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JUDICIAL DECISIONS

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

III. STATES AND OTHER SUBJECTS OF INTERNATIONAL LAW

Immunity of foreign States from jurisdiction in civil matters as a customary rule automatically incorporated into the Italian legal order by virtue of Article 10, paragraph 1, of the Constitution – Compensation to the victims of gross violations of human rights committed during World War II – Human rights exception to immunity from jurisdiction – International responsibility of Germany – Generally recognised norms of international law protecting the liberty and the dignity of every human being as jus cogens *– Gross violations of human rights as international crimes – Treaty of Peace of 10 February 1947 – Economic and Financial Agreement of 2 June 1961 between Italy and Germany – Immunity from jurisdiction denied*

Corte di Cassazione (Sez. I penale), 13 January 2009, No. 1072
Criminal Proceedings against Josef Max Milde

1. The *Milde* case is the latest confirmation of a number of judgments and rulings by the Italian Supreme Court dismissing pleas of immunity from civil jurisdiction in relation to gross violations of human rights committed by German military forces in Italy during World War II. The decision under review it sets out in a more direct and balanced manner the conclusions reached by the same Court in the widely discussed 2004 *Ferrini* Judgment. It is worth recalling that the innovative conclusions of these consistent decisions, and the judgment in the *Milde* case in particular, have led Germany to bring an action before the International Court of Justice complaining that Italy, by the conduct of its courts, has violated the principle of sovereign immunity (*Jurisdictional Immunities of the State (Germany v. Italy)*, see <http://www.icj-cij.org/docket/files/143/14923.pdf>).

Before embarking on an analysis of the grounds for the Court's decision, let us briefly describe the previous stages of the proceedings prior to the final decision of the *Corte di Cassazione*. On 10 October 2006, the Military Tribunal of La Spezia, sitting as court of first instance, found Max Josef Milde guilty of the killing of civilian enemies contrary to Article 185 of the Italian Wartime Criminal Military Code. He was found to have caused the death of 203 people, mostly aged persons, women and children, wantonly acting with cruelty and premeditation, raping many women and tearing corpses to pieces. In the civil action introduced in the criminal proceedings by the victims of atrocities, Germany was found liable for the criminal conduct of its military forces, and was ordered to pay compensation.

This decision was later confirmed by the Military Court of Appeal with a judgment delivered on 18 December 2007. In particular, the *Corte d'Appello* rejected the two main arguments invoked by Germany to foreclose the case being decided on the merits by Italian judges. In the first place, the Court rejected Germany's claim that Italy had waived "on its behalf and on behalf of its nationals all claims against Germany and German nationals outstanding on 8 May 1944" pursuant to Article 77, paragraph 4, of the Peace Treaty of 10 February 1947, and to the Bilateral Agreement signed in Bonn on 2 June 1961 to settle some financial and economic questions between the two Parties. The reasons for rejecting this argument will be discussed in the concluding section of this commentary.

Secondly, the Court dismissed Germany's plea that military activities always enjoy immunity from jurisdiction. On this point, the *Corte d'Appello* strictly followed the *Cassazione*'s reasoning in the 2004 *Ferrini* Judgment and affirmed that:

> "Compliance with each person's inviolable rights is a fundamental principle of international law. It has the effect of reducing the scope of other traditional principles based on the sovereign equality of States, such as the customary norm granting every State immunity from the civil jurisdiction of foreign States. In fact, the jurisdictional immunity of foreign States is not absolute and cannot be invoked in proceedings relating to acts amounting to international crimes, i.e. acts violating the universal values based on respect for human dignity which transcend, as such, the interests of a particular State community".

2. This basic argument runs throughout the whole decision of the *Corte di Cassazione*. The first part of the decision is in fact an exposition of the most recent case-law of the *Cassazione* dismissing jurisdictional immunity of foreign States in relation to claims by individuals as victims of gross violations of human rights. After a thorough examination of its own precedents, the Court said that they gave rise to a well-established jurisprudence according to which:

> "The customary rule on the jurisdictional immunity of foreign States is not absolute or without exception. It is bound to remain inoperative each time it competes with the customary international law principle legitimizing the exercise of remedies to recover compensation for damage caused by international crimes arising out of grave breaches of inviolable human rights" (para. 4).

In what sense does this conclusion affect current international law on jurisdictional immunity, and how does the Court's decision contribute to the present trend towards the "humanisation" of international law?

The first problem the Court had to solve was to identify the wrongful act for the harmful consequences of which Germany was required to provide compensation. Admittedly, the situation is very different from the usual disputes involving the civil liability of foreign States and instrumentalities before the courts of another State, such as claims in relation to contracts of employment, supply of goods and services, or renting of a building. The *Milde* case concerns the consequences of an internationally wrongful act and, what is more, of a wrongful act perpetrated against nationals of the forum State. Under these circumstances, it proves very difficult to separate the scope of the rule on sovereign immunity from the legal regime of the gross violations of human rights committed by Germany during World War II.

The whole proceedings commenced as a criminal prosecution of some individuals, including Milde, under the above mentioned Article 185 of the Military Criminal Code. The Court recognised that this norm prohibits conduct already condemned by both customary and conventional international humanitarian law. Just like international *ius in bello*, the Court added, Article 185 "aims to protect the human being as an absolute good [...] the offence punished by this Article actually amounts to an international war crime, in that it breaches values recognised by every civilised society". As in *Ferrini*, the Court rightly considers that individual war crimes committed on a large scale are mostly connected with the violation of an international obligation by the belligerent State. In 2004, the *Cassazione* clarified this finding explicitly recalling that deportation to slave labour was "part of a precise strategy carried out by the German State". In the present judgment, the Court has not spelled out the specific internationally wrongful act committed by Germany as clearly, but it appears to see the crimes committed by Milde as a manifestation of the Third Reich's general policy. In fact, it recognises from the very outset that during the previous stages Germany "had never contested that it bears responsibility for the illicit activities carried out by Nazi troops at the time of the Third Reich" (para. 2). It also speaks of "a State's wrongful action" (para. 7) in relation to crimes of war and crimes against humanity which every State has a duty to prosecute and punish, and whose victims are entitled to receive compensation (para. 2). It is however the regime of compensation for victims of gross violations of human rights on which the Court has particularly insisted in different parts of the judgment.

As with *Ferrini* in 2004, this regime also became a hurdle in the present case. How does the Court describe the nature and content of this regime, and what role may domestic judges play in its concrete implementation?

The answers provided by the Court reflect the nature of the obligations breached by Germany which the Court itself recognised as being obligations protecting the *fundamental values* of the international community. Inevitably, reference to fundamental values implies discussing *the general characteristics of a given legal order*, and the relationship *between different categories of norms*. Establishing a position on these *two aspects* in the adjudication of a specific case has never been an easy task. It requires the application of complex legal method developing through several stages, subject in practice to the interpretation of supreme courts. It is precisely

this method that the *Corte di Cassazione* has applied to dismiss the arguments put forward by Germany and to affirm Italian jurisdiction. It is worth illustrating this method in more detail, given the growing possibility of private individuals turning to domestic courts for the recognition of their fundamental rights under international law.

3. Let us begin our analysis by recalling that ever since their introduction into modern constitutions, norms protecting fundamental values have reflected the ethical convictions of a given community. For this reason, they are all created against the background of a common core of general principles of law, i.e. provisions expressing essential concepts rich in meaning. Thus, the first task of a court dealing with fundamental values is to discern the general principle of law enshrining such a value. The very outcome of the case will in fact depend on the relevant general principle formulated by the judge at the offset.

In constitutional and international law alike, the existence of a general principle is inductively drawn from normative material of different natures. Concerning international law in particular, there is abundant judicial practice confirming that the parameters most relied on have come to be the declarations of the UN General Assembly, the preambles of the most important multilateral treaties, and a series of conventional provisions on human rights and the environment. Moreover, in the international case-law, these formal elements are usually held together through reference to some "extra-positive" concepts, such as "elementary considerations of humanity", or "general principles of international justice", construed as a sort of universal morality. On the other hand, we are currently going through a period where fundamental values in national and international law are tending to merge. This is part of the progressive internationalisation of democratic values which has been going on since the entry into force of the UN Charter. Consequently, general principles incorporating fundamental values are increasingly being identified by cross-referencing both international and domestic legal material.

The fundamental principle of international law constantly evoked throughout the entire order is "respect for liberty and dignity as inherent values of every human person", which the Court draws from the whole body of international humanitarian law, from the UN Covenant on Civil and Political Rights, and in particular from customary rules prohibiting crimes of war and crimes against humanity (para. 5). In line with the usual judicial attitude, extra-positive considerations have also been referred to in order to reinforce the nature of the principle in question as a fundamental value. In fact, the Court constantly recalls that respect for liberty and human dignity "transcend the interests of a specific national society", and are "indispensable for the conservation of the international community". It also emphasises that violation of the international obligations inspired by respect for human dignity "fatally shatters the international order". In paragraph 5, the Court conclusively endorses the finding it had reached in Order No. 14201 of 29 May 2008, where

respect for human dignity was equated to "a fundamental principle due to its axiological content as a meta-value".

While recognising the positive nature of general principles of law even before their formulation in a specific decision, scholars of legal theory and constitutional lawyers usually draw a distinction between "rules" and "general principles of law". Unlike rules, general principles of law do not impose a specific course of conduct, but have a restricted regulatory range. They limit themselves to prescribing "a direction that must be followed, a general trend that must be respected, and a value that must be taken into consideration". In fact, fundamental principles of law perform *three main functions*, all of them being auxiliary to rules: stimulating the formation of new rules; providing an interpretation of existing norms which assures the coherence of the legal system as a whole; and supplementing the legal order as a result of the performance of the two previous functions.

4. As for the first function, resorting to general principles for the formulation of new rules by the judiciary usually comes about through an evolutive interpretation of existing law. As an expression of the convictions and needs of society, reference to general principles would help the judge to bridge the gap between law and society. In the case in hand, we may note that the Court inferred the rule establishing compensation for the victims of human rights directly from the fundamental principle of human dignity, loosely building on existing international norms prohibiting gross violations of human rights.

Although briefly mentioning the customary nature of a rule "on the necessary reparation of the gravest violation of fundamental human rights" (para. 6), the Court did not actually dwell in any detail on either the consequences of the international crimes of individuals, or of internationally wrongful acts of States. Nor did it make any distinction between the two regimes. Instead, it referred to the existence of a right of victims to claim compensation as part of a more general international regime on the respect for human dignity, whoever the violator of the norms protecting this value might be. Such a right is sometimes referred to as "the rule that legitimises resorting to all available means to obtain reparation for the gravest injuries to a person's inviolable rights resulting from the commission of an international crime" (para. 3). Elsewhere in the ruling, mention is made to "the rule whereby gross violations of human rights must be necessarily redressed" (para. 6). Finally, in summing up the international legal regime on the violation of "those universal principles to which no derogation is permitted because they protect values considered fundamental by the entire international community", the Court affirmed that:

> "It is essential to the coherence of the international legal system that a violation of the values of human liberty and dignity be necessarily followed by the punitive reaction of the members of the international community and of the victims themselves. If this is not so, it would

> make no sense at all to formally proclaim the primacy of fundamental human rights, while at the same time denying individuals access to a court in order to avail themselves of the remedies capable of securing the effectiveness of those rights when they were violated by a State's criminal conduct" (para. 7).

