ITALY[1]

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Legislation — Italian Participation in International Missions

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[1] This Report was prepared by Rachele Cera, Andrea Crescenzi, Valentina Della Fina, Valeria Eboli, Ornella Ferrajolo, and Rosita Forastiero on behalf of the Institute for International Legal Studies of the National Research Council (CNR), Rome, Italy.

[2] *Legge 21 luglio 2016, n. 145, Disposizioni concernenti la partecipazione dell'Italia alle missioni internazionali*, entered into force on 31 December 2016 (exception Article 20 entered into force on 2 August 2016), published in Gazzetta Ufficiale No 178 of 1 August 2016.

[3] *Legge 14 luglio 2016, n. 131, Conversione in legge, con modificazioni, del decreto-legge 16 maggio 2016, n. 67, recante proroga delle missioni internazionali delle Forze armate e di polizia, iniziative di cooperazione allo sviluppo e sostegno ai processi di ricostruzione e partecipazione alle iniziative delle organizzazioni internazionali per il consolidamento dei processi di pace e di stabilizzazione, nonché misure urgenti per la sicurezza. Proroga del termine per l'esercizio di delega legislativa*, entered into force on 16 July 2016, published in Gazzetta Ufficiale No 164 of 15 July 2016.

[4] *Legge 4 agosto 2016, n. 157, Ratifica ed esecuzione dei seguenti Trattati: a) Accordo tra la Repubblica italiana e Bioversity International relativo alla sede centrale dell'organizzazione, fatto a Roma il 5 maggio 2015; b) Accordo tra la Repubblica italiana e l'Agenzia spaziale europea sulle strutture dell'Agenzia spaziale*

<http://www.gazzettaufficiale.it/eli/id/2016/08/12/16G00170/sg;jsessionid=VDEvjiwmy4ed41F4R1cy+Q__.ntc-as1-guri2a>

- Law No 249 of 21 December 2016, 'Ratification and implementation of the Agreement between the Government of the Republic of Slovenia, the Government of Hungary, and the Government of the Italian Republic on the Multinational Land Force (MLF), with Annex, made in Brussels on 18 November 2014,[5]
<http://www.gazzettaufficiale.it/eli/id/2017/01/05/16G00263/sg>

By Law No 145 of 21 July 2016, 'Provisions concerning Italy's participation in international missions' (hereinafter referred to as Law 145), the Italian Parliament adopted a general legal framework authorising the participation of Italian military contingents in international missions.

The adoption of a law concerning the authorisation of international missions was necessary, taking into account that, currently, Italy comes first in the list of Western and EU countries in terms of number of personnel engaged in UN and EU missions, and second in the number of NATO missions, after the US.

There are approximately 7,000 Italian troops currently engaged in 30 international missions, deployed mainly in Iraq, Afghanistan, Lebanon, Mali, Libya, Egypt, Kosovo, Malta, and Latvia. These missions include those linked to the fight against terrorism, support for the International Criminal Tribunal for the former Yugoslavia in Bosnia and Herzegovina, and the fight against Somali piracy in the Indian Ocean.

In Italy there were previously no general rules governing the procedures related to the authorisation and dispatching of international peacekeeping and peace-enforcing missions. The Italian Constitution only regulates the case of a 'state of war', establishing that it should be decided by the Chambers to give the necessary powers to the Government (Article 78), and that it is incumbent on the President of the Republic to make an official declaration of war (Article 87.9).

The participation in international missions established within the UN or other international organisations is allowed, provided it takes place in compliance with the principles enshrined in Article 11 of the Constitution. Article 11 forbids wars of aggression and allows the use of force only in well-defined cases, such as, for instance, self-defence.

Lacking a set of general rules on this matter, the practice was to have international missions approved through specific legislative measures (adopted usually every 6 months) which authorised the beginning of missions, extensions and funding. For example, Decree-Law No 67 of 16 May 2016, amended and converted into Law No 131 of 14 July 2016, provided for the extension of international missions of Police Armed Forces; development cooperation initiatives; support for reconstruction processes and participation in international

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europea in Italia, con Allegati, fatto a Roma il 12 luglio 2012, e Scambio di Note fatto a Parigi il 13 e il 27 aprile 2015; c) Emendamento all'Accordo tra il Governo della Repubblica italiana e le Nazione Unite sullo status dello Staff College del Sistema delle Nazioni Unite in Italia del 16 settembre 2003, emendato il 28 settembre 2006, fatto a Torino il 20 marzo 2015; d) Protocollo di emendamento del Memorandum d'intesa fra il Governo della Repubblica italiana e le Nazioni Unite relativo all'uso da parte delle Nazioni Unite di locali di installazioni militari in Italia per il sostegno delle operazioni di mantenimento della pace, umanitarie e quelle ad esse relative del 23 novembre 1994, con Allegato, fatto a New York il 28 aprile 2015, entered into force on 13 August 2016, published in Gazzetta Ufficiale No 188 of 12 August 2016.

[5] *Legge 21 dicembre 2016, n. 249, Ratifica ed esecuzione dell'Accordo tra il Governo della Repubblica di Slovenia, il Governo di Ungheria e il Governo della Repubblica italiana sulla Multinational Land Force (MLF), con Annesso, fatto a Bruxelles il 18 novembre 2014*, entered into force on 6 January 2017, published in Gazzetta Ufficiale No 4 of 5 January 2017.

organisations' intitatives aimed at strengthening peace and stabilisation processes; and urgent security measures.

This Decree was adopted to provide adequate financial and legal coverage to planned and on-going interventions, as the measures previously in force provided for such coverage only until 31 December 2015.

According to an established procedure, this Decree-Law governed all missions' regulatory aspects, while for economic, social security, accounting, and criminal law the Decree-Law made an express reference to Law No 108/2009 for matters relating to personnel and to Decree-Laws No 152/2009 and No 209/2008 for issues falling with the scope of criminal law.

Decree-Law No 67/2016 consisted of three headings and twelve articles. The first Heading covered expenditure authorisations for 2016. This authorisation was necessary to extend Italy's participation in international missions currently in progress and to maintain interventions related to development cooperation, support for peace and stabilisation processes (Articles 1−4). Expenditure authorisations were grouped according to geographical criteria: Europe (Balkans, Bosnia and Herzegovina, Albania, Kosovo, Cyprus, and Mediterranean areas); Asia (Afghanistan, Qatar, United Arab Emirates, Bahrain, and Lebanon); and Africa (Mali, Horn of Africa, Indian Ocean, and Somalia).

There were rules on personnel (Article 5), and on matters related to criminal law (Article 6) and accounting (Article 7). There was then a heading devoted to initiatives concerning development cooperation (Article 8) and support for peace and stabilisation processes (Article 9), and to the intervention scheme (Article 10). The last heading provided for the funding of all the measures (Article 11) and its entry into force (Article 12).

With Law No 145/2016, the practice of decrees was discontinued in favour of clear and certain regulation, especially in relation to the role of the different constitutional organs involved in the procedure for the authorisation and extension of Italian participation in international missions.

Law 145 identifies the types of mission, that is to say, peace-keeping and peace-enforcement missions established by the UN or other international organisations of which Italy is a member, including those of the EU, and those which are established under international law (Article 1). Missions established on the grounds of exceptional humanitarian interventions are also included. Though international missions established under the NATO umbrella are no explicitly referred to in Article 1, it seems reasonable that they would fall within the general terminology 'other international organisations of which Italy is a member or, at any rate, established under international law'.

In contrast, some doubts arise concerning the phrase 'exceptional humanitarian interventions'. It is not clear whether it refers to the interventions undertaken to rescue civilian population only, as in the case of Haiti after the 2010 earthquake, or also the use of force within the framework of the 'Responsibility to Protect' doctrine.

Moreover, Article 1 of Law 145 specifies that sending personnel outside national territory is allowed, if its use takes place in compliance with Article 11 as well as with international law in general, international humanitarian law and international criminal law.

Law 145 also establishes that participation in military missions is decided by the Council of Ministers, after informing the President of the Republic and, if necessary, the Supreme Defence Council. This prevents approval being made by Parliament at a final stage, as happened in the past, by converting the Law-Decree (financing the mission) into a law without suitable preliminary examination. The decision is then transmitted to the Chambers, which authorise or deny authorisation on a 'timely basis' and 'in compliance with their rules of procedure' (Article 2).

For each mission, the decision should indicate the following elements: intervention area, objectives, legal basis, which assets to send, including the maximum number of personnel involved, the planned length of the intervention, and the amount of resources to be allocated. Then, Parliament makes its decision based on this information (Article 2.2).

Moreover, under Law 145, following a proposal by the Minister of Foreign Affairs and in agreement with the Minister of Defence and the Minister of the Interior, the Government will submit a report for the approval of the Chambers by 31 December every year. This analytical report on both on-going and concluded missions should cover the progress and the results concerning, but not limited to, the participation of women, the adoption of a gender-sensitive approach, development cooperation interventions, and support for peace and stabilisation processes. The report should come with a summary document, carrying the main data for each mission, such as the international mandate, the length of the mission, the location, the national and international staff deployed, and end-dates, as well as mission updates (Article 3).

In order to finance Italy's participation in international missions, Law 145 provides for the setting up of a specific fund at the Ministry of Economy and Finance, whose allocation is established on a yearly basis by the budget stability law, or by specific legislative measures (Article 4).

This fund is then made accessible by the President of the Council of Ministers' decrees, issued on proposal of the relevant Ministers. These decrees and a technical report are then submitted to the Chambers for an opinion to be given by the Parliamentary committees that have responsibilities for those subject matters and their financial aspects. These opinions should be given within twenty days. If the Government does not intend to comply with the opinions of the parliamentary committees, the texts are transmitted again to the Chambers, with the Government's remarks, amendments, if any, and additional information and explanations. The final opinions of the relevant Committees should be expressed within ten days. After this period, if no answer has been given, the decrees can be adopted (Article 4.3).

The subsequent articles are of merely administrative character; they regulate the treatments of the personnel participating in international operations (articles 5-18).[6] Law 145 takes into account to some extent the possibility that a situation similar to that involving the two Italian marines (the so-called Marò) arrested in India on 17 February 2014 may happen again.[7] In fact, it establishes that Italian military personnel who are detained, or are missing, as a result of their deployment in international missions, keep the allowances and benefits they were entitled to while still operational (Article 9).[8]

[6] The Law 145, as regards the economic treatment of personnel, confirms mission allowances (Article 5), lump sum remuneration for deployment and overtime (Article 6), and operational deployment allowances (Article 7). From an insurance perspective, Law 145 tends to favour lower-rank personnel, granting them the treatment provided for in Law No 301 of 18 May 1982, with a minimum coverage equivalent to the economic treatment of the rank of staff sergeant or corresponding level (Article. 8). Furthermore, it establishes that service rendered in international missions is taken into account when making assessments for promotion to a higher rank (Article 11). Personnel who have applied for an internal competition and cannot take part in it as they are on missions abroad will automatically participate in the next one. If they make it through the selection process, seniority will be calculated starting from the time of the original competition (Article 12). The next articles concern the right to defence in different courts (Article 13), working time (Article 14), days off and ordinary leave (Article 15), service telephone subscriptions (Article 16), civilian staff, with the same entitlements as those of military personnel (Article 17), and the civilian cooperation advisor (Article 18).

[7] See the comment on 'Arbitration between Italy and India in the Dispute concerning the Enrica Lexie Incident' below in this Report.

[8] G Palmisano 'On the Application of International Law in the "Marò" Case' (2014-2015) *Italy and International Law* 2, <http://www.larassegna.isgi.cnr.it/en/focus-on-the-application-of-international-law-in-the-maro-case>.

As regards criminal-law provisions, Law 145 lays down that the Italian military criminal code of peace time is applicable to those personnel taking part in international missions and personnel sent to support the same missions (Article 19.1). If the Government decides to apply the rules of the Italian military criminal code of wartime, under Article 19.2, a specific bill should be submitted to Parliament (Article 2.2).

Moreover, those who use or order the use of force for needs linked to military operations are not punishable under this Law. The non-punishability provision was originally limited to military personnel; now, it has been extended to all mission staff, including support staff (Article 19.3). However, non-punishability is not extended to crimes referred to in Articles 5 and subsequent articles of the Statute of the International Criminal Court, such as the crime of genocide, war crimes, and the crime of aggression (Article 19.4).

As regards the last articles of Law 145, it is worthwhile mentioning that the Ministry of Defence, the Ministry of the Interior, and the Ministry of Economy and Finance may initiate urgency procedures for the purchase of goods and services linked to particular needs in international missions (Article 21). Just like in the cases of need and urgency, in order to cater for the indispensable needs of local populations, contingent commanders may order purchases and interventions or they may start works. These should be done with an eye to costs, derogating the Government general accounting provisions, within the limits established for the Fund set up at the Ministry of Economy and Finance (Article 22).

Law 145 has undoubtedly filled in a gap that existed in the Italian legal system for a long time, even though some issues are still pending. In fact, this law seems to cover all missions in which Italy takes part, but not missions that Italy may decide to be involved in on its own, as remote as that possibility may be.

At the same time, Law 145 does not specify whether it is possible to adopt urgent measures, such as ordering the dispatch of a mission without obtaining the Chambers' authorisation first. The phrase 'in a timely fashion' in Article 2.2 with reference to the time allowed for obtaining Parliament's authorisation is, to some extent, mitigated by the statement 'in compliance with their rules of procedure'. In fact, Law 145 does not seem to cover intelligence missions with military co-participation, provided for in Law No 198 of 1 December 2015, converting and amending Decree-Law No 174 of 30 October 2015, concerning the extension of international missions of Police Armed Forces; development cooperation initiatives; support for reconstruction processes and participation in international organisation initiatives aimed at strengthening peace and stabilisation processes.

