ITALIAN PRACTICE RELATING TO INTERNATIONAL LAW

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(edited by *Giuseppe Cataldi* and *Massimo Iovane*)

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Sovereign immunity from jurisdiction – States and international organizations – Sovereign Military Order of Malta – Agreement of 21 December 2000 between Italy and the Sovereign Military Order of Malta – Jurisdiction over employment disputes with the Association of Italian Knights of the Sovereign Military Order of Malta

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Association of Italian Knights of the Sovereign Military Order of Malta v. M.F.

In the orders under review, the *Corte di Cassazione* denied jurisdictional immunity of the Sovereign Military Order of Malta (hereinafter "the Order") on the

basis of the lack of an explicit treaty provision required by the extra-territorial nature of the entity in question. The Court affirmed Italian jurisdiction over disputes concerning employment relationships stipulated by the Association of Italian Knights of the Sovereign Military Order of Malta (A.C.I.S.M.O.M.), an entity in public law belonging to the Order, running health care centres on Italian territory through which the Order pursues its institutional aims. Let us briefly outline the events leading to these rulings.

In the first decision, the medical director of an outpatients clinic belonging to A.C.I.S.M.O.M. brought a case before the *Tribunale di Roma* requesting the right to receive: (i) the remuneration due to directors of complex structures (like the hospitals operated by A.C.I.S.M.O.M.); (ii) payment of the balance; and (iii) damages arising from previous lower pay. In response, A.C.I.S.M.O.M. sought a preliminary ruling from the *Corte di Cassazione* on the question of jurisdiction under Article 41 of the Italian Code of Civil Procedure, arguing that its subjection to the jurisdiction of an Italian court would imply unacceptable interference with A.C.I.S.M.O.M.'s right to manage its own affairs, and would be incompatible with the immunity enjoyed under both Article 10 of the Italian Constitution and the Agreement of 21 December 2000 (regarding the management of hospitals and ambulatories in the Italian territory by A.C.I.S.M.O.M.), implemented in Italy by Law No. 157/2003. However, the *Corte di Cassazione* rejected the applicant's request and asserted Italian jurisdiction.

In the second case, A.C.I.S.M.O.M. objected before the *Tribunale di Roma* to the injunction requested by M.F. for the failure to pay welfare contributions concerning the employment relationship (Decision of 23 January 2009, No. 18951). Moreover, A.C.I.S.M.O.M. sought a preliminary ruling from the *Corte di Cassazione* on the question of jurisdiction under Article 41 of the Italian Code of Civil Procedure and stated that it did not share the previous jurisprudence of the Court denying jurisdictional immunity to A.C.I.S.M.O.M. Nevertheless, the *Corte di Cassazione* confirmed its previous judgment and reaffirmed Italian jurisdiction over the dispute.

The Court's decision to deny jurisdictional immunity to A.C.I.S.M.O.M. is based essentially on the following grounds. First, the Court compared the Order and A.C.I.S.M.O.M. to international organizations and emphasized the differences between situations in which jurisdictional immunity is invoked by States and those in which it is claimed by entities other than States. According to the Court these organizations operate with varying degrees of autonomy, pursuing their own goals, but lack the element of territoriality traditionally associated with sovereignty and protected under international law (para. 2.2, Order No. 18481). In the Court's view, the first problem associated with these entities is whether they should be granted personality under international law, and consequently the ability to establish legal relations with States. In the absence of specifically agreed definitions, their international personality has been often defined in terms of the immunities and privileges conferred on them. However, the capacity to participate to certain relations and to

be subject to international law on the basis of provisions contained in their constitutive treaties does not always grant such organizations equal status to States. It may be that such bodies are not necessarily guaranteed immunity from national jurisdiction (para. 2.2, Order No. 18481). Further, the Court affirmed that:

> "[A]s it is impossible to place States and international organizations on the same level, the privileges and immunities the latter enjoy cannot be derived from customary international law, but must be provided for by specific treaty provisions. […] Whether international organizations are entitled to immunity is therefore a question of interpretation of the so-called 'headquarters agreements', drawn up between the organization and the State in which it establishes its headquarters. Such agreements concern the overall legal status of the organization and better guarantee its self-regulation, in addition to giving certainty to its relationships with the host State, but they do not necessarily establish immunity, or otherwise they limit such immunity by reference to institutional functions or property destined for official use" (para. 2.2, Order No. 18481).

Second, the *Corte di Cassazione*, in the light of the above-mentioned considerations, examined the regulatory framework governing the activities performed in Italy by health facilities belonging to the Order and run by A.C.I.S.M.O.M. In particular, the Court considered the Agreement stipulated on 21 December 2000 between the Italian Government and the Order regulating the relationship between the National Health Service and hospitals belonging to the Order, whose activities are managed by A.C.I.S.M.O.M. on Italian territory. In the Court's opinion, an examination of this Agreement reveals that A.C.I.S.M.O.M.'s activities: (a) are entirely governed by the national and regional healthcare services; (b) are subject to monitoring and supervision by the Italian authorities; and (c) may not fall outside Italian jurisdiction (paras. 2.7-2.8, Order No. 18481). Moreover, the Court maintained that:

> "[T]he recognition of A.C.I.S.M.O.M.'s international personality is based on Article 13 of the Agreement of 21 December 2000 (under which all disputes arising between the Parties on the interpretation and application of the Agreement shall be settled amicably or through diplomatic means). However, this recognition does not *per se* imply immunity from national jurisdiction for which a treaty provision is necessary" (para. 2.6, Order No. 18481).

Consequently, in the *Corte di Cassazione*'s view, "the denial of jurisdictional immunity to A.C.I.S.M.O.M. derives from the lack of a specific treaty provision required by the extra-territorial nature of the entity in question" (para. 2.8, Order No. 18481).

The rulings under review are the latest step in a gradual erosion of the jurisdictional immunity of the Order. Italian courts (in particular the *Corte di Cassazione*) have always accorded the special status of a sovereign international law subject to the Order, equal in all respects to a foreign State with which Italy has diplomatic relations. For instance, in 1935 the *Corte di Cassazione* held in *Nanni v. Pace and Sovereign Order of Malta* that the Order "was an international legal person, existing independently of the national sovereignty of the Italian State" (for the Italian text, see RDI, 1935, p. 369 ff.). Moreover, in 1991, in *Sovereign Order of Malta v. State Financial Administration*, the Court of Cassation affirmed that – in line with its established case law – the Order of Malta (since it possesses its own independent organization recognized by Italy and other States) enjoys peculiar subjectivity in international law with regard to the implementation of its institutional aims and thus also in the Italian order. This subjectivity derives from the regulation of automatic adaptation sanctioned by Article 10(1) of the Constitution and is supported by the normal prerogatives enjoyed by States due to their sovereignty (*Corte di Cassazione*, Judgment of 5 November 1991, No. 11788, IYIL, Vol. VIII, 1988-1992, 39 ff.).

It appears that the Order has always drawn its right to immunity from State jurisdiction as well as to fiscal exemption from this "functional personality", and has extended it to those public entities (i.e. A.C.I.S.M.O.M.) through which the Order pursues its institutional aims. The *Corte di Cassazione* initially granted the Order absolute immunity from jurisdiction by virtue of the customary principle *par in parem non habet jurisdictionem* (see, e.g., *Corte di Cassazione*, Order of 6 June 1974, No. 1653, IYIL, Vol. II, 1976, p. 328 ff., with a comment by Gaja; *Corte di Cassazione*, Order of 18 March 1999, No. 150, IYIL, Vol. IX, 1999, p. 154 ff., with a comment by Iovane; *Corte di Cassazione*, Order of 12 November 2003, No. 17087, IYIL, Vol. XIV, 2004, p. 343 ff., with a comment by De Vittor). More recently, the *Corte di Cassazione* has followed a more cautious trend and reaffirmed Italian jurisdiction over disputes concerning the patrimonial aspects of labour relations stipulated by A.C.I.S.M.O.M. In so doing, the Court has applied the principle of the *jure imperii* limitation that has developed with regard to foreign States.

Nevertheless, in these recent judgments, while denying the jurisdictional immunity of the Order over the specific dispute, the Court has continued to firmly assert the sovereignty of the Order and its entitlement to the legal treatment due to foreign States with which Italy enjoys normal diplomatic relations. Furthermore, it claimed that the "theory that the Order of Malta enjoys sovereign privileges is unanimously shared by legal scholars" (see, e.g., *Corte di Cassazione*, Order of 12 November 2003, No. 17087, *cit*.; *Corte di Cassazione*, Judgment of 3 January 2007, No. 5, unreported).

However, the above-mentioned tendency has been heavily criticized by many international law scholars as having no support in the principles of international law (see Conforti, "Sui privilegi e le immunità dell'Ordine di Malta", Foro It., 1990, Vol. I, p. 2597 ff.; Focarelli, *International Law as a Social Construct*,

Oxford, 2012, p. 217 ff.). Indeed, while Italian courts have frequently recognized the jurisdictional immunities of the Order, most States ignore it or expressly reject its claim to sovereign prerogatives (see CONFORTI, *cit*., p. 2597 ff.; TREVES, *Diritto internazionale. Problemi fondamentali*, Milano, 2005, p. 164 ff.). Some scholars wholly reject the idea of the Order enjoying international personality. In particular, it has been argued that the Order is dependent on the Holy See, as held by a Cardinals' Tribunal of the Holy See in 1953, hence it lacks independence (besides territory) as a requirement for statehood. It has also been contended that the privileges of the Order are not granted by international law, but are recognized by virtue of *comitas gentium* or by the domestic law of certain States (see, among others, CASSESE, *Diritto internazionale*, Bologna, 2006, p. 132 ff.; and FOCARELLI, *cit*., p. 217 ff.).