On the other hand, the obligation to pay compensation is not clearly established by international customary and treaty rules providing for *individual criminal responsibility*. In practice, respect for human dignity would require damages to be awarded by the competent national judge as part of the offender's punishment. If a guilty verdict is delivered by an international criminal tribunal, it is possible to claim damages in the State where the tribunal's judgment must be implemented. Finally, a State may unilaterally decide to execute a judgment, wherever delivered, condemning an individual for international crimes. In this case, compensation must be claimed in the courts of that State.

Neither the scope of customary rules imposing compensation for victims of gross violations *committed by foreign States* nor the modalities for awarding damages to wronged individuals have been firmly established. In fact, the practice consists mainly of declarations by international organizations and *ex gratia* payments. Nonetheless, we may venture to say that a customary rule imposing the obligation of the responsible State to redress the injury sustained by the victims has already taken shape, albeit partially. Reference to the underlying fundamental principle would confirm the basic content of that rule; at the same time, it would leave to the judge the task of completing the details of a still fragmentary regime, and to solve possible implementation problems in favour of the victims.

5. This remark brings us to the second function of general principles. In effect, the concrete application of norms on fundamental values has always meant limiting the power of public institutions in some way. Indeed, the protection of fundamental values is often described as providing a threshold between "the realm of liberty and that of authority". It is one of the main functions of supreme courts to ensure this delicate balance between the need to protect the State and the rights of individuals. In international law, this tension may naturally appear in the form of a conflict between the ancient rules devised to protect the State's government apparatus, and the more recent international law on the protection of human rights. Fundamental general principles of law constitute unifying parameters which enable the judge to defend the rights of individuals, while maintaining the coherence of the system as a whole. As the *Corte di Cassazione* put it:

> "The solution to the case in question cannot be based on a merely quantitative approach, i.e. on the number of decisions favouring one position or the other. While discerning the existence of positive cus-

> tomary international norms is important, the role of the interpreter does not consist in a mere arithmetical calculation of the elements of practice. Other elements have also to be taken into account, such as the particular qualitative content of the applicable rules, their reciprocal interconnections, and their position according to the hierarchy of values established by the international legal order. Bearing this in mind, the real question to be decided is whether customary rules protecting fundamental values inherent to every human being should prevail over the rule on the jurisdictional immunity of foreign States. Moreover, the right to individual reparation always ensues as a consequence of the violation of customary rules protecting fundamental rights, even when such a violation has been committed by a State" (para. 4).

Further on in the judgment, the Court reiterates these concepts by affirming that "[t]he conflict between the customary rule on the jurisdictional immunity of foreign States and that on the necessary reparation of the gravest violations of fundamental human rights requires coordination in order to establish which of the two norms should prevail" (para. 6).

On this point, the Court repeats the conclusions it had already reached in the recent *Lozano* decision of 24 July 2008 (see *infra* the commentary by SERRA). In this judgment, the *Cassazione* had recognised that international norms based on respect for each person's liberty and dignity, such as those prohibiting the most heinous crimes, must prevail as norms possessing a higher rank. The Court corroborates this assumption by referring to the notion of the international *jus cogens* set out in Article 53 of the 1969 Vienna Convention on the Law of Treaties:

> "The different value of customary rules is confirmed by the different legal force they enjoy in the international legal order. According to a well-established judicial and doctrinal opinion, the customary rule on State immunity may actually be derogated from by an *ad hoc* treaty provision. However, customary rules aiming to protect inviolable human rights do not permit of any derogation because they belong to peremptory international law or *jus cogens*" (para. 6).

It is apparent that the Court is not using the notion of *jus cogens* or peremptory rules of general international law for either of the effects advocated by recent developments in the field of the law of treaties, and the consequences of internationally wrongful acts. In fact, it is not trying to invalidate a treaty; nor is it in any way attempting to justify a countermeasure by a State other than an injured State. On the other hand, both these effects have proved marginal in the practice on the international protection of fundamental values. Actually, resort by the Court to the notion of *jus cogens* reinforces the function of fundamental principles of law as interpretative devices to balance conflicting interests in the decision of a given case.

6. As a final outcome, this hermeneutical operation by supreme courts should bring about an *innovation* and *enrichment* of the legal system or systems involved. This is in fact the third and concluding function performed by fundamental general principles of law. However, this result should not be taken for granted. The success of the entire operation depends on the courts respecting a series of parameters assuring the rationality and congruence of the grounds leading to the decision. Firstly, they must ensure that an innovative solution corresponds to the ethical convictions and political project of the community desiring to protect certain values. Secondly, the decision must be in harmony with the entire system of existing law and procedures, and find a realistic balance between conflicting norms. Only a judgment which conforms to these conditions can aspire to establish an influential precedent followed by other national or international courts, on the one hand, and stimulate the formation of a new customary rule, on the other. Instead, a judgment which interprets general principles at odds with the evolution of society and the characteristics of the legal system risks remaining a dead letter. It may even be tantamount to a violation of both constitutional and international law.

The latter remark requires further consideration. Nowadays, there is a clear tendency towards the universalisation of fundamental values concerning human rights and the environment. In other words, the same general principles of law embodying fundamental values have become a common heritage in constitutional and international law alike. Consequently, courts rely more and more on mixed national and international practice in the formulation of fundamental principles. A careful balance between constitutional and international law is thus often needed when a decision on fundamental values has to be made.

This is a problem which the Court addressed in paragraph 7 of the present judgment:

> "Lastly, it is important to stress that the conclusion reached in the present judgment must also be assessed in the light of the system of values and principles permeating the Italian constitutional system. In reality, Article 10, paragraph 1, of the Constitution affirms that the Italian legal order must conform to the generally recognised norms of international law [...]. However, even those scholars maintaining that customary rules incorporated by means of Article 10 enjoy a constitutional status [...] recognise that they must respect the basic principles of our legal order, which cannot be derogated from or modified. Fundamental human rights are among the constitutional principles which cannot be derogated from by generally recognised norms of international law".

We may say that, according to the Court, international norms protecting fundamental values enjoy a twofold guarantee. As international *jus cogens*, they prevail over other international norms regulating interests of a different kind, especially

those concerning the protection of States' governmental power. On the other hand, the same priority is also ensured by domestic law, given that fundamental values protected by international law overlap with identical values protected by most constitutions. In any case, these would not in fact allow the application of international norms contrasting with their most basic principles.

7. Has the Court correctly applied the parameters for resolving the normative conflict on the basis of fundamental principles of international law? The answer is bound to have a great bearing on the outcome of the pending dispute between Italy and Germany. It may also cast some light on the role of domestic courts to which individuals wishing to protect their rights under international law increasingly are turning.

In delivering the present judgment, we think that the Court did respect the conditions indicated by the judicial practice of democratic States and the doctrine of constitutionalism, to deal with the interpretation of fundamental values.

First, the evolution of contemporary international law is undoubtedly moving towards a recognition of the greater importance of the protection of fundamental values, and reacting against gross violations of human rights. Thus, setting aside the rule on jurisdictional immunity would certainly correspond to the ethical convictions of the entire international community.

Second, the Court found a realistic balance between conflicting norms without excessively departing from the general characteristics of present international law. Unlike the *Ferrini* Judgment, in the present case the *Cassazione* did not venture to demonstrate the existence of a humanitarian exception to sovereign immunity. However, we think that it convincingly indicated several elements of practice supporting a human rights-oriented solution to the conflict between the international principles in question. On the other hand, it could hardly be denied that customary international law today tends to limit the jurisdictional immunity of foreign States as an extension of the "tort exception", at least when the violation of human rights has been committed on the territory of the forum State.

Assuming that the right of victims to receive compensation should take priority over contrasting international norms, problems may nonetheless arise concerning the application of the pertinent regime to specific situations. Indeed, the juxtaposition of different procedures to recover compensation frequently occurs in practice, which necessarily requires co-ordination on a case-by-case level. These different procedures include diplomatic protection, international adjudication, resort to the judge of the State where the violation was committed, and recourse to any domestic court under the principle of universal civil jurisdiction. It is precisely at this stage that the role of domestic courts becomes problematic.

In particular, legal scholars have raised three different questions in this area. Firstly, should domestic judges be excluded from the evolutionary process of customary law in order to avoid "progressive" decisions entailing the international

responsibility of their State? Secondly, and more specifically, should they refrain from attempting to balance conflicting interests, whenever this calls for the interpretation of international law? Finally, is diplomatic protection a more suitable means of allowing a State to protect its citizens' fundamental rights more effectively, while avoiding political embarrassment in its relations with the foreign States involved?

As for the first question, we do not think that domestic courts can realistically be kept out of the process of the continuing adaptation of customary law to the changing needs of the international community. Indeed, the shift from absolute to restrictive sovereign immunity was possible thanks to some innovative decisions by Italian and Belgian courts, affirming their jurisdiction in relation to the commercial activities of foreign States.

The answer to the second question is even more important as far as the protection of fundamental values is concerned. Here again, it is difficult to avoid judicial intervention by domestic courts involving the interpretation of conflicting international norms. Given the growing number of international norms on human rights, violations of these norms will naturally induce the victims to address their claims to national jurisdictions as a first move. On the other hand, national judges, especially supreme courts in democratic States, will spontaneously perform their constitutional function as guardians of fundamental values against possible abuses by other powers. In this context, they also control the admissibility of limitations to internationally recognised human rights necessary to preserve other legitimate public interests. Admittedly, the international system presupposes this role of the national courts, which has been devised exactly in these terms since the protection of fundamental rights became an integral part of national constitutions during the Enlightenment period.

The latter remark gives us some arguments to deal with the third point too. The increasing role of domestic courts in the interpretation of international norms on human rights suggests that judicial intervention and diplomatic protection should be seen as complementary, and not as alternative means. This is an argument we have already put forward in our commentary to the *Ferrini* Judgment (see IOVANE, "The *Ferrini* Judgment of the Italian Supreme Court: Opening Up Domestic Courts to Claims of Reparation for Victims of Serious Violations of Fundamental Human Rights", IYIL, Vol. XIV, 2004, p. 165 ff., pp. 191-193). Recourse to a national judge or a decision setting aside the immunity of a foreign State could induce the national State to take up the claim of one of its injured citizens. Being dominated by the political opportunism of the executive power, diplomatic protection alone has not always proved a reliable method of obtaining redress for injured nationals. In the case in hand, this is confirmed by the attitude of the Italian Government, which had waived some of the claims of its nationals in two treaties concluded in the aftermath of World War II. But this brings us to the concluding part of the judgment and to the last argument put forward by Germany to have the *Corte d'Appello*'s judgment quashed.

8. Germany had actually invoked Article 77(4) of the Peace Treaty of 10 February 1947 establishing that "Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on 8 May 1944, except those arising out of contracts and other obligations entered into, and rights acquired, before 1 September 1939". According to the Court, this provision concerns the merits of the case, and must not be dealt with by a decision on jurisdiction. Moreover, the Court adds, the entire treaty is "inapplicable to the present dispute" because Germany is not a party to it. In addition, the Court affirms that:

> "The waiver established in the Peace Treaty concerns *in rem* rights relating to material damage, and not to moral damage to be granted to the relatives of the victims of war crimes, as had been precisely determined in the impugned decision of the *Corte d'Appello* using unquestionable logical and legal arguments" (para. 7).

