

The Italian Way: A Blend of Cooperation and Hubris

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Abstract

The aim of this paper is to discuss how the relationship between the Italian Constitutional Court (ICC) and the European Court of Human Rights (ECtHR) has developed in the last ten years. The paper focuses on the Italian narrative for fundamental rights protection, pinpointing the different phases the ICC has gone through in developing its approach. The paper argues that the ICC has literally invented and shaped, from nothing, a meaningful dialogue, and that overall the outcomes of this dialogue may be considered commendable, although not always irenic. Recent rulings show clearly that the ICC wants to play the role of a networking facilitator, taking decisions of the ECtHR seriously but also prescribing to ordinary judges that they should not be taken to extremes, nor used superficially.

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I. The Implementation of the ECtHR's Decisions: Rights versus Democracy?

We do not live in a reconciled constitutional world. More and more, judicial power is the object of harsh criticism, both at the national and international level. Italy is no exception. Critiques orbit mainly around three intertwined concepts concentrated in the pivotal role held by judges: democracy, legitimacy and responsibility.¹

At the national level, so-called judicial activism is severely criticized for filling the many gaps left by faltering legislative power,² even though domestic courts equally decide in name of the people and are grounded on the authority of the democratic sovereign. As concerns Italy, the crisis of legislative power has been mainly due to the globalization phenomenon; the political choice to leave to the judiciary fundamental decisions in sensitive matters like religious freedom and the right to refuse medical treatments; and the worsening quality of the parliamentary class.³ Ordinary courts have correspondingly widened the scope of their powers through direct application of the Constitution, through the so-called “Constitution-oriented construction of statute law” – initially suggested by the Constitutional Court itself to lighten its own workload, and subsequently taken much further – and through a (European Convention on Human Rights-oriented construction of statute law), also endorsed on many occasions by the Constitutional Court.⁴

While enlarging the border of their own competence, the courts have often found themselves in conflict with political power and – it is worth adding – they have not always been up to this more ambitious task. In the last twenty years, the Constitutional Court has been subject to political overexposure, with a considerable increase in attention since 2011, attracting accusations of “politicization” when its rulings have not met the expectations

¹ Among many see *A. Bickel*, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, 1962.

² In this essay I use this term as an equivalent for “parliaments”.

³ *M. Luciani*, *Dottrina del moto delle costituzioni e vicende della Costituzione repubblicana*, in: *Osservatorio sulle fonti*, 11.2.2017, <<http://www.osservatoriosullefonti.it>> (last accessed 30.6.2017).

⁴ The most blatant example is judgment n. 49/2015, which in other respects may be seen as a (questionable) attempt to modulate national recognition of the influence of ECtHR precedents. On the relationship between ordinary judges and the ICC, see *A. Pugiotto*, *Dalla “porta stretta” alla “fuga” dalla giustizia costituzionale? Sessant’anni di rapporti tra Corte e giudici comuni*, in: *Quaderni costituzionali*, 2016, 149.

of certain political parties or of the most influential interest groups.⁵ The Constitutional Court replied to this criticism by emphasizing the “collegial” nature of the Court’s rulings. Indeed, not only does this nature characterize the phase when a decision is adopted, but it has a deeper meaning, going well beyond a mere respect for procedural rules: the Court speaks in the public arena only with a single voice – that of its rulings. So, its judgments are the result of a deliberative process that redresses the potential (alleged) political biases of single judges.

International courts, in turn, are accused of overlapping with both the national judicial and legislative powers, producing problematic and conflicting outcomes without any democratic source of legitimacy to rely upon. As *Massimo Luciani* – current President of the Italian Association of Constitutional Law Professors – noted, the passage from a *national sovereign* to a *trans-national anti-sovereign* is not yet completed, and its outcome is far from certain.⁶

International courts, like the ECtHR, found their legitimacy, first of all, on institutional and procedural features and, secondly, on the rights and values they are designed to protect. As scholars have already pointed out, nowadays human rights have risen to the status of a foundational concept of public law, replacing the traditional concept of sovereignty.⁷ This might work as a powerful and continually-renewable source of legitimacy: it appeals to the same values that traditionally underpin national constitutions and, as long as international courts are seen as fulfilling a task comparable to

⁵ Former President of the Court, *F. Gallo*, acknowledged this political over-exposure in his introduction to the “2012 yearly report on the constitutional case-law”, available at <<http://www.cortecostituzionale.it>> (last accessed 30.6.2017). In sum, this political over-exposure went hand in hand with judicial activism. Three outcomes of this recent attitude are worth pinpointing: 1) the upholding of bold political initiatives enacted by some relevant decrees-law adopted by the Government; 2) filling in the critical political voids left by national Parliament, acting partly in concert with the President of the Republic; and 3) confronting European and international courts by strengthening both the national constitutional position and compliance with the different Charters. For a more detailed analysis see *G. D’Amico/D. Tega*, 1993-2013: la Corte costituzionale tra giurisprudenza e politica, in: S. Sicardi/M. Cavinno/ L. Imarisio (eds.), *Vent’anni di costituzione (1993-2013): Dibattiti e riforme nell’Italia tra due secoli*, 2015, 551. For both an historical overview of the development of Italian constitutional adjudication and on the “Italian Style” in global constitutional adjudication, see *V. Barsotti/P. G. Carozza/M. Cartabia/A. Simoncini*, *Italian Constitutional Justice in Global Context*, 2016.

⁶ *M. Luciani*, *Costituzionalismo irenico e costituzionalismo polemico*, in: *Giurisprudenza costituzionale*, 2006, 1643.

⁷ *A. von Bogdandy/I. Venzke*, *In Whose Name? A Public Law Theory of International Adjudication*, 2014.

those of constitutional courts, the former can share at least a part of the legitimacy resources belonging to the latter.

This accounts for much of the ECtHR's success and the expansion of its role. After all, its judges consider that their Court largely plays the same role as a constitutional court,⁸ although it is highly questionable if this comparison is entirely correct. The ECtHR has enhanced its position in particular by treating the Convention as a "living instrument": this has allowed the ECtHR to overcome both the relatively limited number of rights in the Convention (compared to the new generation of documents on human rights) and the vagueness of the clauses concerning the limits that can be imposed on each right by the public authority.

By using this doctrine together with the doctrine of "European consensus", the Court evolved from an instrument conceived to prevent another world war and to strengthen democracy in the face of totalitarianism,⁹ to the most relevant adjudicator on contemporary rights claims. Beside dealing with classical rights such as the right to vote and retrospective legislation, the ECtHR has considered cases of reproductive rights, gender identity, sexual orientation issues, the end of life, the right to life, hate speech, and protection of personal data. This shift was possible not only due to the democratic processes which took place after the fall of the Berlin wall but also to faltering national Parliaments who seemed incapable of giving effective answers to these kinds of claims and aspirations.¹⁰ Indeed, some legal scholars define the ECtHR as an anti-majoritarian institution, while Parliaments are considered as majoritarian institutions – the bearers of sectional claims – and perceived as antagonistic to the interests of minorities within the society.¹¹

⁸ See *G. Raimondi*, current President of the ECtHR, *Corte di Strasburgo e Stati: dialoghi non sempre facili*. Intervista a cura di Diletta Tega, in: *Quaderni costituzionali*, 2014, 463.

⁹ *K. Vasak*, author of one of the very first French commentaries on the Convention, *La Convention européenne des droits de l'homme*, 1964, 281.

¹⁰ The ECtHR decision *Lautsi v. Italy* of 3.11.2009 (n. 30814/06) has been considered a clear example of this anti-majoritarian attitude, considering that the Italian Parliament failed to replace the royal decrees of 1924 and 1928 that still recall (even if ambiguously) the crucifix' display in classrooms.

¹¹ It is well known that *Raz* argued that the democratic legitimation of judicial power is grounded on human rights protection *versus* contingent political majorities (see *J. Raz*, *The Morality of Freedom*, 1986). From the same perspective, see also *R. Dworkin*, *Freedom's Law. The Moral Reading of the American Constitution*, 1996. *Dworkin* recognized that this perspective implies a paradox: on controversial topics – deeply discussed over the centuries by philosophers, politicians, citizens – it is necessary to accept what judges rule, although they decide without a spectacularly special level of knowledge.

