ITALY[1]

Contents

Legislation — Introducing the Offense of Torture into the Italian Criminal Code

☛ Law No. 110 of 14 July 2017 'Introduction of the crime of torture into the Italian legal order'[2] <http://www.gazzettaufficiale.it/eli/id/2017/07/18/17G00126/sg>

As already reported in the *YIHL*, Italian criminal legislation did not envisage a special offense of torture,[3] even though Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[4] – which Italy ratified in 1989 – requires states parties to criminalise torture, including appropriate penalties, in their domestic legal order. [5] Other treaty provisions relevant to the issue to which Italy is a party, are the International Covenant on Civil and Political Rights,[6] Article 7, the European Convention on Human Rights (ECHR), [7] Article 3 and the Rome Statute of the International Criminal Court,[8] which qualifies torture as a war crime (Article 8) and a crime against humanity (Article 7).

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[2] Legge n. 110, 14 luglio 2017, 'Introduzione del delitto di tortura nell'ordinamento italiano', entered into force 18 July 2017, published in *Gazzetta Ufficiale* No. 166 of 18 July 2017.

[3] See Rachele Cera et al., Correspondents' Report – Italy (2013) 16 *YIHL* <http://www.asser.nl/media/3912/italy-yihl-19-2016v2.pdf> accessed 9 October 2018, pp 21-28 and Rachele Cera et al., Correspondents' Report – Italy (2014) 17 *YIHL* <http://www.asser.nl/media/3912/italy-yihl-19-2016v2.pdf> accessed 9 October 2018, pp 12-13.

[4] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85, entered into force 26 June1987 [CAT].

[5] Under Article 4 of the CAT, above n. 4, "1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person, which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

[6] International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171, entered into force 23 March 1976.

[7] Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221, entered into force 3 September 1953 [ECHR].

[8] Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3, entered into force 1 July 2002 [Rome Statute].

All mentioned treaties have become part of the Italian legal order, by virtue of implementing orders adopted by Parliament. Many of their provisions are not self-executing however, and, thus, require explicit implementation. This is relevant also in light of Article 25 of the Italian Constitution, by virtue of which no criminal offense or penalty can be established, if not by law. While the Italian Military Criminal Code, which applies during armed conflicts, penalises torture,[9] all attempts by Parliament of introducing similar provisions into the ordinary Italian Criminal Code were unsuccessful. Over the years, many Italian jurists and national courts, as well as the relevant treaty-monitoring bodies, the UN Human Rights Council and the European Court of Human Rights (ECtHR) – with *Cestaro* v. *Italy* (2015) as the leading case[10] – stressed on the need of filling this legislative gap as a matter of priority.

A new remedy was established in 2017, with Law No. 110 of 14 July. This Law introduced the crime of torture, as the title suggests, "into the Italian legal order". Such wording is partly misleading, because torture has always been punishable in Italy, as a result of Article 13, paragraph 4 of the Constitution ("Any act of physical and moral violence against a person subjected to restriction of personal liberty shall be punished."). Furthermore, Article 2 of the Constitution protects all inviolable rights of individuals. In the absence of special implementing norms, Italian judges used to apply the constitutional precepts prohibiting torture in conjunction with the articles of the Criminal Code establishing the offenses of 'abuse of power', 'personal injury' and others. However, this has not necessarily guaranteed accountability or appropriate punishment in all situations, also because the mentioned offenses are subjected to statutory limitations.

The draft bill later approved as Law No. 110/2017 was introduced into the Senate by the Chairman of the Human Rights Committee Luigi Manconi and other members of the Democratic Party in 2013 (Act of the Senate S.10, or so-called 'Manconi draft bill')[11] under the title 'Introduction of the offense of torture into the Criminal Code'. Article 1 added a new article (608 bis) in that part of the Criminal Code that deals with offenses against personal freedom. More precisely, the new norms on torture followed Article 608, which penalises the conduct of abuse of power by public officials against detainees or other persons in their custody.

The text of Article 608 bis closely mirrored the definition of torture under Article 1 of the CAT.[12] It provided for imprisonment from four to ten years for "any public officials or persons acting in an official capacity intentionally inflicting on a person, in whatsoever manner, pain or suffering, whether physical or mental". Such conduct was punishable "if directed to obtain information or a confession from the tortured person, punish a person for any act he or a third person has committed, or when

[9] Article 185 bis of the *Italian Military Criminal Code* imposes imprisonment from 1 to 5 years on any member of the military forces who inflicts torture or inhuman treatment on war prisoners, civilians, or other persons protected under the relevant conventions of humanitarian law.

[10] European Court of Human Rights, Fourth Section, *Cestaro* v. *Italy*, Judgment, 7 April 2015, Application 6884/11 available at <http:// http://hudoc.echr.coe.int/eng?i=001-153901>.

[11] Senato della Repubblica, Atti Parlamentari, Atto No. 10, XVII Legislatura – Disegni di legge, rapporti e documentazione, *Disegno di legge presentato alla Presidenza il 15 marzo 2013 d'iniziativa dei Senatori Manconi, Corsini e Tronti* [Senate of the Republic, Parliamentary Acts, Act No. 10, XVII Legislature - Drafts of Law, Reports and Documentation, 'Bill presented to the Presidency on March 15, 2013 by Senators Manconi, Corsini and Tronti'].

[12] Unlike other treaties, which prohibit torture without defining its legal concept, the CAT, above n. 4, states in Article 1: "[T]he term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".

utilised as a means of intimidation or coercion, or for any discrimination reasons." (Article 608 bis, paragraph 1.) Paragraph 2 envisaged an increased penalty in case of personal injury resulting from such acts, and a doubling of the sentence in the event of the tortured person's death. Under paragraph 3, the same penalties were imposed on any public officials or other persons acting in an official capacity who had incited others to commit torture, had abstained from preventing the commission of torture, or had tacitly consented to it. The subjective element of torture, as established under the CAT, was respected because Article 608 bis penalized the conduct in question only if carried out by state officials or other persons acting in an official capacity, and with the motives listed in Article 1 of the CAT (*mens rea*). With regard to the material element (*actus reus*), the draft bill was even wider in scope, because it criminalised the conduct of causing any pain or suffering, and not necessarily of a "severe" nature.

All other provisions of the draft bill were also in line with the CAT precepts. Article 2, paragraph 1 excluded the possibility of recognising diplomatic immunities to aliens convicted for the crime of torture in another country or by an international tribunal. This norm reflected Article 8 of the CAT, and the fact that torture is a crime under general international law. Paragraph 2 set out an obligation to extradite any foreign citizen to the country where a proceeding was pending, or a judgment had been pronounced against him for the crime of torture; in case of proceedings brought before international tribunals, the relevant international norms applied.

Moreover, Article 3 added a new paragraph in Article 191 of the Italian Code of Criminal Procedure. This Article excluded the utilisation in judicial proceedings of evidence unlawfully collected. The new paragraph echoed Article 15 of the CAT in establishing that statements obtained by torture cannot be utilised as evidence in proceedings, except when necessary to prove that an act of torture has been committed and in order to ascertain the criminal responsibility of its author.

Finally, Article 4 modified Article 19 of the Consolidated Act on Immigration Law and the Status of Aliens (legislative decree No. 286 of 1998).[13] Article 19 imposes limits on the expulsion of aliens. A new paragraph 1 bis was added into the Article, with the aim of prohibiting the *refoulement*, expulsion or extradition, of any persons to a state in which there are serious reasons to believe that these persons would be at the risk of being subjected to torture. In evaluating the 'serious reasons', Italian state authorities had to take into consideration inter alia whether systematic or grave human rights violations were occurring in that country. It is almost superfluous to note that these provisions were in line with the contents of Article 3 of the CAT and Article 3 of the ECHR as interpreted by the ECtHR.

Concluding, the 'Manconi draft bill' needed no, or few modification, from the perspective of fully implementing the CAT in Italy. However, the Senate Permanent Committees, first, and after that, Plenary Sessions, examined the draft text in conjunction with a number of previous draft bills on the same subject (Acts of the Senate S.362, S.388, S.395, S. 849, and S.874). This resulted in reopening several controversial issues, which Parliament had unsuccessfully addressed in the past. Such a course of action put at risk the adoption of any new provision on torture, and led to a heavy modification of the initial version of the 'Manconi draft-bill', during the debate at the Senate and, later, the Chamber of Deputies.

[13] Decreto legislativo n. 286, 25 luglio 1998, 'Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero', entered into force on 2 September 1998, published in *Gazzetta Ufficiale* No. 191 of 18 August 1998.

One of the most problematic issues was the non-general acceptance within Parliament that torture is, typically, a crime committed by state officials, at least in the meaning of the CAT. It was objected in the Senate that private persons are equally capable of committing torture, especially members of the 'mafia' and other criminal organizations. This argument was not irrational. However, it was also utilised to support the opinion that adapting domestic laws following the CAT approach could harm the honour of the police forces and other state officials. There was no general recognition of the fact that the 'asymmetric relationship' between, on the one hand, public officials and other persons acting in an official capacity and, on the other hand, detainees and other individuals deprived of their freedom is at the very core of the concept of torture under the CAT. This notion has been confirmed by all treaty-monitoring bodies and international courts in their jurisprudence, and national criminal law should, therefore, comply with it too. Though defended by many parliamentarians,[14] this point of view did not prevail, despite the fact that Italian criminal law has examples of offenses that can be committed only by a well-specified category of persons (*reato proprio*). In the text approved by the Senate on 5 March 2014 (first reading), torture is described as a crime that can be committed by anyone (*reato comune*). It was suggested inserting the relevant provisions through a new Article 613 bis of the Criminal Code (i.e., after Article 613, which does not envisage a *reato proprio* of state officials). In addition, in the draft text, the use of torture committed by state officials was merely regarded as an aggravating circumstance and not as an autonomous offense.[15]

Another point of discussion was whether the reiteration of the wrongful act was a condition for criminalisation. Also on this point, the wording of the CAT, Article 1 ("any act"), is clear. In the views of several members of the Parliament, however, this meant every single act of torture would be considered an autonomous crime and, thus, the provision would inflict a series of crimes on the alleged perpetrator, even though, in reality, inter-related acts should rather constitute one single conduct. As a result of this reasoning, the material element of torture was further weakened. Such changes were firstly introduced by the Chamber of Deputies (draft approved on 9 April 2015), and then continued by the Senate (draft approved on 17 May 2017).[16] During this process, any mention of the motivating factors contained in the CAT disappeared.