Law 198/2015 allows the President of the Council of Ministers, after hearing the Parliamentary Committee for the Security of the Republic, to adopt special intelligence measures, in cooperation with defence special forces in the event of crisis or emergency situations abroad involving national security or the protection of Italian nationals abroad. Moreover, it is established that personnel of the Armed Forces deployed in these activities are entitled to the same functional guarantees given to secret service agents: they are not punishable for the crimes they may have committed and they can use false identities. It is not clear, however, whether the procedure provided for in the outline law is applicable in this case, or whether these types of mission are excluded.

As regards the financing of military operations in which Italy takes part, two laws of 2016 should be mentioned: Law No 157 of 4 August 2016 and Law No 249 of 21 December 2016.

Law No 157/2016 concerned the ratification and implementation, among other instruments, of the Protocol of Amendment of the Memorandum of Understanding between Italy and the United Nations regarding the use by the UN of military installations in Italy for the support of peacekeeping and humanitarian operations.

The strong increase in the number of UN engagements in the stabilisation of crisis areas led then-Secretary-General Ban Ki-moon to submit a Global Field Support Strategy specifically devoted to logistics support in 2010. This Strategy provided for centralisation and standardisation in the management of logistics support activities in order to improve effectiveness and deployment capabilities, as well as to contain peacekeeping operation costs.

Brindisi's UN logistics base, initially established in the mid-1990s as a warehouse of materials discarded by the UN Protection Force Operation of the former Yugoslavia, had its function extended. It later became the base of important support services for UN peacekeeping and humanitarian operations.

The Protocol of Amendment was adopted to regulate some areas that were not covered by the Memorandum of Understanding between Italy and the UN. The most important changes include the commitments taken by Italian authorities to ensure the following: privileges and immunity of the base in the event of legal actions against the UN (Article 2); exemption from taxes, duties, prohibitions, and restrictions (Article 4); inviolability of the premises with exclusive use (Article 5); safety and security of UN and related staff, including members assigned to the premises and visitors (Article 7); and extension of privileges and immunity to base personnel (Article 9).

Law No 249/2016 provided for the ratification and implementation of the Agreement between the Governments of the Republic of Slovenia, Hungary, and Italy on the Multinational Land Force (MLF), with Annex, made in Brussels on 18 November 2014. This Agreement replaced and updated the content of the previous Agreement establishing the MLF on 18 April 1998. After Slovenia and Hungary joined NATO (in 2004 and 1999, respectively) and the EU (in 2004), there was a need to harmonise the Agreement provisions with the consequent training and operational needs.

The MLF is intended to: strengthen military cooperation between signatory countries; help develop a European security and defence identity; increase the response capability in crisis situations; and reinforce military relations between the countries concerned, in accordance with their domestic legal systems and international obligations. Italy, as the 'Leading Nation', provides the Commander and most of the personnel of the Headquarters. The MLF was used, among other missions, in Kosovo and in Afghanistan within the ISAF mission.

As regards financial coverage, both Laws (Nos 157 and 249) establish that the costs for the implementation of the respective Agreements should come from the Special Fund, which is part of the Programme 'Reserve and Special Funds' of the Ministry of Economy and Finance (Article 3.1).

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Cases — Differences between 'War Campaigns' and 'Peace Operations'

☛ Decision No 240 of 4 October 2016 of the Constitutional Court, *Federalismi.it. Rivista di diritto pubblico italiano, comparato ed europeo* <http://www.federalismi.it/ApplOpenFilePDF.cfm?artid=32734&dpath=document&dfile=11112016162254.pdf&content=Corte+Costituzionale,+Sentenza+n.+240/2016,+in+tema+di+militari,+personale+militare+in+servizio+per+conto+dell%27ONU+in+zone+d%27intervento.+-+stato+-+documentazione+-+>

In 2016, the Constitutional Court had an opportunity to analyse the concepts of 'war' and 'peace operations' in Italy's domestic legal order.

The Court was asked to assess the constitutionality of certain legislative provisions concerning the salary and pension of members of the Italian Army participating in UN and other peace operations. Relevant is Law No 1746 of 1962,[10] which established that the military personnel employed in so-called 'intervention areas' in the framework of UN operations are entitled to such treatment as is provided by law for 'combatants' (Article 1, paragraph 1). The only requirement is that the Chief of the Defence Staff has issued a determination of its own which lists the relevant geographical areas (paragraph 2), made, of course, in accordance with the UN Security Council resolutions.

Based on these provisions, a number of members of the Army who had served in countries such as Afghanistan, Iraq, Egypt, Somalia and Eritrea filed applications before regional administrative courts to have their right to pension benefits recognized, for the relevant periods, which Law No 390 of 1950[11] granted to combatants participating in 'war campaigns'. In many cases these claims were successful. However, the Council of State later reversed the first instance decisions because Law No 1746/1962, though extending certain combatants' benefits to peacekeepers, does not cover this particular benefit, which Law No 390 provided only for those who participated in Second World War campaigns.[12]

The Administrative Court for the Friuli-Venezia Giulia Region decided, rightly, that this authoritative interpretation from the Council of State represented the 'living law' on the matter. The same interpretation, however, raised doubts about the compatibility of Law No 1746/1962 with the principle of equality before the law (Article 3.1 of the Constitution).[13] Consequently, the Administrative Court referred the question to the Constitutional Court through nine orders (No. 73 to 81) of 12 February 2015. There also followed an order with same content from the Abruzzo Region Administrative Court (No. 35 of 2016).

The Constitutional Court decided on all these recourses by decision No 240/2016.[14] As is clear, the core issue of the submitted question was whether denying to peacekeepers some

[10] Law No 1746 of 11 December 1962, 'Extension of benefits for combatants to the military personnel in service in intervention areas for the purposes of UN missions', published on the *Gazzetta Ufficiale* No 6 of 8 January 1963, <http://www.gazzettaufficiale.it/eli/id/1963/01/08/062U1746/sg>.

[11] Law No 390 of 24 April 1950, 'Calculation of the 1940-1945 war campaigns', published in the *Gazzetta Ufficiale* No 149 of 3 July 1950, <http://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario;jsessionid=HKbKm3S0c7n8ewJCx2ekgA__.ntc-as5-guri2b?atto.dataPubblicazioneGazzetta=1950-07-03&atto.codiceRedazionale=050U0390&elenco30giorni=false>.

[12] Decision No 5127 of 2014 of the Council of State, <https://www.giustiziaamministrativa.it/cdsintra/cdsintra/AmministrazionePortale/DocumentViewer/index.html?ddocname=KUBQHWE75JP6DZXDDCKTNAJAXM&q=>.

[13] 'All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.'

[14] Decision No 240 of 4 October 2016 of the Constitutional Court, *Federalismi.it. Rivista di diritto pubblico italiano, comparato ed europeon,*

benefits granted to the military staff involved in war campaigns amounts to discrimination. It is a well-established principle that a violation of the equality principle under the Constitution occurs every time persons in same situation are entitled to differing legal treatments. In the opinion of the applicants and the referring judges, taking part in UN peace operations does not substantially differ from serving in war campaigns. Certainly, the objective of such operations is maintaining or restoring peace conditions. However, the modalities of the activity are the same in both cases. Most importantly, the activity itself is such to put the lives of the personnel involved at risk, be they peacekeepers or 'combatants' in proper sense.[15] In addition, the unique requirement provided by Law No 1746/1962 was met in the cases at hand. All the geographical areas where the complainants had served for the purposes of UN operations were listed in an order of the Chief of the Defence Staff issued on 11 January 2007, and renewed in 2013.

The Presidency of the Council of Ministers intervened, through the *Avvocatura generale*, in the proceeding before the Constitutional Court. It argued that, after the adoption of Law No. 1746/1962, special legislation on peacekeeping has developed in Italy. The relevant legal framework provides that combatants are not entitled to certain monetary benefits outside of times of war. Under the Constitution, a state of war exists if the Parliament has so agreed (Article 78),[16] and an official state of war declaration has been made by the Head of the State (Article 87.9). Clearly, determination from the administrative authority of the geographical areas wherein Italian military contingents have to serve in furtherance of Security Council resolutions cannot be a substitute for these constitutional requirements.

The *Avvocatura* also invoked the preparatory works of Article 1858 of the Code of the military order,[17] as further disproving the thesis of the complainants. This Article deals with the benefits granted to the combatants who have served in 'war campaigns'. During the Code drafting process, there was a debate about whether the words 'war campaigns' utilized in the text were consistent with Article 11.1 of the Constitution ('Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes'). In the end, the drafters decided that Article 11.1 of the Constitution, though rendering Italy's involvement in traditional armed conflicts very unlikely, does not completely exclude the possibility of employing military personnel in operations other than peace missions. For this reason, the words 'war campaigns' were kept in the final text. For the *Avvocatura*, this means that Article 1858 of the Code implicitly makes a distinction between military campaigns conducted in time of war and so-called peace operations. With this regard, it further observed:

> It is a matter of fact that the two situations are quite different. The operations conducted under the authority of the UN qualify as peace operations. Their aim is securing and bringing help to the affected populations, as well as supporting or rebuilding weakened institutions in post-conflict situations. To the contrary, war campaigns are carried out

<http://www.federalismi.it/ApplOpenFilePDF.cfm?artid=32734&dpath=document&dfile=11112016162254.pdf&content=Corte+Costituzionale,+Sentenza+n.+240/2016,+in+tema+di+militari,+personale+militare+in+servizio+per+conto+dell%27ONU+in+zone+d%27intervento.+-+stato+-+documentazione+-+>.

[15] Ibid, Considerations in point of fact, § 1.1.

[16] Article 78 of the Constitution reads 'Parliament has the authority to declare a state of war and vest the necessary powers into the Government'.

[17] Legislative decree No 66 of 15 March 2010 'Code of the military order', published in the *Gazzetta Ufficiale* No 106 of 8 May 2010, <http://www.gazzettaufficiale.it/gunewsletter/dettaglio.jsp?service=1&datagu=2010-05-08&task=dettaglio&numgu=106&redaz=010G0089&tmstp=1274953468670>.

> when an armed conflict exists between sovereign States or coalitions, to resolve an international dispute.[18]

The chosen example was, perhaps, not appropriate. As already noted, Article 11.1 of the Constitution expressly prevents Italy to have recourse to the use of force against other States for the settlement of disputes. These arguments suggested that there is no discrimination in the differing treatments of, respectively, war combatants and peacekeepers. In addition, the *Avvocatura* noted that upholding the claims meant imposing a significant burden upon public funds, because the members of Italian Army serving in UN operations are very numerous; not to speak of the expenses deriving from entitling to same favourable treatment all the military personnel that might be involved in future peace operations.[19]

The complainants viewed this line of reasoning as leading to clear discrimination against them. Their main argument was that the concept of war has changed considerably over the last several decades, following factual and legal developments at the international level. War as armed confrontation between sovereign states now rarely occurs and is marginal as compared with other situations – so-called 'asymmetric war' – where state armies are faced with armed groups or organizations with aggressive intentions, which are not connected to any legitimate governments and act for various purposes (insurgency, terrorism, etc.). In all cases, there is fighting involving the use of weapons and loss of life, property destruction and so on. Sadly, these events have also occurred in a number of UN peace operations, including in Somalia, Iraq, Afghanistan, Lebanon, and the Balkans. The only difference between these operations and traditional 'war campaigns' is that there is no declaration of a state of war. This is not, however, a substantive difference allowing differing treatments of those involved. International law does not distinguish between various categories of armed conflicts depending on whether a state of war has been officially declared. The concept of armed conflict not only covers confrontation between state armies *inter se*, but also with armed organizations and groups. It seems that no particular formalism characterizes the concept of 'war' in current international law. The practice that has developed since so-called First Gulf War (UN operations 'Desert Shield' and 'Desert Storm' of 1990-91) makes it clear that drawing the legal concept, exclusively, from the experience of the two World Wars is no longer possible. Substantively speaking, taking part in an armed conflict, in the proper sense, or in so-called peace operations does not make a difference for the military staff involved.[20]

Before examining the discrimination issues, the Constitutional Court rejected, as a first step, the objection concerning the impossibility of extending the requested benefit to peacekeepers, due to the high number of complaints received. For the Court, this argument was unacceptable, for the following reasons:

> The authority of the Parliament to determine the amount of pensions and any relevant rules does not encounter limits, except for blatant irrationality. It is therefore for the Parliament to decide how to reconcile the beneficiaries' vital needs with the concrete availability of financial resources and state budget requirements (decision No. 372/1998 [of the Constitutional Court]). However, the burden that would derive to the State treasury if the arguments of the complainants were upheld cannot *per se* prevent the Court from examining the constitutionality question submitted to it. If well-documented in the counterclaim, this circumstance is, rather, one of the aspects the Court will take

[18] Decision No 240/2016, Considerations in point of fact, § 2.
[19] Ibid.
[20] Ibid, §§ 4-5.

> into account when balancing all the involved constitutional values for the purposes of its decision.[21]

With regard to the merits, the Court noted that taking into account the legal developments which have occurred over the years at the international and the national levels, it was necessary to decide on the submitted question. When the Parliament passed Law No 1746 of 1962, UN peacekeeping was in its early days. Italian national legislation had no special provisions on the matter. Filling the gap seemed a matter of urgency, also because many casualties had occurred among Italian forces in Kindu (former Belgian Congo) in November 1961. Including these cases in the material scope of application of the existing legislation on 'war combatants' seemed a good solution. Later, however, there was substantial growth in peacekeeping operations. Over the years, the Parliament passed many laws on the matter. These were occasioned by Italy's participation in various UN operations, and laid down special legal regimes for each mission, or group of missions. In addition, Law No 145 of 21 July 2016[22] has provided a general legal framework on all the relevant aspects, including pay and pension, mission allowances and specific insurance for the military staff participating in peace operations.

