IS THERE AN "ITALIAN STYLE" IN CONSTITUTIONAL ADJUDICATION?*

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Abstract

The article, taking inspiration from the recently published book "Constitutional Adjudication in Global Context" by Barsotti, Carozza, Cartabia and Simoncini, deals with the question whether there is an "Italian style" in constitutional adjudication will be explored. In order to answer to the above mentioned question, the paper focuses on the internal and external challenges to the emerging and consolidation of the Italian Court' crucial position in Italian constitutional landscape. The main idea behind the paper is that such challenges favored the rise and the growth, in the constitutional case law, of a judicial style that is, in a way, "by design" aimed at fostering the relational dimension and at allowing the Italian Court to adapt (and to adjust) its strategy depending on the evolution of the relevant context. Thanks to a sort of "internal unchosen training", the Italian Constitutional Court has been able to find itself well trained and more prepared than other European courts to play a key role in the current period of cooperative constitutionalism in Europe.

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* This essay was delivered at the 2016 ICON-S Conference *Borders, Otherness and Public Law – Berlin*, June 17th-19th, 2016. The panel, composed also by M. Cartabia, V. Barsotti, P. Popelier and A. Simoncini, chaired by N. Lupo, discussed the main outcomes of the Volume *Italian Constitutional Justice in Global Context* co-authored by V. Barsotti, P. Carozza, M. Cartabia, and A. Simoncini.

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1. Introduction

In this article the question whether there is an "Italian style" in constitutional adjudication will be explored. It ought to be stated at the outset that whether the answer is right or wrong, it depends on what exactly the question means (or suggests) to imply.

If the question aims at suggesting that the ambition to establish a variety of relationships with other actors (from an institutional and interpretative point of view) is an exclusive feature of the Italian Constitutional Court (hereinafter, "ICC"), then the answer is certainly a negative one. As Patricia Popelier claimed, it can be argued that a European common style in constitutional adjudication has emerged and is now well established.

If, by contrast, the idea of an Italian style in constitutional adjudication is not meant to suggest that there is an Italian peculiarity, but, rather, that some distinctive traits emerge from its first 60 years of jurisprudence ICC case law, than the answer can be a positive one. This seems to be also the perspective followed by the authors of the book that is under review. "We do not want by any mean" - they make clear - "to suggest that the ICC is absolutely singular in this effort at rationality"[1].

But first the meaning and significance of the term "Italian style", so far as it is relevant to the role of the ICC in its controls, will be considered. The discussion will then broaden to the "external" and "internal" challenges and this will lead to a better consideration of the conjecture set out initially.

2. The "Italian style" according to Merryman

As it is well known, the idea that points out the existence of special features in the Italian style has been introduced for the first time, more than fifty years ago by John Henry Marryman, through three seminal articles regarding, respectively, doctrine, law and interpretation as developed in the Italian legal context[2].

[1] V. Barsotti, P. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context* (2016), 235.

[2] J.H. Merryman, *The Italian Style*, 18 Stan. L. Rev. 39, 396, 583 (1965-66).

It is helpful to begin with a couple of quotation which give a clear idea of the bridge existing between Merryman inspiring words and the Authors' intuition to focus on an Italian style in constitutional adjudication. First, he observed that "the norms, institution and process of Italian law become truly Italians only when they are seen through Italian eyes". Against this background, it is easy to observe that the book under discussion is the first attempt, in the Italian scholarly debate, to shed some light on the distinguishing features of the Italian constitutional adjudication for a broader audience. Not only is the book written in English, but it also uses a distinctive approach. Instead of following the approach that is traditional in Italian commentaries and treatises, this book is based on both a deductive approach and a wide use of cases (precisely for this reason, it would be very helpful and useful to arrange an Italian version of the book).

Secondly, in an almost prophetic way, Merryman observed that: "The future would seem to hold an expanded role and greater prestige for Italian judges. In part this will come through deflation of the bloated conception of the legislator that has loomed over continental legal though since 1804. In part will flow from a reconsideration of nature and rigidity of the separation of powers".

Merryman's call for a reconsideration (if not crisis) of the traditional way to conceive the separation of powers is particularly helpful here. It highlights what is the main reason that lies behind the rise of the relationality factor, which the Authors have the great merit to recognize as the main ingredient of the "Italian style" of constitutional adjudication. A judicial style based on a relational cooperative and adaptive approach which the ICC was in a way forced to develop in order to face several challenges over the last 60 years.

