2016

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Judging in the inter-legalities context.

A narrative of failures and harmony throughout constitutional, European, and international courts.

Abstract

In addressing the issue of the American *exceptionalism vis à vis* the alleged European deference to International Law, a recent Harvard Law Review *Note* pointed out that the milestone Kadi judgement by the ECJ and the Italian CC decision 238/2014 (State immunity) belong in a context of high deference to International law, and reserve to judges a chance of resistance *only* in case of contrast against 'supreme' constitutional principles. This article considers the Italian decision on a different thread. It is associated with a promising path toward a more *comprehensive* legal reasoning, one that can be instantiated by some pronouncements of the ECtHR as well.

On the background lie questions concerning the role of Courts, the limits of their traditional 'positivist' self-perception, the nature of their independence and orientation to doing justice. Resuming cases that lead from the Kadi saga to the ICJ, the Italian CC, the ECtHR, and finally the Russian CC, it can be shown that it is time for Courts to assume a higher function, bridging the gap between interconnected legal regimes, and delivering justice beyond self-regarding legal reasons. 'Responsible' judging aims at the 'whole', not just to gate-keeping: considering the multiple-perspective scene, the inter-systemic extent of law, and granting concern and respect to claims from competing jurisdictions.

Introduction: Room for a different *Note*.

In addressing the issue of the American *exceptionalism vis à vis* the alleged European deference to International Law, the example of two decisions, the milestone Kadi[1] judgement by the ECJ and the Italian Constitutional Court n. 238/2014[2] (upon State immunity) has been commented upon in a recent Harvard Law Review *Note*[3], challenging the perception that they might be evidence of a self referential posture, a novel detachment of Europe from International law obligations. On the surface, what

[1] ECJ, Joined Cases C-402/05 P, Yassin Abdullah Kadì and Al Barakaat International Foundation v. Council & Commission, 2005 E.C.R. II-3649, Judgment of 3 September 2008.

[2] Judgment no 238 – Year 2014, English translation provided by the Italian Constitutional Court, <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/ S238_2013_en.pdf>

[3] 'Constitutional Courts and International Law: Revisiting the Transatlantic Divide', *Note* in (Mar 10) 2016, 129 Harv. L. Rev. 1362, available at http://harvardlawreview.org/2016/03/constitutional-courts-and-international-law-revisiting-the-transatlantic-divide/

the two decisions defended was not the duty to abide by International law but the precedence of their internal 'constitutional' norms. However, the *Note* points out that such a resistance or primacy was justified upon the special nature of *some* internal principles, those deemed to be *supreme*. Both cases have been covered by a fully developed scholarship, but the *Note* adds a nuanced view, centered upon the fact that the 'resistance' of supreme principles (only) is confirming an otherwise fully deferential attitude in Europe to international law, one that places judicial advice in exceptional cases on a delicate position, but excludes oscillating political assemblies from the final say *vis à vis* international law.

As I shall submit, besides that view, though, the tenor, the legacy of the Italian decision can be differently understood in their distinctiveness, even *vis à vis* the Kadi case at the ECJ. They can rather be taken as closer to a perhaps more promising rationale, one that can be exemplified in some other decisions issued by the ECtHR as well. But in order to draw the lines of a different understanding, some background ideas as to the role of judges and the structure of their reasoning are to be introduced.

Although some cases considered in the following pages have been largely commented upon,[4] it is worth reassembling them and shortly line them up again, albeit in a wider narrative, including some further instances of judicial attitudes and reasoning: this time in order to trace a judicial *itinerarium* furthering a somewhat upgraded idea as to judicial function and role (and that even the newly suggestive Harvard *Note* does not include).

The cases mentioned above are instances of a long aged question concerning obedience to international law, but, through them, non-compliance is substantively justified on the basis of those same values, human rights especially, that International norms themselves purport to protect against States. As the events can be described, and regardless of the relevant judicial reasoning, in appealing to the fundamental European primary norms, the ECJ (now CJEU) in the Kadi case showed it provides human rights' protection higher than the International legal order. And so did the Italian Constitutional Court in the question about Germany's immunity before Italian

[4] I have myself done so. This article also draws upon, gathers and revises some separate analyses I have published in the *Journal of International Criminal Justice* ('German war crimes and the Rule of International Law', January 2016) and the online journal *Questions of International Law*, July 2014 ('The principled and winding road to Al Dulimi. Interpreting the interpreters').

Tribunals[5]. Of course this substantively virtuous outcome might be interpreted as simply contingent and not detracting from the wrongness of such a non responsive attitude toward IL. Nonetheless and ironically, what had been in the past the moral *leit motiv* of internationalism, that is, the overcoming of unconditional State self-interest in the name of individuals and peoples, turns to be hardly appropriate here as a critique against Italy[6] and the European Union. And to tell it all, it might even be thought that, perhaps besides their declared argument, these Courts were defending international values, not just national or regional ones.

While this very subject matter has spurred disagreements, it invites some further, background questions. Beyond the appearances, the reasoning of the Courts often matters even more than the decision, and naturally, more than the 'right' outcome it is the (possibly 'wrong') argument that should be the object of appropriate scrutiny, since it is from the argument that the lesson of the Court emerges, and it is upon the argument that routes of judicial path-dependence[7] flourish. Thus, some consideration is in order of how Courts' reasoning reveal their real attitude in complex cases, namely those that are at the crossroad between different jurisdictions.

The transformations in the international and transnational intercourses, the changing supranational environment, the proliferation of different layers of extra-state laws have prompted a context that challenges older legal orders with novel commitments and responsibilities: up to the point that framing the behavior of the Courts in the known schemes of conduct (included monism, dualism, exceptionalism, and the like) might barely be satisfactory.

The underlying sense of the mostly known judicial stories in this article can be shortly resumed as revolving around the question of what is Courts' duty better related to. Are they gatekeepers and sentinels of the uncorrupted integrity of their own legal order, or are they encumbered with a larger role? Is their job best described as merely jurisdiction-relative or centered upon the case and the task of doing justice?

In principle, such hypotheses should not be thought of as opposite, since they can be perfectly compatible, and not in conflict: unless the problem they face locates

[5] S*upra* at note 2.

[6] It is to be noted that the Italian Parliament had plainly implemented the decision of the ICJ 2012 banning Italian courts from accepting civil litigation against Germany.

[7] A. Stone Sweet, 'Path Dependence, Precedent, and Judicial Power' in M. Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization: Path Dependence, Precedent, and Judicial Power*", Oxford, OUP, 2002, pp. 112-135.

under the competing (or concurring) control of different legal regimes. Judicial stances and decision making might result from a unilateral, one-sided reasoning, thereby leaving unaddressed the complexity that the parties might have asked to solve. In a sense, judges happen to asymmetrically engage from the point of view of their institutional allegiance with the legal order to which they 'belong', while the questions at issue (and the parties involved) are under the normative purview of more than one legal regime. The mindset from which the following reflections are made, brings to the perception that in the attitude required of judges' reasoning should have its place the sense of *responsibility for the whole*[8], i.e. for the entirety of the interconnected legalities, of the normative claims sourced in diverse orders, if equally, albeit separately, controlling the issue at stake.

