THE ROLE OF NATIONAL COURTS FOR THE INTERNATIONAL RULE OF LAW: INSIGHTS FROM THE FIELD OF MIGRATION

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This paper evaluates the theory that national courts can act as agents for the protection of the international rule of law, i.e. the idea that, under certain conditions, national courts may compensate for the lack of international mechanisms of law enforcement and ensure that their own governments comply with international law. This theory is tested against a paradigmatic case study from the field of migration, the Diciotti affair, which serves as an example of international law violations caused by governmental policies of migration containment. In this incident, migrants rescued at sea by an Italian Coast Guard ship were confined onboard for a number of days in apparent violation of international legal standards. The breaches of international law which occurred during the incident were at the center of civil and criminal cases before the Italian courts. Even though, prima facie, the response of the Italian judiciary would appear to be a textbook confirmation of the view of national courts as guardians of the international rule of law, the paper argues that the Diciotti affair also suggests that caution is required as regards the actual powers of national courts to compel state authorities to respect international law.

Keywords: international rule of law, national courts, international migration law, international law of the sea, international human rights law, migration control

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I. INTRODUCTION

It is frequently argued that national courts can play a fundamental role in supporting the international rule of law (IRL).[1] By providing remedies for violations of international law committed by the state, they may compensate for the lack of international mechanisms of coercive enforcement against national authorities and thus fulfill one of the essential requirements of any definition of rule of law: the accountability of public authorities for their breaches of the law.[2]

The field of migration constitutes an ideal testing ground for this theory. Alleging the existence of supposed 'migration emergencies',[3] the political

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1 André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011). For a more thorough review of the relevant literature see below Section II.

2 Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology', in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009) 45.

3 See Jaya Ramji-Nogales, 'The Role of Human Rights Law in Constructing Migration Emergencies' (EJIL: Talk!, 24 February 2017)

authorities of a significant number of countries are implementing policies of migration control in defiance of international legal standards of migrants' protection.[4] These standards – collectively termed 'international migration law' – consist of norms pertaining to various areas of international law, including human rights law, humanitarian law, labor law and the law of the sea.[5] In such a fragmented legal landscape, international mechanisms allowing for an independent ascertainment of state breaches of international migration law are scant and sectorial, the most prominent example being, in the field of human rights law, the European Court of Human Rights (ECtHR). Nor do there exist international means of enforcing international migration law against unruly national governments. It is therefore natural to wonder if national courts may fulfill the role of a systemic force for the IRL in the field of migration, ensuring governmental compliance with international migration law and even turning the tide of weakening international legal regimes.[6]

Against this backdrop, this contribution focuses on national courts' responses to breaches of international law caused by governmental policies of migration control. It does so primarily through the lens of a case study, the 2018 *Diciotti* affair, concerning apparent violations by Italy of international migration law following a migrant rescue operation in the Mediterranean Sea. This incident is paradigmatic because of the consequences such violations entailed before the Italian courts. Not only was a civil action brought against

<https://www.ejiltalk.org/the-role-of-human-rights-law-in-constructing-migration-emergencies-esil-blog-symposium/> accessed 16 May 2019; Muhammad Shahabuddin, 'Postcolonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar' (2019) 9 Asian Journal of International Law 334.

4 See e.g. Lena Riemer, 'How Trump's Migration Policy Erodes National and International Standards of Protection for Migrants and Asylum Seekers' (EJIL: Talk!, 28 November 2018) <https://www.ejiltalk.org/how-trumps-migration-policy-erodes-national-and-international-standards-of-protection-for-migrants-and-asylum-seekers/> accessed 16 May 2019.

5 Vincent Chetail, *International Migration Law* (Oxford University Press 2019) 7-12.

6 The role of national courts is crucial even in the strongly integrated context of the European Convention on Human Rights: see e.g. Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (Oxford University Press 2015).

the state by a number of victims, but criminal proceedings were also initiated against members of the Italian government.[7]

After reviewing the main theoretical approaches to the role of national courts in supporting the IRL (section II), this article provides a brief description of the facts of the *Diciotti* affair as well as an analysis of the international legal norms that would appear to have been breached during the incident, notably in the fields of the law of the sea and human rights law (section III). The focus then turns to how the Italian courts reacted to such violations and to their efforts to ensure the executive's accountability, situating these efforts within the broader framework of the theory of national courts as agents for the promotion of the IRL (section IV). The article concludes by arguing that the *Diciotti* affair may suggest that caution is required as regards the actual powers of domestic courts to compel state authorities to respect international law, in the sense that, in practice, even a fiercely independent judiciary may end up being a valuable but imperfect instrument for the IRL (section V).

Of course, as a matter of methodology, caution is due when extrapolating from a single case. It is not the purpose of this paper to make sweeping or conclusive arguments for or against any of the theories put to the test. What is argued is merely that the analysis of a concrete case may provide some depth to concepts which are often posited at a higher level of abstraction, revealing both strengths and shortcomings of the capacity of national courts to review governmental acts violating international law. And while, as will be shown, some features of the *Diciotti* affair are closely dependent on the characteristics of the European and the Italian legal settings, other features arguably exemplify difficulties that any independent judiciary may encounter when attempting to enforce international law against its own government.

II. National Courts: Agents for the Protection of the International Rule of Law?

The idea that national courts may serve as agents of the international legal order finds its roots in the thought of George Scelle. Given the lack of centralized international organs fulfilling legislative, executive and judicial

[7] A more detailed account is below Section IV(1).

functions, the celebrated French author maintained that those three functions of the international legal order were to be performed, as it were, in a delocalized form. National organs would thus act as international organs, fulfilling an international function, whenever they acted in the international legal sphere, along the lines of what Scelle called '*dédoublement fonctionnel*' (role splitting).[8]

More recent scholarship rarely subscribes to the view that national courts would constitute fully fledged *organs* of the international legal order.[9] It is instead commonly acknowledged that it would be purely fictitious to treat them as institutionally detached from the state of which they are a part.[10] Rather, what has survived of Scelle's thought – and has in fact thrived in subsequent literature – is the view that national courts may fulfill an international *function*, namely that of filling the enforcement gap that international law continues to experience and that could diminish its effectiveness.[11] This gap stems from the fact that, on the one hand, the areas

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8 George Scelle, *Précis de droit des gens: principes et systhèmatique*, vol. I (Recueil Sirey 1932) at 43, 54-56 and 217; Id, 'Règles générales du droit de la paix' (1933) 46 Recueil des cours 327, at 358-359 (terming the *dédoublement fonctionnel* 'la loi essentielle des rapports internationaux'). For comments on Scelle's theory, see *ex multis* Haro F. van Panhuys, 'Relations and Interactions Between International and National Scenes of Law' (1964) 112 Recueil des cours 1, at 8-11; Antonio Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (*dédoublement fonctionnel*) in International Law' (1990) 1 European Journal of International Law 210.

9 There are echoes of this view in Richard A. Falk, 'The Role of Domestic Courts in the International Legal Order' (1964) Indiana Law Journal 429, at 436-437, speaking of 'national courts as international institutions, that is, as institutions responsible for upholding international law and for displaying it as a common system of law peculiar to no single state'.

10 Massimo Iovane, 'L'influence de la multiplication des juridictions internationales sur l'application du droit international' (2017) 383 Recueil des cours 233, at 320, noting that 'les tribunaux internes [...] fonctionnent normalement comme des instruments de la justice nationale, même quand ils sont tenus d'appliquer des normes internationales' and adding in ft. 127 '[a] moins d'accepter la thèse du dédoublement fonctionnel qui finit par considérer tous les organes internes comme des organes internationaux'.

11 See e.g. Yuval Shany, '*Dédoublement fonctionnel* and the Mixed Loyalties of National and International Judges', in Filippo Fontanelli, Giuseppe Martinico and Paolo

regulated by international law have expanded considerably in recent decades, causing its domain to overlap to a great extent with that of national law (e.g. in the field of human rights)[12] while, on the other hand, the development of international mechanisms of law enforcement has not managed to keep pace. Because states retain exclusive control of coercive authority within their own borders, international law remains, somewhat paradoxically, entirely dependent for its domestic implementation on the very subjects whose actions it aims to constrain.[13] It is precisely this 'increasing disparity between [international law's] growth of normative content and its lack of enforcement mechanism' that led Benedetto Conforti to assert that a 'truly legal function of international law' could only be achieved through the action of 'domestic legal operators' and, most relevantly, national courts.[14]

André Nollkaemper has recently developed and popularized this view by combining it with theories of the IRL, i.e. the scholarly attempts to apply the concept of rule of law to the international realm.[15] Nollkaemper's view is based on two main premises. Firstly, the rejection of any distinction between the rule of law at the domestic level and at the international level in favor of a unified notion of rule of law, at least where there is an overlap in the subject-

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Carrozza (eds), *Shaping Rule of Law Through Dialogue. International and Supranational Experiences* (Europa Law 2010) 27, at 40.