In the final version approved by the Senate (second reading) as Article 1 of Law No. 110, on 5 July 2017, the new Article 613 bis of the Italian Criminal Code reads as follows:

> Anyone who causes, with repeated violence or serious threats or acting with cruelty, severe physical pain or a psychological trauma that can be verified, to a person deprived of personal freedom or who is under his custody, power, vigilance, control, care or assistance, or in another situation of reduced defence, shall

[14] See speeches from, among others, Senators Luigi Manconi and Enrico Buemi in Senato della Repubblica, XVII Legislatura, Fascicolo iter DDL S.10, 'Introduzione del reato di tortura nel codice penale' [Senate of the Republic, XVII Legislature, Dossier iter DDL S.10, 'Introduction of the crime of torture in the penal code'], pp 446-449.

[15] See the 'unified text' of the draft-bill in Senato della Repubblica, XVII Legislatura, n. 10-362-388-395-849-874-B [Senate of the Republic, XVII Legislature, no. 10-362-388-395-849-874-B], p 2.

[16] See Camera dei Deputati, XVII Legislatura, N. 2168-B, Proposta di legge approvata, in un testo unificato, dal Senato della Repubblica il 5 marzo 2014 (stampato Camera n. 2168), modificata dalla Camera dei Deputati il 9 aprile 2015 (stampato Senato n. 10-362-388-395-849-874-B), nuovamente modificata dal Senato della Repubblica il 17 maggio 2017, Introduzione del delitto di tortura nell'ordinamento italiano, trasmessa dal Presidente del Senato della Repubblica il 18 maggio 2017 [See Chamber of Deputies, XVII Legislature, No. 2168-B, Proposed law, in a unified text, by the Senate of the Republic March 5, 2014 (printed Room No. 2168), amended by the Chamber of Deputies on April 9, 2015 (printed Senate No. 10-362-388-395-849-874-B), again amended by the Senate of the Republic on 17 May 2017, Introduction of the offense of torture in the Italian legal system, transmitted by the President of the Senate of the Republic on May 18 2017], p 2.

> be punished with imprisonment from 4 to 10 years, if the fact consists in more conducts, or implies a treatment inhuman and degrading for the dignity of this person.
> If the conduct described in the preceding paragraph is hold by a public official or a person acting in an official capacity, with an abuse of his powers or in breach of the obligations inherent to his public functions or official capacity, the penalty is imprisonment from five to 12 years.
> The preceding paragraph does not apply in case of pain deriving only from the execution of lawful measures that exclude or restrict personal rights. [17]

Paragraphs 4 and 5 provide for an increased penalty in case the torture leads to serious injury, or death.

Additionally, Law No. 110 introduced a new Article 613 ter into the Italian Criminal Code establishing the offense of 'incitement to torture by public officials'. This norm imposes the penalty of imprisonment from 6 months to 3 years on any public official or a person acting in an official capacity who incites other state officials or persons acting in an official capacity to commit torture, when no act of torture has actually occurred as a result of this conduct.

Taking all of these provisions into account, it can be concluded that criminalising torture irrespective of it being inflicted by public officials or private persons, is not *per se* contrary to Italy's obligations under the CAT. As is accepted, CAT allows states parties to establish law provisions with wider application in their own domestic legal order.[18] To fully respect the CAT obligations, however, Law No. 110 should have introduced the commission of torture by state officials and other persons acting in an official capacity as an autonomous offense. In addition, it is not clear why the main offense (Article 613 bis) can be committed by anyone, while instigation to torture constitutes a crime (Article 613 ter) only if committed by state officials.

Another relevant deviation from the CAT is that Article 613 bis does not refer to the motivation of the perpetrator to commit torture. To the contrary, it adds a number of (unnecessary) elements into the legal notion of torture – such the reiteration of violence, or acting with cruelty – and, thus, is possibly narrowing the scope of application. With regard to inflicting mental pain, suffering is not regarded as sufficient to constitute torture. Instead, "a psychological trauma", which, in addition, "can be verified", is needed. Also rather obscure is the part of Article 613 bis requiring that the act consist of "more conducts", or involve "a treatment inhuman and degrading for the dignity of [the tortured] person". Leaving aside that all relevant international instruments utilise the expression "inhuman *or*" and not "*and* degrading treatment", one can hardly imagine how torture might occur without also implying ill-treatment. With regard to torture committed by a public official or a person acting in an official capacity, the further aggravating conditions of an abuse of powers or a breach of the obligations inherent in the public functions of the perpetrator are introduced. Here, again, one can find requirements not only unknown to the CAT, but also completely useless for defining the crime (as is clear, inflicting torture is *per se* an abuse of power and a breach of state officials' obligations).

Finally, Law No. 110 did not embed the proposal put forward during the drafting process of establishing a fund for victims' compensation.[19]

Not surprisingly, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has criticised the new Italian legislation, already in its

[17] This paragraph is in conformity with CAT, above n. 4, Article 1, paragraph 1 (last phrase), which excludes from the legal notion of torture "pain or suffering arising only from, inherent in or incidental to lawful sanctions".
[18] CAT, above n. 4, Article 1, paragraph 2.
[19] Article 5 specifies that the implementation of Law No. 110 does not involve new or major burden on the state budget.

drafting process.[20] After the adoption of Law No. 110, Italian representatives at the Sixty-second Session of the Committee against Torture (CAT Committee) tried to defend its most discussed contents, by observing:

> Act No. 110/2017, on the introduction of the crime of torture in the Italian legal system, criminalised a wide range of acts that could, individually, be considered to constitute torture. For example, repeated violence or inhuman or degrading treatment alone could provide sufficient grounds for charges of torture to be brought. (…)
> The inclusion of an aggravated circumstances provision for cases where the perpetrator was a public official did not in any way restrict the scope of applicability of the Act, including with regard to private individuals tasked with caring for dependent persons in residential health-care facilities. Furthermore, the criminalisation of incitement to torture was an important step forward. [21]

It does not seem that the CAT Committee found these arguments convincing. In its concluding observations, the Committee did not include the adoption of Law No. 110 of 2017 in the 'positive aspects' of the CAT implementation that emerged from Italy's combined fifth and sixth periodic reports. [22] With regard to Law No. 110, the Committee observed:

> Despite the explanation given by the delegation as to the non-cumulative nature of the elements mentioned in article 613 bis, the Committee considers that this definition is significantly narrower than the definition contained in the Convention, and establishes a higher threshold for the crime of torture by adding elements beyond those mentioned in article 1 of the Convention. [23]

The Committee recommended Italy to ensure that the domestic legal definition of torture would be in line with the one contained in the CAT, "by eliminating all superfluous elements and identifying the perpetrator and the motivating factors or reasons for the use of torture".[24] Moreover, the Committee was concerned that the crime of torture is subject to a statute of limitations. Torture is now envisaged as a special offense by Article 613 bis of the Italian Criminal Code, with a possible penalty of four to ten years imprisonment and a statute of limitations of 18 years. The Committee recommended Italy to introduce a new norm establishing that torture is not subject to statutory limitations.[25]

The other articles of Law No. 110 remained substantially free from criticism and, thus, seem to be consistent with the relevant CAT provisions. This concerns the modification of Article 191 of the Italian Code of Criminal Procedure (non-utilisation of statements obtained by torture in judicial

[20] In the words of the CPT, "[u]nfortunately, the draft legislation in question is not in compliance with the precepts of the 1984 United Nations Convention against Torture. More particularly, the bill provides that the offence must be reiterated and that it can be committed by an ordinary individual; the fact that an act of torture may be inflicted by a public official is not considered as an autonomous criminal offence but rather as an aggravating factor. Finally, the offence is subject to a statute of limitations.", see CPT, Report to the Italian Government on the visit to Italy carried out by the European Committee for the prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 21 April 2016, CPT/Inf (2017) 23, 8 September 2017, p 12.
[21] Committee against Torture, Sixty-second Session, Summary record of the 1582nd meeting, Consideration of reports submitted by States parties under article 19 of the Convention, Combined fifth and sixth periodic reports of Italy, CAT/C/SR.1582, 17 November 2017, paras 49-50.
[22] Committee against Torture, Sixty-second Session, Concluding observations on the combined fifth and sixth periodic reports of Italy, CAT/C/ITA/CO/5-6, 18 December 2017, paras 4-8.
[23] Ibid., para 10.
[24] Ibid., para 11.
[25] Ibid., paras 12-13.

proceedings)[26] and of Article 19 of the Consolidated Text on Immigration Law (non-refoulement, expulsion or extradition of aliens to a state where they could be subjected to torture). [27] The same is true of the non-recognition of diplomatic immunities to aliens who are prosecuted or had been convicted for the crime of torture in another country or by an international tribunal; and their expulsion to that country or surrender to that international tribunal. [28]

