
From Utopia to Disenchantment: The Ill Fate of ‘Moderate Monism’ in the ICJ judgment on The Jurisdictional Immunities of the State

Francesco Francioni*

Abstract

Realizing Utopia is the posthumous testament of Antonio Cassese and an act of faith in the emancipatory power of international law. In Chapter 15 of the book he advocates a further breaching of the wall of sovereignty by enabling international law to invalidate inconsistent national law. This article discusses the ambiguities and pitfalls of this approach in light of the recent (2012) judgment of the ICJ in Jurisdictional Immunities of the State. It argues that, contrary to Cassese’s proposal of ‘moderate monism’, a cosmopolitan view of the global community grounded in the rule of law and human rights may be better advanced by domestic courts, especially when, as in the ICJ case, the reason of justice and the right of access to judicial remedies are trumped by a deferential interpretation of the rule of sovereign immunity.

1 Introduction

The book cover of *Realizing Utopia* depicts a small man climbing a ladder and reaching for the moon in a star-studded sky. The picture evokes the diminutive figure of Antonio Cassese and may be interpreted in different ways. It may be seen as a representation of a man longing to overcome the vicissitudes of the human condition by projecting himself to the sidereal depths of heaven. It may be seen as a naïf rendition of a dreamer who is so disillusioned with the outward reality of this world that he needs to take solace in the contemplation of the universe. It could also be seen as a manifestation of the awe that ordinary people feel when reflecting on the beauty and mystery of the universe.

* Emeritus Professor, European University Institute; Member of the EJIL Editorial Board. Email: Francesco.francioni@eui.eu.

All these interpretations are plausible. The reader can choose. After all, it is the essence of any art work that the message it conveys remains ambiguous.

But none of these interpretations would do justice to the character and intellectual history of Antonio Cassese. Nino, as I knew him for nearly 40 years, was not a ‘Utopian’, in the sense of cultivating an inclination to shun the realities of the world and chase the impossible dreams of an ideal international law. On the contrary, Cassese was always a man of action; a scholar and a practitioner who always placed his intellectual resources and professional expertise at the service of concrete causes of international justice. His way of being a realistic utopian was to infuse ethical and humanitarian values into positive law through the power of imagination. He did so in so many of the important and difficult tasks he undertook in his long professional career: as a UN *rappporteur* on foreign economic assistance and human rights in the case of Chile;¹ as a negotiator for the modernization of international humanitarian law; as a judge in the nascent system of international criminal justice; as chair of the European Council Committee for the prevention of torture and of the UN Commission of Inquiry on Darfur; not to mention his constant engagement as a commentator on international events for leading newspapers. As I have observed elsewhere about Cassese’s work:

[H]e has somehow broken the positive law taboo according to which legal scholars can be only detached observers of the law and of its change by the recognized authority, the State. He has not simply ‘looked at’ the changing structure of the law as a spectator to a story told by an external narrator. He has added his voice to the narrative of the progressive development of the law.²

2 On ‘Moderate Monism’

In all these tasks Cassese invested an extraordinary amount of enthusiasm and energy. He extended the same amount of enthusiasm and energy to the supervision and guidance he provided to several generations of students and researchers, helping so many young scholars develop a career path in the field of international law. And he devoted the same energy and enthusiasm to this book at the very last stage of his life. Besides conceiving and coordinating the entire project of *Realizing Utopia*, he wrote nine chapters of the book (including its important introduction).

Other colleagues in this symposium have undertaken the task of providing a general review of the work³ and a critical assessment of its method.⁴ My task is more limited. I want to comment on Chapter 15 of the volume, which deals with the eternal problem of the effects of international law in domestic law and looks at how the former may acquire the force of invalidating the latter. Rather than accepting the

¹ The UN report was originally published at 14 *Texas Int'l LJ* (1979), 251 and it is now reprinted in *The Human Dimension of International Law. Selected Papers A. Cassese* (2008), at 375 ff.