Regardless of the old controversy between the proponents and opponents of the international personality of the Order, what should be strongly supported is that the Order does not enjoy the status of a sovereign entity and, consequently, cannot be granted the same privileges and prerogatives that are usually accorded to foreign States under customary international law.

The Sovereign Military Order of Malta is an organization founded at the beginning of the twelfth century, linked to the Holy See and committed to medical, humanitarian and charitable assistance. In the past, the Order ruled over Rhodes (1310-1522) and Malta (1530-1798). Today it does not rule over any territory. Therefore, one should agree with those scholars affirming that the term sovereign is not to be taken literally and should not lead anyone to believe that the Order is a State under international law, or still less "sovereign" over a territory. Although the Order has maintained diplomatic relations with many countries over the centuries, this in itself is no guarantee of sovereign status (see FOCARELLI, *cit*., p. 217 ff.; COX, "The Acquisition of Sovereignty by Quasi-States: The Case of the Order of Malta", Mountbatten Journal of Legal Studies, 2002, p. 26 ff.).

Given the aforementioned opinions, the solution reached by the *Corte di Cassazione* in the rulings under review is much more consistent with current international practice and doctrinal opinions. By equating both the Order and A.C.I.S.M.O.M. to international organizations, the Court has correctly denied their jurisdictional immunity due to the absence of a specific treaty provision. Indeed, the immunity of international organizations is usually considered to be based upon explicit provisions in treaties and agreements. It is debatable whether this also applies to the United Nations and certain other similarly important international organizations, but it is nonetheless valid for the overwhelming majority of them (see PAVONI, "Human Rights and the Immunities of Foreign States and International Organizations", in DE WET and VIDMAR (eds.), *Hierarchy in International Law: The Place of Human Rights*, Oxford, 2012, p. 78 ff.; DE BELLIS, *Le immunità delle organizzazioni internazionali dalla giurisdizione*, Bari, 1992, p. 62 ff.).

The sources of privileges and immunities of international organizations are diverse, ranging from constituent instruments to domestic legislation. Constitutional

texts generally do not deal in great detail with privileges and immunities, and the general tendency has been to supplement the basic texts by a further instrument. It has often been found necessary to conclude a bilateral agreement with the host State in whose territory the headquarters or other offices of the organization area situated. In the absence of a treaty obligation, a State is under any duty to concede privileges and immunities to an international organization. In a few countries, some governments and national courts consider that international organizations were entitled to jurisdictional immunity under customary international law. Nevertheless, it seems difficult to regard such positions as representing the general opinion of States on this issue (see SANDS and KLEIN, *Bowett's Law of International Institutions*, London, 2009, p. 490 ff.; for a minority – albeit authoritative – opinion, see CONFORTI, *Diritto internazionale*, 9th ed., Napoli, 2013, p. 278, stating that, as a matter of fact, "nowadays, it is believed that an international organization enjoys immunity under an autonomous customary international norm").

Furthermore, the solution reached by the *Corte di Cassazione* in the present decisions seems to be coherent with its recent case law regarding disputes over the jurisdictional immunities of international organizations. In particular, the Court has explained that international organizations might be endowed with a restricted international capacity enabling them to achieve their specific and limited purposes, which cannot be compared to the purposes pursued by a State. Their position as international subjects can therefore by no means be deemed comparable with that of States. This means, as a consequence, that the customary rule *par in parem non habet jurisdictionem* is not applicable to all international entities. As it is impossible to place States and international organizations on the same level, the privileges and immunities the latter enjoy can only arise from specific agreements (see, e.g., *Corte di Cassazione*, Order of 18 March 1999, No. 149, IYIL, Vol. IX, 1999, p. 155 ff., with a comment by IOVANE; *Corte di Cassazione*, Order of 28 October 2005, No. 20995, IYIL, Vol. XV, 2005, p. 319 ff., with a comment by DE VITTOR) (the full Italian text of Order No. 18481 is published in RDIPP, 2011, p. 459 ff.; the full Italian text of Order No. 11513 has not been published).

SUSANNA VALENTI

Criminal jurisdiction of the receiving State over an extraordinary rendition committed on its territory by diplomatic, consular and military agents of the sending State – Diplomatic functions under Article 3(1)(b) of the Vienna Convention on Diplomatic Relations of 18 April 1961 – Consular functions, grave crime and immunity from the jurisdiction under Articles 5(1), 41(1) and 43(1), respectively, of the Vienna Convention on Consular Relations of 24 April 1963 – Official duty and jurisdiction over military personnel serving overseas under Article VII of the Agreement between the Parties of the North Atlantic Treaty Regarding the Status of Their Forces of 19 June 1951 – Crime of torture

Corte di Cassazione (Sez. V penale), 29 November 2012, No. 2009
Adler and others v. Corte d'Appello di Milano (the "Abu Omar case")

Corte d'Appello di Milano (Sez. III penale), 1 February 2013, No. 747
Castelli, Medero, Russomanno v. Tribunale di Milano (the "Abu Omar case")

On 29 November 2012, the *Corte di Cassazione* presented the reasoning for the decision handed down on 19 September of the same year in relation to the so called "*Abu Omar* case". The facts, as well as their judicial developments throughout the Italian criminal justice system, deserve to be briefly recalled to place the *Cassazione*'s landmark decision in the right perspective.

An Egyptian *imam* residing in Italy as a political refugee, Abu Omar, was kidnapped in Milan by a CIA (Central Intelligence Agency) team in February 2003 and then clandestinely transferred to Egypt, where he allegedly suffered torture. This operation – a perfect example of extraordinary rendition – was part of a wider US programme, established in 1995 and repeatedly confirmed by the subsequent presidential administrations, which provided the CIA with extra-judicial powers for the apprehension and inter-State transfer of suspected terrorists worldwide. The alleged support of the Italian military intelligence (SISMI) to the CIA personnel involved in the case, as well as the domestic law implications thereof, are not covered by this commentary.

A two-fold factual circumstance contributed to the relevance of the case from an international law point of view. First, at the time of the events, three out of the twenty-six CIA agents charged with the crime of abduction (an offense punishable up to 10 years under Article 605 of the Italian Criminal Code) were accredited as diplomats and two held the status of consular staff in Italy. Second, a US colonel, stationed at the US airbase in Aviano as chief security, was also among the defendants for authorizing the use of the airport facilities to fly Abu Omar out of Italy.

Against the above background, judges from three different levels of the Italian criminal system were confronted with two key questions closely pertaining to international law: (1) whether CIA agents, who at the time of the crime were also accredited as officials of the US diplomatic and consular service in Italy, enjoyed immunity from the criminal jurisdiction of the Italian courts; (2) whether Italy had jurisdiction over the US colonel who was in command of, and gave access into, the Aviano air base.

The first instance decision by the *Tribunale di Milano (Sez. IV penale*, *Public Prosecutor v. Adler and others*, 1 February 2010, No. 12428, IYIL, Vol. XX, 2010, p. 413 ff., with a comment by Serra) resulted from *in absentia* proceedings (permitted under Article 420 *quater* of the Italian Code of Criminal Procedure). Starting from the consideration that the abduction was carried out within the ambit of the *diplomatic function* of "protecting in the receiving State the interests of the sending State", as set forth by Article 3 of the Vienna Convention on Diplomatic Relations (VCDR) of 18 April 1961, the *Tribunale* concluded that the three CIA agents ac-

credited as diplomats could not be prosecuted due to the existence of an *absolute jurisdictional immunity* from criminal, civil, and administrative jurisdiction for acts performed while exercising their functions, an immunity that would continue to have effect even *after* the completion of the diplomatic mission.

The argument used for the diplomats was then extended to the CIA agents holding consular status; but for them, the *Tribunale* held that they were prosecutable and punishable even if they had committed the crime in the exercise of their functions. This was so because, as the judge reasoned, for consular agents a more limited criminal immunity exists, which must be excluded for a "grave crime", i.e. a crime punishable by deprivation of liberty for a term of up to five years as prescribed by Article 3 of Law No. 804/67, which explains and interprets Article 41 of the Vienna Convention on Consular Relations (VCCR) of 24 April 1963.

The *Tribunale* identified the key-rule to decide on whether it could proceed against the US colonel in Article VII of the Agreement between the Parties of the North Atlantic Treaty Regarding the Status of Their Forces of 19 June 1951 (NATO SOFA). In interpreting that provision, it reconstructed the criteria which govern the application of the domestic criminal law to visiting forces: under para. 2(b), the receiving State is given *exclusive* jurisdiction with respect to offences which violate its own law, but not the law of the sending State; under para. 3(a)(ii), where a crime violates the law of both jurisdictions, a *concurrent* jurisdiction is established with the host State having primacy with respect to all cases except offences arising out of the performance of "official duty" by the sending State's personnel. Based on this analysis, the judge developed the reasoning which led to the assertion of the Italian exclusive jurisdiction and the rejection of the written claim by the US government that any conducts by the US colonel were done in the performance of his *official duty* and that, as a consequence, the sending State, and not the receiving State, had the primary right of jurisdiction.

Appeal proceedings were initiated against the *Tribunale*'s decision by, among others, the legal counsels of all non-appearing US defendants. The second instance decision was handed down by the *Corte d'Appello di Milano (Sez. III penale*, *Adler and others v. Tribunale di Milano*, 15 December 2010, No. 3688, IYIL, Vol. XXI, 2011, p. 351 ff., with a comment by SERRA) again further to *in absentia* proceedings. The *Corte d'Appello* did not review the part of the *Tribunale*'s verdict which had elaborated on the concepts of diplomatic function and immunity from jurisdiction. In fact, due to a procedural error (i.e. the defendants were wrongly summoned as "absconders" also after the first instance decision had dismissed charges against them) the positions of the three CIA agents enjoying diplomatic status were singled out and referred to adjudication through separate proceedings (for which see at the end of the present note). Regarding the other non-appearing defendants, the *Corte d'Appello* increased the original sentences of the lower court by substantially upholding its judgment, though with some significant interpretive twists.