Law No. 110 has been criticised also in Italy, as having introduced, with a delay of about 30 years, a legislation unable to guarantee effective non-impunity for torture. The fact that the Criminal Code contemplates the specific offense of torture is however a step forward. [29] Moreover, and in accordance with well-established jurisprudence of the Italian Constitutional Court, Italian judges must apply the domestic provisions on human rights in conformity with the provisions of the ECHR as interpreted by the ECtHR, and – as it emerges from the current judicial practice – also other international human rights treaties. As observed, this means that many of the described ambiguities of the domestic legal definition of torture could be superseded by judicial application.[30]

ORNELLA FERRAJOLO[31]

Legislation — Amendment to the Rome Statute of the ICC Suppressing the "Opt-out" Clause on War Crimes (Article 124)

- ☛ Law No. 200 of 4 December 2017 'Ratification and execution of the Amendment to Article 124 of the Statute establishing the International Criminal Court, adopted at The Hague through resolution ICC No. 2 of 26 November 2015'[32]
  < http://www.gazzettaufficiale.it/eli/id/2017/12/23/17G00208/sg>

Italy ratified the Rome Statute[33] establishing the International Criminal Court (ICC) through Law No. 232 of 12 July 1999. This Law also contained an implementation order, by virtue of which the Statute entered the domestic legal order. Further adaptation of national legislation followed with Law No. 237 of 20 December 2012 containing provisions on Italy's cooperation with the ICC (Rome Statute, Part IX). [34]

However, Italy has not yet ratified the Amendments adopted by the Statute's Review Conference held in Kampala (Uganda) in 2010. One of these Amendments has enlarged the list of weapons whose

[26] Law No. 110 of 2017, above n. 2, Article 2.
[27] Ibid., Article 3.
[28] Ibid., Article 4.
[29] Antonio Marchesi, Delitto di tortura e obblighi internazionali di punizione [The Crime of Torture and International Obligations to Punish] (2018) 1 *Rivista di diritto internazionale*, pp 131-150.
[30] Cf. Flavia Lattanzi, La nozione di tortura nel codice penale italiano a confronto con le norme internazionali in materia [The Notion of Torture in the Italian criminal code in Comparison with the Relevant International Standards] (2018) 1 *Rivista di diritto internazionale*, pp 151-184, especially pp 183-184.
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[32] Legge n. 200, 4 dicembre 2017, 'Ratifica ed esecuzione dell'emendamento all'articolo 124 dello Statuto istitutivo della Corte penale internazionale, adottato a l'Aja con risoluzione ICC n. 2 del 26 novembre 2015', entered into force 24 December 2017, published in *Gazzetta Ufficiale* No. 299 of 23 December 2017.
[33] Rome Statute, above n. 8.
[34] See Rachele Cera et al., Correspondents' Report – Italy (2012) 15 *YIHL* <http://www.asser.nl/media/1424/italy-yihl-15-2012.pdf> accessed 9 October 2018, pp 8-12.

utilisation qualifies as a war crime under Article 8 of the Rome Statute.[35] The others introduced the legal definition of aggression (new Article 8 bis of the Rome Statute), and laid down conditions and modalities for the ICC to exercise its jurisdiction over the same (new Articles 15 bis and 15 ter).[36] All these Amendments have entered into force, and are binding upon states parties having accepted them.[37]

In 2010, the Review Conference also discussed the question of whether to suppress Article 124 of the Rome Statute. As is known, this Article contains a transitional clause allowing states parties to make a declaration, upon ratification, in order to exclude war crimes allegedly committed in their territory or by their nationals from the ICC jurisdiction. Such declaration, which the state may withdraw at any moment, has effect for a period of seven years after the Statute has entered into force *vis-à-vis* the declaring state. Paragraph 2 of the Article envisaged a review of these provisions as a part of the Statute's general review, to be made ten years after the Statute's entry into force.[38] At the Review Conference, the states parties decided, however, to leave unchanged Article 124 for the moment and further review the provision at a future Assembly of State Parties (ASP) Session. On 26 November 2015, the ASP adopted, by consensus, an amendment completely removing Article 124 from the text of the Statute.[39]

On 21 February 2017, the Italian Minister for Foreign Affairs, in agreement with the Minister for Justice and the Minister for Economics and Finance, introduced a draft bill on the subject in the Senate.[40] The bill was very straightforward. Article 1 provided a parliamentary authorisation to the ratification of the Amendment suppressing Article 124, as embedded in the ASP Resolution No. 2 of 2015. The resolution was attached to the draft bill. Article 2 contained an implementation order, making the Amendment to have legal effect in Italy after its entry into force internationally in accordance with Article 121 paragraph 4 of the Rome Statute.

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[35] Amendments to Article 8 of the Rome Statute, adopted through Review Conference Resolution RC/Res.5, 10 June 2010, 2868 UNTS 195 (entered into force 26 September 2012).

[36] Amendments on the crime of aggression to the Rome Statute, adopted through Review Conference Resolution RC/Res.6, 11 June 2010 <https://treaties.un.org/doc/Publication/CN/2010/CN.651.2010-Eng.pdf> accessed 8 October 2018. In 2016, the number of the states that had accepted the Amendments was 30, equal to seven-eighths of the parties to the Statute. With a resolution taken in its sixteenth session from 4 to 14 December 2017, the Assembly of State Parties (ASP) decided to activate the jurisdiction of the ICC over aggression as of 17 July 2018, see <https://www.icc-cpi.int/Pages/item.aspx?name=pr1350> accessed 8 October 2018.

[37] To become mandatory upon all state parties an amendment must be accepted by seven-eighths of the state parties (Rome Statute, above n. 8, Article 121 paragraph 4). Under paragraph 5, however, "[a]ny amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.".

[38] Article 123 paragraph 1 of the Rome Statute, above n. 8, states: "Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute.".

[39] Amendment to Article 124 of the Rome Statute of the International Criminal Court, The Hague, 26 November 2015, adopted through ASP Resolution ICC-ASP/154/res. 2, 26 November 2015 <https://treaties.un.org/doc/source/docs/ICC-ASP-14-Res2-ENG.pdf> accessed 8 October 2018.

[40] Senato della Repubblica, Atti parlamentari, Atto n. 2709, XVII legislatura, Disegno di legge 'Ratifica ed esecuzione dell'emendamento all'articolo 124 dello Statuto istitutivo della Corte penale internazionale, adottato all'Aja con Risoluzione ICC n. 2 del 26 novembre 2015', comunicato alla Presidenza il 21 febbraio 2017 [Senate of the Republic, Parliamentary Acts, Act no. 2709, XVII legislature, draft of the law 'Ratification and execution of the amendment of article 124 of the Statute establishing the International Criminal Court, adopted in The Hague by ICC Resolution n. 2 of 26 November 2015, communicated to the Presidency on 21 February 2017'].

When introducing the draft bill, the Rapporteur highlighted that Article 124 was conceived *ab origine* as being transitional. Agreed on by the states participating in the negotiating process of the Statute "at a stage immediately preceding the adoption of the final text", these provisions were intended "as a compromise solution to encourage wider acceptance of the draft treaty from among states".[41] In practice, there have been only two states parties making an opt-out declaration under Article 124.[42] The Rapporteur further observed that the provisions in this Article derogated from the general rule of non-admissibility of reservations to the Statute, laid down in Article 120. Suppressing the 'opt-out' clause on war crimes meant achieving the objective of the Statute's indivisibility. Once in force, the Amendment will make any act that constitutes a crime under the Rome Statute attributable to the perpetrators and prosecutable by the ICC, without any temporary exception.[43]

With regard to Italy's constitutional order, Parliament's authorisation was not necessary to ratify the Amendment, strictly legally speaking. This is because the Amendment merely consists in abolishing a right previously recognised to the Statute's contracting parties. In addition, Italy did not exercise this right when acceding to the Statute, which makes the content of the Amendment irrelevant at the national level. More precisely, implementing the Amendment domestically does not need legislative measures, nor entails a new or major burden upon the state budget and, thus, it does not require previous authorisation by Parliament. [44] It is, however, a well-established practice of the Government to obtain parliamentary authorisation before Italy consents to be bound internationally by modification to any treaty that had been introduced into the Italian legal order by law. [45]

On the grounds of the technical reports accompanying the draft bill, the draft bill did not raise any possible conflict between the legislative powers of, respectively, the State and the Regions. This is because Italy's international relations fall within the sphere of the State's exclusive competence (Article 117 of the Italian Constitution). Moreover, the draft bill had no impact on the existing legislation, and was plainly in line with Italy's obligations stemming from international and EU law.[46]

After approval by the Senate on 4 May, the draft bill was submitted to the Chamber of Deputies, which finally approved it, without modification, as law No. 200 of 2017.

Thanks to this Law, Italy is able to join the few states parties to the Rome Statute having so far ratified the Amendment to Article 124.[47]

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[41] Ibid., p 3.
[42] Colombia and France made an Article 124 declaration, upon ratification, on 5 August 2002 and on 9 June 2000, respectively. On 13 August 2008, the government of France notified the UN Secretary-General that it had decided to withdraw its declaration. The text of these declarations is available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en> accessed 8 October 2018.
[43] Atto n. 2709, above n. 39, pp 3-4.
[44] Article 80 of the Italian Constitution states: "Parliament shall authorise by law the ratification of such international treaties as have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation".
[45] Atto n. 2709, above n. 39, p 4.
[46] Ibid., pp 5-7.
[47] As at 13 April 2018, these states were: Austria, Finland, France, Netherlands, Norway, Portugal, and Slovakia, see <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10-c&chapter=18&clang=_en> accessed 8 October 2018.