The Court also shared the opinion of the *Corte d'Appello* concerning the interpretation of the Economic and Financial Agreement between Germany and Italy signed in Bonn on 2 June 1961. Following the payment of a sum of money by Germany as established in Article 1 of the Agreement, the Italian Government declared under Article 2 that "all claims of Italian citizens and legal persons still pending against Germany relating to rights or cause for actions arising in the period between 1 September 1939 and 8 May 1945 have been settled". Under Article 3, Italy also committed itself to surrogate Germany in the event of any legal action arising from those claims. According to the *Corte di Cassazione*:

> "The opinion of the *Corte d'Appello* excluding the application of the Agreement to the dispute in question is firmly grounded. In fact, the waiver by Italy does not include claims which, as the one in question, were not even begun at the time the Agreement was concluded and cannot thus be considered as pending at that date. On the other hand, the plaintiff has not produced any convincing argument to confirm that the said Agreement also refers to claims and actions arising from moral damage caused by international crimes amounting to gross violations of human rights" (para. 7).

In other words, the Court favoured a literal interpretation which insists on the Agreement's reference to claims arising exclusively before its entry into force. In the same vein, it stressed that the Agreement does not expressly include claims concerning damage caused by international crimes in the waiver by Italy. However, this is an *a contrario* interpretation which could in turn be challenged or reversed with counterarguments of the same kind.

We think that the Court could have once again resorted to the notion of fundamental principles of law and to their *jus cogens* nature to justify an evolutive

interpretation of both treaties invoked by Germany. As we saw earlier, one of the functions of general principles enshrining fundamental values is precisely that of supplementing the legal order through an evolutive interpretation of existing law. This is true not only for customary rules such as those on jurisdictional immunities, but also of multilateral and bilateral treaties. Thus, the Court would have done no more than align those treaties with the general move of current international law towards protecting human rights, and reacting against their gravest violations.

The judgment of the International Court of Justice in the *Gabčíkovo-Nagymaros* case is an important precedent on how newly created fundamental principles may stimulate the evolutive interpretation of existing treaties. Concerning the effects of the principle of sustainable development on the interpretation of the bilateral treaty between Hungary and Slovakia regulating the construction of a system of locks on the Danube, the Court affirmed that the new norms on the protection of the environment "have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports, 1997, p. 7 ff., para. 141, p. 78).

This same attitude has been more recently reflected in the *Iron Rhine* arbitral decision of the Permanent Court of Arbitration of 24 May 2005 between Belgium and the Netherlands. This case also concerned the influence of sustainable development on the interpretation of a treaty whose application may undermine the surrounding environment. Here again, the Arbitral Tribunal affirmed that a treaty-guaranteed right of an economic nature must be exercised by taking into account environmental considerations, although the protection of the environment was not envisaged at the time the treaty in question was concluded (para. 223, p. 90) (the Italian text of the decision of the *Corte di Cassazione* is published in RDI, 2009, p. 618 ff.).

MASSIMO IOVANE

VIII. CULTURAL HERITAGE

Customary obligation to return cultural property – Conventions on the Laws and Customs of War – Vienna Convention on Succession of States in respect of State Property, Archives and Debts – Restitution of art objects removed during colonial times – Prohibition of the use of force – Self-determination of peoples – Cooperation in cultural heritage issues

Consiglio di Stato, 23 June 2008, No. 3154

Associazione nazionale Italia Nostra Onlus c. Ministero per i beni e le attività culturali et al.

(Cf. *supra* in this volume the commentary by CHECHI, "The Return of Cultural Objects Removed in Times of Colonial Domination and International Law: The Case of the Venus of Cyrene")

X. TREATMENT OF ALIENS AND NATIONALITY

Alien – Asylum-seeker – Recognition of refugee status – 1951 Geneva Convention Relating to the Status of Refugees – Need for international protection – Burden of proof relating to refugee status – Lack of documentary evidence – Good faith and credibility of the applicant – Benefit of the doubt

Corte di Cassazione (Sezioni Unite civili), 17 November 2008, No. 27310
Alì Mohamed Hussain v. Ministry of Internal Affairs

With the judgment in question, the *Corte di Cassazione* examined the question of evidence in trials concerning the recognition of refugee status by the Italian State. This complex question has been addressed several times in domestic case-law, and has been the subject of directives and guidelines by relevant institutions and international organizations. At the root of the problem there are the opposing needs of the State receiving the asylum-seeker and the asylum-seeker himself.

The receiving State usually faces the difficult task of having to distinguish between applications in good faith from foreigners in actual need of international protection, and the applications made with a vested interest, by economic migrants. Moreover, refugees and migrants often use the same routes and modes of transport, so they arrive in groups and they all present an application for recognition. Last year, for example, one third of the people arriving on Lampedusa (an island in the South of Italy, close to the North African coast) by boat applied for asylum (see "Irregular Migration by Sea", available at: <www.unhcr.org>, and "Garantire accesso alla protezione a chi arriva via mare", available at: <www.unhcr.it>).

On the other hand, however, considering the situation of the applicant, in most cases, persons fleeing from persecution arrive with the barest necessities and very frequently even without personal documents. Many applicants, moreover, are forced to destroy their identity papers, since knowledge of their identity might be dangerous for them during their journey. As a consequence, an applicant may often be unable to support his statements by documentary or other proof.

For these reasons, the UN High Commissioner for Refugees, while acknowledging the general legal principle that the burden of proof lies on the person submitting a claim, and therefore, on the applicant, has always recommended that States should relax the burden of proof on the applicant (see UNHCR, "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees" ("Handbook on Procedures and

Criteria"), Doc. No. HCR/IP/4/Eng/REV.1, Re-edited, Geneva, January 1992, available at: <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf>).

Before the judgment in question, however, the position of Italian case-law on this question was still rather inflexible. The Supreme Court had always affirmed that the applicant "had to prove at least the presumed, concrete danger he was running, with precise reference to the real and present nature of the risk" (*Corte di Cassazione (Sez. I)*, 20 December 2007, No. 26822; *Corte di Cassazione (Sez. I)*, 23 August 2006, No. 18353; *Corte di Cassazione (Sez. I)*, 27 December 2005, No. 28775; *Corte di Cassazione (Sez. I)*, 2 December 2005, No. 26278; and *Corte di Cassazione (Sez. I)*, 2 February 2005, No. 2091).

With this judgment, however, for the first time, the *Corte di Cassazione* showed its awareness that, concerning the recognition of refugee status, the main principles of our legal system on the distribution of the burden of proof are not applicable.

It is necessary firstly to summarise the facts leading to the *Corte di Cassazione*'s judgment. The applicant, upon arrival in Italy in 2001, had declared that he was an Iraqi citizen, an ethnic Kurd professing the Shiite Muslim faith, that he was part of a group of opponents of Saddam Hussein's regime, and that for all these reasons he and his family had been subject to persecution by the Iraqi military. Consequently, he had applied for recognition of his refugee status to the Central Commission competent for this matter (*Commissione Centrale per il Riconoscimento dello Status di Rifugiato*). However, the Central Commission refused to recognise refugee status, because the applicant had not complained of "a situation of danger to his personal safety, but an objective and generalised danger situation, caused by the armed conflicts going on in a few areas of Iraq". This situation did not come under danger of personal persecution as conceived by the Geneva Convention of 1951, according to which Italy would have guaranteed protection.

Against this decision of the Central Commission, the Iraqi citizen turned to the Court in Florence, which upheld his right to the recognition of refugee status (Tribunal of Florence, 10 March 2003).

The Ministry of Internal Affairs appealed against the first instance decision before the *Corte d'Appello* in Florence. The Court upheld the grievances of the Ministry, holding that the claimant had not provided sufficient evidence for recognition of his refugee status. In fact, for this purpose the fact that the claimant spoke Kurdish did not constitute sufficient evidence, nor did the hypothesis of persecution as a Kurd. Neither of these circumstances was sufficient to show that the claimant risked individual persecution (Court of Appeal of Florence, 11 February 2005).

The Iraqi citizen then appealed to the Supreme Court, complaining of a violation of the law concerning evidence regarding refugees. In the appellant's opinion, the Italian State, according to the Geneva Convention of 1951 and the New York Protocol, was obliged to conform to the principles established by the UNHCR's Handbook on Procedures and Criteria. Especially, the Italian State ought to have respected the criteria set out in paragraph 196 of the Handbook, according to which:

> "cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. [...] [T]he duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that cannot be proved. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt".

In addition, the applicant complained of the *Corte d'Appello*'s failure to apply the principles sanctioned by Council Directive No. 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (available at: <http://eur-lex.europe.eu>). According to the applicant, the *Corte d'Appello* should have been obliged to conform to the Directive, even if at the time of the judgment the time limit for its incorporation had not yet run out. However, the decision of the *Corte d'Appello* seems to have gone against the criteria established for the distribution of the burden of proof provided for by the Directive itself.

The *Corte di Cassazione* upheld the appeal, acknowledging that the *Corte d'Appello* had illegitimately applied the general principles of the Italian legal system on the distribution of the burden of proof, according to which anyone presenting a fact must prove it. This principle, indeed, is not valid for some categories of controversies, since they are governed by specific provisions regarding proof. Regarding refugees, in particular, the existing domestic rules anchor the burden of proof to the criterion of "mere possibility". According to this criterion, the refugee need not prove the existence of a concrete, actual and imminent danger of persecution in the State of origin, but the mere *possibility* of such a persecution, depending on the circumstances (ethnic, cultural, religious, etc.) which gave rise to his or her decision to flee.

For the *Corte di Cassazione*, the criteria set out in the Handbook on Procedures and Criteria are not applicable, as they are not binding, but the domestic judge was obliged to conform to the criteria on evidence provided for by Directive 2004/83. In particular, Italy implemented this Directive in 2007 (with D.Lgs. No. 251 of 19 November 2007), and thus after the appeal hearing had taken place. Nevertheless, according to the *Cassazione*, since the Directive was already in force (though not yet implemented by Italy) and the content of its provisions was sufficiently clear and precise, the *Corte d'Appello* had to conform to it.

The Supreme Court, then, in tracing the framework of the "innovative evidence regulations" to be applied in Italy, refers in detail to Article 4(5) of Directive 2004/83, according to which:

> "[...] where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met: (a) the applicant has made a genuine effort to substantiate his application; (b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given; (c) the applicant's statements are found to be coherent and plausible and do not run counter to specific and general information relevant to the applicant's case which is available; (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and (e) the general credibility of the applicant has been established".

Thus, the Court expressly recognises that

> "much importance is given to the unofficial investigative powers [...] of the judge, who has to cooperate in the assessment of the conditions that allow the foreigner to enjoy international protection, acquiring *ex officio* the information necessary to know the legal system and the political situation of the country of origin".

And also, "the examining authority [is entrusted with] an active and supplementary role in the instruction of the application, independently of the operative principle proper to ordinary civil practice and unrestricted by procedural preclusions or impediments".

Concerning the specific case where the claimant is not able to provide documentary evidence, or some other type suitable to support his application, the Court affirms that, "the diligence and the good faith of the applicant make up for the insufficiency of the evidence provided, with a clear consideration of the ordinary rules on evidence as set out in current Italian law".

The change in direction of the Court, as appears evident from the content of the decision, is mainly linked to the coming into force of Directive 2004/83. There is no doubt that the new law on evidence, stated by the *Corte di Cassazione* in conformity with the Directive, has clear benefits for applicants with real difficulty in proving the validity of their request. In particular, this law allows a better balance between the needs of the applicant himself and the State. The State, indeed, will be able to verify the validity and good faith of the application, but will have to do so using the specific powers of the members of the Commission and the judges, who enjoy wide-ranging and discretionary powers of investigation, and this burden will not fall to the applicant, who has considerably fewer means at his disposal.