As regards the two double-hatted CIA-consuls, the appeal judges considered Article 41(1) VCCR not relevant to the case because the concept of "grave crime"

can operate (by means of coercive measures like arrest or custody) only as a *temporary* limitation to the consul's personal inviolability, without prejudice to the wider immunity from jurisdiction enjoyed under Article 43(1) ("[c]onsular officers […] shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions"). However, the Court specified that Article 43(1) VCCR could not shield the defendants from the criminal jurisdiction because the abduction of a person was exceeding the typical ambit of the consular function as defined by Article 5 VCCR, i.e. protecting in the receiving State the interests of the sending State within the limits permitted by international law.

In relation to the US colonel, the *Corte d'Appello* confirmed the *Tribunale*'s decision on the exclusive jurisdiction of the host State, yet opted for a different reasoning. The Court noted that the decisive question was not whether the US judicial authorities were willing to prosecute the crime but whether the concerned conduct was lawful under the concrete circumstances in which it materialized. To this end, it was acknowledged that depriving someone of his personal liberty was indeed a crime under Article 134 US Uniform Code of Military Justice (UCMJ). However, this alone could not substantiate the case for concurrent jurisdiction under Article VII(3)(a) NATO SOFA simply because Article 134 UCMJ, on *kidnapping*, required among the constitutive elements of the crime, that the defendant had acted not only *wilfully* but also *wrongly*. Hence, for the Court, the conduct performed to the detriment of Abu Omar could not fall under the hypothesis of *kidnapping*, as defined by the US military penal law, but under the concept of *extraordinary rendition*, certainly not prohibited, but actually permitted, and even ordered, by the US special legislation on counterterrorism in force at the time of the crime. Furthermore, the Court observed that, even admitting, for the sake of argument, that the colonel's conduct was punishable under Article 134 UCMJ, then Article VII(3)(a) NATO SOFA still could not provide a legal basis for the US to assert their primary jurisdiction. None of the hypotheses therein was, in fact, relevant to the case: letter (i) refers to offences solely against the property or security of the sending State and letter (ii) to offences arising out of any act or omission done in the performance of official duty. Whilst letter (i) was plainly not pertinent, letter (ii) could not serve the purpose because the contested actions were performed not as a member of the US air force but, rather, by abusing this quality, and thus not in the performance official duty, yet outside and against it. According to the Court, the nexus between the fact committed (abduction) and function (being a member of the US air force) was of a merely occasional nature (i.e. the fact was committed *on the occasion of the duty* but not *in the performance* thereof).

The *Corte d'Appello*'s decision was challenged before the *Corte di Cassazione*, among others, by the legal counsels of the CIA-consuls and the US colonel.

The defence of the US colonel reiterated the three main arguments already used before the first instance and the appeal judges: (1) the facts attributed to the defendant constituted an offence also within the American legal system where "kidnap-

ping" is punishable under Article 134 US UCMJ; therefore, the US, as the sending State, should have primary jurisdiction in accordance with the NATO SOFA concurrent jurisdiction scheme; (2) authorizing the use of the American airbase in Aviano to transfer Abu Omar to Egypt (via Germany) amounted to "official duty" and, as a consequence, should entail the primary right of jurisdiction of the sending State under the NATO SOFA; (3) the *Cassazione*'s decision on the so called "Greenpeace case" (*Corte di Cassazione (Sez. III)*, *Thierry Bonne*, Decision of 27 January 1997, Cassazione Penale, 1997, pp. 3055-3056) established a precedent, ignored by the trial courts, according to which the Italian judge would be bound to dismiss charges against US military personnel any time the willingness of both the host and sending States concur in the assertion of the latter's primary jurisdiction; based on this precedent, trial judges should have given effect to the opinion of Italian Minister of Justice which, on 23 October 2009, had agreed to the assertion of primary jurisdiction made by the US Military Prosecutor in Aviano on 23 September 2009.

The *Cassazione* rejected all the arguments presented by the US colonel's defence by confirming the appeal decision with some minor additions. With reference to the first argument, the reasoning of the appeal judges was reported almost *verbatim* with the adverb "wrongly" pointed out to as the key missing element ("element of injustice", para. 20.4) to qualify an extraordinary rendition as "kidnapping" under the meaning of Article 134 US UCMJ with all the consequences, in terms of concurrent jurisdiction, foreseen in Article VII(3)(a) NATO SOFA. In relation to the second argument, the Court simply noted that the circumstance of being "on duty" while performing the contested criminal conduct is "relevant only in case of concurrent right of jurisdiction as foreseen under Article VII(3) [NATO SOFA], and not also in case of exclusive jurisdiction" (para. 20.6). Finally, as far as the "Greenpeace case" is concerned, the Court observed that, whilst the hypothesis of concurrent jurisdiction allows for a waiver of jurisdiction by the competent political-administrative authorities of the host State,

> "[T]he hypothesis of [...] exclusive jurisdiction [...] does not allow for any waiver of jurisdiction for the simple and decisive reason that the performed act is not foreseen as a crime in the sending State and, therefore, [...] the waiver [...] would have the only twofold effect of preventing the establishment of the truth on a fact [...] committed on the Italian territory and granting impunity to the author of that fact" (para. 20.7).

Two main arguments were brought in before the *Cassazione* by the defence of the CIA agents enjoying consular status: (1) the extraordinary rendition of Abu Omar was performed in the exercise of the consular function, as defined by Article 5 VCCR – whereby the legitimate objective of protecting in the receiving State the interests of the sending State would be subject only to the respect of international

law (to which extraordinary renditions would be irrelevant) and not also of the (Italian) domestic law (for which extraordinary renditions certainly amount to a crime); (2) a customary international norm would exist according to which an individual who is a State organ cannot be subject to the jurisdiction of another State for *iure imperii* conducts performed on the territory of the latter (*par in parem non habet iurisdictionem*); as such, being the apprehension of Abu Omar a special mission ordered by the US government, the CIA agents, regardless of their consular status, should enjoy functional immunity from the criminal jurisdiction of the host State.

The first argument was rejected by the *Cassazione* with the following reasoning:

> "[Article 5 VCCR] can in no way be understood as a blank authorisation, based on which a consul can carry out any actions as long as they are in the interest of his sending State. And, in fact, […] Article 5 enumerates with precision some consular functions […] which are *typically administrative in nature*, being their main objective to favour the commercial activities of the represented State as well as to support its citizens any time they encounter difficulties in the host State. […] Many of the activities […] enumerated in […] Article 5 […] must be carried out *in accordance with 'the laws and regulations of the receiving State'*. Furthermore, letter (m) of Article 5 [VCCR] allows consuls to perform any other functions entrusted [...] by the sending State '*which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State*' […]" (para. 23.4, emphasis added).

It is commendable that the Court stressed the concept of "typicality" of the consular functions, according to which no abstraction is allowed from the ordinary understanding of the scope of consular functions as inferable from the list of administrative activities contained in Article 5 VCCR. The fact also deserves praise that the Court elaborated further on the ultimate purpose of such typicality by adding that the ambit of the immunity granted by the VCCR is of a strict interpretation by the judges of the host State because it entails limitations "to the sovereignty of the host State as well as to the principle of territoriality of criminal law" (para. 23.2). In this respect, the Court maintained that the VCCR balances the two principles of immunity and territoriality of criminal law insofar as it grants the "immunity [...] for crimes committed in the exercise of the consular functions, whilst all the other conducts not referable to such functions remain subject to the jurisdiction of the host State" (para. 23.2).

An aspect of the decision plausibly exposed to criticism is the use of domestic law (i.e. the provision of the Italian penal code on kidnapping) as the *primary* parameter to assess whether the contested conduct was a protected consular function; such a methodological approach reduced, to some extent, the international

stature of the decision. Too vague and somewhat misleading appears a statement of the Court on the *ancillary* role of international law as parameter of compliance:

> "The conclusions reached make it redundant […] to ascertain whether or not the kidnapping of Abu Omar […] amounts to a breach of international law, although it must be pointed out that the negative opinion of the applicant […] raises quite a few doubts when one takes into account the developments in *humanitarian law* and the content of Article 7 – crimes against humanity – of the Statute of the International Criminal Court" (para. 23.4, emphasis added).

In particular, and with all due respect, the reference to the Statute of the International Criminal Court (ICC) does not seem as relevant as the *Cassazione* believed; in fact, while "enforced disappearance of persons" and "torture" are explicitly listed among the acts by means of which a crime against humanity can be perpetrated (Article 7(2) ICC Statute), it remains that each of the listed acts must be "committed as part of a widespread or systematic attack directed against *any civilian population*" (Article 7(1) ICC Statute, emphasis added). However widespread or systematic they may be, the US extraordinary renditions do not target a particular civilian population but are directed to believed-to-be terrorists worldwide. As such, reference to international human right law (under which illegal deprivation of freedom and torture amount to crimes *per se*) could have been more pertinent than the one to international humanitarian law (in this sense, see the European Parliament Resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA, para. 5, which is quoted by the *Cassazione* at para. 20.5).

Much more relevant from an international law point of view appears, on the contrary, the reference made by the *Cassazione* to the crime of torture:

> "[T]he kidnapping of Abu Omar was executed to transfer the prisoner to a State – Egypt – where interrogation under *torture*, to which the Abu Omar was actually subject [...], was permitted. *The aim pursued by the kidnapping* is actually one of the objectives of extraordinary renditions and transforms the conduct performed by the defendants into a violation of *humanitarian law*, since torture is banned not only by the European law (1950 European Convention for the Protection of Human Rights and Fundamental Freedoms), but also by the UN treaties (1966 UN Covenant on Civil and Political Rights, 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment [CAT]). The reference to the UN Convention for the protection of all persons from enforced disappearance of 2007 is omitted because the latter was approved after the commission of

> the crime and, therefore, would not be applicable based on the principle of non-retroactivity of treaty law" (para. 23.7, emphasis added).

