Italy and International Law

**Survey by the Institute for International Legal Studies - CNR**
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# GUIDE TO READING OF EDITION No. 1: 2012-2013

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**1.** The first edition of *Italy and International Law. Survey of Italian cases and materials on International law* edited by the Institute for International Legal Studies offers an annotated collection of selected documentation regarding approximately 200 cases of legislation, jurisprudence or international monitoring of treaty implementation emerging from the Italian practice in International law in the years 2012 and 2013[1].

Of the documentation selected by far the greatest part consists of jurisprudential cases, as one would expect, if one considers the number of judicial authorities whose judgments and orders have been taken into account and, most particularly, the amount of attention given the Constitutional Court jurisprudence. Cases of the other two typologies are less numerous but none the less indicative of a notable practice over the arc of two years. This confirms, if needed, the widespread incidence within the national practice of Italy of obligations deriving from international law.

Among the twenty-one major entries into which the documentation is systematically classified by subject[2], some offer more ample cases than others. Predictably, these correspond to certain areas of international law in which cooperation between states is particularly widespread and well

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[1] On the classification of documentation by subject and the three indexes of the *Survey* (by category and by treaty and the chronological index) see *Italy and International Law*, Introduction.

[2] These are: "Aliens"; "Cultural Heritage"; "Development Cooperation"; "Diplomatic and Consular Relations"; "Environmental Protection"; "Human Rights"; "Immunities of State and of State Officials"; "International Crimes"; "International Disputes"; "International Humanitarian Law"; "International Organizations"; "Judicial Cooperation"; "Law of the Sea"; "Migration"; "Peace and Security"; "Private International Law"; "Relationship between International Law and Domestic Law"; "Relationship between International Law and EU Law"; "Sources of International Law"; "Stateless Persons"; "Weapons". Regarding subsections within each section we refer you to the Subject index.

developed. It is especially to these areas that I will refer below, given the impossibility of giving adequate account of all the contents of the *Survey*, too wide and elaborate to be referred to in detail here. The aim is to give some general indication on the organisation of the material or to point out certain cases of particular interest, referring the reader, for anything more, to a consultation of the relevant documentation.

**2.**The area which is given major emphasis in the first edition of the *Survey* is, without doubt, that related to the protection of human rights and fundamental freedoms. In this area, the wide practice confirms a continuing interaction between treaties and the Italian Constitution (see the entry on "Human Rights", and the separate but related entries on "International Crimes" and "International Humanitarian Law").

Regarding the pertinent legislation it is worth mentioning the laws authorizing the ratification and the implementation of important multilateral treaties: The Optional Protocol to the UN Convention Against Torture (Law No. 195/2012); the Lanzarote and Istanbul Conventions of the Council of Europe (Law No. 172/2012 and Law No. 77/2013), as well as the long awaited though partially disappointing provisions to implement in Italy the Statute of the International Criminal Court (Law No. 237/2012).

As with the jurisprudence the majority of the cases concern the domestic application of the European Convention on Human Rights (ECHR). There are however frequent references to other treaties: the two UN Covenants of 1966 (ICCPR and ICESCR); the Charter of Fundamental Rights of the European Union (EU), often cited in reference to the binding juridical effectiveness it assumed with the entry into force of the Lisbon Treaty; the European Social Charter (in which we see the two National Reports presented by Italy to the competent treaty body) and among the instruments for the protection of vulnerable persons, chiefly the 1951 Convention on the Status of Refugees, the New York Convention on the Rights of the Child of 1989 and the 2006 UN Convention on the Rights of Persons with Disabilities.

Alongside the established human rights protections, to which the major part of the documentation refers (see the numerous subheadings which try to be as detailed as possible depending on the contents of the acts and documents) the Italian practice appears attentive even to the emergence

of "new" individual rights. In this regard national jurisprudence on medically assisted procreation is illustrative (sub-subheading of "respect for private and family life"), following the judgment of the European Court of Human Rights in the case *Costa and Pavan* v. *Italy*.