2. The diverging attitudes in the Kadi case

I) As all know today, in the famous Kadi case, the European Court of First Instance (CFI)[9] held that 'the resolutions of the Security Council […] fall, in principle, outside the ambit of the Court's judicial review and […] the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations' (para 225). As a consequence, a domestic review of the decisions of the Security Council cannot take place, because it would end up preventing the States and the Community from complying with the Rule of International law (with the exception of the infringement of a *jus cogens* rule: which is deemed not to be the case in Kadi's judgement). Thus, it is the Rule of international law, given its supremacy over any other States' obligations (pursuant Article 103 of UN Charter) to deny the expected protection of Kadi's fundamental rights (to a judge, to a defence, and to property), despite their being part of primary law and 'constitutional traditions' within the European Union (and admittedly, if more importantly, of human rights in the international law order, as well as within the UN

[8] More about this in G. Palombella, 'Global legislation and its discontents', in Livoja and Petman, *International Law-making*, Routledge 2013, esp. pp. 70-2.

[9] CFI Kadi Case T-315/01, Kadi v. Council and Commission, 21 September 2005, [2005] ECR II-3649.

regime).

Much of the strength of this decision lies in furthering obedience to international law. It is, in my view, that kind of *dura lex sed lex* upon which, historically, the stability and efficacy of a legal order have been construed in the past, within the realm of XIX and XX centuries States, especially in continental Europe. This vein of praised 'positivist' reasoning fosters predictability and certainty of International law, in as much as it abides by the rules of the Security Council and the will of States behind it. A Court well tuned to International law would not dare to endanger its authority, and the monist attitude here also implies some hierarchical primacy, supported by a well founded textualism. [10]

Much of its weakness is seen[11] in the lack of recognition of the primacy of fundamental rights, or the denial of the jus cogens nature of some essential individual rights. But, more than that, it can be seen in the jurisdictional cleavage that it purports to respect, as a watertight threshold between the European Court and the normative sphere of the UNSC resolutions, one that falls "outside the ambit of the Court's judicial review and […] the Court has no authority to call in question, even indirectly, their lawfulness" (*supra* CFI, § 225)). This is diligently formal, but is meant to a kind of 'acoustic separation' between judicial jurisdictions, that reflects hierarchical asymmetry.

Somehow unpredictably, the logics of such non-communicant boxes, soon vacillates at the subsequent words of the CFI (today General Tribunal). In a rather contradictory move, in fact, the Court withdraws the assumption of the acoustic separation: "None the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible." (para 226). The move – aptly defined as

[10] For ex., cf. Ch.Tomuschat, in *Case Law* section of the *Common Market Law Review*, 43: 537–551 (2006), writes: "The Court of First Instance has taken a courageous step forward in acknowledging the primacy of the UN system over the Community legal order. This was certainly not easy for judges who are accustomed to discarding any objections from the domestic level of the 25 Member States as being irrelevant. In principle, the configuration thus attained is a well-balanced construction, suited to foster international cooperation within a homogeneous world order system."(p. 551).

[11] Grainne De Burca, "The European Court of Justice and the International Legal Order After Kadi", *Harvard International Law Journal*, 51, 1, 2010, 1-49, at pp. 21-2.

"unexpected and ambulatory"[12] - does not impose the European rights' check upon Council's resolutions, but elevates the European Court to an agent protecting the coherence of International legality, that jus cogens violations, even in the name of world supreme security, might disrupt.

Although this sort of international empowerment of the European Court (in exceptional cases) has been criticized, it is far from being, of itself, misleading. In principle, it is the interest of the international community that fundamental international norms are complied with by whatever acting authority. And national or regional Courts, that are imposed to adjudicate on the basis of illegal international acts and rulings, should better be called to expose such an illegality and reject its imperative, if they have to be faithful participant in the interplay between domestic and international orders. After all, if something stands out in the modern role of Courts, *it is their judging under the law, their hierarchical independence, not their subordination to other authorities.*

However, such a limitation only to a grave jus cogens infringement is of uncertain coherence, and it implies more than it says. The appraisal of *grave jus cogens violation* presupposes indeed a general competence of the Court on assessing international law, the scrutiny of the resolutions, and eventually a *decision* as to what counts as gravity, jus cogens, and exceptional cases. Accordingly, all that presupposes some continuous jurisdictional space, that is, an enlarged sphere of judgment, beyond regional domestic norms.

For the CFI, Security Council can only be curbed by jus cogens norms, because its legislative authority is otherwise unrestricted: however, if a Court is entitled to judging[13], then it is not the case that 'the King can do no wrong'. Moreover, in so doing perhaps the CFI did hint at a new strand of *dédoublement fonctionnel*[14], one unanticipated by Scelle, but bearing the same promise: that is, as Antonio Cassese

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[12] Ibidem, p. 21.

[13] This is disputed, of course. See the debate about whether (not even) the ICJ can be entitled to scrutinise the Security Council, in De Burca, *supra* note 11. In her footnote she also notes that it is unlikely that the ICJ could pursue such a scrutiny, since only States are allowed at the Court. Beyond that, Tomuschat (supra at note 11) wrote: "it would also appear to be unsuitable, in principle, to control the lawfulness of Security Council resolutions with respect to the specifications of Chapter VII (Art. 39) of the Charter. To assess whether a threat to international peace and security exists means essentially discharging a political function which judges are unable to perform with the same degree of authoritativeness" (ibid.).

[14] Among the works of G. Scelle on it, see 'Le phenomene juridique du dedoublement fonctionnel', in *Rechtsfragen der Internationalen Organisation - Festschrift fur H. Wehberg* (1956), pp. 324-342.

remarked, "domestic Courts can have a lot of weight in pronouncing upon transnational issues, thereby assuming that international law is effectively complied with"[15] . Eventually, the general interest of compliance with International law, that Courts can defend, is consistent with the tenet that, like in Scelle's view, the international order is *superior* to States' law, at least in the view of being more than a corpus of rules of ethics[16]. While extending the domestic Court's jurisdiction in cases of violation of peremptory international norms, the entire judgement of the CFI endorses such a 'superiority' and also the precedence to be straightforwardly accorded to International law.

As a last note, it should be born in mind that the Court does not arbitrate between the two legal orders, as between 'peers', and does not think that there can be cases where the Rule of International law should be challenged by contextual and content based assessments, capable to revoke the existing hierarchy between legal orders (*i.e.* in allowing well founded substantive claims emerging from a competing legal order).

II) The European Court of Justice adjudicates the Kadi[17] case on different, and admittedly, self referential basis, assuming that a dualist stance can ensure the protection of European fundamental rights, virtually regardless of what should gain primacy in the International legal order. To tell it concisely, while at the CFI human rights had been concealed in the name of the international rule of law, at the ECJ human rights are celebrated in the name of the European Rule of law. If it is perplexing that the Rule of International law can thrive on forgetting the rights that itself claims to protect, it is likewise barely satisfactory that those same rights can only be defended at the price of reaffirming the rather self contained nature of respectively the international and the domestic scenes.