However, it is less acceptable that the *Corte di Cassazione* had to wait for the entry in force of the above-mentioned Directive to consider the new evidence regime

operational in Italy. In fact, the system introduced by the EU Commission reiterates all the more important criteria already recommended to States by the UNCHR in its Handbook on Procedures and Criteria. There is no doubt that the latter is not a binding instrument. However, Italy, before the Directive came into force, was obliged in any event to make all necessary efforts to enforce the Geneva Convention of 1951 and the related Protocol, and so to guarantee effective international protection for refugees. From this standpoint, the Italian judges could have, perhaps, made greater use of those investigative powers that allow them to obtain *ex officio* the evidence they need pursuant to Article 183 of the Code of Civil Procedure (the Italian text of the decision is available at: <www.italgiure.giustizia.it>).

LUCIA ALENI

XI. HUMAN RIGHTS

Medical treatments – Blood transfusions – Jehova's Witnesses – Right to health – Conscientious objection to transfusion of blood on religious grounds – Risk to life – Informed consent – Oviedo Convention of 4 April 1997 (Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine)

Corte di Cassazione (Sez. III civile), 15 September 2008, No. 23676
G.M. v. Gestione Liquidatoria della soppressa USL/11 Pordenonese

Increasingly over the past few years, domestic courts and tribunals of several States have had to settle legal issues originated by patients' refusal of medical treatment on religious, ethical or other grounds. Probably, one of the major sources of worldwide legal disputes in this field is the Jehovah's Witnesses' ban on blood transfusions and blood components. Such a "religious ban" on blood transfusions was at the origin of the present decision.

The case originates in an application against the local healthcare authority (*Unità Sanitaria Locale – USL*) of Pordenone by a Jehova's Witness, seeking compensation for damages suffered following blood transfusions occurred at the Pordenone public hospital. On January 1990, after having been hospitalized in an unconscious condition at this hospital, and being in mortal danger, the applicant had to undergo several blood transfusions despite the fact that, as a Jehova's Witness, he was an objector to blood transfusions on religious grounds. Such an objection was expressed in a badge-card, the applicant carried with him, and on which were printed the words "no blood". The badge-card, moreover, provided a general release of liability, for medical personnel, from unfavourable consequences resulting from the objection to transfusions.

The applicant summoned the *USL* of Pordenone before the *Tribunale* of Pordenone claiming compensation for damages. He argued, in effect, to have suf-

fered non-pecuniary damages, as the administration of a blood transfusion despite his explicit dissent, amounted to a violation of his right consciously to object to a medical treatment. Furthermore, the applicant also claimed pecuniary damages as he maintained that he contracted the hepatitis C virus as a result of the blood transfusion. The *Tribunale* of Pordenone granted the plaintiff's claims and ordered the local health authorities to pay compensation both in respect of non-pecuniary damage (*danno esistenziale*) and in respect of pecuniary damage (biological damage, *danno biologico*) resulting from the infection contracted with the transfusion.

By Decision No. 665 of 25 October 2003, the *Corte d'Appello* of Trieste, acting as appellate jurisdiction, reversed the first instance decision and denied both damage claims. Against this decision the applicant lodged a complaint with the *Corte di Cassazione* seeking judicial review. Invoking, among other things, Article 13(1), and Article 32(2) of the Italian Constitution, and Articles 5, 6, and 9 of the 1997 Oviedo Convention on Human Rights and Biomedicine, the plaintiff complained, at first, that the appellate jurisdiction failed to vouchsafe his right to dissent to blood transfusion. From a second point of view, the applicant challenged the test applied by the *Corte d'Appello* in order to exclude any link of causation between the blood transfusion and the hepatitis C infection.

In rendering its own decision the *Corte di Cassazione* argued, with regard to the first argument, that the conduct of the medical personnel of Pordenone hospital in the present case has not infringed the right to refuse a medical treatment, nor violated the principle of informed consent. According to the judges of the *Corte*, in effect, this principle, which allows a patient to conscientiously object to a specific medical treatment, is satisfied only when the dissent is informed; in other words, it has to be expressed in the presence of objective, concrete and ascertained circumstances. Such significance may not be triggered, in the *Corte* opinion, by an *ex ante* and preventive declaration written down on a badge-card. Therefore, the *Corte* dismissed this part of the application. On the contrary, as to the second argument, disputing the test applied as to the evaluation of the link of causation between the transfusion and the infection, the judges observed that the civil plenary session of the *Cassazione* (*Sezioni Unite Civili*) has changed the regime in this field by introducing a reversal of the burden of proof on the health authority administering the transfusion as well as the applicability of a presumption of causation (see *Corte di Cassazione (Sezioni Unite civili)*, 11 January 2008, Nos. 576-585). Being in possession of the documentation on the traceability of the blood components (principle of the "proximity of evidence"), the local health service administering the blood transfusion bears responsibility – according to the *Corte* – for proving that the side-effect in question was not a consequence of its conduct. Against this background, the *Corte* quashes the appellate decision remanding the case for a new examination on the merits.

The judgment under review encompasses several legal issues, which are objects of longstanding debate within the Italian legal system. In particular the decision deserves attention as it falls within the contemporary debate in Italy about the

ethical aspects of the administration of medical treatments and involves the problem of determining how to strike the balance between the right of an individual to refuse a treatment and the obligation of health care authorities to assure the right to life of patients (as to the legal literature on the topic see CANAVACCI and FRATI, *La responsabilità medica: profili etici e giuridici*, Torino, 2003).

From this point of view, asked to determine the conditions in which it is possible to qualify patients' *Dichiarazioni anticipate di trattamento* (Advance healthcare directives) as constituting an "informed dissent", the *Corte* concludes that the dissent expressed preventively by a declaration written down on a badge-card may not be regarded as being "informed". Indeed, in the opinion of the *Corte*,

> "as to the relevance of the refusal to consent a treatment, [...] this Court is of the view that, in case of serious risk to the life of a patient, his dissent to the administration of a medical treatment must be unequivocal, actual and informed. In other words, this dissent must not express an hypothetic, programmatic, nor ideological will, but rather it must contain a deliberate choice, object of a concrete and specific assessment made by the patient about its own health situation; it must express, in other words, the patient's judgment and not his '*ex ante* evaluation'; [...] this dissent, in sum, must be subject and not precede the information concerning the existence of an imminent risk of life; it must be actual and not preventive or expressed when the knowledge of the seriousness of the health conditions be still lacking".

It is worth noting that, even if the *Corte* rejects all contrary arguments of the plaintiff, included those grounded on the articles of the Oviedo Convention, the decision seems to be consistent with the principles established by the latter Convention with regard to the protection of patient's informed consent. In effect, it is indubitable that in the Italian legal system human beings have to be able to freely give or refuse consent (expressing a dissent) to any medical intervention involving their person. This rule expresses the patients' autonomy in their relationships with their health care professionals; and consequently, any approach which might ignore the wish of the patient is restrained. However, both in the case of consent and the case of dissent, the decision of the person concerned shall be respected once he has been "informed" of the consequences. If consent, or dissent, is not given on the basis of objective information provided by the responsible health care professional as to the nature and potential consequences of the planned intervention or its alternatives, in the absence of pressure from any outside influences, the autonomy principle will not be effective, as the person concerned has not been put in condition where he or she can self-determine. Turning to the evaluation of the assessment made by the *Corte*, i.e. the possibility to object to the administration of blood transfusions in a life threatening situation, by expressing dissent through a badge-card, is undeniable proof that the patient may have expressed an anticipated dissent to the administra-

tion of specific medical treatments with regard to foreseeable situations where he would not be in a position to express an opinion about the treatment. Public health authorities are allowed to take into account these declarations when deciding to proceed with a specific treatment (this circumstance is confirmed by Article 9 of the Oviedo Convention). However, such declarations may not be regarded as expressing an "informed" consent. They lack, in effect, the basic requirement for achieving this purpose: that the patient receive actual and objective information from the responsible healthcare professional as to the nature and potential consequences of the planned intervention. From this point of view, these declarations are nothing more than... mere "wishes" (this is exactly the terminology employed by Article 9 of the Oviedo Convention, as manifestly opposed to the terminology "informed declarations" employed under Article 5) with a lower legal value than "informed" declarations. These wishes, in sum, contain non-binding guidance from the patient to the healthcare authorities (in this sense cf. PICIOCCHI, "La Convenzione di Oviedo sui diritti dell'uomo e la biomedicina: verso una bioetica europea?", DPCE, 2001, p. 1310 ff.). In these situations, the decision of determining if the wishes of the person concerned have to be followed is a matter of balance among the competing public and private interests at stake; in other words it is necessary to strike a fair balance between the obligation of healthcare authorities to assure the right to life and the right of the individual concerned to refuse the treatment. Lacking an actual and objective expression of dissent, i.e. lacking any "informed" dissent, the balance will have to be fixed, necessarily, to give priority to the obligation of healthcare authorities to protect the right to life. On the contrary, the balance will have to be fixed in the sense of giving priority to advance directives containing the dissent of the patient to a medical treatment, if, for instance, in presence of the factual circumstances requiring the medical treatment, the dissent is confirmed by a person formally acting as representative or as an agent of the patient not able to dissent (this point of view is shared also by the National Committee on Bioethics, Advice on "Dichiarazioni anticipate di trattamento", adopted on 18 December 2003, p. 4 ff., and Advice on "Rifiuto e rinuncia consapevole al trattamento sanitario nella relazione paziente-medico", adopted on 24 October 2008, p. 11 ff.).

Having decided to give priority to the obligation of healthcare authorities to safeguard the right to life over the right of the individual concerned to refuse the treatment, the *Corte di Cassazione* seems to have decided correctly, as the patient's advance dissent to the blood transfusion expressed on a badge card might not be qualified as being "informed" (from a comparative point of view, it is worth noting that the same attitude of the *Corte di Cassazione* has been showed by French courts: see, for instance, *Cour de Cassation (Première chambre civile)*, 15 November 2005, No. 4-18.180, JCP, La Semaine Juridique, éd. générale, 29 March 2006, and *Cour d'appel d'Aix-en-Provence (10e ch.)*, 21 December 2006, *Jacques B. et al. v. Charles A. et al.*, Juris-Data, No. 2006-325829; a contrary legal position seems having been adopted by those courts, in North-American countries, according to which the patients' dissent to medical treatment should be analysed in terms of

"compromise" between patient and medical health authority, with the consequence that involving the Jehovah's Witnesses' ban on blood transfusions, this ban should always receive priority over contrary evaluations of medical staff: see, *inter alia*, *Malette v. Shulman et al.* [1990] 67 DLR (4th) 321, Ontario Court of Appeal, 30 March 1990; finally, it is worth pointing out the decision of the Japan Supreme Court in the *Takeda* case in which the judges of the Supreme Court decided, for the first time in Japan, to uphold the right of a Jehovah's Witness to informed consent, and this within a system in which medical authorities traditionally have been for long considered having the right to withhold information and to adopt medical decisions on behalf of patients: see *Takeda v. State*, 54(2) Minshu 582, 1710 Hanrei Jiho 97, 1031 Hanrei Taimuzu 158, Sup. Ct., 29 February 2000, quoted in LEFLAR, "Diritti che mettono radici (l'avanzamento delle aspettative dei pazienti nella medicina e nel diritto giapponesi)", Questione Giustizia, 2001, p. 562 ff.).