This enhancement has gone hand in hand with the growing skepticism of national governments towards the ECtHR. Let us think about Protocol 15 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (not yet in force, adding to the preamble of the ECHR the terms “subsidiarity” and “margin of appreciation”): it represents the answer to some States’ concerns about the supposed judicial activism of the Strasbourg Court, in particular regarding the “living instrument” doctrine. After all, the declared aim of the Brighton Conference in 2012 was to affirm the necessity for the Court to be deferent towards the solutions adopted by States, at the legislative or judicial stage, to comply with the ECHR. Thus, it is not surprising that the protection of rights, after having played, for many decades, a founding role as a source of legitimacy, is now showing a reverse, conflicting face, putting into question the role of the courts and challenging the promising doctrine of “international constitutionalism” or even of “cosmopolitan law and cosmopolitan justice”.

This kind of co-habitation between both levels’ judges provokes a state of *interpretative and adjudicative competition* among courts, i.e., it influences the role of judges, alters both the nature and the scope of the questions they must resolve and goes so far as to condition, and occasionally undermine, the authority of their decisions.¹² Therefore, national courts must adapt their nature, reasoning, and normative references and preferences, as well as the perception of their own institutional role. Constitutional courts, in particular, are fully embedded in a fabric made of national constitutions, European Union (EU) law, and international conventions – something that is even more evident in the domain of fundamental rights. This interdependence affects their responsibilities.¹³ On the one hand, they are charged with new duties because to some extent they are called to serve as EU law and ECHR adjudicators; on the other hand, some of their traditional competences are to be adjusted to a more complex legal order.

Approaches to this scenario have been different, yet often coexisting: constitutional courts may at times be reluctant, cooperative, defensive, or challenging.¹⁴ All these attitudes, for instance, coexist in the case-law of the

¹² M. Póiares Maduro, Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism, in: J. L. Dunoff/J. P. Trachtman (eds.), *Ruling the World: Constitutionalism, International Law, and Global Governance*, 2009, 358.

¹³ See V. Ferreres Comella, *Constitutional Courts and Democratic Values. A European Perspective*, 2009.

¹⁴ See M. Cartabia, I diritti in Europa: la prospettiva della giurisprudenza costituzionale italiana, in: *Riv. Trimestr. Dir. Pubbl.* (2015), 29.

ICC, with only one attitude definitively outmoded: that of indifference.¹⁵ In particular, ICC case-law clearly shows the will to secure domestic compliance with the jurisprudence of both the ECtHR and the European Court of Justice (ECJ). Its attitude is never deferential; on the contrary, the ICC is well aware of the complexity of the national legal system and of the importance of explaining that complexity to both European Courts. In particular, concerning the ECtHR, in the last ten years the ICC has literally invented and shaped, from nothing, a meaningful dialogue, and overall the outcome of this dialogue has been commendable, although not always irenic. While from time to time one could rightly have had the impression that the ICC applied the law of retaliation rather than implemented a fruitful dialogue, the majority of the decisions show a genuine effort to converge.

To address the complexity of the issue, I will describe and discuss the relationship between the ECtHR and the ICC by pinpointing five different attitudes that the ICC has shown over time:¹⁶ the Reluctant Season; the Turning Point; the Clashes; the Enforcement of the ECtHR's case-law; and the ICC as a Networking Facilitator. With regard to the ECtHR, the development of a supra-national system of rights-protection has ostensibly triggered a form of judicial dynamism in Italy. On some occasions, this has corrected older national tendencies, improving the rights' constitutional defense; on others, there have been clashes with ICC case-law, some of them still unresolved, as will be shown. The current Italian narrative on these topics is paradigmatic of both the well-known tensions stirring within European constitutional democracies and of a more fruitful dialogue.¹⁷

¹⁵ As described by *S. Cassese*, *La giustizia costituzionale in Italia: lo stato presente*, in: *Riv. Trimestr. Dir. Pubbl.*, 2012, 603. *Cartabia* already in 2009 asked for a more lively judicial dialogue, criticizing in particular the indifferent attitude of the ICC towards the ECJ: see *M. Cartabia*, *Europe and Rights: Taking Dialogue Seriously*, in: *Eu Const. L. Rev.* 5 (2009), 5.

¹⁶ See, for a critical appraisal of the relationship between the ICC and the ECtHR in the protection of fundamental rights, *D. Tega*, *I diritti in crisi*, 2012.

¹⁷ I believe that a focus on national experience may avoid an analysis that is too abstract and detached from reality, a result that is too superficial. As *von Bogdandy* wrote: "The issue might appear differently from another place. The world looks different from Beijing, Cairo, or Quito but also, within the European legal space, from Coimbra, Heidelberg, or Oxford, not least because different constitutions apply [...]. Given the political, cultural, and ideological diversity, any contribution that purports to be universal should be viewed with suspicion." See *A. von Bogdandy*, *Common Principles for a Plurality of Orders: A Study on Public Authority in the European Legal Area*, in: *International Constitutional Law Review* 12 (2014), 981.

II. *Argentoratum locutum, iudicium non finitum*: A National Narrative for Fundamental Rights Protection

In his opinion in *Secretary of State for the Home Department v. AF (No. 3)*,¹⁸ Lord Rodger coined the motto “*Argentoratum locutum iudicium finitum*” (“Strasbourg has spoken, the case is closed”) to signify the practical consequences of taking into account Strasbourg jurisprudence, as required by the Human Rights Act. This very telling phrase can be reappraised to summarize the ICC’s stance on the subject.¹⁹ If it is true that the ICC considers the Strasbourg court the sole interpreter of the ECHR, it is equally true that the ICC has no intention to abdicate its role as the sole interpreter of the national Constitution. A decision by the Strasbourg Court does not end the case, as the ICC insists on playing a central role in “coordinating” the penetration of Strasbourg decisions within the constitutional system at large.

The attitude of the ICC towards Strasbourg case-law has changed greatly over time. While a sort of reluctant approach characterized more than fifty years of its jurisprudence, everything changed in the span of a few years, after the constitutional reform in 2001 provided that legislative power had to be exercised in compliance with the constraints deriving from EU and international obligations.

1. The Reluctant Season

From as far back as 1960, reference to the ECHR, as well as other international human rights treaties, has been a constant feature, in some sense or another, of the ICC’s constitutional case-law.²⁰ The Constitutional Court, at the request of the referring courts, gave attention to the suitability of integrating the ECHR into the yardstick of constitutionality. In fact, the Italian system had no provision on the domestic value of international treaty law,

¹⁸ [2009] UKHL, 28.

¹⁹ *Lady Hale* has also reinterpreted Lord Rodger’s famous words, in critically discussing the so-called “mirror principle”: see *B. Hale*, *Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?*, in: HRLR 12 (2012), 65, in particular 77.

²⁰ On these different phases see *D. Tega*, *The Constitutional Background of the 2007 Revolution. The Jurisprudence of the Constitutional Court*, in: G. Repetto (ed.), *The Constitutional Relevance of the ECHR in Domestic and European Law: An Italian Perspective*, 2013, 25 et seq.

or any article – such as Art. 10, para. 2 of the Spanish Constitution – according to which constitutional rights must be interpreted in light of international rights documents ratified by the State. Accordingly, as the ECHR was ratified by an ordinary law, its integration into the constitutional yardstick was ruled out by the ICC. The ICC's initial approach, until 2007, was that as international treaties are given effect solely by acts of law that make them enforceable in the national legal system, any conflict between a treaty enforced by means of an ordinary law and domestic legislation falls outside the jurisdiction of the constitutional court, resulting in a conflict between ordinary laws.²¹

Judgment n. 188/1980 provides an example of this approach. In that decision, the applicants relied on the ECHR and the International Covenant on Civil and Political Rights (ICCPR) to challenge the constitutionality of Arts. 125 and 128 of the Code of Civil Procedure, insofar as they require the appointment of a public defender for an accused who refuses assistance. The Constitutional Court affirmed that both treaties have only the value of ordinary law, as neither Art. 10, nor Art. 11 of the Constitution provide them with a higher rank.²² However, the ICC demonstrated great knowledge of Strasbourg jurisprudence, referencing, for the first time, two decisions of the Commission in order not only to highlight the erroneous interpretation made by lower courts of Art. 6(3)(c) of the ECHR but also to demonstrate the harmony between the Convention's and the Constitution's provisions on fair trial.