The recurrent confusion between humanitarian law and human rights law aside, the Court's decision laudably captured the link between the crime of kidnapping committed on the Italian soil and the subsequent torture suffered by the victim in Egypt. However, the legal implications of such a link could have been described more convincingly by qualifying the kidnapping as an act of *complicity in torture* (namely, the torture occurred at destination) under the meaning of the 1984 CAT (effective in the Italian legal system since 11 February 1989). Elements in support of the argument that renditions, as a *precursor to torture*, account to an international crime (and, specifically, a violation of a *jus cogens* norm) could have been inferred from the case law of the UN Committee against Torture, which explicitly considered the practice of extraordinary renditions as a breach of CAT (see *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003, 20 May 2005).

The second argument proposed by the defence of the CIA-consuls offered to the *Cassazione* the opportunity to review its previous position as defined in *Lozano* (decision of 24 July 2008, No. 31171, IYIL, Vol. XVIII, 2008, p. 346 ff., with a comment by Serra), where it had maintained the existence of a customary international norm granting functional immunity (*ratione materiae*) from the criminal jurisdiction of a foreign State to the individual-organ who performed *iure imperii* acts. In *Abu Omar* the *Cassazione* substantially disavowed the hermeneutic solution adopted in *Lozano*. The logical path followed by the last instance judges started from the consideration that "sovereign State immunity from the civil jurisdiction certainly exists as a customary principle of international law […]; however, no immunity from the criminal jurisdiction – which, needless to say, is only referable to persons and not to States – can be derived from it" (para. 23.7).

Having ruled out the existence of a parallel between civil and criminal jurisdiction, the Court went on in its reasoning by wondering whether, under customary international law, any other individual-organs of a sovereign State enjoy functional immunity from the criminal jurisdiction of foreign States apart from diplomatic and consular agents, Head of States, Heads of Government and Foreign Ministers. To this end, the Supreme Court briefly analyzed both the relevant doctrine and jurisprudence. Regarding the doctrine, the *Cassazione* noted that the scholars' opinion on the matter is very diverse with some authors plainly recognizing the existence of a custom on functional immunity of State agents, some others attaching to it a much narrower scope limited to the activities authorized by the foreign State on whose territory they are performed, and others still advocating that "the benefit of immunity is granted by *specific norms* only to some categories of individual-organs when exercising the functions typical of their office" (para. 23.7, emphasis added). The *Cassazione* considered this latter opinion as "the most correct one for it takes into account the developments of international relations as reflected, for instance, in the NATO SOFA and

the [VCCR]" (para. 23.7). For the Court, "the illustrated disharmony among scholars" would indicate that "a uniform and repeated practise on the matter is far from being indisputable" (para. 23.7). As a matter of fact, looking at the case law purportedly corroborating the existence of a customary norm on functional immunity, the *Cassazione* observed that: (1) only two of the numerous jurisprudential cases recalled in *Lozano* were relatable to the criminal law domain, having all the others a civil law connotation; (2) at a closer inspection, in one of these two cases (*Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*), Judgment of 4 June 2008, para. 194), the International Court of Justice had actually ruled against the recognition of a functional immunity to the concerned person; (3) even the only relevant jurisprudential precedent left (i.e. the case of the Canadian sheriff McLeod of 1841, for which see *British and Foreign State Papers*, Vol. 29, p. 1139) was much too dated and referred to a State, the US, whose practice has been so irregular ever since to allow for a smooth reconstruction of the norm in question. As to the Italian case law, the Court clarified that, with the exception of *Lozano*, criminal immunity of the foreign organ has only been recognized where specific international agreements of constitutional rank existed, such as the *Patti Lateranensi* with the Vatican State (see *Corte di Cassazione (Sez. V)*, *Marcinkus*, Decision of 17 July 1987, No. 180349, which recognized the lack of criminal jurisdiction over the managers of the Vatican bank *Istituto Opere Religiose*). Further to the above summarized reasoning, the Court concluded that:

> "[T]he practice developed so far on the matter is discontinuous to the extent that it is not possible to infer a general norm therefrom; and, as a matter of fact, the immunity from the foreign jurisdiction of the organs of the sending State is governed by specific treaties in the absence of which no immunity is, in principle, recognized by the national jurisdictional organs" (para. 23.7).

The Court also added that the circumstance that international treaties, such as SOFAs, are normally used to derogate from the principle of exclusive jurisdiction of the sending State in criminal matters is a clear indicator of the uncertainty about the existence of the customary norm on functional immunity for foreign State agents. In this respect, as correctly observed in legal literature, the only US military involved in the Abu Omar case grounded his appeal on the NATO SOFA and not also on a purported customary norm on functional immunity (see TONDINI, "Milano, Baghdad, Nuova Delhi: Le rotte incerte dell'immunità funzionale", Quaderni Costituzionali, Vol. 33, No. 1, 2013, forthcoming). This author notes that the requirement of a prior agreement between the territorial State and the sending State for the purpose of recognizing the immunity of the State agents has been affirmed also by the High Court of Kerala in *Enrica Lexie* (see *Massimiliano Latorre v. Union of India*, Decision of 29 May 2012, (2012) 252 KLR 794, para. 48), concerning the arrest, by the Indian authorities, of two Italian marines facing murder charges for accidentally killing two Indian fishermen, believed to be armed pirates,

within the Indian contiguous zone while serving as "vessel protection detachment" on board an Italian-registered commercial oil tanker).

The *revirement jurisprudentiel* of the *Cassazione* arguably heals the *vulnus* opened by the *Lozano* precedent and aligns the Italian case law with the prevailing international practice which has recently led the Special Rapporteur of UN International Law Commission to state:

> "There would […] appear to be sufficient grounds for talking of an absence of immunity [in a] situation where criminal jurisdiction is exercised by a State in whose territory an alleged crime has taken place, and this State has not given its consent to the exercise in its territory of the activity which led to the crime, and to the presence in its territory of the foreign official who committed this alleged crime" (ILC, *Second report on immunity of State officials from foreign criminal jurisdiction*, UN Doc. No. A/CN.4/631, 10 June 2010, para. 90).

Understandably, the *Cassazione* did not deal with the issue of the diplomatic immunity recognized by the first instance judge to the three CIA agents who enjoyed diplomatic status at the time of the kidnapping. In fact, as recalled above, due to formal irregularities concerning the instruments of notification, separate appeal proceedings had to be instructed for these three individuals, which culminated in the decision of the *Corte d'Appello di Milano* No. 747/2013 of 1 February 2013 (reasoning deposited on 14 February 2013).

The separate appeal judgment quashed the *Tribunale*'s conclusions as to the three US diplomats by considering them prosecutable and sentenceable *in absentia* (to six and seven year imprisonment). The reasoning of the appeal judges extensively relied, by analogy, on the arguments proposed by the *Cassazione* for the consular agents involved in the same case, and can be summarized as follows: (1) the three American appellants did not act as diplomats but simply as CIA agents; (2) even if, for the sake of argument, they had acted as diplomats, the facts contested to them (i.e. kidnapping of a suspect terrorist) could in no way be categorized as "diplomatic function" under the meaning of Article 3 VCDR, although fighting international terrorism is logically linkable to the wider objective of "[p]rotecting in the receiving State the interests of the sending State"; furthermore, the circumstance that the victim was kidnapped with the aim of being tortured in a third country made the appellants' conduct contrary also to "humanitarian law" (to be read as international human rights law), and thus not "within the limits permitted by international law", as required by Article 3 VCDR; and (3) no customary rule exists which would grant functional immunity to individuals-organs of a sending State acting *iure imperii* in the territory of the receiving State (see pp. 20-24).

While it is certainly commendable that the *Corte d'Appello* followed the path opened by the *Cassazione* as regards the notion of functional immunity, it cannot be ignored that an important opportunity was missed to point out some specific

aspects of diplomatic immunity. Contrary to consular immunity which is of a functional nature, diplomatic immunity is absolute for it pertains to the person of the diplomat as such also for acts *not* committed in the exercise of the official functions. It is precisely in this last respect that the appeal judges could have remarked, as correctly claimed by the prosecutor (p. 16), that the *diplomatic immunity lasts after the completion of the diplomatic mission only for acts committed in the exercise of the official functions, whereas for all the other acts it ceases with the completion of the diplomatic mission*. Such a distinction would have had two implications: first, taken alone, the circumstance that the three concerned CIA agents were no longer accredited as diplomats in Italy at the time of the proceedings could have made them amenable to prosecution and conviction for the kidnapping of Abu Omar, *an act committed during their tenure but definitely outside of their official functions*; second, the distinction could have better grounded the quite unsubstantiated statement of the *Corte d'Appello* according to which the three American appellants did not act as diplomats but simply as CIA agents.

The above observation aside, the *Corte d'Appello* could have developed further the opinion that the diplomatic immunity operates "within the limits permitted by international law" (Article 3(1)(b) VCDR). Originally meant to emphasize the obligation of the sending State not to interfere with the domestic affairs of the receiving State, this excerpt of the VCDR should be interpreted today as a call to protect the human being any time an international norm of a higher rank, such as *jus cogens* obligations (and prohibition of torture is definitely such), is allegedly breached by the concerned diplomat. Such a reading is indeed desirable for the progressive development of international law towards a more human rights-friendly configuration (the Italian text of the *Cassazione*'s decision No. 2009/2012 is available at: http://www.diritto24.ilsole24ore.com; the Italian text of the *Corte d'Appello*'s decision No. 747/2013 is on file with the author).