Such challenges favored the rise and the growth, in the ICC case law, of a judicial style that is, in a way, "by design" aimed at fostering the relational dimension and at allowing the e ICC to adapt (and to adjust) its strategy depending on the evolution of the relevant context. Thanks to a sort of "internal unchosen training", the ICC has been able to find itself well trained and more prepared than other European courts to play a key role in the current period of cooperative constitutionalism in Europe.

Before considering some cases in which the ICC has shown the aforesaid attitude to change its skin without changing its identity, it is helpful to shortly set the relevant European background in which the Italian style is rooted and the language of the ICC is spoken. Few quotations can shed some light on the essence and uniqueness of the European constitutionalism in the last decades. This first is drawn from Mauro Cappelletti (1986), according to whom "unlike the American Supreme Court and the European constitutional courts, the ECJ has almost no powers that are not ultimately derived from its own prestige, [and the] intellectual and moral force of its opinions". The courtesy pedagogy is a key element in the Court of Justice reasoning[3]. The second quotation is drawn from Giuseppe Federico Mancini, for a long time Advocate-general at the ECJ. In 1989 he observed that "the Luxembourg Judges have been able to develop a judicial style which explains how it declares the law"[4]. Finally, in 2000 Joseph Weiler argued that the constitutional ingredient which shapes the European legal order's uniqueness is a distinctive element; that is, that "constitutional actors in the Member States accept the European Constitutional discipline not because as a matter of legal doctrine […] They accept it as an autonomous voluntary act endlessly renewed by each instance of subordination"[5]. This implies that unlike constitutional courts, the Court of Justice of the European Union can rely only on a "voluntary obedience" by the political and judicial actors of Member States whereas the formers can always use the weapons of the obligation to obey.

Despite the different perspectives followed by the three points of view just mentioned, they seem to share the same common denominator: that is, the tension and the alleged antinomy between the authoritativeness of the European courts on the one hand, and the authority of constitutional courts. In other and clearer words, I am arguing that in the current stage of cooperative constitutionalism, the equation "authoritativeness:

[3] See M. Cappelletti, D. Golay, *Judicial Branch in the Federal and Transnational Union*, in M. Cappelletti, M. Seccombe, J.H.H. Weiler (eds.), *Integration Trough Law*, (1986), 333, note 281.

[4] G.F. Mancini, *Attivismo e autocontrollo nella giurisprudenza della Corte di giustizia*, 30 Riv. Dir. Eur. 233 (1990).

[5] See J.H.H. Weiler, *Federalism and Constitutionalism: Europe's Sonderweg*, 10 Harvard Jean Monnet Paper 13 (2000).

European courts = authority: constitutional courts" is likely to be wrong, or at least misleading. Indeed, more than ever, for the constitutional courts it is always more crucial the moral and persuasive force of their opinions, beyond their original power to rely on (in Weiler's words) an obligation to obey. It is more in the dimension of authoritativeness than on that of authority that constitutional courts must use their best cards. This is true, in particular, for those constitutional courts that aim to play a front runner role in the (not so) new stage of global constitutionalism.

The binding effects of constitutional courts' judgments are to an extent natural and almost inevitable. However, what it striking - and this Book confirms it - is that the ICC is in a privileged position to play its role in the global arena precisely because of the "unchosen domestic training" mentioned before. Both external and internal challenges forced the e ICC to go beyond the formalistic self-reassurance related to the binding nature of its judgments and to develop a pedagogic, cooperative and relational style or, to borrow again Cappelletti's words, to elaborate a courtesy pedagogy.

3. "External" challenges

In practice, the elaboration of the Court's relational approach is the product of several causes. There are, first, "hostile" external factors. There are, second, internal challenges; that is, the cases in which an initially unsuccessful judicial approach has required an *ex post* creative judicial "adjustment".

With regard to the external hostile factors, reference must be made to the first and maybe hardest one that the ICC had to face in 1956, when it finally started to operate. To give an idea of the institutional environment in which the ICC operated, nothing is more significant than the words of Court's first President, Enrico de Nicola: "when we arrived we had no chairs, there was a single member of staff and we had to get a glass of water by ourselves"[6].