In subsequent cases, the ICC no longer felt the need to point out the position of the ECHR in the system of sources, perhaps because the version adopted since 1960 was well-established. By contrast, the ICC rather resorted to Art. 2 of the Italian Constitution, which stipulates:

“The Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups within which human personality is developed. The Republic requires that the fundamental duties of political, economic and social solidarity be fulfilled.”

²¹ That distinction is typical of all legal systems, like the Italian one, based on the dualistic interpretation of the relationship between internal and international orders. See, among others, *G. Morelli*, *Nozioni di diritto internazionale*, 1967, 89 et seq.; *A. D'Atena*, *Adattamento del diritto interno al diritto internazionale*, in: *Enciclopedia giuridica*, I, 1988, 1; *L. Paladin*, *Le fonti del diritto italiano*, 1996, 413 et seq.

²² In an effort to enhance the constitutional content of the Charters of Rights, in particular of the ECHR, legal scholarship has developed different theories aimed at according the Charters of Rights a higher value than that of ordinary law starting from reflection on the value to be assigned to formal sources that implement those documents on the basis of the commitment our system makes at the time of ratification.

Interpreting Art. 2 as an open clause that can encompass new emerging rights, the ICC managed to extend the constitutional yardstick beyond the limits of the already existing rights. In particular, the Constitutional Court included the ECHR amongst the tools of interpretation of Art. 2, so that to give Convention rights constitutional protection.²³

In the evolution of this jurisprudence, a peculiar (and isolated) approach is provided by judgment n. 10/1993, in which the ICC referenced both the ECHR and the ICCPR in a case concerning an accused foreigner's right to be informed of the accusation against him in a language that he understands. In doing so, it stated, in an *obiter dictum*, that Art. 143 of the Code of Criminal Procedure, which secures a lower guarantee for the accused than at the international level, cannot prevail over the ECHR and the ICCPR, but must be construed in line with them so that it provides the same level of protection. Indeed, the ECHR and the ICCPR "are provisions arising from a source with atypical competence, and, as such, they are unsusceptible to being repealed or modified by ordinary laws". The Constitutional Court concluded by according particular expansive force to Art. 143, arising from the relationship with the principles contained in the ECHR and ICCPR and fed by the necessary link with the constitutional values relating to the rights of defence, considered fundamental principles in accordance with Art. 2 of the Constitution. Therefore, in that case, the Constitutional Court granted the ECHR provisions, on the one hand, a passive resistance from repeal by ordinary law, as the ECHR stems from an atypical source of law; on the other hand, recognized to the principles of international treaty law a unique position within the constitutional yardstick. The *obiter dictum* was highly innovative with respect to the established orientation which, as abovementioned, had always denied both to the ECHR and to the ICCPR a place in the hierarchy of sources above ordinary law. Yet, the Court, in subsequent rulings, although touching on the theme of the ECHR, neither took this statement any further, nor developed it in any articulate way.²⁴

²³ For an initial analysis of the Constitutional Court's case law regarding Article 2 and the rights established at international level see *A. la Pergola*, L'adeguamento dell'ordinamento interno alle norme del diritto internazionale dei diritti umani, in: *I diritti umani a 40 anni dalla Dichiarazione universale*, 1989, 46 et seq. On Article 2 as an "open clause" encompassing rights not expressly mentioned in the text of the Constitution see *A. Barbera*, Articolo 2, in: *G. Branca* (ed.), *Commentario della Costituzione*, 1975.

²⁴ This clearly shows that the *obiter dictum* cannot be considered as an overruling of previous case-law. Rather, the position contained in judgment n. 10/1993 could be interpreted as an attempt to draw a distinction between international treaty law *tout court* and international documents on human rights. If it is true that the atypical character mentioned by the judges can be traced back not to the formal terms but to material ones, it may be concluded that the

The later phase of the ICC's approach consisted of a broader openness to the international treaties on human rights. Case law provides several insights into the interpretation of constitutional principles in light of the ECHR, highlighting the difficulty in determining a single attitude on the part of the Court. The Court reiterated what in this period was its main focus: the relationship of integration, through interpretation, between the Constitution and the ECHR, beyond the fact that the latter, not being a constitutional source, could not be a yardstick of constitutionality on its own.²⁵ Judgment n. 388/1999 is a case in point. First, the Court refused to retreat to the purely formalistic attitude it had established in 1960 – and never previously denied – showing that it was uninterested in looking to the past and repeat the lack of constitutional status of the Convention. It also stated that it did not deem it necessary to bring the *obiter dictum* stated in n. 10/1993 to clearer and more mature consequences. It instead decided, without providing either theoretical or practical justification, to base its judgment on a different level of reasoning, advocating for an interpretation of rights “enriched” by reference to the international treaties on human rights and which, in this way, rose to recognize the emerging trends in the field of the so-called “new rights”. It is also interesting to note that the ICC referred to the ECHR as interpreted by the Strasbourg Court – namely, a living instrument to be interpreted in light of the conditions of modern life. A statement of this kind, which extends to Strasbourg's jurisprudence as well, was symptomatic of an approach shown to have totally overcome any interest in the systematics of the sources of law and, at the same time, an approach, as stated at the outset, that considers the ECHR as important criteria for interpretation in the activity of cobbling together different models of safeguards characterizing our system of protection of rights.

2. The Turning Point: The Constitutional Reform of 2001

The 2001 constitutional reform marked the turning point in the ICC's approach, amending Art. 117, para. 1 to provide that the legislative power vested in the State and the Regions should be exercised in compliance with

Court felt the need to enhance precisely the matter of rights as an element capable of influencing the passive resistance of the national law incorporating the treaties.

²⁵ A. Corasaniti, Protezione costituzionale e protezione internazionale dei diritti dell'uomo, in: *Diritto e società*, 1993, 607; M. Luciani, La hiérarchie des normes constitutionnelles et sa fonction dans la protection des droits fondamentaux, in: *Annu. Int'l Just. Const.*, Vol. VI, 1990, 175 et seq.

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constraints deriving from EU and international obligations. This provision became, by the Constitutional Court's decisions n. 348 and 349/2007, its exclusive reference for considering the ECHR as interposed rule in judgments on the constitutionality of laws.

In the decisions n. 348 and 349, the ICC held that Art. 117, para. 1, of the Italian Constitution, as amended in 2001, guaranteed the ECHR, as interpreted by the ECtHR, an "intermediate" status: higher than ordinary laws, but lower than the Constitution. Consequently, while ordinary courts may interpret national laws in the light of the ECHR, only the Constitutional Court may declare a law void if it is incompatible with the ECHR, provided that the relevant ECHR principle, in turn, is not incompatible with constitutional rules and principles.²⁶ Moreover, the two judgments stated that, having ratified the ECHR, Italy is bound to conform its legislation to this treaty *in the meaning made clear by the ECtHR*.

Later case-law progressively narrowed this statement. It was considered far too "pan-European", particularly because the significant margins of creativity in the ECtHR's interpretation of the ECHR was thought to entail a real danger of unpredictable decision-making by Strasbourg, weakening the European system of rights protection.²⁷ Thus, in judgment n. 317/2009, the Constitutional Court stated its own definition of the national margin of appreciation, affirming that

"Naturally, it is for the European Court to decide on the individual case and the individual fundamental right, whilst the national authorities have a duty to prevent the protection of certain fundamental rights – including from the general and unitary perspective of Article 2 of the Constitution – from developing in an unbalanced manner to the detriment of other rights also protected by the Constitution and by the European Convention."

Since 2009, there had been a steady and proud affirmation of the specific role of the Italian Constitution and Constitutional Court, which is worth discussing, as the ICC spoke in a peculiarly firm tone, occasionally bordering on arrogance. Some judgments of the ICC of this period show two sides of the coin: both a conflicting face of human rights protection, with an attempt by the national judge to unilaterally assert its understanding of human rights, and a more co-operative attitude. Both sides uphold, as the next two subsections will explain, the difficulties encountered by Italian judges

²⁶ *M. Cartabia*, Le sentenze "gemelle": diritti fondamentali, fonti, giudici, in: *Giurisprudenza costituzionale*, 2007, 3564.

