To conclude, it can be said that, in general, international human rights law and, in particular, Article 4 CERD, "do […] not require the criminal prosecution of all bigoted and offensive statements" (CERD Committee, TBB v. Germany, Communication No. 48/2010, Individual Opinion of Committee Member Mr Caralos Manuel Vazquez, dissenting, para. 2), but domestic authorities have "to gauge the likely impact of the statements in the social context prevailing in the State party" (*ibid.*, para. 3). In determining whether the impugned conduct amounts to racist hate and propaganda and whether a concrete danger might arise from the defendants' conduct, the *Corte d'Appello* will have to follow the principles established by the *Corte di Cassazione.* In particular, it will have to adequately motivate its reasoning in order to strike a fair balance between the protection of human dignity and equality, on the one hand, and the right to freedom of expression, on the other.

LORENZO ACCONCIAMESSA

XIII. INTERNATIONAL CRIMINAL LAW

(Cf. *supra* XI, *Corte di Cassazione (Sez. I Civile)*, 19 November 2020, No. 26376 (Order), *Jeff Nathanael Gouet v. Ministero dell'Interno)*

XVII. RELATIONSHIP BETWEEN MUNICIPAL AND INTERNATIONAL LAW

AN ONLY CHILD WITHOUT "YOUNGER BROTHERS": *CONTRADA V. ITALY (NO. 3)* AND THE NEVER-ENDING SAGA OF THE RELATIONSHIP BETWEEN ITALIAN COURTS AND THE ECTHR

Relationship between the Italian legal order and the ECtHR – Erga alios effects of ECtHR Rulings – Dialogue between courts – Effective remedy – Foreseeability of criminal conviction

Corte di Cassazione (Sezioni Unite Penali), 3 March 2020, No. 8544
Criminal proceedings against Stefano Genco

In the everlasting saga of domestic judgments concerning the impact of the European Court of Human Rights' (ECtHR) case law on the Italian legal order, the ruling under review stands as a not-to-be-missed episode. The judgment revolves around the issue of whether individuals who find themselves in situations that are identical, or at least very similar, to those of applicants who have already obtained a favourable judgment from the ECtHR, may rely on the ECtHR judgment in the domestic courts without needing to apply to the ECtHR themselves. Italian scholarship commonly refers to those individuals as "younger brothers" (*fratelli minori*) to successful applicants to the ECtHR, implying that there is a sort of relationship of kinship between the two categories – both children of

the same parent (ideally, the violation of a right protected by the ECHR; see ROMEO, "L'orizzonte dei giuristi e i figli di un dio minore", Diritto penale contemporaneo, 16 April 2012, available at: <https://archiviodpc.dirittopenaleuomo.org/upload/1334557367Romeo%20orizzonte%20giuristi.pdf>; VIGANÒ, "Una prima pronuncia delle Sezioni Unite sui 'fratelli minori' di Scoppola: resta fermo l'ergastolo per chi abbia chiesto il rito abbreviato dopo il 24 novembre 2000", Diritto penale contemporaneo, 10 September 2012, available at: <https://archiviodpc.dirittopenaleuomo.org/d/1695-una-prima-pronuncia-delle-sezioni-unite-sui-fratelli-minori-di-scoppola-resta-fermo-l-ergastolo-per>).

The facts underlying the case can be summarized as follows. On 15 February 1999, Stefano Genco was sentenced to four years in prison for aiding and abetting a mafia-type organization from the outside (*concorso esterno in associazione di stampo mafioso*, hereinafter also only *concorso esterno*), pursuant to Articles 110 and 416-*bis* of the Italian Criminal Code. He was accused of multiple acts aimed at supporting a local mafia organization, including conducting agricultural business and committing illegal acts (such as extortion) on behalf and for the benefit of the organization, all taking place until February 1994 (the chronological detail will come in handy later). The judgment became final on 13 June 2000, and from then on Genco began to serve his sentence.