In this background, which is described by the book under review[7], three main challenges (or hostile elements) contrasted the

[6] V. Barsotti et al., *Italian Constitutional Justice in Global Context,* cit. at 1, 27.
[7] Ibid., 33.

ICC's attempt to legitimize itself as new actor in the Italian constitutional arena. First of all, there had been a full decade of diffuse constitutional review, by administrative and ordinary courts. Secondly, there was a significant asymmetry between the legislator and the ICC. While the former was considered as a sort of omnipotent authority, the latter's lack of legitimation was manifest in the debate which characterized the Constituent Assembly. Some political forces openly opposed to the creation of a constitutional court - it was seen as usurping the roles of politicians in an undemocratic way. Finally, the judiciary was dominated by conservatism: an attitude of cultural inertia and lack of openness toward new methods.

That being the scenario, perhaps it would not have been too provocative to raise in 1956 a question (borrowing the title of an article by a judge of the European Court of Human Rights written in 1964): has the ICC a future?[8]

It is not too far from the true to affirm that it has been the same ICC in the first judgment (no. 1/1956) to make the decisive step to secure its own future by overstepping the aforementioned obstacles. And it did so in its own way (an Italian way).

A twofold element characterized the approach of the ICC. On the one hand, it engaged immediately in an elaborated, public reasoned discussion about the normative value of the Italian constitutional order. It is not by chance that it in the book under review the first judgment (no. 1/56) of the ICC is compared to *Marbury v. Madison*[9]. Similarly to the landmark US Supreme Court decision has pointed out[10], the ICC clarified that Constitution is

[8] H. Rolin, *Has the European Court of Human Rights a Future*?, 11 Howard L.J. 442 (1965). At the time Judge Rolin expressed this preoccupation, the European Court of Human Rights had ruled on only two cases in six years. The European Court of Human Rights ("ECtHR") started to operate in 1958. Its first case, a judgment was adopted in 1960, whereas in 1961 it ruled on the merits of a controversy. In 1962, in the second of the cases assigned them, ECtHR judges could only ascertain its irrelevance because in the meantime the Belgian government adopted measures to restore the claimant's position. Other two years were to pass before the Court was assigned a third case. The judgment for this case was only decided in 1967. With only three cases in eight years, there was reason to be worried.

[9] 5 U.S. 137 (1803).

[10] "The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other

the highest law of the land which must be taken seriously, even with regard to those provisions that were wrongly regarded - by some ordinary judges - as being only programmatic and, therefore, deprived of immediate effects. On the other hand, by showing at the same time a flexible, adaptive, relational approach in which there was no sign of constitutional arrogance, but rather an expression of cooperative constitutionalism.

This cooperative approach was addressed, first and foremost, to the judiciary. For the new court, it was simply vital to convince "common" (ordinary and administrative) judges raise questions of constitutionality before the ICC. And, since such judges were suspicious and reluctant to play the new "game", the ICC did its best to involve them in a conversation, or dialogue. Secondly, the ICC elaborated a successful approach *vis à vis* the legislator. Its approach was a mixture of deference towards Parliament - a short term strategy, seen retrospectively - and of emphasis on the need to implement constitutional provisions through legislative action[11]. An important element of the Court's strategy was its choice to focus on legislation enacted before the entry into force of the Constitution (1948), that is to say the rules enacted under Fascism (1922-1943). This avoided or at least attenuated potential conflicts with the Parliament of the day.

4. Internal challenges

In this section I continue my consideration of the relationships between the ICC and other "players", focusing on the legal relevance and significance of the European Convention of Human Rights (hereinafter, ECHR). This will show the evolution of the relationships between the ICC and the European Court of Human Rights (hereinafter, "ECtHR").

The role of the ECHR has been significantly affected by the reform of the Italian Constitution that took place in 2001. Although such reform was meant to deal exclusively with the relationship between the State and Regions, it had an important impact on the status of both EU and international law. Article 117

acts, is alterable when the legislature shall please to alter it". 5 U.S. 137 (1803), 177.

[11] V. Barsotti et al., *Italian Constitutional Justice in Global Context,* cit. at 1, 34.

(1) of the Constitution now provides that "legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from the EU legal order and international obligations".