Government Policy — Italy and International Humanitarian Law

- ☛ Addresses of the Hon. Minister of Foreign Affairs and Hon. Minister of Defence at the 3rd Conference on International Humanitarian Law, Rome, 27 October 2017
- ☛ Discorso dell'On. Ministro degli Affari Esteri e dell'On. Ministro della Difesa alla III Conferenza Internazionale sul Diritto Internazionale Umanitario, Roma, 27 ottobre 2017[48]

Entitled "The Protection of the Civilian Population in Warfare - The Role of Humanitarian Organizations and Civil Society", the third Conference on International Humanitarian Law, held at the *Scuola Ufficiali* in Rome on 27-28 October 2017, was focused on the role that civil society and humanitarian organizations play in international humanitarian law (IHL). During this occasion, representatives of the Italian Government illustrated the position of Italy concerning IHL and some initiatives in this field.

The Italian Minister of Foreign Affairs, Hon. Angelino Alfano, stressed the importance of civilian protection, given the gradual shifting of the international law axis from States to individuals. The Minister highlighted that upholding IHL must be considered as both a strategic instrument and a moral imperative.

Mr. Alfano underlined that respect for principles of humanitarian assistance, as embodied in IHL, is an essential condition for stability and peace by which, especially when such conditions are guaranteed at borders, security and growth can be assured in Italy.

Furthermore, he affirmed the moral value of IHL, embracing the responsibility to protect the most vulnerable and fragile individuals being victims of atrocities. In this regard, the Minister recalled that in the last five years, Italy has more than doubled the resources dedicated to humanitarian actions, almost half of which was implemented by non-governmental organisations (NGOs). Such initiatives engage Italy in Syria, in Iraq, in the countries afflicted by famine (Yemen, Somalia, South Sudan, northern Nigeria), and in the countries of origin and transit of refugees and migrants. In this last regard, the Minister mentioned the Italian "humanitarian approach" in response actions to the migration crisis, which enabled Italy "to wed solidarity with security".

The Minister underlined also the evolutionary character of IHL, which is called to respond to new threats. The reference was made in particular to "cultural cleansing", acts of intentional destruction of cultural heritage that can be considered war crimes and/or crimes against humanity, "because the acts of destruction of cultural heritage are an enormous obstacle to peace. They hinder dialogue and reconciliation, fuelling hatred among communities and between generations." As for the action of Italian diplomacy in this regard, the Minister recalled that Italy put forth the issue of protection of culture to the Security Council, promoting Resolution 2347, the Council's first-ever resolution on the protection of cultural heritage in areas of conflict. Italy also promoted many initiatives to combat the illegal trafficking of cultural property, which provides terrorist organisations with a source of funding, especially within the framework of the Global Coalition against Da'esh.

Some of these observations were shared during the same occasion by the Minister of Defence, Sen. Roberta Pinotti. "The theme of humanitarian law is central to our future and to peace that we

[48] The address of the Minister of Foreign Affairs is available at <http://www.esteri.it/mae/it/sala_stampa/archivionotizie/interventi/discorso-dell-on-ministro-alla_14.html> accessed 8 October 2018.
Some excerpts of the address of the Minister of Defence are available at <https://www.difesa.it/Primo_Piano/Pagine/Carabinieri_a_Roma_la_terza_conferenza_sul_diritto_internazionale_umanitario.aspx> accessed 8 October 2018.

must continue to nourish," Sen. Pinotti noted, recalling that "today more than ever, the population needs protection during armed conflicts, because today the population is at the centre, in a physical and conceptual sense, of armed conflicts."

"This new strategic condition has clear consequences on the progress of international humanitarian law, understood as a gradual expansion of the areas of protection and progressive constraints on the use of war violence," said the Minister, noting that steps forward in such direction were at the same time more difficult and even more urgent and necessary. Reference was made, in particular, to the complex problem of the definition of legitimate fighters, against the background of the existence of numerous non-State actors driven by various disparate motivations, and to the serious problem posed by the use of so-called human shields and sexual violence.

RACHELE CERA[49]

Legislation — National Day of Civilian Victims of War and Conflicts

☛ Law No. 9 of 25 January 2017, 'Establishment of the National Day of Civilian Victims of War and Conflicts in the World'[50]
<http://www.gazzettaufficiale.it/eli/id/2017/02/13/17G00017/sg>

About three years after its proposal through Bill No. 1623, the National Day of civilian victims of wars and conflicts has been established and will be held every year on the 1st of February.

As Article 1 of Law No. 9 recalls, the celebration of this day is aimed at preserving the memory of the civilian victims of all wars and conflicts in the world, and to promote a culture of peace and the repudiation of war, according to the principles set forth in Article 11 of the Italian Constitution.

With regard to the scope, it must be noted that the Bill was dedicated to the memory of civilian victims only of World War II. During the drafting process, the scope of Law No. 9 has been expanded by referring generically to wars and conflicts, in order to recognise the complexity of the current international scenario, whereby civilian populations are mostly affected by warlike clashes that are not triggered by formal war declarations.

The chosen date is not accidental, being the same date on which, in 1979, the Single Text on War Pensions came into force by which civilian victims were fully recognised as war victims, comparable to military victims. [51]

With regard to the celebrations to be realised on the occasion of this day, Law No. 9 entrusts territorial authorities with the task of promoting and organizing ceremonies, events, meetings and testimonies on the experiences of the civilian population during the world wars and on the impact of subsequent conflicts on civilian populations all over the world (Article 2). In addition, given the high educational, social and cultural value of the anniversary, Article 4 of Law No. 9 calls on the Ministry of Education, University and Research to issue specific directives on the involvement of schools of

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[50] Legge n. 9, 25 gennaio 2017, 'Istituzione della giornata nazionale delle vittime civili delle guerre e dei conflitti nel mondo, entered into force 28 February 2018', published in *Gazzetta Ufficiale* No. 36 of 13 February 2017.
[51] Decreto del Presidente della Repubblica n. 36, 26 dicembre 19878, 'Testo Unico delle norme in materia di pensioni di guerra' [Decree of the President of the Republic No. 915, 23 December 1978, 'Single Text on War Pensions'], published in *Gazzetta Ufficiale* No. 287 of 29 January 1979, Ordinary Supplement.

all levels in the promotion of celebrative initiatives. The National Association of Civilian Victims of War Onlus and its International Observatory on Civilian Victims of Conflict are foreseen to take part in the realisation of such initiatives.

However, Law No. 9 specified that the recurrence in question is not a civil solemnity; therefore, it does not affect the working time in public offices, nor the flagging requirements for public buildings.

RACHELE CERA

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

- Supreme Court of Cassation, Civil United Sections, Decision No. 762 of 2017 concerning the state immunity of the Federal Republic of Germany
  <http://www.eclegal.it/wp-content/uploads/2017/02/sez-un-762-2017.pdf>
- Tribunal of Sulmona, Judicial Order 2 November 2017 [on the proceeding No. 20/2015] about the massacre in Pietransieri on 21 November 1943
  <http://docenti.unimc.it/f1.marongiubuonaiuti/teaching/2017/17200/files/ladattamento-dellordinamento-statale-al-diritto/tribunale-di-sulmona-ord.-2-novembre-2017-su-procedimento-n.-20-2015-comune-di-roccaraso-e-altri-c.-repubblica-federale-di-germania>
- Tribunal of Ascoli Piceno, Judicial Order of 8 January 2017
  unpublished as of March 2018
- Tribunal of Fermo, Decision of 30 October 2017
  unpublished as of March 2018

The Supreme Court of Cassation, Civil United Sections, by decision No. 762 of 2017 held that Italy has jurisdiction over claims for compensation of Italian citizens in relation to Nazi war crimes that occurred during the German occupation of Italy during World War II. The case concerned an Italian citizen subject to deportation and forced labour, both classified as war crimes by the Italian jurisprudence, and by the German authorities.

The Court of Cassation in doing so annulled the Court of Appeal of Florence Decision No. 1911/2013, which, conversely, had denied any compensation as it found that it had no jurisdiction to hear such claims, affirming Germany's state immunity before Italian national courts.

The aforementioned Court of Appeal of Florence Decision No. 1911/2013 was based on a previous Supreme Court of Cassation, Civil United Sections, decision No. 4284 of 2013,[52] which was in turn based on the International Court of Justice (ICJ) Judgment of 3 February 2012 (*Germany v. Italy: Greece intervening*) on jurisdictional immunities of the state.[53] According to the ICJ's judgment, "the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945".[54]

[52] Court of Cassation, Civil United Sections, 21 February 2013, Decision No. 4284, available at <http://www.iurisprudentia.it/public/sentenze/635575661418322500_IMMUNITA%20PDF.pdf> accessed 8 October 2018.
[53] ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment, 3 February 2012, [2012] ICJ Rep 99. See for an analysis Correspondents' Report – Italy (2012), above n. 33, pp 4-6.
[54] Ibid., para 139.

In order to better understand the decision under review, some preliminary remarks are required.

In fact, the reparation for victims of Nazi war crimes is a long-standing issue before Italian Courts.

By Decision No. 5044 of 11 March 2004, the Supreme Court of Cassation held that the functional immunity of Germany could not be applicable in relation to acts classified as international crimes.[55]

The decision concerned several cases of slaughter, deportation, and gross violations of human rights of civilians that took place in Civitella, Cornia and San Pancrazio in 1944.[56] The Court of Cassation, first penal section, obliged Germany to provide compensation to the relatives of the victims.

Following this decision, Germany sued Italy before the ICJ, referring to the jurisdictional immunity of a State before foreign national courts. The ICJ had to decide whether peremptory human rights norms existed that would prevail over the immunity of a State. The ICJ held that it is uncertain that at the time of the decision such peremptory norms already existed.

