OBEY OR DISOBEY: NATIONAL COURTS AND INTERNATIONAL LAW IN THE THOUGHT OF CONFORTI

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Abstract

The subject of the application of international law by national courts was central – arguably the most central – to the scholarly work of Benedetto Conforti. The defining feature of his views on this matter was the dialectical opposition between the poles of obedience and disobedience. In fact, Conforti called upon national courts to take up a dual role: key enforcers of international law, but also defenders of national fundamental values against *international law. This paper reflects on the complexity of Conforti's thought and on its relation with scholarship and case law. The analysis is articulated around the themes of the past, the present and the future: respectively, the roots of his ideas and their connection with previous scholars, his writings' influence on judicial practice, and the legacy of his thought.*

Keywords: Benedetto Conforti; international law and domestic legal systems; national courts; resistance to international law; *controlimiti* doctrine.

1. *Confortiano*

Many times, in the rooms and hallways of Italian universities, I have heard people refer to international law application in national courts as a *tema confortiano*. Come to think of it, that is a strange choice of words for a subject that is in the public domain and that had long been in vogue among international lawyers when Benedetto Conforti first approached it. Looking back at people's lives we often take their achievements for granted, but Conforti measured himself against the likes of Dionisio Anzilotti,[1] Georges Scelle[2] and many others and still managed to associate his name to that subject.

Of course, those who use that word are simply acknowledging that the subject of domestic courts and international law is central – arguably the most central – to Conforti's scholarly work. It is the theme that runs through all editions of his manual of international law, from the 1976 *Appunti dalle lezioni di diritto internazionale*[3] to the current 12th edition of *Diritto internazionale* co-authored by Massimo Iovane.[4] It is the subject explored in the opening chapter ("*Droit international et*

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[1] Anzilotti, *Il diritto internazionale nei giudizi interni*, Bologna, 1905.

[2] Scelle, "Règles générales du droit de la paix", RCADI, Vol. 46, 1933, p. 331 ff., pp. 358-359, introducing the theory of *dédoublement fonctionnel*. See also *infra* Section 3.

[3] Conforti, *Appunti dalle lezioni di diritto internazionale*, Napoli, 1976.

[4] Conforti and Iovane, *Diritto internazionale*, 12th ed. with updates, Napoli, 2023.

opérateurs juridiques internes") of his 1988 General Course at the Hague Academy of International Law,[5] as well as in the *Institut de droit international* resolution, of which Conforti was rapporteur, titled "The Activities of National Judges and the International Relations of their State".[6] These examples are just a glimpse into a lifelong scientific quest.

It is a great responsibility to write about this aspect of Conforti's work, all the more since this short piece will be read by many who knew him well. I should start by apologising to them for anything they might perceive as a distortion of Conforti. To alleviate my feeling of inadequacy, I have chosen to remove any pretense of objectivity and write in the first person. I can only provide the hindsight-biased perspective of another generation. My dear mentors, Massimo Iovane and Fulvio Maria Palombino, were themselves mentored by Conforti, but I wonder how much of a real connection I can claim by mere academic genealogy. In fact, while I have a few direct memories of Conforti participating in conferences and other formal gatherings, I only spoke to him once.

I was a second year PhD student and I was trying to finalise my first article, which was well into its eight or ninth revision. When the paper reached an acceptable form, Prof. Iovane informed me, to my dismay, that he would send it to Conforti. I soon found myself at Conforti's home to chat about my piece. That meeting gave me much-needed motivation because, as often happens to doctoral students, I was in the thick of my second-year blues. It was December 2015; Conforti sadly passed away in January. While many among the readers will be able to share important lessons learned from Conforti, I cherish the small one he taught me: a giant in our field, under trying personal circumstances, had found an hour to chat with a PhD student he had never seen before.

Excuses and memories aside, in these pages I wish to reflect on Conforti's thought on international law in domestic courts. Although his ideas on the role of national judges have the elegance of simplicity, I will claim that his thought as a whole is not as simple as its individual parts (Section 2). In his writings, Conforti calls upon national courts to take up a dual role: key enforcers of international law, but also defenders of national fundamental values *against* international law. I will submit that what is most *confortiano* is not the attention paid to the domestic judge *per se*, but rather this dialectical opposition between the poles of obedience and disobedience. I will try to substantiate this claim by exploring the relation of Conforti's thought with scholarship and case law. The analysis will be articulated around the themes of the past, the present and the future: respectively, the roots of his ideas and their connection with previous scholars (Section 3), his writings' influence on judicial practice (Section 4), and the legacy of his thought (Section 5). In this last respect, I will conclude with a plea to avoid reductionism and cultivate the complexity of Conforti's thought.

[5] Conforti, "Cours général de droit international public", RCADI, Vol. 212, 1988-V, p. 9 ff.
[6] 7 September 1993.

2. A Complex Thought

As an emergent property of his teachings on national courts and international law, the complexity of Conforti's thought can only be appreciated by taking a bird's-eye view. Considering the amount of writings he devoted to national judges, aiming for comprehensiveness would be impossible and would serve little purpose anyway. I will limit myself to sketching out Conforti's key ideas in order to connect the dots.