GIANLUCA SERRA

XI. TREATMENT OF ALIENS AND NATIONALITY

Diplomatic Protection – ILC's Draft Articles on Diplomatic Protection – State responsibility for failure to exercise diplomatic protection – Non-justiciability of political acts – Acts of high administration – Fundamental right to access to justice under Articles 24 and 113 of the Italian Constitution – Law No. 69/1987 ("Norms relating to the protection of the Italian merchant navy")

Corte di Cassazione (Sezioni Unite Civili), 19 October 2011, No. 21581
Il Tuo Viaggio srl v. Presidency of the Council of Ministers and others

Over the last decades, the characteristics of diplomatic protection have been undergoing significant changes (for an overview, see FLAUSS (ed.), *La protection*

diplomatique. Mutations contemporaines et pratiques nationales, Bruxelles, 2003). The most remarkable of these is undoubtedly the growing importance attributed to individual interests and, as a consequence, the greater amenability on the part of individuals to submit government decisions to judicial review (PERGANTIS, "Towards a 'Humanization' of Diplomatic Protection?", ZAÖRV, 2006, p. 351 ff., notably pp. 379-386). The judgment in question fits into this wider trend, insofar as it seems to affirm that Italian citizens (including Italian based corporations) are entitled to sue their government for failure to exercise diplomatic protection.

The facts of the case under review may be summarized as follows. The complainant (Il Tuo Viaggio srl) was an Italian shipping company, active in commercial transportation at sea between Italy and Morocco. The controversy arose when Morocco denied the renewal of authorization to cover this particular sea route. The Italian Government decided not to intervene with the Moroccan authorities, despite the company having objected that such a denial was in breach of the Agreement on Maritime Transport signed by Italy and Morocco on 15 April 1982 ("1982 Agreement"). The complainant sued the Presidency of the Council of Ministers, the Ministry of Infrastructures and Transportation, and the Ministry of Foreign Affairs before the Regional Administrative Tribunal of *Lazio*, seeking compensation for damages suffered due to their inaction. Notably, it argued that the competent national authorities did not adopt any of the measures envisaged by Law No. 69/1987 (entitled "Norms relating to the protection of the Italian merchant navy") in order to protect its interests abroad.

With Judgment No. 7278/2007, the Regional Administrative Tribunal rejected the claim. The company challenged this decision before the *Consiglio di Stato*, which dismissed the appeal on three grounds (Judgment No. 8719/2009). First and foremost, it denied having jurisdiction over government decisions regarding the exercise of diplomatic protection, since they were non-justiciable political acts. Second, it maintained that diplomatic protection could not have been exercised because domestic remedies had not been exhausted. Third, it affirmed that it was not possible to establish a causal link between the damage suffered by the company and the alleged omissions by the Italian Government (see the commentary by CHECHI, *Il Tuo Viaggio s.r.l. v Presidency of the Council of Ministers and ors*, Judgment of 19 October 2011, No 21581, International Law in Domestic Courts (ILDC) 1891 (IT 2011), available at: <www.oxfordlawreports.com>).

The company then lodged an appeal with the *Corte di Cassazione*. In its complaint, the appellant stated that the *Consiglio di Stato*'s refusal to exercise jurisdiction amounted to an infringement of Articles 24 and 113 of the Italian Constitution, which guarantee, respectively, the fundamental rights to access to justice and to obtain judicial review of administrative acts. The *Corte di Cassazione* granted the appeal, as it held that the *Consiglio di Stato* misapplied the principle of non-justiciability of political acts. In the Court's opinion, this mistake was due to the erroneous characterization of the powers conferred by Law No. 69/1987 as diplomatic protection:

> "The decision by the *Consiglio di Stato* is questionable insofar as it decided the case by making reference to the institution of diplomatic protection – which, as defined by Article 1 of the ILC's Draft Articles on Diplomatic Protection(as well as by the International Court of Justice in the *Diallo* judgment of 24 May 2007) 'consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility'. The *Consiglio di Stato*, indeed, assumed that the acts adopted under Article 1 of Law No. 69/1987 should be deemed as non-justiciable foreign policy decisions. Yet, it failed to consider that, in this hypothesis, the Ministry of Infrastructures and Transportation (formerly the Ministry for the Merchant Navy) acts on a proposal by a technical commission (not a political one), with a view to defending the national merchant navy and regulating maritime trade pursuing the national interest. Measures undertaken under that law, thus, lie outside the category of political acts *stricto sensu*, as they are acts of (high) administration, falling under a more specific national policy about maritime commerce" (para. 4.2).

Therefore, when it comes to the exercise (or otherwise) of powers conferred by Law No. 69/1987, the Executive is not free of any constraint. On the contrary, in this matter "there are inalienable legitimate interests whose protection wholly falls within the province of judicial authorities. These interests are similar to the 'legitimate expectations' which in common law systems surround the exercise of powers which stem, as in this case, from customary international law" (para. 5). The Court, therefore, annulled the challenged ruling and remanded the case to the *Consiglio di Stato*. In fact, it maintained that the other grounds of dismissal were mere *obiter dicta* and should be reconsidered in the light of the quashing decision (para. 6).

Quite predictably, this judgment attracted some attention among international law scholars (see, in particular, PUSTORINO, "Protezione diplomatica e interesse legittimo dell'individuo", RDI, 2012, 156 ff., and CHECHI, *cit.*). Commentators converge in criticizing the Court's distinction between the institution of diplomatic protection, the exercise of which would be non-justiciable, and the measures envisaged by Law No. 69/1987, which would be regularly amenable to judicial review (PUSTORINO, *cit.*, p. 157; CHECHI, *cit.*, A2-A3). Indeed, Law No. 69/1987 aims to regulate government intervention *vis-à-vis* foreign States in protection of the national merchant navy. This is nothing less than diplomatic protection, as defined by the ILC and the ICJ (both paradoxically quoted by the Court to support its reasoning). Moreover, the Court itself admitted that the case at hand revolved around "the exercise of powers [stemming] from customary international law". On these prem-

ises, it is difficult to see why the enactment of domestic legislation regulating the exercise of diplomatic protection should transform the latter into something else.

While the Court's failure to subsume the powers in question into the category of diplomatic protection is open to criticism, in other respects the judgment is certainly laudable. First, as mentioned above, it contributes to strengthening the view whereby, in the field of diplomatic protection, States are no longer free to ignore the individual interests involved. Such a view, which is corroborated by growing domestic practice (see BASSU, *La rilevanza dell'interesse individuale nell'istituto della protezione diplomatica*, Milano, 2008, p. 80 ff.), has been partly endorsed by the ILC's Draft Articles on Diplomatic Protection, whose Article 19 recommends States to "give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred". The relevance of this judgment is not impaired by the deficiencies which characterize the Court's analysis of diplomatic protection. Rather, its (misleading) reliance on national legislation (viz. Law No. 69/1987) confirms that, for the time being, the protection of individual interests in this matter has an overwhelmingly "internal" origin (PUSTORINO, "Recenti sviluppi in tema di protezione diplomatica", RDI, 2006, p. 68 ff., p. 86). Second, it is worth noting that the Court questioned the *Consiglio di Stato*'s decision to qualify the government conduct at issue as a non-justiciable political act, and preferred to resort to the notion of "act of high administration". Under Italian administrative law, acts of high administration – unlike "political acts" – are subject to judicial review, albeit in a milder form, since judicial scrutiny is limited to verifying the absence of manifest irrationality in the exercise of public powers. This shows how issues traditionally deemed to be non-justiciable because of their connection with foreign affairs may be handled by judges without excessively intruding into government discretion. As has been suggested elsewhere (AMOROSO, *Insindacabilità del potere estero e diritto internazionale*, Napoli, 2012, p. 105 ff.; ID., "A Fresh Look at the Issue of Non-Justiciability of Defence and Foreign Affairs", Leiden JIL, 2010, p. 933 ff., p. 943), this may occur if courts apply a low standard of review, limiting themselves to assessing whether the Executive has acted in bad faith or in gross negligence (or, tantamount to the same thing, whether its action was affected by manifest irrationality). Such an approach – especially in areas where the government is not bound by human rights obligations (such as diplomatic protection) – would strike a suitable balance between the need to grant political organs an adequate scope for manoeuvre in foreign affairs and the judicial duty to preserve the rule of law (enshrined, in the Italian legal system, in Articles 24 and 113 of the Constitution) (for the Italian text of the decision see RDI, 2012, p. 258 ff.).

DANIELE AMOROSO

Law of nationality – Acquisition of nationality jure sanguinis – *Convention on Certain Questions Relating to the Conflict of Nationality Laws of 12 April 1930 – Article 15 of the Universal Declaration of Human Rights – Declaration on nationality of a Member State annexed to the Maastricht Treaty – European Convention on Nationality of 6 November 1997– Multilateral treaties as evidence of customary international law – Granting nationality as a question pertaining to the domestic jurisdiction of States – Law No. 91/1992 ("New norms on citizenship")*

Corte di Cassazione (Sez. I civile), 27 April 2011, No. 9377
Ministry of the Interior v. B.M. and B.S.

In the case under discussion, the *Corte di Cassazione* dealt with a classical theme of public international law, i.e. the law of nationality. While not offering a significant contribution to the development of law in this field, this judgment stands out in its accurate analysis of international law issues.