²⁷ As noted by *V. Zagrebelsky*, former Italian judge at the ECtHR, *La giurisprudenza casistica della Corte europea dei diritti dell'uomo: Fatto e diritto alla luce dei precedenti*, in: *B. Biscotti/P. Borsellino/V. Pocar/D. Pulitanò (eds.), La fabbrica delle interpretazioni*, 2012, 69.

in using the ECtHR's case-law within a civil-law legal system: first, the ECtHR's case-law is strongly affected by the common-law tradition; second, it is deeply connected to the single case brought to the Strasbourg Court's attention; and third, as far as the ICC is particularly concerned, its jurisdiction is – in contrast to the ECtHR – exclusively based on comparing the abstract contested norm against the constitutional yardstick, rather than assessing the merits of a particular case.

3. The Clashes

In 2012 and 2015 the ICC handed down two decisions that strongly conflicted with the ECtHR: in decision n. 264/2012, it applied a balancing test that sacrificed a facet of the right to a fair trial in favor of other constitutional relevant interests, contrary to the position taken by the Strasbourg Court; and in decision n. 49/2015, the ICC made for the first time a substantial effort to explain to ordinary judges how to handle Strasbourg case-law, aiming to secure domestic compliance, yet demonstrating a remarkably arrogant attitude.

In 2012 a real clash took place between the two Courts. In judgment n. 264, on the so-called *Swiss pensions* issue, the ICC directly contradicted the Strasbourg Court's judgment in *Maggio*.²⁸ Refusing to annul the law deemed by the ECtHR to be incompatible with the ECHR, the Constitutional Court chose instead to protect other constitutionally relevant principles, rights and goods, arguing that these should also be considered by the ECtHR as imperative reasons of public interest.

More interestingly, the Constitutional Court expressly declared that the different outcome was not due to divergences in principle, but rather to methodological differences, which are a consequence of the specific perspective from which each Court delivers its rulings. While the ECtHR, answering individual complaints, is bound to protect the values at stake as parceled, individual rights, the Constitutional Court protects fundamental rights in a fashion which is “systemic and not piecemeal across a series of uncoordinated provisions in potential conflict with one another”.

Indeed, the Constitutional Court stressed that its task is always to ensure the maximum expansion of guarantees, in a non-individualistic, systemic meaning:

²⁸ ECtHR, *Maggio and others v. Italy*, 31.5.2011 (n. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08). See *M. Massa*, La sentenza n. 264 del 2012 della Corte costituzionale: dissonanze tra le corti sul tema della retroattività, in: *Quaderni costituzionali*, 2013, 137.

“the comparison between the protection provided for under the Convention and the constitutional protection of fundamental rights must be carried out whilst aiming to achieve the broadest scope for guarantees, a concept which – as clarified in judgments n. 348 and 349 of 2007 – must be deemed to include the necessary balancing against other interests protected under constitutional law, that is with other provisions of the Constitution which in turn guarantee fundamental rights liable to be affected by the expansion of individual protection. The reference to the national ‘margin of appreciation’ – a principle adopted by the Strasbourg Court itself and which is of relevance when toning down the rigidity of the principles formulated on European level – must at all times be included within the assessments of this Court, which is not unaware that the protection of fundamental rights must be systemic and not piecemeal across a series of uncoordinated provisions in potential conflict with one another.”

In 2015 the Court, with judgment n. 49, went further than it had ever previously done in fencing off the national legal system from the influence of the ECHR, both by laying down a list of conditions which an ECtHR ruling must fulfil before it can be used to challenge a national law and by charging the ordinary courts with the task of controlling compliance with these conditions before referring a law to the Constitutional Court. In the ICC’s view, the referring court in the case before it had given an exceedingly simplistic reading to the ECtHR judgment in *Varvara*, where the ECtHR had found a violation of Art. 7 (*nulla poena sine lege*).²⁹ The claims originated from the confiscation, ordered by a court of appeal, of land and buildings that had been developed unlawfully, in spite of the fact that criminal proceedings had been discontinued on the grounds that prosecution of the offence was time-barred. According to the Constitutional Court, the referring court should have construed the *Varvara* judgment within the “continuing stream of European case-law”, and with reference to the constitutional principles of subsidiarity in criminal matters and legislative discretion in relation to punishment policy. In a detailed judgment, the Constitutional Court reminded the referring court that the European Court does not establish the meaning of national law but only controls whether or not, as enforced, it infringes the ECHR in cases in which an application has been made; that ordinary courts should interpret national law in accordance with the ECHR; and that, nevertheless, the ordinary courts must first of all interpret national law in accordance with the Italian Constitution, which has an axiological prevalence over the ECHR.

For the first time, the Constitutional Court enumerated the situations in which the ordinary courts are bound by a Strasbourg ruling:

²⁹ ECtHR, *Varvara v. Italy*, 29.10.2013 (n. 17475/2009).

- a) when the ruling concerns a specific individual dispute remitted to the national court;
- b) when a line of Strasbourg case-law is “well-established”; and
- c) when the ruling is a pilot judgment.

The Constitutional Court also confirmed that a judgment by the ECtHR is not binding if it – and, therefore, the Italian law enforcing the ECHR, inasmuch as it also enforces the judgment in question – is not compatible with the Italian Constitution in the opinion of the Constitutional Court, which is the only body empowered to reach such a conclusion.

The judgment of the Grand Chamber on three similar cases against Italy is expected.³⁰ In this case the ICC followed the recommendation made by the former President of the Strasbourg Court, *Sir Nicolas Bratza*,³¹ who suggested that when national courts distance themselves from the ECtHR’s case-law, they should explain their reasoning clearly, giving the ECtHR the opportunity to reconsider its position *pro futuro*. In my view, judgment n. 49/2015 could be of great help to the Grand Chamber due to its careful explanation of the scope and legal content of the confiscation of land as a sanction for unlawful developments. The outcome could be a new *Horncastle* case, with the ICC in the same position as the United Kingdom (UK) Supreme Court in 2009.³²

And yet, at the same time, judgment n. 49/2015 adopts an arrogant attitude towards the Strasbourg Court and its case-law, which may be excessively defensive or even dangerous. First, it asks too much of the ordinary courts, as not all courts have a deep insight in the ECtHR case law and a knowledge of its official languages. Second, it also runs the risk of pushing

³⁰ See cases *G.I.E.M s.r.l.* (n. 1828/06), *Hotel Promotion Bureau s.r.l. and Rita Sarda s.r.l.* (34163/07), and *Falgest s.r.l. and Gironda* (n. 19029/11).

³¹ *N. Bratza*, *The Relationship Between the UK Courts and Strasbourg*, in: EHRLR 11 (2011), 505.

³² [2009] UKSC 14. On 9.12.2009 the UK Supreme Court declined to apply the so-called “sole or decisive rule”, as it was at that time understood, following the judgment of the ECtHR in *Al-Khawaja and Tahery v. The United Kingdom* (20.1.2009, n. 26766/05 and 22228/06). *Horncastle* raised the question whether there could be a fair trial when a defendant was prosecuted based on evidence given by witnesses who subsequently did not attend the trial in person and therefore were not available to be cross-examined by the defendant. When hearing the applicants’ appeal, the UK Supreme Court examined *Al-Khawaja and Tahery* and invited the Grand Chamber to accept a request to rehear the case. The subsequent Grand Chamber judgment in *Al-Khawaja and Tahery v. the United Kingdom* (15.12.2011) agreed with the Supreme Court that the “sole or decisive rule” should not be applied inflexibly. The ECtHR reiterated this doctrine in *Horncastle and Others v. the United Kingdom* (16.12.2014, n. 4184/10).

the ICC away from fundamental rights issues, leaving these to ordinary and international courts.

Conclusively, in the light of judgment n. 49/2015, it might be questioned whether the two aforementioned landmark judgments of 2007 really created an effective recourse against violations of the Convention, especially in cases where the alleged violation of the ECHR derives directly from national law. This is the exact question that arose in *Parrillo v. Italy*.³³ The substantive issue at stake was an important one: the status of human embryos. The applicant challenged the ban under Italian legislation on donating to scientific research embryos conceived through medically assisted reproduction as incompatible with Art. 8 of the Convention. The Italian applicant had never brought the issue before any Italian judge and, consequently, had not asked any Italian court, nor the Constitutional Court, to guarantee the alleged right in the light of national and international human rights law. The Italian Government therefore objected that domestic remedies had not been exhausted, particularly with regard to the possibility of having the Constitutional Court assess the compatibility of the law currently in force with the ECHR. The Grand Chamber ruled that the applicant was not bound to employ such a remedy, assuming that it was neither directly available to the party nor adequately effective. Judgment n. 49/2015 was mentioned by the Grand Chamber as one of the reasons for this conclusion, as it affected the effectiveness of the ICC's protection of Convention rights. Indeed, in a joint partly concurring opinion, five judges declared that they shared in the majority decision only due to judgment n. 49/2015 and to the doubts it cast on the cooperative attitude of Italian courts.