Probably the best known of these ideas is that of the centrality of "domestic legal operators" (chiefly courts, but also any other State organs tasked with applying the law[7]) to compensate for the lack of effective international mechanisms of international law enforcement.[8] Based on the premise that "only a State's internal system can act effectively to prevent the State from violating international law", Conforti exhorted national judges "to use to their limits the mechanisms provided by municipal law to ensure compliance with international norms".[9] Many notable aspects of his thinking are nothing but corollaries of this fundamental concept.[10] For example, Conforti strongly opposed overly narrow approaches to direct applicability. He argued that treaty provisions should be deemed non-self-executing in just three cases, all amounting in practice to a material or legal impossibility of direct application: when a provision does not impose obligations but merely grants discretionary powers to the State; when indispensable internal organs or mechanisms are lacking; or when the Constitution sets forth specific requirements to be fulfilled, as in the case of the reservation of law in criminal matters.[11] Binding resolutions of international organisations were also to be considered as self-executing in national law, irrespective of the adoption of implementing legislation.[12]

Other meaningful examples of his internationalist posture are his polemic against the political question and act of State doctrines, as tools preventing the adjudication of international legal matters by national courts;[13] his opposition to judicial deference

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[7] See e.g. Conforti and Labella, "Invalidity and Termination of Treaties: The Role of National Courts", EJIL, 1990, p. 44 ff., p. 43: "[w]hat we discover with respect to the competence of the national judge may then be applied to other domestic legal operators (government officials, public bodies, and in general anyone called upon to apply the law or to secure compliance with it within the state)".

[8] Conforti, "Cours général", *cit. supra* note 5, p. 25.

[9] *Ibid.*, p. 26.

[10] Further insights on such views, discussed *infra* in the text, may be obtained from the reports drafted by Conforti as Special Rapporteur of the *Institut de droit international* on "The Activities of National Judges and the International Relations of their State". See "Preliminary Report", Annuaire de l'Institut de droit international, Vol. 65-I, 1993, p. 428 ff.; "Provisional Report", *ibid.*, p. 371 ff.; and "Final Report", *ibid.*, p. 428 ff., all reprinted in Conforti, *Scritti di diritto internazionale*, Vol. II, Napoli, 2003, p. 381 ff.

[11] Conforti, *Diritto internazionale*, 10th ed., Napoli, 2014, pp. 338-339. The *Cours général* only mentions the first two cases: Id., "Cours général", *cit. supra* note 5, pp. 42-43.

[12] Conforti, *Diritto*, *cit. supra* note 11, pp. 360-363. See also Id., "The Direct Applicability in Domestic Law of Recommendations Adopted under art. IX of the Antarctic Treaty: Some Comparative Remarks", in Francioni (ed.), *International Environmental Law for Antarctica*, Milano, 1992, p. 225 ff., reprinted in Conforti, *Scritti*, *cit. supra* note 10, p. 375 ff.

[13] Id., "Cours général", *cit. supra* note 5, pp. 30-34 and 36-40; Arts. 2 and 3 of *Institut de droit international*, *cit. supra* note 6.

to the executive branch in the interpretation and application of international rules;[14] or his advocacy of the power of domestic courts to independently ascertain all causes of treaty invalidity or termination, albeit with only *inter partes* effects, irrespective of denunciation or equivalent acts by the contracting States.[15] Further, he devised a peculiar construction of the *lex specialis* principle to limit reliance on the *lex posterior* rule in relations between treaties and later statutes in legal systems where the two sources have the same rank. While acknowledging that a treaty is not necessarily *lex specialis* in a traditional sense, as its material content may or may not be more general than a statute's,[16] Conforti's position was that "[i]ts special character arises […] from the fact that an international rule is supported within the domestic legal system not only by the State's intention to regulate certain relations in a given manner, but also by its intention to comply with international obligations".[17] Thus, he argued, a later statute could not repeal a treaty absent a clear legislative intent to breach international law.[18] He termed this idea "*sui generis* speciality", but it has also been called "speciality *à la* Conforti".[19]

But this is only one side of the coin. Few lines after inviting national judges to ensure compliance with international law "to the maximum extent possible", the Introduction to *Diritto internazionale* warns against pushing the domestic application of international law "to the point of compromising fundamental values of the State community, usually constitutionally guaranteed".[20] This idea, too, reverberates through Conforti's writings. The key example is provided by his reading of Article 10 of the Italian Constitution, giving general international law constitutional rank within the Italian hierarchy of sources. According to Conforti,

> if interpreted systematically, [Article 10] contains an implicit safeguard clause for the fundamental values (and only for them) underlying our Constitution […]. A general international norm that exceeds such a limit cannot be deemed covered by Article 10 and will remain inopera-

[14] Conforti, "Cours général", *cit. supra* note 5, pp. 34-36; Art. 1 of *Institut de droit international*, *cit. supra* note 6. He adopted a more nuanced position as to the ascertainment of international facts, as reflected in Art. 7(1) and (2) of *Institut de droit international*, *cit. supra* note 6: "[n]ational courts should be able to defer to the Executive, in particular the organs responsible for foreign policy, for the ascertainment of facts pertaining to the international relations of the forum State or of other States. The ascertainment of international facts by the Executive should constitute *prima facie* evidence of the existence of such facts". Cf. Id., "L'accertamento dei c.d. fatti internazionali da parte del giudice interno", in *Studi economico-giuridici*, Vol. LV, Napoli, 1993-1994, p. 111 ff., reprinted in Id., *Scritti*, *cit. supra* note 10, p. 459 ff.

[15] Conforti and Labella, "Invalidity", *cit. supra* note 7; Art. 5 of *Institut de droit international*, *cit. supra* note 6.

[16] Conforti, *Diritto*, *cit. supra* note 11, p. 356.

[17] *Ibid*., p. 358.

[18] *Ibid*., p. 357. Cf. also Id., "Cours général", *cit. supra* note 5, pp. 57-61; and Id., "La 'specialità' dei trattati internazionali eseguiti nell'ordine interno", in *Studi in memoria di Giorgio Balladore Pallieri*, Vol. II, Milano, 1978, p. 187 ff., reprinted in Conforti, *Scritti*, *cit. supra* note 10, p. 343 ff.