The judgment invites, finally, some reflections as to the legal status of the Oviedo Convention in the Italian legal system. It is well-known that the official website of the Council of Europe does not mention Italy as having ratified the Convention. The reason for this circumstance is that Italy has not completed the implementation process of the convention as, after having passed Law No. 145 on the ratification and execution of the Convention, Italian authorities have not deposited the instrument of ratification with the Secretary General of the Council of Europe. As the deposit of the instrument of ratification is an essential part of the ratification procedure, according to Article 33(4) of the Convention, Italy may not be regarded as a country which has ratified the Convention. Despite this lack of full implementation, the Oviedo Convention has not been completely without effects within the Italian legal system. It has been used to provide interpretative guidance for domestic authorities in their policy-making activities in the field of bioethics. From this perspective, the Convention has played a major role in the discussions regarding the introduction of Law No. 40 of 19 February 2004 on medically assisted reproduction (GU No. 45 of 24 February 2004, see LENZERINI, IYIL, Vol. XIV, 2004, p. 442 ff.) as well as the admissibility of a referendum on the same Law No. 40 (see *Corte Costituzionale*, 28 January 2005, Nos. 45-49, with note by NAPOLETANO, IYIL, Vol. XV, 2005, p. 330 ff.). Moreover, the Convention and its principles are also increasingly regarded by Italian domestic tribunals as interpretative instruments aimed to guide them when interpreting domestic law (this point of view has been recently stressed by the same Italian Supreme Court in the decision released in the *Englaro* case (see *Corte di Cassazione (Sez. I civile)*, 16 October 2007, No. 21748, para. 7.2 – and the note by PALOMBINO *infra* in this *Yearbook*; for brief remarks on the attitude of Italian courts towards the Oviedo Convention see TONINI, "La rilevanza della Convenzione di Oviedo sulla biomedicina secondo la giurisprudenza italiana", RDI, 2009, p. 116 ff., p. 121; for a general survey on the Oviedo Convention, see CATALDI, "La Convenzione del Consiglio d'Europa sui diritti umani e la biomedicina", in PINESCHI (ed.), *La tutela internazionale dei diritti umani*, Milano, 2006, p. 589 ff.). The present judgment of the *Corte di Cassazione*

seems resolutely to confirm this peculiar attitude of domestic courts with regard to the Convention (the Italian text of the decision has been published in Foro It., 2009, I, p. 35 ff.).

MARCO FASCIGLIONE

XII. INTERNATIONAL CRIMINAL LAW

Jurisdiction over criminal acts committed by military personnel in the context of a multi-national force operating within the territory of a third country – Nature and extent of the "law of the flag" under international law – The principle of restrictive immunity of individuals-organs and its interaction with peremptory norms on the protection of civilians in wartime

Corte di Cassazione, 24 July 2008, No. 31171
Lozano ("the *Calipari* case")

On 24 July 2008 the *Corte di Cassazione* confirmed, albeit with many purported corrections, the *Corte d'Assise*'s Judgment No. 21 of 25 October 2007 (commented by SERRA in this *Yearbook*, Vol. XVII, 2007, p. 287 ff.), dismissing, for lack of jurisdiction, a criminal case against the US soldier Mario Lozano, charged *in absentia* with the "political murder" of a high-ranking Italian intelligence agent. The facts which brought about the case refer to the 4 March 2005 killing of Nicola Calipari by "friendly fire" at a US checkpoint on the way to Baghdad airport, while the former was escorting a newly freed Italian hostage out of Iraq.

The argument of the first instance dismissal had been threefold: a) the assumed existence and relevance of the "law of the flag" as a customary international principle (directly applicable via Article 10(1) of the Italian Constitution) subjecting a soldier exclusively to the criminal law of his sending State for any wrongdoing committed in the foreign territory; b) the corroboration of this principle by Chapter VII UN SC Resolution No. 1546 of 8 June 2004, which was deemed self-executing in the Italian legal system; c) the supposed exercise of the primary jurisdiction by the US Department of State and the consequent exclusion of the hypothetical concurrent jurisdiction by an Italian court based on the passive nationality criterion.

Both the *Procura* (Public Prosecutor's Office) and the victims' defence challenged the judgment before the *Corte di Cassazione* by pleading some diametrically opposite arguments. Yet, the *Cassazione* rejected the appeal on the basis of a different reasoning which largely embraced the solution envisaged by some scholars (see RONZITTI, "Bisogna stipulare accordi specifici per i rapporti interni alle coalizioni", Guida al Diritto-Il Sole 24 Ore, 2008, No. 6, p. 52 ff.; on the decision at hand see ID., "L'immunità funzionale degli organi stranieri dalla giurisdizione penale: il caso *Calipari*", RDI, 2008, p. 1033 ff.).

The *Corte d'Assise*'s reference to the law of the flag principle was considered "*quite inadequate*" to paralyze the Italian passive jurisdiction, lacking customary nature and being irrelevant to the case.

The practice of attributing exclusive jurisdiction to the sending State in similar cases does not seem so clear-cut as to amount to a principle of customary law. After recalling the doubts already raised by the Permanent Court of International Justice in the remote 1927 decision on the *Lotus* case (*The Case of the S.S. Lotus*, PCIJ, Series A, No. 10, 1927, p. 19), the *Cassazione* quoted the judgment passed in 1959 by its criminal plenary session (*Sezioni Unite penali*) in the *Meitner* case (Giustizia penale, 1960, III, p. 481 ff.), where the progressive erosion of the law of the flag, in favour of the territoriality principle, was drawn from international instruments such as the London Convention of 1951 (Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (NATO SOFA)), whose Article VII establishes a sophisticated system of allocation of jurisdiction between the sending and hosting States.

As to the irrelevance of the principle, the Court aligned itself with the claimants maintaining that the law of the flag, irrespective of its encapsulating legal source (either a SOFA or a UNSC binding resolution), could be interpreted only as "to govern [...] the so-called 'vertical' relations between the sending and the host States", leaving therefore uncovered the regime of "the 'horizontal' allocation of the jurisdiction between the States participating in a [...] Multinational Force operating in the territory of another State". The irrelevance of the issue of the asserted self-executing nature of the UN SC Resolution No. 1546 (2004) was the logical consequence of the above. Nonetheless, the Court took the opportunity to make it clear that "the Italian practice [...] requires a municipal implementing norm, especially when the case involves a criminal matter – which is reserved to statutory regulation by the Constitution".

After the refutation of the *Corte d'Assise*'s main arguments, the *Cassazione* went through a new legal and logical path – partly indicated by Lozano's defence – aimed at preventing the jurisdiction from being asserted by the Italian courts.

The legal ground for the US exclusive jurisdiction was, in fact, inferred from the customary international principle of restrictive sovereign immunity preventing *a State* from being judged by foreign tribunals (*par in parem non habet jurisdictionem*) whenever a question of *civil* liability arises from activities carried out by its officials with a view to exerting sovereign functions and pursuing public purposes (*iure imperii* conducts). The scope of the immunity is restrictive, thereby excluding activities aimed at pursuing private goals (*iure gestionis* conducts). A "natural corollary" of the described norm would be, in the Court's view, the *functional* immunity of the US soldier from the Italian criminal jurisdiction for the conduct performed in the scope of a multinational military operation under a clearly distinguishable national chain of command.

The *Cassazione* did not consider the functional immunity as an absolute rule, rather a flexible one to be balanced with a peremptory norm (*ius cogens*) in the

sense of Article 53 of the 1969 Vienna Convention on the Law of Treaties. The latter, albeit in the process of formation, would impose a limitation to the immunity principle whenever *iure imperii* conduct accounting for an international crime breaches fundamental human rights.

Once stated the theoretical derogability of the restrictive functional immunity, the Court went on wondering whether the case under review constituted an international crime susceptible, as such, to paralyse both the functional immunity of the accused and the plea for lack of jurisdiction of the Italian criminal judge. The answer was negative. First of all, the Court skipped the preliminary issue of Iraqi armed conflict's nature (either internal or international), arguing that the UN SC Resolution No. 1546 (2004) considers the international humanitarian law anyway applicable, even after the formal end of the occupation. Secondly, it excluded the possibility of qualifying the case as a "crime against humanity" given the evident lack of the typical elements of such an offence (i.e. widespread and systematic violations, wilfully perpetrated against civilians). Thirdly, it maintained that the facts ascribed to Lozano do not amount to any of the *prima facie* relevant misconduct falling into the category of "war crimes": murder in all its forms, wilful killing of civilians, attack wilfully directed against civilians not taking part in the conflict. It is worth noticing that the Court assimilated "war crimes" to the "grave breaches" of international humanitarian law.

The Court excluded the existence of a crime of war in light of the "subjective and objective features [which are typically associated with] the definition of 'grave breaches'". As to the subjective component, the alleged wrongdoing would lack "the absolutely necessary element of the awareness, on the part of the author of the crime, of the factual circumstances [...] from which one can deduce the protected status granted to the victims [by international humanitarian law]". The reconstruction of the subjective element would be hindered by the fact that the killing occurred when the vehicle transporting Mr. Calipari was quickly approaching – at night – a check-point located in a zone which had already been the object of a series of terrorist attacks. As to the objective element, the Court highlighted the "isolated and individual nature of the fact" and stressed the difference of "scale" between the tragic death of Calipari and other dramatic episodes. This reasoning led the Court to exclude Italian jurisdiction over the case. Whilst mostly acceptable as to the negative part, the *Cassazione*'s decision is still subject to criticism when it comes to assessing the positive aspects.

The first criticism looks at the customary rule on which the argument for lack of jurisdiction was based. If the functional immunity of military personnel sent on mission abroad "constitutes [...] a customary international source, universally accepted by the prevalent doctrine and case-law, both national and international, [...] supervening upon the link criteria set by the national criminal norms", why States, albeit only within the vertical relations with the territorial State, feel it necessary to stipulate specific SOFAs? If this principle really existed, SOFAs would appear more as a form of redundant protection than the codification of a generic

customary obligation. Not only would the SOFA practice prove the non-existence of the law of the flag as a consolidated customary principle, but it would also attest that the general principle of restrictive immunity *of States* has not extended up to "ontologically" encompass that specific category of individuals-organs, namely soldiers deployed abroad. The bulk of the case-law and the practice exhibited in the judgment do not appear to be related to such a specific "segment" of sovereign activities. Rather, they concern the functional immunity of either individuals-organs from the foreign State's *civil* (not criminal) jurisdiction or high-ranking statesmen (not soldiers) from the criminal jurisdiction.

The affirmation that it is possible to depart from the immunity principle is also not free from criticism. First of all, we remark that the Court once again relied on case-law (admittedly marginal) and on *civil* (not criminal) liability in order to corroborate the progressive formation of a custom locating "the breaking point of any tolerable exercise of the sovereign power" in breach of *jus cogens* (on this logical flaw see the case note by PALCHETTI, International Law in Domestic Courts, ILDC 1085 (IT 2008), available at: <http://ildc.oxfordlawreports.com>).

Secondly, it is formally illogical to deny the self-executing character of the UN SC Resolution No. 1546 (2004) and then to quote its text to circumvent the preliminary issue of the Iraqi armed conflict's nature, an issue which could have been more linearly resolved by cross-referencing the authoritative case-law of the ICTY (see *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, Decision of the ICTY Appeals Chamber on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, paras. 100-119) extending to civilians of internal armed conflict the same level of protection as granted under the scope of international wars.