The Court further pointed out that the issue of immunity was a preliminary question.

The ICJ also rejected the so-called "last resort argument", according to which the victims would be deprived of their right to appear before a judge to protect their rights, if Germany was immune from the Italian jurisdiction.

Lastly, the Court rejected the tort exception based on Article 11 of the European Convention on State Immunity[57] and Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property[58], which exclude State immunity in relation to any proceeding which relates to pecuniary compensation for death or injury to a person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State (i.e. *tort exception*).[59]

Afterwards, Italy gave a follow up to this decision in its legal system by Law No. 5 of 2013.[60] Following a referral from the Tribunal of Florence, on 22 October 2014, the Italian Constitutional Court by its Decision No. 238,[61] stated that the denial of any judicial remedy, as a result of judicial immunity of a foreign State, violates Article 24 of the Italian Constitution containing the right to

[55] Court of Cassation, Civil United Sections, 11 March 2004, Decision No. 5044/2004, available at <http://www.schiavidihitler.it/Pagine_risarcimento/Ultime%20notizie/Cassazione.doc> accessed 8 October 2018.

[56] These places are located in the province of Arezzo in Tuscany and, therefore, fall under the jurisdiction of Florence.

[57] European Convention on State Immunity, opened for signature 16 May 1972, 1495 UNTS 181, entered into force 11 June 1976.

[58] United Nations Convention on Jurisdictional Immunities of States and Their Property, opened for signature 2 December 2004, not yet entered into force, available at <https://treaties.un.org/doc/Treaties/2004/12/20041202%2003-50%20PM/CH_III_13p.pdf> accessed 8 October 2018.

[59] It has to be pointed out that at that time Italy had not ratified any of these Conventions and it is doubtful that such norms corresponded to customary law.

[60] Legge n. 5, 14 gennaio 2013, 'Adesione della Repubblica italiana alla Convenzione delle Nazioni Unite sulle immunità giurisdizionali degli Stati e dei loro beni, fatta a New York il 2 dicembre 2004, nonchè norme di adeguamento all'ordinamento interno' [Law No. 5, 14 January 2013, 'Adhesion to the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, and provisions for the adaptation of internal law'], entered into force 30 January 2013, published in *Gazzetta Ufficiale* No. 24 of 29 January 2013. See for an analysis Correspondents' Report – Italy (2013), above n. 3, pp 1-5

[61] Italian Constitutional Court, 22 October 2014, Decision No. 238, available at <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=238> accessed 8 October 2018. See for an analysis Correspondents' Report – Italy (2014), above n. 3, pp 1-11 and Rachele Cera et al., Correspondents' Report – Italy (2015) 18 *YIHL* <http://www.asser.nl/media/3308/italy-yihl-18-2015.pdf> accessed 9 October 2018, pp 1-9.

access to justice, in conjunction with article 2 of the Constitution that ensures the protection of human rights.[62]

According to the Court, the right to a judicial remedy is a fundamental principle of the Italian judicial system. Such fundamental principles act as a limit to the entry of general rules of international law into the Italian legal system, as they represent indispensable features and identification elements of the legal system itself (the so-called *control theory or teoria dei controlimiti*).[63]

Following these premises, the decision under comment affirms that Germany does not enjoy the privilege of immunity in relation to war crimes and the rights of the victims to have access to a judicial remedy for such offenses.

During the proceedings, Germany argued that the Italian courts were lacking jurisdiction on such matters according to Article 77, paragraph 4 of the Peace Treaty No. 1430 of 1947 and Article 2 of the Bilateral Agreement between Germany and Italy signed in Bonn on 2 June 1961.[64]

The Court rejected such argumentation referring to its previous case law on the immunity of foreign States for acts *iure imperii*. It stressed that in such cases, the immunity constitutes a privilege (*prerogativa*) and not a right of the foreign state.

It further specified that Decision No. 238/2014 of the Constitutional Courts does not allow such privilege for the *delicta imperii*, i.e. those acts which amount to violations of *ius cogens*, because they are in breach of universal values that go beyond the national interests.[65]

The Court affirmed that the customary international law on the immunity of a foreign State is not unconditional, but it has to be aligned with the fundamental principle of supremacy of fundamental rights and human dignity. The immunity from civil jurisdiction of a foreign State is not "total" in case of crimes against humanity. According to the Italian judges when a contradiction exists between sovereignty on the one hand and the protection of fundamental rights on the other hand, the latter prevails.

Such view is confirmed by other decisions too.

The Tribunal of Sulmona, by Judicial Order of 2 November 2017 on proceeding No. 20/2015, held that Germany, as State successor of the Third Reich, was responsible for the slaughter that occurred

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[62] "La norma consuetudinaria internazionale sull'immunità dalla giurisdizione degli Stati stranieri, con la portata definita dalla CIG determina il sacrificio totale del diritto alla tutela giurisdizionale dei diritti delle vittime" ["The international customary norm on immunity from the jurisdiction of foreign states, as defined by the ICJ, determines the total sacrifice of the right to judicial protection of victims' rights"]. Italian Constitutional Court, 22 October 2014, Decision No. 238, above n. 61.

[63] For a comment see also Deborah Russo, La sentenza della Corte costituzionale n. 238 del 2014: la Consulta attiva i "controlimiti" all'ingresso delle norme internazionali lesive del diritto alla tutela giurisdizionale [The ruling of the Constitutional Court n. 238 of 2014: the Court activates the fundamental principles which act as a limit to the entry of general rules of international law into the Italian legal system that are detrimental to the right to judicial protection] available at <https://www.osservatoriosullefonti.it/archivio-rubriche-2014/fonti-dellunione-europea-e-internazionali/1124-la-sentenza-della-corte-costituzionale-n-238-del-2014-la-consulta-attiva-i-qcontrolimitiq-allingresso-delle-norme-internazionali-lesive-del-diritto-alla-tutela-giurisdizionale> accessed 8 October 2018.

[64] Decreto del Presidente della Repubblica n. 1263, 14 aprile 1962, 'Esecuzione dell'Accordo tra la Repubblica italiana e la Repubblica Federale di Germania per il regolamento di alcune questioni di carattere patrimoniale, economico e finanziario con scambi di Note, concluso a Bonn il 2 giugno 1961' [Decree of the President of the Republic No. 1263, 14 April 1962, 'Implementation of the Agreement between the Italian Republic and the Federal Republic of Germany for the Settlement of Some Property, Economic and Financial Issues with Exchange of Notes, concluded in Bonn on 2 June 1961'], published in *Gazzetta Ufficiale* No. 214 of 25 August 1962.

[65] In this sense Court of Cassation, United Sections, Decision No. 15812/16, Court of Cassation, First Section, Decision No. 11163/11 and Court of Cassation, United Sections, Decision No. 14201/08 and Court of Cassation, United Sections, Decision No. 5044/04, see <http://www.carabinieri.it/docs/default-source/Editoria/rassegna/rassegna-4-2016.pdf?sfvrsn=92787423_2> accessed10 October 2018.

in Pietransieri on 21 November 1943, which led to the extermination of almost a whole village, amounting to about 128 victims, including elders, women and children killed with particular brutality.

In the view of the Tribunal, such acts amounted to crimes against humanity and war crimes. To support such view, it recalled Article 6, paragraph 2 of the Statute of the Nuremberg International Military Tribunal of 8 August 1945, Article 147 of the Fourth Geneva Convention of 12 August 1949 for the Protection of Civilian Persons in Time of War, Article 85, paragraph 4 of its Additional Protocol I of 8 June 1977, Articles 7 and 8 of the Statute of the International Criminal Court, signed in Rome on 17 July 1998 and ratified by Italy through Law No. 232 of 1999.

The Tribunal stressed that these treaties were applicable even before their respective entry into force because they already constituted principles of law common to all civilized nations (*principi di diritto comuni a tutte le nazioni civili*) beforehand, irrespective of their "formalization" (*formalizzazione* in the Italian version) in such treaties.

The Tribunal finally also recalled[66] Article 7, paragraph 2 of the European Convention of Human Rights and Fundamental Freedoms (ECHR), stating that state immunity "shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."[67]

The Tribunal of Ascoli Piceno, Judicial Order of 8 January 2017 confirmed this view.[68] It held Germany liable for an amount of €1.28 million for the murder of three of the four citizens[69] of Castignano whose relatives asked for compensation. They were killed by German soldiers on 16 June 1944. The beneficiaries of the compensation were not only the descendants of the victims but also the community of the town of Castignano as a whole, which was considered a victim as well, for the loss of perspectives of development of the local community.

This order followed a previous decision of 8 March 2016 of the same Tribunal in which Germany was condemned for similar acts as well.

According to the Tribunal, Italy has jurisdiction over claims of compensation for damages arising from war crimes and crimes against humanity. This is in line with the aforementioned Decision of the Constitutional Court No. 238 of 2014.

The Tribunal of Ascoli Piceno, with its decision of 8 January 2017, denied the applicability of the Peace Treaty of 1947 and the Bilateral Agreement of Bonn of 1961, because, while Germany paid more than 40 million marks as a compensation to Italy based on these agreements, the compensation did not include the moral damages, now recognised to the relatives of the victims and to their communities. Finally, the Tribunal pointed out that statutory limitations do not apply to compensation for damages arising from war crimes and crimes against humanity. The same approach was followed by the Tribunal of Fermo with Decision of 30 October 2017.[70] This case related to 600.000 Italian soldiers being deported by the German Armed Forces and then interned in a *lager*. They were forced to work for the German war industry, in the agricultural sector and for services to the Hitler regime between 8 September 1943 and May 1945 (they are known as *Schiavi di Hitler* ('Slaves of Hitler')).