[19] Canzian and Lamarque, "Due pesi e due misure. I trattati internazionali sui diritti umani e gli 'altri' obblighi internazionali secondo i giudici italiani", Rivista AIC, 2020, p. 373 ff., p. 386.

[20] Conforti, *Diritto*, *cit. supra* note 11, p. 9.

> tive within the State; which means that all those who are tasked with applying it, and first and foremost the judges, may refuse to do so without the need for a ruling by the Constitutional Court on the matter.[21]

He also fully embraced the constitutional review of treaties[22] and resolutions of international organisations.[23]

Crucially, Conforti's adherence to the doctrine Italians call *controlimiti* did not have a purely constitutional dimension. As a matter of fact, he disapproved of the principle of irrelevance of internal law, as enshrined in Article 32 of the 2001 Articles on State Responsibility[24] and in Article 27 of the 1969 Vienna Convention on the Law of Treaties,[25] for not including a carve-out for national fundamental values. He viewed Articles 32 and 27 as holding "an extremely rigid position – albeit rooted in an ancient and widespread opinion – that warrants reconsideration in light of a modern and realistic view of international law that balances internationalist and internal values".[26] And he speculated that State practice could perhaps hint at the birth of a new circumstance precluding wrongfulness allowing States to invoke their own fundamental constitutional values to escape international responsibility, at least where the inconsistency between the Constitution and international law has been maintained by a State's supreme judicial organs.[27]

I hope that this cursory overview has adequately clarified what I mean by complexity. Conforti's thought is animated by a tension between two poles: obey or disobey. I see this tension as the most defining aspect of Conforti's outlook on the domestic judge.

I will not venture to discuss whether and to what extent this inner conflict led to inconsistencies, but I certainly believe it would be unjust to accuse Conforti of overall incoherence. Indeed, the two poles of his thinking are underlaid by the same foundational ideal of defending the legal character of international law. That international law constitutes "real" law, and should be applied as such by legal professionals, is the theoretical premise of Conforti's whole attitude towards national judges. As he put it,

> a study limited to the supranational conduct of States, which overlooked the internal legal systems of those States, could not discover the 'legal' nature of international law. Rather, the truly legal function of international law essentially is found in the internal legal systems of

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[21] *Ibid*., p. 348.

[22] *Ibid*., pp. 358-359.

[23] *Ibid*., pp. 362-363.

[24] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001. Art. 32 provides: "[t]he responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part".

[25] Vienna Convention on the Law of Treaties, 23 May 1969, entered into force 27 January 1980.

[26] Conforti, *Diritto*, *cit. supra* note 11, p. 400.

[27] *Ibid*. On this subject see also Palombino (ed.), *Duelling for Supremacy: International Law vs. National Fundamental Principles*, Cambridge, 2019, whose "original project [...] was conceived together with Prof. Benedetto Conforti" (Acknowledgments, p. xv).

> States. Only through what we could term 'domestic legal operators' can we describe the binding character of international law [...].[28]

The implications of this concept are profound and radical. If "understood solely in the context of the international community and international relations, without any reference to national legal systems", international law is not real law.[29] He termed this side of international law its "political-diplomatic aspect", demoting it to "a sort of positive international morality".[30] He criticised judicial abdication in foreign affairs,[31] the concept of non-self-executing international sources and the other abovementioned doctrines as obstacles not just to the effectiveness of international law, but to the "full recognition of [its] legal value".[32]

This is one way to explain the tension. To treat international law as real law means to treat it like a grown-up: to praise it when it deserves it, to criticise it if necessary. Conforti never held international law in awe: in the end, it is just law like any other.

3. Continuator or Innovator?

When I first reflected on the tension characterising Conforti's approach to the role of national judges, I immediately assumed the second thread, that of "disobedience", to be an afterthought. I associated his reflections on the *controlimiti* doctrine with the latter stage of his career, due, I guess, to the role they came to play in the dispute between Germany and Italy over State immunity.[33] I was however mistaken. The caveat on the "fundamental values of the State community" already appears in the 1976 *Appunti dalle lezioni*,[34] exactly in the same words as we can find in the Introduction to the latest edition.[35]

The tension between obedience and disobedience was thus already a feature of Conforti's thinking when it reached full maturity with the publication of the manual. I learned from a firsthand account that he went on at length about this tension in his international law course of 1973-1974, whose transcript formed the basis of the *Appunti*, likening the interplay between national and international law to a marriage that, to work well, requires sacrifices from both spouses.[36] But the tension dates back even further. For example, the concept of the "*sui generis* speciality" of treaties was developed in a 1966 paper relating to Community law.[37] In that same paper, Conforti

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[28] Id., "Cours général", *cit. supra* note 5, p. 25.

[29] *Ibid*., p. 28.

[30] *Ibid*.

[31] Borrowing the terminology of Amoroso, "Judicial Abdication in Foreign Affairs and the Effectiveness of International Law", Chinese Journal of International Law, 2015, p. 99 ff.

[32] Conforti, "Cours général", *cit. supra* note 5, p. 30.

[33] On which see *infra* Sections 4 and 5.

[34] Conforti, *Appunti*, *cit. supra* note 3, p. 10.

[35] Conforti and Iovane, *cit. supra* note 4, p. 9.

[36] I am deeply grateful to Guido Raimondi for sharing this recollection.

