

INTERNATIONAL LAW IN ITALIAN COURTS 1999-2009: AN OVERVIEW OF MAJOR METHODOLOGICAL AND SUBSTANTIVE ISSUES*

GIUSEPPE CATALDI** and MASSIMO IOVANE***

When the *Italian Yearbook of International Law* resumed publication about ten years ago, the format of the new series continued to give a prominent role to the section on judicial decisions. This choice reflected the awareness of the board of editors that Italian judicial practice provides a rich source of ideas and criteria for the interpretation and development of international law. At the same time, it reflected the approach originally proposed by Professor Benedetto Conforti, among the founders of the *Yearbook* in the early 1970s, according to which the implementation of international law by domestic courts serves the function of international justice better than recourse to traditional diplomatic means. In this perspective, the latter are dominated by *raison d'état* and complaisance towards the international interests of the executive, whereas domestic courts would apply international law as part of their institutional function of fair interpretation and application of all legal rules. In this context, compliance with international law becomes an element of the rule of law regime, where respect for the supremacy of law is assured by an independent and impartial judiciary. This was a correct intuition. Ever since, the role of the judiciary, and of domestic courts in particular, has become even more important, due to the increased expansion of international law, now governing a much wider range of subjects than only a few decades ago. Today, the role of domestic courts is being discussed as one of the main features of contemporary international law. A large doctrinal movement entirely devoted to analysing the causes and consequences of this widespread phenomenon has developed over the last decade.¹

* Giuseppe Cataldi is the author of sections 5 and 6; Massimo Iovane is the author of the Introduction and sections 1-4.

** Professor of International Law, University of Napoli "L'Orientale".

*** Professor of International Law, University of Napoli "Federico II".

¹ CONFORTI, "The Activities of National Judges and the International Relations of their State, Final Report", *Yearbook of the Institute of International Law*, 1993, Part I, p. 428 ff.; FRANCONI, "International Law as a Common Language for National Courts", *Texas ILJ*, 2001, p. 587 ff.; BENVENISTI, "Judicial Misgivings Regarding the Application of International Norms: An Analysis of Attitudes of National Courts", *EJIL*, 1993, p. 159 ff.; SHANY, "National Courts as International Actors: Jurisdictional Implications", *federalismi.it*, *Rivista di diritto pubblico italiano, comunitario e comparato*, No. 15, 2009, available at: <www.federalismi.it>; BENVENISTI, "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts", *AJIL*, 2008, p. 241 ff.; BENVENISTI and DOWNS, "National Courts, Domestic Democracy, and the Evolution of International Law", *EJIL*, 2009, p. 59 ff.

According to most authors, domestic courts are nowadays particularly influencing topics such as the relationship between the judiciary and the executive in the application of international law, the determination of customary law, the interpretation of treaties, and the relationship between international and domestic law. Italian jurisprudence has significantly contributed to all of these issues.

On the other hand, increased reliance on international law by domestic courts does not depend on a quantitative element only, i.e. it is not only connected with the number of claims brought before them. It is chiefly the content of contemporary international law which really makes the difference between the present and the past role of national judges. Nowadays, there could hardly be any doubt that most international rules, both customary and conventional, regulate the interests of individuals or the international community as a whole. This marks a crucial shift from classical international law whose only purpose is the protection of a State's governmental power and the delimitation of this power towards other States. By and large, international law protecting the interests of individuals overlaps with the fundamental liberties guaranteed by the national constitutions of democratic States. As these liberties concern them directly, individuals would naturally turn to domestic courts to seek accessible judicial protection of their rights under international law.

This "humanisation" of international law has profoundly influenced the general approach adopted by the Italian judiciary. It seems that a common thread runs throughout the most recent case law whereby the different international rules are interpreted in light of the fundamental rights protected by constitutional law. Furthermore the whole national legal order is reassessed in light of the protection of human rights as envisaged by both constitutional and international law. We will stress the influence of this common inspiration on the solutions adopted by the courts in the course of the following paragraphs.

Bearing in mind the general context of contemporary international law, we have identified the following six topics as worthy of in-depth examination and illustration in this overview:

1. The courts' attitude towards the executive;
2. The identification of customary law;
3. The regime of fundamental values and of international *jus cogens*;
4. The interpretation of treaties;
5. The relationship between national and international law;
6. International law and Italian Regions.

1. THE ITALIAN COURTS' ATTITUDE TOWARDS THE EXECUTIVE

Let us begin with a preliminary consideration. Faced with a growing number of claims based on international law, domestic courts all over the world are gradu-

ally abandoning their traditional deference to the executive power, and the fear that their decisions might upset their State's relations with foreign States. As Yuval Shany put it, recent practice shows a trend towards disinclination by domestic courts to employ judicial "avoidance techniques", such as the doctrines of the political question and the Act of State, non-justiciability, lack of standing, and so forth, "developed over time by national courts" precisely "to reduce their exposure to international law".² Some recent supreme court decisions have courageously proceeded to review the international legality of government conduct. However, this has only taken place mainly in the judicial practice of some democratic States. Important questions such as the legality of war and of covert missions abroad, or the establishment of abuse committed by officials while on duty, may still remain largely shielded by judicial self-restraint. Yet, even in those cases where domestic courts did dismiss a claim based on international law under the political question or Act of State doctrines, they tried at least to justify their decision on purely legal grounds, such as the need to give priority to an equally protected but concurrent interest, instead of prejudicially refusing any pronouncement over allegedly sensitive political questions. Over the last decades, Italian judges have often claimed their role as impartial guardians of the rule of law even when the application of international rules, or the decision over questions of international concern, would interfere with areas such as national security and foreign policy.

On the other hand, the frequent conflicts between the executive and the judiciary mainly reflect the contemporary predominance of international norms protecting fundamental values in the field of human rights. In effect, the concrete application of norms on human rights has always meant limiting the power of public institutions in some way. This may engender competition between the executive, representing the State's general interest in the preservation of public order and good international relations, and the judge, seen as the defender of civil liberties and individual freedoms. It is one of the main functions of the courts, especially of supreme courts, to ensure the delicate balance between these two conflicting interests.

We may recall that in several judgments the *Corte di Cassazione* has strongly reaffirmed that the judiciary, and not the executive, is competent to evaluate whether a foreigner is entitled to the right of asylum under Article 10, paragraph 3, of the Italian Constitution and the pertinent international norms.³ Few years later, in the sensitive *Ocalan* case involving questions concerning the asylum and extradition of a Kurdish leader, the *Tribunale di Roma* reiterated that the assessment of the conditions for granting asylum under Article 10, paragraph 3, of the Constitution and international norms rests entirely with the judiciary. Similarly, it did not hesitate to affirm that fighting to obtain recognition of the rights of the Kurdish people

² SHANY, *ibid.*, p. 2.

³ See, e.g., *Corte di Cassazione (Sez. Unite civili), Jaber Allen v. Ministero dell'interno*, 26 May 1997, No. 4674, IYIL, Vol. IX, 1999, p. 157 ff. (commentary by ZANIBONI).

is undoubtedly a political activity which would justify a refusal to grant extradition by the requested State under Article 10, paragraph 4, of the Constitution.⁴ Still on the same problem, we may further recall that the Constitutional Court affirmed in 2001 that no constitutional principle bars the law-maker from affording the ordinary judge power to annul an act of the public administration, and to act in the place of the executive itself, when this is necessary for the effective judicial protection of these individual rights. This case concerned an appeal against the denial of an entry visa for family reunification.⁵

However, the rights of the individual have not always been given priority over governmental decisions involving questions of public order or foreign policy. A prominent example of this attitude is the decision by the *Corte di Cassazione* on the *Markovič* case.⁶ In this decision, the Court ruled that it lacked jurisdiction on a claim to award compensation for damages incurred by the victims of an allegedly internationally wrongful air attack by NATO against the Federal Republic of Yugoslavia. According to the Court, an act of war is the expression of a political function and, for this reason, no judge can have the power to challenge the way it was conducted. It also reaffirmed the trite argument that because international rules govern relations among sovereign States, questions of responsibility and reparation should be dealt with only on the international level even when the said rules envisage the protection of individuals.

2. THE IDENTIFICATION OF CUSTOMARY LAW

Concerning the second general topic, i.e. the determination of international customary rules, we may roughly divide the practice of Italian courts into two different periods. The first period extends to 2004, whereas the second one covers the last five to seven years.