12 Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 Recueil des cours 9, at 63, describing international law as a 'comprehensive blueprint for social life'; James Crawford, 'International Law and the Rule of Law' (2003) Adelaide Law Review 3, at 6-8, noting that international law is increasingly concerned with the states' internal matters.

13 Anne-Marie Slaughter and William Burke-White, 'The Future of International Law is Domestic (or, The European Way of Law)' (2006) 47 Harvard International Law Journal 327, at 343.

14 Benedetto Conforti, *International Law and the Role of Domestic Legal Systems* (Martinus Nijhoff 1993) at 7-12; Id (Massimo Iovane ed), *Diritto internazionale*, 11th ed. (Editoriale Scientifica 2018) at 8-9. Similarly, see Henry G. Schermers, 'The Role of Domestic Courts in Effectuating International Law' (1990) 3 Leiden Journal of International Law 77, particularly at 78-79.

15 See generally Arthur Watts, 'The International Rule of Law' (1993) 36 German Yearbook of International Law 15; Stéphane Beaulac, 'The Rule of Law in International Law Today', in Palombella and Walker (eds) (n 2) 197.

matters of international law and municipal law.[16] Secondly, the inclusion within such a unified notion of rule of law of both formal and substantive elements.[17] The 'formal' prong encapsulates the need for compliance with the law, requiring public power to be brought under the law and held accountable for its breaches, while the 'substantive' prong focuses on the content of the law, requiring that it conforms to fundamental human rights.[18] Against this backdrop, it is argued that national courts may promote the (domestic as well as) international rule of law as long as a number of conditions are realized, namely that: (i) they have jurisdiction over an international claim; (ii) they are independent from the national political branches; (iii) they are entitled by domestic law to apply international law; and (iv) private parties have standing to invoke the international norm as the basis of their claim.[19] This conclusion largely echoes the content of a 1994 resolution of the Institut de Droit International, which suggested that in order for national courts to operate in the guise of international courts they should be allowed by domestic law to apply international law independently from their own governments.[20] For the

16 Nollkaemper (n 1) at 3. For a similar view see Yuji Iwasawa, 'Domestic Application of International Law' (2015) 378 Recueil des cours 12, at 184, arguing that application of international law by national courts 'is an effective means to enforce international obligations against the reluctant Government and promote the rule of law in the state'.

17 See Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) Public Law 467; Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) at 91 ff., proposing a scale, ranging from 'thin' to 'thick' versions, to describe the different models of rule of law.

18 Nollkaemper (n 1) at 3-5.

19 Ibid at 21-113.

20 See the resolution of the Institut de droit international 'The Activities of National Judges and the International Relations of their State' (1994) 65(II) Annuaire de l'Institut de droit international 318, particularly Art. 1.2 (national courts should 'bas[e] themselves on the methods followed by international tribunals') and Art. 5.3 (they should 'mak[e] every effort to interpret it as it would be interpreted by an international tribunal and avoid [...] interpretations influenced by national interests').

sake of brevity, in the following pages this theory on the role of national courts for the IRL will be referred to as the 'internationalist model'.[21]

The above views, it should be noted, have not gone unchallenged. A first counterargument is that, even where on paper domestic law empowers them to apply international law in an impartial and independent manner, national courts would still tend not to apply international law to review governmental acts in politically sensitive situations. To this end, they would resort to an array of judicial techniques collectively termed 'avoidance doctrines', including, for example, the so-called 'political question' doctrine, the 'act of state' doctrine and the doctrine of self-execution of treaties.[22] Second, it has been contended that national courts are prone to national biases even where they apply international law.[23] This is because, as Andreas Paulus has put it, 'they do so because domestic law requires it, not because they are organs of the international community'.[24] Eyal Benvenisti has claimed that national courts could never be impartial in the sense envisioned by Nollkaemper, i.e. so as to operate as if they were international tribunals, because 'their chief motivation is not to promote global justice but to protect primarily, if not exclusively, the domestic rule of law'.[25] Moreover, national courts may apply international law merely as a tool to safeguard the discretion of national governments against 'the attempts of interest groups and powerful foreign

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21 The same terminology is used by Mattias Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' (2003) 44 Virginia Journal of International Law 19.

22 Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts' (1993) 4 European Journal of International Law 159, at 169-173. On the 'political question' doctrine see further below Section IV.1.

23 Wolfgang G. Friedmann, *The Changing Structure of International Law* (Stevens & Sons 1964) at 146-147.

24 Andreas Paulus, 'National Courts and the International Rule of Law – Remarks on the Book by André Nollkaemper' (2012) 4 Jerusalem Review of Legal Studies 5, at 9.

25 Eyal Benvenisti, 'Comments on the Systemic Vision of National Courts as Part of an International Rule of Law' (2012) 4 Jerusalem Review of Legal Studies 42, at 45; Eyal Benvenisti and George W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) 20 European Journal of International Law 59, at 61.

governments to influence them'.[26] In a somewhat similar, although less radical, fashion, Karen Knop has criticized the 'internationalist model' as reducing the role of national courts to a mere 'compliance mechanism', and has contended that the use of international law in domestic courts should be regarded as a process less of enforcement and more of translation. An inescapable feature of the national judicial function would be to interpret and apply international norms in a way which is influenced by the national legal and cultural background.[27]

In sum, the key trait common to such skeptical views is the challenge to the equivalence between international and domestic rule of law. While these approaches generally do not deny that national courts may faithfully apply international law under certain circumstances, they highlight that this outcome is entirely dependent on considerations of domestic law and, for this reason, more elusive than the 'internationalist model' suggests. This stance may be reinforced by noting that national courts of any jurisdiction – even those where international law is respected as a matter of course – show some degree of resistance towards international legal regimes, at least when it comes to safeguard principles of domestic law perceived as fundamental.[28]

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[26] Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 American Journal of International Law 241, at 244. Similarly, Antonio Cassese criticized Scelle for neglecting cases in which national organs, although acting within the international legal sphere, pursue chiefly national interests instead of 'metanational values or long-term, communal objectives': Cassese (n 8) at 219.

[27] Karen Knop, 'Here and There: International Law in Domestic Courts' (1999-2000) 32 NYU Journal of International Law and Politics 501, at 503-505. Compare to Francesco Francioni, 'The Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience', in Benedetto Conforti and Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff 1997) 15, at 16, arguing that independent judges should act 'as *la bouche de la loi*, as instruments of the impartial application of international law'.

[28] See the studies collected in Fulvio Maria Palombino, *Duelling for Supremacy. International Law vs. National Fundamental Principles* (Cambridge University Press 2019); Alexandra Huneeus, 'Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights', in Javier Couso, Alexandra Huneeus, Rachel Sieder (eds), Cultures of Legality: Judicialization and Political Activism in Latin America (Cambridge University Press 2010) 112, at 134-135;

III. Governmental Violations of International Migration Law: the Example of the *Diciotti* Affair

As mentioned in section I, the field of international migration law offers a particularly suitable testing ground for the role that national courts can play in the effective enforcement of international law. This is not only because international law violations frequently occur in this area, but also because such violations may concern norms of fundamental importance, including those protecting basic human rights. This section illustrates these points by concentrating on a case which recently unfolded in Italy and which constitutes a prime example of violations of international migration law produced by current governmental policies of migration containment. The next section then considers the national courts' reaction to such breaches within the framework of the above theories on the role of national courts for the IRL.

The case at hand originated from an August 2018 incident involving a vessel of the Italian Coast Guard (the *Diciotti*) carrying 177 migrants rescued in the Mediterranean Sea. After a five-day wait off the coast of Lampedusa island, the *Diciotti* was authorized to dock in the Sicilian port of Catania. However, the migrants were prevented from disembarking for two more days, in the case of 27 unaccompanied minors, and five more days for all the others. Members of the Italian government declared that the impasse would continue until the European Union found a solution for the allocation of migrants to states other than Italy.[29] People onboard were allowed to go ashore only after the Catholic Church, Ireland and Albania agreed to a redistribution plan.[30]

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[29] Steve Scherer and Gabriela Baczynska, 'Italy clashes with EU over migrants stranded on rescue boat' *Reuters* (24 August 2018) <https://www.reuters.com/article/us-europe-migrants-italy/italy-clashes-with-eu-over-migrants-stranded-on-rescue-boat-idUSKCN1L9181> accessed 19 April 2019.