Further pointing out the *lex specialis* argument, the Court observed:

> If one considers the changes that have occurred in the international legal framework as well as the domestic legal order, law No 1746 cannot be longer interpreted in such a manner as to equate peacekeepers to the 'combatants' engaged in 'war campaigns'. Special norms exist, which take into account the risks inherent in all peace operations and, even, in each of them …[23]

The Court then noted that a definition for 'combatant' is provided by legislative decree No 137 of 1948, as modified by Law No 93/1952.[24] The word 'combatant' refers to various categories of individuals (members of the military staff, civilians embedded to military units, prisoners, partisans), who all participated in the Second World War. From the subsequent legislation, including Article 1858 of the Code of the military order, it follows that the concept of 'combatant' does not apply in the framework of UN operations. The Parliament has made a distinction between war and peace operations, and it has the power of to do so. In addition, the distinction is, certainly, not illogical, due to the peculiarities of peace operations, which the Parliament duly took into account in establishing the applicable norms.[25]

Having regard to international law principles, with which the domestic legal order must conform, the Court observed:

> The argument put by the claimants in the principal proceedings concerning the adaptation of the domestic legal order to international law pretends that the concept of 'war' is now broader than in the past, as it includes further meanings besides the traditional one. These meanings correspond, allegedly, to 'armed conflicts', 'international crises', and also cover peace operations carried out under the umbrella of the UN. It is true that, starting from law decree No 421 of 1 December 2001 ('Urgent provisions on the participation of military staff to the multinational operation Enduring Freedom')[26] …, the Parliament decided that the Military Penal Code apply in some peace

[21] Ibid, Considerations in point of law, § 7.
[22] See the comment on Law No 145 of 21 July 2016 in this Report.
[23] Decision No 240/2016, Considerations in point of law, § 8.1.
[24] Legislative Decree No 137/1948, 'Norms on the granting of certain benefits to the Second World War combatants' is published in the *Gazzetta Ufficiale* No 67 of 20 March 1948.
[25] Decision No 240/2016, Considerations in point of law, § 8.1.
[26] Law decree No 421/2001 converted, with modifications, into Law No 6 of 31 January 2002 is published in the *Gazzetta Ufficiale* No 28 of 2 February 2002, <http://www.gazzettaufficiale.it/atto/serie_generale/

> operations. In addition, Article 2 of law No 15/2002 added two new paragraphs in Article 165 of the Military Penal Code applicable in time of war with the view of assimilating 'military operations carried out abroad' to 'armed conflicts'. These examples show, however, that the two situations do not fall, as a rule, in a same legal category. Assimilation among them is only possible in application of certain law provisions, which have expressly equated peace operations, to certain extent and for limited purposes, to armed conflicts.[27]

In further support of its interpretation, the Court mentioned Article 2.1.f of Law No 331 of 14 November 2000 ('Rules on professional military service')[28]. This Article, later replaced by the Code of the military order, allowed recourse to conscription in two cases. One was the existence of a state of war agreed on by the Parliament in accordance with Article 78 of the Constitution. The other was Italy's involvement, directly or due to its participation in an international organization, in 'serious international crises'. In the Court's views, this means that 'war' and 'armed conflicts' do not fall, under Italian legislation, in a same category, although these two 'extremely serious events' both authorize general conscription.[29] Attempts of equating peace missions to war campaigns have not, *a fortiori*, any legal basis. In the Court's words:

> All these situations involve risks for human life (and it seems that the Parliament has graduated peacekeepers' emoluments and allowances depending on the theatre and objectives of each operation). However, the participation of a number of military professionals in peace missions clearly differs from 'war' as well as from 'international crises', two extreme events in which national legislation allows general conscription. Latter circumstance [ie, the fact that conscription is not allowed for peace operations] is enough to justify the Parliament's choice of not ensuring to peacekeepers, at least automatically, a same treatment as is provided by law for war combatants.[30]

The Court concluded that peacekeepers are not discriminated against. The existing special legislation grants them benefits that are proportionate to the peculiar situation of participating in military operations which do not qualify as 'war' or 'armed conflicts'.

This decision is in line with an earlier one, made by the Court on an almost identical question (decision No 509 of 1988)[31]. Doubts on possible breach of the equality principle had arisen from the fact that certain benefits granted to the combatants in the First World War and the Ethiopian War of 1935-36 were not also granted to the military staff later deployed in the Italian Eastern Africa to carry out so-called 'colonial policing operations'. The Court ruled that the question was unfounded because colonial policing operations aimed to restore or maintain public order in a territory under Italy's sovereignty, and were not conducted against foreign States.

Though a very formalist decision and, thus, open to criticism, the Constitutional Court's approach to the legal qualification of peace operations is plainly consistent with that of the Parliament. Accordingly, Italy's participation in UN and other military operations abroad does not fall within the scope of Articles 78 and 87.9 of the Constitution. Interestingly, the draft constitutional reform submitted to a referendum in December 2016 (and not validated

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[27] Decision No 240/2016, Considerations in point of law, § 8.2.

[28] Text in the *Gazzetta Ufficiale* No 269 of 17 November 2000, <http://www.gazzettaufficiale.it/eli/id/2000/11/17/000G0367/sg>.

[29] Decision No 240/2016, Considerations in point of law, § 8.2.

[30] Ibid.

[31] Text published in the Constitutional Court's official website, <http://www.giurcost.org/decisioni/1988/0509s-88.html>.

by popular vote) made the principle explicit. It was stated in the draft text that declaration of a state of war by the Chamber of Deputies is not a legal requirement for a) the fight against terrorism, b) military missions abroad, and c) any activity deriving to Italy from being a NATO Member.[32]

ORNELLA FERRAJOLO[33]

Treaty Action — Cooperation in security and defence policy, in peacekeeping and humanitarian operations

- Law No 52 of 4 April 2016, 'Ratification and implementation of the Memorandum of Understanding between the Government of the Italian Republic and the Council of Ministers of Bosnia and Herzegovina on cooperation in the field of defence', done in Rome on 30 January2013 [Legge 4 aprile 2016, n. 52, 'Ratifica ed esecuzione del Memorandum d'intesa tra il Governo della Repubblica italiana e il Consiglio dei Ministri della Bosnia ed Erzegovina sulla cooperazione nel settore della difesa', fatto a Roma il 30 gennaio 2013]. Entered into force on 27 April 2016[34] <http://www.gazzettaufficiale.it/atto/vediMenuHTML?atto.dataPubblicazioneGazzetta=2016-04-26&atto.codiceRedazionale=16G00065&tipoSerie=serie_generale&tipoVigenza=originario>
- Law No 62 of 19 April 2016, 'Ratification and implementation of the Cooperation Agreement on the field of defence between the Government of the Italian Republic and the Government of the Republic of Senegal', done in Rome on 17 September 2012 [Legge 19 aprile 2016, n. 62, 'Ratifica ed esecuzione dell'Accordo di cooperazione in materia di difesa tra il Governo della Repubblica italiana e il Governo della Repubblica del Senegal', fatto a Roma il 17 settembre 2012]. Entered into force on 5 May 2016[35] <http://www.gazzettaufficiale.it/atto/vediMenuHTML?atto.dataPubblicazioneGazzetta=2016-05-04&atto.codiceRedazionale=16G00071&tipoSerie=serie_generale&tipoVigenza=originario>
- Law No 64 of 19 April 2016, 'Ratification and implementation of the Agreement between the Government of the Italian Republic and the Federal Government of the Somali Republic on cooperation in the field of defence', done in Rome on 17 September 2013 [Legge 19 aprile 2016, n. 64, 'Ratifica ed esecuzione dell'Accordo tra il Governo della Repubblica italiana e il Governo federale della Repubblica di Somalia in materia di cooperazione nel settore della difesa', fatto a Roma il 17 settembre 2013]. Entered into force on 6 May 2016[36] <http://www.gazzettaufficiale.it/atto/vediMenuHTML?atto.dataPubblicazioneGazzetta=2016-05-05&atto.codiceRedazionale=16G00072&tipoSerie=serie_generale&tipoVigenza=originario>

[32] Amendment AC 2613-A (17-705), Article 17: cf C Galli, 'Chi delibera lo stato di guerra?' [Who has the authority to decide on state of war?], *Libertà e Giustizia*, (26 January 2015), <http://www.libertaegiustizia.it/2015/01/26/chi-delibera-lo-stato-di-guerra/>.

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[34] Published in *Gazzetta Ufficiale* No. 96 of 26 April 2016.

[35] Published in *Gazzetta Ufficiale* No. 103 of 4 May 2016.

[36] Published in *Gazzetta Ufficiale* No 104 of 5 May 2016.

☛ Law No 191 of 3 October 2016, 'Ratification and implementation of the Agreement between the Government of the Italian Republic and the Government of the Republic of Armenia in the field of defence', done in Yerevan on 17 October 2012 [Legge 3 ottobre 2016, n. 191, 'Ratifica ed esecuzione dell'Accordo tra il Governo della Repubblica italiana ed il Governo della Repubblica dell'Armenia nel settore della difesa', fatto a Jerevan il 17 ottobre 2012]. Entered into force on 21 October 2016[37] <http://www.gazzettaufficiale.it/atto/vediMenuHTML?atto.dataPubblicazioneGazzetta=2016-10-20&atto.codiceRedazionale=16G00202&tipoSerie=serie_generale&tipoVigenza=originario>

In 2016, Italy ratified some agreements in the field of defence with the purpose of strengthening international peace and world stability.

The agreements ratified by Italy cover many areas of cooperation, such as security and defence policy, arms control in compliance with international treaties on the matter,[38] the organization of armed forces, the structure and equipment of military units, the education and training of military personnel, environmental issues and pollution caused by military installations, and also cooperation in peace and humanitarian operations.

It is interesting to note that all countries that are parties to these bilateral agreements are members of the UN and as such, they already take part in activities related to the maintenance of peace, including peacekeeping operations. However, through these agreements Italy aimed to reinforce international cooperation in sustaining peace operations, especially those which have humanitarian purposes, and to promote greater collaboration with the contracting Parties at an operational level.[39]

An example of a more integrated cooperation is that with Bosnia and Herzegovina as part of the NATO Partnership for Peace Programme (PfP*)*, joined by Bosnia and Herzegovina in 2006. The PfP aims to increase stability, diminish threats to peace and build stronger security relationships between individual Euro-Atlantic partners and NATO, as well as among partner countries.[40] The Agreement between Italy and Armenia is also framed in the context of relations with NATO, as Armenia joined the PfP in 1994.[41]

Another relevant Agreement is with Somalia, a strategically important country particularly because of the operations of the Islamist fundamentalists al-Shabaab and the continuing phenomenon of maritime piracy off the Somali coast. Through this Agreement, Italy intended to contribute to the stabilization of this country with which it has historical ties.[42] The Agreement provides for cooperation in different areas, including the conduct of Peace Support Operations (PSO)[43] and humanitarian operations, the fight against piracy and

[37] Published in *Gazzetta Ufficiale* No 246 of 20 October 2016.

[38] Some of these agreements also cover cooperation in the field of the defense industry, research and development of armaments (see Article 14 of the Agreement with Senegal, Article 3 of the Agreement with Somalia, and Article 6 of the Agreement with Armenia).

[39] See Article 3 of the Agreement with Senegal, Article 2 of the Agreement with Armenia.

[40] <http://www.nato.int/cps/en/natolive/topics_50349.htm>; <http://documenti.camera.it/leg17/resoconti/commissioni/bollettini/pdf/2015/09/30/leg.17.bol0513.data20150930.com04.pdf>.

[41] <http://www.nato.int/cps/en/natohq/topics_48893.htm>.

[42] See the dossier prepared for the parliamentary works on the ratification of this Agreement <http://documenti.camera.it/Leg17/Dossier/Pdf/ES0450.Pdf>.

[43] The term PSO refers to the operations and activities of all civil and military organizations deployed to restore peace and/or relieve human suffering. Peace support operations may include diplomatic actions, traditional peacekeeping, and the more forceful military actions required to establish peaceful conditions (see <http://www.davidmlast.org/Travel/Brazil_files/mackinlay-guide%20to%20PSO.pdf>). On these operations

other maritime security activities, in line with UNSC resolutions requiring Member States to cooperate in the repression of piracy in Somalia (Article 2).[44] Italian military personnel participate in the EU missions in Somalia[45] which assist in strengthening Somalia's capacity to ensure maritime security and in particular to fight piracy.[46]

Due to its strategic location in West Africa, an important Agreement was concluded between Italy and Senegal, which is one of the major troop contributors to the UN and African Union peacekeeping missions among the African countries. This Agreement covers a wide range of fields, including cooperation in humanitarian and peacekeeping operations (Article 3).