In my opinion, the Grand Chamber has been wrong both in drawing too many worrisome deductions from judgment n. 49/2015 and, most of all, in having not declared the application inadmissible for lack of the exhaustion of domestic remedies. Yet the *Parrillo* case can also be read as a forceful reaction to the arrogance of judgment n. 49/2015: since the ICC jeopardized the binding force of the ECtHR's decisions in that judgment, the Strasbourg Court, in *Parrillo*, considered the recourse to the ICC as ineffective. The immediate outcome was precisely that the important issue at stake has been pushed away from Italian courts, including the Constitutional Court. But, should tensions with the Italian judiciary rise higher, there would be some danger for the ECtHR as well: it might lose some very effective allies; the binding character of its decisions might become the object of endless con-

³³ ECtHR, Grand Chamber, *Parrillo v. Italy*, 27.8.2015 (n. 46470/11); see, in particular, the joint partly concurring opinion of Judges *Casadevall, Raimondi, Berro, Nicolaou* and *Dedov*.

troversies; and its very status would be questioned, as the challenge would come from well-established national institutions whose task is (also) to protect fundamental rights.

This conflicting attitude of the ICC is not a specific rebellion against the ECtHR, but can rather be considered an example of a more complex effort to protect its role against other courts. The breakthrough example of this *animus* was judgment n. 238/2014, that reversed the International Court of Justice (ICJ) judgment about the international custom on the immunity of States from the civil jurisdiction of other States.³⁴ The ICC, applying for the first time the so-called “counter-limits” doctrine (limits to sovereignty limitations), made this trend explicit: it did not question the interpretation of international law by the ICJ, but refused to let it infringe on the constitutional guarantee of the right of defense against the most severe violations of human rights.

This decision deserves greater attention here, even if it is a reaction to a position made by a court other than the ECtHR. This judgment questioned the alleged supremacy of “global constitutional law” or cosmopolitan constitutionalism. Judgment n. 238/2014 unexpectedly and clearly showed that the legitimacy and authority of international courts can still be, in some instances, weak. The ICC actively opposed the ICJ ruling as, in order to defend the “primacy” of the fundamental rights of the human being, it did not deem it necessary to “bend” the Constitution to the purely State-centered logic followed by the ICJ.

The decision to subvert the ICJ’s ruling clearly exemplifies the recent attitude of the ICC, and undermines the idea of “an irenic dialogue” among courts – the same dialogue which had served as a cornerstone for the theories built by supporters of “global constitutional law”. Now, the ICC makes clear that the “dialogue” between an international and a national court does not follow a script where the former says to the latter “I rule; you take notes”. This is evident in judgment n. 238/2014: as no autonomous margin of appreciation was available for a constitutionally-oriented construction of the relevant international obligation, the ICC opposed the ICJ.

Judgment n. 238 is weak and, to a large extent, wrong; and I am not inviting anyone to resist the celebration of “global constitutional law” in the name of a *naïf revanche* of an odd patriotism. Instead, it is an example of

³⁴ As interpreted by the ICJ in its judgment in *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)*, 3.2.2012. Among the many comments, see G. Boggero, *The Legal Implication of Sentenza n. 238/2014 by Italy’s Constitutional Court for Italian Municipal Judges: Is Overcoming the “Triepelian Approach” Possible?*, in: *ZaöRV* 76 (2016), 203.

what I have already stated: such celebrations are often too optimistic. I wish to call for a more complex speculation on the political, cultural and constitutional constraints and difficulties that challenge the narrative of pluralism at the international and global level, with particular regard to the development of rights cosmopolitanism at the transnational level.³⁵ The fiercely independent attitude of the ICC shows that not everyone is prepared to take international law seriously for what it already is: an integral part of our highly imperfect constitutional universe.³⁶

4. The Enforcement of the ECtHR's Case-Law

Since 2007, many ICC judgments can be ascribed to a sincere will to implement the ECtHR's rulings. In some decisions, the ICC quashes national legislation on the basis of previous ECtHR judgments. The path walked by the ICC to come to this outcome is not always homogeneous, also because the Court can only consider the constitutional claims denounced by the referring judges:

- a) sometimes the ICC declares the unconstitutionality of legislation through explicit application of Art. 117, para. 1 of the Constitution. In these situations, the ICC recognizes that the main reason for unconstitutionality is a blatant contradiction with the ECHR;
- b) other times, the ICC applies other constitutional provisions as yardstick, but refers specifically to Strasbourg case-law. Here the ICC does not resort to Art. 117, para. 1, but strengthens its constitutional interpretation by recalling ECtHR decisions;
- c) in yet another group of cases, the ICC uses ECtHR decisions not specifically related to the legislation at stake, anticipating possible future judgments against Italy on that specific norm. This attitude is very promising, as it demonstrates that ICC has started to "interiorize" the ECtHR's judgments, detecting further anomalies related to the ECHR.

An example of the first trend can be found in several recent rulings, mainly focused on procedural guarantees. In judgment n. 200/2016, the ICC enforced the Strasbourg case-law that requires the principle of *ne bis in*

³⁵ Expressions used by *A. Stone Sweet*, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, in: *Global Constitutionalism*, 2012, 53. For a critical approach see *M. Goldoni*, *The Politics of Global Legal Pluralism*, in: *Jura Gentium*, 2014, <<http://www.juragentium.org>>.

³⁶ *M. Kumm*, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law*, *Ind. J. Global Legal Studies* 20 (2013), 629.

idem enshrined in Art. 4 of Protocol 7 to be applied with regard to a naturalistic conception of the fact (*idem factum*) rather than to its legal qualification. This means that no one can be prosecuted twice for the same facts just because these facts are given a different legal qualification. This principle has been definitively settled by the ECtHR in *Zolotoukhine v. Russia*.³⁷ Applying this principle the ICC ruled unconstitutional a provision of the Criminal Code insofar as, in a specific situation, it allowed the same person to be prosecuted twice for the same fact.

Judgment n. 184/2015 concerned the criteria to calculate the amount of the compensation for the State's failure to dispose criminal proceedings within a reasonable time. Law n. 89/2001, conceived as domestic remedy to redress violations of Art. 6 of the Convention and to prevent applicants from going to Strasbourg, awards just satisfaction to the person charged with a criminal offence when the criminal proceeding exceeded a reasonable time. However, to calculate the amount the individual is entitled to as a compensation for the violation of the right arising from Art. 6 ECHR, the law does not take into consideration the investigations prior to the trial. It was challenged before the ICC by the referring courts for its contrast with the jurisprudence of the ECtHR, which acknowledges the right to compensation for the investigations too. By applying the Strasbourg case law as a yardstick,³⁸ the ICC ruled the contested law unconstitutional, insofar as it does not consider the date in which the person under investigation is given formal knowledge of the investigation against him as the starting date to calculate the amount of compensation.

Judgments n. 97 and 109/2015 concerned another familiar limb of Art. 6 ECHR, the guarantee of a "public hearing". By making plain application of the relevant Strasbourg case-law, the ICC ruled unconstitutional some provisions of the Code of Criminal Procedure, insofar as they do not allow the holding of a public hearing in specific judicial proceedings.³⁹

Judgment n. 210/2013 is particularly interesting, since through this decision the ICC *de facto* took a general measure to enforce the ECtHR judg-

³⁷ ECtHR, Grand Chamber, *Zolotoukhine v. Russia*, 10.2.2009 (n. 14939/03).

³⁸ The ICC reasoning was based on the ECtHR judgments *Ringisen v. Austria*, 16.7.1971 (n. 2614/65); *Eckle v. Germany*, 15.7.1982 (n. 8130/78); *Corigliano v. Italy*, 10.12.1982 (n. 8304/78); *Manzoni v. Italy*, 19.2.1991 (n. 11804/85); *Messina v. Italy*, 26.2.1993 (n. 13803/88); *Kobtsev v. Ukraine*, 4.4.2006 (n. 7324/02).