[30] To the knowledge of the present author, this plan was never fully implemented. In particular, no migrant would appear to have been transfered to Albania: see Nicola Pedrazzi, 'Nessun asilante della Diciotti è mai arrivato in Albania' *OBC Transeuropa* (4 February 2019) <https://www.balcanicaucaso.org/aree/Albania/Nessun-asilante-della-Diciotti-e-mai-arrivato-in-Albania-

The events of the *Diciotti* incident should be looked at within the broader framework of the strategies of immigration containment implemented by various Italian governments in recent years.[31] Such strategies have taken on different forms, ranging from so-called 'push-backs' to Libya directly performed by Italian authorities – which the ECtHR censured in the notable case of *Hirsi Jamaa*[32] – to cooperation with Libya,[33] which was regulated by a controversial agreement between Italy and the Government of National Accord led by Fayez al-Sarraj.[34] More recently, the Italian government put in place yet another approach to migration through the Mediterranean, consisting *inter alia* in closing Italy's ports to ships carrying migrants rescued

192453?fbclid=IwAR0Wxr1Tmjpss4bGz81_bUqZhTJcy4-_gdYMyz7rnarl3udWMr5rVhXUD0s>.

31 See *ex multis* Marina Mancini, 'Italy's New Migration Control Policy. Stemming the Flow of Migrants from Libya Without Regard for Their Human Rights' (2017) 27 Italian Yearbook of International Law 259.

32 *Hirsi Jamaa and Others v Italy*, App. No. 27765/09 (ECtHR, 23 February 2012). See Violeta Moreno-Lax, 'Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12 Human Rights Law Review 574.

33 Federica Mussi and Nikolas Feith Kan, 'Comparing Cooperation on Migration Control: Italy–Libya and Australia–Indonesia' (2015) 10 Irish Yearbook of International Law 87; Jean-Pierre Gauci, 'Back to Old Tricks? Italian Responsibility for Returning People to Libya' (EJIL: Talk!, 6 June 2017) <https://www.ejiltalk.org/back-to-old-tricks-italian-responsibility-for-returning-people-to-libya/> accessed 19 April 2019.

34 Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana (Italy – Libya) (2 February 2017) <http://www.governo.it/sites/governo.it/files/Libia.pdf> (in Italian), accessed 19 April 2019. On the controversies with regard to this agreement, see Anna Liguori, *Migration Law and the Externalization of Border Controls: European State Responsibility* (Routledge 2019); Marina Mancini, 'Il Memorandum d'intesa tra Italia e Libia del 2017 e la sua attuazione', in Natalino Ronzitti and Elena Sciso (eds), *I conflitti in Siria e Libia. Possibili equilibri e le sfide al diritto internazionale* (Giappichelli 2018) 191; Giulia Ciliberto, 'Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law?' (2018) 4 Italian Law Journal 489.

at sea.[35] Under the 'closed ports policy', boats run by non-governmental organizations (NGOs) have been denied access to Italian coastal cities on multiple occasions.[36] Even against this backdrop, however, the *Diciotti* incident constitutes something of an anomaly, because it concerned the Italian Coast Guard's own boat being prevented by the Italian government from disembarking migrants in an Italian port.

1. The Diciotti *Affair and the International Law of the Sea*

The international law assessment of the incident should be performed separately with respect to the international law of the sea and international human rights law, i.e. the areas of international law that are most directly relevant to migration at sea. As regards the former, the relevant legal framework is contained in the UN Convention on the Law of the Sea (UNCLOS)[37] and two International Maritime Organization (IMO) Conventions, namely the 1974 Safety of Life at Sea Convention (SOLAS) and the 1979 Search and Rescue Convention (SAR).[38] Italy is a party to all three

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35 See generally Pasquale De Sena and Francesca De Vittor, 'La "minaccia" italiana di "bloccare" gli sbarchi e il diritto internazionale' (SIDIBlog, 1 July 2017) <http://www.sidiblog.org/2017/07/01/la-minaccia-italiana-di-bloccare-gli-sbarchi-di-migranti-e-il-diritto-internazionale/?fbclid=IwAR1gO1pZrNPRT2ik_Y67MuHUfgVMtw7h6vUCpX3tAVLGN5wsjtru-iPJT10> accessed 19 April 2019.

36 'Dalla Mediterranea alla Diciotti: tutte le navi respinte da Salvini' *Il Sole 24 Ore* (5 July 2019) <https://www.ilsole24ore.com/art/dalla-mediterranea-diciotti-tutte-navi-respinte-salvini-ACr4AtW> accessed 12 July 2019; 'Migrant crisis: Italy minister Salvini closes ports to NGO boats' *BBC News* (30 June 2018) <https://www.bbc.com/news/world-europe-44668062> accessed 19 April 2019. See e.g. Melanie Fink and Kristof Gombeer, 'The Aquarius incident: navigating the turbulent waters of international law' (EJIL: Talk!, 14 June 2018) <https://www.ejiltalk.org/the-aquarius-incident-navigating-the-turbulent-waters-of-international-law/> accessed 19 April 2019; Martina Ramacciotti, 'Sulla utilità di un codice di condotta per le organizzazioni non governative impegnate in attività di search and rescue (SAR)' (2018) 101 Rivista di diritto internazionale 213.

37 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

38 International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 276 (SOLAS); International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into

Conventions. Article 98 UNCLOS sets forth a general duty to render assistance to people in distress at sea, while the two IMO Conventions flesh out this principle in more detail. The SAR Convention, in particular, requires coastal states to ensure search and rescue services within the marine area under their responsibility, so-called Search and Rescue Region (SRR), and establishes an obligation for states to cooperate in the performance of search and rescue duties.[39] In 2004, both the SAR Convention and the SOLAS Convention were amended to read as follows:

> The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.[40]

In the case of the *Diciotti* incident, the rescue operation took place in the Maltese SRR but was performed by Italian vessels acting under directions of the Maritime Rescue Coordination Center of the Italian Coast Guard. The Italian authorities performed the rescue operation shortly after receiving a

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force 22 June 1985) 1405 UNTS 97 (SAR). Both Conventions have been amended in 2004. On this legal regime see Irini Papanicolopulu, 'The Duty to Rescue at Sea, in Peacetime and in War: A General Overview' (2016) 98 International Review of the Red Cross 491.

39 See in particular SAR Convention, Annex, Chapter 3. On the Convention regime see further Daniel Ghezelbash, Violeta Moreno-Lax, Natalie Klein and Brian Opeskin, 'Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia' (2018) 67 International and Comparative Law Quarterly 315.

40 Ibid para 3.1.9; SOLAS Convention, Chapter V, Regulation 33, para 1.1 (with minor textual differences). Both amendments were adopted with a view to clarifying the states' obligations in the aftermath of the *Tampa* affair, when the Australian government refused to allow a Norwegian cargo ship to disembark 433 migrants rescued from a vessel in distress. On this incident see Penelope Mathew, 'Australian Refugee Protection in the Wake of the Tampa' (2002) 96 American Journal of International Law 661; Matteo Fornari, 'Soccorso di profughi in mare e diritto di asilo: questioni di diritto internazionale sollevate dalla vicenda della nave Tampa' (2002) 57 Comunità internazionale 61.

distress call from the ship carrying migrants.[41] In this initial phase, Italy's actions appear to be fully in line with the relevant international obligations. In referring to a 'primary responsibility' of the state responsible for the SRR, the IMO Conventions implicitly acknowledge that states may perform search and rescue services in other states' SRRs. This is also consistent with the SAR Convention's emphasis on cooperation. The Convention further provides that '[o]n receiving information that any person is, or appears to be, in distress at sea, the responsible authorities of a Party shall take urgent steps to ensure that the necessary assistance is provided'.[42] Given Malta's notorious unwillingness to intervene in its SRR,[43] Italy rightly took responsibility for the search and rescue operation upon receiving the distress call.[44]

The legal assessment of the events which took place in the following ten days, however, is more complex. The day after conducting the search and rescue operation, the *Diciotti* requested from the authorities of both Italy and Malta the indication of a place of safety for the migrants to disembark. Because the two governments disagreed about the port of disembarkation, neither country responded to the vessel's request, thus leaving it standing by off the coast of Lampedusa. Two days later, the *Diciotti* received orders from the

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41 The factual circumstances of the incident are summarized in the Tribunal of Catania's request to Parliament for authorization to proceed against the Minister of the Interior, <http://www.senato.it/service/PDF/PDFServer/BGT/1097913.pdf> accessed 21 May 2019 at 6-8 (hereinafter 'Request'). On this document see further below Section IV(1).

42 SAR Convention, Annex, Chapter 2, para 2.1.1.

43 In the case under scrutiny, the Maltese authorities refused to intervene by questioning that the migrant vessel was actually in distress: see 'New standoff: Malta says migrants were not in distress, refused help' *The Malta Independent* (16 August 2018) <http://www.independent.com.mt/articles/2018-08-16/local-news/New-migration-standoff-brewing-as-Salvini-threatens-to-renege-on-Aquarius-agreement-6736194975> accessed 19 April 2019.