All the agreements in the field of defence provide for the modalities of the cooperation that rely on the mutual exchange of experts, visits of military ships and aircrafts, participation by Parties' personnel in training courses, seminars, and conferences, military exercises, peacekeeping and humanitarian operations, and in other activities aimed at reinforcing relations of mutual cooperation.[47]

VALENTINA DELLA FINA[48]

Treaty Action — International Terrorism

☛ Law No 153 of 28 July 2016, 'Rules for the Fight against Terrorism, as well as Ratification and Execution: a) of Council of Europe Convention on the Prevention of Terrorism, adopted in Warsaw on 16 May 2005; b) of International Convention for the suppression of Acts of Nuclear Terrorism, adopted in New York on 14 September 2005; c) of Protocol amending the European Convention on the Suppression of Terrorism, adopted in Strasbourg on 15 May 2003; d) of Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, adopted in Warsaw on 16 May 2005; e) of Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, adopted in Riga on 22 October 2015' [Legge n. 153, 28 luglio 2016, 'Norme per il contrasto al terrorismo, nonché ratifica ed esecuzione: a) della Convenzione del Consiglio d'Europa per la prevenzione del terrorismo, fatta a Varsavia il 16 maggio 2005; b) della Convenzione internazionale per la soppressione di atti di terrorismo nucleare, fatta a New York il 14 settembre 2005; c) del Protocollo di Emendamento alla Convenzione europea per la repressione del terrorismo, fatto a Strasburgo il 15 maggio 2003; d) della Convenzione del Consiglio d'Europa sul riciclaggio, la ricerca, il sequestro e la confisca dei proventi di reato e sul finanziamento del terrorismo, fatta a Varsavia il 16 maggio 2005; e) del Protocollo addizionale alla Convenzione del Consiglio d'Europa per la prevenzione del terrorismo, fatto a Riga il 22 ottobre 2015']. Entered into force on 24 August 2016[49]

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see, M Zwanenburg, *Accountability of Peace Support Operations* (2005); H-A Frantzen, *NATO and Peace Support Operations, 1991-1999: Policies and Doctrines* (2005).

[44] See, among others, SC Res 2316, UN SCOR, 7805th mtg, UN Doc S/RES/2316 (9 November 2016).

[45] EUTM Somalia and EUCAP Nestor (renamed EUCAP Somalia in 2017).

[46] See the comment to Law No 145 of 21 July 2016 and Law No 131 of 14 July 2016 in this Report.

[47] See, for example, Article 2, paragraph 3, of the Agreement with Somalia; Article 4 of the Agreement with Senegal.

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[49] Published in the *Gazzetta Ufficiale* No. 185 of 9 August 2016 (S. O. No. 31).

<http://www.gazzettaufficiale.it/eli/id/2016/08/09/16G00165/sg >

With Law No 153/2016, Italy ratified five international treaties, namely, the *Convention on the Prevention of Terrorism of the Council of Europe* (2005),[50] the *International Convention for the Suppression of Acts of Nuclear Terrorism* (2005),[51] the *Protocol amending the European Convention on the Suppression of Terrorism* (2003),[52] the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of the Council of Europe* (2005)[53] and the *Additional Protocol to the Convention on the Prevention of Terrorism* (2015),[54] which imposed various obligations upon States to prevent, detect, investigate and prosecute terrorist offences.

[50] *Convention on the Prevention of Terrorism of the Council of Europe*, opened for signature on 16 May 2005, CETS No 196 (entered into force on 1 June 2007). The Convention joins other international instruments in the overall objective of preventing and fighting terrorism. The purpose of the Convention is to enhance the efforts of Parties in preventing terrorism and its negative effects on the full enjoyment of human rights, on one hand, by establishing as criminal offences certain acts that may lead to the commission of terrorist offences, namely, public provocation, recruitment and training, and on the other hand, by reinforcing co-operation on prevention both internally (national prevention policies), and internationally (modification of existing extradition and mutual assistance arrangements and additional means). Furthermore, the Convention contains a provision on the protection and compensation of victims of terrorism. A consultation process is planned to ensure effective implementation and follow up.

[51] *International Convention for the Suppression of Acts of Nuclear Terrorism*, opened for signature on 14 September 2005, 2445 UNTS (entered into force on 7 July 2007). The Convention imposes an obligation on State parties to establish the offences within the scope of the Convention as criminal offences under their national laws and to make these offences punishable by appropriate penalties, which take into account their grave nature. Furthermore, the Convention is based on the 'extradite or prosecute' regime. In this regard, as provided under Article 13, in the absence of an *ad hoc* treaty, the Convention may be the basis for extradition and for the modification of provisions of existing extradition treaties to the extent that they are incompatible with the provisions of the Convention.

[52] *Protocol amending the European Convention on the Suppression of Terrorism*, opened for signature by member States signatories to treaty CETS No 90 on 15 May 2003, CETS No 190 (not yet in force). The Protocol extends the list of the offences to be 'depoliticized' to cover all the offences described in the relevant UN anti-terrorist Conventions and Protocols. Furthermore, this Protocol introduces a simplified amendment procedure, which will allow new offences to be added to the list in the future. It also provides for a follow-up mechanism ('COSTER') in charge of implementing the new procedure in relation to reservations as well as other tasks related to the follow-up of the Convention.

[53] *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of the Council of Europe*, opened for signature on 16 May 2005, CETS No 198, (entered into force on 1 May 2008). This Convention updates the 1990 *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of the Council of Europe*, opened for signature on 8 November 1990, CETS No 141 (entered into force on 1 September 1993). It represents the first international treaty covering both the prevention and the control of money laundering and the financing of terrorism. The Convention is grounded on the idea that quick access to financial information or information on assets held by criminal organisations, including terrorist groups, is the key to successful preventive and repressive measures. In this vein, the Convention takes into account the issue that terrorism could not only be financed through money laundering from criminal activity, but also through legitimate activities.

[54] *Additional Protocol to the Convention on the Prevention of Terrorism of the Council of Europe*, opened for signature by the Signatories to Treaty CETS 196 and for accession by the non-member States which have acceded to Treaty CETS 196 on 22 October 2015, CETS 217 (entry into force on 1 July 2017). The Protocol is aimed to supplement the 2005 Convention (CETS No. 196) by adding some provisions on the criminalization of a number of acts that are related to terrorist offences and a norm on the exchange of information. The offences set out in the Protocol, like those in the Convention, are mainly of a preparatory nature in relation to terrorist acts. Furthermore, it also provides for a network of 24-hour-a-day national contact points to facilitate the rapid exchange of information.

In line with the recent trends of anti-terrorism law,[55] the main purpose of these international and regional treaties is, on the one hand, to strengthen efforts to prevent terrorism and, on the other hand, to provide a legal framework for domestic legislation concerning the introduction and punishment of new terrorist offences and the prohibition of financing of terrorism.

Law No 153/2016 consolidates and completes the existing domestic legal framework on the fight against terrorism. Indeed, the Italian legal framework on terrorism is a composite one due the developments gained since the second half of 1970s. At that time, Italy adopted significant legislation to fight against domestic terrorism. When the phenomenon of terrorism assumed a transnational dimension, Italy was able to modify its legislation allow for the highest level of coordination at the international level.[56] The amendments to the Italian legislation are the consequence of the changes in terrorism at global level. Many states in Europe and around the world are faced with a growing terrorist threat posed by individuals who travel abroad for the purpose of terrorism, so called 'foreign fighters'. To address this, on 12 December 2016, the UN Security Council unanimously adopted Resolution 2322 'Aiming to Strengthen International Judicial Cooperation in Counter Terrorism'. This Resolution requested all Member States 'to enact, and where appropriate, review their respective counter terrorism legislation in view of the evolving threat posed by terrorist groups and individuals'. In line with the UNSC Resolution 2322, Italy focused most of its efforts on complying with the international instruments aimed at preventing and suppressing terrorist acts.

Law No 153/2016 contains relevant provisions for the effective implementation of the five international treaties. In conformity with the Italian legislative practice concerning international treaties, Articles 1 and 2 contain the usual provisions for ratification. In particular, Article 1 provides for the authorization for the Italian President of Republic to ratify the international instruments and Article 2 provides for the implementing order, namely, the so-called 'ordine di esecuzione'. By virtue of Article 80 of the Italian Constitution, which requires the previous authorization of the Parliament for the ratification of certain kinds of treaties among which are those involving changes of legislation, the bill was introduced into both the Chamber of Deputies and the Senate.[57]

In addition, Article 3 introduces the definitions of some frequently occurring terms used throughout the law such as the definitions of 'radioactive material' and 'nuclear materials', specifically plutonium and uranium. It also contains a definition of 'nuclear installation', which includes the reactors for aircraft propulsion vessels, as well as any system or means of transport used to produce, store, treat or transport radioactive material, and the concept of 'nuclear device' includes any nuclear explosive device, but also any device capable of dispersing radioactive material or emitting radiation, so as to cause serious damage to people, property and environment. Finally, the provision mentions the National Inspectorate for Nuclear Safety and Radiation Protection ('ISIN') established under Article 6 of the Legislative Decree No 45/2014 which implemented Directive 2011/70/EURATOM establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste.

[55] See S Marchisio, 'Recent Developments in Anti-Terrorism Law: How to Fill Normative Gaps', in D S Hamilton, ed, *Terrorism and International Relations* (2006).

[56] See Committee of Experts on Terrorism (Codexter), 'Profiles on Counter-Terrorist Capacity, Italy' (November 2008); S Praduroux, 'Italy', in K Roach, ed, *Comparative Counter-Terrorism Law* (, 2015).

[57] See Parliamentary Acts, Chamber of Deputies, Bill No 3303, introduced on 10 September 2015 and finally approved with amendments on 28 January 2016; Senate, Bill No 2223 approved with amendments on 28 June 2016; Chamber of Deputies, Bill No 3303-B approved on 19 July 2016.

Due to Law No 153/2016, the Italian legal framework on terrorism has been strengthened by the introduction of new offences to the Criminal Code. This law represents a key legal development with regard to the criminalization of terrorism acts in Italy. Over the years, the laws on terrorism have introduced into Italian criminal law definitions of acts committed for terrorist purposes and have punished terrorist conduct both by individuals and by organistiaons. In line with the provisions introduced into the Italian Criminal Code by Law No. 431/2001[58], Law No 438/2001[59] and Law No 43/2015[60], Law No 153/2016 introduced into the domestic legal framework three new criminal offences, namely, financing of conducts for terrorist purposes (Article 270-*quinquies*.1 of Criminal Code), subtraction of properties or money subject to seizure (Article 270-*quinquies*.2 of Criminal Code)[61] and acts of nuclear terrorism (Article 280-*ter* of Criminal Code).

The financing of terrorism is punished as part of broader criminal behavior under Article 270-*bis* of the Italian Criminal Code, which punishes anyone who promotes, sets up, organizes, leads or finances associations intending to carry out acts of violence with the purpose of terrorism or subversion of the democratic order, punishable by imprisonment from seven to 15 years. The new provision criminalizes any conduct consisting of gathering funds or goods with the objective of committing terrorist acts, even without a link to a criminal association or a conspiracy. Therefore, any conduct aimed at financing terrorist activities is criminalised.

Article 280-*ter* of Criminal Code, introduced by Article 4 of Law No 153/2016, contains the provisions for the effective implementation of the *International Convention for the suppression of Acts of Nuclear Terrorism*. In particular, under Article 280-*ter*, anyone who procures radioactive material for himself or another and/or anyone who creates a nuclear weapon or possesses it is punishable with imprisonment of not less than 15 years. Furthermore, any person who unlawfully and intentionally uses radioactive material or device, or uses or damages a nuclear facility in such a way as to release, or with a real danger that it could release, radioactive material is punishable with imprisonment of not less than 20 years. Under Article 280-*ter*, the same penalty applies when the conduct described therein relates to the use of chemical or bacteriological materials.

This criminal provision completes the framework of the types of offences on nuclear terrorism and strengthens the sanctions provided for specific offences in this field. It is worth

[58] Law No 431/2001 'Conversion into Law, with modifications, of the Decree Law No 369/2001 on Urgent Measures to fight the financing of international terrorism', entered into force on 15 December 2001, published in *Gazzetta Ufficiale* No 290 of 14 December 2001.

[59] Law No 438/2001 'Conversion into Law, with modifications, of the Decree Law No. 347/2001 on 'Urgent Measures to fight international terrorism', entered into force on 19 December 2001, published in *Gazzetta Ufficiale* No 293 of 18 December 2001.

[60] Law No 43/2015 'Conversion into Law, with modifications, of the Decree Law No 7/2015 on Urgent Measures for the Fight against Terrorism, including International Terrorism, as well as Extension of the International Mission of the Armed Forces and Police, Cooperation Initiatives of International Organizations for the Consolidation of Pace and Stabilization Processes', entered into force on 21 April 2015, published in *Gazzetta Ufficiale* No 91 of 20 April 2015. For a deeper analysis of Law No 43/2015, see Correspondents Report – Italy (2015) 18 *YIHL*, 14-18.

[61] The new provision provides a penalty of two to six years' imprisonment and a pecuniary penalty of 3,000 to 15,000 euro. This new crime was introduced in conformity with Article 4 ('Investigative and provisional measures') of the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* which requires States Parties to adopt 'such legislative and other measures as may be necessary to enable it to identify, trace, freeze or seize rapidly property which is liable to confiscation' in order to 'facilitate the enforcement of a later confiscation'.

remembering that Law No58/2015[62] introduced the crime of attempt on the safety of nuclear installation, which is punishable by four to eight years' imprisonment.[63] It also must be noted that the crime of traffic and abandonment of nuclear materials (Article 452-*sexies* of Criminal Code) was introduced and sanctioned by the law on environmental crimes adopted on 22 May 2015.[64]

Under Article 6 of Law No 153/2016, the Ministry of Justice is appointed as a point of contact requested by Article 7 of the *Convention for the Suppression of Acts of Nuclear Terrorism* to have responsibility for sending and receiving the information. In addition, the provision contains a number of information requirements on the Public Prosecutor with regard of criminal proceedings concerning the crime for acts of nuclear terrorism.