³⁹ The ICC reasoning was based on *Bocellari and Rizza v. Italy*, 13.11.2007 (n. 399/02); *Paleari v. Italy*, 26.7.2011 (n. 55772/08); *Capitani and Campanella v. Italy*, 17.5.2011 (n. 24920/07); *Leone v. Italy*, 2.2.2010 (n. 30506/07); *Bongiorno and others v. Italy*, 5.1.2010 (n. 4514/07); *Perre and others v. Italy*, 8.7.2008 (n. 1905/05); *Lorenzetti v. Italy*, 10.4.2012 (n. 32075/09).

ment in *Scoppola*.⁴⁰ In this decision, the Strasbourg court, departing from its previous case-law, held that Art. 7, para. 1 of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. However, since the ECtHR does not have the power to invalidate national laws, the application of this principle to other cases identical to the one that led to the *Scoppola* decision was prevented by a “legislative obstacle”: the Parliament, indeed, had not repealed the legislative provision that caused the breach of the Convention. It was then the Constitutional Court, through judgment n. 210/2013, to remove that legislative obstacle by declaring unconstitutional the contested provision, giving general effects to the Strasbourg decision in *Scoppola*.

Through judgment n. 113/2011, the ICC put an end to the lack, in the Italian legal order, of a remedy to reopen a case when an individual has been convicted by a court that did not meet the requirements of Art. 6 of the Convention. While the Strasbourg court has repeatedly stated that a retrial or a reopening of the case represents the appropriate way to redress a violation of Art. 6 – for instance in the decisions against Italy *Kollcaku* and *Zunic*⁴¹ –, the Italian legislature failed to comply with this obligation. Already in its judgment n. 129/2008, the ICC had directed a “pressing invitation” to the Parliament to fill this legislative gap. In judgment n. 113/2011, having observed that in the meantime no act had been passed by the Parliament, the Court itself filled the mentioned gap. It held unconstitutional Art. 630 of the Code of Criminal Procedure insofar as it does not provide for the review of a judgment or conviction to reopen a trial when mandated by Art. 46, para. 1 ECHR to comply with a final judgment of the ECtHR.

Judgment n. 187/2010 is part of a long series of decisions on social rights of foreign nationals in Italy. In this case, the legislative provision granting disability benefits only to those immigrants with a long-term residence permission and therefore excluding many legal immigrants, was challenged for violating the prohibition of discrimination (Art. 14 ECHR, in relation to Art. 1 of Protocol 1). By applying the criteria the Strasbourg court has set to assess whether a certain treatment is discriminatory,⁴² the Court struck down the contested legislation as discriminatory. The questioned benefit was not a mere supplement for low incomes but rather provided a minimal

⁴⁰ ECtHR, Grand Chamber, *Scoppola v. Italy*, 17.9.2009 (n. 10249/03).

⁴¹ ECtHR, *Kollcaku v. Italy*, 8.2.2007 (n. 25701/03); *Zunic v. Italy*, 21.12.2006 (n. 14405/05).

⁴² See in particular ECtHR, *Niedzwiecki v. Germany*, 15.2.2006 (n. 58453/00), and *Si Amer v. France*, 10.5.2010 (n. 29137/06).

level of support to ensure the very survival of persons in particularly difficult conditions. As it answers a basic human need, the benefit had to be granted to both Italian and foreign nationals under equal conditions.

The second group of decisions encompasses those that did not resort to Art. 117, para. 1 but still strengthened the ICC's interpretation with regard to the ECtHR's judgments.

In judgment n. 286/2016, the ICC declared unconstitutional several provisions of the Civil Code insofar as they did not allow the parents, by mutual consent, to attribute to their children at the moment of birth the maternal as well as the paternal last name. The Court held the prohibition to give the child the mother's surname too unconstitutional for violating the child's right to personal identity, enshrined in the general clause of Art. 2 of the Constitution as well as the principle of equality between the spouses protected by Art. 29. Although the main ground of unconstitutionality did not rely on the law's infringement of the ECHR but of the Constitution, the Court acknowledged that the Convention and constitutional law converge toward the same result. In particular, it mentioned that in *Cusan and Fazzo* the ECtHR held that the automatic attribution of the father's surname to the child despite the parents' opposite will violated Art. 14 in conjunction with Art. 8 of the Convention.⁴³

In judgment n. 278/2013, the Court considered legislation that did not permit disclosure of the biological mother's identity to the child when the mother had chosen to remain anonymous at the time of childbirth (so-called anonymous birth). In the Court's view, the concerned legislation is unconstitutional insofar as it does not provide for the possibility, upon request by the adopted child, to discretely consult the mother who availed herself of the anonymous childbirth with a view to revoking the secret on her identity. While the biological mother's identity cannot be revealed to the child against her will, the law must provide for a means to ask the mother, after several years, whether she still wants to keep her identity secret. In this case too, the ICC grounded the unconstitutionality of the law in the violation of constitutional provisions, Arts. 2, 3, and 32, and did not take directly into account the violation of the Convention. However, it stressed that this solution is fully consistent with the ECtHR jurisprudence and recalled the ECtHR decision *Godelli*, in which Italy was found in violation of Art. 8 because

“where the birth mother has decided to remain anonymous, Italian law does not allow a child who was not formally recognized at birth and was subsequently

⁴³ ECtHR, *Cusan and Fazzo v. Italy*, 7.1.2014 (n. 77/07).

adopted to request either access to non-identifying information concerning his or her origins or the disclosure of the mother's identity",

thus failing "to strike a balance and achieve proportionality between the interests at stake".⁴⁴ Interestingly enough, in judgment n. 425/2005, an entirely analogous case, the ICC had declined to declare the same provision unconstitutional. One can therefore assume that the ECtHR's decision in *Godelli* played a pivotal role in making the ICC change its mind.

In judgment n. 96/2015, the Court was called to assess the constitutionality of the legislation on medically assisted procreation, which permitted access to these techniques only in cases of certified and incurable sterility or infertility, but not when a fertile couple that carries a serious genetic disease seeks recourse to medically assisted procreation with preimplantation diagnosis to select an embryo unaffected by that disease. The Court declared the legislation at stake unconstitutional for its unreasonableness in relation to abortion legislation. Indeed, since Italian legislation allows recourse to abortion when the conceived is affected by a serious genetic disease, it is unreasonable to prohibit recourse to the less intrusive mean of embryo selection. The provisions at stake were then struck down for their conflict with Art. 3 (principle of equality) and Art. 32 (right to health) of the Constitution, without considering the alleged breach of Art. 117. However, the Court acknowledged that the contradiction in the Italian legislation had been previously stressed in the same terms by the ECtHR, which in *Costa and Pavan* found Italy in breach of Art. 8 of the Convention because the Italian legislation lacked consistency in this area:

"On the one hand it bans implantation limited to those embryos unaffected by the disease of which the applicants are healthy carriers, while on the other hand it allows the applicants to abort a foetus affected by the disease."⁴⁵

In judgment n. 143/2013, the ICC heard a reference challenging the law that restricted the number and the duration of the meetings between lawyers and prisoners incarcerated under the strict anti-mafia regime. The court held that these strict limitations violated the right to defense enshrined in Art. 24 of the Constitution, as the need to prevent the prisoners who are members of criminal organizations from continuing to give instructions and guidance to their organization from within the prison does not justify such a strong limitation of the right to defense. In performing this proportionality review, the ICC strengthened its reasoning by referencing the jurispru-

⁴⁴ ECtHR, *Godelli v. Italy*, 25.9.2012 (n. 33783/09), para. 58.

⁴⁵ ECtHR, *Costa and Pavan v. Italy*, 28.8.2012 (n. 54270/10), para. 64.

dence of the ECtHR, in particular by stressing that the ECtHR had found a breach of the right to a fair trial in a case with significant similarities.⁴⁶

As an example of the last group of decisions, in judgment n. 260/2015, a complex case of labor law, the Court considered a recurring question: a legal provision which, purporting to interpret previous legislation, curtails the rights of some of the interested parties. The ICC noted that the contested provision was not interpretative at all but rather retrospectively and unreasonably innovative. In this way, the ICC applied strict standards for the review of retrospective legislation comparable to those usually enforced by the ECtHR, even though the ECtHR, which has often condemned Italy for its frequent use of retrospective and interpretative legislation, had not yet had the occasion to rule on the contested provision. By so doing, the ICC is likely to have spared Italy another condemnation in Strasbourg.