Thirdly, the assimilation of "war crimes" to "grave breaches" is unacceptable. Some scholars rightly noted that the Court assimilated the species to the genus (see CASSESE, "I crimini di guerra e il caso Calipari", *La Repubblica*, 5 August 2008, p. 28; ID., "The Italian Court of Cassation Misapprehends the Notion of War Crimes: The *Lozano* Case", JICJ, 2008, p. 1077 ff.). We partially share this opinion, since what could at first sight seem to be a conscious logical operation aimed at reducing the whole to one of its parts is, in fact, a legal error due to an inattentive reading of the International Criminal Court Statute (ICCSt), the Geneva Conventions of 1949 (GC) and the Additional Protocols of 1977 thereto (APGC). As a matter of fact, some offences (i.e. murder in all its forms), which are clearly "serious violations" (see Article 3 common to the four GC as well as Article 8(2)(c)(i) of the ICCSt), were classified as "grave breaches"; some other offences (i.e. attacks wilfully directed against civilians), that are categorised as "grave breaches" by the GC (see Article 85 of the I APGC) and downgraded to "serious violations" by the ICCSt (see Article 8(b)(i) and (e)(i)), were uncritically labelled as "grave breaches". The confusion on matters of war crimes is not a nominalistic but a substantive issue, since the restrictive subjective and objective requisites associated with the "grave breaches" lead the Court to exclude *a priori* that the facts ascribed to Lozano amount to a war crime. The Court would have probably reached an op-

posite conclusion if it had started from a sound definition of "war crimes", as drawn from the international case-law (see case *Tadić*, *cit. supra*, paras. 84 and 94) and the doctrine (see *The Manual of the Law of Armed Conflict*, Oxford, 2004, p. 427, para. 16.26): i.e. every "serious violation" of the international humanitarian law, other than those listed as "grave breaches" in the GC and the APGG.

Fourthly, it is puzzling that the Court carried out, on the one hand, a summary assessment (exceeding its competence) of the "concrete historical and factual dimension" while, on the other hand, it let slip an element, to us, decisive among the "factual circumstances from which it is possible to deduct the status of protection enjoyed by the victims". The swift approach to the check-point of a civilian car cannot be brought as a justification for Lozano's inability to ascertain the status of the passengers and the consequent impulsive conclusion that they were hostile elements. This can be inferred from the special protection granted by Article 50(3) of I APGC to "civilian objects" in case of doubt about their identity as well as the wide *per adversum* definition of "civilian objects" enshrined in the previous paras. 1 and 2.

The application of the restrictive functional immunity principle to troops deployed abroad – admitting but not conceding its existence – could have been neutralized by opting for a different logical and legal approach based (not on international humanitarian law but) on international human rights law. The Court just focused on the reconstruction of universally accepted international principles and did not make a complete reconnaissance of treaty norms binding the concerned States and capable of derogating from the purported immunity principle. In this respect, we deem crucial Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR), to which both the US and Italy were parties at the time of the crime. This norm obliges the contracting State to guarantee to "any person whose rights [...] are violated [...] an effective remedy, *notwithstanding that the violation has been committed by persons acting in an official capacity*" (emphasis added). The right to the judicial ascertainment of the circumstances of a loved one's death could have been inferred from the right to an effective judicial remedy for the deprivation of life (a supreme value protected by Article 6(1) of the ICCPR). From a domestic law point of view, the Court could have grounded such interpretation also on Article 24(1) of the Italian Constitution: "[a]ll persons are entitled to take judicial action to protect their individual rights and legitimate interests". To those who may challenge the applicability of the ICCPR to a State party outside its territory we remind that Article 2 therein stipulates the State parties' obligation "to respect and to ensure to all individuals within its territory *and subject to its jurisdiction* the rights recognized in the [...] Covenant" (emphasis added). As is common knowledge, the UN Human Rights Committee (HRC) gave an extensive interpretation of the extra-territorial application of the ICCPR (see *Delia Saldìas de Lopez v. Uruguay*, Communication No. 52/1979, UN Doc. CCPR/C/OP/1 (1984), p. 91, paras. 12(2)-12(3); and also HRC, Comment on the United States of America, UN Doc. No. CCPR/C/79/Add 50, 6 April 1995, para. 19). This

"case-law", read in conjunction with the advisory opinions where the International Court of Justice affirmed the applicability of human rights treaties also in time of war as *lex generalis* in relation to international humanitarian law (*Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, p. 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports, 2004, p. 136), renders the ICCPR relevant to our case.

The above proposed thesis remains anyway a "second best" if compared with what could have been a vanguard stance: the application, by analogy, of the jurisdictional complementarity criterion set forth in Article 17(1)(a) of the ICCSt to the relations between the US and Italy. Such an interpretation could have been grounded on two main arguments: a) the technical impossibility to take legal proceedings before the ICC, given the non-ratification of its Statute by the US (the State of the alleged criminal) and Iraq (the State where the alleged crime was committed); a teleological reading of Article 146 of IV CG aimed at extending also to "serious violations" the special procedural consequences associated with the "grave breaches", i.e. the obligation for each contracting party *either* to refer a criminal to its judges *or* to extradite him to another interested party competent to try him (*aut dedere aut judicare*). The complementarity criterion could have been the "missing link" between the criminal system of the US (the "unwilling State") and Italy (the State which could have intervened on the basis of either the passive nationality or universal jurisdiction). Far from being an instrumentalisation backed by "judicial nationalism", such an approach could have found its rationale on a teleological level since it genuinely expresses the ideal tension towards the protection of fundamental interests: first of all, the interest of the international community in removing impunity for war crimes; secondly, the interest of the victim and the claiming parties to enjoy an effective remedy (see again Article 2(3) ICCPR). Yet, there is no trace of such a perspective in the Court's reasoning, where "the issue related to the assessment of an actual, effective, exercise of the criminal jurisdiction by the sending State toward Lozano is considered absorbed [in the declaration of exclusive jurisdiction by the US]".

To conclude, although we do not share the Court's conclusions, we acknowledge that its judges seized the terms of a problem which transcends the Calipari case: "[the diverse] models of peace keeping missions [...] [invariably bring about] difficulties to identify the framework of legal sources, national and international, applicable to the criminal offences committed by the personnel of the several military contingents". There is indeed an urgent need to fill the gap of the customary international law through *ad hoc* treaties governing the jurisdictional relations between the contingents participating in the same coalition warfare so as to get rid of those "grey zones" – as the Court called them – "characterized by the rise of new and controversial issues given the evident involvement of several legal systems" (the Italian text of the decision has been published in RDI, 2008, p. 1223 ff.).

GIANLUCA SERRA

XV. CO-OPERATION IN JUDICIAL, LEGAL, SECURITY, AND SOCIO-ECONOMIC MATTERS

Relationships with foreign authorities – 1983 Strasbourg Convention on the Transfer of Sentenced Persons – Article 12: Pardon, amnesty, commutation – Special measures of pardon (Indulto) – Applicability – Interpretation of treaties

Corte di Cassazione (Sezioni Unite penali), 23 September 2008, No. 36527
Napoletano

In this case, the criminal plenary session (*Sezioni Unite penali*) of the *Corte di Cassazione* was asked to settle a general and very important issue, namely whether the "*indulto*" – a special type of pardon, provided for by Article 174 of the Italian Criminal Code – fell within the scope of Article 12 of the 1983 Strasbourg Convention on the Transfer of Sentenced Persons, under which the administering State – the State to which the sentenced person has been transferred in order to serve his sentence – "may grant pardon, amnesty or commutation of the sentence in accordance with its Constitution or other laws".

The facts can be summarized as follows. In 1989, an Italian national had been sentenced to life imprisonment for murder by the Crown Court of Strafford, in the United Kingdom). Ten years later, the *Tribunale di Milano*, applying the 1983 Convention, recognized the British judgment and converted the sentence to thirty years' imprisonment – a sanction prescribed by Italian law for similar offences (Article 575 of the Italian Criminal Code).

On 31 July 2006 the Italian Parliament passed Law No. 241 granting special measures of pardon (so called *indulto*), which may lead to the reduction of a sentence by a maximum of three years (except for some grave offences, e.g., terrorism, slavery, and usury – see Article 1(2)). A decree issued by the judicial authority would be necessary to obtain the benefits of the *indulto*. Asked to apply the *indulto* to the applicant, the *Tribunale di Milano* excluded this possibility in a judgment delivered in 2007. It maintained that Italy (the administering State) was bound by the legal nature and duration of the sentence as determined by the court of the United Kingdom (the sentencing State). In addition, Article 12 ("Pardon, amnesty, commutation") of the 1983 Convention only mentioned pardon, amnesty and commutation as a means of clemency that could be granted by the administering State, whereas the legal nature of the *indulto* was deemed to be different from any such measures. The 2007 judgment was challenged before the *Corte di Cassazione*. It was asked to quash the judgment and recognize the applicant's right to enjoy the effects of an *indulto*.

In its foregoing judgments, the *Corte di Cassazione* had constantly affirmed that no *indulto* was available to persons sentenced abroad and serving their sentences in Italy (see, *inter alia*, *Corte di Cassazione (Sez. I)*, 29 January 2008, No. 10266, *Nogarin*; *Corte di Cassazione (Sez. I)*, 20 December 2007, No. 2106,

Falcone; *Corte di Cassazione (Sez. I)*, 5 December 2007, No. 47005, *Lenti*; *Corte di Cassazione (Sez. I)*, 31 October 2007, No. 42420, *Adesso*; *Corte di Cassazione (Sez. I)*, 25 October 2007, No. 40804, *Perinato*; *Corte di Cassazione (Sez. I)*, 11 April 2007, No. 19444, *Greco*; *Corte di Cassazione (Sez. VI)*, 21 March 2007, No. 17804, *Melina*; *Corte di Cassazione (Sez. I)*, 14 March 2007, No. 19076, *Poma*; *Corte di Cassazione (Sez. I)*, 23 January 2007, No. 17583, *Cutrona*; *Corte di Cassazione (Sez. IV)*, 14 December 2000, *Di Cesare*; *Corte di Cassazione (Sez. I)*, 28 February 1997, No. 1716, *Giacon*; *Corte di Cassazione (Sez. VI)*, 7 October 1994, *Falci*; *Corte di Cassazione (Sez. I)*, 22 June 1994, *Pileggi*). In the light of the 1983 Convention, it had been maintained that Article 10 ("Continued enforcement") obligated Italy to respect the legal nature and duration of the sentence as determined by the sentencing State. Additionally, a literal interpretation of Article 12 did not envisage the inclusion of the *indulto* among the measures that could be granted to the sentenced person. The same Article 12 could not be interpreted extensively or by analogy.

In the judgment under review, the *Cassazione* reaches the opposite conclusion. On the method of interpreting the 1983 Convention – ratified and incorporated in Italy with Law No. 112 of 12 February 1974 – the Supreme Court states that the hermeneutical criteria to be used are those set by the 1969 Vienna Convention on the Law of Treaties (VCLT), rather than those applied to interpret domestic provisions. In particular, Articles 31, 32 and 33 VCLT are mentioned expressly. It was also recalled that, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Article 31(1)). The Court went on to recall that the said Article implicitly includes the effectiveness principle (*ut res magis valeat quam pereat* or *principe de l'effet utile*), and that Article 31(2) states that, in interpreting a treaty, not only the text, but also its preamble and annexes are to be taken into consideration. It then affirmed that "all the principles must be taken into account; any interpretation excluding one of them would be incorrect. The above-mentioned principles concur in determining the exact meaning of the provisions in question, as a whole".

To specify the normative framework concerning the transfer of sentenced persons, the Supreme Court examines: a) the 1983 Strasbourg Convention; b) other international acts; and c) bilateral treaties concluded by Italy.

Concerning the first point, the Court recalls that the Strasbourg Convention aims to facilitate the transfer of foreign prisoners to their home countries by providing a simple and expeditious procedure. Mentioning paragraph 9 of the Explanatory Report (ER), it also stresses that, in order to facilitate the rehabilitation of prisoners and the good administration of justice, States have built up a cooperative framework, as the repatriation of sentenced persons may be in the best interests of the prisoners as well as of the governments concerned.