As it is now well known, the European Court of Justice found that Kadi's fundamental rights had been infringed by the EU regulation implementing the Security Council resolution against him. According to the ECJ, however, those rights are also pillars of European primary law: European internal regulations are unlawful,

[15] A. Cassese, 'Remarks on Scelle's theory of Role Splitting (*dédoublement fonctionnel*) in International Law', 1 *EJIL* (1990) 210, at pp. 230-1.

[16] Cassese, ibidem.

[17] ECJ, Joined Cases C-402/05 P, Yassin Abdullah Kadì and Al Barakaat International Foundation v. Council & Commission, 2005 E.C.R. II-3649, Judgment of 3 September 2008.

regardless of a Security Council mandate, when they violate the fundamental norms of Community law. In a sense, it made an argument for European primary law to prevail consequently over the obligations stemming from IL (so disregarding art. 103 UN).

The ECJ decision was criticised because, contrary to the 2005 decision of the CFI, it meant the EU did not comply with IL, thus betraying true internationalism (like the US in *Medellin*[18] and elsewhere): a kind of American style *exceptionalism*,[19] contradicting the original attitudes of the EC in the '50s[20].

On a different note, it should be remarked that, beyond its virtues, the ECJ reasoning amounted to a pronouncement about which of the two legal orders should be given precedence, *instead of an assessment about, say, the infringement of fundamental rights in a supranational sphere where the two are interrelated*. It settled not a question of *disagreement,* between IL and the EU, but a question of autonomy or precedence.

There is the other interpretive alternative available, though: using a less strict interpretation, the ECJ Kadi decision is also intended as an appeal to the Security Council, aiming to grant compliance in the future if it can guarantee some *equivalent protection* of human rights of the targeted individuals. It is a pattern of dialogue beyond the State, with promising potential in the relationship among legalities (the UNSC and the EU) [21]. However, this view is not really found in the Court's reasoning, but in the AG Maduro opinion, reminding the *Bosphorus*[22] example cited by the appellant[23]. The Court strongly emphasizes the separation of the EU legal order. Of course this would not impede a serious consideration of the international rule, to which European States belong. In its arguments, however, it has been noted "the lack

[18] *Medellín v. Texas*, 552 U.S. 491 (2008)

[19] G. de Búrca, "The European Court of Justice and the International Legal Order After Kadi", *Harvard International Law Journal*, 51, 1, 2010, 1-49.

[20] G. de Burca, "The Road Not Taken: The EU as a Global Human Rights Actor", in *American Journal of International Law*, 105, 2011, 649 ff.

[21] Among many comments, see for ex. Juliane Kokott & Christoph Sobotta, 'The Kadi Case—Constitutional Core Values and International Law—Finding the Balance?,' 23 *EUR. J. INT'L L.* 1015 (2013).

[22] Case C- 84/95 [1996] ECR I- 3953.

[23] Case C-402/05, Opinion of Advocate General Poiares Maduro, who also writes: "Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order. However, no such mechanism currently exists" § 54 *available at* http://blogeuropa.eu/wp-content/2008/02/cncc_02_05_kadidef.pdf).

of direct engagement [by the Court] with the nature and significance of the international rules at issue in the case, or with other relevant sources of International law."[24] More consistently to its premises than the CFI, the ECJ also excluded that its dualist stance could include a review of the UNSC Resolutions.

According to the mentioned Harvard *Note,* that traces a different view, the understanding by the ECJ "closely parallels that adopted in Germany by the FCC in response to the ECJ's assertion in *Costa v. ENEL* of the primacy of EU law over Member States' domestic law. In *Solange I,* the FCC ruled that in the hypothetical case of a conflict between a European Community norm and the guarantee of fundamental rights provided by German Basic Law, the latter would prevail"[25]. The point here stressed has to do with the European exceptionalist favor as to fundamental rights, and the relevant manifesto is the passage at the German Constitutional Court, assuming the following: "The part of the Basic Law dealing with fundamental rights is an inalienable, essential feature of the . . . Basic Law . . . and one which forms part of the constitutional structure of the Basic Law."[26]

It is not at all a general distrust towards European (or International) law, but the highest value of the supreme principles/ rights (as an 'extraordinary section' of constitutional law) cannot be superseded[27]. And it is a main thesis of the *Note,* that there is no similarity or closeness of Europe to American skepticism toward International law. Although "both sides espouse a vision of the primacy of their respective constitutional orders over the international order" at the U.S. Supreme Court "fundamental human rights do not hold the foundational, extraordinary constitutional status they hold in the eyes of the European constitutional courts for purposes of considering whether to apply international law domestically. The European approach differs markedly in that the courts have constructed internal hierarchies within their constitutional orders vis-à-vis international norms".[28]

These considerations are fair and sound. However, that said, one can ask

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[24] de Burca, supra note 19, at p. 23.

[25] Constitutional Courts and International Law: Revisiting the Transatlantic Divide', *supra* note 3, p. 1380.

[26] (BVerfG, 2 BvR 52/71, May 29, 1974, 37 Entscheidungen des Bundes-Verfassungsgerichts [BVERFGE] 271, 1974 (Ger.), *translated in Solange I — Beschluß*, TEX. L., http://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588 (last updated Dec. 1, 2005) [http://perma.cc/V6CB-2F7C]. B.I.4.4.

[27] Constitutional Courts and International Law: Revisiting the Transatlantic Divide', *supra* note 3, p. 1380

[28] Ibidem, p. 1381.

whether is it the most we can ask, and fair enough *vis à vis* international law. Can the question of human rights, founding structure of European constitutional orders, only function just as an armor-plate, a communicative stop, preventing any further engagement with values, principles, interests and circumstances of the imperatives sourced by International law? Why should such a layer of constitutional fundamentals be preventing any closer appraisal of the international law norms? In principle, there might be countervailing human rights and related objectives that International law might need to protect, by asking the community of peoples to join a common effort, beyond partial views. In a sense, the FCC Solange 2[29] decision would have offered perhaps a pattern of a slightly more attentive approach: it declared that would no longer exercise jurisdiction to decide on the constitutionality of European Community legislation *as long as* the European system ensured an effective protection of fundamental rights substantially similar to that required by the German Basic Law. This mutual approach -in the same vein as the previous Frontini[30] case at the Italian Constitutional Court- does not exclude that the European order (v. State) or the International (v. the EU or the State) might be worth being engaged with on a deeper consideration. It is still different from that kind of uncommunicative self referential stance that at the ECJ in Kadi case had foreclosed the appraisal of "the nature and significance of the international rules at issue in the case, or [with] other relevant sources of international law"[31].

It is, nonetheless, perfectly true that, in comparing the US and the EU, "Europe's permissive approach to incorporation of international law generates added oversight responsibility for its constitutional courts: in the absence of procedural safeguards, the courts are the sole gatekeepers for their domestic legal systems vis-à-vis international norms. By contrast, American procedural hurdles entail that the legislative branch holds primary gatekeeping responsibility"[32].

Again, this further and largely sharable conclusion can prompt here a subsequent observation, one that, I think, runs hindmost with the entire narrative

[29] *Wünsche Handelsgesellschaft* decision of 22 October 1986, BVerfGE 73, 339, case number: 2 BvR 197/83.

[30] Case *Frontini*: Decision No 183/1973 (dec. 18, 1973, Italian Constitutional Court).