Worthy of mention is the provision for seizure of radioactive material, devices or nuclear facilities in the course of a criminal proceeding connected with an offence of nuclear terrorism. In this regard, Article 7 of Law No 153/2016 stated that judicial authority that seizes such material must give notice to the Prefect and the Ministry of Justice. The Prefect is also in charge of adopting any necessary measures for recovering and securing radioactive materials. Under Article 7, it is up to the Ministry of Economic Development, in cooperation with the Ministry of Justice and the Ministry of Environment and after the consultation of ISIN, to provide for the restitution of radioactive materials to a State Party of the 2005 Convention of New York through specific agreement if necessary.

Finally, Article 9 of Law No 153/2016 identifies the 'Unità di informazione finanziaria' (Unit of Financial Information well known as UIF), established by Legislative Decree No. 231/2007, as the Authority of Financial Intelligence in conformity with Article 12 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. As required by Article 1 of the Convention, the Authority is a central, national agency responsible for receiving, requesting, analyzing and disseminating to the competent organs, disclosures of financial information. The norm under examination also designs the Ministry of Economy as the central authority responsible for sending and answering requests made under the Convention, or the transmission of them to the authorities competent for their execution. Furthermore, the Department of Public Security of the Ministry of Interior is appointed as point of contact for the transmission of information in conformity to the *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism*.

ROSITA FORASTIERO[65]

Treaty Action — Cooperation in combating international terrorism and organised crime, and in fight against the impunity of international crimes

- ☛ Law No 209 of 3 November 2016, 'Ratification and implementation of the Agreement between the Government of the Italian Republic and the Government of the Republic of Austria in the field of police cooperation', done in Vienna on 11 July 2014 [Legge 3

[62] Law No 58 of 28 April 2015, 'Ratification and Execution of Amendment to the Convention on the Physical Protection of Nuclear Material of 3 March 1980, adopted in Vienna on 8 July 2005, and Provisions for the Adaption of Internal Law', entered into force on 28 May 2015, published in *Gazzetta Ufficiale* No 109 of 13 May 2015.
[63] See Correspondents Report – Italy (2015) 18 *YIHL*, 25-26.
[64] Law No 68 of 22 May 2015, 'Rules on Crimes against Environment', entered into force on 29 May 2015, published in *Gazzetta Ufficiale* No 122 of 28 May 2015.
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novembre 2016, n. 209, ' Ratifica ed esecuzione dell'Accordo tra il Governo della Repubblica italiana e il Governo della Repubblica d'Austria in materia di cooperazione di polizia', fatto a Vienna l'11 luglio 2014]. Entered into force 22 November 2016[66] <http://www.gazzettaufficiale.it/atto/vediMenuHTML?atto.dataPubblicazioneGazzetta=2016-11-21&atto.codiceRedazionale=16G00222&tipoSerie=serie_generale&tipoVigenza=originario>

- Law No 2013 of 3 November 2016, 'Ratification and implementation of the Cooperation Agreement between the Government of the Italian Republic and the Hashemite Kingdom of Jordan for the fight against crime', done at Amman 27 June 2011 [Legge 3 novembre 2016, n. 213, 'Ratifica ed esecuzione dell'Accordo di cooperazione tra il Governo della Repubblica italiana e il Regno hascemita di Giordania in materia di lotta alla criminalità', fatto ad Amman il 27 giugno 2011]. Entered into force 24 November 2016[67] <http://www.gazzettaufficiale.it/atto/vediMenuHTML?atto.dataPubblicazioneGazzetta=2016-11-23&atto.codiceRedazionale=16G00226&tipoSerie=serie_generale&tipoVigenza=originario>
- Law No 186 of 3 October 2016, 'Ratification and implementation of the following agreements: a) Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, with Annexes, done at Brussels on 11 May 2012; b) Framework Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part', made the Phnom Penh 11 July 2012 [Legge 3 ottobre 2016, n. 186, 'Ratifica ed esecuzione dei seguenti Accordi: a) Accordo di partenariato e cooperazione tra l'Unione europea e i suoi Stati membri, da una parte, e la Repubblica dell'Iraq, dall'altra, con Allegati, fatto a Bruxelles l'11 maggio 2012; b) Accordo quadro di partenariato e cooperazione tra l'Unione europea e i suoi Stati membri, da una parte, e la Repubblica delle Filippine, dall'altra', fatto a Phnom Penh l'11 luglio 2012]. Entered into force 18 October 2016[68] <http://www.gazzettaufficiale.it/atto/vediMenuHTML?atto.dataPubblicazioneGazzetta=2016-10-17&atto.codiceRedazionale=16G00199&tipoSerie=serie_generale&tipoVigenza=originario>
- Law No 56 of 6 April 2016, 'Ratification and implementation of the Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part', done at Brussels 27 June 2012 [Legge 6 aprile 2016, n. 56, 'Ratifica ed esecuzione dell'Accordo quadro globale di partenariato e cooperazione tra l'Unione europea e i suoi Stati membri, da una parte, e la Repubblica socialista del Vietnam, dall'altra', fatto a Bruxelles il 27 giugno 2012]. Entered into force 30 April 2016[69] <http://www.gazzettaufficiale.it/atto/vediMenuHTML?atto.dataPubblicazioneGazzetta=2016-04-29&atto.codiceRedazionale=16G00067&tipoSerie=serie_generale&tipoVigenza=originario>
- Law No 107 of 25 May 2016, 'Ratification and implementation of the Partnership and Cooperation Framework Agreement between the European Union and its Member States, of the one part, and Mongolia, of the other part', done at Ulan Bator April 30, 2013 [Legge 25 maggio 2016, n. 107, 'Ratifica ed esecuzione dell'accordo quadro di partenariato e cooperazione tra l'Unione europea e i suoi Stati membri, da una parte, e la

[66] Published in *Gazzetta Ufficiale* No 272 of 21 November 2016.
[67] Published in *Gazzetta Ufficiale* No 274 of 23 November 2016.
[68] Published in *Gazzetta Ufficiale* No 243 of 17 October 2016, Ordinary Supplement No 44.
[69] Published in *Gazzetta Ufficiale* No 99 of 29 April 2016.

Mongolia, dall'altra', fatto a Ulan-Bator il 30 aprile 2013]. Entered into force 21 June 2016[70]
<http://www.gazzettaufficiale.it/atto/vediMenuHTML?atto.dataPubblicazioneGazzetta=2016-06-20&atto.codiceRedazionale=16G00114&tipoSerie=serie_generale&tipoVigenza=originario>

In 2016, Italy ratified some cooperation and partnership agreements aimed mainly at enhancing cooperation in the fight against international terrorism, organised crime[71] and transnational crime, in accordance with the relevant UNSC resolutions[72] and EU key instruments.

Most of treaties ratified by Italy were concluded by the EU with third countries to cooperate in combating terrorism in conformity with the EU Counter-Terrorism Strategy of 2005.[73] Following terrorist attacks in several EU States, the fight against terrorism has played an increasingly important role in the Common Foreign and Security Policy (CFSP) of the Union and in its wider international relations.[74] The strategic guidelines for justice and home affairs, adopted in June 2014 by the European Council, called for an effective counter-terrorism policy, which included internal and external aspects. In addition, on 12 February 2015, the EU heads of State and government stressed the importance for the Union of engaging more with third countries on security issues and counter-terrorism.[75]

All partnership and cooperation agreements ratified by Italy cover a wide range of fields, such as economic and political policies, trade and investments, human rights, migration, smuggling and traffic in human beings, but also cooperation in countering the proliferation of weapons of mass destruction, small arms and light weapons (SALW) which constitute a growing threat to peace, security and development.[76] This wide range of issues is meant to strengthen international stability and security and to engage States Parties to respect a set of shared values as those expressed in the UN Charter, which is recalled in most of the agreements.

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[70] Published in *Gazzetta Ufficiale* No 142 of 20 June 2016.

[71] See the UN *Convention against Transnational Organised Crime* and its supplementing three Protocols (Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition). The Convention was opened for signature on 12-15 December 2000, 2225 UNTS 209 (entered into force on 29 September 2003). As of 31 March 2017, the Convention was ratified by 187 States, including Italy.

[72] See, in particular, SC Res 1267, UN SCOR, 4051st mtg, UN Doc S/RES/1267 (15 October 1999) , SC Res 1373, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001), SC Res 1822, UN SCOR, 5928th mtg, UN Doc S/RES/1822 (30 June 2008) and SC Res 1904, UN SCOR, 6247th mtg, UN Doc S/RES/1904 (17 December 2009), which are recalled in most of the cooperation agreements. See also the UN Global Counter-Terrorism Strategy adopted by UNGA in 2006, which is reviewed every two years <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy>, and SC Res 2341, UN SCOR, 7882nd mtg, UN Doc S/RES/2341 (13 February 2017).

[73] From a legal point of view, they are mixed agreements. These latter are concluded in areas that fall within the shared competences, therefore, the agreements are concluded both by the Union and by the Member States. Cf J Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (2001).

[74] Cf, among the others, P Eeckhout, *EU External Relations Law* (2001); K E Smith, *European Union Foreign Policy in a Changing World* (2014).

[75] See <http://www.consilium.europa.eu/en/policies/fight-against-terrorism/ >. Cf F de Londras and J Doody *The Impact, Legitimacy and Effectiveness of EU Counter-Terrorism* (2015).

[76] See the EU Strategy to combat the illicit accumulation and trafficking of SALW and their Ammunition of 2006 <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%205319%202006%20INIT >.

All the agreements concluded by the EU cover cooperation among the Parties to fight against the impunity of international crimes and to promote the values, principles and measures set out in the Rome Statute of the International Criminal Court (ICC).[77] An example of this is the Framework Partnership and Cooperation Agreement with the Philippines. The Preamble of that Agreement affirms that 'the most serious crimes of international concern relating to international humanitarian law, genocide and other crimes against humanity should not go unpunished and that prosecution of these crimes should be ensured in order to enhance international peace and justice'. The fight against serious crimes of international concern is one of the objectives of cooperation established in Article 2 of the Agreement. In addition, Article 7 relates to the role of the ICC in punishing the most serious international crimes.[78]In paragraph 1, the Parties recognise the relevance of international and national measures to punish and prosecute such crimes, including through the ICC. For this purpose, the Parties agreed to conduct a beneficial dialogue on the universal adherence to the Rome Statute in accordance with their respective laws, including the provision of assistance for capacity-building (Article 7, paragraph 2).

Article 7 of the Partnership and Cooperation Agreement concluded with Iraq is also dedicated to the ICC. While paragraph 1 of Article 7 is worded in similar terms as those used in the above-mentioned provision concerning the Agreement with Philippines, in pararaph 2 the Parties recognised that Iraq, which is not yet a State Party to the Rome Statute, 'is considering the possibility of acceding to it in the future'.

The Cooperation Agreement with Vietnam, which is not yet a Party to the Rome Statute, does not contain an article on ICC.[79] However, in Article 11, para. 4, the Parties recognized that the ICC 'is a progressive and independent institution operating for the purpose of international peace and justice'. In addition, they agreed 'to cooperate with a view to strengthening the legal framework aimed at preventing and punishing the most serious crimes of concern to the international community and to consider the possibility of adherence to the Rome Statute'.

Article 5, paragraph 1, of the the Framework Agreement with Mongolia states that '[t]he Parties consider that establishing an effectively functioning International Criminal Court constitutes a significant development for international peace and justice'. In addition, in paragraph 2, the Parties agreed, among other things, to cooperate and to take the necessary measures in order to fully support the universality and integrity of the Rome Statute and to strengthen their cooperation with the ICC.[80]

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[77] The Council of the European Union adopted on 16 June 2003 a Common Position on the ICC, which was followed up by an Action Plan adopted on 4 February 2004 (<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Ar10150>). The Rome Statute of the International Criminal Court was opened for signature on 17 July 1998, 2187 UNTS 90 (entered into force on 1 July 2002).

[78] Philippines ratified the Rome Statute in 2011; all EU Member States are Parties to the ICC (see <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en>).

[79] The agreement with Vietnam is the third cooperation agreement concluded by the EU with a country of the Association of South East Asian Nations (ASEAN), following those with Indonesia and the Philippines. The reluctance by Vietnam to assume commitments on human rights slowed the negotiations for the signing of the Agreement (see <http://documenti.camera.it/leg17/dossier/Pdf/ES0428.pdf>).

[80] Mongolia ratified the Rome Statute in 2002.

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Cases — International Islamic Terrorism and Foreign Fighters

- Judgment No 3 of 25 May 2016 of the Milan Court of Assize, Diritto Penale Contemporaneo <http://www.penalecontemporaneo.it/upload/Assise_MI_BRIKI%20(1).pdf >
- Judgment No 48001 of 14 July 2016 of the Court of Cassation, V Criminal Section, Diritto Penale Contemporaneo <http://www.penalecontemporaneo.it/upload/Cass_48001_2016.pdf >
- Judgment No 8 of 19 December 2016 of the of the Milan Court of Assize, Diritto Penale Contemporaneo <http://www.penalecontemporaneo.it/upload/CAssise_MI_Bushra.pdf >

In a several judgments Italians judges addressed the issue of international Islamic terrorism, putting to the test the substantial legislative framework adopted to face its alarming spread worldwide.The Italian Parliament legislated to bring solutions adopted to fight the mafia into the field of counterterrorism. Decree Law No 374 of 2001, converted in Law No 438 of 2001, rewrote Article 270 *bis* of the Criminal Code (Associations for terrorist purposes, including international terrorism, or for subversion of the democratic order) and introduced an *ad hoc* offence concerning the assistance to members of associations for the purpose of terrorism, namely Article 270 *ter* of the Criminal Code.