Analogously, the debate on fundamental liberties is extending to aspects which, until now, have scarcely been considered (see, for example, the Italian Response to the Consultative Council of European Prosecutors which, on the subject of information regarding criminal proceedings raised the difficulty of reconciling freedom of expression with the protection of privacy). Also, in relation to principles of non-discrimination, the relevant practice highlights worrying current phenomena: principally discrimination and violence against women or, more sporadically, on the basis of sexual orientation (see in this regard, the subheading "gender equality" in which are gathered cases – often reproduced also in other items in the classification – related to the offense of stalking, to femicide, as well as the practice of female genital mutilation or to the persecution faced by homosexuals, the two latter also relevant to the jurisprudential evaluation relating to the recognition in Italy of the status of refugee).

There is no lack either of documentation on more traditional subjects: we see the case of treatment of Roma and Sinti on the basis of national legislation (the so called "security package" of 2008 though subsequently extensively recast) which was criticised, after some delay, by the Committees of the Convention on the Elimination of All Forms of Racial Discrimination and the ICESCR, not to mention the European Commission on Racism and Intolerance (ECRI).

The practice referring to the Convention against Torture and to Article 3 of the ECHR (see the subheading "prohibition of torture", with the further entry for "treatment of persons in prison and other persons deprived of their freedom") is additionally significant. It again highlights the consequences of the absence in Italian criminal law of the crime of torture or cruel, degrading or inhuman punishment. Refer to, in this regard the observations of the CPT Committee (European Convention for the Prevention of Torture) following its visit to Italy in 2012. Even more significant are in domestic jurisprudence: the judgement of the Third Assize Court of Rome in the "Cucchi" case; the refusal of house arrest by the Surveillance Magistrate ("magistrato di sorveglianza") in the "Aldrovandi" case; and, with a clear reference to the necessity of

legislative intervention, decision No.37008/2013 of the Court of Cassation on the "Bolzaneto" case. Moreover, the considerable normative and jurisprudential consequences of the pilot-sentence of the European Court of Human Rights (ECHR) on the *Torreggiani* case require pointing out, also remembering that already the conditions of prison detention in Italy have been subject to critical remarks from monitoring bodies (see, again, the abovementioned report of the CPT Committee).

The prohibition of torture has also arisen in regard to criminal proceedings over the "extraordinary rendition" of Abu Omar, the much discussed international anti-terrorism case in Italy, which has had over time wide ranging developments. In relation to the case, this edition of the *Survey* brings together all the relevant judgements in the period under examination (Court of Cassation No.46340/2012; Court of Appeal of Milan, III Criminal Section, February 1, 2013; Court of Appeal of Milan, IV Criminal Section, February 12, 2013; order No. 244/2013 of the Constitutional Court).

**3.** One area of subject matter conceptually autonomous but characterised by clear connections with the classification "Human Rights" (particularly as concerns the two subsections, "non discrimination" and "refugees and asylum seekers") is found in the entry for "Migration".

In this area the application of international law in Italy is marked, as is well known, by various criticalities. In the two year period 2012 and 2013 the practice followed by the Italian authorities in 2009 and 2010 of blocking migrant vessels intercepted in international waters, even to the detriment of persons who would have had title to refugee status or other forms of international protection recognised by the Italian immigration law, was at the centre of international attention. This practice was held to be contrary to the principle of non-refoulement (Article 4 of Protocol No. 4 of the ECHR) by the European Court of Human Rights in its judgement of 2012 in the case *Hirsi Jamaa et al.* v. *Italy*. Nor is this the only international monitoring body to express this view. On this subject we may find: the ECRI Report published in the same year; repeated recommendations aimed at Italy by the UN High Commissioner for Refugees; and again, the Report of the Special Rapporteur on the Human Rights of Migrants of the UN Human Rights Council, whose

recommendations were aimed not only at Italy but also at the EU institutions, in order that EU border management fully takes into account the rights of migrants.

No less noteworthy is the case law regarding the conditions of irregular migrants under administrative detention in Identification and Expulsion Centres (CIEs) and in Reception Centres for asylum seekers (CARAs) both subject to repeated condemnations by international bodies and the national judiciary. The Report drafted by the Human Rights Commissioner of the Council of Europe following his visit to Italy in July 2012 bears witness to the first category (see also the relevant comment of the Italian government). For the second category, it is worth noting, among others, the judgement of the Court of Crotone No.1410/2012 which declared that the irregular migrants participating in a lengthy protest inside a CIE could not be held punishable for the offense of "persistent damage" by applying the exemption of legitimate defence (Art. 52 of the Italian criminal code) against an unjust offence against their fundamental rights.