[37] Conforti, "Diritto comunitario e diritto degli Stati membri", RDIPP, 1966, p. 5 ff., pp. 18-19, an earlier version of which was presented by Conforti at the 3rd Congress of the International

defended the *Corte Costituzionale*'s power to review the compatibility of European Community legislation and treaties with domestic constitutional principles.[38] Later on, he was ready to admit that the relevance of these views to European law had faded.[39] But I do not find it far-fetched to imagine that the scholarship and case law concerning the Community law of the 1960s, as the breeding ground of Conforti's ideas on national courts, left a mark on those ideas as he extrapolated them to international law.[40] It is also clear that his interest in the interplay between the Constitution and international law did not arise in a vacuum, as several other scholars were also grappling with the same issues at that time.[41]

That said, the search for the deeper roots of his ideas treads on slippery ground. Conforti always marked his distance from past theoretical approaches. The debate between monists and dualists is swiftly dismissed by the manual as "irrelevant"[42] and by the General Course as "sterile and anachronistic disputes".[43] I believe, however, that his disregard for the confrontation between monism and dualism is better explained not by a lack of connection to those theories but by his eclecticism. He rejected both extremes because, in a sense, he belonged to both theories. And by this I am not implying that the two "poles" of Conforti's thought (obedience and disobedience) derive respectively from monism and dualism: in fact, the matter is much more complicated than that.

For example, the idea that the effectiveness of international law rests mainly on the shoulders of national courts may appear to be indebted to Scelle's theory of *dédoublement fonctionnel*,[44] and indeed Conforti and Scelle are frequently cited to-

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Federation of European Law, held in Paris in November 1965, on "Measures to Ensure the Introduction of Community Law into the National Legal Systems". See Id., "Mécanismes juridiques assurant la mise en oeuvre de la législation communautaire par les autorités législatives et exécutives nationales", Bulletin des juristes européens, 1967, p. 29 ff.

[38] Conforti, "Diritto Comunitario", *cit. supra* note 37, pp. 8-13.

[39] Id., *Diritto*, *cit. supra* note 11, pp. 375-377, suggesting that the time was probably ripe to shelve the *controlimiti* doctrine with respect to European Union law. Considering the later *Taricco* saga, however, that was perhaps premature: cf. Conforti and Iovane, *cit. supra* note 4, pp. 412-415.

[40] That was indeed a criticism that some leveled against him: see Maier, "*International Law and the Role of Domestic Legal Systems*. By Benedetto Conforti", AJIL, 1994, p. 840 ff., p. 842.

[41] See, for example, La Pergola, *Costituzione e adattamento dell'ordinamento interno al diritto internazionale*, Milano, 1961, which Conforti cited (Conforti, *Appunti*, *cit. supra* note 3, pp. 163, 172 and 176) and wrote about: see Conforti, "Costituzione italiana e diritto internazionale generale", in Leanza (ed.), *Costituzione dello Stato e norme internazionali*, Milano, 1988, p. 159 ff., reprinted in Conforti, *Scritti*, *cit. supra* note 10, p. 371 ff. From this last piece we learn that Conforti found La Pergola's book a bit too formalistic: *ibid*., pp. 372-373. Similarly, see also Conforti, "Diritto comunitario", *cit. supra* note 37, pp. 10-11.

[42] Conforti, *Appunti*, *cit. supra* note 3, pp. 164-165; Conforti and Iovane, *cit. supra* note 4, p. 334. Cf. already Conforti, "Diritto comunitario", *cit. supra* note 37, p. 14, note 15: "monism and dualism [...] constitute purely theoretical positions from which nothing concrete can be deduced regarding the solution of practical problems, particularly the position of international norms within domestic legal systems".

[43] Id., "Cours général", *cit. supra* note 5, p. 41.

[44] Scelle, *cit. supra* note 2, pp. 358-359. See also Id., "Le phénomène juridique du dédoublement fonctionnel", in Schätzel and Schlochauer (eds.), *Rechtsfragen der internationalen Organisation*, *Festschrift für Hans Wehberg zu seinem 70. Geburtstag*, Frankfurt am Main, 1956, p. 324 ff.

gether.[45] Scelle was an international monist, meaning that he posited the primacy of international law over national law.[46] However, I could not identify a single reference to Scelle in *Diritto internazionale*. The General Course, for its part, only mentions Scelle's theory outside of its natural context, in the section devoted to the principle of common heritage of mankind.[47] There, a footnote reveals that Conforti did not see himself as a continuator of Scelle:

> It is needless to stress that we are adhering here to a very narrow concept of *dédoublement fonctionnel*, a notion limited precisely to the rules that bind the State in the interest of the international community as a whole. Conversely, Scelle's concept is very broad and refers to all international rules [...].[48]

As I uncovered this passage, it dawned on me that the resemblance between the thoughts of Scelle and Conforti is part real and part superficial. The obvious difference is that Conforti did not believe in the absolute primacy of international law, but there is more. Commenting on Scelle, Cassese wrote that for him "national officials *do not have double roles which are fulfilled simultaneously*, but a dual role in the sense that they operate in a Dr. Jekyll and Mr. Hyde manner, exhibiting a split personality".[49] The idea of national courts moonlighting as international courts was as far from Conforti as one could get. To him, national courts were national all the way through, even when they applied international law.[50] His rejection of *dédoublement fonctionnel* may perhaps be another way to clear up the tension between obedience and disobedience in his thought. If national courts owe their allegiance exclusively to national law, one could argue that the tension is mostly apparent as they actually only obey one master.[51] Even if this were true, however, it still would not resolve the tension within Conforti's normative preferences, torn as they were between international law and constitutional fundamental principles.

If not Scelle, then who? In a passage of his manual that I have always found particularly mind-bending, Conforti connects his idea of the centrality of "domestic le-

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[45] See e.g. Frishman and Benvenisti, "National Courts and Interpretive Approaches to International Law", in Aust and Nolte (eds.), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence*, Oxford, 2016, p. 317 ff., p. 318; Nollkaemper, *National Courts and the International Rule of Law*, Oxford, 2011, p. 8, notes 45 and 46.