During the first period, Italian courts, and the *Corte di Cassazione* in particular, mainly addressed questions concerning customary rules on jurisdictional immunity of foreign States and international organisations. Faced with the perennial questions about the *jure imperii* or *jure gestionis* nature of the contested activity, the *Cassazione* mainly continued to rely on its own precedents, cautiously adapting previous findings to different claims. Reference to international practice, and to the case law of foreign courts in particular, is hardly to be expected. There are admittedly some brief quotations from the European Convention on State Immunity.

⁴ *Tribunale di Roma, Abdullah Oçalan v. Presidenza Consiglio ministri e Ministero interno*, 4 October 1999, IYIL, Vol. IX, 1999, p.161 ff. (commentary by ZANIBONI).

⁵ *Corte Costituzionale, Kwabena*, 17 May 2001, No. 140 (order), IYIL, Vol. XII, 2002, p. 270 ff. (commentary by LIGUORI).

⁶ *Corte di Cassazione (Sez. Unite civili), Presidency of the Council of Ministers v. Marković et al.*, 5 June 2002, No. 8157, IYIL, Vol. XII, 2002, p. 292 ff. (commentary by BRUNO).

Apart from the field of jurisdictional immunities, the customary nature of an obligation not to subject aliens to military service was also affirmed by the Constitutional Court in a 2001 judgment,⁷ while recognising that the same prohibition does not refer to stateless persons permanently residing in Italy.⁸ Moreover, mention must be made of a judgment of 28 February 2001, where the *Corte di Cassazione* reiterated its opinion that the principle of speciality is part of contemporary international law, although this conclusion lacks any reference to the practice. On the one hand, the customary nature of the principle of speciality is said to be unquestionable; on the other hand, and at the same time, the Court stated that the principle appears to be concretely governed by conventional rules.⁹ Still on the subject of customary law, reference should be made to a 1997 decision by the Constitutional Court on the *ne bis in idem* principle. The Court did not venture to affirm that a customary rule enshrining this principle already exists, but regarded the latter as part of a normative trend which inspires contemporary international law.¹⁰

During the second period, domestic courts are showing a more confident attitude towards independent assessment and interpretation of international customary law.

Independent assessment means a more in-depth examination of international practice to infer the existence and scope of an international custom. In fact, national judges no longer limit themselves to quoting only their own precedents, nor do they blindly follow suggestions and advice from the executive branch of government. According to a technique which is more familiar to international courts, they increasingly refer to a large set of legal materials, especially the previous decisions of foreign and international courts, acts of international organisations, and domestic legislation.

On the other hand, a more confident attitude on the part of the judiciary has also meant a pioneering identification of international customary rules in completely new and controversial topics. However, this operation is sometimes carried out by “picking and choosing” elements of the practice which better fit a given solution, without further determination of a genuine international *opinio juris*.

Finally, the method of the systematic interpretation of customary rules is to be welcomed. This means that in the process of identifying the pertinent rule, judges take pains to clarify how it harmonises with the corpus of existing customary and treaty law.

⁷ *Corte Costituzionale, A.P.*, 15 May 2001, No. 131, IYIL, Vol. XI, 2001, p. 277 ff. (commentary by BRUNO).

⁸ *Corte Costituzionale, Bobovicz*, 18 May 1999, No. 172, IYIL, Vol. X, 2000, p. 303 ff. (commentary by ZANIBONI).

⁹ *Corte di Cassazione (Sez. Unite penali), Ferrarese et al.*, 28 February 2001, IYIL, Vol. XII, 2002, p. 286 ff. (commentary by ZANIBONI).

¹⁰ *Corte Costituzionale, Re: requested extradition of Priebke*, 3 March 1997, No. 58, IYIL, Vol. IX, 1999, p. 179 ff. (commentary by STARITA).

As a first prominent example of this jurisprudence, we may quote the decisions by the Rome *Corte d'Assise* and the *Corte di Cassazione* concerning jurisdiction over criminal acts committed in the context of a peace-keeping operation. In this case, the *Corte d'Assise* boldly affirmed in 2008 the existence of a customary rule imposing the so-called “law of the flag” according to which a soldier is subject to the criminal law “of the State that has sent him to a foreign territory as member of a military contingent”.¹¹ However, the Court grounded its finding exclusively on the large number of international treaties on the status of Multinational Forces. It has been rightly argued that these treaties might as well be considered as evidence of an opposite solution. In other words, they could be seen as “providing for derogation” to a customary regime favouring the criminal jurisdiction of the victim’s national State or of the territorial State, or they could work as “gap-fillers” to a non-existent customary regime.¹² The Court of Cassation later overturned this conclusion by delivering a no less controversial judgment. It grounded the lack of Italian jurisdiction on a different customary rule recognising immunity from criminal jurisdiction to foreign officials for the conduct performed in the scope of a multinational military operation. This rule is said to be a corollary of the principle of the restrictive sovereign immunity of foreign States. Although, the existence of a customary rule on functional immunity in the terms envisaged by the Court is in turn questionable, at least it was discerned from abundant international practice, including treaties, domestic and international case law, and acts of international organisations.¹³

Judgment No. 1072 of the Court of Cassation, handed down on 17 January 2007, offers an important example of the innovative approach by the judiciary in identifying customary rules outside the traditional principles of international law. In this decision, the Italian Supreme court did venture to affirm, albeit cautiously, the existence of a customary international rule, valid both in time of peace and in time of armed conflict, roughly corresponding to the definition of terrorism set out by the Financing Convention. The Court indicates three elements as being already part of the customary notion of terrorism. Firstly, a terrorist attack covers any act intended to cause death or serious bodily harm to a civilian, or to any other person not taking active part in the hostilities in a situation of armed conflict. Secondly, the purpose of any terrorist act is to intimidate a population, or to compel a government or an international organisation, to do or to abstain from doing any act. Lastly, a terrorist act pursues a religious or political end. The Court does not specifically address the problem of the international character of a terrorist act, implicitly as-

¹¹ *Corte d'Assise di Roma, Re: Lozano*, 3 January 2008, No. 21, IYIL, Vol. XVII, 2007, p. 287 ff. (commentary by SERRA).

¹² SERRA, *ibid.*, p. 289.

¹³ *Corte di Cassazione (Sez. I penale), Re: Lozano*, 24 July 2008, No. 31171, IYIL, Vol. XVIII, 2008, p. 346 ff. (commentary by SERRA).

suming that an act of international terrorism must show some kind of transnational connections.¹⁴

A third illustration of the same trend is the decision of the *Consiglio di Stato* of 23 June 2008. The highest administrative jurisdiction did not hesitate to affirm the existence of a customary rule imposing the restitution of cultural artefacts removed from States which have been victims of military occupation and colonisation. The obligation was inferred from diverse elements of international practice, like the previous one, but this time the judges also tried a systematic interpretation of the customary rule in question. In fact, they highlighted that the obligation of restitution of art objects is a corollary of the interplay between the principle prohibiting the use of force and the principle of the self-determination of peoples.¹⁵

3. THE REGIME OF FUNDAMENTAL VALUES AND OF INTERNATIONAL *JUS COGENS*

The third general topic of contemporary international law touched upon by recent Italian case law concerns the legal regime of fundamental values. In all legal orders, fundamental values enshrine the basic ethical values holding together a given community. For this reason, they are broadly formulated by reference to a common core of general principles of law, i.e. provisions expressing essential concepts rich in meaning. Nowadays, given the current universalisation of fundamental values, the determination of fundamental principles of law is carried out by cross-referencing both international and domestic legal material, such as constitutional norms, the declarations of the UN General Assembly, and a series of consistent international treaties on human rights. For a few recurring examples of fundamental principles of law in recent practice, we may quote the principle of “respect for human dignity and personal freedom”, the principle of equality and non-discrimination, the principle of sustainable development. Unlike norms which prescribe a specific course of conduct, fundamental principles of law perform such auxiliary functions as justifying an evolutive interpretation of an already existing norm, or resolving conflicts between norms, thus assuring the coherence of the legal system as a whole. It has always been a specific task of the judiciary, and especially of supreme courts, to discern the pertinent general principle of law and try to work out all the implications it may offer for the adjudication of a specific claim. Case law from democratic States is replete with

¹⁴ *Corte di Cassazione (Sez. I penale), Bouyahia Maher Ben Abdelaziz et al.*, 17 January 2007, No. 1072, IYIL, Vol. XVI, 2006, p. 322 ff. (commentary by ALENI).