44 This is further confirmed by the 2016 International Aeronautical and Maritime Search and Rescue Manual, a non-binding document jointly published by the IMO and the International Civil Aviation Organization (ICAO): see Volume II, Section 3.6: '[w]hen an RCC or RSC receives information indicating a distress outside of its SRR, it should immediately notify the appropriate RCC or RSC and take all necessary action to coordinate the response until the appropriate RCC or RSC has assumed responsibility'.

Italian maritime authorities to sail towards Sicily and to dock in the port of Catania. All this happened without the Italian authorities formally declaring Catania to be the 'place of safety' where the migrants could disembark; on the contrary, the captain of the *Diciotti* was informed that Catania only constituted a temporary port of call. A formal designation as place of safety was still lacking when the migrants were eventually allowed ashore.[45]

Two points are relevant for the assessment of Italy's management of the incident from the perspective of the international law of the sea. Firstly, the terms of the Conventions, requiring disembarkation to be effected 'as soon as reasonably practicable' and by having regard to the 'particular circumstances of the case', do not demand immediate disembarkation. Secondly, and most crucially, the above-quoted passage of the IMO Conventions requiring the country responsible for the SRR to ensure that the rescued people are brought to a 'place of safety' is commonly interpreted as an obligation to 'take the lead in finding a port for disembarkation'[46] and not as a duty to disembark people in the coordinating state itself (this duty can logically be extended to any country taking on responsibility for a particular search and rescue operation).[47] In principle, therefore, the IMO Conventions are without prejudice to the international law rule that entitles a state to regulate access to its ports as an exercise of its sovereignty.[48] As a matter of fact, the lack of a default state of disembarkation or a standard procedure for determining such a state has been termed 'the main *lacuna* in the current SAR regime'.[49] A delay of some days in the disembarkation, while

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45 Request (n 41) at 7-8.

46 Fink and Gombeer (n 36).

47 Efthymios Papastavridis, 'Rescuing Migrants at Sea and the Law of International Responsibility', in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2017). On the notion of place of safety, see Martin Ratcovich, 'The Concept of 'Place of Safety': Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?' (2015) 33 Australian Yearbook of International Law 81.

48 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits, Judgment) [1986] ICJ Rep 14, para 213.

49 Patricia Mallia, 'The MV Salamis and the State of Disembarkation at International Law: The Undefinable Goal' (ASIL Insights, 15 May 2014)

consultations are conducted between the coastal states involved, is rather run-of-the-mill in the functioning of the ILO Conventions.[50]

The above may lead to the conclusion that no violations of the law of the sea seemingly occurred while the *Diciotti* awaited instructions off the coast of Lampedusa. This conclusion may be reinforced by noting that thirteen migrants in need of medical assistance were allowed ashore in Lampedusa without further delay.[51] With regard to the days spent in the port of Catania, however, a different conclusion is probably warranted. Once the ship docked in a port, the disembarkment of all migrants was certainly reasonably practicable, therefore making the further delays hardly justifiable under the terms of the Conventions.

Interestingly, some government officials advanced the argument that the ship itself, while docking in the port of Catania, could constitute a place of safety.[52] This argument implies that, for Italy to meet its obligations, disembarkation of the migrants was unnecessary. But such a view neglects the fact that the IMO Conventions expressly provide for a general duty to disembark. The IMO Maritime Safety Committee Guidelines on the Treatment of Persons Rescued at Sea support the view that a ship may serve as a place of safety only 'temporarily',[53] and that 'alternative arrangements' should be made as soon as possible.[54]

<https://www.asil.org/insights/volume/18/issue/11/mv-salamis-and-state-disembarkation-international-law-undefinable-goal#_edn5> accessed 19 April 2019.

50 On the many cases in which vessels carrying migrants rescued in the Meditteranean had to wait for days before a port for disembarkment could be identified see Kristof Gombeer, 'Human Rights Adrift? Enabling the Disembarkation of Migrants to a Place of Safety in the Mediterranean' (2015) 10 Irish Yearbook of International Law 23.

51 Request (n 41) at 5.

52 Ibid 31.

53 MSC 78/26/Add.2, 20 May 2004, para. 6.13.

54 Ibid. See also para. 6.14: '[a] place of safety may be on land, or it may be aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked to their next destination'.

2. *The* Diciotti *Affair and International Human Rights Law*

The events under scrutiny should also be evaluated from the standpoint of international human rights law. The most relevant provision in this respect is Article 5 of the European Convention on Human Rights (ECHR), which enshrines the prohibition of arbitrary deprivation of liberty. Pursuant to this Article, in order to be lawful, a deprivation of liberty must: (i) fall within one of the admissible grounds listed at para. 1;[55] (ii) be prescribed by law;[56] and (iii) be subject to prompt and speedy judicial review.[57] In its rich case law concerning this provision, the ECtHR has clarified that a breach of Article 5 may occur regardless of whether the alleged deprivation of liberty is qualified as such under domestic law. What is required is merely that a person has been confined without his/her consent in a restricted space for a non-negligible period of time, a notion which may include deprivations of a relatively short duration.[58]

When applying such standards to the events of the *Diciotti* case, the main issues arise with regard to Article 5(1)(f), which provides for a lawful ground of deprivation of liberty in the case of 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. In the *Khlaifia v Italy* case, the ECtHR applied this principle to the detention of irregular migrants in a reception center and on a ship.[59] It should be noted, however, that the facts in *Khlaifia* were different from

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55 Article 5(1)(a)-(f) of the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (ECHR). The list is exhaustive and the exceptions must be interpreted restrictively: see *S, V and A v Denmark*, App Nos 35553/12, 36678/12 and 36711/12 (ECtHR, 22 October 2018) para 73. On Article 5 ECHR, see William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) at 219-263.

56 Article 5(1) ECHR.

57 Article 5(3)-(4) ECHR.

58 See e.g. *Storck v Germany*, App No 61603/00 (ECtHR, 16 June 2005) paras 73-74; *Rantsev v Cyprus and Russia*, App No 25965/04 (ECtHR, 7 January 2010) para 317.

59 *Khlaifia and Others v Italy*, App No 16483/12 (ECtHR, 15 December 2016). See the comment by Jill I. Goldenziel (2018) 112 American Journal of International Law 274; and Maria Rosaria Mauro, 'Detention and Expulsion of Migrants: the Khlaifia v. Italy Case' (2015) 25 Italian Yearbook of International Law 85.

Diciotti, in that the migrants were already present on Italian territory and were awaiting deportation from the country. What is of interest here is instead the first limb of Article 5(1)(f), which recognizes that states have a right to control aliens' entry into their territory.[60] Clearly, this provision acknowledges that states can detain immigrants, and this also applies to asylum seekers.[61] Therefore, a violation of Article 5 cannot be inferred from the mere fact that the migrants were detained for some time.

It is rather the particular features of this detention that raise serious doubts about its compatibility with the Convention. Firstly, the confinement of migrants on the *Diciotti*, while it was anchored in the harbor of Catania, was neither prescribed by domestic law nor carried out according to any pre-established procedure; rather, it was an act of arbitrariness.[62] Secondly, the fact that the detention was realized in violation of a specific international law obligation to disembark is relevant in the assessment of its lawfulness under the ECHR. Indeed, to determine whether a deprivation of liberty is 'prescribed by law', the Strasbourg Court refers to procedural standards set not only by domestic law but also, when appropriate, by international law.[63] Thirdly, it can be presumed that the migrants were not promptly informed of the reasons (whatever they might be) for their detention, in breach of Article

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60 See e.g. *Amuur v France*, App No 19776/92 (ECtHR, 25 June 1996) para 41.

61 As was the case in *Saadi v United Kingdom*, App No 13229/03 (ECtHR, 29 January 2008).

62 As noted by Francesca Cancellaro and Stefano Zirulia, 'Controlling Migration through De Facto Detention: The Case of the "Diciotti" Italian Ship' (Border Criminologies, 22 October 2018) <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/10/controlling> accessed 19 April 2019, Italian law prescribes that migrants can be detained for the sole purposes of executing a deportation order, and only within 'deportation centers': see Art. 13-14 of Legislative Decree n. 286 of 1998. The arbitrariness of the detention from the standpoint of domestic law is further confirmed by the fact that no formal administrative act forbidding disembarkation was issued during the stand-off: see 'Accesso civico ai Ministeri dell'interno e dei Trasporti: nessun provvedimento formale di chiusura dei porti' (ASGI, 10 January 2019) <https://www.asgi.it/media/comunicati-stampa/chiusura-porti-accesso-civico/> accessed 19 April 2019.

