

# INTERNATIONAL LAW AND NATIONAL LAW: SOME RECENT PERSPECTIVES IN ITALIAN CONSTITUTIONAL LAW\*

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## 1. Introduction

Being this, as it is, a short résumé of a very complex question<sup>1</sup>, it is not necessary to go too deeply into the analysis of international law to recognize and remember that the subjects of international law, that is principally, but not only, the States, are responsible for their actions and obligations towards the international community<sup>2</sup>:

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<sup>1</sup> Fully and completely treated elsewhere, also in some publications of mine, as for instance, only to cite the most recent, GUARINO, *L'adesione della UE alla Convenzione Europea dei Diritti dell'uomo e la Costituzione italiana*, in <http://www.giurcost.org/studi/guarinotre.pdf> and ID., *Le novità del Trattato di Lisbona: art. 6.3 e integrazione dei sistemi. Suggestimenti brevi per una riflessione critica*, in ZANGHÌ, PANELLA, *Il Trattato di Lisbona tra Conferme e novità*, Torino (Giappichelli) 2009, p. 49 ff. But see also, ID., *I diritti dell'uomo come sistema: un'ipotesi di lavoro*, in *Rivista della cooperazione giuridica internazionale*, 2008, p. 7 ff. and ID., *Terrorismo, conflitti interni e internazionali: la legge applicabile*, in *La Giustizia Penale*, 2006, p. 257 ff.

<sup>2</sup> Be it conceived in a monistic or dualistic way, to use the Kelsen’s construction, between, International law and national law there is no real conflict, but instead an obligation to fulfill: KELSEN, *Reine Rechtslehre*, 1934 (Scientia Verlag, 2008), p. 330 «...was als Konflikt zwischen Normen des Völkerrechts und Normen eines staatlichen Rechtes angesehen wird, gar kein Normenkonflikt ist, daß der Sachverhalt in Rechtsätzen beschrieben werden kann, die sich in keiner Weise logisch widerspre-

where “responsible” means that a State must fulfill (in good faith and full co-operation, as written in A/RES/2625) its obligations in whatever way it is necessary to attain the effect.

Just to bring an example in a complex problem here not to be deeply discussed, it is enough to cite the well known expression used (for the first time so explicitly if also in a “dated” document) in article 1 of the *Draft Convention on the codification of the Law of international responsibility of States* of the Hague<sup>3</sup>: «Tout manquement aux obligations internationales d’un Etat du fait de ses organes...entraîne la responsabilité internationale de celui-ci», very similar (but, with all deference for the work of the international law Commission of the UN, less clear) is the definition of the draft of the ILC on the responsibility of States whose article 1, read in connection with Chapter II of the same document, defines the question in similar terms<sup>4</sup>.

Put in a little more theoretical terms, be it accepted the monistic or dualistic conception of the system of international and national law, the consequence is always that every State, being part of an/the international Community, has to apply its norms, either customary or contractual, and either through its laws or through its jurisprudence. The only alternative would be not to be a part of *an the* International Community: the latter being *effectively* the single and *necessary* one in which the States (and the other subjects of international law) live and act<sup>5</sup>. If we were also to

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chen«...die “Normwidrigkeit” einer Norm keinen Konflikt zwischen der niederen und der höheren Norm, sondern nur die Vernichtbarkeit der niederen Norm oder die Strafbarkeit einer verantwortlichen Organs bedeutet, ...» who explicitly speaks of sanctions against a State not abiding by international law rules, *not being those rules null and void*! The idea by which a State can simply not abide to international (contractual) norm, is typically by TRIEPEL, *Völkerrecht und Landesrecht*, Leipzig (Hirschfeld) 1899, Scientia Verlag 1958. Being this paper directed to illustrate the way in which Italian Constitutional Law regulates the application in Italy of International law rules, this is not the place to deepen even if also such an important a topic.

<sup>3</sup> Cited by VERDROSS, *Die allgemeine Rechtsgrundsätze als Völkerrechtsquelle: zugleich ein Beitrag zum Problem der Grundnorm des positiven Völkerrechts*, in *Festschrift H. Kelsen zum 50. Geburtstage gewidmet: Gesellschaft-Staat und Recht, Untersuchungen zur reinen Rechtslehre*, Wien (Springer) 1931, p. 360 n. 3.

<sup>4</sup> Art. 1 runs as follows: « Every internationally wrongful act of a State entails the international responsibility of that State», but the reference to the Organs of the State is only to be found in article 4». Instead, very important, is article 3, that runs: « The characterization of an act of a State as internationally wrongful is governed by international law. *Such characterization is not affected by the characterization of the same act as lawful by internal law*», this being the fundamental assumption of these few lines.

<sup>5</sup> It would suffice again to cite the wonderful words by Kelsen, *Zur Lehre vom Primat des Völkerrechts*, in *Internationale Zeitschrift für Theorie des Rechts (Revue internationale de la théorie du droit)*, 1938, p. 211 ff. where he writes (p. 216): «Das Völkerrecht als solches *al totales System* gilt sicherlich nur unter der Voraussetzung daß es als *Ganzes in allgemeinen beobachtet wird* auch wenn einzelne seiner Normen das für die Geltung des Ganzen erforderliche Mindestmaß an Wirksamkeit nicht aufwei-

accept (and it is not my case, as I tried to show in a previous article<sup>6</sup>) the hypothesis<sup>7</sup> on the so called *fragmentation* of international law<sup>8</sup>, or of the so called *self-contained regimes*<sup>9</sup>, the necessity by a State in some way to apply the norms of an international law in its internal law system<sup>10</sup>, would be indispensable not to leave the State in a situation of permanent conflict with the international society.<sup>11</sup>

This means, in my opinion, that the old idea by which the States are free to apply the rules agreed upon by themselves only till they continue to agree on them<sup>12</sup>, has

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sen», and, some lines above (p. 215): «Der Satz, daß durch die übereinstimmende Willensäußerung zweier oder mehrere Subjekte eine Norm erzeugt wird, die die Subjekte zu dem in der übereinstimmenden Willensäußerung bezeichneten Verhalten verpflichtet, *ist in keiner Weise eine rechtstheoretische Voraussetzung, sondern eine Rechtsnorm höchst konkreten Inhalts*, die durchaus nicht Bestandteil jeder Rechtsordnung sein muß. *Es sind Rechtsordnungen denkbar, die den Vertragsrechtsatz überhaupt nicht kennen*» (Italics mine).

<sup>6</sup> *Per una ricostruzione in termini di sistema dei diritti dell'uomo*, cit. also in Studi LEANZA, Napoli (Edizioni Scientifiche) 2009, but see also WOODS, *Emerging Paradigms of Protection for "Second Generation" Human Rights*, in *Loy. J. Pub. Int. L.*, 2004/05, p. 103 ff.

<sup>7</sup> Both very inconsistent if also only because the States, the subjects of International law, at a lower or higher level shall necessarily have to "speak one another", if they want to live together in the same world.

<sup>8</sup> KOSKENNIEMI, *Fragmentation Of International law: Difficulties arising from the Diversification and Expansion of International law*, Report of the Study Group of the International law Commission, UN Doc. A/CN.4/L.682, 2006.

<sup>9</sup> SIMMA, *Self-contained regimes in International law*, in *EJIL*, 2006, p. 483 ff.,

<sup>10</sup> Of course if and when (but it is about always so) the State can abide by International law only through the process of creating a law that imposes on the individuals living in the country and the organs of the State (and therefore the judiciary) the application of such norms: at last International law is made for the individuals. See for instance (choosing in an enormous bibliography) JONES, *The pure Theory of International law*, in *Brit. Y.B. Int'l L.*, 1935, p. 8: «International law determines what is to be done, but delegates the further determination of the *individual who is to do it to be established by municipal law*. In asserting that International law does not bind individual, the transformational theory is really denying that its rules are binding at all, *for none but individuals can ever be bound*».