A literal interpretation might suggest that the constitutional status of EU law has been compared to that of international law, European Convention on Human Rights (hereinafter, "ECHR" or "Convention") included. However, the courts have not embraced this interpretation. Immediately after the entry into force of the new constitutional provision, a new brave judicial approach[12] by ordinary judges held that the well-known paragraph 16 of the landmark decision of the Court of Justice in *Simmenthal*[13] applied to the ECHR.

Only six years after 2001 did the ICC find the possibility to elaborate and present its vision on the constitutional provision. It did so by way of its judgments no. 348 and no. 349 of 2007. The Court's vision is characterized by three main elements. First, EU law enjoys a particular legal status, to the extent to that its primacy is recognized with the only exception of the doctrine of "*controlimiti*"; that is, the supreme constitutional principles. By contrast, according to the ICC, Article 117 (1) provides the ECHR with a higher status than domestic ordinary legislation. Secondly, and consequently, the ECHR itself has to respect the Constitution in its entirety, and not just its fundamental principles which define the scope of the applying in respect to EU law. Thirdly and finally, the ICC held that, if ordinary judges find that domestic law infringes the ECHR, they must stay the case and refer a question of constitutionality to the ICC, thus preventing judicial activism.

This is the reason why the assessment carried out by the ICC is based on a two stages approach. The first stage has the

[12] The Court of Genoa, for instance, in order to solve a conflict between ordinary national laws and ECHR principles, started to apply the same solution according to which, since the historic decision of the Constitutional Court in *Granital* in 1984, ordinary judges have applied the priority of EC law in cases of conflict between national law and EC law. It has been followed in this position by other courts of first and second instance.

[13] See par. 21, Court of Justice, Case C-106/77, *Simmenthal,* according to which: "Every national Court must in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with Community law, whether prior or subsequent to the Community rule".

purpose to verify the existence of a contrast between the relevant ECHR provisions and the Italian Constitution. Only if the contrast is excluded, the ICC will move to the second stage of its evaluation, ascertaining the possible incompatibility of the domestic legislation with the ECHR. In the case the contrast is found to occur, domestic legislation is struck down because of the violation of Article 117 (1) of the Italian Constitution.

Interestingly enough for the focus of the present paper, in its judgments no. 348 and no. 349 of 2007 the ICC added, that the exact meaning of the ECHR can be determined only as it is interpreted by the European Court of Human Rights. In fact, according to the ICC, the content of the Convention is essentially that "which may be inferred from the case law developed by the Court over the time". This was the first time, after the entry in force of Article 117 (1), in which the ICC laid down an unconditioned obligation (for itself as well as for all Italian judges) to interpret to the Convention in accordance with the meaning given by the ECtHR in its case law.

In the light of these circumstances, it can be suggested that the ICC sought to achieve a sort of compensation. On the one hand, it excluded that the new constitutional provision - article 117 (1) - which mentioned both EU law and international obligations soon after the Constitution could be interpreted literally, that is, in the sense that the Convention had the same legal status of EU law. On the other hand, the ICC acknowledged that the ECHR had a special legal status, above legislation.

Whatever the actual reasons behind this step, the constitutional judges realized almost immediately that such interpretative constraint, enforced in a radical and absolute way, gave them too little *margin de manouvre* with regard to the ECtHR case law. Such first judicial move, as it has been anticipated, needed then to be revisited, without a radical and too explicit *revirement* which would have affected the relationship with the ECtHR.

The Court had to make use of its adaptive, flexible and relational style. In so doing, it used several judicial techniques, with the goal or at least the effect of attenuating the unconditional obligation to be bound to ECHR interpretation by the ECtHR reading, without never, at least explicitly, abnegating it.

The first judicial technique takes the view that the case law of the Court of Strasbourg would be binding for the ICC only in its substance (or in its essence). Strangely enough, this judicial technique emerged for the first time in the same ruling in which the constitutional judges have drawn the most radical implications from the said self-imposed obligation to be bound by the ECtHR interpretation of the Convention. More precisely, in its decision no. 311 of 2009, the ICC, affirmed that "this Court cannot substitute its own interpretation of a provision of the ECHR for that of the Strasbourg Court, thereby exceeding the bounds of its own powers, and violating a precise commitment made by the Italian state through signature and ratification of the Convention without any derogations". In other words, a departure from the interpretation of the ECHR given by the Strasbourg Court would produce an infringement of the obligation resulting from international law. However, the ICC added, that "it goes without saying that the assessment of the European case law established regarding the relevant Convention provision must be carried out in a manner that respects the essence (or the substance) of case law of the European Court of Human Rights"[14]. It is here that the emphasis put on substance produces its effects.