[31] According to Grainne de Burca, supra note 11, at p. 23. The Solange method was considered promising in the relations among different jurisdictions: see N. Lavranos , 'Towards a Solange Method between International Courts and Tribunals', in: Y. Shany/T. Broude, *The Allocation of Authority in International Law*, Essays in Honour of Prof. R. Lapidoth, (2008), pp. 217-235

[32] 'Constitutional Courts and International Law: Revisiting the Transatlantic Divide', *supra* note 3, at p. 1383.

occasioned by those judicial judgments at issue. The concern for the defense of the domestic sphere is a generalized one, shared by all State legal systems. But the focus on the Constitutional or national courts *simply as gatekeepers* might be somehow outdated. In a context of intertwined legalities, even International law has changed its traditional focus, by adding regulatory law and 'community' law to its conventional, treaty based core regarding the sheer interests of the States[33]. In such a context, International law does not only discipline the *external independence* but also impinges upon the *internal autonomy* of regional or State systems[34]. The unprecedented and massive regulatory penetration by global or regional specialized regimes is a further evidence that the very role of 'gatekeeper' is cherished and yet operating in relatively few, although surely important, cases, while much is already beyond the gate: it is like a gatekeeper delusion, with the risk that we make a case of closing the stable door after the horse has bolted. What might better describe the role of Courts in such a changed interplay among legal orders, if it is not so much or not only the icon of gatekeepers?

In different words, the questions to start with can be centered upon further concerns. First, whether the protection of the fundamental rights of Mr Kadi (or similarly of anyone else) was really an issue only relevant to the European legal order, or should have been recognized its proper weight in the international system as well. Second, can it be seen from a Court's angle as a matter still boiling down to the defense of domestic walls? When the subject matters amount to an inter-legalities' occurrence, why a Court should not carefully consider *all the relevant norms* that, from national or international law, concur or compete in controlling the case?

From the perspective of the appellant, after all, the ideal-type-Mr. Kadi finds himself under the crossing fire of the UN Sanctions Committee and the European Union regulations: the autonomy/ identity of orders notwithstanding, his right /access to justice would ideally require a comprehensive, not just a lame, verdict. The outcome, of course, is not in question, it is the reasoning instead. If the focus is centered upon the case and the preeminent task of doing-justice, the adjudication of

[33] Cf. the chapters included in *From Bilateralism to Community Interest. Essays in Honour of Bruno Simma,* Edited by Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer, and Christoph Vedder, Oxford, OUP, 2011.

[34] On this issue, for ex. G. Arangio Ruiz, 'International Law and Inter-individual Law', In *New Perspectives on the Divide Between National and International Law,* ed. By Janne E. Nijman and Nollkaemper André, Oxford, OUP, 2007, pp. 15-51.

Kadi's rights should hardly be thought of as not-contradicting the legality of the SC resolution in its own international law terms, because the chain of decisions resolutions and regulations affecting Kadi links causally two jurisdictions, and such an intertwinement makes unreal the picture of two parallel orders that never meet.

Accordingly, from the other perspective, that of the Courts, jurisdictional limits would be interpreted in the new interaction between laws and legalities affecting each other in the international/global context. Since centuries we solemnize the Courts' role as an independent guarantee of the 'just' due to individuals, according to the context and the law. This entails renouncing approaches that can appear to be one-sided, and considering the relevant law on a privilege of independence. The nature of the independence of Courts in such *inter-systemic* cases invites further reflection: it can potentially bear different implications, e.g. with reference to how their duty to do justice all-the-relevant-law-considered should best be intended; and how such a duty can be kept in balance with system-allegiance, with Courts' institutional dependence/ belonging within formal jurisdictional thresholds.

3. The Italian Constitutional Court and a narrative shift

It is by bearing the above questions in mind, and in the view to address them under a different light, that we can look at some other interpretive choices, like the case n. 238/2014 at the Italian Constitutional Court and two decisions of the European Court of Human rights (*Al Jedda* and *Al Dulimi*).

According to the Harvard *Note*, the same considerations and interpretation apply to the decision 238/2014 of the Italian Constitutional Court as those it made with regard to the *Kadi* case at the ECJ. The main rationale should be taken to be the peculiar European openness toward International Law and the counterbalancing limitation due to respect for those constitutional principles, that in the domestic hierarchy are above other constitutional rules, and are believed 'supreme'. Although this can be taken for granted, the interpretation suggested by that *Note* conceals the limitations of the Kadi judgment that I recalled in the above sections and the different potential that the pronouncement of the Italian Constitutional Court bears. In fact, I shall recommend a reading that tries to treasure the important argumentative traits of the decision, suggesting how its logics can help proposing more mature interlocutions at the intersections between different orders.

Germany brought the case before the ICJ claiming that Italy had breached the rule of states' immunity by allowing civil suits before the Italian courts for compensation due to victims of second world war crimes. The ICJ[35] ascertained that a customary rule does exist granting state immunity for *acta jure imperii*, to which cases of grave war crimes are no exception. Such an immunity rule formulated by the Court is strictly endowed with procedural primacy, which prevents the further appraisal of the merits. Accordingly, the violation of jus cogens norms by Germany does not displace its right to immunity, regardless of whether victims are thereby deprived of any means of redress.

The weakness of this pronouncement by the ICJ is at the root of subsequent judicial issues, as that raised before the Italian Constitutional Court. As I remarked elsewhere[36], the ICJ still understands its role in a narrow way, one that has prevented it from fully taking into account the real complexity of the case and the countervailing peremptory norms against international crimes and protecting human rights. So, it is a one sided interpretation of International law: it does not attempt at balancing these considerations with the rule of immunity. Sticking to the sheer existence of a customary rule is all but a neutral stance. More, the Court recognizes the insufficiency of its verdict: lacking a legal remedy, to victims of war crimes, it suggests the re-opening of further political negotiations: confessing self incurred impotence[37]. That is the self-understanding of the highest international Court as unable to convey the entire normative strength of the existing international legal order, and confining itself to a sheer arbiter between the arguments raised by the parties. Such a mindset runs contrary to the possibility that international law be interpreted in its integrity, and as a whole, as all Courts have to do with regard to their own legal orders. That is the lack of a culture of justification, one that does not ignore the material and normative

[35] ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), judgment of 3 February 2012, online at http://www.icj-cij.org/docket/files/143/16883.pdf

[36] Here I shall draw upon my previous comment: G. Palombella, 'German War Crimes and the Rule of International Law', in *Journal of International Criminal Justice*, 2016), 1-7 (doi:10.1093/jicj/mqv070).

[37] See the ICJ Judgement (Jurisdictional Immunity of states, supra fn. 34) at §104: "... the Court is not unaware that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned. It considers however that the claims arising from the treatment of the Italian military internees referred to in paragraph 99, together with other claims of Italian nationals which have allegedly not been settled — and which formed the basis for the Italian proceedings — could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue".

relations between different concurring sub-domains of international law. Such a culture of justification does not necessarily require that the Court play some creative role[38], but, at least, that it works through making the most of the legal order as *complete*[39]. All the more so, since the point is not, in the present case, the absence of explicit words and norms, a gap that a judge should bridge by interpretation, but on the contrary, the relevance of positive law that a judge should not be entitled to neglect or simply downplay to sheer moral recommendation.