[46] Cassese, "Remarks on Scelle's Theory of 'Role Splitting' (*dédoublement fonctionnel*) in International Law", EJIL, 1990, p. 210 ff., p. 212.

[47] Conforti, "Cours général", *cit. supra* note 5, p. 164.

[48] *Ibid.*, note 345.

[49] Cassese, *cit. supra* note 46, p. 213, emphasis in the original.

[50] Cf. Iovane, "L'influence de la multiplication des juridictions internationales sur l'application du droit international", RCADI, Vol. 383, 2017, p. 233 ff., p. 320: "les tribunaux internes [...] fonctionnent normalement comme des instruments de la justice nationale, même quand ils sont tenus d'appliquer des normes internationals [... à] moins d'accepter la thèse du dédoublement fonctionnel qui finit par considérer tous les organes internes comme des organes internationaux".

[51] I thank the anonymous reviewer for this insightful reflection.

gal operators" to Jellinek's theory of the self-limitation of the State:[52] "no dialectical deceit can hide the eternal truth contained in the theory of self-limitation [...], that the international community does not have at its disposal the *legal* means to react effectively and impartially to breaches of international rules".[53]

To summon Jellinek while pleading for the legal character of international law would seem to be an own goal. Jellinek built on the positivist groundwork laid by Hegel, who disparaged international law as *äußeres Staatsrecht* (external State law); and while he did not deny the bindingness of international law, he saw it as entirely contingent upon the (fluctuating) sovereign will of States.[54] Monist Lauterpacht argued that "the doctrine of self-limitation cannot be interpreted otherwise than as a denial of the binding force of international law".[55] But Conforti's sympathy for Jellinek should be taken with a grain of salt. Normatively, Conforti started from a completely different premise: that States *should* commit to international law. He rejected one key postulate of the theory of self-limitation, i.e. "the idea of the unrestrained discretion of the State (its freedom to ignore any international obligations in the name of some allegedly 'superior' interests)".[56] Ultimately, then, what Conforti endorsed was a version of Jellinek's thought so watered-down that it was almost unrecognisable from the original. His position bore more resemblance to that of classic dualists, such as Triepel,[57] who were influenced by the theory of self-limitation but accepted the existence of international rules independent of the wills of individual States.[58]

Digging deeper into any of Conforti's ideas on the national judge, one will likely find a similar amount of eclecticism. This is arguably true even for the very idea of prioritising norms of national law over international law, which seems to be the most dualist of all. In defence of his position, Conforti wrote that the coordination between international and national law "cannot fail to take into account that in some sectors domestic law is more advanced than international law".[59] Thus his idea of "disobedience" was fundamentally premised on his attention to human rights,[60] a theme traditionally belonging to the speculations of monist thinkers[61]

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[52] Jellinek, *Allgemeine Staatslehre*, Berlin, 1900, cited by Conforti in the Italian translation: *La dottrina generale dello Stato*, Milano, 1921, p. 667.

[53] Conforti, *Diritto*, *cit. supra* note 11, p. 9, emphasis in the original.

[54] *Ex multis*, see Gragl, *Legal Monism: Law, Philosophy and Politics*, Oxford, 2018, pp. 28-29.

[55] Lauterpacht, "The Nature of International Law and General Jurisprudence", Economica, 1932, p. 301 ff., p. 309.

[56] Conforti, "Cours général", *cit. supra* note 5, p. 27.

[57] Triepel, "Les rapports entre le droit interne et le droit international", RCADI, Vol. 1, 1923, p. 73 ff.

[58] Lauterpacht, *cit. supra* note 55, p. 312.

[59] Conforti, *Diritto*, *cit. supra* note 11, p. 9.

[60] Cf. Id., "La Cour Constitutionnelle italienne et les droits de l'homme méconnus sur le plan international", RGDIP, 2015, p. 353 ff.

[61] See, for example, Rigaux, "Hans Kelsen on International Law", EJIL, 1998, p. 325 ff., p. 332.

and that was dear to Conforti both in his scientific activity[62] and as a judge in Strasbourg.[63]

Now, Conforti would probably scold me for throwing around words like "monism" and "dualism" so much. But in my defence, I do so only to show how his ideas managed to reimagine traditional concepts in original ways.

4. National Courts and Conforti: A Reciprocated Love?

After discussing the relationship between Conforti's thought and what preceded it, I would like to turn to what ensued from it during his lifetime. My focus will be on the practice of courts because the influence he exercised on scholarship is common knowledge. While Conforti was not keen on theory for theory's sake, he certainly was fond of practice:[64] his ideas drew heavily from domestic case law, as he repeatedly highlighted in his manual,[65] and he never shied away from measuring judicial developments against his own views. But was his love for national courts reciprocated?

As is perhaps natural, some of his ideas never took hold of judges. Italian courts, for example, have continued to grapple with the notion of direct applicability, construing it considerably more narrowly than Conforti conceived.[66] The *Corte Costituzionale*'s insistence on retaining centralised control over the compatibility of national law with international law was to him a source of particular frustration, as he believed that this control should pertain primarily to common, i.e. non-constitutional, courts. He felt that Judgment No. 349/2007, which affirmed that a court should seise the *Corte Costituzionale* "where[ver] [it] doubts the compatibility of the national law" with treaty provisions,[67] should have left more room to the judges' power to resolve conflicts through interpretation.[68] He harshly criticised Judgment No. 38/2008, which held that conflicts between earlier statutes and later treaties could

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[62] Pisillo Mazzeschi, "Benedetto Conforti ed il suo contributo scientifico in materia di diritti umani", DUDI, 2016, p. 277 ff. See, for instance, Conforti and Francioni (eds.), *Enforcing International Human Rights in Domestic Courts*, The Hague/Boston/London, 1997, and particularly Conforti, "National Courts and the International Law of Human Rights", *ibid.*, p. 3 ff.