63 *Medvedyev and Others v France*, App No 3394/03 (ECtHR 29 March 2010) para 79; *Toniolo v San Marino and Italy*, App No 44853/10 (ECtHR, 26 June 2012) para 46.

5(2) ECHR. In *Saadi v United Kingdom*, the ECtHR found a breach of this provision in the UK authorities' 76-hour delay in informing the applicant, an asylum seeker, of the reasons for his detention in a reception center, even though the detention itself was not found to be unlawful under Article 5(1) ECHR.[64] Lastly, the migrants' confinement on the *Diciotti* was not subject to any form of judicial review.

In conclusion, it can be asserted that Italy most likely breached Article 5 ECHR.[65] It should be noted that 41 migrants have already announced their intention to bring the case to the Strasbourg Court.[66] Comparable provisions of other international conventions may also be said to have been breached, primarily Article 9 of the International Covenant on Civil and Political Rights (ICCPR)[67] and (with regard to the situation of the minors onboard the *Diciotti*) Article 37(b) of the Convention on the Rights of the Child.[68]

It has been suggested that the confinement of the migrants on the *Diciotti* may also constitute a violation of Article 3 ECHR, pursuant to which '[n]o one shall be subjected to torture or to inhuman or degrading treatment or

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64 *Saadi v United Kingdom* (n 61).

65 In this sense see Massimo Frigo, 'The Kafkaesque "Diciotti" Case in Italy: Does Keeping 177 People on a Boat Amount to an Arbitrary Deprivation of Liberty?' (OpinioJuris, 28 August 2018) <http://opiniojuris.org/2018/08/28/the-kafkaesque-diciotti-case-in-italy-does-keeping-177-people-on-a-boat-amount-to-an-arbitrary-deprivation-of-liberty/> accessed 19 April 2019.

66 'Migrants appeal to European Court in kidnapping case' *AdnKronos* (21 February 2019) <https://www.adnkronos.com/aki-en/security/2019/02/21/migrants-appeal-european-court-kidnapping-case_R15awdcGcp00s488BuNggK.html?refresh_ce> accessed 19 April 2019.

67 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). On Article 9, see Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd ed. (Oxford University Press 2013) at 340-391.

68 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3. On Article 37, see William Schabas and Helmut Sax, *Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Martinus Nijhoff Publishers 2006). See further Roberto Virzo, 'Coastal States and the Protection of Migrant Children at Sea', in Francesca Ippolito and Giacomo Biagioni (eds), *Migrant Children: Challenges for Public and Private International Law* (Editoriale Scientifica 2016) 3.

punishment'.[69] In its case law, the ECtHR has clarified that only cases of ill-treatment attaining a 'minimum level of severity' fall within the scope of this provision.[70] With particular regard to detained persons, the Court has held that the 'unavoidable level of suffering inherent in detention' is not sufficient to produce a breach of Article 3, as long as the conditions are compatible with respect for human dignity and the detainee's health is adequately protected.[71] The ECtHR assesses whether these conditions are respected on a case-by-case basis by taking into account all the factual circumstances of the case, which may include duration, age and state of health of the affected people, or whether there was a situation of extreme overcrowding.[72]

In more practical terms, in *Khlaifia v Italy* the ECtHR found that the detention of migrants on two ships for five to seven days did not constitute a violation of Article 3 on the part of Italy in light of multiple factors, namely the fact that the detainees were provided with medical assistance, satisfactory food and drink, water and electricity, adequate bedding and clothing.[73] While there is no indication that the *Diciotti* migrants were denied adequate health assistance, food and water, the conditions on the *Diciotti* were arguably harsher than in *Khlaifia*. The Tribunal of Catania described the migrants' condition as 'precarious', for example because they were forced to sleep on the ground on the ship's deck, but also noted that the ship's captain actively tried to ensure decent living conditions.[74] All things considered, it is hardly possible to make a conclusive judgment on whether the ECtHR would find Article 3 to have been violated in this case. This would depend on a more detailed assessment of the specific conditions to which the migrants were

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69 Carmelo Danisi, 'What "Safe Harbours" Are There for People Seeking International Protection on Sexual Orientation and Gender Identity Grounds? A Human Rights Reading of International Law of the Sea and Refugee Law' (2018) 5 GenIUS 6, <http://www.articolo29.it/wp-content/uploads/2018/11/genius-2018-02.pdf> accessed 19 April 2019, at 17.

70 *Khlaifia and Others v Italy* (n 59) para 159.

71 *Rahimi v Greece*, App No 8687/08 (ECtHR 5 April 2011) para 60.

72 This principle was first expressed in *Ireland v United Kingdom*, App No 5310/71 (ECtHR 18 January 1978). See *inter alia Kalashnikov v Russia*, App No 47095/99 (ECtHR 15 July 2002) para 102 (on duration); and *Mursič v Croatia*, App No 7334/13 (ECtHR 20 October 2016) para 104 (on severe overcrowding).

73 *Khlaifia and Others v Italy* (n 59) para 207.

74 Request (n 41) at 27.

subjected on the *Diciotti* during the stand-off, as well as on the personal conditions of each individual migrant.

IV. Testing the Limits of Governmental Accountability before National Courts: Lessons from the *Diciotti* Affair

This article now turns to the role that national courts may play in remedying violations of international migration law and ensuring governmental accountability. In this regard, the example of the *Diciotti* affair again proves illustrative. This section focuses on the reaction of the Italian courts to the governmental breaches of international law which occurred during the incident and on their efforts to scrutinize the legality of the state authorities' actions. As will be seen, some elements of the analysis clearly confirm the main premises of the theory of national courts as guardians of the IRL. However, other features of this case also shed light on the limitations that national courts may encounter in their attempts to ensure executive accountability for international law violations.

1. The Power of National Courts: International Law as a Limit on Governmental Action

Some elements of the *Diciotti* case clearly conform to the 'internationalist model' of the role of national courts in supporting the IRL.[75] In particular, the violations of international law committed during the incident produced two strands of disputes before national courts: one civil and the other criminal. As regards the former, 41 people who were confined onboard the *Diciotti* sued the Italian government for damages before the Tribunal of Rome.[76] The basis of their claim, on which the court has yet to rule, was a violation of the right to personal liberty under Article 5 ECHR and Article 13 of the Italian Constitution.[77] With regard to the criminal consequences of

[75] See above Section II.

[76] 'Diciotti migrants file for damages' *Ansa* (21 February 2019) <http://www.ansa.it/english/news/politics/2019/02/21/diciotti-migrants-file-for-damages_e0427f34-b737-4d63-b384-e5e71a6915cf.html> accessed 19 April 2019.

[77] The text of the appeal is available at <https://www.panorama.it/wp-content/uploads/2019/02/RICORSO-EX-ART.-702-BIS.pdf> accessed 21 May 2019.

the incident, shortly after the disembarkation of the migrants, a public prosecutor initiated proceedings against the Italian Minister of the Interior, Matteo Salvini, who allegedly masterminded the state's response. The charge was that keeping people onboard the *Diciotti* amounted to illegal deprivation of liberty insofar as it violated multiple norms of both national and international law. Further criminal cases were later initiated on the same grounds against other members of the executive, including the President of the Council of Ministers, Giuseppe Conte, but these charges were dismissed.[78]

For the purposes of the present discussion, the criminal case against the Minister of the Interior is particularly notable and deserves further comment.[79] On 22 January 2019, the Tribunal of Catania confirmed the charges of kidnapping and requested Parliament to authorize a trial.[80] Pursuant to the Italian Constitution, in order for ministers to be tried for acts committed in the exercise of their functions, authorization by one of the Chambers of Parliament is required.[81] In its request to Parliament for authorization to proceed, the Tribunal of Catania attached great importance to international law, referring in particular to limits set by international treaties to the exercise of governmental action and administrative discretion. As a matter of principle, the Tribunal correctly recalled that, by virtue of the Constitution, the treaties to which Italy is a party cannot be subject to

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78 'Diciotti: procura Catania chiede archiviazione per Conte, Di Maio e Toninelli' *Reuters Italia* (20 February 2019) <https://it.reuters.com/article/topNews/idITKCN1Q91Z6-OITTP> accessed 19 April 2019.

79 It should be noted that the strictly criminal law aspects, including the soundness of the criminal charges levied against the Minister, lie outside of the scope of the present analysis, which focuses only on the aspects of the request to Parliament which are relevant from the standpoint of international law.

80 For the text of the request for authorization to proceed see Request (n 41). All charges against the other members of the government were instead dismissed on account that the alleged criminal conducts could not to be attributed to them: see 'Diciotti: archiviazione per Conte, Di Maio e Toninelli' *AdnKronos* (21 March 2019) <https://www.adnkronos.com/fatti/politica/2019/03/21/diciotti-archiviazione-per-conte-maio-toninelli_zzkKMI6DY7anUkeqC6KJlL.html?refresh_ce> accessed 10 April 2019.