When, later on, the issue was raised before the Italian Constitutional Court as to the constitutionality of the Italian rules conforming to IL and thus preventing the victims from access to justice and the protection of their most fundamental rights, the Court[40] actually asserted that the latter belong to the *supreme* principles of the legal order and as such they cannot be forfeited, even in the name of International obligations. Of course, the immediate reaction by scholars was to define the pronouncement as blind to International law, nurtured by a traditional dualist view of the relations among states and extra-state orders[41]

It is then necessary to briefly recall some key passages in the Court's reasoning. The Court opposes the tenet of the ICJ as to the logical priority of immunity: it denies that the "reversal of the relationship of logical priority between distinct procedural and substantial judicial assessments" is "unacceptable". On the contrary the merits must be thoroughly examined "simply because an objection concerning jurisdiction necessarily requires an examination of the arguments put forward in the claim, as formulated by the parties" (para 2.2.). Not that the Court wishes to contrast the ascertainment by the ICJ of the *existence* of a customary rule of immunity, but it feels

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[38] R. Higgins, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, in *ICJ Rep*, 226, Dissenting Opinion of Judge Higgins. 1996, pp. 590-591)

[39] H. Lauterpacht, *The Function of Law in the International Community*, Oxford, Clarendon Press, 1933, pp. 66-67

[40] Italian Constitutional Court, Judgment No. 238 of 22 October 2014, available online at http:// www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf (hereinafter, 'Judgment No. 238').

[41]Robert Kolb, 'The relationship between the international and the municipal legal order: reflections on the decision no 238/2014 of the Italian Constitutional Court ' in *Questions of International Law,* dec. 2014, wrote: "The gist of decision no 238/2014 is a separatist treatment of the two legal orders involved. It is a high peak of a new form of robust dualism. Dualism is here not limited to explain the penetration of international legal norms into the national legal order. It ventures further, extending to a denial of any constructive 'dialogue' with international law and the judgment of the ICJ" . See also Anne Peters, 'How to Make the Best out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order'. www.jurablogs.com/go/let-not-triepel-triumph- how-to-make-the-best-out-of-sentenza-no-238-of-the-italianconstitutional-court-for-a-global-legal-order.

free instead to reject the idea that a procedural principle bears itself a logical priority ending up into… an immunity from being appraised in the context of other fundamental principles. If the customary rule has not an abstract priority, then it does not stand separate: as a consequence, the ICJ conviction regarding the absence of *conflict* between rules of merit, like Jus cogens, and immunity as a rule of procedure cannot be held true. Accordingly, that *conflict* now resurfaces both in the Italian and in the international orders.

Now, the sensitive question is whether the Court has taken a mere self-regarding stance, or has reasoned otherwise. Let us remind how the argument goes. It has to take into account the specific structural constraints, the *automatic incorporation* rule provided for general international law by art. 10 of the Italian Constitution. Such a norm doesn't prevent the assessment of the compatibility between the supreme principles of the Constitution and International law norms (that is a principle confirmed recalling a C.C decision of 2009, and the same holds true with the German Constitutional Court, which faces the similar art.25 of the BVG as to general international law). Admittedly, the Court has to take general IL at the level of constitutional rank, but it is obvious, even in a wider continental context, that different constitutional commitments might ask for a fine tuning and a balance exercise[42] if they cannot be both satisfied all at the same time. Such a choice is much easier where on one side are those supreme principles that cannot be postponed (as those in art. 2 protecting fundamental rights and art. 24 Const protecting access to justice).

Now, the Constitutional Court is mainly taking a different angle. The Court looks at the International *rule defined by the ICJ* and scrutinizes its compatibility *before* its incorporation can happen. We can explain this move if we think of the Constitution as a frame of mutually compatible norms. International law has developed general principles that have acquired a domestic constitutional status, and certainly the international principle of sovereign equality, the subsequent *par in parem non habet imperium (or judicium)*, down to the principle of immunity, are in the abstract compatible with a constitution based on fundamental rights and access to justice. But that rule of immunity *as identified by the ICJ* for States violating jus cogens and basic human rights would make the constitutional frame absolutely self

[42] The general theory in the German system has been taught by R. Alexy, *A Theory of Constitutional Rights*, transl. by J. Rivers, Oxford, OUP, 2009.

contradictory. For such a reason, that precise rule, formulated through those terms, according to the Italian Court has never "entered" the constitutional order and cannot have become part of it. Accordingly, this test of compatibility triggered by the general commitment to incorporation pursuant art. 10 Const. *differs* from a scrutiny of constitutionality of the Italian *legislation*, even if incorporating IL. The case is different because the Court has to focus upon an object (the ICJ defined rule of immunity) that cannot be found by looking *inward* our own legal system, but only at its home door. Differently from a sheer dualist Court, which works by scrutinizing internal norms on the basis of domestic parameters (like in the Kadi case: the ECJ did only scrutinize an internal European regulation on the basis of European fundamental norms) this judgment requires the Court to move to the threshold (the customs' counter) of the domestic order, and take into serious consideration the claims from the International legal order. It asks for an interfacial judgment, on the *limen* between the two legal orders.

Of course, those who would prefer the art.10 provision to work as an absolute and unconditional incorporation of whatever general norms emerge as a matter of IL, are evidently asking for an *unconditional* hierarchy between the two legal orders. But this is not the choice of the Court (and it is not even the case of other Constitutional Courts in Europe). It has instead to pursue a reflexive test, one that considers the normative claims from IL *also* as claims in principle endowed by the Italian Constitution with higher force than legislation itself, and in principle of constitutional level. Remarkably, the scrutiny of compatibility concerning the rule of immunity is actually done at the intersection where International and domestic law are led by the normative commitment prescribed by the Italian Constitution, which pre-articulates the two orders as legally pre-disposed to interweave. Eventually, the balance is struck between: *on one side* the IL principle of *Sovereign equality* –still external as a matter of its particular actualization into a specific rule as it is formulated by the ICJ; *on the other side*, constitutional rights, artt. 2 and 24 of the Constitution, and relevantly, the principles underlying international Jus cogens norms: the latter count both as countervailing parameters in the coherence of IL itself *and* as domestically 'constitutionalized' norms, thus working as trans-systemic normative bridge.

Given the key of art. 10 Const., the downsides of dualist ideologies are not in place here: IL is not an 'outsider' whose pretenses to domestic effects either can be ignored, or are conditional upon the *whim of political majorities*. Its normative

entitlement to interplay at the same level with the constitutional order is already built in it. Due to the interfacial position to be taken by the Court, *vis à vis* an object of constitutional scrutiny that is not yet 'in the domestic inside', the balance, as above noted, is struck in-between two legal orders, far away from an inward-looking decision making.

As the judgment goes, while the Court recognizes the immunity principle, it cannot uphold, in the case at stake, that *specific rule* implementing the principle so as to cover mass crimes: as though deportation, genocide or torture could ever qualify for the exercise of "typical governmental powers". This is not for the Court what IL can mean for legitimate exercise of *acta iure imperii*. And the latter observation tackles IL coherence, contributes its understanding, is not simply waving domestic reasons.