[63] Raimondi, "Benedetto Conforti prima Commissario e poi Giudice dei diritti umani a Strasburgo", DUDI, 2016, p. 287 ff.

[64] See the tribute by Francioni in the Proceedings of the Colloquium held in Strasbourg on 24 February 2017, *Benedetto Conforti and Luigi Ferrari Bravo. From Naples to Strasbourg and Beyond – an Extraordinary Journey*, Napoli, 2018, p. 27 ff., p. 30, describing Conforti's method as "so innovative as compared to the formalism of the Italian positivism of the XX Century, and so focused on the social facts and the empirical data of the practice, rather than on abstract rules".

[65] For example, the theory of *sui generis* speciality built upon US, Italian and Swiss case law concerning the presumption of conformity with international law: see Conforti, *Diritto*, *cit. supra* note 11, p. 357.

[66] See most recently *Corte di Cassazione* (*Sezioni Unite Civili*), 5 July 2021, No. 18923, and the comments collected in DUDI, 2022, p. 39 ff.

[67] *Corte Costituzionale*, 24 October 2007, No. 349, para. 6.2; IYIL, Vol. XVII, 2007, p. 292 ff., with a comment by Cataldi.

[68] Conforti, *Diritto*, *cit. supra* note 11, p. 355. I am grateful to Giuseppe Cataldi for bringing Conforti's criticism of the so-called *sentenze gemelle* to my attention.

not be solved based on the *lex posterior* principle but had to be referred to the *Corte Costituzionale*.[69] For all its affinity with Conforti's thought, which will be discussed below, not even Judgment No. 238/2014[70] followed his view that, under Article 10 of the Constitution, every judge was empowered to deny application of customary rules deemed contrary to constitutional fundamental principles without a ruling from the *Corte Costituzionale*.[71] But many of his ideas did gain traction in judicial practice, and it is not hard to see why: his manual circulated widely among practitioners (including, of course, thousands of students-turned-practitioners) and Conforti's practical approach ensured he always spoke the same language as national judges.

Many great jurists could write in their résumé to have steered judicial practice to a greater or lesser extent. There is, however, one aspect which makes Conforti's influence on courts truly unique. I am referring to the fact that his writings have inspired opposing judicial trends, bringing about both openness and resistance to international law. This is further proof of how relevant the tension between obedience and disobedience was to his thought.

First, two examples on the side of openness. The first relates to State immunity from measures of constraint. Until 1992, an antiquated legislation dating back to 1925 required prior authorisation from the Minister of Justice for the attachment of any type of asset of foreign States, subject to reciprocity.[72] Like other scholars, Conforti criticised it as inconsistent with both customary international law (Article 10 of the Constitution), which only bars attachment of State assets used for public purposes, and the constitutional right of access to justice (Article 24).[73] In line with his long-standing views, he maintained that that legislation perpetuated

> the trend aimed at having international law 'administered' by the executive power rather than by judges, and at blurring the lines between legal and political international relations. This trend does not contribute to the development of a community of law among States, but rather fuels the widespread skepticism about the 'legality' of international law.[74]

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[69] 25 February 2008, No. 39. See Conforti, "Atteggiamenti preoccupanti della giurisprudenza italiana sui rapporti fra diritto interno e trattati internazionali", DUDI, 2008, p. 581 ff.; Id., *Diritto*, *cit. supra* note 11, p. 356.

[70] *Corte Costituzionale*, *Simoncioni, Alessi and Bergamini v. Federal Republic of Germany and Presidency of the Council of Ministers*, 22 October 2014, No. 238, IYIL, Vol. XXIV, 2014, p. 1 ff., with comments by Francioni, Pisillo Mazzeschi, Bothe, Cataldi and Palchetti.

[71] For criticism of this aspect of the judgment see Conforti and Iovane, *cit. supra* note 4, p. 374.

[72] Art. 1 of Regio DL 30 August 1925, No. 1621, enacted into law, with modifications, by Law 15 July 1926, No. 1263.

[73] Conforti, "L'interferenza del Governo nelle procedure esecutive riguardanti beni di Stati esteri o di altri soggetti internazionali in Italia: perché non seguire l'esempio degli Stati Uniti?", RDI, 1992, p. 127 ff.

[74] Id., *Diritto internazionale*, 3rd ed., Napoli, 1988, p. 229, commenting on *Corte Costituzionale*, 13 July 1963, No. 1963, which upheld the constitutionality of Art. 1 of Regio DL No. 1621, *cit. supra* note 72.

These views surfaced in a 1989 judgment by the *Corte di Cassazione*, which noted that

> The norm is criticised by a part of legal scholarship which especially emphasises 'the subordination of the judiciary to the executive power: international law, like law in general, should always be administered, within the State, by the judge and not by the executive power; in this case, it should be the judge to ascertain the international norm on the immunity of foreign States from enforcement actions and apply it to the specific case'.[75]

The inevitably unattributed quote (the court is legally banned from citing legal scholars[76]) was of course taken from *Diritto internazionale*.[77] Eventually, Conforti's views were fully vindicated when Judgment No. 329/1992 of the *Corte Costituzionale* declared the unconstitutionality of the 1925 provision with respect to Articles 10 and 24 of the Constitution.[78]

The second example relates to the status of treaties in Italian law. In the aftermath of the 2001 reform of the Italian Constitution, Conforti argued that the new text of Article 117(1),[79] should be construed as elevating treaties in the domestic hierarchy of sources, so that inconsistent statutes should be deemed unconstitutional.[80] This was not the only possible reading of the provision and not every scholar shared the same view. However, the *Corte Costituzionale* fully embraced it when, in 2007, it held that Article 117 had given the European Convention on Human Rights an intermediate rank between statutes and the Constitution.[81]