Following the attacks in Madrid and London, the Decree Law No 144 of 2005, converted in Law No 155 of 2005, introduced Articles 270 *quater* and 270 *quinquies* of the Criminal Code, respectively dedicated to the terrorist recruitment and training.[82] With the same legislative act, Article 270 *sexies* was inserted in the Criminal Code by providing a legal definition of conduct with terrorist purposes.

Finally, the attack in Paris in 2015 has led the legislature to further amend legislation with the aim to adapt the Italian legal order to multiple supranational decisions (first and foremost, the UN Security Council Resolution 2178 of 2014). Decree Law No 7 of 2015, converted in Law No 43 of 2015, extended the punishment to the person recruited for carrying out acts of terrorism (Article 270 *quater*, paragraph 2, of the Criminal Code) and to the one who is 'auto-trained', namely a person who has informed him or herself through information channels and then has carried out acts directed towards terrorist aims (by modifying Article 270 *quinquies*, paragraph 1, of the Criminal Code).[83] Furthermore, Italian lawmakers created, by Article 270 *quater* 1 of the Criminal Code, the new crime of organization of transfers with the aim of terrorism and reinforced the effectiveness of preventive measures limiting personal freedom foreseen in Article 4, paragraph 1d, of the Anti-Mafia Code, extending them to foreign fighters.

As observed by Italian commentators, the legislative tendency in Italy is to extend the threshold of criminal liability for international terrorism to the carrying out of preparatory and collateral activities.[84]

By ruling on the cases in question, Italian judges provided relevant interpretative keys on new terrorist offences, some of which were addressed for the first time in Italian jurisprudence.

[82] See Correspondents Report – Italy (2005) 8 *YHIL*, 453-455.
[83] See Correspondents Report – Italy (2015) 18 *YHIL*, 20-22.
[84] M Aliatis, 'L'art. 270 bis c.p. al vaglio del Tribunale di Milano', in *Giurisprudenza penale*, <http://www.giurisprudenzapenale.com/2016/05/29/lart-270-bis-c-p-al-vaglio-del-tribunale-milano>.

The most relevant interpretative issue faced by the Italian judges concerned the qualification of the crime under Article 270 *bis* of the Criminal Code, with decisions reaching (apparently) different conclusions.

The Milan Court of Assize in its Judgment No 3 premised its reasoning on the argument that terrorism associated to the Islamic State is a disjointed phenomenon in which each individual may, alone, implement the terrorist organization's program. This peculiarity clearly poses difficulties in the identification of the moment from which it can be said that a person participates in the terrorist association, pursuant to Article 270 *bis* of the Criminal Code. On this point, the Court highlighted that to participate and strengthen the Islamic State, it is sufficient that the participant is put 'at the disposal' of the network to implement its purposes or, more simply, indicates his or her criminal projects so that they can be claimed by Islamic State. The Court stated that the crime under Article 270 *bis* of the Criminal Code must be considered to have been carried out when the acts are undertaken to support terrorist action, such as those aimed to proselytize, spread propaganda documents or acquire false documents. According to the Court, the intercepted phone calls of the defendants revealed their adhesion to the principles of the Islamic State and their willingness to take a more active part in such association and, therefore, the accused were found guilty.

In contrast, in Judgment No 48001, the Court of Cassation overturned the decision of the Court of Bari, confirmed by the Court of Appeal, which recognized the accused responsible for the crime of terrorist association. The reasoning adopted by the Court of Cassation relied on the distinction between 'training' and 'indoctrination' of alleged terrorists. According to the Court, while training may be an activity able to give substance to the purposes of terrorism, indoctrination is only a precondition for the establishment of an association which may result in the carrying out of terrorist acts. Looking at the evidence adduced against the accused in that case, the Court deemed that it lacked significant indications of an effective capacity of the partnership to carry out acts also abstractly definable as terrorism under the definition contained in Article 270 *sexies* of the Criminal Code. This was supported by the fact that, from the telephone recordings of the accused in the period from 2009 until their arrest in 2013, no terrorist act was committed, nor were any concrete preparatory activities undertaken with terrorist purposes.

On the same issue, the Milan Court of Assize by its Judgment No 8 ruled in a different direction by finding the accused guilty of association for terrorist purposes. The proselytizing activity carried out by one of the defendants by imparting fundamentalist lessons to women study groups via Skype was qualified as supporting terrorist action, which falls within the criminal offence under Article 270 *bis* of the Criminal Code. The fact that the accused had never provided her students instructions useful for future training or for the carrying out terrorist attacks was not relevant, since it reflects the clear division of roles of the Islamic State according to which it is men who have to implement the *jihad*. In the view of the Court, the defendant's lessons were able to persuade people to join the call to *jihad*.

Such indoctrination was decisive for the total radicalization of another accused that, known as the first foreign Italian fighter, has moved in Syria to join the *jihad*. Once she arrived in Syria, after having married a Muslim man, the young Italian woman sought to persuade her family on a daily basis to join her in Syria to make the *hijra*. In the view of the judge, such proselytizing activity was not aimed at spreading a creed, but at convincing the others to operate the precise choice of unconditional adherence to the Caliph. The accused was therefore condemned for the crime under Article 270 *bis* of the Criminal Code since in the view of the Court the conduct of association is also carried out simply by concretely cooperating to the realization of the aims of the terrorist group by 'making a contribution in terms of human growth of the Islamic State.'

From the reading of these judgments, it seems that the line between making out the criminal charge and not is demarcated by the concept of 'practical capacity' of the training conduct. This must be distinguished from 'abstract anticipatory' conduct which is not punishable.[85] It should therefore be assessed whether the conduct of indoctrination can actually lead to the commitment of a crime. However, by following this logical deductive approach, the offence would be impossible to judge. Furthermore, Articles 270 *bis* ss of the Criminal Code would be deprived of its *ratio*,[86] which is the prevention of a 'presumed danger.'

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Cases — War Crimes and State Immunity from Jurisdiction: Follow-up of Decision No 238/2014 of the Constitutional Court

☛ Judgment No 15812 of 3 May 2016 the Court of Cassation, Civil United Sections, <http://www.giurcost.org/casi_scelti/Cassazione/Cass.-15812-2016.pdf>

With the Judgment No 15812 of 2016, the Court of Cassation upheld its case law on war crimes and State immunity from jurisdiction in line with its decisions issued in 2015.[88]

The case originated from the proceedings instituted in 2007 by the descendants of Italian citizens who were deported to Germany and forced to hard labor. The appeal was first presented before the Court of Mantova and then before the Court of Bergamo, to which the case was remitted for reasons of competence. On 21 September 2012, the Court of Bergamo declared the lack of Italy's jurisdiction over Germany, and the Court of Appeal upheld this decision.

The heirs of Spartaco Gamba, one of the deportees, appealed to the Supreme Court. The appellants mainly contended the violation of Article 10 of the Italian Constitution (through which the Italian legal order conforms to generally recognized norms of international law) and the international norm according to which, in derogation from the principle of immunity from jurisdiction, States may determine in favor of private citizens the jurisdiction of another State for a particular dispute.[89] The applicants also contended the interpretation of Article 3 of Law No 5/2013 concerning the enforcement of ICJ judgments given by the Supreme Court in its Decision No 1136 of 2014.[90] Indeed, for the applicants Article 3 of Law No 5/2023 did

[85] A Cotiniello, 'Terrorismo e indottrinamento. Anatomia della fattispecie alla luce di una recente pronuncia della Suprema Corte di Cassazione', *Giurisprudenza penale*, <http://www.giurisprudenzapenale.com/wp-content/uploads/2017/01/continiello_gp_2017_1.pdf>, 6-8.
[86] Ibid, 14 ss.
[87] Rachele Cera is Researcher at the Institute for International Legal Studies of the National Research Council (CNR), Rome.
[88] See Correspondents Report – Italy (2015) 18 *YIHL*, 1-10..
[89] In this respect, the applicants contended the violation Article 15 of Annex IV of the 1953 Agreement on German External Debts on Settlement of Disputes which reads as follows: 'Except as otherwise expressly, provided in this settlement proposal, any disputes between creditor and debtor as to the existence and the amount of any claims shall be decided by a Court of Law, or a Court of Arbitration agreed upon by the parties, which is competent in view of the legal relationship between the parties'. In addition, the appellants contended the violation of the following provisions: Articles 2, paragraph 1, and 4, paragraph 1, of Law No 218/1995 reforming the Italian system of international private law; Articles 24, 111 and 117 of the Italian Constitution; Articles 1, 28, paragraph 2, and 39 of the 1957 European Convention for the *Peaceful Settlement of Disputes,* in conjunction with Article 47 of the EU Charter for Fundamental Rights and Article 6, paragraph1, of the European Convention on Human Rights concerning the right to an effective remedy and to a fair trial.
[90] See Correspondents Report – Italy (2014) 17 *YIHL*, 1-3.

not exclude the possibility that the State, which committed serious war crimes and crimes against humanity, could be sued before the courts of other States. This occurs when the State concerned waived, implicitly or explicitly, immunity from jurisdiction. In the present case, Germany participated in the proceedings; it was defended by an Italian lawyer and sued Italy in order to be indemnified for any possible obligation to pay damages. Consequently, the appellants argued that Germany could not plead the immunity from jurisdiction.

In its reasoning, the Supreme Court traced all relevant domestic case law on Germany's immunity from civil jurisdiction related to claims for acts committed by the Nazi troops. The Court pointed out the different positions taken by the Italian courts on this issue during the decade 2004-2014,[91] focusing in particular on the decisions following the 2012 ICJ judgment on the dispute between Germany and Italy.[92]

In its reasoning, the Supreme Court stressed in particular the core principles introduced with Decision No 238/2014 of the Constitutional Court which applied to the present case.[93] The first principle related to the fundamental right to defence established by Article 24 of the Italian Constitution. According to the Constitutional Court, this human right cannot be restricted by the recognition of an absolute State immunity in cases of claims for compensation concerning crimes against humanity and serious violations of fundamental rights. In Decision No 238/2014, it is clear that immunity from jurisdiction of a foreign State is granted in order to protect the exercise of sovereign functions. This rule does not protect States' conduct that does not represent the typical exercise of governmental powers but is, on the contrary, unlawful actions carried out in violation of inviolable human rights.[94] In addition, in Decision No 238/2014, the Constitutional Court held that the fundamental principles of the Italian constitutional system and the inalienable rights constitute a 'limit to the introduction…of generally recognized norms of international law, to which the Italian legal order conforms under Article 10, paragraph 1, of the Constitution'.[95] The Court, while recognizing that under Article 1 of Law No 848/1957 decisions of the ICJ are binding, ruled that the respect for fundamental rights protected by the Italian Constitution creates a limit on the binding nature of ICJ decisions.[96] It followed that Italy was not obliged to comply with the 2012 ICJ judgment which rejected Italy's jurisdiction to make claims against Germany concerning war crimes and crimes against humanity.

Finally, with regard to Law No 5/2013 adopted soon after the 2012 ICJ decision, the Constitutional Court declared the unconstitutionality of Article 3 of this act because it was considered in contrast with Articles 2 and 24 of the Constitution.[97]

Based on the Constitutional Court's ruling, the Supreme Court upheld the grounds of appeal and quashed the ruling on appeal. It also recognized the jurisdiction of the Italian judge and, for this reason, the case was referred again to the Court of Bergamo.

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[91] The Court began with the examination of the 2004 *Ferrini* case up to the judgment of the Constitutional Court No. 238 of 2014.
[92] See Correspondents Report – Italy (2012) 15 *YIHL*, 1-6.
[93] See Correspondents Report – Italy (2014) 17 *YIHL*, 1-12.
[94] Ibid, 10.
[95] Ibid, 9.
[96] The Constitutional Court ruled on the constitutionally of Law No 848/1957 implementing the UN Charter in the domestic legal order. Through this act, Italy also accepted Article 94 of the UN Statute obliging Member States to comply with the ICJ judgments, including the decision of February 2012 that recognized Germany's immunity of jurisdiction. For the reasoning of the Constitutional Court, see Correspondents Report – Italy (2014) 17 *YIHL*, 11.
[97] Article 3 of Law No 5/2013 imposes on Italian judges to comply with the ICJ ruling. See Correspondents Report – Italy (2013) 16 *YIHL*, 1-5.

Legislation — Denial of the Holocaust and Other Serious Crimes as Part of Racial Discrimination

- ☛ Law No 115 of 16 June 2016 'Modification of Article 3 of law No. 654 of 13 October 1975 concerning fight against, and punishment of the crimes of genocide, crimes against humanity and war crimes as described in Articles 6, 7 and 8 of the Statute of the International Criminal Court'[99]
  <http://www.gazzettaufficiale.it/eli/id/2016/06/28/16G00124/sg%20 >

In contrast to many European countries, Italy had no special provisions in its national legislation aimed to prevent and punish the denial of the Holocaust (so called 'denialism').

The relevant prohibition is supported by the Charter of the United Nations, the Universal Declaration of Human Rights and the *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*,[100] as well as a number of pertinent UN General Assembly resolutions.[101]

Within EU legislation, the 2008 Framework Decision 'On combating certain forms and expressions of racism and xenophobia by means of criminal law'[102] is the most relevant instrument. It requires EU member States to make domestically punishable the types of conduct listed in Article 1. These include 'publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes' as described in Articles 6-8 of the ICC Statute and Article 6 of the Charter of the Nuremberg Tribunal. Such conduct is proscribed if it is intentionally directed against a group of persons or a member of such a group defined by reference to factors such as race, religion and ethnic origin, and likely to incite violence or hatred against such a group or a member of such a group.[103]

The obligations resulting from the international and EU legal framework prompted Italy to take the legislative measures necessary to fill the gap in its domestic legal order. However, as has been common to the experience of other European countries, a fierce debate arose within and outside the Parliament on whether criminalizing denialism was compatible with the freedom of expression guaranteed by Article 21 of the Constitution[104] and Article 10 of the European Convention on Human Rights.[105] In January 2007, before the adoption of the EU framework decision, the then Italian Minister for Justice had announced a draft bill, on the government's initiative, prohibiting denialism. Strong response from the scientific

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[99] *Legge 16 giugno 2016, n. 115, Modifiche all'articolo 3 della legge 13 ottobre 1975, n. 654, in materia di contrasto e repressione dei crimini di genocidio, crimini contro l'umanità e crimini di guerra, come definiti dagli articoli 6, 7 e 8 dello Statuto della Corte penale internazionale*, entered into force on 13 July 2016, published in *Gazzetta Ufficiale* No 149 of 28 June 2016.