Going on with its description of the Convention's regime, the Court further recalls that, once the Parties agree to the transfer of the sentenced person the Convention of-

fers two alternative optional measures for executing the sentence: Article 10 deals with its "continued enforcement", while Article 11 envisages the possible "conversion of the sentence" by means of an *exequatur*. Italy, ratifying the Convention, chose incorporation through "continued enforcement" (Article 3 of the Law No. 334/1988). The Court also notes, however, that regardless of the option chosen by the State party, Article 9(3) of the Convention states that the "enforcement of the sentence shall be governed by the law of the administering State, and that State alone shall be competent to take all appropriate decisions". In the ER (para. 47) it is in fact affirmed that the "reference to the law of the administering State is to be interpreted in a *wide sense* [...]. To make this clear, paragraph 3 states that the administering State alone shall be competent to take all appropriate decisions" (emphasis added).

The Supreme Court also examines Article 10, referring once again to the ER to make clear how far the administering State is bound by the legal nature as well as the duration of the sentence, as determined by the sentencing State. According to the Court, the sentence to be served in the administering State is subject to any later decision of that State. For example, on conditional release or remission, it "must correspond to the terms of the original sentence, taking into account the time served and any remission earned in the sentencing State up to the date of transfer" (para. 49). If the two States concerned have different penal systems, the Court adds, the Convention allows the conversion of the sanction to the punishment or measure prescribed by its own law for a similar offence within certain limits: "Article 10(2) enables the administering State merely to *adapt* the sanction to an equivalent sanction prescribed by its own law in order to make the sentence enforceable. The administering State thus continues to enforce the sentence imposed in the sentencing State, but it does so in accordance with the requirements of its own penal system" (para. 50).

Interpreting the provisions of Article 9(3) and Article 10, the Court maintains that the administering State is not formally forbidden from converting the sanction to the punishment prescribed by its own law for a similar offence. On the contrary, it cannot apply a punishment aggravating, by its nature or duration, the sanction imposed by the sentencing State (see para. 50 of the ER).

In the opinion of the *Cassazione*, the authority of the administering State to take "all appropriate decisions" – as provided for by Article 9(3) – is confirmed by two soft law acts: the Report of the Committee of the Ministry of the Council of Europe on Parliamentary Assembly Recommendation 1527 (2001) on the "Operation of the Council of Europe Convention on the Transfer of Sentenced Persons – critical analysis and recommendations" (Doc. CM/AS(2003) Rec1527final of 23 January 2003, Appendix, Point 9(iii), and the Report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (Doc. No. 9117 of 7 June 2001, part II, D, paras. 24 ff.)).

Concerning Article 12, the Supreme Court states that the ER (para. 59) and declarations of State parties made at the time of ratification broadly take into account the authority of the administering and sentencing States to grant "pardon, amnesty or commutation". Only in two cases – those of Azerbaijan and Germany

– has it been asked that the decisions regarding the pardon of sentenced persons transferred by these two countries should be *agreed* upon between the respective domestic competent authorities.

An obligation concerning the termination of enforcement is provided for (see para. 63 of the ER) when pardon, amnesty or commutation are granted by the sentencing State. More generally, the administering State shall provide information to the sentencing State concerning the completion of the enforcement of the sentence (e.g., sentence served, remission, conditional release, pardon, amnesty, and commutation) pursuant to Article 15 of the Convention and paragraph 64 of the ER.

Turning to the second point, namely the other international acts concerning cooperation on issues covered by the 1983 Convention, the *Cassazione* makes reference to a proposal of a European Union Council Framework Decision on the application of the principle of mutual recognition to judgments on criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (see Council Framework Decision 2008/909/JHA of 27 November 2008, which was approved after the judgment under review was delivered), and to Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties. Both acts contain similar provisions allowing the administering State to grant pardons and commutations.

The Court recalls that the authority of the administering State concerning decisions regarding Article 12 of the 1983 Strasbourg Convention is recognized also by several bilateral treaties concluded by Italy (e.g., Bangkok Treaty of 28 February 1984 concluded with Thailand concerning the execution of criminal judgments, Article 10 of the Italy/Peru Treaty of 24 November 1994 on the transfer of sentenced persons, Article 6 of the Italy/Hong Kong Treaty of 18 December 1999, Article 12 of the Italy/Cuba Treaty of 9 June 1998).

Having completed the identification of the normative framework, the judges examine the issue of its interpretation. First of all, the *Corte di Cassazione* rejects any literal interpretation of Article 12 of the 1983 Strasbourg Convention. The Convention was written in the two official languages of the Council of Europe (English and French), and the Italian translation – not mentioning *indulto* – is not an official one: consequently, the absence of *indulto* from the permissible measures is irrelevant. It is stated that *indulto*, as it is envisaged in the Italian Criminal Code (Article 174), does not exist in foreign legal orders, in particular in France and in the United Kingdom.

The Court then refers to the ER, which uses the expression "remission of penalty" to mention measures that can be decided by the administering State (paras. 49 and 64). This expression, in its French form "*remise de peine*" has been used in EU documents as a translation of the Italian *indulto* (see COM(2008) 332 of 27 May 2008). The same expression has been used by the European Court of Human Rights in several decisions (e.g., *Artico v. Italy*, Application No. 6694/74, Judgment of 13 May 1980, para. 45; *Grava v. Italy*, Application No. 43552/98, Judgment of

10 July 2003, paras. 31 ff.; *Pilla v. Italy*, Application No. 64088/00, Judgment of 2 March 2006, para. 19), in acts of the Council of Europe (e.g., Committee of Ministers, Recommendation No. R (99) 22 Concerning Prison Overcrowding and Prison Population Inflation, adopted on 30 September 1999, Appendix, para. 23), as well as in a comparative study prepared by the French Senate on pardon acts ("L'amnistie et la grâce", Les documents de travail du Sénat, Série Législation Comparée, Doc. LC 177, 1 October 2007).

All these examples – and other references included in EU documents, as well as domestic practice of countries providing for measures similar to *indulto* (e.g., Portugal) – lead to the conclusion that the systematic interpretation of the Convention must take into account *all* the criteria envisaged by the VCLT.

The "humanitarian" aim and the spirit of the 1983 Strasbourg Convention and the necessity of not using rigid criteria for its interpretation had been recalled also by the Constitutional Court in its judgment in the *Baraldini* case (22 March 2001, No. 73, see CATALDI, IYIL, Vol. XI, 2001, p. 298 ff.). According to the *Cassazione*, serving the sentence in the country of origin of the offender cannot amount to an aggravation, in nature or duration, of the sanction imposed by the sentencing State; consequently the same measures of pardon must be applied to all persons, regardless of the place in which they were sentenced. As a result, the *Corte di Cassazione* accepts the petition of the applicant and quashes the decision of the *Tribunale di Milano*, requiring a new one, which must take into account the decision of the Supreme Court.

The in-depth analysis made by the *Corte di Cassazione* on the rules for the interpretation of the 1983 Convention is significant. First of all, it expressly rejects any interpretation of the treaty based upon domestic standards. Secondly, the criteria established by the VCLT are clearly applied. The judges of the Supreme Court have used "any subsequent practice" (Article 31(3)(b)) to read the wording of Article 12, narrowly interpreted by the same Court in the past years, to exclude a "type" of pardon. Finally, the judgment is noteworthy also for its contribution to jurisprudential coherence: lower courts, openly diverging from the case-law of the Cassation, had delivered judgments in favour of the applicability of the *indulto* for similar cases (see *Corte d'Appello* of Caltanissetta, 9 May 2002; *Corte d'Appello* of Rome, 21 June 2006, *Baraldini*; *Corte d'Appello* of Catanzaro, 1 December 2006, *Vizza*) (the Italian text of the judgment has been published in Cassazione penale, 2009, p. 57 ff.).

GIOVANNI CARLO BRUNO

XVIII. RELATIONSHIP BETWEEN MUNICIPAL AND INTERNATIONAL LAW

Health – Principle of informed consent – Cross-fertilization – Oviedo Convention of 4 April 1997 (Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and

Medicine: Convention on Human Rights and Biomedicine) – Implementation of international treaties

Corte di Cassazione (Sez. I civile), 16 October 2007, No. 21748
Englaro

The judgment under discussion represents one the most significant decisions handed down in the long legal battle on the *Englaro* case. Eluana Englaro, as the result of head injuries sustained in a road-traffic accident in January 1992, fell into a vegetative state with spastic *tetraplegia* and loss of higher cognitive function. Her father and guardian, basing his arguments on his daughter's personality and the ideas concerning life and dignity which she had allegedly expressed before the accident, began court proceedings seeking authorization to discontinue his daughter's artificial nutrition and hydration. With its decision of 16 October 2007, the *Corte di Cassazione* stated that the judicial authority may give such authorization, but on condition that a similar desire may be attributed with certainty to the patient.

The whole judgment is based on the well-known principle of informed consent, understood as the choice that the patient makes concerning the medical treatment to be undergone, after detailed information from the doctor in charge. That this is precisely the principle used by the Court can be inferred first of all from the Italian Constitution, especially from Article 32. This Article, in fact, which protects health as a fundamental right of the individual, as well as in the public interest, envisages the possibility of compulsory health treatment, but subjects this to a legal reservation, qualified by the necessary respect for the human person and further specified through the need for the legislator to put in place all possible preventive measures, in order to avoid the risk of complications.

From the perspective of cross-fertilization among the various legal systems and jurisdictions that are increasingly characterising today's world (see SLAUGHTER, "A Global Community of Courts", Harvard ILJ, 2003, p. 191 ff.), it is worth noticing that the *Cassazione* does not confine itself to examining the pertinent domestic laws. It indeed points out how analogous indications concerning the scope of the principle can be drawn both from legislative (Article 111-110 of the French *Code de santé publique*) and judicial practice (United States Supreme Court, *Vacco et al.*; *Quill et al.*) of other countries as well as from international practice. In particular,

> "[at] the level of supranational sources, the [...] principle finds recognition in the Convention of the Council of Europe on Human Rights and Biomedicine, concluded in Oviedo on 4 April 1997 [...] which, in Article 5, expresses the following general rule [...]: 'An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it'. [In the same way,] [f]rom the EU Charter of Fundamental Rights, adopted in Nice on 7 December 2000, one evinces how the free and informed consent of

> the patient concerning medical intervention should be considered not only from the point of view of the lawfulness of the treatment, but above all as a true fundamental right of European citizens pertaining to the more general right to the integrity of the person. [The European Court of Human Rights itself underlined] that in the sphere of medical treatment the refusal to accept a particular treatment might inevitably lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8(1) of the Convention (right to private life); and that a person may claim to exercise a choice to die by declining to consent to treatment which might have the effect of prolonging his life [see *Pretty v. United Kingdom*, 29 April 2002, para. 63]".

The possibility of applying the principle of informed consent – the decision goes on – is however in doubt when, as in the case in question, the subject to be protected is in a permanent vegetative state and is not therefore capable of expressing any will regarding health treatment; in the Italian system there is in fact no rule that expressly allows the guardian of the patient to decide on his or her behalf.

Despite this, in the *Cassazione*'s view, the judge can authorise the interruption of health treatment when two conditions are both present, i.e. where: a) the person concerned is in a persistent vegetative state; and b) there is full evidence that, had she/he been in possession of all her/his faculties, she/he would have opposed medical treatment.