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[66] See also, the similar reasoning in Court of Cassation, Second Section, Decision No. 15107 of 2016, available at<http://www.neldiritto.it/public/pdf/15107_04_2016.pdf> accessed 8 October 208.
[67] ECHR, above n. 7, Article 7.
[68] Unpublished as of March 2018. For an overview, see <https://www.ilrestodelcarlino.it/ascoli/cronaca/germania-condannata-crimini-castignano-1.2930294> accessed 8 October 2018.
[69] Giuseppe Villa, Domenico Villa, Luigi Cicconi.
[70] Unpublished as of March 2018. See <https://www.ilrestodelcarlino.it/ascoli/cronaca/hitler-deportati-1.3503552> accessed 8 October 2018.

The descendants of three of the 'slaves of Hitler', Vincenzo Neroni of Acquaviva, Giovanni Vagnozzi and Camillo Pasquale Borri of Cupra Marittima, sued Germany before the Tribunal of Fermo. On 30 October 2017, Germany was held liable after the Tribunal established its jurisdiction. Germany did not appear before the Tribunal.

After reviewing the previous case law, including the ICJ decision of 2012 and the Italian Constitutional Court and Cassation judgments, the Tribunal of Fermo affirmed that prescription periods do not apply to war crimes and crimes against humanity and that there is a right to compensation for such acts. The Court qualified the violation of human rights suffered by the victims as "slavery" and compensated their descendants with an amount of €50 000. Germany asked for the victims' pardon but refused to compensate them.

The condemnation of Germany by Italian Courts reveals several issues.

First of all the issue of jurisdiction and immunity of foreign states. Such question is closely related to another sensitive issue, concerning the rank of peremptory norms of international law and their rank when implemented into the Italian legal system.

The emphasis on *ius cogens* norms is, in our view, very important. It is a recognition of the supreme legal rank of the norms that guarantee fundamental human rights to which the norms on state immunity are subordinated.

The approach followed by the Italian jurisprudence on these issues testifies the Italian view on the core values of the international community that, going beyond a certain traditional and formal state-centric view, recognises a growing role of the individual.

Secondly, the rank of the norms of customary international law in the internal legal system might be affected. Such decisions support the theory according to which norms of customary international law in the domestic legal sphere share the rank of domestic norms regulating the same matter.

The principle according to which statutory limitations do not apply to war crimes and crimes against humanity and to their compensation is as well noteworthy. Under this principle, an absolute right for victims to have access to justice is recognised.

Finally, in the Italian case law the right of any individual to have access to a judge is strongly affirmed, notwithstanding the *dictum* of the ICJ. This fundamental right is established in the ECHR as well and in the European Court of Human Right's case law regarding the effectiveness of the protection of rights. In fact, no right can be effective without the possibility to claim it before a court.

VALERIA EBOLI[71]

Cases — International Terrorism and Foreign Fighters

☛ Court of Assizes of Milan, Judgment No. 2 of 13 April 2017
<https://www.penalecontemporaneo.it/upload/2018-sentenzaassisemonsef.pdf >

By Judgment No. 2/2017, the Court of Assizes of Milan sentenced *in absentia* to eight years in prison El Mkhayar Monsef, a young Moroccan citizen and illegal immigrant in Italy, for the crime of participation in an association for terrorist purposes under Article 270 bis of the Criminal Code

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('Associations for the purpose of terrorism, including international terrorism, or for subversion of the democratic order'). In particular, the Court found the defendant guilty for his active participation in a terrorist association because, after a period of indoctrination decisive for his total Islamic-fundamentalist radicalization, he travelled to Syria to join the *Islamic State in Iraq and the Levant* (ISIS). Once El Mkhayar Monsef arrived in Syria, he took an active part in such association, namely by becoming a *mujahed*, a fighter engaged in the so-called *jihad*, the holy war. He also carried out proselytising activities on his social network profiles aimed at convincing members of the Italian community where he lived in foster care, but also members of his family and others, to pledge allegiance to ISIS and to engage in *jihad*.

It is not the first time that the issue of international Islamic terrorism and the phenomenon of foreign fighters have been addressed in Italian jurisprudence. In several decisions, Italian judges ruled on the new terrorist offences, providing relevant interpretative keys aimed to extend the threshold of criminal liability for international terrorism.[72] In this vein, the judgment by the Court of Assizes under examination is a confirmation of the previous jurisprudence on the matter, but also on the trends in anti-terrorism law.[73]

In particular, in its judgment of 13 April 2017, the Court of Assizes focused on three key arguments, i.e. the classification of ISIS as a terrorist organization, the evidence of its terrorist purposes and the identification of the crimes committed by the accused under Article 270 bis of the Criminal Code and the *status* of the Islamic State under international law.

As recalled by the Court in its preliminary reflections, ISIS is an organization officially established in 2013 by Al-Qaeda. Since its establishment, ISIS has extended its control over a wide geographic area, where it applied the Sharia law. With the proclamation of the Caliphate by Abu Bakr Al Baghdadi, all Muslims were invited to join ISIS with the aim to defend the Muslim community. Accordingly, ISIS organized militias formed by Islamic fundamentalist fighters from various countries, the so-called foreign fighters. However, ISIS pursues its purposes and strategies by also encouraging individuals who, alone or organized in small cells, perpetrate attacks in their country of residence then claimed by ISIS. These individuals are commonly well known as 'Lone Actors.[74]

The international community reacted to this violent extremist ideology that has led to terrorist attacks carried out in many European States by condemning such attacks.

The classification of ISIS as a terrorist organization and the evidence of its terroristic purpose clearly emerge, first of all, from the UN Security Council Resolutions No. 2170 of 15 August 2014 and No. 2178 of 24 September 2014. These resolutions, based on Chapter VII of the UN Charter, requested all Member States

[72] See Correspondents' Report – Italy (2016), above n. 72, pp 22-24 and Correspondents' Report – Italy (2015), above n. 60, pp 19-20.
[73] On anti-terrorism law, see among others, Sergio Marchisio, Recent Developments in Anti-Terrorism Law: How to Fill Normative Gaps, in Daniel S Hamilton (ed) *Terrorism and International relations*, Center for Transatlantic Relations SAIS, Washington, 2006. See also Correspondents' Report – Italy (2016), above n. 72, pp 14-21; Correspondents' Report – Italy (2015), above n. 60, pp 14-18; Fabio Raspadori et al., Correspondents' Report – Italy (2005) 8 *YIHL*, pp 453-455.
[74] A deeper analysis on international terrorism showed the need to reconsider the notion of "lone wolves" and adopt the more correct notion of "lone actors". This because "lone actors" are not the stealthy and highly capable terrorists the "lone wolf" moniker alludes to. Bart Schuurman, Lasse Lindekilde, Stefan Malthaner, Francis O'Connor, Paul Gill & Noémie Bouhana, 'End of the Lone Wolf: The Typology that Should Not Have Been' (2018) *Studies in Conflict & Terrorism* <https://www.tandfonline.com/doi/pdf/10.1080/1057610X.2017.1419554?needAccess=true> accessed 15 November 2018.

> to take all measures as may be necessary and appropriate and in accordance with their obligations under international law to counter incitement of terrorist acts motivated by extremism and intolerance perpetrated by individuals or entities associated with ISIL, ANF[75]

and to ensure that

> any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and decides that all States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense (...).[76]

Among other international instruments, the Court of Assizes of Milan also recalled the UN Security Council Resolution No. 2249/2015 in which the UN Security Council, after the attacks of Paris in 2015, *condemned* in the strongest terms the "continued gross, systematic and widespread abuses of human rights and violations of humanitarian law, as well as barbaric acts of destruction and looting of cultural heritage carried out by ISIL".[77] In the Preamble, the terrorist attacks perpetrated by ISIL are referred to as 'a global and unprecedented threat to international peace and security'. Furthermore, in paragraph 5 the UN Security Council called upon Member States that have the capacity to take all necessary measures to counteract ISIS on the territory under its control in Iraq and in Syria "in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law."

In conformity with UN Security Council Resolutions, Italy recognised ISIS as a terrorist organisation and strengthened its legal framework on the matter by introducing new offences and related penalties in the Italian Criminal Code with the Decree-Law No. 7 of 18 February 2015, converted, with modifications, into Law No. 43 of 17 April 2015 (Urgent Measures for the Fight against Terrorism, including International Terrorism, as well as Extension of the International Missions of the Armed Forces and Police, Cooperation Initiatives for the Development and Support of Reconstruction Processes, and Participation in Initiatives of International Organisations for the Consolidation of Peace and Stabilisation Processes).[78]

Recognising the terrorist nature of ISIS, the Court of Assizes addressed the second issue concerning the qualification of the crime under Article 270 bis of the Criminal Code. It premised its reasoning on the principle of *affectio societatis*, based on which the supranational terrorist organisation must be understood as a network in which the function of the organisation itself is to catalyse the association of individuals under a common criminal project.[79] In this line, the Court ruled that to participate in the Islamic State, it is sufficient that the participant puts himself or herself "at the disposal" of the network to implement its terrorist purposes. This assumption excludes that the

[75] UNSC Res 2170/2014, UN Doc. S/RES/2170, 15 August 2014, para 6.
[76] UNSC Res 2178/2014, UN Doc. S/RES/2170, 24 September 2014, para 6. It is worth remembering that this Resolution does not contain a definition of terrorism and is formulated in general terms. However, it contains mandatory measures (such as in paragraph 6) additional to exhortative proclamation. In this vein, it can be counted among the so-called 'legislative resolutions' of the Security Council, see Natalino Ronzitti, Foreign terrorist fighters e legge antiterrorismo [Foreign Terrorist Fighters and anti-terrorism legislation] (2015) 3 *Rivista di diritto internazionale*, pp 881-887.
[77] UNSC Res 2249/2015, UN Doc. S/RES/2249, 20 November 2015. See further Raffaella Nigro, La Risoluzione del Consiglio di Sicurezza delle Nazioni Unite n. 2249 (2015) e la legittimità dell'uso della forza contro l'ISIS in base al diritto internazionale [The United Nations Security Council Resolution No. 2249 (2015) and the Legitimacy of the Use of Force Against ISIS under International Law] (2016) 1 *Diritti umani e diritto internazionale*, pp 137-156.
[78] In this regard, see Correspondents' Report – Italy (2015), above n. 60, pp 14-18.
[79] This principle was enucleated in Court of Cassation, Section V, Decision No. 31389/2008, not published.

participation in a terrorist organisation can be grounded exclusively on the basis of psychological or ideological adhesion to its programme.