<sup>11</sup> See on the question again JONES, *The pure*, cit., p. 14: «Why then should the formal unity of international and municipal law be destroyed by material conflict between individual rules of the two systems? *Cannot a Statute passed in the face of the terms of a treaty be compared to a contract binding between the parties but exposing them to the payment of a penalty?*», see also MENDELSON, *The effect of Customary International law on Domestic Law: an overview*, in *Non-St. Actors & Int'l L.*, 2004, p. 75 ff. See also further a more thorough discussion of the topic.

<sup>12</sup> See for instance, also in a very "old" conception of International law, FENWICK, cit *infra* nt. 18, p. 394: «From the legal as well as the political point of view the nations are no more than a group of independent units voluntarily agreeing to observe certain rules to which they have given their implied or express- consent. These rules rest therefore upon a purely contractual basis, and have no element of the command of a political superior to a political inferior regarded by Austin as essential to true law», but further, p. 396: «*In the case of national courts the theory is that international law is part of the law of the land and must be ascertained by the courts whenever cases involving such questions are presented to them. ... In the case of the Paquete Habana (175 U. S. 677) Mr. justice Gray reviews the whole field of usage and treaty and juristic opinion in his search for the law on the status of captured enemy fishing vessels, and he reaches the conclusion, contrary to the claim of the United States, that their exemption*

no foundation if we want to conceive the international society, as it is: a necessary Community ruled by norms, general (by definition: unwritten) and contractual<sup>13</sup>, some of them being rules on the production of other norms<sup>14</sup>. Moreover the formation of a customary norm can see, and very often sees, the figure of the so called *persistent objector*, opposing the formation of that rule<sup>15</sup>, but *when the custom becomes a rule, an unwritten rule, also the objector has to abide by it*.

That means in one word, that if it is perfectly conceivable that a State denounces a treaty, it is also necessary that it does so in full respect, at least, of the principles of good faith and legitimate confidence, though it could be not in the interest of the State itself. It is even unnecessary to remind on this point, just to bring an example, the order of the ICJ<sup>16</sup> on the question of the withdrawal by the USA of its acceptance of the unilateral jurisdiction of the same Court (optional clause, article 36 of the Statute of the ICJ), in which the Court said that, being it surely the right of the USA to withdraw its acceptance of the compulsory jurisdiction of the Court: «[60.] In fact, the declarations, even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction, in which the conditions, reservations and time-limit clauses are taken into consideration. In the establishment of this network of engagements, which constitutes the Optional- Clause system, the principle of good faith plays an important role».

But, to cut the question short, it is sufficient to remember the disposition of article 56 of the Vienna Convention on the law of treaties<sup>17</sup>, that defines exhaustively the question and “establishes” a (little hazardous, from my point of view) twelve months term to give effect to such a declaration.

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from capture is “an established rule of international law” independently of any express agreement of the nations on the subject».

<sup>13</sup> Very interesting and well known is the explanation by VERDROSS, *op. cit.*, p. 359: «liegt daher eine Norm des allgemeinen völkerrechtlichen Gewohnheitsrecht nicht erst vor, wenn sie durch die Übung aller Staaten anerkannt worden ist, sondern wenn sie sich bei den bisher aufgetauchten Streitfälle zwischen verschiedenen Staaten in der Weise durchgesetzt hat, daß auch ihre künftige Beobachtung erwartet werden kann» (italics mine)

<sup>14</sup> As the two fundamental rules of international customary law, *pacta sunt servanda* and *consuetudo est servanda*. But also, as we shall see, article 10 of the Italian Constitution and possibly now article 117.1 of the same.

<sup>15</sup> And by the way, not applying it: legitimately not applying it!

<sup>16</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), *Jurisdiction and Admissibility, Judgment*, in I.C.J. Reports 1984, p. 392.

<sup>17</sup> «1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty. 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1»

Of course, and as well known, two are the possibilities to realize the said objective. The *first one*, typical of the countries of common law, is the effective functioning of the traditional rule “international law is a part of the law of the land”<sup>18</sup>, whose effect should be to automatically make international law rules applicable as internal rules. In spite of the fact that this rule has recently found a strong opposition in some writers and some judges of the Supreme Court of the United States, with particular reference to human rights<sup>19</sup>, it seems yet the prevailing rule, with reference at least to international customary law.

For the treaty law the expression of the will of the State through the ratification (or at least the signature) is essential<sup>20</sup>, but often not sufficient for internal law. And sometimes, in common law countries, as also in civil law countries, a treaty (the so-called «non self-executing treaty») to be effectively applied requires the adoption of additional or explanatory rules. Sometimes the affirmation, by some judicial or legislative bodies, that a treaty, being non self-executing, is not applicable appears as an expedient not to apply the treaty<sup>21</sup>. But all that does not bar the responsibility of the State, in application of the customary rule today expressed in article 27 of the Vienna Convention on the law of treaties<sup>22</sup>, that excludes the availability for the State of the expedient to consider an internal law contrary to a treaty, as a legitimate cause to justify the non-abiding by the said treaty itself.<sup>23</sup>

<sup>18</sup> See, just to cite some of the many: LAUTERPACHT, *Allegiance, diplomatic protection and criminal jurisdiction over Aliens*, in *Cambridge L. J.*, 1945/47, p. 330 ff.; SPROUT, *Theories as to the applicability of International law in the Federal Courts of the United States*, in *Am. J. Int'l L.*, 1932, p. 280 ff.. See also the well known article of FENWICK, *The sources of International law*, in *Mich. L. Rev.* 1917/18, p. 393 ff.

<sup>19</sup> See, SOUTHARD, *Human Rights Provisions of the UN Charter: the history in US Courts*, in *ILSA J. Int'l & Comp. L.*, 1995, p. 41 ff.; FARBER, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, in *Cal. L. Rev.* 2007, p. 1335; MCGINNIS, *Foreign to our Constitution*, in *Nw. U. L. Rev.* 2006, p. 303; PRYOR, *Foreign and International law Sources in domestic Courts Interpretation*, in *Harv. J.L. & Pub. Pol'y* 2006-2007, p. 173; CLEVELAND, *Our International Constitution*, in *Yale J. Int'l L.*, 2006, p. 1.

<sup>20</sup> See for instance the procedure in USA in <http://www.state.gov/s/l/treaty/index.htm>, with reference to the procedure of advice and consent by the Senate.

<sup>21</sup> SOHN, HENKIN, cit, p. 258: «we wished to b part of the system, and have a US national as a member on the Human Rights Committee, without undertaking serious obligations...We declare the Covenant to be non self-executing but we do not have or seek any laws to execute it So *I do not know whether the treaty is law of the land or is not law of the land. If you declare something to be non self-executing, the United States has an obligation to execute it*»

<sup>22</sup> Art. 27 Vienna Convention: «A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.»

<sup>23</sup> In this sense, the famous case of the controversy between the USA and the UN about the admission of the PLO to the UN, is a model, with the explicit admission by the Secretary of State of the impossibility (and the perfect awareness of that) not to violate the treaty on the headquarters of the UN. See SHORT, *The PLO Observer Mission Dispute: An Argument for U.S. Compliance with the U.N.*

Anyway, an internal obligation to apply treaties in USA law, could be found in Article VI paragraph 2 of the US Constitution<sup>24</sup>. This important rule would require a more extensive comment, but here is not the place to make them. It is only very important to underline how, also in the USA, exists an explicit rule obliging judges and individuals to apply treaties, and therefore it is not impossible to imagine the possibility of a Court obliging an organ of the State or an individual to act in conformity with a regularly ratified treaty, or of an individual claiming the application of that treaty *in reference to himself*.<sup>25</sup>

In *civil law countries*, or at least in Italy, failing the cited implicit rule, there must be adopted, and in fact have been adopted, laws permitting, in some way, the incorporation of international law (customary or not) in the internal law system.