The subsections of the section on "Migration" include, in conclusion, ample, interesting and useful case law for better understanding a juridical phenomenon which remains little understood and inadequately governed in Italy. In this regard please refer to the subheadings relating to regularisation and expulsion of irregular migrants, to the issuing and renewing of residency permits, family reunification, protection of unaccompanied children, to the status of regular migrants (which is also now and then related to the section on "Aliens" and is therefore found in the *Survey* under both the relevant classifications).

**4.** A third area with a correspondingly rich practice regards national territory and sustainable use of natural resources. The largest part of the relevant documentation in the first edition of the *Survey* is brought together in the section on "Environmental Protection" which, and not by chance, presents one of the most amply stocked subsections. See, however, also the entries for "Law of the Sea" and "Cultural Heritage".

In this regard we should point out a constantly resurfacing jurisdictional conflict between the State and the Regional Authorities in relation to (though not exclusively so) the Ramsar Convention on Wetlands of International Importance (order No. 308/2013 of the Constitutional

Court). Also see, on the sore subject of waste management, the decision of the European Court of Human Rights in the case *Di Sarno* v. *Italy*.

On the contrary, the trial regarding the pollution caused by the industrial plant of Ilva which provoked damage to both the environment and human health has not assumed particular relevance from a viewpoint of international law (see judgement No. 857/2013 of the Constitutional Court which decided some questions of constitutional legitimacy of the provisions of Law No. 231/2012 raised by the Taranto judiciary).

As regards legislation it is worth mentioning the laws authorising the ratification and implementation of the New York Convention on the Law of the Non-Navigational Uses of International Watercourses which is not yet in force at the international level (Law No.165/2012) and a certain number of additional protocols to the Alpine Convention (Laws No.50 and 196 both of 2012). Regarding the marine environment, we may find the ministerial decree of 2012, which was adopted shortly after the sinking of the cruise ship "Concordia" off the Island of Giglio and which introduced limitations on merchant navy transit in the Sanctuary of Cetaceans and the Lagoon of Venice, two particularly vulnerable areas.

The documentation regarding monitoring procedures on the application of environmental treaties is extremely copious. In addition to the already mentioned Ramsar Convention (Italian National Report, 2012) we may find: The UN Convention to Combat Desertification (Italian Report to the IV cycle, 2010-2011); the Kyoto Protocol (National Inventory of Greenhouse Gases 1990-2010); the Espoo Convention on Environmental Impact Assessment in a Transboundary Context (Italy Report of 2013, with hints to the environmental impact of the Turin to Lyon international railway); the Madrid Protocol to the Antarctic Treaty, which Italy's failure to put into force in its domestic legislation was made evident by a joint inspection by the Russian federation and the U.S. at the Antarctic Station "Mario Zucchelli"; the Berne Convention on the Conservation of European Wildlife and Natural Habitats with two Italy reports which, conversely, bear witness to the adoption of national measures to combat the invasion of an exogenous species in order to protect regional biodiversity.

There is a modest amount of practice referring to the law of the sea and to cultural heritage. Documentation referring to the latter is sufficient, however, to illustrate the failure to adequately conserve important

national archaeological sites: see the Joint UNESCO WHC/ICOMOS Reactive Monitoring Mission to the Archaeological Areas of Pompei, Hercolaneum and Torre Annunziata and consequent legislative action in response (Law No.112/2013)

**5.** Differently from the areas just mentioned other sections are little or not at all evident in domestic practice even though they assume, from the point of view of general international law, notable systematic importance.

This is shown by the modest amount of case law regarding the "Sources of International Law", or the minimal amount on international disputes and, even more so, by the complete absence from the first edition of the *Survey* of certain fundamental legal concepts or principles. For example, in the two year period under consideration we found no documentation relating to state responsibility for internationally wrongful acts. The same is true as regards international persons. Only some prerogatives of state sovereignty (beyond those already stated and which relate to management of territory and the sea - see the sections "Immunities of States and of State Officials" and "Diplomatic and Consular Relations") or the prerogatives of international organisations (see the sparsely itemised section of the same name) become apparent.