This approach is not immune from problems. It is not clear which would be the basis for such limitation: why should only the essence of the case law of the ECtHR be binding when, on the contrary, the case law of the ECJ is binding in all its elements? In order to explain this difference, it is not sufficient to point out the different status enjoyed by EU law and the ECHR, respectively, with the result that only the fundamental principles of the Constitution are deemed to be an obstacle to the national enforcement of EU law. Nor is the basis for drawing the distinction what is essential and what is not essential, in the ECtHR case law easy to understand.

No clear answers to such questions emerge from the case law of the ICC. In 2011, instead, it used another judicial technique with a view to departing from the (self-imposed) obligation to consider entirely binding the case law of Strasbourg Court. More precisely, in its decision no. 236/2011, the ICC considered a challenge to a national legislation which provided that a reduction

[14] See par. 6, Constitutional Court, judgment 16 November 2009, no. 311.

in time-barring limits for certain offences would not apply retroactively to the benefit of the accused to proceedings which were already pending before courts of appeal or before the Court of Cassation. The ICC held the question was unfounded, drawing heavily in its judgment from the case law of the ECtHR, but in a quite original way. It admitted that, had it affirmed that the principle of the retroactivity of more favorable criminal legislation (as asserted by the ECtHR) were to be held to be more rigid than that already recognized in the case law of the said Court (in the sense that such principle could not be subject to exceptions or restrictions justified by special circumstances), this would have been constituted a departure from the case law of ECtHR. However, using the distinguishing technique, the ICC noted that "no such novel characteristic is apparent from the judgment of the European Court of 17 September 2009 (*Scoppola v. Italy*). There is nothing in the Court's judgment which can preclude the possibility that, in special circumstances, the principle of retroactivity *in mitius* may be subject to exceptions or restrictions. This is an aspect which the Court did not consider, and which it had no reason to consider, given the characteristics of the case upon which it was deciding"[15]. In other words, according the second judicial technique under investigation, the ICC emphasized the difference between the case at stake and the relevant case law of the ECtHR, by reading in this case law something more (or less) than its actual and "true" meaning.

In its third judicial technique the ICC emphasized the difference between the fragmented evaluation carried out by the ECtHR and the comprehensive one at the heart of the ICC reasoning. More precisely in the decision no. 264/2012 the ICC affirmed that the balancing exercise carried out by the ECtHR would be "broken down into a series of provisions that are uncoordinated and potentially in conflict with one another"[16]. By contrast, the assessment which characterizes the activity of the ICC is said to be "systematic" and "coordinated", because includes a check and balance attitude among the different values at the heart of a constitutional legal order. This implies, in other words, that the same case, in Strasbourg and in Rome, could be

[15] See par. 13, Constitutional Court, judgment 19 July 2011, no. 236.
[16] See par. 4.1, Constitutional Court, judgment 19 November 2012, no. 264.

decided in a different way because of the different context and the different nature of the judicial assessment.

This is what happened in the decision no. 264/2012. The ICC was requested to judge the constitutionality of legislation modifying the arrangements applicable to the calculation of pensions for workers who have spent all or part of their working life in Switzerland. Whereas under the previous interpretation of Italian legislation, payment of contributions in Switzerland established entitlement to a pension in Italy on the basis of Italian contributions at equivalent salary, irrespective of the fact that the contribution levels in Switzerland were significantly lower, following an enactment providing for an "authentic interpretation", an Italian pension was to be calculated on the basis of the actual level of Swiss contributions, thus resulting in lower pensions. The Court's consideration of such issue was openly carried out in the light of the ECHR case law, with specific reference to the *Maggio* case[17]. The European Court had held that it was "not persuaded" of the fact that the general interest reason was compelling enough to overcome the dangers inherent in the use of retrospective legislation. It had thus concluded that Italy had infringed the applicants' rights under Article 6, paragraph 1, of the ECHR by intervening in a decisive manner to ensure that the outcome of proceedings to which it was a party were favourable to it.