² ‘Francioni, ‘International Human Rights in an Environmental Horizon’, 21 *EJIL* (2010) 41, at 42.

³ See Milanovic, this issue, at 1033.

⁴ See Feichtner, this issue, at 1143.

classical postulate of the formal separation of the two legal orders (dualism), Cassese in this chapter takes a Grotian perspective and argues in favour of a sort of substantive 'monism', which he calls 'moderate monism'. The utopian part of his proposal entails a reform of existing law based on four conditions:

1. the establishment of an international judicial body with compulsory jurisdiction;
2. the setting up of an enforcement body entrusted with verifying states' effective compliance with international decisions;
3. the inclusion in national constitutions of a provision that would automatically nullify national legislation conflicting with international law decisions;
4. the possibility of a preliminary ruling by an international court in case of doubt as to the compatibility of domestic law norms with international law and internationally binding decisions.

Cassese recognized that these conditions remain aspirational, and that the most significant progress in his view had been made and could be further made in regional groupings such as the European Union, the Council of Europe, the Organization of American States, and the like.

3 The ICJ Judgment in *Jurisdictional Immunities*

I chose this chapter for the present commentary after I read the 2012 judgment of the International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy, Greece Intervening)*.⁵ Nino died just a few months before the judgment was handed down and I wonder what he would have thought of the application of his idea of moderate monism to the operative part of that judgment, in which the Court indicates the measures required to remedy the situation created by the respondent state's (Italy) exercise of jurisdiction over Germany. The ICJ found that such exercise of jurisdiction by Italian courts, in relation to claims presented by Italian victims of Nazi war crimes committed in Italy, was a violation of international law. The violation consisted in the denial of sovereign immunity for acts committed by armed forces of the respondent state in connection with an armed conflict. Therefore, Italy was under an obligation to ensure that 'by legislation or ... other means of its choosing' national decisions infringing on Germany's immunity 'cease to have effect'.

The formula used by the Court seems to vindicate to a certain extent the doctrine of moderate monism advocated by Nino Cassese. Although with different nuances, the ICJ with this decision confirmed a trend already shown in previous judgments and advisory opinions, notably, the *Avena* judgment⁶ and the 1999 opinion on the *Immunity of a Special UN Rapporteur*.⁷ In these cases the Court showed a clear readiness to go beyond the traditional divide between international law and national law, and

⁵ ICJ Judgment of 3 Feb. 2012, available on the website of the ICJ at ICJ-CIJ.ORG.

⁶ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 Jan. 2004, [2004] ICJ Rep 12, at para. 141.

⁷ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, [1999] ICJ Rep 62.

made a determination of what specific measures were necessary *within the national legal system of the respondent state* to remedy the violation of international law.

4 From Utopia to Realism

In principle, the approach followed by the Court can be seen as a progressive step towards a cosmopolitan legal order where a more effective enforcement of international law is made possible by what Cassese advocated as the ‘invalidation’ effect on domestic law and domestic adjudication incompatible with international law or international law decisions.

The trouble with this approach, however, is that in the German immunity case the advancement of international law consists in a re-statement of the overriding importance of the traditional black-box value of sovereignty and state-centred immunity at the expense of the contemporary value of individual access to justice, effective remedy for victims of gross violations of human rights, and the fight against impunity for heinous crimes.

Unlike *Avena*, where the *dispositif* of the judgment entailed the recognition of an individual right to have a death sentence reconsidered in light of the respondent state’s obligations under the Vienna Convention on Consular Relations to provide consular assistance to the accused, in *Germany v. Italy* the Court goes in the opposite direction and orders the respondent state to close the doors of judicial redress to individual victims of war crimes because of the alleged non-derogability of the rule of state immunity.

In this situation it is clear that the generous cosmopolitan view advanced by Cassese in his formulation of ‘moderate monism’ can have unintended adverse effects in the sense of hindering, rather than advancing, the progressive development of international law, and especially the human rights dimension of international law.