¹⁵ *Consiglio di Stato, Associazione nazionale Italia Nostra Onlus v. Ministero per i beni e le attività culturali et al.*, 23 June 2008, No. 3154, commented by CHECHI, “The Return of Cultural Objects Removed in Times of Colonial Domination and International Law: The Case of the Venus of Cyrene”, IYIL, Vol. XVIII, 2008, p. 159 ff.

examples of these interpretative operations based on the fundamental principles, express or implied, of national Constitutions. The innovation introduced by the recent practice of domestic courts is the spread of this activity to include the fundamental principles of international law for the interpretation of international and domestic norms, and for the solution of possible conflicts between different categories of international norms.

Italian courts have applied this hermeneutical methodology in several occasions when dealing with cases involving the violation of internationally protected human rights, and especially to complete the international legal regime relating to crimes against humanity. International customary norms in this field are mostly deduced from the general principle of law protecting “the human dignity and personal freedom of every person”, while acknowledging that international practice is scarce and inconsistent on any given topic. Notably, these norms are identified by Italian courts as belonging to the group of “peremptory norms of general international law” or “international *jus cogens*”, i.e. norms possessing a higher rank. The same holds true also for the case law of other States. The notion of *jus cogens* is not used by Italian courts for either of the effects advocated by recent developments in the fields of the law of treaties, and the consequences of internationally wrongful acts. In fact, they do not attempt to affirm the invalidity of a treaty; nor justify a countermeasure by a State other than an injured State. On the other hand, both these effects have proved to be rather marginal in the international practice. Actually, resort by the Court to the notion of *jus cogens* reinforces the function of fundamental principles of law as interpretative devices to balance conflicting interests in the decision of a given case, or to justify an evolutive interpretation of existing international and domestic rules.

As a first example, we may quote the different judgments on the *Priebke* case. Having affirmed a general principle of law protecting the human dignity of every person, the judgment of first instance of the Rome Military Tribunal draws from that principle the existence of a peremptory norm of customary international law preventing all States from allowing such crimes to be barred due to the length of time elapsed.¹⁶ In the same case, the Court of Cassation first recognised that the killing of innocent civilians was contrary to the basic principle of humanity of *jus gentium* existing at the time the acts were committed. On this premise, it then concluded that the authors of this crime could not invoke the defence of following superior orders as an excuse or as a mitigating circumstance to shirk their responsibility.¹⁷

Also relevant as an expression of the same development, is the judgment delivered by the *Corte di Assise di Roma* on 6 December 2000 concerning the crimes

¹⁶ *Tribunale militare di Roma, Re: Priebke*, 22 July 1997, No. 322, IYIL, Vol. IX, 1999, p. 168 ff. (commentary by STARITA).

¹⁷ *Corte di Cassazione (Sez. I penale), Re: Priebke*, 1 December 1998, No. 1295, IYIL, Vol. IX, 1999, p. 171 ff. (commentary by STARITA).

committed between 1976 and 1983 by the military dictatorship in Argentina against the opponents of the regime. In reality, the decision seems to have been based exclusively on domestic rules, namely on the provisions of the Italian Criminal Code. However, the Court did refer to some universal principles to justify the illegality of the orders received by the members of the Argentine military accused of the gravest of crimes. According to the Court, the crimes committed by the accused, namely acts of torture, imprisonment under inhuman conditions, executions without trials, “violate the principles of natural law and breach the most elementary rules in force also in time of war”. It is on this finding that the Court finally based its affirmation that the accused could not take advantage of the defence of superior orders as an excuse or as a mitigating circumstance.¹⁸

Of course, the methodology based on drawing customary rules from the fundamental principle of the respect for human dignity has inspired the two landmark decisions *Ferrini*¹⁹ and *Milde*,²⁰ both concerning the prevalence of the customary rule on the prohibition of gross violations of human rights over the customary rule on the jurisdictional immunity of foreign States. In effect, the obligation of Germany to pay compensation for damage sustained by the victims of the German army was directly drawn from the general principle of law of human dignity. The two decisions also give a clear illustration of another function performed by the general principles of law enshrining fundamental values, namely ensuring the coherence of the legal system as a whole. According to the Court, customary rules protecting each person’s dignity and liberty must be considered as norms of a higher rank. In other words, they are norms of international *jus cogens* and thus prevail over conflicting rules which do not share the same nature.

These two judgments also testify to the new tendency favouring a systematic interpretation of international customary rules by domestic courts. The customary regime of gross violations of human rights is not described in isolation, but within the context of the international legal order as a whole. As the *Corte di Cassazione* plainly pointed out in the *Milde* judgment in particular, the identification of a customary rule does not consist in a mere arithmetical calculation of the elements of practice. Other elements must be taken into account such as their reciprocal interconnections and their position in the hierarchy of values.

¹⁸ *Corte d’Assise di Roma, Riveros et al.*, 6 December 2000, IYIL, Vol. XII, 2002, p. 283 ff. (commentary by CATALDI).

¹⁹ *Corte di Cassazione (Sez. Unite civili), Ferrini v. Federal Republic of Germany*, 11 May 2004, No. 5044, RDI, 2004, p. 539 ff., commented by IOVANE, “The *Ferrini* Judgment of the Italian Supreme Court: Opening Up Domestic Courts to Claims of Reparation for Victims of Serious Violations of Fundamental Human Rights”, IYIL, Vol. XIV, 2004, p. 165 ff.

²⁰ *Corte di Cassazione (Sez. I penale), Criminal Proceedings against Josef Max Milde*, 13 January 2009, No. 1072, RDI, 2009, p. 619 ff., IYIL, Vol. XVIII, 2008, p. 325 ff. (commentary by IOVANE).

4. THE INTERPRETATION OF TREATIES

This brings us to the fourth general feature of recent Italian judicial practice, namely the attitude of domestic courts towards interpretation of treaties. Since the end of the Second World War, a large number of subjects have been transferred on the international sphere for regulation by bilateral and multilateral treaties or by acts of international institutions. For this reason, we witness an increase in domestic cases (a) parsing the texts of treaty provisions to complete the otherwise scanty content of domestic provisions, (b) drawing from international practice to establish the meaning of a treaty provision, (c) avoiding unilateral interpretation by considering the overall practice of the contracting States in the application of the treaty. In illustrating these three points, we will omit references to the European Convention on Human Rights (ECHR), which will be dealt with in the paragraphs dedicated to the relationship between national and international law.

a) The use of international treaties to integrate domestic provisions on the same topic has been quite frequent in recent Italian case law, whatever the rank (constitutional, statutory, or administrative) of the domestic provisions in question. This is perhaps a consequence of the fact that, as pointed out by some scholars, some substantive international law rules appear better suited to regulating certain matters.²¹ Ironically, we witness a large number of “non-self-executing domestic rules” which the judge has to complete by resorting to international treaty provisions governing identical subject matter. This integration has taken place even when, strictly speaking, the treaty itself was not applicable to the case in hand either because it was not yet in force, or because it governed different, albeit similar, matters which, in addition, showed no close ties with the other contracting Parties. Moreover, in many instances reference to international treaties in order to interpret incomplete domestic legislation has been made automatically by the courts, i.e. independently of explicit invocation by the parties.

We must first of all examine the consequences of this phenomenon on constitutional norms. In fact, not only are these rules at the top of the hierarchy of sources, but they are also the most generically formulated of all domestic rules and need constant judicial adaptation.

Chronologically, we may start by recalling that Article 10, paragraph 3, of the Constitution on the right of aliens to political asylum, and paragraph 4 on the prohibition of extradition of aliens accused of political offences have been supplemented by reference to those conventions such as the Geneva Convention of 1951 on the Status of Refugees,²² or the 1990 Dublin Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the

²¹ SHANY, *cit. supra* note 1, p. 7.

²² *Corte di Cassazione*, 26 May 1997, No. 4674, *cit. supra* note 3.