But in both cases the application of international law rules, even of an International customary law rule, in a State can be stopped founding the refusal to apply on the principle of sovereignty<sup>26</sup>, a recent application of which, is the refusal by Brazil

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*Headquarters Agreement*, in *Fordham Int'l L.J.* 1988-89, p. 751 ff., and *US vs. PLO*, 695 F. Supp. 1456, at 1464 affirms explicitly: «Under our constitutional system, statutes and treaties are both the supreme law of the land, and the Constitution sets forth no order of precedence to differentiate between them. U.S. Const. art. VI, cl. 2. Wherever possible, both are to be given effect. ... Only where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedence. ... *The long standing and well-established position of the Mission at the United Nations, sustained by international agreement, when considered along with the text of the ATA and its legislative history, fails to disclose any clear legislative intent that Congress was directing the Attorney General, the State Department or this Court to act in contravention of the Headquarters Agreement.* This court acknowledges the validity of the government's position that Congress has the power to enact statutes abrogating prior treaties or international obligations entered into by the United States. ... However, unless this power is clearly and unequivocally exercised, this court is under a duty to interpret statutes in a manner consonant with existing treaty obligations. This is a rule of statutory construction sustained by an unbroken line of authority for over a century and a half. Recently, the Supreme Court articulated it in *Weinberger v. Rossi*, supra, 456 U.S. at 32: "It has been maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L. Ed. 208 (1804), that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains ... ." See also FRANCK, *Legitimacy in the International System*, in *AJIL*, 1988 p. 705 ff., FRANCK, *The Alien Tort Statute and the Founding of the Constitution*, in *AJIL*, 1988 p. 61 ff. On the entire controversy, ILM 1988, pp. 712-835 and UN Doc. A/42/915 and addendums.

<sup>24</sup> Running as well known: «This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding».

<sup>25</sup> As well known a similar situation is possible in Italian Law, with particular reference to the question of a missed application of a Directive of the EU.

<sup>26</sup> See on this point also, HENKIN, SOHN, *International law in a world of multiple actors: a conversation with Louis Henkin and Louis B. Sohn*, in *Am. Soc'y Int'l L. Proc.* 1998, p. 253, speaking of the question of sovereignty: «What he meant was that we are stuck with the question of sovereignty in the sense of 'not subject to governance'. And that is my objection: too often sovereignty means 'not subject

to extradite Mr. Battisti, not abiding by the extradition treaty between Italy and Brazil, on the basis of the sovereign nature of the decision to give or not the accused/condemned.

Indeed, in principle, no rule coming from a foreign power (be it the International Community or another State or an International Organization, or a subject of international law not a State nor an International Organization) shall find application in a State that does not accept it through its constitutional system: *a.*- in a *dualistic* legal system, because of the “impermeability” of the State system of law to foreign or international law; *b.*- in a *common* law system, because though the rule that international law is a part of the law of the land is implicit, it is always possible for a State to enact laws preventing the application of the international rule<sup>27</sup>. This is *technically possible*, from the internal point of view<sup>28</sup>; on the contrary it is usually (or better: certainly) unlawful from the international point of view.

The problem in both systems is to ascertain if and how it can be possible in *internal law*, through internal proceedings, to compel the State to abide by the international law rules, even if with reference to a single individual.<sup>29</sup>

Of course one can today argue that the content of the principle of sovereignty is in some way restricted or, better, that its content is in some way different from the past, but the principle in itself is still strongly alive. I mean, for instance, that if it is perfectly conceivable (even if accepted or not) that in some matters, as for example the environmental questions, some principles, that represent fundamental exigencies of humanity, can have the effect of reducing the width of the sovereignty, the said principle of sovereignty is there to affirm that the single subjects of international law still dispose today of a sphere of autonomy, possibly a residual one, in respect of the

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to international governance’...sovereignty is a sort of the national equivalent of individual ‘liberty’...The crimes [committed in the name of ‘liberty’] are *refusal to be governed*. Refusal to undertake obligations,. Refusal to be monitored. Refusal to comply. I think of ‘sovereignty’ as being the ‘liberty’ in the *Lochner* case. We are living through the *Lochner* period, in which liberty, laissez-faire, is the dominant value. That is the trouble with ‘sovereignty’ in that sense». The reference is to *Lochner v. New York* 198 US 45 (1905), where a law enacted by the State of New York was challenged because limiting the freedom of contract, and was also later strongly, criticized by the US President T. Roosevelt. It is always the old recurring question on the width of sovereignty in international law.

<sup>27</sup> An example above nt. 23. As well established, being the treaty the supreme law of the land equivalent to an act of Congress, a treaty «operates of itself without the aid of any legislative provision.» (*Reid v. Covert*, 354 US 1, 1957, p. 254) and therefore if a treaty and a law of Congress are inconsistent the Court has held that the most recent prevails (HALL (Ed.), *The Oxford Companion to the Supreme Court of the United States*, Oxford (Un. Press) 2005, p. 1026.

<sup>28</sup> Even if, as we shall see further, a some sophisticated (and also, maybe, hazardous) interpretation of the recent Constitutional norm of article 117.1 of the Italian Constitution, can authorize some doubt.

<sup>29</sup> *Supra*, ntt. 25 and 28.

international law Order<sup>30</sup>, that can practically prevent international law from being applied in their territory (or sphere of competence), even with the described consequences on the plan of responsibility.<sup>31</sup>

Besides, the inter-relation between international law and national law is strengthened and deepened by the well known rule for which some fundamental principles of national law contribute to the formation of unwritten international law rules (art. 38 of the Statute of the ICJ): international customary rules.

Object of the following few lines is to illustrate *a.*- how the Italian constitutional system has regulated the inter-relation between internal law and international law, and *b.*- how the allocation of Italy in a particular juridical system, that is the EU, can impose on the Italian system itself (by-passing the usual constitutional process of law making) a lot of norms in no way contracted upon, and lastly, *c.*- how our constitutional system, or, better, some of our fundamental rules (not necessarily of a constitutional nature) can not only influence and generate norms in the EU, but even, if also not directly, generate fundamental rules for other States Member of the EU.

## 2. *The transformation of international law in internal Law in the Italian Constitutional System*

As is well known, and treating the question very shortly, the introduction of rules of international law into the Italian legislation, can be done in two ways. A so called “ordinary” one and a so called “special” one.

The ordinary one, the less used, can be described in very few words, because it simply consists in the pure reproduction in the Italian law system of an international rule: be it customary or conventional, through a normal (therefore “ordinary”) law.

The problem in adopting this method derives from the fact that from the point of view of an Italian observer (an individual, an Organ of the State or a Judge) that law is simply a common law, in nothing to be considered, and even recognized, different from other laws of the country. Therefore, the rule, by the said Italian observer, shall be applied as a common Italian law, that is without reference to the modifications or the interpretations etc. that the said rule has, or has had or shall have, in the international community. Or, at least, a series of new provisions would be required to adapt

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<sup>30</sup> To explain with an example, it is perfectly conceivable (short of fully accepted) today that the full exploitation of the Amazon Forests is no more in the full disposition of the State of Brazil or other, but that does not mean that Brazil lacks its sovereignty, but simply that the width of that sovereignty does not arrive to leave Brazil completely free to exploit those forests, because a superior principle in the interest of the Humanity imposes to leave those forests as they are.