The Court stated that the offence covered by Article 270 bis of the Criminal Code requires "alleged danger" to exist. This enables the State to repress also merely preparatory conduct. In this regard, the jurisprudence has identified some behaviours as symptomatic of the concrete adhesion of a subject to the criminal association of a terrorist nature. Both the 'participatory' conduct and the 'preparatory' acts as well as facilitators fall under Article 270 bis. The latter acts aim to proselytise, spread propaganda documents, enlist and to make the terrorist action concrete through a set of functional activities.

On this point, the Court stated that the crime provided by Article 270 bis is committed even if only one of these criminal behaviours is realised. Furthermore, the Court ruled that in the light of the specific structure that characterises terrorist associations, it is not necessary to prove that the participant is in contact with the central core of the association, but it is sufficient that he or she is in contact with a single 'node' of the network.

Finally, the Court of Assizes of Milan focused on the issue of the status of the Islamic State under international law. In particular, this issue was submitted by the defence of the accused, which argued that if the Islamic State was considered a state under international law, the active participation in the ranks of the ISIS army would not constitute a crime.

In this regard, it is worth to remember that the principle of effectiveness is the cornerstone of international subjectivity. International law does not create its subjects, but takes note of their existence. States acquire international legal personality regardless of their political regime, denomination and form of state. According to international law, the state comprises typical material elements: people, territory and a government.[80]

The Court of Assizes examined these criteria and considered them as constitutive criteria of statehood, but, in this respect, it ruled that ISIS has not reached a level of external and internal sovereignty, such as to be considered a state. On the one hand, its external sovereignty is questioned by the unanimous condemnation of the international community. On the other hand, the internal control of the territory by ISIS is strongly compromised by civil war and the extreme variability of the boundaries in the occupied territories.

Furthermore, in the opinion of the Court, the violent extremist ideology of ISIS, its terrorist acts, its continued gross systematic and widespread attacks directed against civilians, abuses of human rights and violations of international humanitarian law, including those driven on religious or ethnic grounds, suggest that the Islamic State is not a state, more precisely a state whose birth is grounded on the so-called principle of self-determination of people.[81]

It is against the background of these findings that the Court sentenced the defendant guilty of the crime referred to in Article 270 bis of the Italian Criminal Code following his active participation in the ranks of ISIS and his activities of proselytism and propaganda for terrorist purposes.

By way of conclusion, the ratio of Article 270 bis of the Italian Criminal Code is to prevent an "alleged danger". However, the fact remains that currently a universally accepted definition of

[80] See, inter alia, Sergio Marchisio, *Corso di diritto internazionale* [Course in International Law], G. Giappichelli (ed), Turin, 2014, pp 173 ff. and Malcolm Shaw, *International Law*, Cambridge University Press, Cambridge, 2008, pp 195 ff.
[81] Under international law, the principle of self-determination of people establishes the obligation of states to allow people to decide on the form of political organisation in line with their own aspirations and to respect the choices made by these. On the principle of self-determination of people, see Giuseppe Palmisano, Autodeterminazione dei popoli [Self-determination of people] in *Enciclopedia del Diritto* [Encyclopedia of Law], Giuffrè Editore, Milan, 2012.

international terrorism does not exist. By the end of 2000, work has begun on drafting a comprehensive convention on international terrorism, but the negotiations for this treaty are still continuing.

ROSITA FORASTIERO[82]

Cases — Serious Crimes against Italian Citizens in Latin America

☛ III Court of Assizes of Rome, Judgment of 17 January 2017, Criminal proceedings No. 2/15 R.G. <http://www.24marzo.it/index.php?module=pagemaster&PAGE_user_op=view_page&PAGE_id=553&MMN_position=87:87>

With decision of 17 January 2017, the Court of Assizes of Rome, in the so-called *Plan Condor trial*, ruled on the serious crimes committed against people of Italian descent by the military dictatorships of Latin America during the 1970s as part of an operation coordinated to suppress political dissidents known as *Plan Condor*.[83] This Plan was established by the dictatorships of several Latin American countries (Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay) to coordinate their intelligence services with the purpose to repress the "subversive threat" of a Communist penetration of South America, and more generally to eliminate guerrilla movements and political opponents through illegal arrests, kidnapping, torture, and enforced disappearances.[84] The Plan provided for cooperation between the states involved through an exchange of information and an operational collaboration that guaranteed the possibility to commit crimes in different states and the impunity of those responsible.

The decision of the Italian Court should be seen in the context of judicial initiatives aimed at condemning people who perpetrated these serious crimes. In spite of the enormous political difficulties in starting trials in the countries involved in *Plan Condor*,[85] it is worth recalling that 23 criminal proceedings started in 2016: 13 took place in Uruguay, four in Chile and six in Argentina.[86]

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[83] The Court judged on the crimes committed against 42 people considered *desaparecidos* (Forcefully disappeared persons), see Alessandro Leogrande, Cos'è il Plan Condor e perché è finito sotto processo in Italia [What was Plan Condor and why did it end up on trial in Italy], *Internazionale,* 19 January 2017 <https://www.internazionale.it/opinione/alessandro-leogrande/2017/01/19/sentenza-processo-plan-condor> accessed 9 October 2018.

[84] *Plan Condor* was set up on 25 November 1975 in Santiago de Chile, Chile, during the First Inter-American Working Meeting of Intelligence, which convened the leaders of the military intelligence services of Argentina, Bolivia, Chile, Paraguay, and Uruguay, see Debora Iozzi, The Italian Trial on Operation Condor: Justice from Abroad, *Council on Hemispheric Affairs*, 27 November 2016 <http://www.coha.org/the-italian-trial-on-operation-condor-justice-from-abroad> accessed 9 October 2018. *Plan Condor* comprised three phases, during the second phase, the cross-border operations to kidnap, interrogate and make dissidents disappear started. In the third phase, an international assassination team to operate in all countries involved in the Plan was established, see Arturo Jimenez, The Condor Case: the human costs of militarization in Latin America, *Zmagazine,* January 2007 <http://www.arturojimenezbacardi.com/uploads/5/1/7/3/51735819/jimenez-bacardi_arturo_(2007)_the_condor_case-_the_human_cost_of_militarization_in_latin_america.pdf> accessed 9 October 2018.

[85] The Governments of these countries issued amnesties for crimes committed during the dictatorships.

[86] See Francesca Lessa, *Justice without Borders: Accountability for Plan Condor Crimes in South America*, Oxford Policy Brief, Oxford, 2016, p 6. In May 2016, an Argentine court found 15 former military officials guilty of conspiring to kidnap and assassinate dissidents in the framework of *Plan Condor*. These included the former dictator Reynaldo Bignone who was given a 20-year sentence, see Steve Scherer, *Reuters*, 17 January 2017 <https://www.reuters.com/article/us-

However, the Italian decision is particularly relevant because it was rendered in a state not directly involved in the Plan but in a state whose citizens were victims. Furthermore, it was the first European country for such proceeding to take place in. In this context, the ruling of the Court of Assize of Appeal in Rome on the *ESMA case* is also worth recalling.[87] With judgement No. 17 of 24 April 2008, the Court of Assize of Appeal confirmed the decision of the Court of Assize in Rome of 2007, which sentenced to life imprisonment four Argentinean officers found guilty of premeditated murder of three Italian citizens who were kidnapped and then disappeared in Argentina during the "dirty war" of 1976 – 1983.

The criminal trials on the *ESMA case* and *Plan Condor* took place in Italy because the Italian law allows national judicial bodies to prosecute *in absentia* the presumed perpetrators of crimes committed against Italian citizens abroad.[88]

There is also another legal reason why the trial was carried out in Italy. Among the defendants was Jorge Nestor Troccoli, who was chief of the intelligence service of the Uruguayan Navy in the 70s. He 'interrogated' people detained at *Fusna*, a detention centre similar to Argentina's ESMA. He has Italian origins and moved to Italy in 2007, making use of his dual citizenship as magistrate Mirtha Guianze tried to instruct a trial against him in Montevideo.[89] Jorge Nestor Troccoli was the only one among the 33 defendants not to be tried *in absentia*.[90]

The judgment of the Court of Assizes of Rome came after eight years of investigations and over 60 hearings. The investigations started in 1999 following the complaints of eight Italian victims' family members and were conducted by the Italian judicial authorities guided by the Public Prosecutor Giancarlo Capaldo. They concerned serious crimes, such as torture, enforced disappearance, extrajudicial executions, illegal appropriation of children, and sexual violence, perpetrated under *Plan Condor*.

During the trial, hundreds of witnesses confirmed the existence of *Plan Condor* and the serious crimes committed.[91] One of the main obstacles in investigating these crimes concerned the gathering

italy-murder-condor/italy-sentences-two-former-south-american-leaders-to-life-in-prison-for-operation-condor-murders-idUSKBN1512XR> accessed 9 October 2018.