Genco's most famous sibling is Bruno Contrada, former agent of the Italian secret service (SISDE). Contrada was accused of having systematically contributed to the activities of the *Cosa Nostra*, by supplying the organization with information about ongoing police investigations into its members, and was ultimately sentenced to ten years' imprisonment for the same crime as Genco, that is *concorso esterno*. Following his final conviction, Contrada applied to the ECtHR. In the case of *Contrada v. Italy (No. 3)* (Application No. 66655/13, Judgment of 14 April 2015), the ECtHR held that Contrada's conviction for acts amounting to *concorso esterno* which occurred before 1994 was in breach of Article 7 of the ECHR. The Court found that the offence in question had resulted from developments in Italian case law which began in the second half of the 1980s and consolidated only in 1994 (*Corte di Cassazione (Sezioni Unite Penali)*, *Criminal proceedings against Giuseppe Demitry*, 5 October 1994, No. 16). As a result, the ECtHR concluded that the law had not been sufficiently clear and foreseeable to Contrada at the time of the events.

Learning about the success of Contrada, and realizing that he found himself in a very similar situation (he had been convicted for the same offence and for events that had occurred before 1994), Genco filed a petition to the *Corte di Appello di Caltanissetta* seeking a review of his sentence pursuant to Article 630 of the Code of Criminal Procedure, as amended by *Corte costituzionale*, *Paolo Dorigo*, 7 April 2011, No. 113 (IYIL, 2011, p. 375 ff., with a comment by PALOMBINO). As is known, in the *Dorigo* case, the *Corte costituzionale* found Article 630 to be unconstitutional as it did not provide for retrial where necessary to ensure compliance with the final rulings of the ECtHR, under Article 46 of the ECHR.

The *Corte di Appello* dismissed Genco's petition, finding that *Contrada* was not applicable to his case as that ECtHR judgment contained a flawed appraisal

of the foreseeability of the *concorso esterno* offence. Genco filed an appeal on points of law before the *Corte di Cassazione*, arguing that the *Corte di Appello* had erred by ignoring the fact that the ECtHR had found a systemic violation in the Italian legal order in *Contrada*. In spite of its not being a *stricto sensu* "pilot judgment", that judgment was nonetheless applicable beyond the particular case, irrespective of whether the legal reasoning sounded convincing to domestic courts. The breach identified by the ECtHR consisted in the lack of foreseeability of an offence (*concorso esterno*) before a certain date (when the *Demitry* judgment was delivered). Thus, akin to Contrada, an indefinite number of individuals (including Genco) could not foresee a conviction for *concorso esterno* before 1994. The *Sesta Sezione* of the *Corte di Cassazione*, to which the appeal had been allocated, relinquished the case to the *Sezioni Unite* on account of the existing conflict in the case law pertaining to the remedy available – if any – for those individuals who found themselves in a situation identical or similar to Contrada's, but who had not applied to the ECtHR.

Thus, the *Sezioni Unite* were requested to settle the following questions: (i) whether *Contrada* was general in scope and could be extended to identical or similar cases, i.e. *erga alios*; and (ii) in the affirmative, through which domestic remedy should such "extended" implementation of ECtHR's judgments take place. To begin with, the *Sezioni Unite* recapitulated Contrada's judiciary saga. In that case, the ECtHR concluded that there had been a violation of Article 7 ECHR because the Italian courts had failed to demonstrate that Contrada could have been aware of the offence at the time of the impugned events: Contrada's conviction had been based exclusively on the *Corte di Cassazione*'s subsequent rulings. Following the ECtHR's judgment, Contrada eventually had his sentence declared unenforceable pursuant to Article 673 of the Code of Criminal Procedure, which regulates objection to execution following the repeal of an offence.

Turning then to Genco, the *Sezioni Unite* held that he could not invoke Article 46 ECHR as the legal basis for having his sentence reviewed in accordance with *Contrada*, neither on the basis of Article 630 nor on the basis of Article 673 of the Code of Criminal Procedure. The *Sezioni Unite* explained that, as a matter of fact, Article 46 ECHR can be invoked before domestic courts only by individuals who have directly obtained an ECtHR judgment in their favour. Individuals in situations identical or similar to those of the applicants in an ECtHR judgment, can benefit from the relevant ECtHR ruling rendered to their older siblings, but only if the ruling qualifies as a "pilot judgment" or "any other judgment in which the Court draws attention to the existence of a structural or systemic problem" of the domestic legal order, pursuant to Article 61 of the ECtHR's Rules of Court (last modified on 1 January 2020). Only in these cases does the Article 46 ECHR obligation to conform to a final judgment transcend the individual dimension and require that the judgment be extended to any individuals finding themselves in identical or similar situations. As is evident from a cursory reading of the ECtHR's judgment in *Contrada*, this was neither a "pilot judgment" nor a judgment exposing a structural or systemic problem in the Italian legal order. As further evidence, no general statement, such as a request for the adoption of general measures by the Italian government, could be found in the ECtHR's ruling. This

sufficed to conclude that Genco could not invoke *Contrada* for the purpose of having his sentence reviewed or declared unenforceable.

