may create doubts about the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law.”

¹⁰¹ This is the opinion of *B. Conforti*, *Diritto internazionale*, 10th ed. 2015, 402-403.

¹⁰² It has been argued that “this practice should be interpreted as making explicit the states’ persistent concern for the safeguarding of domestic constitutional precepts” (*A. Peters*, note 15).

¹⁰³ Vienna Convention on the Law of Treaties (note 6).

¹⁰⁴ Convention on the Rights of the Child, 20.11.1989, 1577 UNTS 3. On the reservations on this convention see *W. A. Schabas*, *Reservations to the Convention on the Rights of the Child*, *Hum. Rts. Q.* 18 (1996), 472 et seq.

The US internal law reservation to Article 16 of the 1966 International Covenant on Civil and Political Rights¹⁰⁵ should be considered in the same vein. In this regard, Finland declared:

“A reservation which consists of a general reference to national law without specifying its content does not clearly define to the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore may cast doubts about the commitment of the reserving State to fulfill its obligations under the Convention. Such a reservation is also, in the view of the Government of Finland, subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty.”

It has been contended that insofar as an internal reservation is concerned, Article 27 of the Vienna Convention on the Law of Treaties¹⁰⁶ (and the supremacy clause underpinning it as well) would not be relevant; it only applies, in fact, “once the extent of the State’s obligations has been determined, that is, once the issue of reservations has been addressed and resolved”.¹⁰⁷ This contention is not altogether persuasive and fails to consider the practice of late reservations, namely reservations formulated after having expressed the consent to be bound by the treaty.¹⁰⁸

In terms of Article 19 of the Vienna Convention, States are required to formulate a reservation “when signing, ratifying, accepting, approving or acceding to a treaty”.¹⁰⁹ With the sole exception of where the treaty itself provides for such a possibility, this clearly implies that late reservations are not allowed. Nonetheless, State practice reveals that a reservation of this kind is regarded as lawful when none of the other contracting parties objects to it. Point 2.3.1 of the 2011 ILC Draft Guidelines on reservations expresses the same concept:

“Unless the treaty provided otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation.”¹¹⁰

¹⁰⁵ International Covenant on Civil and Political Rights, 19.12.1966, 90 UNTS 171.

¹⁰⁶ Vienna Convention on the Law of Treaties (note 6).

¹⁰⁷ W. A. Schabas (note 104), at 480.

¹⁰⁸ C. Walter, Article 19. Formulation of Reservations, in: O. Dörr/K. Schmalenbach (note 6), 239 et seq., at 257.

¹⁰⁹ Vienna Convention on the Law of Treaties (note 6).

¹¹⁰ Guide to Practice on Reservations to Treaties, in: Report of the International Law Commission on the Work of Its Sixty-third Session, UNGAOR, 66th Sess., sup. No. 10, at 181, UN Doc. A/66/10/Add.1 (2011).

It is plausible that, should a domestic court persistently refuse to comply with a treaty obligation *vis-à-vis* a fundamental national value requiring to be protected, the forum State could decide to enter into a late reservation, whose aim is actually to safeguard that value.¹¹¹ State practice does not yet exist in this matter, but future developments towards this direction cannot be ruled out. To date, however, internal reservations basically remain a technique by which recourse to counter-limits is merely prevented, and in any case, only insofar as a treaty provision is concerned.

An additional technique, which may be used to reconcile supremacy of international law and counter-limits, consists of the so-called “internationalization of national values”. Several authors endorse the idea, whereby “decisions to refrain from giving effect in domestic legal orders to international law may be based on rules of domestic law that conform to or give effect to another rule of international law”.¹¹² Such decisions, in fact, could be regarded as an attempt to preserve the rule of law at both domestic and international level.

On closer look, neither this approach offers a conclusive solution in the matter. Two reasons are evidence of this allegation. First, in some cases, national courts resort to counter-limits to defend values that are only relevant at domestic level. In this sense, the 2012 decision of the Italian Constitutional Court and its defending attitude regarding certain fundamental principles related to the State pension system, seem to be quite revealing.¹¹³ Second, even if two international values are in question, an international court may be called upon to establish which of these values has to prevail.¹¹⁴ In this case, it is rare for a domestic court to depart from this choice within a subsequent national proceeding. In any event, should such a circumstance arise, it could hardly be understood in terms of “internationalization” of domestic principles. Once again, the Italian Constitutional Court provides a sound example by its decision passed in 2014.¹¹⁵

In that case in particular, two international values were at stake: The need to defend State sovereignty through the immunity rule on the one hand and

¹¹¹ More in general, on the relationship between national courts and their domestic governments in the use of international law see *E. Benvenisti*, Reclaiming Democracy: The Strategic Uses of Foreign and International Law by Domestic Courts, *AJIL* 102 (2008), 240 et seq.