One adverse effect is the already experienced backlash against the Court ruling in the form of a reaffirmation of the autonomy of the democratic processes in the affected state and of its sovereign freedom to decide how to give effect in its legal order to norms and decisions of international law. This reaction has been observed in the aftermath of the *Avena* case, with the refusal by the courts of Texas to take into consideration the ICJ judgment for the purpose of reconsidering the notorious *Medellin* case. The legitimacy of the Texas courts’ position was upheld by the US Supreme Court on the basis of the argument that there was no legal basis in Article 94 of the UN Charter for holding the judgments of the ICJ as self-executing in the legal order of member states.⁸

Another negative effect of the ‘moderate monism’ approach is the risk of a disruptive impact of the ICJ’s decision on the ordering of constitutional competences within the national legal system. It goes without saying that legislative measures or executive decisions aimed at quashing *res iudicata* judgments are very problematic in a

⁸ On this litigation saga see Hoppe and Simma, ‘From *LaGrand* and *Avena* to *Medellin* – A Rocky Road toward Implementation’, *Tulane J Int’l & Comp L* (2006) 1.

constitutional order in which the judiciary enjoys full independence. This is the case for Italy under Article 104 of the Constitution. Of course, the Italian judiciary may decide spontaneously that the ICJ judgment has direct effects on ongoing proceedings against Germany and dismiss the relative claims for lack of jurisdiction. This is what the Florence Tribunal did in a decision of 12 March 2012 on the basis of Article 94 of the UN Charter and of Article 11 of the Constitution, a position confirmed by decision of the Italian Court of Cassation number 32139 of 9 August 2012.⁹ But such solution, based on the spontaneous compliance of the judiciary, may be ephemeral, subject to reversal insofar as it may be based on reasons of comity rather than strict legal obligations of enforcement.

But the most important obstacle to the theory of automatic municipal law effect of international decisions is its possible conflict with basic principles of constitutional law. An international judgment in which the rule of state immunity is uncompromisingly upheld, even in the face of a repeated and prolonged denial of access to justice and of remedial process to victims of egregious violations of human rights, may raise serious issues of constitutionality. In the case of Italy such issues arise in relation to Article 24 of the Constitution, which guarantees the fundamental right of access to justice and judicial protection. This is not an idiosyncratic provision of Italian law: as is well known, it is part of the European Convention on Human Rights, Article 6, as interpreted by the Strasbourg Court, which has systematically repeated that, even if there are legitimate limitations to the right provided under Article 6 of the Convention, no one can be deprived of 'the essence of access to justice'¹⁰ in the absence of alternative remedies open to individuals. This principle has been articulated in the well-known cases of *Waite and Kennedy v. Germany* and *Beer and Regan v. Germany*,¹¹ and it is acknowledged in the compelling opinion by Judge Yusuf in his dissent from the majority in *Jurisdictional Immunities of the State*. Although indirectly and somewhat awkwardly, it is even acknowledged by the ICJ when it notes with 'surprise and regret' that the individual victims of war crimes had not been able to obtain any reparation for the incredible period of 60 years, thus implying that some direct consultations and negotiations between Italy and Germany should be pursued to put an end to a clear injustice.

Finally, the most problematic implication of the 'moderate monism' advocated by Cassese is that a very conservative international decision like *Germany v. Italy* is bound to have a stifling effect on an otherwise progressive and dynamic judicial practice capable of adjusting the time-honoured rule on state immunity with the contemporary need to ensure respect for human rights, to remedy past injustices, and, in the end, to modernize a system of international law still overly dependent on the idea of state sovereignty.

⁹ These documents are on file with the author.

¹⁰ For a comprehensive review of the international practice and Strasbourg case law on the right of access to justice see F. Francioni, *Access to Justice as a Human Right* (2007), esp. Ch. 1, at 1–56.

¹¹ App. Nos. 26083/94 and 28934/95, judgments of 18 Feb. 1999, at paras 68 and 58 respectively.