After denying the existence of any obligation to conform to *Contrada* in the case under scrutiny, the *Sezioni Unite* somehow felt the need to indulge in further arguments which were apparently unconnected with the issues submitted to their scrutiny. In particular, the *Sezioni Unite* wondered whether, at a more general level, Italian courts were obliged to "take into account" the ECtHR's case law (including the *Contrada* judgment).

When framed within the terms of the general duty to conform to ECtHR rulings, in addition to the classic 2007 "twin judgments" (*Corte costituzionale*, *R.A. v. Comune di Torre Annunziata; Comune di Montello v. A.C.; M.T.G. v. Comune di Ceprano* and *E.P. et al. v. Comune di Avellino et al.; A.G. et al. v. Comune di Leonforte et al.*, 24 October 2007, Nos. 348 and 349, IYIL, 2007, p. 292 ff., with a comment by CATALDI), the judgment rendered by the *Corte costituzionale* in *Carlo Gurgone et al.*, 26 March 2015, No. 49 (IYIL, 2015, p. 536 ff., with a comment by TERRASI) had to be taken into account. According to this judgment, Italian courts have to conform solely to pilot judgments or to judgments amounting to "well-established European jurisprudence" on a given provision of the ECHR (RUSSO, "Ancora sul rapporto tra Costituzione e Convenzione europea dei diritti dell'uomo: brevi note sulla sentenza della Corte costituzionale n. 49 del 2015", Osservatorio sulle fonti, 2/2015, p. 1 ff.; see also ROSSI, "L'interpretazione conforme alla giurisprudenza della Corte EDU: quale vincolo per il giudice italiano?", Osservatorio sulle fonti, 1/2018, p. 1 ff.). According to the *Sezioni Unite*, this holds true in spite of the findings contained in *G.I.E.M. s.r.l. and Others v. Italy* (Applications Nos. 1828/06 and 2 others, Judgment of 28 June 2018, on which see RENGHINI, "La sentenza *G.I.E.M.* e il confronto tra la Corte europea dei diritti umani e le corti nazionali", DUDI, 2018, p. 702 ff.), in which the ECtHR affirmed that its judgments all had the same legal value.

On this basis, the *Sezioni Unite* argued that a further reason militating against the *erga alios* extension of *Contrada* was that the ECtHR's findings in that case could hardly be said to amount to "well-established European jurisprudence" as per Judgment No. 49/2015, with respect to the requirement of the "foreseeability" of a criminal law provision (Article 7 ECHR). Indeed, previously the ECtHR had, at times, interpreted the requirement from a *subjective* viewpoint – ie having regard to the personal expertise and knowledge of the accused – and at other times from a more *objective* one – ie focusing on the quality of the criminal law provision and its interpretation by the judiciary. In *Contrada*, the ECtHR had displayed an "unprecedented harshness", in that it completely overlooked the role of judicial interpretation as an inevitable tool for clarifying legal rules, including criminal law provisions, and jumped to the conclusion that the *concorso esterno* was totally unforeseeable by the applicant, without inquiring into his awareness of the criminal nature of his conduct. The ECtHR finding was based on factual grounds – namely, the interpretive contrast around Articles 110 and 416-*bis* of the Criminal Code – but these had been wrongly assessed by the ECtHR. As a result, the findings contained in *Contrada* could not be extended to identical or

similar cases on account of their being (i) inconsistent vis-à-vis "well-established European jurisprudence" and (ii) in all cases, inherently flawed.