¹¹² *A. Nollkaemper* (note 14), 76.

¹¹³ Constitutional Court (note 89).

¹¹⁴ As to the resolution of normative conflicts for the application of international law see *U. Linderfalk*, The Principle of Rational Decision-Making as Applied to the Identification of Normative Conflicts in International Law, *ZaöRV* 73 (2013), 591 et seq.

¹¹⁵ Constitutional Court (note 1).

the right to judicial protection on the other hand, i.e. a right which is set forth not only in Article 24 of the Italian Constitution (as well as in most Constitutions all over the world), but also at international level in Article 6 of the European Convention,¹¹⁶ as interpreted by the Strasbourg Court. Reference is especially made to the judgments in *Waite and Kennedy*¹¹⁷ and *Beer and Reagan*.¹¹⁸ In both cases, the necessity to balance the granting of immunity against the right to judicial protection was highlighted:

“For the Court, a material factor in determining whether granting ESA [the European Space Agency] immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.”¹¹⁹

Notwithstanding this, in 2012 the ICJ clearly recognized the prevalence of the immunity rule.¹²⁰ Accordingly, not only several Supreme Courts around the world,¹²¹ but also the Strasbourg Court itself,¹²² modeled their case law on the foregoing statement. From this perspective, more than as an attempt to preserve the *current* rule of law at both domestic and international level, the Italian Constitutional Court’s decision challenging the immunity rule as interpreted by the ICJ falls within the traditional dynamics underpinning the formation of a new custom. On the other hand, at least *de iure condendo*, this very same circumstance – i.e. the fact that the decision calls for an imminent advancement of the rule in question – may also be understood as a form of reconciliation.

¹¹⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms (note 35).

¹¹⁷ *Waite and Kennedy v. Germany*, 18.2.1999, Series A 13.

¹¹⁸ *Beer and Reagan v. Germany*, 18.2.1999, Series A 13.

¹¹⁹ See para. 68 (*Waite and Kennedy*) and para. 58 (*Beer and Reagan*).

¹²⁰ Jurisdictional Immunities of the State (note 2).

¹²¹ See Supreme Court of Canada *Kazemi v. Iran*, 2014 SCC 62, which, in light of the 2012 ICJ judgment, also states as follows: “While the prohibition of torture is certainly a *jus cogens* norm from which Canada cannot derogate and is also very likely a principle of fundamental justice, the peremptory norm prohibiting torture has not yet created an exception to state immunity from civil liability in cases of torture committed abroad. At this point in time, state practice and *opinio juris* do not suggest that Canada is obligated by the *jus cogens* prohibition on torture to open its courts so that its citizens may seek civil redress for torture committed abroad. Consequently, failing to grant such access would not be a breach of the principles of fundamental justice.”

¹²² *Jones et al. v. UK*, Judgment of 14.1.2014, para. 198: “[S]ince the recent judgment of the International Court of Justice in *Germany v. Italy* (see paragraphs 88-94 above) – which must be considered by this Court as authoritative as regards the content of customary international law – clearly establishes that, by February 2012, no *jus cogens* exception to State immunity had yet crystallised.”

IV. Concluding Remarks: Supremacy of International Law and “Reasonable Resistance” by National Courts

As can be inferred from the above, neither internal reservations nor the technique consisting of internationalizing domestic values are able to solve all conceivable conflicts between supremacy of international law and national fundamental principles. Hence, this discrepancy sometimes results in an *aporia*, which as such does not lend itself to any formal solution: on the one hand, national legal systems claim the right to limit international norms and decisions, insofar as the latter sharply conflict with fundamental (constitutional) principles; on the other hand, international law vindicates its supremacy over internal law.

Still, as a matter of fact, domestic courts increasingly tend to mitigate the effects of such an *aporia* by adopting a strategy of “reasonable resistance”. In effect, the practice on this topic, while involving a number of domestic courts around the world and concerning the use of counter-limits with reference to several international tribunals’ judgments, is still rather limited; nonetheless, there is increasing convergence of the conditions that are applied in those States where the doctrine under consideration is known.¹²³

This circumstance is particularly evident if one considers that constitutional (supreme) courts dealing with counter-limits almost always resort to them on the basis of the same complex argumentation, the aim of which is to spell out the rationale behind such a resort and, in the end, to render more tolerable, also from the standpoint of international law, a disregard of the principle of supremacy. In other words, the high burden of proof that domestic courts usually set in these cases does nothing but prove the general acceptance of the principle here scrutinized.