Member States of the European Communities.²³ In turn, the UN Convention on the Elimination of All Forms of Racial Discrimination was applied by the *Corte di Cassazione* in 2001 to justify a possible limitation of Article 21 of the Constitution which recognises freedom of expression.²⁴

Some years later, it was the Constitutional Court which referred to a set of international conventions on the protection of human rights and the rights of the child for the interpretation of Articles 29 and 30 of the Constitution. Recourse to these international sources enabled the Court to draw the prohibition of expulsion of alien women during pregnancy directly from the broad constitutional principles on the protection and assistance of the family established in those norms.²⁵

In 2002, the Constitutional Court partially upheld an appeal of the *Corte di Cassazione* challenging the constitutional legality of the prohibition of investigations of paternity for children born out of an incestuous relationship. The decision was based on some constitutional principles such as the principle of equality and that of non-discrimination interpreted in light of the UN Convention on the Rights of the Child.²⁶

Worth mentioning in this context is also the reference by the Italian courts to the 1997 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Oviedo Convention) to solve thorny ethical questions in the interpretation of Italian constitutional principles, although Italy is not yet a party to that Convention. In a group of 2005 judgments,²⁷ the Constitutional Court referred to the Convention and its Additional Protocol of 12 January 1998 on the Prohibition of Cloning Human Beings, to support the protection of “an irrevocable minimum standard of protection of human rights and dignity of the human being as required by the Italian Constitution in the field of medically assisted procreation”.²⁸ The Oviedo Convention was again applied for the interpretation of Article 32 of the Italian Constitution on the right to health in the more recent *Englaro* judgment by the *Corte di Cassazione*.²⁹

²³ *Tribunale di Roma*, 4 October 1999, *cit. supra* note 4.

²⁴ *Corte di Cassazione (Sez. I penale)*, *Aliprandi et al.*, 28 February 2001, *IYIL*, Vol. XII, 2002, p. 273 ff. (commentary by BRUNO).

²⁵ *Corte Costituzionale*, *Dylmishi Selim v. Prefetto di Palermo*, 22 July 2000, No. 376, *IYIL*, Vol. X, 2000, p. 301 ff. (commentary by LIGUORI). See also *Tribunale di Bologna*, 28 April 2004 (decree), *IYIL*, Vol. XIV, 2004, p. 348 ff.; *Corte di Cassazione (Sez. I civile)*, *M.J.*, 9 June 2005, No. 12169, *IYIL*, Vol. XV, 2005, p. 324 ff. (both commented by ALENI).

²⁶ *Corte Costituzionale*, 28 November 2002, No. 494, *IYIL*, Vol. XIV, 2004, p. 354 ff. (commentary by BRUNO).

²⁷ See *IYIL*, Vol. XV, 2005, p. 330 ff., (commented by NAPOLETANO).

²⁸ NAPOLETANO, *ibid.*, p. 334.

²⁹ *Corte di Cassazione (Sez. I civile)*, *Englaro*, 16 October 2007, No. 21748, *IYIL*, Vol. XVIII, 2008, p. 356 ff. (commentary by PALOMBINO). The point will be examined in detail *infra* section 5.

Let us turn now to some examples of statutory rules which have been interpreted and completed by the judiciary resorting to international treaties.

In the field of the protection of the marine environment, the 1973 International Convention for the Prevention of Pollution by Ships (MARPOL Convention) has been used by the *Corte di Cassazione* to harmonise two conflicting national provisions, on the assumption that the object and purpose of that Convention is precisely to ensure that all preventive measures are enforced equally in all of the Contracting States.³⁰

International treaties have often been applied to fill in the gaps in the Criminal Code and of the Code of Criminal Procedure.

The Slavery Convention adopted in Geneva on 25 September 1926 and the Supplementary Convention on the Abolition of Slavery also adopted in Geneva on 7 September 1956 were applied by the *Corte di Cassazione* in several judgments between 1996 and 1999 to clarify some ambiguous points in Article 600 of the Italian Criminal Code on the reduction of “a person to slavery or to a condition analogous to slavery”.³¹ A similar attitude was later taken by the *Corte di Assise di Milano* in 2003.³²

The new Article 270 *bis*, paragraph 3, of the Italian Criminal Code on international terrorism has been interpreted through extensive reference to international treaties on co-operation against terrorism, and other international materials. As of 2004, many judgments have been handed down by both the *Corte di Cassazione* and lower courts applying this technique.³³

b) The interpretation of treaty provisions through reference to international practice, such as other relevant treaties, acts of international institutions, and foreign legislation and case law has been a standard attitude among Italian courts over the last decade. In particular, international practice has been referred to in the interpretation of international treaties on the protection of human rights, and on international co-operation in judicial matters.

In the judgment of 18 May 1999, No 172, the Constitutional Court interpreted the 1954 New York Convention relating to the Status of Stateless Persons in light of the legislative practice of other contracting States. On the basis of this analysis, it could conclude that the Italian norms imposing the duty of military service on stateless persons were not incompatible with the provisions of that Convention.³⁴

³⁰ *Corte di Cassazione (Sez. Unite penali), Mistretta and Peralta*, 24 June 1998, No. 8, IYIL, Vol. X, 2000, p. 293 ff. (commentary by ANDREONE).

³¹ See IYIL, Vol. X, 2000, p. 306 ff. (commented by IOVANE).

³² *Corte di Assise di Milano, Toma et al.*, 15 December 2003, IYIL, Vol. XIV, 2004, p. 359 ff.; see also *Corte di Cassazione (Sez. IV penale), Tahiri*, 23 November 2004, No. 81, IYIL, Vol. XV, 2005, p. 327 ff. (both commented by FASCIGLIONE).

³³ See IYIL, Vol. XV, 2005, p. 343 ff., and IYIL, Vol. XVI, 2006, p. 322 ff. (commented by ALENI).

³⁴ See IYIL, Vol. X, 2000, p. 304 ff. (commentary by ZANIBONI).

c) In principle, the Italian courts have professed to be faithful to the rules on interpretation of the Vienna Convention on the Law of Treaties (VCLT) in order to avoid unilateral, nationalistic or excessively subjective interpretations on international conventions.

The criterion whereby a treaty must be interpreted according to its object and purpose has been resorted to in the above-mentioned judgment on the MARPOL Convention. Interestingly, in some instances the Italian courts resorted to a sort of variation to the “object and purpose” principle which they called “the humanitarian aim and spirit” of a treaty.

This criterion allowed an interpretation of the 1983 Strasbourg Convention on the Transfer of Sentenced Persons which takes into account the rights of the prisoners.³⁵

The different rules on interpretation established in Article 31 of the VCLT have been thoroughly applied in the different orders issued by the *Tribunale di Milano* in 2001 in relation to proceedings instituted against Mr. Berlusconi accused of bribing judges to rule in his favour. In this case, the judges had to interpret the 1959 European Convention on Mutual Assistance in Criminal Matters. In particular it had to be decided whether the receiving State could accept non-certified copies of documents by the sending State, i.e. Switzerland in the case in question. The Tribunal first of all recalled that according to Article 31 of the VCLT a treaty must be interpreted in light of its object and purpose. It then found that the object and purpose of the Strasbourg Convention was to facilitate international co-operation and judicial assistance. Secondly, it applied Article 31(3)(b) whereby the interpreter must take into consideration “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. It thus concluded that a continuous and uniform practice coupled with lack of protest permits judges of both contracting parties to consider non-certified copies of the requested documents as perfectly valid and usable as evidence.³⁶

The judgment of the *Corte di Cassazione* of 14 January 2003 marks, however, a step backwards in this positive trend.³⁷ The case concerned the interpretation of the 1999 Agreement between Italy and the United Nations on the enforcement of judgments of the International Criminal Tribunal for the Former Yugoslavia (ICTY), implemented in the Italian legal order with Law No. 207 of 7 June 1999. This law

³⁵ *Corte Costituzionale*, Baraldini, 22 March 2001, No. 73, IYIL, Vol. XI, 2001, p. 298 ff. (commentary by CATALDI); *Corte di Cassazione (Sez. Unite penali)*, *Napoletano*, 23 September 2008, No. 36527, IYIL, Vol. XVIII, 2008, p. 356 ff. (commentary by BRUNO).

³⁶ See IYIL, Vol. XI, 2001, p. 302 ff. This interpretation was later confirmed by *Corte Costituzionale*, 4 July 2002, No. 315 (order), IYIL, Vol. XII, 2002, p. 290 ff., and by two 2002 judgments of the *Corte di Cassazione (Sez. I penale, Re: Monnier*, 15 October 2002, No. 34576, and *Sez. I penale, Re: Strangio et al.*, 8 November 2002, No. 37774), IYIL, Vol. XIII, 2003, p. 256 ff. (all commented by IOVANE).

³⁷ *Corte di Cassazione (Sez. I penale)*, *Jelusic*, 14 January 2003, No. 1377, IYIL, Vol. XIII, 2003, p. 252 ff. (commentary by STARITA).

contains norms which conflict with previous Law No 120 of 14 February 1994, adopted by the Italian Parliament immediately after the establishment of the ICTY by the Security Council, on the cooperation with the Tribunal. In an attempt to reconcile the two sets of rules, the Court opted for a purely nationalistic approach to the interpretation of the 1999 Agreement. In particular, the Court ignored the English text of the Agreement, and referred only to the Italian one, whereas according to the Agreement, it is the English text which has to be considered authoritative.