If that was not enough, the *Sezioni Unite* devoted energy to dismantling the ECtHR's very understanding of "foreseeability", and argued that *Contrada* had also erred in relation to the following considerations: (i) it held that the *concorso esterno* amounted to a judge-made offence; (ii) it failed to correctly appraise the relevant case law of the *Corte di Cassazione*; (iii) it considered the *Demitry* judgment as "overruling" previous judgments, which it did not; (iv) it failed to consider that its findings contradicted the prerogative of the *Corte di Cassazione* as guarantor of the correct interpretation of the law; and (v) it overlooked that, in case of doubt as to the criminal relevance of particular conduct, it was a well known principle of criminal law enshrined in Article 5 of the Criminal Code that individuals were expected to refrain from that conduct.

Eventually, Genco's appeal on the points of law was thus declared unfounded, given that *Contrada* could not be extended to Genco's case as it was neither a "pilot judgment" nor could it be considered as amounting to "well-established European jurisprudence".

As stated at the very beginning of this contribution, the judgment at hand tackles a legal conundrum that both Italian jurisprudence and scholarship have been dealing with for a considerable amount of time, namely the scope of the duty to conform to ECtHR rulings beyond a particular case. Scholarship traces this (alleged) duty back to Articles 1, 19, and 32 of the ECHR (see ARNARDÓTTIR, "Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights", EJIL, 2017, p. 819 ff.) with respect to individuals in similar or identical situations to those of a successful applicant to the ECtHR. Generally speaking, the issue of the *erga alios* scope of ECtHR judgments is strictly connected to the existence of a "structural or systemic problem" in the domestic legal order. A judgment in which the ECtHR finds a violation of the ECHR imposes on the respondent State a legal obligation not only to ensure just satisfaction pursuant to Article 41 ECHR, but also "to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach" (*Scozzari and Giunta v. Italy*, Applications Nos. 39221/98 and 41963/98, Judgment of 13 July 2000, para. 249) as per Article 46 ECHR (COLANDREA, "On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the Assanidze, Broniowski and Sejdovic Cases", Human Rights Law Review, 2007, p. 396 ff.). In tackling this topical issue, however, the *Sezioni Unite* adopted an approach that leaves much to be desired, at least for three reasons.

First, the *Sezioni Unite* contented themselves with noting that no general measures had been explicitly ordered or at least indicated by the ECtHR in *Contrada*, references to Article 46 ECHR being absent altogether. By doing so, however, they ruled out the possibility of inferring the existence of a structural problem from that judgment, a possibility which had been convincingly outlined by the *Sesta Sezione*

when relinquishing the case to the *Sezioni Unite*. For the *Sesta Sezione*, the ECtHR had implicitly acknowledged that conviction for *concorso esterno* was not foreseeable for individuals other than Contrada, which resulted in the need for judicial authorities to ascertain which domestic remedies should be activated in such cases. In spite of this, the *Sezioni Unite* adopted a purely *formalistic* approach, which, on closer inspection, contrasted sharply with the jurisprudence of none less than the *Corte costituzionale* (see *Criminal proceedings against Salvatore Ercolano*, 3 July 2013, No. 210, which affirmed that general measures, while discretionary in content, had to be adopted by domestic authorities, if necessary *proprio motu*, that is even though the ECtHR had ordered none in a particular case). At the end of the day, a *substantive* approach dealing with the nature and scope of the violation under scrutiny seemed preferable; unfortunately, the *Sezioni Unite* failed to adequately explain the reasons why they chose to discard such an approach.

Secondly, one may easily notice the "alchemical transformation" the questions addressed to the *Sezioni Unite* underwent during the proceedings: the case was relinquished by the *Sesta Sezione* so that the *Sezioni Unite* could answer the question of whether *Contrada* was a "pilot judgment" or a judgment exposing "the existence of a structural or systemic problem" of the domestic legal order. However, the *Sezioni Unite* ended up replying that the ECtHR's ruling was neither a "pilot judgment" (so far, so good) nor… "well-established European jurisprudence". Would one receive an "asked and answered" objection, if one asked that question again? It is hard to respond in the affirmative, given that the two issues remain conceptually discrete. To argue that a particular judgment of the ECtHR detected a structural problem does not automatically imply that that judgment amounted to "well-established European jurisprudence": "isolated" judgments could also make such a finding. To put it differently, the fact that *Contrada* did not amount to "well-established European jurisprudence" had per se nothing to do with its general scope. The *Sezioni Unite* failed to keep those issues duly distinct; however, it must be admitted that the topic itself – the relationship between the general duty to take into account ECtHR jurisprudence when interpreting the ECHR and the specific duty to conform to a ruling beyond a particular case – has not attracted adequate attention by scholars (with some remarkable exceptions: Randazzo, "Interpretazione delle sentenze della Corte europea dei diritti ai fini dell'esecuzione (giudiziaria) e interpretazione della sua giurisprudenza ai fini dell'applicazione della CEDU", Rivista AIC, 2/2015, p. 1 ff.).