81 Italian Constitution, Article 96.

derogation by decisions of either Parliament or any other political authority.[82] Article 117(1) of the Italian Constitution indeed provides that 'legislative power is exercised by the state and the regions in compliance with [...] the constraints deriving from [...] international obligations'. The Constitutional Court has interpreted this provision as meaning that, after incorporation, treaties possess a rank higher that ordinary legislation in the Italian hierarchy of norms.[83] Consequently, the Tribunal of Catania affirmed that '[political] discretion in the management of migratory flows is constrained, pursuant to the Constitution [...] [by] the norms of binding international treaties'.[84]

While the above statements of principle may seem uncontroversial, the way in which the Tribunal applied them to the circumstances under its review is more distinctive. The key issue with which the Court was confronted was whether Minister Salvini's actions with regard to the *Diciotti* incident fell within the legal definition of kidnapping, i.e. an 'unlawful deprivation of physical liberty'.[85] Having affirmed that deprivation of liberty which does not conform to the requirements of international law must be considered unlawful,[86] the Court embarked on an examination of a number of international legal sources, including the UNCLOS, the SOLAS and SAR Conventions, and the IMO Maritime Safety Committee Guidelines on the Treatment of Persons Rescued at Sea.[87] This led it to conclude that, once the

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82 Request (n 41) at 9. It should be noted that the principle of prevalence of international treaties over ordinary laws was traced back by the Tribunal to Articles 10, 11 and 117 of the Constitution. In fact, only the referene to Article 117 is pertinent, while the other two provisions have no relevance for the domestic rank of treaties.

83 Constitutional Court, Judgments Nos. 348 and 349 of 24 October 2007.

84 Request (n 41) at 42 (translation by the author).

85 Ibid 27, quoting from Court of Cassation, Fifth Criminal Section, No. 19548/2013 (in the original: 'illegittima restrizione della [...] libertà fisica'). The crime of kidnapping is provided for in Article 605 Italian Penal Code.

86 Request (n 41) at 30.

87 Ibid 9-12 and 30-35.

ship was docked in the port, preventing disembarkation for two to five days constituted a violation of the international law of the sea.[88]

A further interesting feature of the decision of the Tribunal of Catania relates to its treatment of the political connotation of the decision to close Italy's ports. The age-old problem of the intersection of politics and adjudication originates from a variety of considerations. One such consideration, which falls outside the scope of the present discussion, relates to the supposedly political nature of law itself. As is well known, a popular scholarly view sees international legal discourse as inherently political,[89] though the extent to which this is the case is very much contested.[90] Secondly, judicial decisions may have the effect of thwarting the choices of democratically elected organs: this is referred to as 'counter-majoritarian difficulty' in US legal circles.[91] Thirdly, from the standpoint of the principle of separation of powers, it is argued that some decisions should be taken by the legislature and executive only and not by the courts.[92] In Italian judicial practice, this last concern has given rise to the doctrine of the so-called *atto politico*,[93] a form of judicial

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88 Ibid 32. It should be noted that the Tribunal of Catania's jurisdiction did not extend to the events between the rescuing of the migrants and the arrival in the port of Catania. Such events had instead been previously examined by the Tribunal of Palermo, in order to assess whether the Minister of the Interior had committed any crimes in that phase. Some excerpts contained in the decision of the Tribunal of Catania clarify that the Tribunal of Palermo (whose ruling has not been made public) held that no violations of international law had been committed until the *Diciotti* reached Catania: see ibid 5.

89 Martti Koskenniemi, *From Apology to Utopia: The Structure of the International Legal Argument* (2nd edn, Cambridge University Press 2005); David Kennedy, *International Legal Structures* (Nomos 1987).

90 James Crawford, *Chance, Order, Change: The Course of International Law* (AIL-Pocket 2014) at 157-178.

91 Francois Venter, 'The Politics of Constitutional Adjudication' (2005) 65 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 129.

92 Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 Yale Law Journal 597.

93 On which see, *ex multis*, Cesare Dell'Acqua, *Atto politico ed esercizio di poteri sovrani* (CEDAM 1983); Giuseppe Di Gaspare, *Considerazioni sugli atti di governo e sull'atto politico: l'esperienza italiana e francese nello stato liberale* (Giuffré 1984); Gabriele Pepe, 'Il principio di effettività della tutela giurisdizionale tra atti politici, atti di alta amministrazione e leggi-provvedimento' (2017) 22 Federalismi.it.

abstentionism analogous to the US 'political question' doctrine or the French *acte de gouvernement*.[94] In the *Marković* case, for example, the Italian Court of Cassation held that the Italian courts had no jurisdiction over a claim for compensation brought against Italy by Serbian nationals whose relatives had been victims of the 1993 NATO bombing of Belgrade. The Court held that the conduct of hostilities by the executive branch constituted an *atto politico* and was thus outside the reach of judicial review.[95]

The problem raised by the 'political question'/*atto politico* doctrine is essentially one of a tradeoff between separation of powers and the rule of law. In shielding political acts from judicial review, this doctrine entails an obvious tension with the idea that the political branches should be held accountable for breaches of the law. This also applies as far as the IRL is concerned. Indeed, when the 'political question' doctrine is applied to the field of foreign affairs, it constitutes one of the typical 'avoidance doctrines' used by courts to refrain from applying international law in politically sensitive cases. As such, it has been criticized as severely limiting the effectiveness of international law within domestic legal orders: in practice, it may lead any international law claim against the government to fail on procedural grounds.[96]

In the present case, one of the issues before the Court was whether the acts of the Minister could be subject to judicial review even though they were expressions of a political decision by the executive. The prosecutor argued that the facts under scrutiny constituted a legitimate political choice, not subject to judicial review on account of the principle of separation of powers.[97] However, the Court struck the balance between the prerogatives

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94 James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012) at 83-87 and 103-110.

95 *Presidency of the Council of Ministers v Markovic and ors*, Order No. 8157 of 8 February 2002, ILDC 293 (IT 2002). For the doctrine's classic restatement in the US legal system, see *Baker v Carr*, 369 US 186 (1962).

96 Benvenisti (n 22) at 169-170. See further Daniele Amoroso, 'Judicial Abdication in Foreign Affairs and the Effectiveness of International Law' (2015) 14 Chinese Journal of International Law 99. On the concept of 'avoidance doctrines' see also above Section II.

97 Roberto Bin, 'Halloween! Il Caso Diciotti e il fantasma dell'atto politico' (laCostituzione.info, 1 November 2018)

of the political branches and their accountability decisively in favor of accountability. It stated that only acts laying down the governmental political agenda in a general and abstract way can be free from judicial review, mentioning, by way of example, the government's request for a vote of confidence or the management of foreign relations. By contrast, this does not apply to political decisions which have the capacity to directly impinge on individual rights.[98]

Such a restrictive understanding of the notion of *atto politico* – as well as the ensuing enhancement of governmental accountability – is certainly commendable from the standpoint of the IRL. It also appears reasonable from the standpoint of domestic constitutional law. As a matter of fact, the Court proved to be well aware of separation of powers concerns and did not rule out that certain areas of governmental action may lie outside the realm of judicial scrutiny. It simply limited such an exemption to those decisions that the Constitution expressly allocates to the legislature and executive only. This approach distances itself from the *Marković* precedent, and with good reason: with regard to that case, it had been noted in the literature that specific military actions 'are not to be considered as political decisions, but rather as executive activities undertaken in the implementation of a previous political decision' and should thus be amenable to judicial review.[99] What the Italian Constitution does entrust to the parliament, which also confers upon the executive the necessary authority in this field, is the authority to decide to engage in military operations, so that, as a consequence, only such political decisions may not be subject to judicial scrutiny.[100] *Mutatis mutandis*, the

<https://www.lacostituzione.info/index.php/2018/11/01/halloween/> accessed 19 April 2019.

98 Request (n 41) at 48.

99 Micaela Frulli, 'When are States Liable towards Individuals for Serious Violations of Humanitarian Law? The Marković case' (2003) 1 Journal of International Criminal Justice 406, at 411-412.