5. THE RELATIONSHIP BETWEEN NATIONAL AND INTERNATIONAL LAW

The effects of international law in the legal system of a State cannot be evaluated *in abstracto*, but are to be constantly and attentively benchmarked against concrete methodological and substantive issues faced by the judiciary, a task the IYIL has been committed to since its foundation in the 1970s.

A remarkable feature of the Italian jurisprudence focusing on the relationship between national and international law during the last ten years is the increased receptiveness of the Italian legal system *vis-à-vis* international law. Nevertheless, this attitude, quite new if compared to previous decades, is not paralleled by a homogeneity of approaches in interpreting and applying international law. Differences are sometimes acute. Decisions taken on the basis of pure domestic law but with “courtesy references” to customary and/or treaty law are still present, but in a reduced percentage. This is particularly important in the field of human rights, as the existence of a progressively established link between the judicial enforcement of International law and the defence of the fundamental rights of the individual has been repeatedly recognised. Especially in cases in which domestic judges refused to resort to “avoidance techniques” such as the political question doctrine or the Act of State doctrine, the enforcement of international law has often allowed for a protection of individual positions to an extent that would not have been possible by merely applying domestic law or by complying with the political directives of the executive.

5.1. *International Customary Law*

Article 10, paragraph 1, of the Constitution expressly establishes that “[t]he Italian legal system conforms to the generally recognised rules of international law”. Such a broad formulation does not only provide for the obligation to implement international customary law, but it directly and automatically incorporates this law into the domestic system. On several occasions the *Corte Costituzionale* recalled Article 10, paragraph 1, Constitution to hold that international customary norms must be considered as rules integrating a parameter of constitutionality against which the legitimacy of a piece of national legislation is to be verified. Actually, all domestic

institutions and organs, especially national courts, in charge with the application of law are competent to verify the existence, or the content, of international customary rules and the modifications that their automatic incorporation produces in the Italian legal system. In order to fulfil international obligations, they shall compare the content of international customary law with that of domestic law. This is necessary to establish which internal rules have been amended or have come into force. Both in applying a rule of international customary law and in taking the decision to bring a question of constitutional legitimacy before the Constitutional Court, the Italian courts are fully independent. In any case, the interpretation, the reconstruction of the content, and the effect of the application of the rule of international customary law made by a court are limited to the case pending before it and their decisions cannot be considered as binding on any other court or tribunal.

An aspect that is worth mentioning regards the relationship between international customary law and the Italian Constitution, in particular when an international customary rule contrasts with a constitutional fundamental principle. As customary law remains an *external* legal source permanently incorporated into the Italian legal system by Article 10, paragraph 1, Constitution, the protection of the fundamental principles of the Constitution prevails over the constitutional obligation to adhere to international customary law.

In 1979, in the *Russel* case, dealing with the potential conflict between the customary principle of diplomatic immunity from civil jurisdiction and the individual right to legal action as enshrined in Article 24, paragraph 2, Constitution, the Court had traced a demarcation line between international customary rules already existing prior the time the Constitution entered into force (1948) and international customary rules that had become effective only thereafter. In the first hypothesis, international customary law were to prevail over fundamental principles of the Constitution, whilst in the latter, international customary law had to be incorporated into the Italian legal system only as long as it complied with the constitutional core principles. This solution, based on a chronological criterion, seems to have been dropped by the Court since decision No. 73 of 22 March 2001. In an *obiter dictum*, the Court stated that “fundamental principles of the constitutional order” and “inalienable rights of the human being” are a limit to the automatic incorporation of international customary law into the Italian legal order. According to the Court, rules of international customary law acquire the same force as constitutional law: both of them are at the same level in the Italian hierarchy of legal sources, or rather the former are not subordinate to the latter and prevails over them as *lex specialis*. In any case, international customary law does not prevail over the supreme principles of the Italian Constitution. If a rule of international customary law is in contrast with a fundamental principle of constitutional law or infringes on an inalienable human right, it cannot be implemented into the Italian legal system.³⁸ In

³⁸ See *Corte Costituzionale*, 22 March 2001, No. 73, *cit. supra* note 35.

this case, a judge who recognizes the relevance of a rule of international customary law to the pending case cannot apply it without first bringing the question before the Constitutional Court.

The *Corte di Cassazione* seemed to share the above opinion, as in 2009 in *Milde* it held that

“[...] Article 10, paragraph 1, of the Constitution affirms that the Italian legal order must conform to the generally recognised rules of international law [...]. However, even those scholars who maintain that customary rules incorporated by means of Article 10 enjoy a constitutional status [...] recognise that they must respect the basic principles of our legal order, which cannot be derogated from or modified. Fundamental human rights are among the constitutional principles which cannot be derogated from by generally recognised rules of international law”.³⁹

In our opinion, this approach – by the way analogous to the *controlimiti* (counter-limits) doctrine developed by the Constitutional Court *vis-à-vis* the application of EU law – is the correct one; it in fact opens the domestic system to international law to the maximum extent possible, without any fear of subversion of the common, fundamental values shared by the community of people settled on the national territory.

5.2. *Peremptory Rules of International Law (Jus Cogens)*

As affirmed by the *Corte di Cassazione* in a number of decisions issued between 2004 and 2009, Article 10, paragraph 1, Constitution incorporates within the Italian legal system not only rules of international customary law but also peremptory rules of international law, i.e. *jus cogens*, by vesting domestic courts with the authority to directly interpret and apply them. This point has been discussed, together with the relevant decisions, in section 3.

5.3. *International Treaty Law*

The *Corte Costituzionale* has constantly excluded that international treaties rank at the highest level of the national legal sources hierarchy. They do not have the same rank as constitutional rules.

³⁹ See *Corte di Cassazione*, 13 January 2009, No. 1072, *cit. supra* note 20.

Before the Constitutional Law No. 3 of 18 October 2001 came into force, the principles of consistent interpretation and of *lex specialis* were used to enable Italy to comply with its international obligations. In fact, scholars and judges, in spite of the rank that international treaties have in the Italian legal system, tried, via these principles, to recognize their supremacy over domestic law.

The amended Article 117, paragraph 1, Constitution provides now that “in performing their legislative powers, the State and the Regions shall respect the Constitution and the obligations arising from international law [...]”. Under the quoted clause, international treaty law occupies an intermediate position – midway between constitutional law and ordinary law – in the Italian hierarchy of legal sources. Consequently, international treaty law must be in compliance with the Constitution but it prevails over any conflicting domestic ordinary laws. This implies that domestic courts cannot apply, as they used to do before the 2001 constitutional reform, traditional criteria – i.e. the *lex posterior* and *lex specialis* principles that govern the contrast between rules of the same rank – to a conflict between domestic law and international treaty law. Now the ordinary judge cannot settle the conflict by his own instruments anymore; since treaty law enjoys constitutional coverage by virtue of Article 117, paragraph 1, Constitution, a contrast between a treaty rule and a domestic rule implies a question of constitutionality for which only the Constitutional Court is competent.

In 2007, the Constitutional Court had the opportunity to evaluate the relationship between Italian law and the European Convention on Human Rights, in light of Article 117, paragraph 1, Constitution; then it clarified the meaning of this constitutional provision.⁴⁰ The Court held that “the rules of the ECHR are not of a constitutional level as such, because one cannot grant them a status different from the act – an ordinary law – that authorised their ratification and execution within our legal system”. Therefore, Article 117, paragraph 1 does not vest international treaties with constitutional rank. Consequently, as stated by the Court, the ECHR rules, like any other international conventional rule, stand midway between ordinary law and constitutional law within the domestic hierarchy of legal sources (“infra-constitutional” rank). Furthermore, the Court held that “with Art. 117, para. 1, a ‘mobile reference’ to the conventional rule applicable to each specific case has been created; such conventional rule gives content and life to the international obligations generically evoked by Art. 117, para. 1”. In other words, the aim of Article 117, paragraph 1 is to give constitutional rank to the principle of observance of international obligations, by recognizing a particular “force of resistance” to law implementing international treaties in case of conflict with subsequent national law.

⁴⁰ See *Corte Costituzionale*, 24 October 2007, Nos. 348 (*R.A. v. Comune di Torre Annunziata; Comune di Montello v. A.C.*; *M.T.G. v. Comune di Ceprano*) and 349 (*E.P. et al. v. Comune di Avellino et al.*; *A.G. et al. v. Comune di Leonforte et al.*), IYIL, Vol. XVII, 2007, p. 292 ff. (commentary by CATALDI).