In the appraisal of the countervailing normative claims emerging in between the two legal orders, the Court inevitably realizes that sacrificing such a strict rule of immunity in case of *Jus cogens* breaches cannot undermine the core significance of the background international principle of State equality, but enhances its consistency with the other fundamental norms of the International order itself; contrariwise, making that specific rule to prevail over art. 2 and 24 Const. would instead impair their core normative content, and downplay their value.

In a nutshell, the Constitutional Court, and due to the interfacial norms of the Italian Constitution (*vis à vis* IL), is not truly working just inside its own walls, but inevitably balancing between the *two legal orders* through making sense of countervailing principled claims in the context of the case. Such an attitude naturally fosters a more comprehensive view of IL as a whole while defending the domestic order from disproportionate imperatives.

Perhaps, disenchanted eyes might insist that in practice the true and only role played by the Italian CC amounts to that of a gatekeeper. Although the noble side of that is seen in the judicial protection of supreme principles concerning basic rights, the real value of the decision's arguments that I have perhaps tried to streamline a bit, is in the consideration of the International legal order as a serious and constitutionally qualified source of normative commitments, that should be complied with, both as a matter of International and of constitutional law. The point I would encourage to see concerns the content-based nature of the Court's discussion, one that does not simply define the issue in terms of a formal judicial jurisdiction's tussle: it can foster instead

a mutual and ongoing construction of domestic and International law systems coherence, and results from a consideration that substantively involves the two legal orders.

From this point of view, it entails a change of perspective. The defense of fundamental rights in the constitutional order is a consequence of a scrutiny of international law claims' strength, consistency and substantive soundness. For a gatekeeper one can imagine different levels of sensitivity and openness: and since an assessment is allowed as to the proportionate/disproportioned weight of non-domestically sourced norms, a Court thereby helps building bridges, instead of keeping walls in function.

What can be clearly upgrading the role of the Courts in the interplay between different orders for sure is not their fidelity to a self-regarding task, even if that task is closing the gate at the *only* presence of supreme principles. Courts are called upon to settle some cases that by their nature would not originate unless two different legalities are concurring or allegedly in conflict. The last decades have shown that Courts bear a higher responsibility in these circumstances, one that should exceed the limited view of 'their own' legal system, although admittedly it would be technically preposterous to ask for them to judge from a standpoint that is not theirs. A one-sided judgment, whose reasoning clearly neglects any other law issued by and depending on other institutional regimes and covering connected profiles of the same matter, would be precarious and self defeating, unable to last, and undermining the credibility that any Court should strive to reach. Courts' responsibility entails the serious pondering of the norms involved, and the capacity of the envisaged outcome to stand the check of the good reasons and norms sourcing from other relevant legal regimes competing in the case. Although a paramount 'integrity' of the supranational context is a matter of 'legislative' construction, and a kind of organic global legal system seems certainly out of sight, nonetheless, a Courts' role in such an environment requires to make the most of the different normative perspectives that converge into the subject under debate, to identify the contribution to positive justice that gathering the different normative angles can offer. In this very sense, a Court shall have to judge in a double function, that is, also in the view to show its own institutional allegiance in its best light to the eyes of those who are supporting reasons belonging to other different systems of law.

4. A 'comprehensive' pattern from the ECtHR

In *Al-Jedda v United Kingdom*[43], (2011) the ECtHR adopted a comprehensive interpretive pattern. Concisely stated, the ECtHR took the vantage point of the supranational setting in which, despite their autonomous and in a loose sense, self-contained[44] regimes, both the Convention and the Security Council are included.

The Grand Chamber of the ECtHR found that indefinite detention without charge of Al Jedda (dual citizen British/Iraqui) by the UK in a Basra facility controlled by British forces was unlawful and infringed his rights to liberty under art. 5 of the ECHR. The significance of the argumentative strategy adopted by the Grand Chamber marks an innovative step.

The ECtHR did not uphold Lord Bingham's argument[45] (House of Lords) in the previous UK proceedings, one pretending conformity to UN SC resolution (n.1546), under art. 103 of the UN Charter, and centered upon *respect for* hierarchy[46]. Focusing upon normative coherence between the Convention's regime and that of United Nations, the Court did not consider the unlawful indefinite detention either *commanded or authorized* by the SC resolution.

Accordingly, it did not address the question about the highest legal authority in international *hierarchy.* Instead of reasoning through 'sources', it searched for *integrity of law* in the wider and plural, supranational order. The question is no longer which is the higher to rule, but which meaning can be ascribed to the whole system of relevant law, included that from the SC. Such a meaning should be made to cohere with the normative context where it is placed. As the Courts states, art 1 of the UN Charter "provides that the United Nations was established to 'achieve international

[43] European Court of Human Rights, *Case of Al-Jedda v. The United Kingdom,* Application no. 27021/08, 7 July 2011 (*Al Jedda*).

[44] On the general concept, cf. Bruno Simma, 'Self-Contained Regimes' (1985) NYIL 111. And also Bruno Simma, Dirk Pulkowski, 'Of Planets and The Universe: Self-Contained Regimes in International Law' (2006) EJIL 483, 500.

[45] See the para 35 (Lord Bingham) of the House of Lords decision, as pasted in the ECtHR, *Al Jedda*, at 11 : "Emphasis has often been laid on the special character of the European Convention as a human rights instrument. But the reference in article 103 [UN] to 'any other international agreement' leaves no room for any excepted category, and such appears to be the consensus of learned opinion". From the same author, though, and significantly, the important book, Tom Bingham, *The Rule of Law*, London, Penguin, 2011.

[46] That kind of appeal to the RoL in the international legal order, resonates in the 2005 decision of the European Court of First Instance in the case *Kadi* (1) (21 September 2005, Case T-315/01 *Kadi v Council and Commission*).

cooperation in … promoting and encouraging respect for human rights and fundamental freedoms'. Article 24(2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to 'act in accordance with the Purposes and Principles of the United Nations' "[47].

It cannot be really *presumed* that SC imperatives are to be conceived either in isolation or as unconditional, regardless of any *other law*. In fact, for the Court, "in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights"[48]. Human rights seem to escape a sheer source-hierarchy, bearing a countervailing, autonomous strength, in the interpretive scope, even *vis à vis* the SC. Accordingly, "the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations"[49].

Now human rights law becomes a meaningful check on the Security Council. Eventually, in a last statement the Court, as I see its reasoning, raises the point that the law of human rights enjoys an equally concurring weight: therefore, should the Security Council want to impose a rupture in the fabric of UN law, this could result only from "clear and explicit language" (§ 102) against international human rights law.

In truth, the Court is raising an argument *per absurdum*, implicitly denying that a *legitimate* IL order can, by a sheer diktat, displace, lacking necessity or other sufficient reasons, equally relevant norms and the considered respect due to their weight. What Lord Bingham didn't see is that the 'sovereign' SC can hardly *phrase* an *explicit* order of unconditioned negation of basic human rights, that might qualify even in the UN system- as the Court reconstructs it- for a seal of legality.

It is the subsequent decision, namely, *Al-Dulimi (2013),* both to make it explicit and to confirm that such an interpretation of the import of *Al-Jedda* is correct.