<sup>31</sup> The systematic and deliberate violation of human rights principles (that is general laws on human rights) in many States is a demonstration of that practical possibility.



the norm to the changed situations of international law.

The principal risk is therefore that in practice in a short time the existing and applicable Italian law can no more, correspond to the real rule of international law on whose “invitation” it was enacted. With the obvious possibilities of a *status* of non-fulfillment by Italy of its international obligations.

The problems created if that method were adopted for the general international law norms, are only too obvious to require a further and deeper analysis here.

Anyway, the “dualistic” approach to the International Community of the Italian Law System has never been called into question. Until, at the time of the redaction of the new Italian Constitution after the second world war, the question was fully discussed in the Constituent Assembly, in particular thanks to an important and famous Italian international lawyer, Tomaso PERASSI<sup>32</sup>, who proposed the actual article 10.1 of the Constitution, with reference to the general international law rules. The scope was not making the Italian law system monistic, but to warrant the perfect and sure performance in Italy of the international law rules.<sup>33</sup>

## 2.1 Article 10 of the Italian Constitution and the automatic validity of general international law in the Italian Constitution.

Article 10.1 of the Italian Constitution in its apparent easiness has had very important effects. Its formulation, in a few words, says that the Italian normative order complies with the general recognized international law rules. The implied reference to article 38.1.b of the Statute of the ICJ seems self-evident. The very well known wording of the rule is: «L'ordinamento giuridico italiano si conforma alle norme di diritto internazionale generalmente riconosciute»

The idea guiding this rule is to render immediately valid and applicable in Italy every rule of customary (or general) international law as soon as it appears or is formed in the international law system.

The effect of this disposition is a classical “renvoi”, in the sense that the Italian judges (for instance, but also an Organ and so on) shall identify, choose and apply

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<sup>32</sup> In particular PERASSI, *Lezioni di diritto internazionale, parte prima*, Padova (CEDAM) 1961, and also PEARSSI, *Lezioni di diritto internazionale, II*, Padova (CEDAM) 1962. On the entire question always actual are the pages by QUADRI, *Diritto internazionale pubblico*, Napoli (Liguori) 1968 p. 54 ff.

<sup>33</sup> See on all those problems the recent article by SALERNO, *Il neo-dualismo della Corte Costituzionale nei rapporti tra diritto internazionale e diritto interno*, in *Riv. Dir. Int.*, 2006, p. 340 ff. and see also SALERNO, *La garanzia costituzionale della Convenzione europea dei diritti dell'uomo*, in *Riv. Dir. Int.*, 2010, p. 637 ff. on the Italian doctrine, see BERNARDINI, *Formazione delle norme internazionali e adattamento del diritto interno*, Pescara (Libreria dell'Università) 1973 (and more recently again BERNARDINI, *L'sovranità popolare violata nei processi normativi internazionali ed europei*, Napoli (Editoriale Scientifica) 1997), LA PERGOLA, *Costituzione e adattamento dell'ordinamento interno al diritto internazionale*, Milano (Giuffrè) 1961.

the customary international laws, where the accent is on the word “choose”. The international law rule is “transformed”<sup>34</sup> in an internal rule, whose exact content has to be ascertained by the interpreter, looking at international law.

It is the judge himself who will ascertain, and convince himself, whether an international rule exists regulating the subject under its scrutiny, and which is its content, and, having so ascertained, abiding by the principle *iura novit curia*, the same judge shall immediately and directly apply that rule. Just to make an example, the Italian rule on diplomatic immunity, commonly applied by the Italian judges<sup>35</sup>, is simply the international one, ascertained and interpreted by the same judges (at least until it was also written in the Vienna Convention<sup>36</sup>) assuring in this way the factual concretization of the said immunity, even in the absence of any law on the subject in the Italian written law system.

Four are, in my opinion, the effects of this mechanism. The *first* one is that in this way the Italian law system abides constantly and immediately by the rules of international law, as they are applied and interpreted in international law<sup>37</sup>, so excluding the necessity, for the Parliament, to produce laws on the subject averting also the consequent possible risk of applying an Italian rule in contrast with the international one.

It can be necessary of course, and this is the *second* effect, that the Italian Parliament or other competent Italian organs, have to produce rules and/or instruments necessary to make the international law rule effectively applicable in Italy. In other words it can happen that the International general Law rule is non self-executing, so that its application can be impossible till the adoption of the necessary further rules, and therefore in this case, till those rules have been adopted, Italy will be in violation of international law. It must be underlined that in this, scarcely probable, case the “principle” expressed in the international customary rule would equally become part of the Italian constitutional system, with all the possible constitutional consequences on the ordinary laws<sup>38</sup>.

The *third* one, is, if possible, also more important, because, as declared in nu-

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<sup>34</sup> This is the very word used by PERASSI at the time of redaction of the rule in Italian Constitutional law.

<sup>35</sup> For instance, see the Constitutional Court judgment, 48/79, where the customary nature of the rule is expressly recognized.

<sup>36</sup> That, being a treaty regularly ratified, shall be applied on different grounds, as explained below.

<sup>37</sup> And also as interpreted and applied in different States, as explained in an older study of mine, *Per una ricostruzione, in termini di sistema*, cit.

<sup>38</sup> For a very interesting application of this last logics, applied to treaty law in a very sensitive international criminal law matter, GAJA, *The long journey towards repressing Aggression*, in CASSESE, GAETA, JONES (EDD.), *The Rome Statute of the International Criminal Court: a Commentary*, Oxford (Un. Press) 2002, p. 427 ff. But, more in general, see my work, *Terrorism*, cited above nt. 1.

merous judgments of the Italian Constitutional Court, the effect of the described procedure is that the rules introduced in this way into our law system, are of a constitutional rank. With the consequence that all ordinary laws, previous or subsequent, to the formation of the international law rule applicable in Italian law, are automatically unconstitutional because in violation of the said article 10.1 (better: can be declared unconstitutional by the Court) . All that assures the continuous adaptation of the Italian law system to international customary law, with only the further guarantee (assured in the said judgments of the Constitutional Court) that it will be the Court itself that watches over and warrants that no general norm of international law is introduced in the Italian law system contrasting with the fundamental principles of the Italian Constitution<sup>39</sup>. Today (and we shall show it later) that control would be extended to the fundamental principles of European Law as defined in article 6.3 of the EU treaty, version of Lisbon

Being, as it is, our judiciary fully independent from the other powers of the State, it could happen (and this is the *fourth* consequence announced above) that a judge (of course a judge of last resort) passes a judgment in contrast with the international law rule, and in this case the international responsibility of the State is inevitable and neither the Parliament nor the Government can do anything to avoid Italian International responsibility.

Concluding on this point, I have to underline that this technique of *renvoi*, is the most suitable and effective to guarantee the full compliance of Italy with its international obligations.

It is so effective and interesting that a famous Italian scholar (Rolando QUADRI)<sup>40</sup> suggested that, being the rule *pacta sunt servanda* itself a customary international law rule (better: a “principle” in his terminology), no further procedure would be necessary to incorporate in the Italian law system all the treaties regularly accepted by Italy. The very suggestive thesis has never been accepted by Italian scholars and, in particular, by the Italian Parliament and jurisprudence<sup>41</sup>, that used and uses the procedure illustrated in the next paragraph.

### 3. *The procedure for the implementation of the international treaties*

Strictly speaking, a procedure for the transformation of contractual international law in internal law, is not envisaged in the Italian Constitution. As well known, till

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<sup>39</sup> As explained in judgment 1146/88 of the Constitutional Court. It is even unnecessary to underline that that means that other constitutional rules, different from the fundamental ones, can turn out modified by an international law rule.