On the other hand, though, the ideas of Conforti also inspired the late Judge Tesauro, rapporteur of Judgment No. 238/2014 of the *Corte Costituzionale*, to carry out the most extreme act of disobedience to international law ever performed by the Italian judiciary.[82] The intellectual link between Conforti's teachings and Judgment No. 238 is well-known and easily documented through his writings. In retrospect, the *Appunti dalle lezioni* seem eerily prescient. There, Conforti reasoned that while "[a] conflict between general international norms and constitutional norms does not have many chances of arising in practice[…, t]he area in which this can happen is that of jurisdictional immunities, particularly State immunities".[83] He put forward

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[75] *Benamar v. Embassy of Algeria and Banco di Roma*, 4 May 1989, No. 2085.

[76] Art. 118 of Regio Decreto 18 December 1941, No. 1368.

[77] Conforti, *Diritto*, 3rd ed., *cit. supra* note 74, p. 228.

[78] *Condor and Filvem* case, 15 July 1992, No. 329, para. 4.

[79] "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations".

[80] Conforti, "Reflections on the Recent Amendments to the Italian Constitution concerning Respect for International and European Community Law", IYIL, Vol. XI, 2001, p. 3 ff.; Id., "Sulle recenti modifiche della Costituzione italiana in tema di rispetto degli obblighi internazionali e comunitari", Foro It., 2002-V, p. 229 ff.

[81] Judgments Nos. 348 and 349/2007, *cit. supra* note 63.

[82] *Cit. supra* note 70.

[83] Conforti, *Appunti*, *cit. supra* note 3, p. 174.

that Article 10 of the Constitution would automatically deny entry into the Italian legal system to any custom incompatible with core constitutional values, so that a declaration of unconstitutionality would be unnecessary.[84]

Writing in the pages of this Yearbook some 35 years later, in the context of a fierce criticism of the *Jurisdictional Immunities* Judgment of the International Court of Justice (ICJ),[85] Conforti reiterated his long-standing views on the relations between customary law and the Constitution and concluded by implying: "all this should be borne in mind when enquiring into how the ICJ judgment should be treated in Italy".[86] He was less allusive in the 2014 edition of *Diritto internazionale*. Commenting on Article 3 of Law No. 5/2013, which gave effect to *Jurisdictional Immunities* in the Italian legal order,[87] he plainly suggested that

> the theory of *controlimiti* should be applied to Law No. 5/2013 [...] *due to the absence of alternative remedies in Germany*; specifically, the law should be considered contrary to Article 24 of the Constitution, insofar as it recognises immunity whenever the ICJ has ruled to that effect. It is worth noting that, although the Court of Cassation has so far preferred to comply with the ICJ judgment, a glimmer of hope comes from the *Tribunale di Firenze*, which [...] raised the issue of constitutionality of the said law.[88]

He also speculated that the gap between Italian law and international law could one day be bridged by a progressive evolution of State immunity:

> It is to be hoped that the Italian judgments which led to the dispute between Italy and Germany will convince the judges of other jurisdictions to abandon the attitude favouring State immunity in the case of disputes relating to serious violations of human rights, just as in the 1920s, when Italian courts advocating the distinction between acts *jure imperii* and *jure gestionis* were followed by Belgian courts and gradually the courts of other States.[89]

It is striking how much Judgment No. 238 borrowed from these writings. While Article 3 of Law No. 5/2013 was declared unconstitutional, no declaration of unconstitutionality targeted the customary rule of State immunity for so-called *delicta imperii*, as that rule was deemed never to have entered the Italian legal system in the

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[84] *Ibid.*, pp. 174-175.

[85] *Jurisdictional Immunities of the State* (*Germany v. Italy; Greece intervening*), Judgment of 3 February 2012, ICJ Reports, 2012, p. 99 ff.

[86] Conforti, "The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity", IYIL, Vol. XXI, 2011, p. 133 ff., p. 142.

[87] Law 14 January 2013, No. 5.

[88] Conforti, *Diritto*, *cit. supra* note 11, p. 349; emphasis in the original.

[89] Id., "The Judgment", *cit. supra* note 86, p. 142.

first place.[90] Also, echoes of Conforti can be discerned in the passage where the *Corte Costituzionale* likened itself to the Italian and Belgian courts that contributed to the birth of the restrictive State immunity doctrine. The Court formulated the hope that its decision, while having "effects in the domestic legal order only [...,] may also contribute to a desirable – and desired by many – evolution of international law itself".[91] Conforti could never have been so immodest, but this hope was his nonetheless.

5. A Tale of Two Confortis?

Based on the above, discussing the legacy of Conforti's thought concerning national courts might seem quite simple. Influential and well-respected among colleagues, held in high regard by courts and perpetuated by eminent mentees, his ideas tick all the boxes of academic glory. But success also comes at a price, which, in the case of a complex thought, is the risk of being trivialised to some extent. Understandably, scholars discussing the relevance of national courts for the effectiveness of international law may reference Conforti as a staunch internationalist "who urged domestic judges to resist domestic pressures to prefer parochial national interest and instead act as agents of the international community".[92] By contrast, scholars discussing Judgment No. 238/2014, and more generally the relations between international law and domestic constitutions, may criticise Conforti as an architect of defiance of international law.[93] As if there were two Confortis. Yet, as we saw, no aspect of his thinking existed without the other.