International law rules on state immunity have been largely shaped by domestic courts, which first established the rule of state immunity as an exception to the principle of territorial jurisdiction. Domestic courts then carved an exception to the exception by restricting immunity on the basis of the now universally recognized distinction between *acta iure imperii* and *iure gestionis*. Further limits have been developed and continue to be developed in order to ensure access to justice to workers, to victims of torts committed in the forum, effectively to pursue perpetrators of acts of state-sponsored terrorism, and even to remedy wrongful deprivation of aliens' property.¹² The law on immunity is in constant flux. The main motor of the dynamic evolution of this area of international law is the jurisprudence of domestic courts. Contrary to the attitude shown in the past, when the Court contributed to the development – or what Cassese calls a 'judicious reform' – of international law,¹³ the ICJ lost an opportunity in *Germany v. Italy* to take into account this dynamic evolution when it decided *a priori* to distinguish between the procedural norm on immunity and the substantive norms founding the cause of action. This rigid separation is misleading: first, because with the definitive abandonment of the theory of absolute immunity preliminary considerations of the substantive relations involved in the dispute are always necessary in order to verify whether an exception, such as the *iure gestionis* nature of the contested act, will apply or not; secondly, because in cases of immunity there is always a functional relationship between the cause of action of the claimant and the normative intensity of the obligation to ensure access to justice, especially when heinous crimes committed against the claimant are alleged.

5 The Pitfalls of Moderate Monism

Returning now to Chapter 15 of *Realizing Utopia*, several considerations can be made on the proposal of moderate monism put forward by Cassese.

First, it is clear that such proposal entails a remarkable faith in the role of international judges for the realization of a better world based on peace, respect for human rights, and freedom from misery and oppression. This faith may have been inspired in Cassese's heart and mind by his experience as an international judge, first in the International Criminal Tribunal for the former Yugoslavia and then in the Special Tribunal for Lebanon. There is no doubt that these experiences gave Cassese ample opportunity to bring some measure of 'realistic utopia' and a strong impulse towards the progressive development of international law into the area of individual criminal

¹² This is especially the case with the US law and practice under the 1976 Foreign State Immunity Act.

¹³ Suffice it to mention here the ground breaking opinion on reparations for injury suffered by the UN, where the Court broke the taboo of the exclusivity of the state as subject of international law [1949] ICJ Rep 174; the enunciation of the concept of 'erga omnes' obligations in the *Barcelona Traction* judgment of 1970, [1970] ICJ Rep 3; and the development of the modern concept of sustainable development in the *Gabcikovo-Nagymaros* dispute between Hungary and Slovakia of 1997 [1997] ICJ Rep 92.

responsibility for international crimes and of state responsibility for internationally wrongful acts.¹⁴

Secondly, the lesson learned from the ICJ's decision in the jurisdictional immunities case suggests that international courts are not always the vehicle for advancing international law towards the goal so passionately felt by Cassese: the development of the human dimension of international law, the minimization of violence, the respect of human dignity, and social justice. One of the most disappointing results of the ICJ judgment in the jurisdictional immunity case is not so much the ultimate result of drawing the curtain of state immunity in a situation where prolonged denial of any remedy to victims of war crimes was acknowledged, so much as to elicit 'surprise ... and regret by the Court';¹⁵ rather, it is the method adopted for reaching such conclusion. The whole meticulous process of reconstruction of international practice undertaken by the Court is premised on the general assumption that immunity is the fundamental principle any exception from which needs painstakingly to be proven by reference to a very high standard of evidence, both of state practice and *opinio juris*. This may be understandable for a court whose judicial services are directed exclusively to a class of consumers, states. In the cosmopolitan perspective proposed by Cassese, this approach would have no place. The critical positivism approach he defends entails that the interpreter make any possible effort to use general principles of the law to promote progress and justice in the international society. These principles, in his view, are not subjective preferences of the interpreter; they are the fundamental values that underlie any decent society: peace, respect for human dignity, transparency and accountability in the exercise of governmental powers, non-discrimination. These values are not only a corrective of the law, whenever the judge resorts to equity in order to facilitate an otherwise unattainable fair outcome of a dispute.¹⁶ They are also the inspiring criteria for interpreting what the law is in the frequently grey areas of customary international law. Since customary law is in constant evolution, the interpreter has a wide range of latitude in evaluating the state of the law and in verifying whether his/her reconstruction corresponds to fundamental principles of justice. This is made evident by the diverging reconstruction of the customary norm on state immunity that emerges from the opinion of the majority and the three dissenting opinions of Judges Cançado Trindade, Yusuf, and Gaja. Perhaps the most glaring failure of the critical positivism approach advocated by Cassese can be found in the lengthy dissection of state practice made by the Court in order to establish whether the so-called 'tort exception' would possibly justify the departure from immunity and the exercise of jurisdiction by Italian courts over war crimes committed by military organs of the respondent state in Italian