Despite the relevant case law of ECtHR was clearly suggesting to conclude for the annulment of the Italian legislation, the ICC concluded that compelling general interests could justify the recourse to retrospective legislation. According to the ICC, "the effects of the said provision are felt within the context of a pension system which seeks to strike a balance between the available resources and benefits paid, in accordance also with the requirement laid down by Article 81 (4) of the Constitution, and the need to ensure that the overall system is rational (judgment no. 172 of 2008), thus preventing changes to financial payments to the detriment of some contributors and to the benefit of others"[18]. It is not difficult to identify the application, in a concrete case, of

[17] Eur. Ct. H. R., judgment of 31 May 2011, *Maggio and others v Italy* (applications nn. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08).
[18] See par. 5.3, Constitutional Court, judgment 19 November 2012, no. 264.

the dichotomy "individual justice" versus "constitutional justice" which the ICC has theoretically developed in the decision 311/2011[19].

The three judicial techniques outlined in this section, in line with the relational matrix of the ICC style which has been presented at the beginning of the paper, have tried to avoid a direct clash between the ICC and the ECtHR and, even before it, a direct and explicit *revirement* of what has been formally declared in the "twins" decisions of 2007 with regard to the self-imposed obligation to be bound by the ECtHR interpretation of the Convention.

By contrast, with a fourth one judicial technique, the ICC, focusing on a more substantial criteria in order to gain a broader *margin of manouvre* with respect to the case law of the ECtHR, has been able to achieve the second goal, i.e. to avoid an explicit *revirement* of the principle adopted in 2007, but not for sure the first one, i.e. to prevent a direct contrast with the ECtHR. More precisely, in its judgment no. 49/2015, the Court was requested to consider two referral orders questioning the constitutionality of legislation which purportedly prohibited the confiscation of property following the commission of a development offence in the event that, notwithstanding that a finding of criminal responsibility had been made, no conviction was imposed on account of the time barring of the offence. The referring courts stated that, whilst the traditional interpretation of the legislation would have allowed confiscation, the judgment by the European

[19] It should be added that the ICC, one year later (judgment no. 170/2013) has partially revisited its radical contrast with the Strasbourg court in relation to the admissibility of the retrospective legislation. In this case the Court heard a referral from a bankruptcy judge questioning legislation which enabled certain amounts due to the state in respect of tax to be granted priority ranking in bankruptcy proceedings, notwithstanding their otherwise unsecured status, and stipulated that such arrangements were to apply with retroactive effect to bankruptcy proceedings that had already been initiated when the legislation came into force. The ICC held, referring also to the ECHR, that whilst retroactive legislation in the area of private law was permitted as a matter of constitutional law, it must be justified by "compelling reasons of general interest", which this time, according to the same Court, were not present in the case.

Court of Human Rights in *Varvara v Italy*[20] now precluded such an outcome. The ICC ruled the questions inadmissible, holding that the referring courts had ascribed an excessive scope and binding force to the *Varvara* judgment, and that the judgment in the *Varvara* case left room for interpretation in a manner consistent with the well-established Italian law permitting expropriation. The underlying rationale is a distinction between settled cased law and isolated judgments of the ECtHR: national judges cannot disregard the former, by are not bound by the latter.

The idea to make reference to the vague[21] and changing notion of ECtHR "consolidated case law" as main criteria to identify the thin red line between the binding and not binding effects of the judgments delivered by the ECtHR does not seem coherent with the cooperative relational approach that has characterized so far the relationship between ICC and Court sitting in Strasbourg. In particular, the assumption that "consolidated law it is only that one resulting from the case law of the European Court on which the national courts are required to base their interpretation, whilst there is no obligation to do so in cases involving rulings that do not express a position that has not become final" raises some doubts. It is not clear how it is possible to consider "final" the position of a judicial body competent to interpret a constitutional "work in progress" like the Convention which, according to the same ECtHR, amounts to a "living

[20] Eur. Ct. H. R., judgment of 29 October 2013, *Varvara v Italy,* application no. 17475/09.