5. The ICC as a Networking Facilitator

Lately, several 2016 judgments show clearly that the ICC wants to play the role of the “networking facilitator”⁴⁷. It is not a sentinel, standing guard to the borders between functions and powers; but a connector, concerned with keeping constitutionally sound and efficient relations among powers, including national and international courts, as well as the legislator. First, the ICC engages in a detailed analysis of ECtHR case-law, rejecting the superficial and exaggerated readings sometimes adopted by ordinary courts; second, it carefully frames supranational law within the national legal system; and third, it highlights the margin of discretion in the enforcement of supranational law that must be acknowledged to the representative authorities.

In 2016, one of the most problematic frontiers with the ECHR concerned the different notions of “criminal matter” adopted by each system: narrower in Italy, broader in Strasbourg. A number of questions stemmed from this very significant divergence. In judgment n. 102/2016, the Court heard two referral orders, from criminal and tax divisions of the Court of Cassation, concerning the punishment of the illegitimate use of nonpublic financial information with both criminal and administrative sanctions. The referring court alleged a violation of Art. 117, para. 1 of the Constitution, pointing out that in *Grande Stevens* the Grand Chamber held that the dou-

⁴⁶ ECtHR, *Öcalan v. Turkey*, 12.3.2003 (n. 46221/99).

⁴⁷ This expression has been coined by V. Barsotti/P. G. Carozza/M. Cartabia/A. Simoncini (note 5), 241.

ble line of punishment, administrative and criminal, of the same fact violates the *ne bis in idem* principle enshrined in Art. 4, Protocol 7 of the Convention.⁴⁸ Although all questions were found inadmissible for various reasons, the ICC called upon the legislature to ensure domestic legislation was in line with the Strasbourg jurisprudence. By so doing, the ICC also gave advice to the legislature, stressing that keeping both criminal and administrative sanctions would not as such be in conflict with the Convention, as long as the two sanctions are given in the same process. Interestingly, the ICC stressed that domestic rules must comply not only with the Strasbourg case law on the right not to be tried or punished twice but also with the EU law principles that require Member States to punish financial crimes in an effective, proportionate and dissuasive way.

In judgment n. 193/2016, the Constitutional Court refused to extend to administrative sanctions the principle of retrospectiveness of the more lenient criminal law (*lex mitior*), which the ECtHR famously stipulated in *Scoppola*.⁴⁹ The referring court considered indeed that the lack of retrospectiveness of a law mitigating an administrative sanction was in conflict with Art. 117, para. 1 of the Constitution, due to this Strasbourg case law. However, the ICC stated that, while in the abstract the *lex mitior* principle may apply to administrative sanctions too, Strasbourg case law does not require its general application to all administrative sanctions, but only to those administrative sanctions that have an afflictive character. In other words, the question of the referring judge lacked in *finesse* and went well beyond what the ECtHR requires. The distinction between criminal and administrative sanctions is, in principle, a legitimate policy tool, and any question of constitutionality should address single provisions on sanctions or their application. This judgment is a good example of the ICC's attitude to instruct ordinary courts to avoid a superficial reading of the Strasbourg case law and not to draw excessive consequences from a line of ECtHR jurisprudence.

In judgment n. 276/2016, again on the concept of "punishment" in national law and the ECHR, the Constitutional Court considered several referral orders on a 2012 law providing for the suspension of officials elected in local and regional bodies when they are found guilty of certain offences, even if the conviction is not yet definitive, and also prohibiting, in the same cases, running for office again. This also applies when the offences had been committed before the entry into force of the contested law. The referring courts challenged the law from several perspectives, including for its conflict with Art. 7 of the Convention. In the referring courts' view, the sus-

⁴⁸ ECtHR, *Grande Stevens v. Italy*, 4.3.2014 (n. 18640/10).

⁴⁹ *Scoppola v. Italy* (note 40).

pension from office should be considered a “criminal sanction” and should therefore be subject to the principle of non-retrospectiveness. In the ICC’s view, however, the questioned provision cannot be constructed as a “punishment”, neither under Italian constitutional law nor under Art. 7 ECHR. Rather, it is a precautionary measure, aimed at preventing illegality in public administration and at enforcing the constitutional duty of citizens entrusted with public functions “to fulfil such functions with discipline and honor”, as required by Art. 54, para. 2 of the Italian Constitution. Accordingly, suspension from public office and prohibition to run for them escapes the prohibition of retrospectiveness and can be the consequence of offences and convictions prior to the entry into force of the contested law. To exclude the violation of Art. 7 of the Convention, the ICC engaged in a deep and detailed analysis of the relevant ECtHR case-law to show that according to the criteria developed by the ECtHR since *Engels*, the measure at stake cannot be considered to fall within the scope of Art. 7. The ICC made a clear effort to establish dialogue with the Strasbourg Court on this issue and to explain precisely how the contested measure fits within the national and supranational order. This is especially significant, as similar issues will be considered in the upcoming Strasbourg judgment on the partially similar *Berlusconi* case.⁵⁰

The mentioned cases clearly show the ICC’s attempt to facilitate dialogue and cooperation among different powers – courts and the legislature – in implementing the obligations arising from the Convention. This kind of attitude emerges also in relation to EU law and with respect to the ECJ. A bright example of cooperation amongst courts is judgment n. 187/2016. This ruling is for now the epilogue of a lengthy dispute concerning the extensive use of temporary employment in schools and its compatibility with Directive 1999/70/CE, concerning the framework agreement on fixed-term work. Considering that the relevant EU provisions had no direct effect and ought to be enforced through the constitutional scrutiny of national law, in order n. 207 /2013 the ICC voiced the widespread concerns of lower courts, joining one of them in requesting a preliminary ruling from the ECJ to clarify the scope of the directive. It was the first time that a preliminary ruling was requested by the ICC in an interlocutory proceeding for the review of legislation instigated by ordinary courts. Previously, just one request had been filed, with order n. 103/2008, after a complaint from the national Government against a regional law. In *Mascolo*, the ECJ held that, pending the completion of selection procedures for the recruitment of tenured staff, the

⁵⁰ *Silvio Berlusconi v. Italy*, Application n. 58428/13, lodged on 10.9.2013, communicated on 5.7.2016.

renewal of fixed-term employment contracts could not be allowed indefinitely and that fixed-term employees were entitled to compensation for any damage suffered on account of such a renewal.⁵¹ After this ruling, and before the constitutional proceedings reached their conclusion, the Parliament passed, in Law n. 107/2015, provisions both on the maximum duration of fixed-term employment contracts in schools, and on compensation for past temporary staff. Judgment n. 187/2016, therefore concluded that EU law had been violated, but the resulting abuse had been subsequently “nullified” by the legislature. Although it may be disputed whether the afforded compensation is sufficient in every case, this sequence of events is, as said at the beginning, a significant instance of cooperation amongst both courts and the legislator, albeit somewhat grudgingly on the latter’s part. It is also noteworthy that, after the ECJ ruling, the ICC postponed the final stage of its proceedings in order to wait for the passing of Law n. 107/2015: a wise move, which is yet another example of how the ICC facilitates the interaction between powers.

More recently, the *Taricco* case, decided – after a lively debate in legal scholarship – with the order n. 24/2017, is another example of preliminary reference to the ECJ, with remarkably less irenic and harmonious overtones. It shows a two-faced nature, exemplifying both the co-operative and antagonist approaches of the ICC.⁵² However, I choose to enhance its networking facilitator content rather than its conflictual nature considering both the arguable ECJ decision it had to address and the ICC’s choice not to apply the counter-limits doctrine.

In its 2015 *Taricco* judgment,⁵³ the Grand Chamber of the ECJ faced a question concerning criminal offences for Value Added Tax (VAT) evasion in Italy. These offences are often perpetrated through elaborate organizations and operations. Consequently, investigations take a great deal of time, with the risk that prosecution may have become time-barred under the relevant provisions of the Italian Criminal Code. Based upon the rather broad phrasing of Art. 325 Treaty on the Functioning of the European Union (TFEU), the ECJ held that national time limitations should neither prevent

⁵¹ Joined Cases C-22/13, C-61/13 to C-63/13 and C-418/13, *Mascolo and others* (2014) ECLI:EU:C:2014:2401.