[100] *International Convention on the Elimination of All Forms of Racial Discrimination*, signed 7 March 1966, 660 UNTS, 195.

[101] Resolution on Holocaust Denial, GA Res 61/255, UN Doc A/Res/61/255(26 January 2007)See also Resolution on the Holocaust Remembrance, GA Res 60/7, UN Doc A/Res/60/7 (1 November 2005).

[102] Council Framework Decision 2008/913/JHA of 28 November 2008, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l33178>.

[103] Council Framework Decision 2008/913/JHA, Article 1.1, c and d.

[104] Article 21.1 contains the following principle: 'Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication.'

[105] Article 10 of the ECHR reads: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'

community followed, with more than 200 historians publically arguing against such a course of action.[106] In their opinion, denying the Holocaust is, certainly, a heinous and dangerous lie. However, fight against denialism can only be by means of historical data, scientific demonstration, and through promoting cultural and social awareness, especially in schools and among young people. By contrast, they argued, criminalizing denialism not only prejudices the freedom of scientific research but also is useless, if not self-defeating, in that it leads to victimization of the targeted persons and gives them an opportunity of further propagating their false and racist ideas during the trial.[107]

This reaction prompted the government to abandon the idea of introducing an offense of denialism into criminal law. Further attempts made in the following years to fill the normative gap in respect of EU legislation were equally unsuccessful.[108]

In 2011, the Minister for Justice announced on the eve of the Holocaust Remembrance Day that a technical group was at work to prepare norms on denialism. At the time, Italy was among the few EU member States that had taken no national measures to comply with the EU framework decision. During the XVI legislature (2012), a draft bill on denialism was introduced into the Senate on the initiative of the Democrat Party.[109] However, the anticipated end of the XVI legislature did not allow completion of the drafting process. Work on the topic restarted during the XVII legislature, with the introduction, on 15 March 2013, of a further draft bill (Act of the Senate S 54),[110] which the Parliament later approved as Law No 115/2016.

The process on passing Law No 115 was difficult, raising lively debate, with, in addition, important differences between the respective views of the Senate and the Chamber of Deputies. The draft bill took different approach to the 2007 draft bill. In the 2007 draft bill, denialism had been conceived as an aggravating circumstance for the offense of 'incitement to committing crimes' described in Article 414 of the Penal Code. Article 414 criminalizes instigating others to commit crimes, as well as the apologia of crimes. The then proposed aggravating circumstance consisted of denying, in addition, genocides or other crimes against humanity, the existence of which Italian or international courts had already ascertained through a final decision: a norm echoing the relevant provisions of French legislation.[111] By contrast, the draft bill S 54, later approved as Law No 115/2016, aimed at modifying national legislation on racial discrimination. This consists, basically, of so-called '*Legge Reali*' of

[106] 'Contro il negazionismo, per la libertà della ricerca storica' ['Against Denial, In Favour of Historic Research Freedom'], 22 January 2007, in StoricaMENTE. Laboratorio di ricerca storica, <http://storicamente.org/02negazionismo>.

[107] Further details in G Puglisi, 'A margine della c.d. 'aggravante di negazionismo': tra occasioni sprecate e legislazione penale simbolica' ['About So-called 'Denial Aggravating Circumstance' between Missed Opportunites and Symbolic Criminal Law'], in *Diritto penale contemporaneo*, 15 July 2016, <http://www.penalecontemporaneo.it/d/4899-a-margine-della-cd-aggravante-di-negazionismo-tra-occasioni-sprecate-e-legislazione-penale-simbolica>.

[108] A short exposé of these precedents is found in Camera dei deputati, Servizio Studi, XVII Legislatura, 'Introduzione dell'aggravante di negazionismo – Atto Camera 2874' [Chamber of Deputies, Studies Service, XVII Legislature, 'Introducing the aggravating circumstance of Holocaust denial – Chamber of Deputies Act No 2874'], Dossier No 291 – 15 April 2015.

[109] Act of the Senate No 3511. The relevant documents are published on the Italian Parliament's official website, <http://www.senato.it/japp/bgt/showdoc/16/DDLPRES/680793/index.html>.

[110] The relevant documentation is available at < http://www.senato.it/leg/17/BGT/Schede/Ddliter/39351.htm >.

[111] So-called '*Loi Gayssot*' (Law No 615 of 13 July 1990 on the punishment of racist, anti-Semitic and xenophobic conducts).

1975, implementing the CERD[112], as modified by subsequent laws, most in particular so-called '*Legge Mancino*' (Law Decree No 122/1993, converted, with modifications, into Law No 205/1993).[113]

Draft bill S 54 envisaged introducing modifications to Article 3 of Law No 654/1975, which implemented Article 4 of the CERD.[114] Article 3 provides, in paragraph 1, imprisonment for up to one year and half or a fine of up to 6,000 euro for making propaganda based on racial superiority and racial or ethnic hatred, or committing or inciting others to commit acts of discrimination or violence for racial, ethnic, national or religious reasons. Moreover, in paragraph 3, there is the prohibition of any organizations, associations or groups having, as a purpose, incitement to discrimination or violence for racial, ethnic, national or religious reasons. Members of these organizations or groups can be punished with imprisonment for up to 4 years, and the leaders with imprisonment for up to 6 years. These penalties apply for the mere fact of participating in, or directing such organizations, associations or groups.

Draft bill S 54 provided for adding a further paragraph (3 bis) into Article 3, with the view of criminalizing other conducts. One was 'apology, denial or trivialization of crimes of genocide, crimes against humanity and war crimes as described in the ICC Statute', a provision widely reflecting Article 1 of the EU framework decision. Another was disseminating by any means, including via the Internet, information or documents relating to racial superiority or racial, ethnic, or religious hatred; and the last one was committing, or inciting others to commit acts of discrimination for racial, ethnic, national or religious reasons. The drafting of these provisions was not a model of clarity (for example, there was mentioned 'special attention to violence and terrorism' without further clarifying this concept). Leaving aside interpretive problems, what many members of the Senate viewed as unacceptable was that the draft bill aimed, they said, at introducing thought crimes, which many felt to be inconsistent with democracy.[115] The opposing position is that imposing limits on the freedom of expression is possible in order to protect other fundamental values. For example, the crimes of slander and libel, which exist in Italy and in most other jurisdictions. *A fortiori,* one cannot protect the freedom of expression to the point of allowing the violation of human dignity caused by denying the Holocaust or other serious crimes, with racist intent. Such behavior is not acceptable in democratic States.[116] Under the ECHR, the freedom of

[112] Law No 654 of 13 October 1975, 'Ratification and implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, opened to signature at New York on 7 March 1966', published in *Gazzetta Ufficiale* No 337 of 23 December 1975.

[113] Law No 205 of 25 June 1993, 'Conversion into law, with modifications, of Law decree No 22 of 26 April 1993 containing urgent measures concerning discrimination for racial, ethnic or religious reasons', published in *Gazzetta Ufficiale* No 122 of 26 April 1993. See also:
<http://presidenza.governo.it/USRI/confessioni/norme/dl_122_1993.pdf>. Law No 85 of 24 February 2006, 'Modifications to the penal code on the subject of thought crimes' (in *Gazzetta Ufficiale* No 60 of 13 March 2006) introduced further modification into Law No 654/1975.

[114] Article 4 ask CERD Parties to condemn 'all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin'.

[115] Cf reports on the discussion of the draft bill's initial and revised version (S.54 and S.54-B) published on the official website of the Senate,
<http://www.senato.it/leg/17/BGT/Schede/FascicoloSchedeDDL/ebook/39351.pdf> and
<http://www.senato.it/leg/17/BGT/Schede/FascicoloSchedeDDL/ebook/46089.pdf>, respectively.

[116] These arguments were strongly supported by the President of the Human Rights Special Commission at the Senate, Senator L Manconi. In the legal literature, see G Sacerdoti, 'Il reato di negazionismo: una tutela della democrazia, non un impedimento alla ricerca storica' ['The Offense of Negationism: A Means of Protecting Democracy and Not an Obstacle to Historic Research'], 'SIDIBlog' [Blog of the Italian Society of International and EU Law], 15 January 2014, <http://www.sidiblog.org/2014/01/15/il-reato-di-negazionismo-una-tutela-della-democrazia-non-un-impedimento-alla-ricerca-storica/>.

expression (Article 10) must be reconciled with the prohibition of abuse of rights (Article 17), as the ECHR Court has highlighted many times, starting from the leading case *Garaudy* v *France* (1998).[117]

Another issue in dispute concerned the fact that the draft text under examination did not mention publicity as a requirement for qualifying the conducts therein described as criminal offenses. If approved as law, paragraph 3 bis of Article 3 would have also covered, absurdly, racist opinions expressed privately, for example in family gatherings or similar situations and, thus, with no risk to public order. For many senators, this side effect of the draft norm was unconstitutional, and reinforced the impression that the objective of the new provision was punishment of certain ideas, independently from their concrete social impact.

In the end, the Senate modified the draft text to make denialism no longer an autonomous offense, but an aggravating circumstance for the offenses already set out in Article 3 of law No 654/1975. In this version, provisionally approved on 11 February 2015, the paragraph added in Article 3 was as follows:

> '3 bis. For the conducts envisaged in paragraph 1, letters a) and b) and in paragraph 3, increased penalties are provided if propaganda, public instigation or public incitement are based, completely or in part, on denial of the Holocaust or of crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the ICC Statute, which Italy ratified by virtue of law No 232 of 12 July 1999'.[118]

With regard to the public character of the relevant conduct, the draft further envisaged modifying paragraph 1 of Article 3, in order to make explicit that propagating racial ideas, instigating, or inciting others to acts of racial discrimination or violence (of which denialism was an aggravating circumstance) were punishable only if publicly committed. In this way, the Senate responded to the objection that private opinions, as objectionable as they may be, are not per se punishable. Finally, a further draft provision modified Article 414 of the Penal Code. It aimed at ensuring coordination between the penalties provided by that Article for the offense of 'incitement to committing crimes' and the increased penalties for the aggravating circumstance of denialism ex Article 3 of law No 654/1975.

The Chamber of Deputies, when examining, in turn, the draft approved by the Senate, did not share the same concerns.[119] For a majority of Deputies, no other modifications to the existing legislation were necessary beyond providing for an aggravating circumstance of denialism as a part of racial discrimination. Instead, the Chamber concentrated on a question, which in its view remained unaddressed. This was the issue of determining who had the power of ascertaining the commission of a given crime (of genocide or crimes against humanity) for the purposes of applying the aggravating circumstance. During debate in the Senate, some had argued that the relevant principle was implicit in the draft paragraph 3 bis.

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[117] Camera dei deputati, Servizio Studi, XVII Legislatura, 'Introduzione dell'aggravante di negazionismo', 5. In the more recent case *M'Bala M'Bala v France*, the Court ruled that the freedom of expression could not be invoked with regard to denialist and anti-Semitic performances carried out by the applicant as a comedian. See: Press Release, ECHR 354(2015), 10/11/2015, <http://osservatorioantisemi-c02.kxcdn.com/wp-content/uploads/2015/11/Decision-MBala-MBala-v.-France-ECHR-does-not-protect-negationist-and-anti-Semitic-performances.pdf>.

[118] Senato, XVII Legislatura, 'Disegno di legge approvato dal Senato della Repubblica' [Senate, XVII Legislature, Draft bill approved by the Senate of the Republic'], 7-8, <http://www.senato.it/leg/17/BGT/Schede/FascicoloSchedeDDL/ebook/46089.pdf>.

[119] Cf Camera dei Deputati, XVII Legislatura, Seduta n. 500 (Chamber of Deputies, XVII Legislature, Session No 500), 12 October 2015, <http://www.camera.it/leg17/410?idSeduta=0500&tipo=stenografico#sed0500.stenografico.tit00020>, and Seduta n 501 (Session No 501), 13 October 2015, <http://www.camera.it/leg17/410?idSeduta=0501&tipo=stenografico#sed0501.stenografico.tit00070>.

Accordingly, for any crimes other than the Holocaust, which no one might put in doubt in good faith, previous ascertainment from the ICC was necessary. The only basis for such interpretation was, however, the *renvoi* made in the paragraph to the ICC Statute, for other purposes. For the Chamber of Deputies, in the absence of an express clause, there was no clarity on this particular point, and this went against the need for legal certainty and other important principles of criminal law. There was consensus on the fact that the ascertainment could not be left to national courts, because of the international character of the crimes involved, and the difficulties of assessing the occurrence of genocides, crimes against humanity or war crimes in the meaning of the ICC Statute and related instruments.