<sup>40</sup> QUADRI, *Diritto internazionale*, cit. above nt. 32.

<sup>41</sup> But, very fascinating as it is, seems today find a “new life” through the new article 117.1 of the Constitution, below § 0.

2001, only two articles of the Constitution govern the question of international treaties. Art. 80 that disposes that the Parliament «authorizes» with an *ad hoc* law the ratification of the international treaties, expressly listed in the said disposition,<sup>42</sup> by the President of the Republic. And article 87, whose paragraph 8 disposes that the latter ratifies the treaties subject to «if necessary» the authorization law of the Parliament. That means, said only incidentally, that the President could ratify treaties also without parliamentary authorization, but meanwhile it means that not all treaties must be ratified (if and when the ratification itself is requested) by the Head of the State<sup>43</sup>.

Anyway, when a treaty is ratified (and this is a practice of the Parliament, not imposed by any statute) customarily the Parliament adopts a law to “order” the execution of the treaty in Italian legal order<sup>44</sup>.

From that moment, and only from that moment onwards the treaty is really applicable in Italy, with the obvious consequence that it can happen that the treaty, valid and effective in international law, is not in force in Italian law because of the lack of the “execution order”. In effect, I must say, this risk is mostly prevented thanks to the practice of the Parliamentary adoption, in one single law, of both the ratification authorization and the order of execution of the treaty.

It could be underlined, only for the completeness of the discourse, that whatever the reason for which a treaty is valid in international law but not in Italian law, something as referred in the previous pages with reference to the general international law rules<sup>45</sup> could happen with reference to treaty law. In fact, if the dispositions of a ratified but not executed treaty<sup>46</sup> are not applicable *per se*, the “principle” posed in the international treaty shall be valid and effective in Italy because of the law having authorized the ratification: indeed, how can you logically conceive of a treaty, fully negotiated, accepted and ratified, but not applicable in Italy because of a lack of sufficient or adequate legal provisions? In particular if the ratification itself was authorized by a law.

This could be, for instance, the case for the Statute of the International Criminal

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<sup>42</sup> Political treaties, treaties providing for arbitration or judicial solution of international controversies, treaties implying modifications of the territory of the State, or comporting expenses or modifications of laws. As it can be easily seen, the range is very ample. But, anyway, it is fully correct maintaining that *not all international treaties must be authorized* by the Parliament for ratification by the Head of the State, while all the treaties can be ratified.

<sup>43</sup> Thus in full conformity with article 11 of the *Vienna Convention on the law of treaties*.

<sup>44</sup> On the entire question see the famous pages by MORTATI, *Istituzioni di diritto pubblico*, Padova (CEDAM) 1975.

<sup>45</sup> *Supra* § 0.

<sup>46</sup> Or not exhaustively executed, as it could be the case for a non self-executing treaty, see the following §§ 0, 0

Court, regularly ratified and “executed” in Italy. The dispositions of the treaty describing the crimes hypothesized by the treaty (and also, in my opinion, the so called “elements of crime”) are fully in force in Italian law, but for a little huge, gigantic particular: no law has till today been enacted to fix the penalties corresponding in Italian Law to those crimes, nor the procedures for prosecuting the crimes themselves<sup>47</sup>, with all the easily imaginable consequences.<sup>48</sup> For instance, and reversing the point of view, if it is perfectly true that the crime of aggression is not prosecutable in international law, it is perfectly (though only theoretically for what said before) prosecutable in Italy! If Italy established a penalty for that crime, I am convinced that in Italy that crime would be prosecutable, while in international law it is not, because of the lacking decision by the SC of the UN, as requested by the Statute.

But, only shortly to conclude on this very sensitive point, it seems theoretically inconsistent that a norm, accepted through the regular functioning of the system, but not sufficiently integrated because *per se* non self-executing, can find no application, above all of generating, in some cases, an international responsibility of the State. The question, in fact, has recently been discussed by the Italian Constitutional Court, in a very important judgment (113/11), where it ruled, through a so called “additive judgment”, that the lack of a criminal procedure rule enabling in certain cases an adjudged (to be considered definitely condemned being the judgment *res iudicata*) to obtain the revision of the trial, had to be considered “filled” by the Constitutional judgment. In other words the Constitutional Court “created” a criminal procedure rule not existing in the criminal procedure code, only paying respect to an international law rule, expressed in a judgment of the European Court of Human Rights.

### 3.1 *The question of the non self-executing treaties*

Though the possibility of which I spoke in the preceding paragraph is often only theoretical, some other problems can arise from this technique, with regard to the cited phenomenon of non self-executing treaties. In fact as explained, until all the necessary integrative provisions are adopted, the treaty, perfectly valid on the international level, will not produce its effects in Italy, again with the consequent problems of international responsibility.

This was, for instance, the case of the treaty of Montreal on aerial hijacking, in reference of which the problems can be two. The first one derives from the very

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<sup>47</sup> As well known, the Statute of the ICC has a complementary value, therefore its competence starts only if Italy does not prosecute (or is incapable of prosecuting!) the said crime in Italy.

<sup>48</sup> *Infra* § 0, and see *supra* nt. 38

formulation of the “order of execution”, where it is explicitly disposed that the full validity of the dispositions of the treaty is postponed to the date of entry into force of the same treaty in international law. The second, more important from my point of view, is that, in force of the disposition of article 1 of the Italian Criminal Code, abiding by the principle “*nulla poena sine lege*” is a pre-condition for the effectiveness of the crime for criminal law: in other words, nobody can be prosecuted for a crime, regularly instituted by criminal law till also the penalty for that crime is disposed<sup>49</sup>. In that case, the penalty was decided, with an *ad hoc* law, only some three years later the entry into force of the treaty, both in international and national law.<sup>50</sup>

The first question is not very important (but we shall come again on it), but it is worth observing here that the effect of that way of writing the “order of execution” has the effect of introducing the crime into Italy, even *before* that the same crime is in force in international law, as explained in the preceding paragraph.

But the second question is much more important, because the effect of the absence of the penalty for that crime, not only has the effect of making impossible the prosecution of the crime in Italy, till the adoption of the subsequent law, but also (and this could have been more important) of rendering impossible, for instance, the extradition of the supposed author of the crime in a foreign country in that period of time.<sup>51</sup> It is also my opinion that even today, it would be impossible to extradite from Italy somebody discovered to have been author of such a crime in that period of time. Besides, in this case the possibility discussed in the preceding paragraph (of an action by the Constitutional Court) would be simply unachievable, because of the “playing” of two fundamental principles: the principle *nulla poena* and the principle of the non-retroactivity of the law<sup>52</sup> expressed also in the well known maxim *nullum crimen sine lege*.

### 3.2 *The opposite hypothesis: a treaty fully authorized but not operative in international law.*

It is surely a very improbable hypothesis, but it could also happen (and it has happened!) that a treaty whose ratification was authorized and whose “order of execution” was adopted, could be perfectly applied in Italy, *but not in international*

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<sup>49</sup> Verbatim: «Nessuno può essere punito per un fatto che non sia espressamente preveduto come reato dalla legge, né con pene che non siano da essa stabilite», that is the sum of the principles *nullum crimen sine lege* and *nulla poena sine lege*.

<sup>50</sup> See on this question my *Terrorismo, conflitti interni e internazionali: la legge applicabile*, in *Giustizia Penale*, 2006, p. 257 ss.