It seems to me that Judgment No. 238 has fueled the risk of reductionist approaches to Conforti's writings. I am aware that Conforti always defended it and I already highlighted that the connection between that judgment and his thought was real. Never having been a fan of Judgment No. 238, I should also admit that I might be falling in the same trap that I just cautioned against, picking the side of Conforti's thought to which I feel closer. With this caution in mind, though, I will highlight what I see as three major points of divergence.

First, even when inciting disobedience to international law, Conforti never stopped being an international law scholar and building bridges between international and national law. For example, in 1988, he expressed approval of Judgment No. 132/1985,[94] where a provision of an international treaty had been ruled unconstitutional, because the *Corte Costituzionale*,

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[90] Judgment No. 238/2014, *cit. supra* note 70, operative part. See Palombino, "Quale futuro per i giudizi di costituzionalità delle norme internazionali generali? Il modello rivisitato della sentenza interpretativa di rigetto", RDI, 2015, p. 151 ff.

[91] *Ibid.*, para. 3.3.

[92] Frishman and Benvenisti, *cit. supra* note 45, p. 318.

[93] See e.g. Krieger, "*Sentenza* 238/2014: A Good Case for Law-Reform?", in Volpe, Peters and Battini (eds.), *Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court's* Sentenza *238/2014*, Berlin, 2021, p. 71 ff., pp. 76-77.

[94] *Coccia v. Turkish Airlines*, 6 May 1985, No. 132.

> Before reaching such a conclusion, takes time to extensively address international practice on the matter and to note how such practice is increasingly leaning towards rejecting [the provision deemed unconstitutional]. In short, the Court finds a way to justify its decision with considerations that are not merely formal, but also relevant to values felt within the international community.[95]

True to his convictions, Conforti criticised *Jurisdictional Immunities* first and foremost for what he saw as an incorrect identification of general international law on the part of the ICJ.[96] There is little trace of this in Judgment No. 238. The judgment, inspired by Conforti's writings, may have expressed a wish to bring change to State immunity,[97] but it effectively ditched the language of international law when it declared that "the interpretation by the ICJ of the customary law of immunity of States [...] is particularly qualified and does not allow further examination by national governments and/or judicial authorities, including this Court".[98] Is this not a form of "interpretive deference" that Conforti might have disapproved of?[99]

Secondly, we saw that Conforti hypothesised the birth of a new circumstance precluding wrongfulness allowing invocation of fundamental constitutional principles.[100] He came to this conjecture by observing that pronouncements of the *Corte Costituzionale* declaring the unconstitutionality of international rules had not attracted "significant protests from the States concerned".[101] As late as 2013, he found confirmation of this view in the reactions, or lack thereof, to the application of the *controlimiti* doctrine by Judgment No. 264/2012.[102] But with Judgment No. 238 that argument was laid to rest once and for all, and Conforti's conjecture was inevitably removed from the 12th edition of *Diritto internazionale*.[103]

Thirdly, and perhaps most importantly, I do not see the idea of a frontal and seemingly irresolvable clash between national and international judges as very *confortiana*. Commenting on the 1979 *Russel* judgment,[104] Conforti criticised the *Corte Costituzionale* for not attempting to spark an evolution of the customary law of diplomatic immunity, but added:

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[95] Conforti, "Costituzione", *cit. supra* note 41, p. 373.

[96] Id., "The Judgment", *cit. supra* note 86.

[97] See *supra* Section 4.

[98] Judgment No. 238/2014, *cit. supra* note 70, para. 3.1.

[99] See the remarks by Pavoni in Weiler, "A Dialogical Epilogue", in Volpe, Peters and Battini (eds.), *cit. supra* note 93, p. 359 ff., p. 379: "[t]here was nothing in theory or precedent barring an autonomous review of the pertinent practice by the Constitutional Court, that might have paved the way for findings different from those of the ICJ yet still justified under *international* law"; emphasis in the original.

[100] See *supra* Section 2.

[101] Conforti, *Diritto*, *cit. supra* note 11, p. 400.

[102] Id., "La Corte costituzionale applica la teoria dei controlimiti", RDI, 2013, p. 527 ff., p. 529.

[103] Compare Id., *Diritto internazionale*, 11th ed, Napoli, 2018, pp. 408-409, with Conforti and Iovane, *cit. supra* note 4, p. 439.

[104] *Russel v. S.r.l. Immobiliare Soblim*, 18 June 1979, No. 48, IYIL, Vol. IV, 1978-1979, p. 145 ff., with a comment by Condorelli.

> It is needless for me to underline the caution with which such a task must be carried out, a caution inherent to any judge who, through their jurisprudence, contributes to the ascertainment of unwritten law. [… T]he *Corte Costituzionale*, like all Supreme Courts, is not *outside* but *within* customary international law, particularly that part of customary law which intersects with the internal life of the State.[105]

I wonder if he ever imagined that Judgment No. 238/2014 would prolong the dispute between Germany and Italy by at least a decade, or the unprecedented steps that Italy would one day take to finish it off for good.[106]

In conclusion, as with any thinker, some of Conforti's ideas will stand the test of time better than others. However, it would not do justice to such a great scholar if the legacy of his ideas were to be judged only in terms of agreement or disagreement. As an academic, Conforti never hid behind theoretical purity or shied away from the difficulties and contradictions of the human experience. He embraced without fear the complexity of two ideas in tension and made a daily effort to reconcile them in the most intellectually honest way possible. This, too, is his legacy.

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[105] Conforti, "La concezione del diritto e dello Stato nell'era della rivendicazione della dignità della persona umana", in *La concezione del diritto e dello Stato nell'era della rivendicazione della dignità della persona umana*, Milano, 1988, p. 237 ff., reprinted in Id., *Scritti*, *cit. supra* note 10, p. 367 ff., p. 370, emphasis in the original.

[106] On which see the contributions by Rossi and by Bufalini in this Volume.