These arguments led the Chamber to pass, on 13 October 2015, a draft deeply modified as compared to the one approved by the Senate. First, it provided no modifications to the existing legislation except for adding paragraph 3 bis into Article 3 of Law No 654/1975. Second, the Senate's draft of this new paragraph was complemented with the following provision:

> Such facts shall be taken into account as ascertained by international tribunals, through final decision, or by determinations from international or supranational bodies, of which Italy is a Member.[120]

The Senate was not receptive to these changes.[121] It seemed to a majority of members that the rationale behind the provision added in paragraph 3 bis was, perhaps, correct but the chosen formula was unsuitable. The meaning of the words 'shall be taken into account' was unclear and, thus, raised interpretive problems. Most importantly, if final decisions from an international court seemed an adequate basis for applying the aggravating circumstance before domestic courts, the same was not true with regard to the more nebulous determinations from other international bodies (which were likely to be of political nature). In addition, the suppression of the other provisions was widely criticized, especially with regard to the publicity requirement, which the Senate persisted in considering necessary.

These objections re-opened discussion on concepts and principles which had been already accepted, with the introduction of a great number of amendment proposals on most diverse issues. For example, there was a proposal to exclude certain war crimes listed in Article 8 of the ICC Statute, and reputed *minoris generis*, from the material scope of the denialism aggravating circumstance.[122] In other words, the situation was such that the outcome of a long-lasting parliamentary process was seriously at risk. In the end, however, the Senate was able to reach consensus on an amendment proposal (No 1401) introduced by the President of the Justice Commission,[123] which – it was agreed – would replace, if approved, all earlier drafts and amendments. Approved by the Senate in the plenary session of 3 May 2016[124] and by the Chamber of Deputies, on 8 June 2016, this became the final text of Law No 115/2016. It contains a unique Article, which modified Law No 654/1975 by adding paragraph 3 bis into Article 3. Under the new paragraph, the penalty for the offenses of propaganda, instigation or incitement described in paragraph 1 is imprisonment for up to two to six years where there is the aggravating circumstance of denialism. This occurs every time the above

[120] Senato, XVII Legislatura, 'Disegno di legge approvato dalla Camera dei Deputati' [Senate, XVII Legislature, Draft bill approved by the Chamber of Deputies'], 7-8, <http://www.senato.it/leg/17/BGT/Schede/FascicoloSchedeDDL/ebook/46089.pdf>.
[121] Cf Senato della Repubblica, XVII Legislatura, Fascicolo iter DDL S 54-B [Senate of the Republic, XVII Legislature, Discussion on the draft bill S 54-B], published on 21 March 2017, <http://www.senato.it/leg/17/BGT/Schede/FascicoloSchedeDDL/ebook/46089.pdf>.
[122] Amendment 1.401/17. Ibid, 252-253.
[123] Ibid, 253.
[124] Ibid, 229-243.

offenses are 'based, completely or in part, on the denial of the Holocaust or of crimes of genocide, crimes against humanity and war crimes as described in Article 6, 7 and 8 of the ICC Statute'. Moreover, it is necessary that the offense has been committed 'in such a manner as resulting in concrete danger of dissemination' (the chosen formula to embed the publicity requirement). The paragraph does not contain indication about the ascertainment, in each case, of the crime allegedly denied. It is likely that Italian courts will take decisions from international tribunals as a legal basis, where possible.

There has been criticism about the new norm because of, inter alia, the difficulties that might be encountered in its application. Although correct at the conceptual level, the choice of introducing punishment of denialism as a part of legislation against racial discrimination means that there are likely to be few opportunities to invoke it in the practice (in reality, all the provisions of Article 3 of Law No 654/1975 have already proved ineffective). In addition, it seems that the compromise solutions embedded in paragraph 3 bis mean that it is not fully in line with the EU framework decision.[125]

ORNELLA FERRAJOLO[126]

Cases — Arbitration between Italy and India in the Dispute concerning the Enrica Lexie Incident

- An Arbitral Tribunal constituted under annex VII of the 1982 United Nations Convention on the Law of the Sea, Dispute concerning the Enrica Lexie Incident, *The Italian Republic v The Republic of India*, Order request for the prescription of provisional measures, 29 April 2016. <https://www.pcacases.com/web/sendAttach/1707>
- Supreme Court of India, Petition(s) for Special Leave to Appeal (C) No (s). 20370/2012 *Massimilano Latorre and Ors Petitioner(s) v Union of India and Ors Respondent(s)* (for relaxation of bail conditions of Sergeant Major Salvatore Girone and office report), I.A. No. 14/2016, 20 September 2016. <http://barandbench.com/wp-content/uploads/2016/05/Massimilano-Lattore-v.-UoI.pdf>

The 'Enrica Lexie' incident gave rise to a dispute between Italy and India[127]. In short, on 15 February 2012, the MV Enrica Lexie, an oil tanker flying the Italian flag, reported a pirate attack occurred in an International Maritime Organization (IMO)-designated high-risk area in international waters along the Indian coast and outside the Indian territorial waters. The same day. criminal investigations started in India for the alleged killing of two fishermen on board an Indian vessel named the 'St. Antony'.

Upon request for cooperation by Indian authorities, the MV Enrica Lexie entered the Indian Port of Kochi in Kerala, and two Italian marines, belonging to a Vessel Protection

[125] G Della Morte, 'Sulla legge che introduce la punizione delle condotte negazionistiche nell'ordinamento italiano: tre argomenti per una critica severa' ['Introducing Punishment of Denialism in the Italian Legal Order: Three Arguments for Severe Criticism'],'SIDIBlog' [Blog of the Italian Society of International and EU Law], 22 June 2016, <http://www.sidiblog.org/2016/06/22/sulla-legge-che-introduce-la-punizione-delle-condotte-negazionistiche-nellordinamento-italiano-tre-argomenti-per-una-critica-severa/>.

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[127] For a detailed description of the facts, see J P Pierini and V Eboli, 'Coastal State Jurisdiction over Vessel Protection Detachments and Immunity Issues: the 'Enrica Lexie' Case' (2012) 51 *Military Law and Law of War Review* 117-148.

Detachment (VPD) deployed onboard,[128] Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone were taken into custody by the Indian Authorities.

The dispute was initially pending before the Indian Courts. Then, Italy questioned the exercise of criminal jurisdiction by Indian judges over the vessel and two Italian marines from the Italian Navy, in respect of that incident.

On 26 June 2015,[129] Italy sued India before the International Tribunal on the Law of the Sea,[130] under Article 287 and Annex VII, Article 1 of the United Nations Convention on the Law of the Sea (UNCLOS).[131]

The orders for provisional measures under comment are related to a request to seek the relaxation of their bail conditions. Before the orders were issued, Sergeant Latorre, after suffering a strong in September 2014, was authorised by the Indian Supreme Court to return to Italy subject to conditions and an undertaking that he would be returned to India. The relief originally granted to Latorre to stay in Italy expired on 30 September 2016. Sergeant Girone remained still kept in custody in India.

On 29 April 2016, the Arbitral Tribunal constituted under Annex VII UNCLOS[132] issued an Order[133] concerning a request[134] for the prescription of provisional measures filed by Italy on 11 December 2015.

The Request for provisional measures was submitted pursuant to Article 290(1) of the UNCLOS seeking an Order from the Tribunal that India take such measures as are necessary to relax the bail conditions. It seeks to allow Sergeant Girone liberty to return to Italy, under the responsibility of the Italian authorities, pending the final determination of the Annex VII Tribunal.

Italy claimed that Sergeant Girone's continuing deprivation of liberty was is in breach of minimum guarantees of due process under international law and caused irreversible prejudice to Italy's rights of jurisdiction over and immunity for its officials.[135]

On 26 February 2016, India submitted its Written Observations on that Request.[136]

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[128] It was deployed in accordance with Italian Law No 130/2011.

[129] See Correspondents Report – Italy (2015) 18 *YHIL*, 22-24 and (2014) 17 *YHIL*, 364-365. The notification is available at <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/Request/Notification_of_the_Italian_Republic_r.pdf >.

[130] Both Italy and India are States Parties to UNCLOS, having ratified it respectively on 13 January 1995 and 29 June 1995.

[131] The dispute focuses on Parts II, V, and VII of UNCLOS regarding the exercise of criminal jurisdiction over foreign-flagged vessels in the circumstances in issue, including as regards the immunity of foreign State officials, and the duty of States under the Convention to cooperate in the repression of piracy. Italy contests the legality under UNCLOS of India's exercise of criminal jurisdiction over the Italian Marines. Italy claims that India, by arresting, detaining, and exercising criminal jurisdiction over the Italian Marines (contrary to Article 92 of UNCLOS), violated Italy's right of exclusive jurisdiction to entertain criminal proceedings in connection with the Enrica Lexie incident and acted in a manner incompatible with Articles 56(2) and 89 of UNCLOS by exercising its jurisdiction as a coastal State in the contiguous zone and the exclusive economic zone.

[132] The Arbitral Tribunal is composed of Professor Francesco Francioni, Judge Jin-Hyun Paik, Judge Patibandla Chandrasekhara Rao and Judge Patrick Robinson as arbitrators, and Judge Vladimir Golitsyn as arbitrator and President of the Arbitral Tribunal. The Permanent Court of Arbitration (PCA) in The Hague acts as Registry in the arbitration by agreement of the Parties.

[133] <http://www.pcacases.com/web/view/117>.

[134] <http://www.pcacases.com/pcadocs/Request/Italys%20Request%20for%20Provisional%20Measures.pdf>.

[135] Arbitration under annex VII of the United Nations Convention on the law of the sea, Dispute concerning the 'Enrica Lexie' incident the Italian Republic v. the Republic of India request for the prescription of provisional measures under Article 290, paragraph 1, of the United Nations Convention on the Law of the Sea, 11 December 2015, available at <http://www.pcacases.com/pcadocs/Request/Italys%20Request%20for%20Provisional%20Measures.pdf>.

[136]< http://www.pcacases.com/pcadocs/Request/Italys%20Request%20for%20Provisional%20Measures.pdf>.

On 30 and 31 March 2016, a public hearing on provisional measures was held and both Parties presented two rounds of oral arguments.

The Arbitral Tribunal unanimously prescribed some provisional measures. In particular, it stated that Italy and India shall cooperate, including in proceedings before the Supreme Court of India, to achieve a relaxation of the bail conditions of Sergeant Girone so as to give effect to the concept of considerations of humanity, so that Sergeant Girone, while remaining under the authority of the Supreme Court of India, may return to Italy during the current Annex VII arbitration.

It confirmed Italy's obligation to return Sergeant Girone to India in case the Arbitral Tribunal finds that India has jurisdiction over him in respect of the Enrica Lexie incident.[137]

Italy and India were requested to report to the Arbitral Tribunal on compliance with such provisional measures, and the President is authorized to seek information from the Parties if no such report is submitted within three months from the date of the Order and thereafter as he may consider appropriate.

On 8 September 2016, Chief Master Sergeant Massimiliano Latorre, whose permission to stay in Italy expired on 30 September 2016, applied to the Indian Supreme Court seeking an extension of his stay in Italy till the end of his arbitration.[138] The Indian Supreme Court allowed him to remain in Italy till the international arbitral tribunal decided the jurisdictional issue.[139]

As far as Sergeant Major Girone is concerned, following an application filed by Italy,[140] for the purposes of seeking relaxation of his bail conditions, the Supreme Court of India considered that Sergeant Girone, while remaining under the authority of the Supreme Court of India, was permitted to return to Italy during the Annex VII arbitration,[141] subject to some conditions.

Prior to his departure, Sergeant Girone had to provide and file an undertaking on affidavit in these proceedings, accepting and recognizing that he remains and shall even upon his departure from India continue to remain under the authority of the Supreme Court of India.

He had to surrender his passport to the Italian authorities on his departure from India and is prohibited from leaving Italy unless the Supreme Court grants him leave to do so, following a petition duly submitted to the Supreme Court to that effect.

On the first Wednesday of every month, Sergeant Girone has to report to an identified Police Station in Italy, which will then inform the Head of Chancery in the Embassy of India in Rome, in writing, after each such reporting.

Italy has to submit, via a Note Verbale from the Embassy of Italy to the Ministry of External Affairs, Government of India every three months, on the first business day of the month in question starting on 1 September 2016, a report on the situation of Sergeant Girone for purposes of apprising the Indian Supreme Court.[142]

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[137] For the former order, see Correspondents Report – Italy (2015) 18 *YHIL*, 22-24.

[138] <http://www.newindianexpress.com/nation/2017/mar/06/supreme-court-to-hear-italian-marine-latorres-plea-seeking-extension-to-his-stay-1578197.html>.

[139] Ibid.

[140] Such application was pursuant to the aforementioned order dated 29 April 2016 of the Annex VII Arbitral Tribunal prescribing provisional measures in the dispute between Italy and India in respect of the 'Enrica Lexie' incident.

[141] Supreme Court of India, Petition(s) for Special Leave to Appeal (C) No (s). 20370/2012 *Massimilano Latorre and Ors. Petitioner(s) versus Union of India and Ors. Respondent(s)* (for relaxation of bail conditions of sergeant major Salvatore Girone and office report), I.A. No. 14/2016, 20 September 2016. <http://barandbench.com/wp-content/uploads/2016/05/Massimilano-Lattore-v.-UoI.pdf. >.

[142] Ibid.

Sergeant Girone is prohibited to directly or indirectly contacting, influencing or tutoring any witnesses in the case, including those based in Italy, and from attempting to destroy the evidence in any manner.

The Court stated that in the event of breach of any of the conditions either cumulatively or independently, the bail granted shall stand cancelled. The Ambassador of Italy was requested to file an undertaking on affidavit in these proceedings prior to the departure of Girone stating that he shall be made to return to India within a period of one month of the decision or direction of the Arbitral Tribunal requiring him to do so or as directed by the orders of the Court.

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