<sup>51</sup> With the further consequence that Italy could not make use of the clause *aut dedere aut iudicare*, and that could result in a damage for the author of the crime. But more: think what could happen if *today* would be discovered the author of such a crime committed *in that period of time*!

<sup>52</sup> Article 11 of the so called *Preleggi*.

law!

This is the case of the Oviedo Convention<sup>53</sup>, that, also without the legislative decrees could be surely applied. But there is a problem: the ratification instrument was not deposited<sup>54</sup>, so that on the international level the treaty is not valid for Italy.

From my point of view, as repeatedly said, the Convention would be perfectly applicable in Italy, and not be only considered, as written in a judgment of the Italian Corte di Cassazione<sup>55</sup>, «an auxiliary function on the interpretative plan», because, contrary to the opinion of the said Court, I am convinced that the fact that the ratification instrument was not already deposited, at the time of the judgment, has effects only on the plan of international law, while in internal law the treaty, or better, the norms deriving from the order of execution of that treaty are fully valid.

I would rather suggest that this could be a classical case of “conflict of powers between State Powers”, being the President of the Republic obliged (art. 80 and 87 of the Italian Constitution) to ratify and deposit the ratification instrument, as, and when, authorized by the Parliament. But, this is in some way a “hole” in the system because it no instrument exists to oblige to the deposit, short of the conflict of powers, or an administrative sanction if the fact derives from an administrative omission by some public official.

#### 4. *The particular problems of the application in Italy of EU law and article 11 of the Italian Constitution*

The questions posed to the Italian Constitutional law by the participation in the EU, are well known and discussed.

It is enough to remember here that, due to the possibility of the EU to adopt obligatory acts (in particular the regulations, immediately and directly applicable in State Member's law), valid also directly for the Member States (the directives) the question was posed on the validity of Italian laws contrary to such dispositions and in particular to the EU law in general. The problem is, obviously very important for the Italian laws enacted after the enactment of a regulation, because in this case there is a conflict between the sovereign legislative power of the Italian Parliament and the obligations assumed under the European treaties.

The complex question was resolved by the Constitutional Court, as well known,

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<sup>53</sup> Ratified with the law 28/03/2001, n. 145, that contains, in addition to the authorization to the ratification and the order of execution, also an article 3, where it is disposed that in six months time the Government shall have to adopt all necessary internal measures to render functional the Convention: legislative decrees, that shall become automatically law after forty days from their transmission to the Parliament. A very pressing norm! Only, substantially ignored.

<sup>54</sup> At least at the date of conclusion of this article, the 30<sup>th</sup> June 2011.

<sup>55</sup> Cass. Civile Sect. 1, 16<sup>th</sup> October 2007, n. 21748.

in a first very important phase affirming the superior rank of European law, in application of article 11 of the Italian Constitution, that permits the “limitations of sovereignty” necessary to participate in International Organizations like, from the point of view of the Court, the EU.

This is not the place to discuss a long discussed question, with particular reference to the fact that the said article of the Italian Constitution was not meant for Organizations as the EU, but for “world Governments” such as was the hoped quality of the United Nations, in 1948, the date of entry into force of the Italian Constitution, whose elaboration began on 25<sup>th</sup> June 1946.

It suffices only to remember that in numerous judgments the Constitutional Court elaborated the said concept of the “limitation of sovereignty”, till in 1984, in the famous judgment *Granital* when the Constitutional Court elaborated a new concept, useful for the discussion that will follow in this brief paper: the idea of the contemporary competence and validity of both legal orders, the Italian one and the European. For that, said the Court (making a reasoning as simple as clever), a «hypothetical fact situation to which the rule attaches a legal consequence» can be regulated by both juridical orders. Therefore the only analysis to make is to ascertain which juridical order is competent to adjudge the fact. That excludes the necessity of bringing the question to the Constitutional Court, because it is not useful nor necessary to declare the unconstitutionality of the Italian law: the Italian law, inconsistent with European law, simply will not be applied by the judges.

All that has an important consequence: an Italian judge (but also and administration or a single individual), in presence of a situation in which both juridical order could be applied, simply applies the European one, because that legal order is the *competent* one. At the moment, I would add, because if Italy denounced the European treaty Italy would no longer be obliged by European Law, but by the, till then not applied, Italian laws, still valid.

##### 5. *The effects on the Italian Law of article 6.3 of the Lisbon treaty on EU*

The overall effect of this interpretation of the relations between Italian and European Law, is that in every circumstance the European Law prevails on the Italian law (be it for the simple declaration of its constitutional superior rank *ex* article 11, or for the theory of the competence or for both), that assures the perfect and actual compatibility of both juridical orders.

But there could be something more. The last version of the European treaties, the version of Lisbon just entered into force, contains an article (actually article 6) that says: «3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general



principles of the Union's law»<sup>56</sup>.

In my opinion this disposition is of overall importance, because through that it is realized something very similar but very much more advanced (in the sense of integration) than what realized with article 38.1.c of the ICJ Statute: *in fact* all fundamental principles of law of the States Member of the European Union (fundamental principles, not constitutional principles, that is something much wider than the Constitutions themselves), and the fundamental principles of the European Convention on human rights, united of course with the fundamental principles of the EU itself, constitute a sort of juridical order, that, *through the assertive dispositions of the EU, shall prevail on each juridical order of each State Member of the EU*.

The consequence of this rule is that those *general principles*, to be construed necessarily only by interpretation by the European Court, but *also* by the *State Courts*, shall apply and shall oblige all the Members independently from the fact that the particular principle derives from a different State legal system than that of the State applying it<sup>57</sup>. And not only: because the integration of those different legislations is extended to the Convention on human rights, itself, and *to the enormous jurisprudence* of that Court.

The result of all this big phenomenon will be a formidable integration of juridical orders, whose effects (I am of the opinion) will go much beyond the effects of a mechanism as that of the subsidiarity<sup>58</sup>.

I would like only to underline here that, in my opinion, the effect of this last mechanism of the subsidiarity is very important for the progressive integration of the European system till its effective transformation in a federation (or something alike). The mechanism of subsidiarity, even with the limitations imposed in the Protocol (limitations, in my opinion, more formal than substantial) have one very significant effect: to give to the Union the possibility and the opportunity to subsume on itself all possible new questions. Significantly enough, in my point of view, was

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<sup>56</sup> It is worth noting that the reported disposition follows n. 2 of the same article, sanctioning the adherence of the EU to the European Convention on human rights. On the problems deriving from such disposition (and from § 1 of the same article, disposing the full validity, as the European treaties themselves, of the Charter of Fundamental Rights of the EU) see recently my: *L'adesione della UE*, cit., at <http://www.giurcost.org/studi/index.html>

<sup>57</sup> See European Court judgments, for instance: C-274/99 P, Bernard Connolly 2001; C-94/00, Roquette 2002; C-12/08, Mono Car Styling.

<sup>58</sup> Article 5.3: «3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol».

for instance the adoption of two important Directives in 2000, the Directives number 43 and 78, where, on the basis of the principle of subsidiarity (only enunciated with no motivation) are posed some fundamental questions of non discrimination, in the form of an instrument obligatory<sup>59</sup> for the Member States.

That means, in the interpretation I suggested, that those principles, and their interpretation and application in *all the European systems of law*, constitute fundamental principles of national law, because and in the limits in which they constitute *general principles* of European Law.

We shall see, in the next paragraphs, how all that finds a completion and a big improvement in the new Article 117.1 of the Italian Constitution.

#### 6. *The introduction in the Italian Constitution of Article 117.1*

With a constitutional reform of 2001, the Title V of the Italian Constitution was severely amended: in reality was re-written. To realize a first phase of a better regulation of our constitutional system that gives, and with the constitutional reform increases, the possibilities and powers to our Regions, as part of an unitary State, of making autonomous laws, though rigorously consistent with the constitutional distribution of competences expressed in the same article 117.