[21] According to the ICC, "It is not always immediately clear whether a certain interpretation of the provisions of the ECHR has become sufficiently consolidated at Strasbourg, especially in cases involving rulings intended to resolve cases that turn on highly specific facts, which have moreover been adopted with reference to the impact of the ECHR on legal systems different from that of Italy. In spite of this, there are without doubt signs that are capable of directing the national courts during their examination: the creativity of the principle asserted compared to the traditional approach of European case law; the potential for points of distinction or even contrast from other rulings of the Strasbourg Court; the existence of dissenting opinions, especially if fuelled by robust arguments; the fact that the decision made originates from an ordinary division and has not been endorsed by the Grand Chamber; the fact that, in the case before it, the European court has not been able to assess the particular characteristics of the national legal system, and has extended to it criteria for assessment devised with reference to other member states which, in terms of those characteristics, by contrast prove to be little suited to Italy".

instrument"[22] that must be interpreted according to present-day conditions. Moreover, current circumstances are by definition different from those of yesterday and those of tomorrow. Accordingly, a position of ECtHR could never be labeled as final.

5. Conclusions

Looking at the relevant scenarios in which the ICC has been able to train its persuasive skills in order to foster trust and voluntary obedience in its different interlocutors, it can be said that very often (though not always) the ICC has found the best key in order to establish a dialogical relationship with its counterparts.

Nonetheless, in the next weeks this approach will be seriously challenged: the ICC will have to decide how to deal with the "time bomb" related to the constitutional fate of ECJ *Taricco* judgment ([23]). As it is well known, the CJEU ruled that operation of the limitation periods in Italian law infringed Article 325 TFEU. A limitation period was not objectionable as such, but national law made it effectively impossible to prosecute offences because the way in which it calculated breaks in the prosecution. Also, the national law infringed the principle of equality set out in Article 325, since other national laws on similar types of economic crime did not contain the same problematic rules on calculation of breaks.

For the CJEU, national courts must not apply the relevant national law. This obligation is based on Article 325 TFEU, which sets out precise and unconditional rules on effective and equal protection of the EU financial interests. Such prohibition to apply the domestic provisions regarding limitation periods for criminal offences (that would result in the application of a longer limitation period) is, however, likely to be detrimental to the interests and rights of the defendant. Consequently, it could be in contrast with the principle of non-retroactivity of criminal law, as three national judges suggested, raising a question of constitutionality in front of ICC. At the heart of the such question there is an underlying assumption confirmed by a well-established case law of the ICC

[22] The idea that the ECHR is a living instrument has figured in Strasbourg's case law since its very early days. The European Court first acknowledged it in the judgment of *Tyrer v United Kingdom*, delivered in 1978.

[23] Court of Justice, Case C-105/14, *Ivo Taricco and others.*

on the substantive nature of the statute of limitation. The assumption is that, by refusing to apply the period of prescription provided national legislation, the criminal judge would breach Article 25 (2) of the Constitution (*nulla poena sine lege*). This is a fundamental principle of the constitutional order, a principle which would thus have the status of a limit ("counter-limit") to the primacy of EU law.

This is not the right place to enter into a more detailed analysis and to guess which could be the option that will be followed by the ICC, among the quite wide range of possibilities from the inadmissibility of the question to the enforcement of counterlimits. However, among the others, the ICC has the chance to apply, once again, the option that would be more consistent with the relational attitude that has been a driving force of its case law so far. Even at first glance, the judgment handed down by the CJEU raises several issues. In particular, it fails to strike a fair balance between the interests at stake. First, it fails to consider adequately Article 47 of the Charter of Fundamental Rights of the EU, which excludes from the scope of application of the principle of legality any interference with the statute of limitation detrimental to the defendant. Second, it overestimates the financial interests of the European Union, a kind of interests that the Court of Justice ranks at the same level as other fundamental rights.

In the light of these issues, a solution is however left to the ICC. It could refer once again a preliminary question to the CJEU, with a view to obtaining clarifications on the outcome of the *Taricco* judgment in light of the relevant constitutional framework. This option, of course, could also be taken by the referring courts, though none of them did so. Precisely for this reason, the ICC could use this option. On the other hand, there are no obstacles preventing the ICC to look for a liaison with the CJEU. In front of an actual and clear risk of collision, where the clash with the EU legal order is most likely to occur, the model of cooperative dialogue and the relational attitude of the ICC could pave the way to reconcile the view of European and national judges.