In the Court's view, Article 117, paragraph 1, Constitution, on the one hand, attributes a particular "force of resistance" to domestic laws implementing international treaties, such as the ECHR, in case of conflict with ordinary legislation, and, on the other hand, it brings the international treaties within the jurisdiction of the Constitutional Court, since "any conflict will not generate problems of temporal succession of laws or assessments of the respective hierarchical arrangement of the provisions in contrast, but questions of constitutional legitimacy".⁴¹

The Court definitely includes among its prerogatives the task of verifying the constitutionality of international treaties adhered to by Italy. And what is more, in relation to the ECHR, the Constitutional Court affirmed that the standard of review for challenging the constitutionality of a national ordinary law is not the rule of the European Convention in itself, but the rule as construed by the judicial body charged with its interpretation and adjudication, that is the European Court of Human Rights. Nevertheless, also the interpretation of the ECHR rule by the European Court must be verified by the Constitutional Court in terms of compatibility with the Constitution before being applied in national legal system.

In principle, the reasoning the Constitutional Court uses with the ECHR should work with provisions of other international treaties, which could have an organ of control, a body to which the Constitutional Court could address to verify the official and authentic interpretation of the conventional rule at stake.

Furthermore, according to the Court, the effects produced by the ECHR within the domestic legal system are not such as to ground the jurisdiction of the national courts to *directly* apply the provisions of the Conventions for the settlement of disputes brought before them (this question will be examined more in depth below). As a consequence, domestic courts do not have the power to set aside domestic laws in contrast with the ECHR, since the alleged incompatibility between these two pieces of legislation amounts to a question of constitutional legitimacy falling under the *Corte Costituzionale's* exclusive jurisdiction.⁴²

In 2008 and 2009, still with reference to Article 117, paragraph 1, Constitution, the Court reaffirmed that the provisions of the ECHR must be considered as "intermediate rules" – i.e. rules complementing the parameter of constitutionality against which the legitimacy of a national piece of legislation is to be verified – and that their specificity lies on the fact that they are subject to the interpretation by the Court in Strasbourg, to which the Contracting Parties are obliged to conform.⁴³ As a consequence, any domestic law in conflict with the ECHR, as interpreted by the

⁴¹ See *Corte Costituzionale*, judgment No. 348, *ibid.*

⁴² See *Corte Costituzionale*, judgments Nos. 348 and 349, *cit. supra* note 40.

⁴³ See *Corte Costituzionale*, *B.R. v. Provincia di Reggio Emilia et al.*, 27 February 2008, No. 39, IYIL, Vol. XVIII, 2008, p. 360 ff. (commentary by NAPOLETANO); *Corte Costituzionale*, *N.P. v. Ministry of Education, University and Research*, 26 November 2009, No. 311, RDI, 2010, p. 163 ff., and *Corte Costituzionale*, *F.V.*, 4 December 2009, No. 317, RDI, 2010, p. 180 ff.

European Court of Human Rights, indirectly infringes on the Italian Constitution and can be repealed by the Constitutional Court.

Moreover, in its decision No. 39 of 2008, the Court extended the effects of Article 117, paragraph 1, Constitution, to domestic law which existed prior to the entry into force of the ECHR; it thus confirmed that also with reference to such pre-existing legislation it is necessary to await a preliminary ruling on the issue of constitutional legitimacy before setting aside the provision in contrast with the ECHR. In other words, if a domestic court detects a conflict between an international treaty and national legislation that is impossible to settle by way of interpretation, it cannot apply the latter without incurring the breach of the former and the underlying Article 117, paragraph 1, Constitution. Any antinomy between domestic and international treaty law must be scrutinized by the Constitutional Court, even when the provisions of an international treaty can be immediately applied by the national judge due to their precise, unconditional and complete nature.

It is a reason for some concern that the ruling of the Court does not allow domestic courts to recognise, while interpreting a rule, any abrogative force to provisions of international treaty law also with reference to pre-existing national laws. The ratification and the implementation of an international treaty should, in fact, imply some restraints on State sovereignty. Can the direct applicability and the direct effect of an international treaty be excluded in block for a treaty ignoring the specificity of its provisions? On the contrary, the circumstance that an international obligation is directly claimable by individuals before the domestic courts of a Party to the underlying treaty should be considered on a case-by-case basis taking into account the clear, precise and unconditional nature of the international rule, as well as the object and purpose of the treaty.

5.3.1. *Italian Courts and the Doctrine of Self-Executing and Non-Self-Executing Rules of International Law, with Particular Reference to the ECHR*

In the last decade Italian legal scholars have vivaciously debated some decisions, in particular by the *Corte di Cassazione*, on the self-executing nature of international treaty rules, especially ECHR provisions. In the context of the ECHR, this issue extends to the self-executing nature of the decisions of the Strasbourg Court.

A significant development came from the already mentioned decisions Nos. 348 and 349 of 2007 of the Constitutional Court, which have clarified (at least so far) the matter, even if these decisions do not represent the optimal outcome from the point of view of either the ECHR or the *Corte di Cassazione* (the most recent pertinent jurisprudence of the latter is commented below).

In its decisions Nos. 348 and 349 of 2007, the Constitutional Court categorically excluded, as already said above, the possibility for the domestic judge to directly apply the ECHR rules while setting aside national law. This position was grounded

on a twofold reasoning: first of all, the ECHR has not created a supranational legal system comparable to the EU; as such, the constitutional “umbrella” provided by Article 11 of the Constitution to EU law is not operational for the ECHR norms; secondly,

“at present, no elements relating to the structure and objectives of the ECHR, or to the characteristics of its specific norms, allow [...] to maintain that the legal position of the individuals may be directly and immediately beneficiary of it, independently from the traditional legal filter of their respective States, so as to entitle the judge not to apply the conflicting national rule. The decisions of the Strasbourg Court [...] are addressed to the State legislator and require a certain conduct from it. This is even more evident when, as in this case, there is a ‘structural’ conflict between the relevant national norm and the ECHR as interpreted by the Strasbourg Court, and the member State is requested to draw the necessary consequences”.⁴⁴

It is hard to share the opinion that the “structure” and “objectives” of the ECHR or “the characteristics of specific norms” are such as to bar the domestic judge from applying the ECHR to a specific case without passing through a preliminary ruling by the Constitutional Court. On the contrary, a two-step test is required when assessing the self-executing nature of a treaty norm: firstly, a verification on whether this norm was introduced into the domestic system; secondly, as recently highlighted by the *Corte di Cassazione*, a verification of the concrete possibility that this specific norm be actually relevant to the pending case. It was the negative result of the second part of the described test that rightly led the *Corte di Cassazione* to refer to the Constitutional Court the questions decided with the two 2007 decisions.

In the past, the doctrine of self-executing treaties was invoked in the case of conventional norms on the protection of human rights, specifically in relation to the ECHR. Prior to the constitutional reform of Article 117, paragraph 1, Constitution, the *Corte di Cassazione*, in its decision in *Polo Castro* of 8 May 1989, affirmed the possibility of direct application of a conventional rule containing “the model of a national act complete in its essential elements”.⁴⁵ It might be objected that, in the *Polo Castro* case, it was a matter of filling a legal vacuum in the national system by directly applying the relevant international norm and not of simultaneous non-application of a specific norm of domestic law. In 2002, in *Muscas*, however, and further to the reform of Article 117, paragraph 1, Constitution, the *Corte di Cassazione* expressly stated, with reference to a dispute on land occupation for purposes of expropriation, that

⁴⁴ See *Corte Costituzionale*, judgment No. 349, *cit. supra* note 40.

⁴⁵ In this case, Article 5(4) ECHR, granting to anyone deprived of personal freedom the right to appeal to obtain a ruling on the legality of the arrest or detention.

“any direct application of Article 1, Protocol 1 of the Convention [...] [on the right to property] is under the responsibility of the national judge who, when detecting any conflict with the national law, must give precedence to the conventional norm provided with immediate binding effect in respect of the concrete case, even if this means the non-application of the national norm”.⁴⁶

This conclusion, which also complies with the orientation of the Strasbourg Court, is in line with some other decisions.⁴⁷ Referring to the right to a fair trial, in *Cat Berro*,⁴⁸ the *Corte di Cassazione* held that ECHR provisions are applicable in the Italian legal system. Since the said provisions originated from a legal source connected to an “atypical” competence,⁴⁹ they cannot be superseded or modified by ordinary domestic legislation. As a consequence, ECHR provisions have to be applied by the judiciary.