Article 117.1 defines the reciprocal competences of State and Regions with the following expression: « La potestà legislativa è esercitata dallo Stato e dalle Regioni nel rispetto della Costituzione, nonché dei vincoli derivanti dall'ordinamento comunitario e dagli obblighi internazionali».

Some comments are in some way self evident.

The first question to underline is that in this disposition the State and the Regions are posed on the same plane as for the power to legislate. In other dispositions (partly in the same article 117) are defined the respective sphere of powers and competences and the ways to resolve the possible contradictions between the State's and Region's laws.

Obviously, both the State and the Regions can only legislate in full respect of the Constitution and that I think, does not request further comments here.

But, it must be underlined very vividly the different expression used with reference to the EU, whose law system is defined an "order, ordinamento", to be distinguished from the "international obligations, obblighi internazionali". The last definition, *not*, I think and wish here to clearly underline, not to mean that the international Community does not constitute a juridical order, but only to refer to a particular

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<sup>59</sup> See on this point my *Lo strumento europeo di lotta alla discriminazione razziale e la sua applicazione in Italia alla luce del diritto internazionale generale e convenzionale*, in *Rivista della cooperazione giuridica internazionale*, 2006, p. 25 ff.

type of obligations: those deriving from obligations directed at the State, either the treaties or also other possible obligations deriving from the International Community. In other words, this expression must be considered, and read, as complementary with the afore-mentioned disposition of article 10.1, in which is assured the observance of the international general law order/system, commonly known as the customary international law system. In this way, the disposition, in my opinion, is an accomplishment of our obligations towards international law and the International Community, because it explicitly imposes an obligation to respect (that is, to apply, effectively apply) all international obligations of the State, beginning with the treaties.

A last observation has to be made with respect to the described disposition: the use of the term “ties” (*vincoli*, in Italian). The term is very unusual, because habitually one speak of obligations, duties, etc. The use of that term, in my opinion, is deliberately meant to indicate something more than the usual “obligation”: the fact that the Italian juridical order, and therefore its laws, its officials, its judges, are bound, if you want, fastened by the international obligations.

In one word, I think that this expression wants in some way to define a different as usual position between the Italian Constitutional system and the international Community.

Being, in fact, ascertained that the Italian law system is *automatically* bound by the customary (better, from my point of view, general) norms of international law, and for that, that any general unwritten norm of international law is part of our juridical system (as said before), with the rank of a constitutional rule (with the sole exception of the fundamental principles)<sup>60</sup>, it is now said very firmly that Italy can in no case have (and let survive) a legislation in deformity with the free accepted rules of contractual international law, and also, with the other obligations possibly deriving as an effect of freely subscribed contractual international norms.

That has, in my opinion, a very, extremely, important consequence. It is absolutely obvious that nobody and nothing, *y compris* the Constitution itself, can prevent the freedom of the Parliament to make laws (acting as it acts in the name of the sovereignty of the people), and therefore those “ties” have to be interpreted in the only possible sense: if the Parliament enacts laws contrasting an international obligation only two are the possible ways: *a.*- the Italian Government finds the way to

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<sup>60</sup> Possibly also, themselves, to be discussed and interpreted in the light of the European fundamental principles as deriving from article 6.3 EU. In fact: if the Italian laws, and in particular the Italian fundamental principles of law (mostly, but non exclusively, expressed in the Constitution) contribute to the formation of a fundamental principle of European law, Italy (as the other States Member of the EU) contributes with *all* its principles, *including the fundamental ones*, and hence theses same principles can be modified by the birth of a new principle of European Law. At least!

release itself from the international obligation in hypothesis violated by the Parliament, or *b.* - the law enacted by the Parliament must be declared unconstitutional for violation of article 117.1 of the Constitution.

Until now, the Italian Constitutional Court has had many occasions to pronounce itself on this norm. In two judgments (348 and 349, 2007, and even more clearly in two judgments 311 and 317, 2009) on some questions relating to the European Convention on human rights, whose Court was claiming that its judgments could prevail on the Italian juridical order (and on its judiciary), as the judgments of the European Union Court. In both the first two cases the Court, only by an *obiter dictum*, said that in hypothesis an Italian law could be considered illegitimate for violation of art. 117.1.

### 6.1 *The order of the Italian Constitutional Court n. 103/2008*

Apparently not directly relevant for this question, but possibly very important as we shall see at the end of this short work, is an order of the Italian Constitutional Court, n. 103/2008, on the possibility of the Italian Constitutional Court to consider itself, in respect of the Court of the EU, an internal judge of last resort, so that, applying the European legal order, the Court could be obliged to refer a case to the European Court, to hear its binding opinion on the interpretation of a norm of the EU, before judging on a question of Italian law.

In this case, the question was to ascertain if a Regional Law, possibly in contrast with European Law because imposing a tax that could be prohibited by European Law, could be cancelled because in contrast with article 117.1, in the part where it disposes that the Region shall not make laws in violation of the European Law.

In this way, the Italian Constitutional Court considers itself a part of a greater system that is the European one. In some way the Court goes against the grain of many contemporary European politicians, in these times less enthusiasts of the EU than in the past.

### 7. *The feasible interpretations and applications of article 117.1 in some significant circumstances*

I shall here very shortly expose some conclusive remarks on the entire question, with particular reference to the feasible and foreseeable effects of the relatively new disposition of article 117.1<sup>61</sup>.

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<sup>61</sup> On the alleged non possibility that «si possa attribuire nel sistema costituzionale italiano alla disposizione contenuta nell'art. 117 1° comma Cost., pur interpretata sistematicamente con le disposizioni di cui agli articoli 10 e 11 Cost, il ruolo di norma di adattamento» on the basis of its "physical" collocation in the Constitution, GAROFALO, *Ordinamento dell'Unione Europea e Ordinamento italiano: 'prove tecniche' di integrazione*, in *Studi sull'integrazione europea*, 2011, p. 245 ff. at 251, I shall come

### 7.1 The “limits” to the powers of the Parliament as expression of the people’s sovereignty

As said before, the particular wording of the disposition is very significant, because the word “ties” implies that the legislative organs of Italy are bound to respect international law obligations. Of course one could also affirm that the use of a peculiar word, especially when non a technical one, has *per se* no particular meaning<sup>62</sup>.

But the fact is that, even if that phrasing were different, the “logic” of the norm is evidently to assure the full abidance of Italy by the international law norms, be they unwritten general norms, or contractual ones. The article in some way, fills a gap in the Italian Constitutional system.

Till 2001 while the general international law norms were constantly and fully part of the Italian Law system, and while, with some major interpretative effort, also the EU laws were (again, constantly and fully where necessary) part of the Italian Law system (both with the effect of prevailing on the “ordinary” laws, if also with the enumerated warnings<sup>63</sup>), the contractual norms could be left in a situation, so to say, of *limbo*, being it possible that an international treaty, obligatory on the international law level, could not be applied, or not fully applied, in the Italian law system. And, the grey zone of the rules deriving from contractual norms (third degree norms) seem itself in a similar situation.<sup>64</sup>

After 2001 the situation has very profoundly changed.

The Italian Parliament (and therefore the Italian law system) is bound to apply all contractual international laws, so that an Italian law in contrast with a treaty not only could be declared null and void because of the particular guarantee assured by an interpretation of the Italian Constitutional Charter (and therefore only once declared so<sup>65</sup>), but today could be declared unconstitutional being in contrast with article

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again in a future study, but see already my cited works: *Lo strumento europeo*, cit., and *Terrorismo*, cit.