The (rather complex) factual background of the case may be described in the following terms. The complainants, B.M. and B.S., are the daughters of Bi.Ma., who was the adopted son of B.B. The latter was a former Italian national. During the Second World War, B.B. had been in Lebanon, a State which was not on friendly terms with Italy. He renounced Italian citizenship and acquired that of Lebanon in order to avoid persecution. At the time of this change of citizenship, Bi.Ma. was underage. Several years later, in 1995, Bi.Ma. successfully applied for Italian citizenship under Law No. 91/1992 ("New norms on citizenship"). At that time, however, his daughters B.M. and B.S. were already of age, and thus were not entitled to become Italian nationals. Nevertheless, they resolved to sue the Ministry of the Interior before the *Tribunale di Roma* with a view to obtaining full recognition of their status as Italian nationals. To support their claim, they produced a form of identification issued by the Lebanese authorities in 1950, in which it was certified that Bi.Ma. was an Italian citizen. On the basis of this document, they argued that their father was already an Italian citizen when they were born, with the consequence that they had acquired Italian nationality *jure sanguinis*. In this respect, the subsequent granting of nationality in 1995 was legally redundant.

The *Tribunale di Roma* rejected the claim. And the judgment was later reversed by the *Corte d'Appello di Roma* on the basis of two arguments. On the one hand, the Court of second instance held that the document issued by the Lebanese authorities constituted satisfactory evidence of the Italian nationality of Bi.Ma. On the other hand, it stressed that the waiver of Italian nationality by B.B. could not affect the *status civitatis* of his adopted son, Bi.Ma, who was still underage at the time (Judgment No. 2101/2010, unreported). The Ministry of the Interior impugned this decision before the *Corte di Cassazione*. Specifically, the appellant (i) underlined the irrelevance of Lebanese laws on nationality (and, consequently, of the certifications issued by Lebanese authorities) on the question of whether an individual is an Italian citizen; and (ii) argued that Bi.Ma., when he came of age, did not apply for

Italian naturalization under Articles 8 and 12 of Law No. 555/1912 (then in force). The *Corte di Cassazione* granted the appeal on both grounds. As only the first one raised international law issues, we will focus solely on this aspect of the question. On this, the Court agreed with the Ministry as to the irrelevance, in the case at hand, of the recognition of Italian citizenship by a foreign authority. This conclusion was reached as the outcome of an in-depth analysis of international legal materials, which it is worth recalling:

> "According to well-established principles of international law, 'it is for each State to determine under its own law who are its nationals' and, as a consequence, 'any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State' (Articles 1 and 2 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws, The Hague, 12 April 1930). Before the 1930 Hague Convention, moreover, the Permanent Court of International Justice had already maintained that, as a matter of principle, issues of nationality fall within the domestic jurisdiction of States (Advisory Opinion, 7 February 1923, *Nationality Decrees Issued in Tunis and Morocco*). Later, the International Court of Justice (Judgment, 6 April 1955, *Nottebohm*) upheld that international law entrusts each State with the task of regulating the attribution of its nationality and according naturalization in conformity with its own legislation, subject to respect for the principle of effectiveness for the purposes of recognition at international level. More recently, the European Convention on Nationality, adopted on 6 November 1997, which entered into force on 1 March 2000, confirmed that 'each State shall determine under its own law who are its nationals' (Article 3(1)), whereas the Declaration on Nationality of a Member State annexed to the Maastricht Treaty (Declaration No. 2) provides that 'the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned'" (para. 2.2.).

After emphasizing that the law of nationality largely falls within the domestic jurisdiction of States, the Court was at pains to specify that, also in this area, State freedom is limited by human rights concerns, with particular reference to the need to avoid statelessness. In this regard, the Court observed:

> "Without claiming completeness, it is necessary to take into account the fundamental importance of Article 15 of the Universal Declaration of Human Rights, whereby everyone has the right to a nationality, with the consequence that 'no one shall be arbitrarily deprived of his

> nationality nor denied the right to change his nationality'. This entails a negative limit to State freedom, since, while each State is allowed to naturalize an alien, it will not be able to deprive him of the nationality he has acquired on the basis of the domestic legislation of another State" (para. 2.2).

In the light of the foregoing, the Court concluded that Lebanon was not empowered to attribute Italian nationality to Bi.Ma. and consequently that the identity document issued by the Lebanese authorities was completely immaterial. Therefore, it quashed the challenged judgment and rejected the plaintiffs' claims.

As mentioned above, one of the striking features of this judgment is its attention to international sources as well as to the practice of international tribunals. Indeed, it is somewhat uncommon to run into a domestic judgment where the case law of the ICJ and especially that of the PCIJ are so pertinently employed in order to justify the *ratio decidendi*. The decision in question, thus, represents an encouraging sample of the growing confidence of Italian judges (and, perhaps, also of Italian lawyers) in dealing with international practice.

In this regard, it is interesting to highlight the method followed by the *Corte di Cassazione* in order to identify the customary regime governing the law of nationality. As we have seen, the Court limited itself to quoting two multilateral treaties not ratified by Italy (the 1930 Hague Convention and the 1997 European Convention on Nationality), Declaration No. 2 annexed to the Maastricht Treaty, the Universal Declaration of Human Rights, and international case law. No mention was made, however, of State practice *stricto sensu* (diplomatic acts, foreign legislation, domestic judgments, etc.), which – at least from an orthodox perspective – should be the paramount point of reference when ascertaining the existence of a customary norm. As one author convincingly pointed out, this "blending [of] institutional sources, abstract treaty provisions, and judicial precedents to infer the existence of customary norms" is typical of contemporary approaches by national courts to customary law and signals a trend towards ever more judge-made international law (IOVANE, "Domestic Courts Should Embrace Sound Interpretive Strategies in the Development of Human Rights-Oriented International Law", in CASSESE (ed.), *Realizing Utopia. The Future of International Law*, Oxford, 2012, p. 607 ff., pp. 610-612).

A final, minor critical remark is in order. The Court draws from Article 15 of the Universal Declaration of Human Rights the principle whereby States are not allowed to deprive an individual of the nationality he (or she) has obtained from another State. This is not completely accurate, as Article 15 is meant to prevent States from arbitrarily denaturalizing their own nationals, not those of other countries (see, on this issue, ADJAMI and HARRINGTON, "The Scope and Content of Article 15 of the Universal Declaration of Human Rights", Refugee Survey Quarterly, 2008, p. 93 ff.) (the Italian text of the decision is published in RDIPP, 2012, p. 181 ff.).

DANIELE AMOROSO

XII. HUMAN RIGHTS

Reproductive rights – Artificial insemination from donor – Effects of the judgments of the European Court of Human Rights in the domestic legal order

Corte Costituzionale, 7 June 2012, No. 150 (order)
S.B. and F.B. v. X; P.C. and R.G. v. UMR; E.P. and MM. v. X.

By this decision the *Corte Costituzionale*, requested to rule on the legitimacy of the ban against Artificial Insemination from Donor (AID), ordered, without ruling on the merit of the case, the return of the file to the referring judges. The Court asked them to re-examine the issues in light of the judgment of the Grand Chamber of the European Court of Human Rights (ECtHR) in the case *S.H. and others v. Austria*.

The Italian Constitutional Court declared that the Grand Chamber decision (in a case similar to the one pending) "influences the meaning of the treaty rules as interpreted by *a quibus* judges and is a *novum* which directly affects the question of legitimacy". First of all, it is important to stress that by this decision for the very first time the Constitutional Court sent back the request to the referring judges after a decision of the ECtHR (a decision not relating to Italy, but to a third Member State). The question concerned one of the most controversial issues of Italian Law on artificial fertilization, the ban of gametes donation in case of absolute infertility of one of the two partners, provided for by Article 4(3) of Law No. 40/2004 ("Norms concerning medically assisted procreation"). It is important to remember that several issues of the abovementioned law, which introduced restrictions and bans heretofore foreign to the Italian previous legal system, have been considered in contrast with human rights by the Italian Constitutional Court itself with decision No. 151/2009 – with respect to limitations concerning the number of embryos to produces and to implant – and by the ECtHR with decision of 28 August 2012 *Costa and Pavan v. Italy*, which concerns the preimplantation genetic diagnosis (see PAVONE, "Medically Assisted Procreation and International Human Rights Law", *supra* in this volume).

In the present case, the question of legitimacy had been raised – with three different orders – by the tribunals of *Firenze*, *Catania* and *Milano* under Article 117(1) (concerning the obligations to respect international treaties) and Article 3 (concerning the principle of equality) of the Constitution – in relation to Articles 8 and 14 of the European Convention on Human Rights (ECHR) (concerning respectively the right to private and family life and the principle of non-discrimination). The tribunals of *Catania* and *Milano* raised a question also in respect of Articles 2 (concerning fundamental rights), 29 and 31 (family life) and 32 (the protection of health) of the Constitution.

All three orders relied on the judgment of 1 April 2010 of the First Section of the ECtHR (*S.H. and others v. Austria*). The rules at the basis of this case are actu-

ally slightly different from the Italian ones. While the latter completely prohibits heterologous fertilization, the Austrian legislation prevents ova donation but admits *in vivo* fertilization with donor sperm. The First Section was invited to decide on the two forbidden aspects of the Austrian Law and concluded in both cases (the banning of fertilization with donated ova and of *in vitro* fertilization with donor sperm) for the infringement of Article 8 in conjunction with Article 14, finding the legislation at stake inconsistent and disproportionate. It should be pointed out that the First Section stated that "notwithstanding the wide margin of appreciation afforded to the Contracting States, the legal framework devised for this purpose must be shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention" (para. 74) (on this decision see CAMPIGLIO, "Il divieto di fecondazione eterologa all'esame della Corte europea dei diritti umani", DUDI, 2010, p. 624 ff.).

When requested to rule on the referral of the Austrian Government (supported by Germany and Italy, third party interveners), the Grand Chamber overturned the verdict of the First Section (on this decision see PAVONE, *cit.*, and VIVIANI, "Il diritto di fondare una famiglia, la fecondazione assistita e i ... passi indietro della Grande Camera della Corte europea dei diritti umani", DUDI, 2012, p. 156 ff.). In examining the margin of appreciation to be assured to the States, the ECtHR placed great emphasis on the fact that the case raised "sensitive moral and ethical issues" and on the lack of a *consensus* in the subject matter at the time the final internal decision was adopted (Judgment of the Austrian Constitutional Court of 14 October 1999).