Thirdly, another aspect worth mentioning was the – strikingly disproportionate – focus on the issue of whether *Contrada* amounted to "well-established European jurisprudence" as per Judgment No. 49/2015, which appears to have been employed as a tool for (partially, but firmly) "resisting" unwelcome judgments by the ECtHR in this field (Amoroso, "Italy", in Palombino (ed.), *Duelling for Supremacy: International Law vs. National Fundamental Principles*, Cambridge, 2019, p. 184 ff.). It has already been argued that in fact this was a merely supplementary argument, as the *Sezioni Unite* did respond – negatively – to the question of whether to extend *Contrada* to Genco's case. Nonetheless, the *Sezioni Unite* engaged in a meticulous refutation of the ECtHR's findings in that judgment, with a view to showing that it had resorted to a notion of "foreseeabil-

ity" that was inconsistent with its previous (and subsequent) case law. One could argue that the *Sezioni Unite*'s main intention was to engage in a "dialogue" with the ECtHR as to the foreseeability of *concorso esterno* for the purposes of Article 7 ECHR in order to adjust some defects displayed by the ECtHR's understanding of the matter (a point which has been correctly highlighted by some Italian scholars: BARTOLI, "Chiusa la saga Contrada: in caso di contrasto giurisprudenziale opera la colpevolezza", Diritto penale e processo, 2020, p. 775 ff.). In sum, Italy was obliged by Article 46 ECHR to comply with the (admittedly flawed) ECtHR judgment, but only as far as Contrada was concerned. No extension whatsoever to "younger brothers" was acceptable: the secret service agent had to remain an only child… an illegitimate one, indeed!

However, the fact that the *Sezioni Unite* decided to tackle and "rebut" the arguments that had led to *Contrada* does not sound so unreasonable when one considers that the ECtHR is expected to rule on the "foreseeability" of *concorso esterno* again in the near future. Two applications concerning the same matter have recently been communicated to the Italian government (*Dell'Utri v. Italy*, Communicated case, Application No. 3800/15, 16 November 2017; *Lo Sicco v. Italy*, Communicated case, Application No. 14417/09, 5 July 2016). Time will tell if the ECtHR will engage in a "dialogue" with the *Sezioni Unite* and revisit its ruling accordingly, or rather it will reaffirm its appraisal of *concorso esterno*. Yet there is an additional reason for anticipating the ECtHR's rulings, particularly the one in *Dell'Utri v. Italy*. Interestingly enough, Dell'Utri applied to the ECtHR, *inter alia*, precisely because of his being denied the status of Contrada's "younger brother", and invoked Article 13 ECHR on the basis that he could not have his sentence reviewed by Italian courts. Incidentally, the issue of which domestic remedy "younger brothers" have to use in order to seek reparation for the violation of their ECHR rights was left totally unexplored by the judgment under review, as a consequence of the *Sezioni Unite*'s denial of *Contrada*'s *erga alios* effects. *Dell'Utri v. Italy* will provide the ECtHR with the opportunity to rule, for the first time, on the issue of "younger brothers" and its relevance under the ECHR (whether via Article 13, or a broad interpretation of Article 46 ECHR, or other provisions). In conclusion, the *saga* of the relationship between the Italian legal order and the ECtHR's rulings seems far from being over: new and compelling episodes are in store for its fans.

DIEGO MAURI

IMPLEMENTING INTERNATIONAL TREATIES INTO THE ITALIAN LEGAL ORDER: DIVERGING VIEWS ON THE IDENTIFICATION OF SELF-EXECUTING PROVISIONS

Relationship between international and domestic law – Dualism – Order of execution – Implementation of international treaty provisions – United Nations Convention against Corruption – International cooperation – United Nations Convention against Transnational Organized Crime – Adjudicative jurisdiction of States