The ECtHR[50] deals- indirectly- with a UNSC 1483 (2003) resolution, which in "clear and explicit language" compels Switzerland, (allowing the State no

[47] ECtHR, *Al Jedda*, para 102 (and the premised para 44).
[48] Ibidem.
[49] Ibidem.
[50] ECHR chamber judgment of 26 November 2013 in *Al-Dulimi*, No. 5809/08.

discretion[51]), to freeze the assets of Al-Dulimi, one of those blacklisted as a suspected terrorist, who had been denied any rights to a defence. Since Switzerland[52] had rejected Al-Dulimi's complaints and resolved to confiscate his assets, the Court decided that violation of art. 6 ECHR (access to justice) had taken place on behalf of the State, and that consequent responsibility fell on it as a member to the Convention, regardless of the duty to implement sanctions from the SC, and even in the absence of any State's discretionary power. In the reasoning of the Court, judicial review was not granted either at the UN or in the domestic procedure. Denial of access to justice, even in pursuing the legitimate ends of peace and security, is deemed *disproportionate* to achieve those objectives.

It is important that the Court, in the same vein as in *Al-Jedda*, does not take a merely external attitude toward the normative corpus of the UN, assuming that it should be taken into consideration *qua normative* in its scope, meaning and aims. Accordingly its reasoning is not shielded in a self-referential closure, but pursues a comprehensive assessment, because it is relevant to the issue at stake. This is why it believes that apparently conflicting obligations from the UN Charter and the ECHR must be at their best harmonised and reconciled (Art. 31(3) lit. c) VCLT (para 112). The presumption (formulated in its *Al-Jedda* decision) according to which UNSC does not in principle mean to impose obligations contradicting international laws of human rights, is defeated. But it does not follow that any behaviour is legitimate if it is commanded by the SC, the highest source for UN security purposes. The Court engages in a *proportionality* judgment, that is, a contextual evaluation between two divergent rules-principles (belonging in different domains) one that might exceed the strict limits of its own jurisdiction (such a judgment implies a revision of the legality of the Security Council resolution, that other Courts being placed in the EU had considered themselves not competent to carry).

But for such an assessment one cannot simply resort to 'formal' tools; it can

[51] The Court had already decided the case *Nada* where discretion was deemed existent (ECtHR (Grand Chamber), *Nada v. Switzerland*, No. 10593/08, judgment of 12 Sept. 2012).

[52] The Swiss Federal Tribunal ((BGE 2A.783/784/ 785 /2006; all of 23 January 2008) had maintained that it was not entitled to revise the legality of SC resolutions except in the event (it was not) of violation of a *jus cogens* rule (as in the reasoning of the Court of First Instance of the EU in Kadi). After allowing Al Dulimi more time for a (unsuccessful) further appeal to that Committee, the Tribunal concluded that Switzerland's behaviour was legitimate, and did not violate either domestic constitutional norms or Art. 6 and 13 of the ECHR.

only flow from taking the participant's point of view[53] in a shared interconnection between diverse international law regimes. It requires bridging the gap that separates the two orders, that is, a deeper self understanding of its role as an agent of international law as a whole, and a further insight into the purposes and meaning concerning the 'grounds' of those laws, the mutual relation between institutions, and the founding ideals of the diverse orders in their relations. At least insofar as that is required within the remit of the issue to be solved.

It has been from such an approach that the Court has chosen (rightly or wrongly) to hold Switzerland 'responsible', putting the State "caught between the obligation to carry out Security Council decisions under Art. 25 of the UN Charter and the obligation to respect international or regional human rights guarantees".[54]

By its reasoning, the Court neither retreated into its own domain nor did it simply concede the protection of the Convention after realising that the SC regime could not grant an equal system of guarantees. On the contrary, it transcended its *conventional* jurisdiction, designed under the legal positivist criteria of one's own rule of recognition[55]. Admittedly, such a reasoning is facilitated by the fact that the ECtHR and the European Convention are themselves part of the International legal order as a whole.

Given the approach taken to the case, the Court's reasoning might on one side be viewed as interpreting the rules and principles of each legal regime involved, and on the other side arbitrating their interplay on a *proportionality* assessment. One possible argument to justify this latter move, that is, a kind of 'jurisdiction overstepping', can presuppose the invocation of some further principle premised to supranational law, beyond States. One can invoke the very idea of justice due to individuals, or a transitive rule of law beyond the state, or the late Dworkin's

[53] The question of the *participant* is explained in the opening of Dworkin's *Law's Empire,* Cambridge Mass., Harvard Univ. Press, and London, Fontana Press, 1986, pp. 13-4. Dworkin wrote that the book "takes up the internal, participants' point of view; it tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truth participants face".

[54] So suggests Anne Peters, 'Targeted Sanctions after Affaire Al-Dulimi et Montana Management Inc. c. Suisse: Is There a Way Out of the Catch-22 for UN Members?' *EJIL Talk* <www.ejiltalk.org/author/anne-peters/> accessed 30 July 2014. See the dissenting opinion of Judge Sajó: the complaint should have been dismissed, as inadmissible *ratione personae*, because the State is not acting of its own but clearly under the order of the SC, which gave it no leeway. But he did join the majority in deciding that a violation of HR *occurred* due to the insufficient guarantees provided by the UN sanctions system. Read it *in coda* to the *Al-Dulimi* judgment.

[55] This is the legal theory basis of a system of law in the milestone work of Herbert Hart., *The Concept of Law*, Oxofrd, Clarendon, 1961.

principle of *mitigation*[56] of States' and international organizations' power *vis à vis* peoples and individuals. The enquiry upon this subject matter is in principle beyond the limits of this article; nonetheless some considerations are in order, being related with the search for a cross-orders rationale of adjudication.

5. Beyond the positivist (mis)understanding

It often seems to positivist lenses that sticking to the rules' text qualifies for legal certainty and protection of domestic democracy: all the more so when it is the case of a confrontation *vis à vis* an 'external' legal order, like International law. On April 19, 2016, Russia's Constitutional Court[57] ruled that enforcement of the 2013 *Anchugov & Gladkov v. Russia* judgment of ECtHR is 'impossible', because it is contrary to the Russian Constitution[58]. Regardless of the merits of the decision (concerning the Russian denial of voting rights to prisoners), for the Constitutional Court apparently the very fact that the European Convention is already built-in the Russian legal order, with supra-legislative status, is not enough to prompt a consideration of the constitutional commitments in the light of the interpretive efforts of the Convention itself.

Also according to the reports, the Russian Constitutional Court recent 2016 decision shows a simple attachment to 'rules' (art. 32/3 Const.), in some frozen textualist positivism, that displaces on one side purposive interpretation and on the other the on going mobility of law in its trans-systemic correlation (in point: with the ECHR Protocol 1, art. 3). It does not even limit 'constitutional resistance' to the cases of core principles of the Russian legal order. One of the tenets of the Russian Constitutional Court is in fact that the signature by the State of the European Convention did not at that time imply any predictable contrast against the

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[56] Dworkin states that it is in order to improve the legitimacy of *their* coercive strength *vis à vis* their citizens, States have a duty to accept a *mitigation* of their own power and to "accept feasible and shared constraints" based on IL (R. Dworkin, "A New Philosophy of International Law", in *Philosophy & Public Affairs*, 41, no. 1, p. 17).