The main argument adopted to justify such a conclusion is above all the principle mentioned in Article 6(3) of the Oviedo Convention, stating that "[w]here, according to law, an adult does not have the capacity to consent to an intervention because of a mental disability, a disease or for similar reasons, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law".

On this point, furthermore, the *Cassazione* points out that:

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

In this way, the decision clearly accepts the contention long maintained in literature, whereby a treaty not yet applicable at the domestic level could anyway be used for interpretative purposes (CONFORTI, *Diritto internazionale*, 7th ed., Napoli, 2007, p. 291).

It seems to us, furthermore, that this is not the hypothesis to focus on in the case in question, so much so that the *Cassazione* does not indicate which domestic rules should be read in conformity with the Oviedo Convention. On the other hand, it underlines that:

> "The *Corte Costituzionale*, in admitting the request for a *referendum* on some rules of Law No. 40 of 19 February 2004 regarding medically assisted procreation, pointed out that any normative gap following the *referendum* would in no way be in contrast with the principles laid down by the Oviedo Convention [see IYIL, Vol. XV, 2005, p. 330 ff., with a comment by NAPOLETANO] [...]: thus implicitly confirming that *the principles it sets out are now part of the national system and they cannot be ignored*" (emphasis added).

The impression given by this part of the decision is that the judge *de quo*, in the wake of constitutional case-law, has *pre-emptively applied* the Oviedo Convention.

The application of unratified treaties is a well-known practice in some countries (such as France, for example) and consists in the power of the judge to apply a treaty before its formal ratification when the political will of the forum State clearly lies in this direction (see PERUZZETTO, "Le droit international devant le juge civil français: la mesure de l'ouverture du système juridique français", in BEN ACHOUR and LAGHMANI (eds.), *Droit international et droits internes – Développements récents*, Paris, 1998, p. 291 ff., p. 300 ff.).

In our case there is no doubt about the will of the Italian State to conform to the Oviedo Convention "all the more so – in the words of the *Cassazione* – following the parliamentary law authorising ratification". The judge thus considered it possible to apply Article 6 of the Convention, as it is a norm that "relating to all health treatments, has the characteristics of a general rule" (for a critical appraisal of the Italian case-law concerning the Oviedo Convention see TONINI, "La rilevanza della Convenzione di Oviedo sulla biomedicina secondo la giurisprudenza italiana", RDI, 2009, p. 116 ff. (the Italian text of the decision is available at: <www.italgiure.giustizia.it>).

FULVIO MARIA PALOMBINO

Status of the European Convention on Human Rights and Fundamental Freedoms within the hierarchy of sources of Italian Law in light of Article 117 of the Italian Constitution – Conflict between domestic laws and the European

Convention on Human Rights – Interpretation of the European Convention on Human Rights

Corte Costituzionale, 27 February 2008, No. 39
B.R. v. Provincia di Reggio Emilia et al.

After the two groundbreaking Decisions Nos. 348 and 349 of 24 October 2007 (see this *Yearbook*, Vol. XVII, 2007, p. 292 ff., with a note by CATALDI), the *Corte Costituzionale* returned to the issue of the relationship between the European Convention on Human Rights (ECHR) and the Italian legal system.

The Court declared the constitutional illegitimacy of Articles 50 and 142 of Royal Decree No. 267 of 16 March 1942 (Regulation governing bankruptcy, arrangement with creditors, controlled receivership and administrative compulsory winding-up), as it was worded before the changes made by Legislative Decree No. 5 of 9 January 2006. Articles 47 and 128 of D.Lgs. No. 5 of 2006 repealed both Articles 50 and 142 of the Royal Decree of 1942, determining the elimination of the public register of bankrupts as well as the bankruptcy discharge procedure. According to the provisions challenged before the *Corte Costituzionale*, the status of a bankrupt had as an automatic consequence the loss of civil and political rights of the bankrupt up to the cancellation from the register following a judgment stating the discharge of bankrupt.

The applicant in the proceeding before the *Tribunale Amministrativo Regionale* (TAR, i.e. the Regional Administrative Tribunal) of Emilia Romagna, Section of Parma, ranked as second best candidate on the list for the awarding of two pharmacy licences, tendered by the *Provincia* of Reggio Emilia on 20 May 2003. However, upon review of the eligibility criteria as per the law in force at the time of the tender procedure, he was excluded from the final list – the full entitlement to civil and political rights is required for admission to a competitive procedure aimed at awarding such licences. In fact, he had been declared bankrupt by the Court of Termini Imerese in 1986 and was still in the register of bankrupts, notwithstanding that he had the right to apply for his discharge in order to obtain the cancellation from the register.

Considering the automatic character of bankrupt incapacity and the fact that its effects persist even after the end of the bankruptcy procedure, the *Corte Costituzionale* declares the constitutional illegitimacy of Articles 50 and 142 of the Royal Decree of 1942 as in contrast with Articles 117(1) ("Legislative power belongs to the State and the Regions [...] within the limits set by [...] international obligations") and 3 ("Right to Equality") of the Italian Constitution. With reference to the second ground of unconstitutionality, the Court holds that the automatic attribution of general personal incapacity regardless of the specific causes of bankruptcy – therefore, without considering different situations – and the duration of its effect even after the end of the bankruptcy procedure have in any event the character of a sanction and do not take into consideration other interests of the bankrupt deserving protection.

It is interesting, here, to analyse the first ground of unconstitutionality. On the basis of Decisions Nos. 348 and 349 of 2007, the Court reaffirms, with reference to Article 117(1) of the Italian Constitution, that the provisions of the ECHR must be considered as "intermediate rules" (*norme interposte*) – i.e. rules integrating a parameter of constitutionality for reviewing national legislation (Decision No. 349, para. 6.2) – and that their specificity lies in the fact that they are subject to the interpretation of the Strasbourg Court, to which Contracting Parties are obliged to conform (Decision No. 349, para. 5). As a consequence, any domestic law in conflict with the ECHR as interpreted by the European Court of Human Rights indirectly violates the Italian Constitution and can be repealed by the *Corte Costituzionale*.

As the rules concerning personal incapacity of a bankrupt, provided by the bankruptcy law effective before the change of 2006, had already been censured by the European Court of Human Rights, who had established that they violated Article 8 of the ECHR, the *Corte Costituzionale* also declares their constitutional illegitimacy as clashing with Article 117(1) of the Constitution. In particular, the Strasbourg Court stated that, "due to the automatic nature of the registration of the bankrupt name in the register and the absence of a judicial evaluation and control on the enforcement of the incapacity descending from the above-mentioned registration and the time necessary to obtain the discharge, the interference of Article 50 of the bankruptcy law on the right to private life of the applicants is not necessary in a democratic society in the light of Article 8(2) of the Convention" (*Vitiello v. Italy*, Application No. 77962/01, Judgment of 23 March 2006, para. 62).

The judgment of the *Corte Costituzionale*, even though in line with its recent case-law, does not seem to take into consideration some aspects of particular relevance.

The Court does not deal with the question of unconstitutionality in the light of the principle of the temporal succession of laws (on this point see MASTROIANNI, "Anche le leggi precedenti la Convenzione europea dei diritti dell'uomo debbono essere rimosse dalla Corte costituzionale?", RDI, 2008, p. 456 ff.). Indeed, it must be noted that the ECHR, ratified and implemented by Italy with Law No. 848 of 4 August 1955, being clearly subsequent to the Royal Decree No. 267 of 1942, should have been applied, at least with reference to the rules of the European Convention that are directly applicable in the Italian legal system, therefore determining the setting aside of pre-existing domestic laws in contrast with it. In other words, regardless of any other argument on the primacy of international obligations even on subsequent laws, if a domestic court identifies a conflict between the ECHR and pre-existing national law that cannot be solved by way of interpretation, it will simply not apply the latter as it violates the European Convention. It is evident that the meaning of the provisions of the ECHR must be reconstructed by the domestic court taking into account the case-law of the Court of Strasbourg. The *Corte Costituzionale*, however, does not seem to share this opinion. The Court, rather, reaffirms and extends the effects of Article 117(1) of the Italian Constitution on the existing domestic law prior to the entry into force of the ECHR. In the Court's

view, Article 117(1), on the one hand, attributes a particular "force of resistance" to domestic laws implementing international treaties, such as the ECHR, in case of conflict with ordinary legislation. On the other hand, it brings the international treaties within the jurisdiction of the *Corte Costituzionale*, since "eventual conflicts will not generate problems of the temporal succession of laws or assessments of the respective hierarchical arrangement of the provisions in contrast, but questions of constitutional legitimacy" (Decision No. 348, para. 4.3).

Moreover, in its referral order to the Constitutional Court the TAR holds that, although the ECHR is binding on Italy, the enforcement of human rights under the Convention concerns national legislation and the Convention rules are not directly applicable in the domestic legal system. The TAR implicitly denies any possibility of automatic abrogation or non-application by a court of domestic laws in conflict with the ECHR, as the power of repealing a law in contrast with international obligations is an exclusive competence of the national and regional legislator, as well as of the *Corte Costituzionale*, when ruling on questions of constitutional legitimacy, especially with reference to Article 117(1) of the Italian Constitution.

It is a source of concern that the *Corte Costituzionale* does not censure the TAR's anachronistic point of view, even when the latter denies the direct applicability of the ECHR and states that the European Convention creates only intergovernmental obligations that do not confer any power for national courts to set aside domestic laws, also in the case they have been superseded by subsequent international treaty provisions (see CONFORTI, "Atteggiamenti preoccupanti della giurisprudenza italiana sui rapporti fra diritto interno e trattati internazionali", Diritti umani e diritto internazionale, 2008, p. 581 ff.).

According to the Court, the European Convention does not produce effects in the domestic legal order which can establish the jurisdiction of national courts directly to apply its provisions in disputes before them, and at the same time not to apply the relevant conflicting domestic law. As a consequence, domestic courts do not have the power to set aside domestic laws in contrast with the ECHR, since the alleged incompatibility between these two sources of legislation amounts to a question of constitutional legitimacy falling under its exclusive jurisdiction (Decision No. 348, para. 3.3, and No. 349, para. 6.1).

It is hard to share the opinion of the Court, since the ratification and implementation of an international treaty imply some restraints on State sovereignty. Moreover, the direct applicability and the direct effect of an international treaty rule cannot be limited to some treaties, such as the EU/EC Treaties, and ruled out for others, such as the ECHR, nor can it be excluded for a treaty in block regardless of the specificity of the provisions therein. The circumstance that an international norm does not require implementing legislation at the national level or that an international obligation imposed upon States by a treaty is directly enforceable by individuals before their domestic courts are questions that should be considered on a case-by-case basis taking into account the clear, precise and unconditional character of the international rule, as well as the object and purpose of the treaty.

On the contrary, in the judgment under review, the *Corte Costituzionale* indirectly confirms that also with reference to existing rules it will be necessary to wait for the Constitutional Court in order to repeal the provision in contrast with the ECHR. Any antinomy between domestic and international law must, in any case, be resolved by the *Corte Costituzionale*, even when it can be maintained, as in this case, that ECHR provisions, within the meaning arising from a constant case-law of the Strasburg Court, can be immediately applied by the national court given their precise, unconditional and complete character.

It is worrying that the judgment of the Court does not allow domestic courts to set aside, while interpreting a rule, pre-existing provisions of national law incompatible with specific obligations of international law. It would be desirable that the Court change this position. Indeed, it not only relates to cases of conflict between a national provision entered into force before the ECHR and the Convention itself, but also to all other international treaties of "great significance" ratified more recently by Italy, including the new Protocols to the Convention (the Italian text of the judgment has been published in RDI, 2008, p. 536 ff.).

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