In our opinion, the recognition of such a wide margin of appreciation is questionable: the Court does not take into account that, in its own words, "when a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted" (para. 95) (the complex issue concerning the margin of appreciation is much debated in literature: see, among others, LETSAS, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford, 2007). Actually, in the present case, the Grand Chamber, although admitting an "emerging *consensus*" on this point, does not give due importance to it as it did in the past. For instance, in *Goodwin v. United Kingdom* (Judgment of 11 July 2002, para. 85) the Court recognized the right to marry of a post-operative transsexual thanks to a mere "*continuing international trend* in favor of […] legal recognition of the new sexual identity" of transsexuals (emphasis added). In the final part of the Grand Chamber judgment, however, the Court added that "this area, in which the law appears to be continuously evolving and which is subject to a particularly dynamic development in science and law, needs to be kept under review by the Contracting States" (para. 118), prefiguring possible future *revirements* of its case law.

This short analysis of the judgment of the Strasbourg Court, which was the basis for the restitutions of the acts to the remitting Italian judges, leads us to raise some criticisms in relation to such a decision from the Constitutional Court, because by doing

so the Italian Court basically seems to want to postpone the analysis of a sensitive issue (on this point see RUGGERI, "La Corte costituzionale, i parametri 'conseguenziali' e la tecnica dell'assorbimento dei vizi rovesciata (a margine di Corte cost. n. 150 del 2012 e dell'anomala restituzione degli atti da essa operata con riguardo alle questioni di costituzionalità relative alla legge sulla procreazione medicalmente assistita)", Consulta OnLine, available at: <http://www.giurcost.org/decisioni/2012/0150o-12.html>, where the author speaks of "Pilate tactics" of the Court, since in his opinion the clear objective of the *Corte Costituzionale* was to "gain time").

In our opinion, in fact, a careful reading of the judgment of the Grand Chamber should cause the lower courts to ask whether the absolute prohibition of heterologous fertilization actually complies with the ECHR, considering scientific and legislative developments. This in light of the last paragraph of the decision, quoted above, and of what the Strasbourg Court has stated in several occasions, that the ECHR is "a living instrument, to be interpreted in present-day conditions" (see, e.g., *X and others v. Austria*, Decision of 19 February 2013, para. 139). Indeed, from the reports cited in the judgment of the Grand Chamber in *S.H. and others v. Austria*, it is clear that at present, within the Member States of the Council of Europe, there is an absolute prohibition to use donor sperm only in Italy, Turkey and Lithuania (Austria, as we have seen, allows sperm donation for *in vivo* fertilization), while there is an absolute ban on egg donation in Italy, Turkey, Lithuania, Austria, Germany, Croatia, Norway and Sweden. This means that only a minority of the 47 Member States which are parties to ECHR prohibits heterologous fertilization. Furthermore, these studies indicate that it is possible to infer a rapid evolution of European legislation (within a few years, several countries changed their legislation, admitting the use of AID).

In light of this, it seems possible to deduce a *consensus* – or at least an "emerging *consensus*" – on the admissibility of heterologous fertilization. It should also be noted that the existence of an European *consensus* was one of the key points, together with legislative inconsistency, behind the recent condemnation of Italy in the case *Costa and Pavan* concerning another aspect of Italian legislation on assisted reproduction, the pre-implantation diagnosis (PID) (on this judgment see PAVONE, *cit.*). Thus we believe that the remitting judges would be fully justified in once again raising the issue of Constitutional legitimacy for violation of Article 117, paragraph 1, asserting the incompatibility of Article 4 of Law No. 40/2004 with Article 8 ECHR on account of scientific and legislative developments subsequent to the period referred to in the judgment of the Grand Chamber (see also PELLIZZONE, "Sentenza della Corte europea sopravvenuta e giudizio di legittimità costituzionale: perché la restituzione degli atti non convince. Considerazioni a margine dell'ord. n. 150 del 2012 della Corte Costituzionale", available at: <http://www.rivistaaic.it/articolorivista/sentenza-della-corte-europea-sopravvenuta-e-giudizio-di-legittimit-costituzionale>).

Even if the lower courts refuse to attribute significance to the "time factor", they could still invoke the illegitimacy of the ban with respect to the other constitutional

rules that were not examined in substance. In fact, as mentioned above, the tribunals of *Catania* and *Milano* raised three additional questions (apart from the non-observance of international obligations, covered by Article 117 of the Constitution). First of all, they alleged that prohibition of AID violated Articles 2, 29 and 31 of the Constitution, because couples suffering from complete infertility could not enjoy the right to respect for their private and family life and the right to self-determination. In addition, such a ban would violate Articles 3 and 31 Constitution, because, without justification, "couples with limits of procreation are treated differently only by virtue of the type of disease affecting one of the partners". The law would in addition be contrary to the principle of reasonableness because, despite the objective set out in Article 1 ("helping to resolve problems arising from reproductive sterility or human infertility"), it could not apply to those who suffer from absolute infertility and need it more than all the other couples (on this point see REPETTO, "Ancora sull'ordinanza n. 150 del 2012 della Corte costituzionale: alcune ragioni per fare di necessità virtù", available at: <http://www.dirittocomparati.it/2012/06/ancora-sullordinanza-n-150-del-2012-della-corte-costituzionale-alcune-ragioni-per-fare-di-necessit%C3%A0-.html>).

Finally, the ban under consideration would be contrary to Articles 3 and 32 of the Constitution, since it undermines "the psychophysical integrity of infertile or sterile couples" and unreasonably limits physician freedom to propose the most effective cure. For this purpose, the remitting judges invoked the abovementioned decision of the Constitutional Court No. 151/2009 (which, in relation to Law No. 40/2004, declared unconstitutional the prohibition to produce up to three embryos, and the obligation to implant them all at once). In that judgment, the Constitutional Court, after recognizing as a constitutional value the "protection of the needs of procreation", stated that "in the field of therapeutic practice, the basic rule is to be the autonomy and responsibility of the doctor, who, with the consent of the patient, makes the necessary professional decisions".

As follows from the above, the questions raised by the tribunals of *Catania* and *Milano* basically concerned in part the same complaints lodged with the Strasbourg Court, in part purely domestic rules. The latter, obviously can be reviewed by the Constitutional Court (and it is questionable that the Court has not already examined them in the ruling herein being reviewed; on this point see RUGGIERI, *cit.*). As for the former, it is to be stressed that the Court held, starting from the judgments No. 348 and 349 of 2007 (see CATALDI and IOVANE, "International Law in Italian Courts 1999-2009: An Overview of Major Methodological and Substantive issues", IYIL, Vol. XIX, 2009, p. 19 ff.), that the ECHR should be interpreted "in accordance with the rulings of the Court specifically established to interpret and apply such norms" and that observance of international obligations can never imply limiting or derogating from human rights ensured under domestic laws (as provided for by Article 53 ECHR).

In our opinion, such a conclusion would be justified taking into account the importance of the values to be secured: the protection of the need to procreate, and in

general to found a family; the right to self-determination; the prohibition of unjustified discrimination; the principles of equality and reasonableness; the protection of health and of autonomy and responsibility of physicians). This also in the light of the fact that Law No. 40/2004 regulates those aspects that could have had an impact on the interests of children born with such a technique (we refer in particular to the rule prohibiting the denial of paternity: see Article 9 Law No. 40/2001) or on human dignity in general (in this respect the ban on marketing gametes is to be appreciated: see Article 12(6) Law No. 40/2004).

An additional issue emerging from the order under examination concerns a much debated topic in literature, that is, the effects of the judgments of the Strasbourg Court in respect of Member States which are not parties to the dispute. It is generally known that Article 46 ECHR, in providing that the "High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties", says nothing as to the legal consequences for States not directly concerned. In literature much has been written as to whether, in addition to the effect of *res judicata*, an effect of *res interpretata* should also be recognized (see on this point CATALDI, "Gli effetti delle sentenze della Corte europea dei diritti umani nel sistema della Convenzione", in FRAGOLA (ed.), *La cooperazione fra corti in Europa nella tutela dei diritti dell'uomo*, Napoli, 2012, p. 51 ff., and the literature cited therein).

The Strasbourg Court has not yet taken a clear position on this point. In its judgment of 18 January 1978, *Ireland v. UK*, it stated that the "Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties" (afterwards, this point was recalled in several decisions: *Guzzardi v. Italy,* 6 November 1980, para. 86; *Karner v. Austria,* 24 July 2003, para. 26; and *Rantsev v. Cyprus and Russia*, 7 January 2010, para. 197). Even more significant is the case *Opuz v. Turkey* (Judgment of 9 June 2009), where the ECtHR stated:

> "[...] [B]earing in mind that the Court provides final authoritative interpretation of the rights and freedoms defined in Section I of the Convention, the Court will consider whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other States".

Recognition of the value of *res interpretata* was then put forward in the Memorandum presented in view of the Interlaken Conference by the President of the Court, Jean Paul Costa, and again, although in a more nuanced way, in the Final Declaration of the Conference of Interlaken of 19 February 2010, in which it is stated:

> "[The] Conference […] calls upon the States Parties to commit themselves to […] taking into account the Court's developing case law, also

with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system" (para. 4).

However, in the Brighton Declaration of 20 April 2012, the position regarding this issue is further attenuated by the fact that it notes the determination (and no longer "the commitment") to "[e]nabling and encouraging national courts and tribunals to take into account the relevant principles of the Convention, having regard to the case law of the Court, in conducting proceedings and formulating judgments".