Following the adoption of Protocol No. 14, which strengthens the obligation deriving from Article 46, paragraph 1, of the ECHR, in *Somogyi*,⁵⁰ the *Corte di Cassazione* maintained that such an obligation

“has been accepted without reservation by Italy, which ratified Protocol No. 14 on 7 March 2006 by Law No. 280/2005. The Protocol has not yet entered into force [...], but the ratification without reser-

⁴⁶ *Corte di Cassazione (Sez. I civile), Muscas et al. v. Comune di Cagliari*, 19 July 2002, No. 10542, IYIL, Vol. XIII, 2003, p. 234 ff. (commentary by BRUNO).

⁴⁷ See *Corte di Cassazione (Sez. Unite civili), Centurione Scotto v. Presidenza del Consiglio dei Ministri*, 23 December 2005, No. 28507, IYIL, Vol. XVI, 2006, p. 314 ff. (commentary by BRUNO). The Supreme Court (see *Corte di Cassazione (Sez. IV penale), Re: Fusi*, 2 May 2003, No. 20031, IYIL, Vol. XIII, 2003, p. 237 ff. (commentary by FASCIGLIONE)) has affirmed the binding nature and the direct application of Art. 2 of the Convention. It went even further, assuming that the norms of the ECHR, if complete in all their elements, produce the same effects of EU regulations: the Court stated that the Convention prevails over incompatible domestic law. This prevalence has been based on the well known arguments drawn from established case law on the priority of EU regulations, and more in general of EU law, over incompatible domestic law. The decision confirms the lack of agreement among domestic tribunals (particularly with Constitutional Court case law) as to the exact position of the ECHR within the Italian legal system. It seems, anyway, that the *Corte di Cassazione* furthered its reasoning to the point of treating the ECHR as being part of EU law.

⁴⁸ *Corte di Cassazione (Sez. I penale), C.B.*, 3 October 2005, No. 35616, IYIL, Vol. XV, 2005 p. 334 ff. (commentary by BRUNO). In this case, the Supreme Court had to decide what kind of consequences could be drawn from a judgement of the European Court of Human Rights which had found a violation of Art. 6 in criminal proceedings, the outcome of which had been the conviction of the applicant. The Court quashed the decision of the Court of Appeal and requested a new decision after a hearing with the applicant and his defence counsel.

⁴⁹ See *Corte Costituzionale*, 19 January 1993, No. 10.

⁵⁰ See *Corte di Cassazione (Sez. I penale), Somogyi*, 3 October 2006, No. 32678, IYIL, Vol. XVI, 2006, p. 317 ff. (commentary by PALOMBINO).

vation of such a relevant treaty provision shows the specific intention of the legislature to unconditionally accept the binding force of the Strasbourg Court's judgements".

On such premises, the Court observed that "in deciding on a request for the reopening of the legal terms to appeal filed by a convicted person, after his/her application was upheld by the European Court, the judge has to conform to that Court's decision which found that the relevant proceedings instituted *in absentia* were unfair".

Moreover, in *Dorigo*,⁵¹ the *Corte di Cassazione* underlined the need, during the enforcement phase of a final criminal sentence, for a full and direct application of the right to a new trial, as a consequence of an ascertained violation of Article 6 of the ECHR by the Strasbourg Court. The *Corte* dealt with the issue arising when two final decisions, one rendered by the European Court of Human Rights and the other by a domestic court, decided the same questions of fact and law in a different way. According to domestic law, the principle of supremacy of national *res judicata* tends to prevail. However, in the mentioned case, the Supreme Court, with a revolutionary approach, asserted that the decisions of the European Court render the divergent Italian judgement void.

This can be considered the most advanced solution reached by the Italian jurisprudence on the matter. Possibly, in *Dorigo* the *Corte di Cassazione* went even too far, overcoming the principle of national *res judicata*. It must be considered, anyway, the exceptional case of a person in jail after a criminal sentence which, according to the Strasbourg Court, had violated the ECHR.

Following the 2007 judgments of the Constitutional Court Nos. 348 and 349, in *Zullo*⁵² the *Corte di Cassazione* had to decide once again the issue whether a

⁵¹ See *Corte di Cassazione (Sez. I penale), Dorigo*, 25 January 2007, No. 2800, *ibid*.

⁵² See *Corte di Cassazione (Sez. I civile), Zullo*, 3 January 2008, No. 14, IYIL, Vol. XVII, 2007, p. 284 ff. In the applicant's opinion the so-called *Pinto* Act, providing the amount of compensation to be established on the basis of the years exceeding the "reasonable time" and not of the entire duration of the proceedings, was in conflict with Art. 6 ECHR, and consequently with the Constitution. The Court first excluded that the *Pinto* Act would be inconsistent with the Constitution, considering that the European Court in many decisions referred to it as an effective remedy for the violation of the right to "reasonable length of the proceedings". Then, on the assessment of the amount of compensation due, did not follow the Strasbourg's case law and recalled the case law of the Constitutional Court in its judgments Nos. 348 and 348 of 2007. On the same issue, see *Corte di Cassazione (Sez. I civile), Ragnoni v. Ministero della Giustizia and Presidenza del Consiglio dei Ministri*, 26 July 2002, No. 11046, IYIL, Vol. XII, 2002, p. 276 ff.; *Corte di Cassazione (Sez. Unite civili), Balsini v. Ministero della Giustizia*, 27 November 2003-26 January 2004, No. 1338, IYIL, Vol. XIII, 2003, p. 245 ff.; *Corte di Cassazione (Sez. I civile), Ministero dell'Economia e delle Finanze v. Di Caprio*, 17 June 2004, No. 11350, IYIL, Vol. XIV, 2004, p. 364 ff.; *Corte di Cassazione (Sez. I civile), Camagni v. Ministero della Giustizia*, 15 September 2005, No. 18266, IYIL, Vol. XV, 2005, p. 336 ff.; *Corte di Cassazione (Sez. I civile), Soc. Analitica v. Presidenza del Consiglio dei Ministri*, 2 July 2004, No. 12110, *ibid.*; *Corte*

decision of the European Court can render the divergent Italian judgement void. This time, not surprisingly, the *Corte* came to a different solution. According to the Supreme Court,

“the case law of the European Court of Human Rights cannot be directly applied, whereas this is possible for EC [now EU] law. The Constitutional Court [...] held that the ECHR does not create a supra-national legal system and therefore does not generate norms that are directly applicable in the contracting States”.

But the question seems not yet definitely settled. Concerning the possibility for the national judge to apply ECHR rules, a new approach is likely to come up from the most recent case law of the Constitutional Court. In its decision No. 311 of 2009, the Court firstly stated that the domestic judge has the competence to “apply the rules [of the ECHR] as interpreted by the Court of Strasbourg [since] this competence was expressly attributed to him by the contracting States”. Secondly, the Court confirmed that the domestic judge must interpret domestic rules consistently with the ECHR. Thirdly, only when there is an “irremediable conflict”, i.e. there is no possibility for a domestic rule to be read compatibly with the Convention by means of any interpretative criterion, the common judge must refer the matter of constitutional legitimacy to the Constitutional Court to ascertain compatibility of this domestic rule with Article 117, paragraph 1, Constitution.

This is a first step toward the “reconciliation” of the Constitutional Court with the jurisprudence of the *Corte di Cassazione*, in particular the criminal sections of the latter, which, prior to the 2001 constitutional reform, and until the two 2007 decisions of the *Corte Costituzionale*, tried to follow the indications coming from Strasbourg aimed at creating a “European public order” whereby a prominent role is given to the domestic judge as the “natural judge” of the Rome Convention. This implies the possibility of direct application of ECHR rules and Strasbourg Court’s decisions as well.