The exception to this trend however is the item "Relationship between International Law and Domestic Law" which highlights a rather ample national practice and, for obvious reasons, is of particular interest in the systematic context under consideration here.

Once again jurisprudential cases relate above all to domestic application of the provisions of the ECHR as interpreted by the European Court of Human Rights, with frequent reference and in-depth analysis of the principles affirmed by the Constitutional Court in two relevant judgements of 2007 (No. 348 and 349). Please refer in this regard to the constitutional jurisprudence, that of the Court of Cassation and trial courts, which are often simultaneously relevant to the two sub-sections "Limits on legislative power deriving from international obligations" (Art. 117, paragraph 1 of the Constitution) and "Implementation of the decisions of the European Court of Human Rights". Within the first of the two sub-sections are included, deliberately, only those decisions in which the question of the constitutional legitimacy of domestic

provisions inconsistent with international norms (from the ECHR or other treaties) are examined fully, and not those – more numerous and occasionally present in the *Survey* for their other relevant aspects – in which issues relating to respect for international obligations are dealt with in too general terms.

As far as regards the decisions of other international courts we cannot omit from the two year period under examination the consequences of the judgement of the International Court of Justice (ICJ) of 2012 on the case *Jurisdictional Immunity of the State* (*Germany* v. *Italy*). From the pertinent documentation there emerges, first and foremost, the awareness of the Italian Parliament and the judicial authority of the necessity of conforming to this decision in accordance with Article 94 of the UN Charter (Court of Appeal of Turin, May 3 2012; Law No. 5 of 2013). Secondly, there emerges the inevitable *revirement* in jurisprudence of the Court of Cassation regarding the existence of the jurisdiction of Italy over Germany in civil proceedings for compensation of damage or loss suffered by Italians as a consequence of crimes committed during the Second World War (judgement No. 32139/2012 and order No. 4284/2013). Finally, there emerges the first show of puzzlement concerning the compatibility of the Italian Constitution with the customary rule of international law regarding state immunity as interpreted by the ICJ (see, again, Court of Cassation No.32139 which intimates a set of issues later extensively examined and decided by the Constitutional Court in 2014).

On the other hand, in regard to the domestic application of Security Council resolutions the cases almost exclusively regard the provisions with which the Italian Parliament authorised the continuation of Italian participation in numerous multilateral operations.

Finally, references to the relationship between domestic law and general international law are rare (see the case of the "Tamil Tigers" decided by the Judge for Preliminary Investigation at the Naples Court) confirming the infrequent relevance to domestic law of sources of international law other than treaties.

**6.** Other items in the classification show limited amounts of cases, though that does not make them any the less interesting. Please refer, for example, to the entry on "Judicial Cooperation" in civil and penal

matters – the latter also in reference to the implementation of the conventions on transnational organised crime and the fight against corruption and illegality in the public administration. It is further worth mentioning the documentation regarding monitoring procedures on treaties concerning the prohibition or limitation of certain weapons, an area in which, historically, such international follow-up mechanisms first developed (see the entry for "Weapons").

Sometimes the scarcity of practice appears predictable given the marginality, in quantitative terms, of the juridical phenomenon under consideration (see, for example, "Stateless persons").

In other subjects we see the prevailing effect of EU Law – consideration of which falls outside the scope of the *Survey* – in respect of the lesser impact of international law. This explains, among other things, the small amount of documentation relating to the section on "Private International Law" with areas partially "communitarized" and the connection between this section and that dedicated to the relationship between EU law and International law.

In preparing the *Survey* we were aware, after all, that the systematic relevance of the study material is sometimes inversely proportional to its quantity. Consider, in this sense the character of the legislative or jurisprudential innovation in certain acts and documents which we deliberately wished to highlight even using from a methodological point of view, an unusual or debatable style of classification. An example of this, again in relation to the legal status of migrants, is the innovative sub-section "Residential Status of Female Victims of Violence" to which attaches, unsurprisingly, a single case in the practice.