Going into detail, the kind of argumentation that has been resorted to in domestic judicial practice consists of two main elements. The first element lies in the clear identification of the fundamental principle, whose safeguarding entails a deviation from an international judgment or interpretation. Such a requirement is far from obvious and makes it possible to stigmatize the practice of those national courts (like the French ones) resorting to counter-limits with the sole view to eluding (rather than to contesting) the implementation of an international judgment, and that, to this aim, end up invoking vague and unspecified fundamental principles of the forum

¹²³ At least in part, this could be a response to the concerns expressed by some scholars with regard to the risk of fragmenting international law. For a reference to these scholars see note 22.

State.¹²⁴ Contrariwise, most national judges accurately identify the principle demanding protection. Support for this proposition may be found not only in the European and US judicial practice, but also in that of Latin-American courts confronting IACtHR judgments, i.e. a context where the elaboration of the counter-limits doctrine is still at an early stage.¹²⁵

On the other hand, the presence of the above element in the reasoning part of the decision does not suffice *per se* to justify a disregard of the supremacy principle. In addition to it, national courts seized with the matter also tend to illustrate why they are best placed to strike a balance between all values at stake. To this end, they rely on a number of different arguments or a combination of them.

One of these arguments is that the international judgment or interpretation affects constitutionally protected rights and interests of individuals (also regarded as bearers of “collective interests”), whose position has not been duly taken into account in the international proceeding. Several decisions exemplify such an argument. For example, the Italian Constitutional Court, in its decision of 2014, contested the 2012 ICJ judgment inconsistency with some fundamental national values, putting forward the general contention whereby such judgments are primarily intended to accommodate State interests at international law level.¹²⁶ Of course, it does not imply the ICJ’s insensitiveness towards national fundamental principles, but rather that the contrast between these principles (if clearly identified) and an international value may be better assessed through the prism of national law. An argument of this kind risks appearing self-evident with regard to judgments deciding inter-State disputes. Nonetheless, the very fact that the Constitutional Court made it explicit in the reasoning of the decision echoes the need to render the latter as acceptable as possible. On the other hand, a similar attitude to contestation on the part of domestic judges can be observed even where a Human Rights Court admitting individual petitions is concerned. In this regard, one may mention the 2004 German Constitutional Court decision, contending that a departure from a ECtHR judgment would be admissible as a matter of principle; in its terms, individual application proceedings before the ECtHR do not always give a complete picture of the legal positions and interests involved, the only party to these proceedings, apart from the complainant, being the State party affected.¹²⁷ Further, the Venezuelan Supreme Tribunal of Justice, in its decision of 2008, regarded an

¹²⁴ See section II., 2.

¹²⁵ See section II., 3. and 4.

¹²⁶ See section II., 3.

¹²⁷ See section II., 4.

IACtHR judgment as non-enforceable, assuming that while the IACtHR takes into account the sole position of the claimant, a Supreme Tribunal is always required to carry out a systemic assessment of all interests at stake and basically to give prevalence to norms protecting collective interests.¹²⁸ A similar position was also taken by the Peruvian Supreme Council of Military Justice.¹²⁹

An additional case justifying the use of counter-limits occurs where the international judgment or interpretation affects fundamental principles that are peculiar to the forum State alone or overlooks the special features of the national legal order where it is intended to operate. An illustrative decision in this regard is that by which the Italian Constitutional Court, in 2012, challenged an ECtHR judgment, because of its failure to consider a number of constitutional principles (such as those of equality and solidarity) linked to the Italian pension system.¹³⁰ The US Supreme Court decision in *Sanchez-Llamas* may be considered in the same vein;¹³¹ in this case, the Court vindicated a sort of margin of appreciation, enabling it to take account of the special features (in terms of fundamental principles) of the legal order into which an international judgment or interpretation must be integrated.¹³² Finally, an analogous argument was resorted to by the German Constitutional Court (2006),¹³³ the Spanish Constitutional Tribunal in *Moreno Gómez*¹³⁴ and the UK Supreme Court in *Horncastle and Pinnock*.¹³⁵

In a nutshell, when applied, the counter-limits doctrine requires a two-step argumentation, the aim of which is not only to mitigate the departure it entails from the principle of supremacy of international law, but also to (tacitly) confirm the ongoing existence of this supremacy. And indeed: if one assumes that the principle ends up being challenged only where some strict conditions occur, accordingly its general acceptance would not be contradicted.

¹²⁸ See section II., 4.

¹²⁹ See section II., 3.

¹³⁰ See section II., 3.

¹³¹ See section II., 4.

¹³² See section II., 4.

¹³³ See section II., 4.

¹³⁴ See section II., 4.

¹³⁵ See section II., 4.