⁵² Lately, we are not short of examples of “national defiance” to ECJ rulings. As stressed by *D. Sarmiento*, An Instruction Manual to Stop a Judicial Rebellion (before it is too late, of course), in: <<http://verfassungsblog.de>>, 2.2.2017, the German Constitutional Court is unimpressed with the quality of the reasoning of the Court of Justice in the *OMT* ruling, and the Danish Supreme Court has expressed upset with the activism of the Court of Justice in *Dansk Industri and others*.

⁵³ Case C-105/14, *Taricco and Others* (2015) EU:C:2015:363.

effective and dissuasive penalties “in a significant number of cases of serious fraud affecting EU financial interests”, nor provide for longer periods in respect of frauds affecting national financial interests, than in respect of those affecting EU financial interests. The ECJ also added – somewhat unexpectedly – that national courts should verify by themselves if that was the case and, if need be, disapply the domestic provisions regulating the maximum extension of the limitation period in order to allow for the effective prosecution of the alleged crimes. According to the ECJ, this would not infringe the principles of legality and proportionality of criminal offences and penalties enshrined in Art. 49 of the Charter of Fundamental Rights of the EU nor Art. 7 ECHR – no punishment without law – with regard to pending criminal proceedings. On the one hand, the alleged crimes constituted, at the time when they were committed, the same offence and were punishable by the same penalties. On the other hand, the ECJ considered the statute of limitation as a procedural institution. In the ECJ’s view, the extension of the limitation period after a crime has been perpetuated is not prohibited, at least when, for a given offence, the limitation period has not expired yet.

In Italy, some courts, including the Court of Cassation, did not hesitate to disapply the relevant provisions of national law, as required by the ECJ. Other courts, including a different panel of the Court of Cassation, perceived a complex constitutional problem, concerning Art. 25, para. 2 of the Italian Constitution, which stipulates that “no punishment may be inflicted except by virtue of a law in force at the time the offence was committed” from two perspectives. First, the ECJ had called for an *ex post facto* increase of criminal liability, as, according to a well-established Italian legal tradition, the limitation period is part and parcel of the substantive discipline of criminal offences, since it is the temporal dimension of criminal liability. Second, the possibility of disapplying the relevant provisions was not only unforeseen and unforeseeable but also subject to exceedingly vague conditions, incompatible with the certainty required in criminal law. Therefore, questions were addressed to the ICC, which in turn – while not disputing the ECJ’s construction of Art. 325 TFEU – asked the ECJ to take into greater account these national principles. The ICC asked if Art. 325 required the disapplication of the relevant national provisions, even in the absence of a sufficiently clear legal basis and when, under national law, time limitations are part of substantive criminal law and thus subject to the principle of legality in criminal matters. It further asked whether disapplication was mandatory, even when its effect would consist of an infringement on the supreme principles of the national constitutional identity of a Member State.

This is a preliminary reference, which, to a certain extent, by itself opened a path for dialogue. The ICC made some effort to frame its national constitutional concerns within EU legal categories, for instance by referencing Art. 4 TEU, and Arts. 49 and 53 of the Charter. Nevertheless, by emphatically invoking supreme constitutional principles, the ICC shows itself ready to take a bolder stance: activating so-called “counter limits” to prevent ordinary courts from applying the *Taricco* judgment. Much will depend on the answer that the ECJ has been asked to provide urgently. This might be the first time a national constitutional court challenges the compatibility of EU primary law and ECJ rulings with fundamental rights and acts to neutralize these rulings.

III. Conclusion: A Blend of Cooperation and Hubris

In this paper I have discussed the different attitudes the ICC has shown towards the ECtHR since the turning point of judgments n. 348 and 349/2007. In sum, the ICC’s approach can be termed a blend of cooperation and hubris, for it includes both a sincere will of cooperation and a readiness to sometimes challenge the ECtHR. This attitude, as it has been shown, is not peculiar to the relationship with the ECtHR but concerns the interplay with other supranational and international courts as well.

In the last decades the protection of human rights has been a powerful legitimizing factor both for international and national courts. Nowadays, however, we experience conflicts over this task that may weaken the legitimization arising from it, particularly putting into question the role of international courts without the support of national constitutional courts. That conflict may be reduced by asking the ECtHR to keep in mind its subsidiary nature, to refrain from behaving like a constitutional court, and to put greater effort into considering and respecting the constitutional traditions of the legal systems at stake. If rights are a source of legitimacy for the ECtHR, it needs more transparency and rigor in its decisions and should, more generally, employ a higher degree of self-restraint in order to avoid the confusion which fuels the anxious relationships with national jurisdictions.⁵⁴ It is to be noted that frictions between the ICC and the ECtHR are not caused by the obligation to award just satisfaction to the plaintiff, but from the general measures that the State is required to adopt to comply with the ECtHR’s judgments. Worries arise in particular from structural

⁵⁴ J. Allard/A. Garapon, *Les juges dans la mondialisation: La nouvelle révolution du droit*, 2005.

measures requested by the Strasbourg Court, rulings questioning basic political choices like the notion of a “criminal matter”,⁵⁵ the principle of secularization,⁵⁶ and medical procreation,⁵⁷ and judgments stepping forward in the field of controversial rights. Through an evolutive construction of the ECHR, these measures impose a degree of uniform recognition for rights which were not foreseeable when the ECHR was ratified. Considering that at the national level some claims for rights advanced by parts of the society are not widely-shared, mainly for cultural and religious reasons, so at the international level the content of these rights is similarly not yet a common ground. Indeed, although much emphasis has been placed on the possibility of a “Europe of rights” based on a *ius commune*,⁵⁸ constitutional traditions within the Council of Europe challenge this assumption in more than one respect.⁵⁹

A multi-level protection of human rights requires not only a lowest common denominator but also some coordination. This issue relates to the entry inside civil-law systems, such as the Italian, of the ECtHR case law, which – focusing on the single controversy, emphasizing third parties’ interventions, and using both dissenting and concurring opinions – follows common law patterns, albeit without the same degree of foreseeability. Although continental judges have never been a “*bouche de la loi*” merely applying statute law, as in the Enlightenment stereotype, they are now fully immersed in a contamination between legal systems that remain different, albeit less and less distinct.⁶⁰ Problems may arise particularly when a national judge is tempted to apply a principle stated in a ECtHR decision as if it were a general principle of statute law, forgetting the strong link with the individual case.⁶¹ From this perspective, the ICC accepted to play the role of a networking facilitator, instructing ordinary courts to avoid a superficial reading of the Strasbourg case law and not to draw excessive consequences from a line of ECtHR jurisprudence.

⁵⁵ *Grande Stevens v. Italy* (note 48).

⁵⁶ *Lautsi v. Italy* (note 10).

⁵⁷ *Parrillo v. Italy* (note 33).

⁵⁸ This effective formula has been crafted by a former President of the ICC: see *G. Silvestri*, *Verso uno ius commune europeo dei diritti fondamentali*, in: *Quaderni costituzionali*, 2006, 7.

⁵⁹ E.g. Protocol 6, forbidding the death penalty, has not been ratified by all the members of the Council of Europe.

⁶⁰ The ECHR itself has noted the fading of the differences between civil and common law systems: see *Huwig v. France*, 24.4.1990 (n. 11105/84), and *Kruslin v. France*, 24.4.1990 (n. 11801/85).

⁶¹ This also means that a national judge might refer to an ECtHR judgment concerning a broadly similar topic, but a different legal system.

At the same time, the ICC, as other national constitutional courts, has engaged in its own dialogue with the ECtHR. There is no need for monologues among deaf judges, ready only to apply “an eye for an eye, a tooth for a tooth” *lex*. There is rather a need for dialogue among willing judges inspired to make a real effort of loyal cooperation. If a constitutional court disagrees with the ECtHR, it must explain very clearly in its decisions the reasons that may lead it to differ from the Strasbourg case-law and must give the ECtHR the opportunity to reconsider its position. If and when Protocol 16 enters into force, national constitutional courts should definitely use it.⁶² As law “does not belong to anyone, but must be cared for by many”,⁶³ it is worth taking seriously what the ICC stated in judgment n. 349/2007:

“This Court and the Strasbourg Court, ultimately, play different roles, although they both aim at protecting as well as possible fundamental human rights.”

⁶² Protocol No. 16 to the Convention will allow the highest courts and tribunals of a State Party to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.

⁶³ *G. Zagrebelsky*, *Il diritto mite*, 1992, 213.