100 Ibid. For critical views of the 'political question' doctrine from the standpoint of constitutional law see further Jonathan I. Charney, 'Judicial Deference in Foreign Affairs' (1989) 83 American Journal of International Law 805, at 806-807, noting that the idea that the judiciary should play no role in the area of foreign affairs is an unproven assumption; and, with regard to Italy, Francesco Bilancia, 'Ancora sull'"atto politico" e sulla sua pretesa insindacabilità giurisdizionale. Una categoria tradizionale al tramonto?' (2012) Rivista AIC,

Tribunal of Catania's approach to the notion of *atto politico* seems to fall squarely within this approach. Furthermore, the 'political question' doctrine is not the only way of safeguarding the prerogatives of the political branches from judicial encroachment. A restrictive understanding of that doctrine may well combine with other means of protecting the separation of powers, such as the adoption of techniques of judicial review of variable intensity. These may include resorting to the (broader) 'unreasonableness' test or to the (stricter) proportionality test.[101]

In light of the above, the response of the Italian judiciary to the governmental breaches of international law in the context of the *Diciotti* affair might appear to be a textbook confirmation of the view of national courts as guardians of the IRL. From an institutional standpoint, Italian courts are certainly independent and empowered by domestic law to apply international law, whose municipal hierarchical rank is moreover higher than ordinary legislation. In the course of the *Diciotti* case, the courts showed no proclivity for the protection of executive policies, nor did they overtly or covertly resort to any 'avoidance doctrines' with a view not to enforcing international law. On the contrary, the Tribunal of Catania was willing to use the relevant international norms as standards of review of the legality of executive action. And this was not limited to reparation claims against the state, but the courts even attempted to hold members of the executive individually liable from a criminal standpoint. All the elements would seem to be in place for effectively ensuring respect for the IRL, along the lines of what the 'internationalist model' suggests.

<https://www.rivistaaic.it/images/rivista/pdf/F.%20Bilancia.pdf> accessed 12 July 2019. Different considerations apply to cases where a constitution expressly rules out judicial review of governmental action; but this is a rare occurrence. See e.g. Art. 19(3) of the Hong Kong Basic Law: 'The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs'.

[101] Amoroso (n 96) at 123-124.

2. The Limits of National Courts: Structural and Functional Obstacles to Holding Governments Accountable

But this is not the whole story. Indeed, the *Diciotti* case also allows us to identify possible shortcomings of the 'internationalist model', highlighting at least three reasons for caution as regards national courts' capacity to contribute to the IRL. These reasons concern: (i) the relationship between domestic and international rule of law; (ii) the effectiveness of the remedies provided by national courts; and (iii) the issues relating to national courts' international law expertise. The first two points are more substantial in that they relate to structural limitations on the role of national courts, i.e. they are constraints originating from the domestic legal framework. As a consequence, a national court normally has no power to overcome them. The third point instead concerns a functional limitation on the courts' ability to effectively apply international law, i.e. a difficulty produced by the court itself and specific to a concrete case.[102]

A first issue highlighted by the *Diciotti* case is that conflating the IRL and the domestic rule of law comes at the risk of some oversimplification.[103] As a matter of fact, what the two concepts require may very well diverge in practice, even in cases where there is a substantive overlapping between international law and national law. Consider the criminal prosecution against the Minister of the Interior. As noted above, the Tribunal of Catania requested parliament to authorize the prosecution to proceed, on the basis that the Constitution necessitates such an authorization. However, Parliament eventually refused to grant authorization, thus barring the enforcement of (domestic and) international law against members of the executive.[104] Was parliament's refusal compliant with the rule of law? If only one notion of the rule of law existed, the answer to this question would be

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[102] See Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford University Press 2014) at 180.

[103] On this equivalence, see Nollkaemper (n 1) at 3. See further above Section II.

[104] 'Diciotti: il Senato nega l'autorizzazione a procedere per Salvini' *Ansa* (20 March 2019) <http://www.ansa.it/sito/notizie/politica/2019/03/19/diciotti-in-aula-al-senato-il-voto-su-salvini-diretta_e77b11bc-d840-4f9f-b49f-424054ca8167.html> accessed 19 April 2019.

unequivocal. Arguably, however, such an evaluation varies depending on whether one adopts an international law or a domestic law perspective.

From the standpoint of the IRL, parliament's vote cannot but be judged negatively, in that it stood in the way of governmental accountability for violations of international law and effectively diminished the courts' ability to act as agents for the promotion of the IRL. Conversely, from the viewpoint of the domestic rule of law, there is simply no accountability gap. Parliament's refusal to authorize prosecution belongs to the physiology of the domestic legal system. Indeed, Article 9(3) of Constitutional Law No 1 of 1989, whose legal value in the Italian legal system is equal to the Constitution, provides that parliament may deny the authorization to proceed if it considers that the Minister acted 'for the protection of a constitutional interest of the State or for the pursuit of a pre-eminent public interest in the exercise of the function of Government'. Parliament's decision is expressly qualified as not subject to external review. Thus, it is the domestic constitutional framework itself which allows for violations of the law when they are directed at pursuing prominent public interests, and this decision is bestowed on parliament only. This may offer support to the view that national courts are first and foremost bound to the promotion of the *domestic* rule of law.[105] They may also promote the IRL when the two concepts happen to coincide; however, where the IRL and the domestic rule of law set differing standards – as may well be the case – the former is inevitably destined to give way.

The failure of the *Diciotti* prosecution also provides a second insight into the structural limits faced by national courts in the application of international law. The 'internationalist model' is premised on the idea that domestic courts can provide international law with effective mechanisms of enforcement. However, there may be a risk of overstating the effectiveness of the remedies that domestic law can provide. National courts normally intervene *ex post facto* and their intervention is often confined to the area of monetary compensation. While this may ensure redress for the victims, it is hardly a

[105] Benvenisti and Downs (n 25) at 61. See further above Section II.

means which can effectively alter state policies challenging the IRL and avoid breaches of international law.[106]

Notably, while the civil case against the Italian government for breaches of international law occurred during the *Diciotti* incident is still pending, Italy's policies of migration containment (particularly the 'closed ports policy') have continued unaltered,[107] thus creating the risk of new violations of international migration law. This situation is not surprising. A civil case brought against the state as a whole, where claimants ask for modest amounts of compensation,[108] is hardly a powerful incentive to avoid breaches of international law – even more so for governments feeding on migration control for political gains. The *Diciotti* prosecution was an attempt by the Italian courts to turn the tables, in that holding members of the executive individually liable for breaches of international law is certainly a much more effective means to condition future state policies and avoid further breaches

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[106] Importantly, there are relevant exceptions where national courts can prevent breaches of international law from occurring. The most relevant exception occurs in situations where courts can alter domestic legislation, e.g. by declaring domestic statutes inconsistent with international law to be null and void. This may happen in the Italian legal order, where the Constitutional Court can quash statutes conflicting with either general international law (see Italian Constitutional Court, Judgment No. 131 of 15 May 2001) or international treaties (see Italian Constitutional Court, Judgments No. 348 and 349 of 24 October 2007). But of course this remedy is only able to prevent breaches of international law which are directly produced by legislation. This was not the case with the *Diciotti* incident, where the breaches of international law were caused by acts of government. In yet other cases, national courts do not merely intervene *ex post facto* but may order cessation of an ongoing illegal act (e.g. an unlawful detention). But again, this was not the case for the *Diciotti* migrants, whose deprivation of liberty was not subject to any judicial review.

[107] As of September 2019, the 'closed ports policy' is being reconsidered in consequence of a change of government: see 'Conte migrant summit with Lamorgese' *Ansa* (12 September 2019) <http://www.ansa.it/english/news/world/2019/09/12/conte-migrant-summit-with-lamorgese_26afc861-3988-40fe-b9be-d5a0d5e74b69.html> accessed 17 September 2019.

[108] In the civil case before the Tribunal of Rome, the 41 appellants asked compensation ranging from around 1000 to 1700 euros per migrant: see the appeal (n 77) at 33.

of international law. But, as the case at hand proves, a constellation of procedural obstacles may make this option impracticable. Therefore, there appears to be an intrinsic limit to the powers of national courts. Their primary role is to provide remedies for breaches that have already occurred,[109] not to guarantee compliance with international obligations in the first place.

In addition to the above structural problems, another difficulty arises from the fact that the Tribunal of Catania's analysis of international law betrayed a serious lack of international law expertise. Had the Parliament allowed the criminal case to proceed, these flaws might have proven to be serious hurdles in the subsequent stages of the trial. This confirms the scholarly warnings that an insufficient knowledge of international law among judges frequently proves to be a significant obstacle to the implementation of international law, perhaps not less relevant than large-scale institutional deficits in a country's domestic law.[110]

There were two main weaknesses in the way the Tribunal of Catania handled the crucial issue of the unlawfulness of the deprivation of liberty. First, it assumed too much with regard to violations of the law of the sea. The Court found a breach of international law in the refusal by the Italian authorities to formally answer to the *Diciotti*'s request for a place of safety.[111] However, the Conventions do not set forth any such obligation. They merely require the rescued people to be brought to a location which meets the required standard

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[109] David Sloss, 'Domestic Application of Treaties', in Duncan B. Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012) 367, at 392-393, noting that if executive officials correctly interpret and apply international law a corrective intervention by national courts may not be needed in the first place.