<sup>62</sup> But, as well known, the «ordinary meaning» of a word must be considered first.

<sup>63</sup> The fact that the general norms of International law are transformed in Italian Constitutional norms with the (possible) limits of the fundamental principles, and the fact that also European norms, if explicitly refused by the Italian Parliament, that is by the Organ legitimately expressing the popular sovereignty, can be weighted by the Constitutional Court to ascertain if (possibly) they are contrary to the Italian Constitution or not. In the second case such norms shall be simply cancelled (even if not already “disapplied”), while in the first case the sole solution would be receding from the European Community.

<sup>64</sup> For instance it was, at my notice, the first time in the history of the Italian Law the direct use of an obligatory Resolution of the Security Council of the UN (S/RES/1627 and following) as justification for the enactment of an Italian law: the anti-money-laundering law.

<sup>65</sup> See on the question the judgment 348/07, §4.7 and some more references there. On the very line identified by the cited judgment, an international treaty must be fully applied, and any rule in contrast with Italian law shall be declared unconstitutional (judgment 311/10) if the judge can not interpret (even “forcing” the said interpretation) the Italian law in full consistency with the international treaty, and

117.1.

But a step more is allowed by the new disposition, because its meaning could imply the *legal* impossibility by the Parliament to legislate in contrast with international contractual norms. As it is obviously accepted that nothing can formally forbid the Parliament to legislate, that means:

*a.*- that the Parliament could be in some way “obliged” to i.- enact the order of execution (or the ordinary law applying the treaty) and ii.- “obliged” to enact all laws necessary to make applicable a non self-executing treaty. That because it would not be in the power of the Parliament not to render effective a treaty in Italian Law, because in the said hypothesis the constitutional rule that says that the Parliament shall legislate only abiding by the obligations of international law would be violated;

*b.*- that therefore, as it is impossible in the Italian constitutional system to “oblige” the Parliament to legislate with a particular content nor to *legislate or not to legislate* at all, the Parliament would in practice have no alternative than to legislate ordering the Government not to accept (easy to do by the simple non ratification of the treaty, if susceptible to the authorization of the Parliament, but very less easy if no authorization law would be necessary) or simply to denounce an international treaty contrary to the will of the Parliament<sup>66</sup>.

In one word, far from limiting the powers of the Parliament, the effect of this disposition could be the exact opposite: to give to the Parliament the concrete possibility to “guide” the Government itself in its international relations. Till today, in effect, one of the most important difficulties of the balance of the Italian constitutional powers, was (and is) that the Parliament, if the Government does not act coherently with its will, can only, *after the initiatives assumed by the Government*, withdraw the political confidence to the Government. In fact, now, the described contrast between the will of the Government and that of the Parliament, would be a clash between constitutional powers that could be judged by the Constitutional Court.

## 7.2 *The hypothesis of non- application of internal laws contrary to international*

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“balancing” the Italian principles with the international ones (judgment 317/10). Only if the perfect consistency between the two norms appears impossible, could the Constitutional Court declare the treaty ordering its incorporation in Italian law, unconstitutional. On this last conclusion I have many doubts (exposed in my *L'adesione*, cit.) because of the contradiction, eventually deriving from such conclusion and the principle *pacta sunt servanda*: so, coming again to some inspired intuition of QUADRI.

<sup>66</sup> The thing, anyway, would be much less easy as it seems, because the Parliament can authorize the ratification of a treaty, brought to its attention, and probably not more than suggest the denunciation of a treaty. There is of course here no room enough further to discuss the matter.

*treaties*

But another consequence could be drawn from the preceding considerations. After the, already referred to, judgment *Granital* of the Italian Constitutional Court, I do not see why the international law order, itself, could not be considered, as it is: a juridical order not different from the EU, and therefore a juridical order whose competence corresponds to the Italian one. And therefore it would not be impossible to apply here too the same logic of the *Granital* judgment, and hence, in case of a law and a treaty regulating the same juridical fact, simply not to apply the Italian law.

This is only a very tentative interpretation, but some Italian judge has already applied this interpretation.<sup>67</sup>

### *7.3 The interpretation by the European Court of an European rule in application of article 6.3 of the EU, Lisbon version*

A last interesting question would be, to conclude this short paper, the analysis of the possible effects of all what said till now with reference to the cited article 6.3 EU, in the Lisbon version.

As said before, one of the effects of that disposition is the possibility that a fundamental principle of law of a given country, *being subsumed as a fundamental principle of European Law*, could become a fundamental principle also for Italian law (and all other member States, of course), and *viceversa*.

Therefore, though bringing the suggested line of reasoning to the extreme consequences, and therefore only on a scholarly basis, if Italy subscribes a treaty containing rules so remarkable to become fundamental principles of Italian law, those same principles could be subsumed in European law as fundamental principles, *ex article 6.3*, and so become common principles in *all* the juridical systems of *all* the European States<sup>68</sup>. And, again, also perfectly *viceversa*. In case of conflict between those principles, it shall be the work of the European Court (and I am persuaded, *exclusively* of the European Court for the accepted prevalence of European Law on national laws, and, of course, the action of article 267 Lisbon Treaty) to decide if and which of them can survive, even if, as underlined in some of the European judgments cited before, *not on a "majoritarian" basis*, but on a "relevance" basis, *in the light of the European political and cultural conceptions*, as they are thoroughly exposed in the treaty itself. That is: principally, on a democratic, liberal market based,

<sup>67</sup> See Tribunale Foggia (Sez. lavoro) 19 March 2007 n. 20085/06 P.G., Cons. Stato, n. 1220/2010 Sez. IV 2nd March 2010, T.A.R. Roma Lazio sez. II 18th May 2010 n., 11984.

<sup>68</sup> The famous case of the young Chinese child is very instructive in the matter: ECJ Case C-200/02, *Kunqian Catherine Zhu, Man Lavette Chen, v Secretary of State for the Home Department*, can, in this direction be considered a real leading case.

laical society, today fully consistent with human rights (European and universal<sup>69</sup>).

But, to conclude, I want to launch another extreme hypothesis.

As well known in these times there is in Italy a big controversy on the constitutional legitimacy of some laws, based also on some treaties, authorizing the *refoulement* or the rejection of immigrant peoples (lacking authorization) arriving in Italy, mostly by sea. On the matter there is an important, but of disputable Constitutional legitimacy, treaty between Italy and Libya.

But the treaty lies there perfectly valid and applicable, and therefore a first very sensible problem: how is it possible that a law deriving from a treaty (the order of execution law), but unconstitutional continues to have validity in Italian law?

The most recent Constitutional jurisprudence seems to lead to the conclusion of the non applicability of that treaty in Italian law. The only way to reach the described effect would be the declaration of unconstitutionality of the law transforming the treaty in internal law. But, on the international plane, the obligation to fulfill the treaty should persist, and therefore Italy would infringe art. 27 of the Vienna Convention on the law of treaties.

But, and so I conclude, the violation of that Vienna rule, would be the effect of a violation of a *new* principle of domestic law, deriving from a principle of European law (both European Union law and European Convention on human Rights law). The only accepted exception to the rule of art. 27 of the Vienna Convention is a constitutional change in the interested State, and this would be just the case<sup>70</sup>. But besides, the principle *rebus sic stantibus* could possibly be pleaded, as the conditions on which the treaty was stipulated are profoundly changed.

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<sup>69</sup> So in mine *Per una ricostruzione*, cit.

<sup>70</sup> For an old case on this question see my *Adattamento al diritto internazionale e estradizione nella Costituzione italiana: spunti critici*, in *Comunicazione e Studi dell'Università di Milano*, p. 347 ff.