On the domestic level, as it has been observed, more and more national supreme courts "s'inspirent et s'appuient" on the case law of the Strasbourg Court (see DRZEMCZEWSKI, "Quelques réflexions sur l'autorité de la chose interprétée par la Cour de Strasbourg", in *La conscience des droits. Mélanges en l'honneur de Jean-Paul Costa*, Paris, 2011, p. 243 ff., who – in the light of a report prepared by the Legal Service of the Parliamentary Assembly of the Council of Europe – cites the Dutch Hoge Raad, as well as the Cypriot and British higher courts, the Belgium *Cour de Cassation*, the Slovak and Polish constitutional courts, the Swiss Federal Court). One must wonder at this point if such an approach on the part of the Member States might be considered a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", pursuant to Article 31(3)(b) of the Vienna Convention on the Law of Treaties of 1969. Symptomatic of such a practice are also the resolutions of the Committee of Ministers, indicating the tendency of States to follow the case law of the Court as a whole (and not only the judgments concerning them). Since "the attribution of the force of *res interpretata* would ensure the full application of the ECHR and would avoid many claims" (see CATALDI, *cit*.), the recognition – at least *de facto* – of such a value by our Constitutional Court is very welcome (the Italian text of the decision is available at: <http://www.giurcost.org/decisioni/2012/0150o-12.html>).

ANNA LIGUORI

XVII. RELATIONSHIP BETWEEN MUNICIPAL AND INTERNATIONAL LAW

Relationship between State and Regions – Implementation of non-ratified international agreements by Regions – Constitutional legitimacy of Article 1(2)(h) of Law No. 32 of 4 December 2009 passed by the Puglia Region – Article 117(2)(a) of the Italian Constitution – Article 117(5) of the Italian Constitution – Article 6(1) of Law No. 131 of 5 June 2003

Corte Costituzionale, 22 October 2010, No. 299
Presidente del Consiglio dei Ministri v. Regione Puglia

The above judgment regards the issue of regional competence to implement and execute international treaties concluded by the State. The *Corte Costituzionale*, upon the request of the *Presidente del Consiglio dei Ministri*, was called upon to decide on the constitutional legitimacy of several articles of Law No. 32, which deals with the rules for the reception, civil coexistence and integration of immigrants, which was passed by the *Puglia* Region on 4 December 2009. The Court's decision deserves particular attention and is of significance in international law for its interpretation of Article 1(2)(h) of the law, which stipulated:

> "Within the scope of its competences, the Region contributes to implementing the principles expressed […] in the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, adopted by the General Assembly of the United Nations on 18 December 1990 and which entered into force on 1 July 2003".

According to the *Presidente del Consiglio dei Ministri*, since the Convention has not yet been ratified by Italy, the above-mentioned article would appear to violate Article 117(2)(a) of the Italian Constitution that gives the central government exclusive legislative power in the field of foreign policy and the international relations of the State.

Conversely, the *Puglia* Region claimed the constitutional legitimacy of this article on two grounds. First, the article expressly referred to the limits of regional competence. Second, it did not refer to the international convention in detail, but merely recalled the "principles" that it contains. In particular, the Region maintained that these "principles" have already been incorporated into the Italian legal system as customary international law under Article 10 of the Italian Constitution, and that such principles anyway correspond to the international obligations arising from the ILO Convention and the Protocol against the smuggling of migrants, supplementing the UN Convention against Transnational Organized Crime. Therefore, the *Puglia* Region was acting in accordance with Article 117(1) of the Constitution, which states: "In performing their legislative powers, the State and the Regions shall respect the Constitution and obligations arising from international law and European Union law".

The *Corte Costituzionale* considered that the issue raised by the *Presidente del Consiglio dei Ministri* was well-founded. For this reason, the Court rejected the Region's allegations and annulled the above-mentioned article. In this respect, the Court held that:

> "This Court has already affirmed that Regions cannot implement international agreements prior to their ratification, if the latter is 'required under Article 80 of the Constitution – also because, in this case, the international agreement certainly lacks effectiveness within the Italian legal system –' unless such agreements have not been con-

> cluded in simplified form and concern matters of regional competence (Decision No. 379/04) […]" (para. 5.1).

Moreover, taking into account the second argument put forward by the Region, the Court added the following:

> "The letter of the article at issue and the wide, generic and basically undefined reference to the implementation of the principles expressed in the Convention – 'in the light of the general hermeneutic criterion of the "non-redundant legislator"' (Decision No. 226/10) – make clear that, contrary to the Region's deduction, it is not possible to strictly interpret the article, assuming that it would make applicable only the generally recognized norms of international law (Article 10, para. 1, of the Constitution) […]" (para. 5.1).

The Court's judgment seems to be in line with the well-established interpretation of Article 117(5) of the Constitution which, after the 2001 constitutional reform, now reads as follows:

> "The Regions and the autonomous Provinces of Trento and Bolzano, in matters of their competence, shall participate in decisions intended to form Community laws and shall arrange for the enforcement and the execution of international agreements and the acts of the European Union, in compliance with the procedural standards established by State laws regulating the exercise of the substitutive authority in cases of non-compliance".

According to the most authoritative doctrine (see, *inter alia*, CONFORTI, *Diritto internazionale*, 9th ed., Napoli, 2013, p. 375; CASSESE, *Diritto internazionale*, Bologna, 2006, p. 303 ff.), the above-cited article would not invalidate the principle whereby incorporation of treaties concluded by the State into the national legal system falls within the exclusive competence of the central power (*Corte Costituzionale*, *Giunta provinciale di Bolzano*, Decision No. 46/1961, para. 3). This approach is based on the following considerations. First, according to Article 5 of the Italian Constitution, the Republic is "one and indivisible". Secondly, international agreements need to be applied within the whole national territory. And most importantly, it is established practice that the order of execution of a treaty be enacted through an ordinary law (usually, the same legislative measure that provides for ratification; see CATALDI, "In tema di rapporti tra autorizzazione alla ratifica e ordine di esecuzione del trattato", RDI, 1985, p. 520 ff.). Moreover, it has been said that, from an international law perspective, responsibility lies with the State as a whole, even if the breach of an international obligation is attributable to an act by a Regional Authority (see Article 4 of the ILC Draft Articles on State

Responsibility). It follows that Regions should arrange for the enforcement and the execution of international agreements only after such agreements have already been formally ratified (when so required by the Constitution) and incorporated by statute. Clearly, there should be no doubt about the exclusive competence of Regions regarding the execution of treaties concluded by themselves, by virtue of Article 117(9) of the Constitution (see RONZITTI, *Introduzione al diritto internazionale*, Torino, 2009, p. 251).

It must be said that the letter of Article 6(1) of Law No. 131 of 5 June 2003 (the so-called *Legge La Loggia*), which implemented the 2001 constitutional reform, caused some uncertainty among scholars (see SCISO, "I 'nuovi' poteri esterni delle Regioni", in CATALDI and PAPA (eds.), *Formazione del diritto comunitario e internazionale e sua applicazione interna*, Napoli, 2005, p. 187 ff.). This article reads: "The Regions and the autonomous Provinces of Trento and Bolzano, in matters within their competence, shall arrange *directly* for the enforcement and execution of *ratified* international agreements […]" (emphasis added). However, according to the literature quoted above, the addition of the word *directly* in the above article could not be interpreted as implying the Regions' competence to adopt an "order of execution" for international agreements concluded by the State, even if it involves matters within their competence (for the opposite view see, e.g., D'ATENA, "La nuova disciplina costituzionale dei rapporti internazionali e con l'Unione europea", Rassegna parlamentare, 2002, p. 927 ff.). The adverb does not even appear in the constitutional text.

Furthermore, reference to the "ratified" international agreements seems to support the Court's conclusion in the present case. Indeed, although the Court has already stated that the above article should also include agreements set out in simplified form (*Corte Costituzionale*, *Presidente del Consiglio dei Ministri v. Regione Emilia Romagna*, 6 December 2004, No. 379, IYIL, Vol. XV, 2005, p. 353 ff., with a comment by TERASSI; and CANNIZZARO, "Le relazioni esterne delle Regioni nella legge di attuazione del nuovo Titolo V della Costituzione", RDI, 2003, p. 759 ff.), the *Puglia* Region, used the challenged article to try to implement a convention which had been formally adopted, but not yet ratified by the State. For this reason, the Court annulled the article on the basis of the above-cited Article 117(2)(a) of the Constitution.

Although it is formally correct, the conclusions reached by the Court appear excessively rigid. The Convention to which the challenged article referred to has not been ratified by Italy. This means that the agreement is "certainly lacking effectiveness within the Italian legal system" and thus it is not legally binding upon the State. More important, the above article did not contain any *specific* measure of implementation and made reference only to the "principle" contained in the Convention. In fact, it could hardly be qualified as an "order of execution" (of a non-ratified treaty) enacted by the Region. In view of this, two remarks are appropriate. First of all, even if the Region had wrongly implemented the Convention, no international responsibility would have arisen for the State. In fact, as stated above,

a non-ratified agreement has no legal value within the national territory. Second, it has to be asked whether a *simple reference* to the principles expressed in an international convention could really imply such a serious consequence, namely the annulment of the article concerned.

It is my opinion that the reference could have been interpreted as a *mere* reminder of the Convention's principles. Therefore, these could have functioned only as an "interpretative benchmark" for the Region's action in the field of immigration, without affecting the exclusive power of the central State in the field of foreign policy and international relations.

In conclusion, the *Corte Costituzionale*, in the present judgment, could have taken a more flexible approach by taking into account the arguments produced by the Region, which, in any case, made explicit reference to the limits of its legislative competence, showing deference, at least indirectly, to the principles referred to in Article 117(2)(a) of the Constitution (the Italian text of the judgment has been published in Giur. Cost., 2010, p. 3867 ff.).

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