5.3.2. *International Agreements that Have Not Completed the Ratification Procedure*

An interesting example of implementation of an unratified treaty is found in the aforementioned *Corte di Cassazione*’s decision in the *Englaro* case. Ruling on the authorization to discontinue Eluana Englaro’s artificial nutrition and hydration,

di Cassazione (Sez. I civile), Sonzogni v. Ministero della Giustizia, 17 March 2004, No. 5386, *ibid.*; *Corte di Cassazione*, 23 December 2005, No. 28507 (*cit. supra* note 47); and *Corte di Cassazione (Sez. Unite civili), Catra v. Ministero della Giustizia*, 23 December 2005, No. 28508, IYIL, Vol. XVI, 2006, p. 314 ff. (all commented by BRUNO).

the Supreme Court stated that the judicial authority may grant such authorization, but on condition that such a desire may be attributed with certainty to the patient. Examining the pertinent provisions, the Court did not confine itself to domestic laws and made a significant application of the Oviedo Convention notwithstanding the fact that Italy has not completed its ratification process. After passing a law on the ratification and execution of the Convention, the Italian authorities did not deposit the instrument of ratification with the Secretary General of the Council of Europe, as required by Article 33(4) of the Convention. The Court specified that:

“[...] [e]ven though the Parliament authorised its ratification by Law No. 145 of 28 March 2001, the Oviedo Convention has not yet been ratified by the Italian State. However, it does not mean that the Convention is without any effect in our legal system. In fact, an internationally valid agreement, though not yet ratified by a State, can be considered – all the more so after the parliamentary law authorising ratification – as having an auxiliary function from the interpretative point of view: it will be suspended by a contrary national rule, but can and must be used in interpreting domestic norms consistently with it”.

The interesting aspect is the following. Without indicating which domestic rules should be read in conformity with the Oviedo Convention, the *Corte di Cassazione* gave full and direct application to the Convention. The main argument adopted to justify its conclusion is the principle mentioned in Article 6, paragraph 3, of the said Convention, stating that

“[w]here, according to the law, an adult does not have the capacity to consent to an intervention because of a mental disability, a disease or for similar reasons, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law”.

Therefore, the *Corte* has not limited itself to identifying in this conventional rule a parameter for guiding the interpretation of the relevant domestic law.

5.3.3. *International Agreements that Have Not Been Formally Approved through the Constitutional Ratification Process (Executive Agreements, Memoranda of Understanding, and Similar Informal Agreements)*

It is generally accepted that each Ministry of the Italian Government has a treaty-making power in all the matters under its administrative and technical competences. In this case, the consent of Italy to be bound by the treaty is expressed

by the signature of the Ministry and the treaty becomes effective without following any other constitutional step.

However, the Constitutional Court, in the *Baraldini* case of 2001, clarified that a treaty “concluded in a simplified form” – in this specific case, the agreement on the conditions to transfer a detainee, Mrs. Silvia Baraldini, from the US to Italy, signed by the US Secretary of Justice and the Italian President of the Council of Ministers⁵³ – had to comply with domestic ordinary law – i.e. Law No. 334 of 25 July 1988 on the “Ratification and Execution of the Convention on the Transfer of Sentenced Persons, adopted at Strasbourg, 21 March 1983”.

In *Baraldini*, the Constitutional Court explained that the agreement between the two governments was to be interpreted within the limits of compliance with the constitutional values and the Strasbourg Convention. Concerning compliance with constitutional values, the *Corte* stated: “the tendency of the Italian system to be open to generally recognised international rules and to international treaties is limited by the necessity to preserve its identity; thus, first of all, by the values enshrined in the Constitution”. Anyway the Court specified that the review of conformity with constitutional values was not necessary in this case, since the rules of the Strasbourg Convention clearly excluded that “the person transferred be subjected to a special and individual enforcement regime with respect to rights and duties applicable to him/her as a detainee”.

6. INTERNATIONAL LAW AND ITALIAN REGIONS

Local government authorities have gained an increasingly important role both internally and *vis-à-vis* EU institutions over the last decade. Also as far as the treaty-making power of the *Regioni* is concerned, one has to chronicle the path of the *Corte Costituzionale*'s case law prior to and after the reform of Title V, Part II, of the Italian Constitution implemented by constitutional Law No. 3 of 2001.

Before the 2001 reform, the Constitutional Court's decisions extended the authority of the *Regioni* to conclude international agreements to its maximum limit. According to the Court,⁵⁴ the central authorities of the State did not enjoy an exclusive treaty-making power in Italy. The foreign activities of the *Regioni* could also encompass the conclusion of international agreements in matters of their compe-

⁵³ The treaty, signed in June 1999, established that the detainee was to serve her imprisonment sentence in Italy without the possibility of benefiting from any mitigation measure provided by Italian legislation, including the possibility to resort to structures external to the jail in case of illness. Such a provision was clearly in contrast with the Strasbourg Convention and also accounted for a violation of the principle of equality before the law, solemnly provided by Art. 3 of the Italian Constitution.

⁵⁴ See *Corte Costituzionale, Presidenza del Consiglio dei Ministri v. Regione Sicilia*, 24 July 1998, No. 332, IYIL, Vol. IX, 1999, p. 150 ff. (commentary by ANDREONE).

tence, yet they had a duty of prior information to the central government. Thus, in order to ensure the respect of the international political guidelines issued by the central Executive, a “prior consent” or a “prior understanding” was necessary.

With the reform of Title V of the Constitution, the external powers of the Regions underwent a further expansion. While maintaining, in the revised formulation of Article 117, the exclusive competence of the State in matters of external policy and international relations, Regions acquired a concurrent legislative power for the conduct of their own international relations and can now sign international agreements with foreign States and understandings with territorial bodies of other States, “in cases governed by and in accordance with the laws of the State”. The clause of Article 117, paragraph 9, that contains such a provision is rather ambiguous and led some Regions (and some scholars) to maintain that they have been granted an autonomous treaty-making power. Law No. 131 of 5 June 2003, containing “provisions for conforming the legal system of the Republic to Constitutional Law No. 3 of 31 October 2001”, at Article 6, brought in an interpretation of the new constitutional norm which is closer to the principle of separation of powers among the constitutional branches of the Italian Republic.

With its decisions, in light of the constitutional reform of Title V, Part II, and its implementing law, the *Corte Costituzionale* basically restated the rulings issued prior to 2001: it confirmed the exclusive competence of the State as regards the undertaking of international commitments.

In 2004,⁵⁵ the Constitutional Court stated that

“the novelty that results from the changed normative framework is in essence the Constitutional recognition of ‘external powers’ to the Regions; that is the authority to enter into understandings with comparable bodies of other States as well as into true agreements with other States, within the scope of their own competences in circumstances and according to the forms determined by State laws. [...] In exercising this recognized authority, the Regions are not considered as ‘delegates’ of the State, but as autonomous entities which directly deal with foreign countries”.

The Court also specified that

“the Regions’ authority to conclude agreements is exercised within a system in which the State, as the sole holder of the foreign policy, is responsible under international law for all agreements and the ensuing effects. As such, the State has the right and the duty to monitor

⁵⁵ See *Corte Costituzionale, Provincia di Bolzano v. Presidenza del Consiglio dei Ministri; Regione Sardegna v. Presidenza del Consiglio dei Ministri*, 19 July 2004, No. 238, IYIL, Vol. XIV, 2004, p. 373 ff. (commentary by CATALDI).

the compliance of such agreements with the general course of the national foreign policy”.

If we move from the treaty-making power to the implementation of international undertakings, the most interesting aspect in the Constitutional Court’s jurisprudence after the 2001 constitutional reform is the distinction between international commitments and EU commitments within the national system. In a 2004 judgment,⁵⁶ it was pointed out that the internal distribution of competences between the central State and the Regions entailed that the latter be directly responsible for the correct fulfilment of EU obligations in respect of issues falling under their competences, whilst the former remains responsible towards the other Member States. Thus, if an agreement signed by a Region with a State is grounded on a EU source that is directly and mandatorily applicable within the legal system of the State, it does not infringe on the limitations imposed by the Constitution regarding foreign policy authority reserved to the State. In this case, and this is the main difference with international commitments, prior agreement with the central government should therefore be considered as implicitly acquired in consideration of the fact that the central government took part in the preparatory and executive phases of EU law.

To conclude, we must underline the equilibrium shown by the *Corte Costituzionale* when facing the uneasy issue of the devolution of powers from the central government to the Regions. On the one hand, the Court has shown a generous attitude in opening to the maximum possible extent the interpretation of the Constitution prior to the 2001 reform towards an involvement of local authorities in the treaty-making power and in the implementing phase. On the other hand, even after the new formulation of Article 117, it has correctly defended the foreign policy authority reserved to the State from too broad interpretations of the sense and meaning of the reform.

⁵⁶ See *Corte Costituzionale, Presidenza del Consiglio dei Ministri v. Regione Friuli-Venezia Giulia, Regione Veneto, Provincia di Bolzano; Provincia di Bolzano v. Presidenza del Consiglio dei Ministri*, 22 July 2004, No. 258, IYIL, Vol. XIV, 2004, p. 374 ff.