¹⁴ No one has forgotten the more advanced test of attribution of state responsibility based on 'overall control' elaborated by Cassese in *Tadic* and the ensuing controversy which arose from the perceived conflict of that test with the criterion established by the ICJ in the 1986 *Nicaragua* case. For critical analysis of the two tests see Cassese, 'The Nicaragua and Tadic tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *EJIL* (2007), 649.

¹⁵ See *supra* note 7, at para. 99 of the judgment.

¹⁶ See Francioni, 'Equity', in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law* (2008).

territory. Judge *ad hoc* Gaja, in his dissenting opinion, provides compelling arguments to disprove the majority opinion that the state of international practice unambiguously excludes the extension of the tort exception to acts of state committed by military organs in the course of a conflict. He does not say that such practice explicitly and unambiguously covers such acts, but reaches the eminently sensible conclusion that the margin of uncertainty present in this area of the law should have warranted a finding that Italy was not internationally responsible towards Germany for the alleged breach of the rule of state immunity. Gaja's conclusion is reached by a rigorous and convincing analysis of state practice, including the legislative history of Article 12 of the 2004 UN Convention on Jurisdictional Immunities of States, which incorporates the 'tort exception'. To these technical arguments one can imagine Cassese would have added his own 'critical positivism approach': in a situation where two possible interpretative options are open as to the admissibility of the 'tort exception', he would have opted for resolving the putative uncertainty of the law in favour of the option consistent with general principles of justice and access to judicial remedies. All the more so since the claimants before the Italian courts had been victims of gross violations of human rights, for whom no judge had been available 'in Berlin'¹⁷ or elsewhere.

6 Conclusion

It is clear from the above that the ruling of the ICJ on the jurisdictional immunities of states is hardly consistent with the plea for a 'realistic utopia' suggested in the book we are now commenting upon. The judgment is formalistic, extremely conservative, and in the end quite regressive in its interpretation of an area of the law that has been characterized by a century-old practice of progressive shrinking of the rule of immunity under the constant pressure of exigencies of justice.

On a positive note, the ICJ seems to have been aware of its own limits in imposing constraints on the future development of the international law on immunity when it declined to grant Germany its request of assurance of non-repetition as a form of reparation by Italy.¹⁸ Therefore, the impact of the judgment remains limited to the very exceptional facts of the case; it is strictly confined to the judicial decisions affecting Germany and to military acts performed in a time of armed conflict. To vindicate Cassese's critical positivism approach, one should not see this judgment as a precedent to blocking a progressive development of the law on immunity by domestic courts. Such progressive development is the hallmark in the evolution of the law on sovereign immunity over the past century. This evolution is likely to continue because of the need to bring the law on immunity more in line with the human right of access to justice, under international law, under European law, and, indeed, under the constitutions of most democratic states.

¹⁷ Berlin is the place in which the proverbial Prussian miller was sure there would be a 'judge' who could hear his grievances.

¹⁸ See para. 138 of the judgment, *supra* note 5.