[110] Many authors have noted that a deficient application of international law in domestic legal systems may stem from a lack of familiarity of judges and lawyers with it, or from the courts' unconscious penchant for domestic law. See e.g. Huneeus (n 28) at 134-135; Harold H. Koh, 'Why the President (Almost) Always Wins in Foreign Affairs – Lessons on Iran-Contra Affair' (1988) 97 Yale Law Journal 1255, at 1315-1316, noting the importance of the background and personality of judges; Bakhtiyar R. Tuzmukhamedov, 'International Law in the Russian Constitutional Court' (2000) 94 American Society of International Law Proceedings 166, at 170, citing as hearsay the case of a US judge who refused to apply the ICCPR 'because he had never heard of it'.

[111] Ibid 31.

of safety, not that such location should be expressly and formally designated as a 'place of safety' under the terms of the treaty.[112] Second, and more importantly, the Court only analyzed the international law of the sea and failed to consider the international obligations in the field of human rights law, particularly those arising from the ECHR. However, as seen above, the jurisprudence of the ECtHR is directly concerned with the notion of unlawful deprivation of liberty, and thus would have constituted a much sounder basis on which to affirm that international obligations had been breached.[113] This failure is all the more surprising when considering that the Court did mention the ECtHR *Khlaifia v Italy* judgment in another passage of its decision, but merely in order to sustain the (rather obvious) principle that inviolable human rights should be recognized also to illegal migrants.[114]

Of course, one should be cautious to draw general conclusions from specific cases where courts showed a lack of international law expertise. Where the misapplication of international law derives simply from negligence or careless methodology, the issue may perhaps be brushed off by blaming domestic judges for lack of professionalism. However, national courts' frequent ignorance of international legal regimes appears to raise a more profound and systemic red flag. Even where all the institutional conditions required under an 'internationalist model' for national courts to function as agents of the international legal order are realized – jurisdiction, independence, ability to apply international law, and standing – one should not simply expect national

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[112] The reason for such a misreading of the IMO Conventions lies in the fact that, in order to identify the relevant international obligations, the Court also relied on a non-binding document by the Italian Ministry of Infrastructure and Transport and the Italian Coast Guard containing the standard procedures for the identification of places of safety in the management of migratory flows: see 'Procedure operative standard per l'individuazione del "POS – place of safety" nell'ambito di operazioni SAR connesse all'emergenza flussi migratori via mare', SOP 009/15, <https://www.lastampa.it/rw/Pub/Prod/PDF/Standard%20Operating%20Procedure.pdf> (in Italian) accessed 19 April 2019. Because this document was adopted with a view to implementing the obligations flowing from the international law of the sea, the Court seemingly assumed that its contents were fully consonant with such obligations. But the procedural aspects of this regulation are of purely internal relevance and find no correspondence in the Conventions.

[113] See above Section II.

[114] Request (n 41) at 43.

courts to start acting as a 'a conveyor belt that delivers international law to the people'.[115] Similarly, also the courts' *willingness* to apply international law may not suffice.[116] The Court in the *Diciotti* case misconstrued international law despite being both institutionally empowered and clearly willing to apply it.

In concreto, in order to solve this issue, it may prove necessary to *actively provide* national courts with the necessary expertise, and this may require support from other agencies of the state. Just by way of example, many domestic legal systems confront this issue by promoting better legal training and information or by adopting legislation implementing or reproducing international norms which would be already part of national law.[117] At other times, national courts may rely on the executive's expertise for ascertaining the content of international law or for its interpretation. This form of judicial deference in international legal matters is normally criticized by the proponents of the 'internationalist model' as an undue interference by executives in judicial affairs, as if it would necessarily diminish the international legal function of national courts.[118] While this opinion is certainly justified in cases where courts are *obliged* to conform to executive

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115 Knop (n 27) at 505.

116 The relevance of the national courts' willingness to apply international law to the maximum extent allowed by their own domestic legal order is stressed by Benedetto Conforti (Massimo Iovane ed), *Diritto internazionale* (11th end, Editoriale Scientifica 2018) at 8.

117 Gennady M. Danilenko, 'Implementation of International Law in CIS States: Theory and Practice' (1999) 10 European Journal of International Law 51, at 56; Sloss (n 109) at 375-376.

118 The term judicial deference is generally used to describe all situations where national courts, 'out of respect for the legislature or the executive [...] decline to make their own judgment on a particular issue': see Richard Clayton, 'Principles for Judicial Deference' (2006) Judicial Review 109, at 109. See Conforti, *International Law* (n 14) at 17-20, advocating the disposal of all forms of judicial deference to the executive; Pierre Pescatore, 'Conclusion', in Francis G. Jacobs and Shelley Roberts (eds), *The Effect of Treaties in Domestic Law* (Sweet & Maxwell 1987) 273, at 277, arguing that judicial deference to the executive in treaty interpretation 'cannot be reconciled with the very idea of the rule of law'.

interpretation,[119] national courts' insulation from their domestic institutional environment is not necessarily a condition to be hoped for. Independent national courts can get it wrong, as the *Diciotti* case shows. And if some institutional support from other state agencies, including the executive, can enable them to obtain a better knowledge of international law, it is hard to see how that would not be a positive outcome for the IRL.[120]

V. Conclusion

The foregoing consideration of the *Diciotti* incident gives a mixed picture regarding national courts' capacity to contribute to supporting the IRL. Some elements certainly give reasons to trust in national judiciaries. The governmental breaches of international law committed in the course of the incident entailed two strands of cases, one civil and the other criminal, before the Italian courts. Regarding the criminal case, the competent court, the Tribunal of Catania, confirmed the charges brought against the Minister of the Interior and asked parliament to authorize a trial, as required under the Italian Constitution. The principles espoused by the Tribunal of Catania in its request to parliament are especially notable. The Court uncompromisingly stated that international law constitutes a limit to the exercise of political and administrative discretion in the management of migratory flows. It also discarded the argument that the governmental choice to 'close' Italy's ports was not subject to judicial review by reason of its political nature. The Court instead construed the notion of 'political question' restrictively and affirmed that any decision of the political

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[119] Notably, the French practice to reserve treaty interpretation to the Minister of Foreign Affairs was found by the European Court of Human Rights to be illegitimate, because in violation of the right to access to an independent and impartial tribunal: see *Beaumartin and Others v France*, App No 15287/89 (ECtHR 24 November 1994).

[120] Julian Arato, 'Deference to the Executive. The US Debate in Global Perspective', in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016) 198, particularly at 213, noting that 'a degree of interpretive discretion for national executives may be a good thing for the international legal order'. For a similar position in the context of the UK Human Rights Act 1998, see Alison L. Young, 'In Defence of Due Deference' (2008) 72 Modern Law Review 554.

authorities can be subject to judicial review as long as as it directly compresses individual rights.

However, other elements of the *Diciotti* affair suggest that some degree of caution is required. Firstly, the courts' capacity to hold the government accountable for its breaches of international law was limited by parliament's vote barring the hearing of the criminal case. This outcome, which is consistent with the Italian Constitution, highlights that the IRL and the domestic rule of law cannot be easily conflated. What is desirable from the standpoint of the former may run counter to the domestic constitutional framework and, thus, to the domestic rule of law. Secondly, the case at hand shows that the effectiveness of national courts' tools to enforce international law should not be overstated, particularly because national courts normally intervene in the remedial phase and may not be capable of guaranteeing compliance with international law in the first place. The cases initiated before the Italian courts produced no tangible effects on the governmental policies of migration containment from which the *Diciotti* incident, and the ensuing breaches of international law, originated. Thirdly, the lack of international law expertise shown by the Tribunal of Catania when dealing with the events of the *Diciotti* suggests that national courts may be unable to correctly apply international law even where they are both institutionally empowered and willing to do so. It might perhaps be advisable, therefore, to reconsider the view that national courts' insulation from other state branches is a necessary precondition for them to contribute to the IRL.

All things considered, the *Diciotti* affair seems to offer some support for the view that one should not put unlimited trust in the power of national judiciaries to enforce international law against unruly governments. While it is undeniable that they perform an important international legal function, they cannot be a panacea for all international law violations, not only because they cannot normally prevent breaches of international law, and mainly intervene in a remedial phase, but also because their remedial powers can be severely constrained by limitations set forth in domestic law. Briefly put, national courts are valuable yet imperfect systemic instruments for the

IRL.[121] Difficult though it may be, state compliance with international law normally requires efforts on the part of the state machinery as a whole.

[121] In these terms see Amoroso (n 96) at 133-134.