[57] A report can be read in Ilya Nuzov, *Russia's Constitutional Court Declares Judgment of the European Court "Impossible" to Enforce*, Int'l J. Const. L. Blog, May 13, 2016, at: http://www.iconnectblog.com/2016/04/russias-constitutional-court-declares-judgment-of-the-european-court-impossible-to-enforce

[58] Art. 32/3 of the Russian Constitution: "3. Deprived of the right to elect and be elected shall be citizens recognized by court as legally unfit, as well as citizens kept in places of confinement by a court sentence". The ECtHR decision in *Anchugov and Gladkov (appl. 11157/04, ECtHR* 4 July 2013) had found a violation of Article 3 of Protocol 1 of the Convention. Russia had exceeded its margin of appreciation in failing to secure the applicant's right to vote in light of 'modern- day penal policy and of current human rights standards'. Russia prescribes a general ban. (paras. 107-110).

Constitution: the subsequent alterations performed by the European Court of HR in interpretive implications of Protocol 1 art. 3 of the Convention have made the ECtHR judgment directly challenging the text of art. 32/3 of the Russian Constitution, and as such the *Anchugov* decision has become one *unenforceable* by the State.

The formal imperative according to which the article of the Constitution hierarchically prevails, would mirror an opposite stance in the International legal order: for ex. diktat issued by the Security Council is a prevailing obligation for States, pursuant art. 103 of the UN Charter. Traditionally, hierarchies are the key to a well-ordered or well-defended system. Moreover, from the International order vantage point, under the VCLT art. 27 rule, no domestic norms can be invoked as a reason for non-compliance, not even constitutional provisions. It would be rather unproductive here to recount the monist-dualist debate, as well as to attempt at qualifying different behaviours in one of the relevant shelves, depending on the somewhat oscillating definitions of that conceptual couple.

What on either sides of systems' confrontation, positivist lenses are ill-equipped to face and address, as the Austin-Hartian tradition in legal thought reveals, is the ultra-systemic nature of legality: the very fact that a rule of recognition solves questions of validity or belonging of legal propositions in one system, but it is clearly unsuited to treat issues where the solution is precisely 'beyond', that is, it is answered only in inter-systemic terms.

Of course, it is easily found that, in turn, International legal order avails, in itself, of its own rules of recognition[59]: but that helps knowing what is legitimate within the International legal system: a 'separate' question that leaves untouched what the answer is in the domestic one. Again, not enough, of itself, to escape the pattern of the two cycles that Triepel[60] defined as doomed to never meet.

Of course, this being the most traditional of international law issues, its unresolved and disputed status is less tolerable given the progress and changes of

[59] Criteria for the Rule of recognition are seen by legal theorists in art.38 of the Statute of the *International Court of Justice*, and in the rules provided by the *Vienna Convention for the Law of the Treaties* (recently S. Besson, "Theorizing the Sources of International Law." In *The Philosophy of International Law*, ed. By Samantha Besson and John Tasioulas, Oxford: Oxford University Press, pp. 164-185; or even J. Waldron "International Law: 'A Relatively Small and Unimportant'Part of Jurisprudence?", *New York University Public Law and Legal Theory Working Papers.* Paper 427, <http://lsr.nellco.org/nyu_plltwp/427J> 2013, 209-23, 219 ss.

[60] Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig: Verlag von C. L. Hirschfeld 1899), p. 111.

international law in the last 70 years, and in particular the known growth of International law into those new areas, from the environment to human rights, that in very many ways entailed piercing the veil of States, making international obligations something affecting the *internal autonomy* of States instead of simply regulating the *external independence* and relations among States. There are community interests, and IL is caring for justice and welfare beyond the States' limits, (or perhaps of *humanity*) not simply arbitrating the self-referred goals between consenting States.

When at stake is a matter of internal *autonomy vis à vis* different orders, the legal traditional positivist apparatus is unequipped and becomes insufficient. Its validity focus refers to system relative parameters, and it has to leave unaddressed the questions that amount to real *disagreements* [61] *among* different although mutually connected legal regimes.

The interpretive notion of the law[62], instead of the traditional positivist one, would better fit here. The 'disagreement' between the two Courts has an interpretive nature, it has to do with the adjudicative reasoning, although it is deceptively focused upon the textual impossibility provided, say, by art. 32 of the Russian Constitution. If a disagreement surfaces, it can be traced back to the believed *raison d'etre* of the Convention and the distinctive fundamental self-understanding of the Russian Constitution. Interpretive disagreements are of this last kind, and are hardly a matter of defeasible textual barriers.

The point in judging in the inter-orders encounters is that in the absence of a shared notion of hierarchy[63], a stringent, substantive dialogue is in order under the admitted duty to interpret the Constitution in 'harmony' with the Convention. Giving substantive reasons, appealing to the *raison d'etre* of the relevant principles in the shift to mutual purposive interpretation, invite to dismiss the shield of formal positivist self defence. To challenge the view of the European Convention as implying

[61] To use a Dworkinian argument here, one can suggest that genuine disagreements are revolving around the grounds of principles, the raison d'etre, purpose and value of different rules; and I submit, such a disagreement can concern the reciprocal strength of normative claims sourced by competing orders. See R. Dworkin, *Law's Empire (*Cambridge Mass., Harvard Univ. Press, and London, Fontana Press, 1986, p. 4, p. 51 and passim).

[62] As the one developed by Dworkin *vis a vis* Hartian positivism (see *Law's Empire*, *supra* n. 59) as the one suggested in the last decades by Dworkin, including its peculiar and varied version specifically concerning IL (cf. Id., *A new philosophy for International law*, supra note). I have addressed the virtues and limits of Dworkin's approach and the change that it made for it to address international law in in G. Palombella, 'Sulle spalle di Dworkin', in *Rivista di filosofia del diritto*, III, 2/2014, pp. 421-442]

[63]

the right to vote for domestic prisoners, is all but forbidden, although it entails more than some domestic textual consistency.

Courts often refrain from walking such a path, although that ultimately might even serve the true interest of Peoples in making the most of their 'posited' will. Courts should revise or upgrade their role serving a specialised, a regional, or a State jurisdiction *when* the case is by its nature placed in between, and rises from the resulting tension. Should they always speak in the name of the 'fragment'-or segmental-order they represent?

The hunch brings beyond a *narrow positivist* dependence upon one's own constituency. There is a further dimension of the Courts: more than an obligation to remain *accountable* to their Sovereign, of whom they are no longer the servants, the Courts are burdened with the vocational role of doing justice, to the extent that the legal context as a whole allows it. Admittedly, that does most often coincide with a functional dedication to vindicate the rights of individuals: against power, sovereigns, political majorities. There is another side, however, here of no less import. Courts might have to consider the purpose of justice in the ways it is *positively framed* through the relevant laws stemming from the multiple normative sources/orders converging onto a single case. They have to be *accountable* as regards their legal order, but they are *responsible* Courts only in shouldering the entire normative complexity that is affecting the fate of the people in the issue before their authority.