[87] See Giovanni Carlo Bruno et al., Correspondents' Report – Italy (2008) 11 *YIHL*, pp 500-502.

[88] See Article 420 bis of the Italian Code of Criminal Procedure as modified by Law No. 67/2014, which introduced an *ad hoc* discipline of the defendant's *in absentia* process. Moreover, Article 10 of the Italian Code of Criminal Procedure establishes that the Tribunal or the Court of Assizes of Rome have jurisdiction for the offences against Italians committed abroad, see Alessandro Leogrande, above n. 83. During the trial, it was clarified that the victims had dual citizenship and had retained the Italian one by paternal descent (*ius sanguinis*).

[89] Among his 42 victims, 20 Uruguayan citizens did not have an additional Italian citizenship and, therefore, the sole defendant was Jorge Nestor Troccoli. According to the Uruguayan law, it is not possible to try anyone *in absentia*, therefore, the Italian court could also proceed for those alleged victims, for who Troccoli was considered responsible, see Alessandro Leogrande, above n. 83.

[90] During the trial, however, he was present in the courtroom only twice. The first time he remained silent, during the second he released spontaneous statements, declaring himself innocent. He supported his innocence by appealing to the principle of due obedience towards the orders of his commanders. However, Troccoli in his book titled *The Wrath of Leviathan* (1996) admitted having tortured detainees justifying this crime with the aim of obtaining information. The III Court of Assizes of Rome, in its decision, recalled this book, in which Troccoli, among other things, affirmed that d*esaparecidos* are 'dead people'. In this regard, the Court recalled the well-established case law of the Court of Cassation (criminal sections) according to which the absence of a body does not prevent the formation of the murder's evidence for the purposes of attributing criminal responsibility.

[91] Among them former political militants, family members of *desaparecidos*, and experts of various kinds, like Giulia Barbera, historian and consultant of the Public Prosecutor, who explained origins, functioning and activities of *Plan Condor*. The existence of *Plan Condor* has been further documented by the committees of inquiry established in the Latin American countries involved in the Plan and by documents of the Central Intelligence Agency and the US Department of that have been made public.

of evidence to incriminate those responsible and access to official documents. Given the military nature of such documents, they were often considered confidential and judicial bodies had difficulty accessing national archives of the countries involved in the Plan. Only in recent years, archives have been opened in many countries, and documents with the names of those responsible for the crimes have emerged. This aspect is strictly linked with the difficulty concerning the establishment of the chain of command and the responsibilities of the instigators and of the material executors of these crimes.

The Court of Assizes judged 33 defendants, all political-military officers who played an active part in the Plan, though in different roles. They were charged with the crime of multiple aggravated murder, since at the time of the judgment the crime of torture had not yet been introduced into the Italian legal system.[92] Moreover, the Italian Criminal Code does not contain a specific norm on the crime of enforced disappearance even though Italy ratified the International Convention for the Protection of All Persons from Enforced Disappearance with Law No. 131/2015.[93]

In its decision, the Court held that under Article 110 of the Italian Criminal Code ('Punishment for those who participate in an offence') the participation in a crime is not only the participation in its execution but also the participation in its planning and preparation, including the provision of the necessary means to accomplish it.

The Court further clarified that under criminal law a distinction had to be made between those who conceived and directed *Plan Condor* and those who carried out intermediate roles. In this regard, it held that following consolidated case law, the military chiefs who planned the crimes committed under the Plan and gave directives to exterminate the alleged subversives, to torture and detain them in inhumane conditions, can be held responsible for such crimes.

However, according to the Court a different reasoning had to be followed for those who acted as intermediaries in the chain of command. In this regard, the Court held that having a role of participant in a criminal structure (for instance, having performed the task of transferring prisoners from one prison facility to another) was not in itself sufficient to presume an automatic criminal responsibility for every offence committed in the context of this structure. The defendants belonging to intermediate military ranks could be charged of the crime of murder only if it was possible to link the single murder to each defendant through sufficient evidence.

Following this approach, with the judgment of 17 January 2017 the Court of Assizes sentenced only eight offenders to life imprisonment.[94] The accused were the following: Luis Garcia Meza Tejada (former President of Bolivia), Luis Arce Gomez (former Interior Minister Bolivia), Juan Carlos Blanco (former Foreign Minister of Uruguay), Hernan Jeronimo Ramirez (Chilean military), Francisco Morales Cerruti Bermudez (former president of Peru), Valderrama Ahumada (colonel on leave of the Chilean army), Pedro Richter Prada (former Prime Minister of Peru) and German Ruiz Figeroa (former head of intelligence services of Peru).[95]

The Court also decided to acquit 19 defendants, including Jorge Nestor Troccoli. This sentence was appealed by the convicted defendants, the Public Prosecutor's Office of Rome and family

[92] The crime of torture has been introduced into the Italian legal system with Law No. 110 of 14 July 2017, see the first part of this report, above p 1.
[93] See Correspondents' Report – Italy (2015), above n. 61, pp 10-14.
[94] The Public Prosecutor had requested 27 sentences to life imprisonment and one acquittal.
[95] During the criminal proceedings six defendants died.

members of the victims, who intend to affirm the guilt of the defendants acquitted at first instance. On 12 April 2018, the first hearing of the Court of Assizes of Appeal of Rome took place.

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Legislation — Italian Participation in International Missions

☛ Decision No. 8 of 14 January 2017, 'Italy's participation in international missions and development cooperation initiatives aimed at supporting peace and stabilisation processes in 2017'[97] <http://documenti.camera.it/_dati/leg17/lavori/documentiparlamentari/IndiceETesti/250/001/INTERO.pdf>.

☛ Decision No. 40 of 28 July 2017, 'Italy's participation in an international mission supporting the Libyan Coastguard'[98] <http://documenti.camera.it/_dati/leg17/lavori/documentiparlamentari/IndiceETesti/250/002/INTERO.pdf>.

☛ Decision No. 3 of 28 December 2017, 'Italy's participation in international missions, and an analytical report on international missions carried out in 2017, and their possible extension'[99] <http://documenti.camera.it/_dati/leg17/lavori/documentiparlamentari/IndiceETesti/250/003/INTERO.pdf>.

By Law No. 145 of 21 July 2016, 'Provisions concerning Italy's participation in international missions' (Law No. 145), the Italian Parliament adopted a general legal framework authorising the participation of Italian military contingents in international missions.[100] Previously, there were no general rules governing authorisation procedures in Italy. International missions were approved by specific legislative measures (usually on a six-month basis), authorising the beginning of missions, their extension, and funding. By Law No. 145, the practice of authorisation by decree was discontinued.

Since the date of entry into force of Law No. 145, the Italian Government has submitted three decisions to the Chambers. These concern: (1) Italy's participation in international missions and development cooperation initiatives aimed at supporting peace and stabilisation processes in 2017 (14 January 2017); (2) Italy's participation in an international mission supporting the Libyan Coastguard (28 July 2017); and (3) Italy's participation in international missions, and an analytical report on international missions carried out in 2017, and their possible extension (28 December 2017).

Pursuant to Law No. 145, on 14 January 2017 the Council of Ministers sent to the Chambers Decision No. 8 concerning Italy's participation in international missions and development

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[97] Deliberazione del Consiglio dei Ministri in merito alla partecipazione dell'Italia a missioni internazionali per l'anno 2017, adottata il 14 gennaio 2017 [Deliberation of the Council of Ministers on the participation of Italy in international missions for the year 2017, adopted on January 14, 2017].
[98] Deliberazione del Consiglio dei Ministri in merito alla partecipazione dell'Italia alla missione internazionale in supporto alla guardia costiera libica, adottata il 28 luglio 2017 [Deliberation of the Council of Ministers on Italy's participation in the international mission in support of the Libyan Coast Guard, adopted on 28 July 2017].
[99] Deliberazione del Consiglio dei Ministri in merito alla partecipazione dell'Italia a missioni internazionali da avviare nell'anno 2018, adottata il 28 dicembre 2017 [Deliberation of the Council of Ministers regarding Italy's participation in international missions to be launched in 2018, adopted on 28 December 2017].
[100] See Correspondents' Report – Italy (2016), above n. 72, pp 1-6.

cooperation initiatives aimed at supporting peace and stabilisation processes. This was the first Decision initiated in this area following the entry into force of Law No. 145. There are 49 technical sheets attached to the Decision. Sheets one to 35 concern the extension of the participation of military and civilian personnel in international missions in Europe (one−10)[101], Asia (11−21)[102] and Africa (22−35)[103].

The subsequent technical sheets concern the extension of the air and maritime patrolling, surveillance, and security operation in the Central Mediterranean *Mare Sicuro* ('Safe Sea', 36); the participation of military personnel in strengthening NATO operations (37−42)[104]; insurance, transportation, infrastructure, and interventions ordered by contingents' commanders (43); the preservation of the External Security and Information Agency (AISE)'s information and operational facility for the protection of military personnel deployed in international missions (44); development cooperation initiatives (45); interventions supporting peace, stabilisation, and security strengthening processes (46); participation in the initiatives of international organisations for peace and security (47); funding allocation for Afghani security forces, including police forces (48); emergency and security interventions in crisis areas (49). These extensions were foreseen for the period 1 January−31 December 2017. The funds allocated for 2017 amounted to €997 million. The Decision was authorised by the Chambers with a resolution of 8 March 2017.

Decision No. 40 on Italy's participation in the mission supporting the Libyan Coastguard was adopted by the Chambers on 28 July 2017. As indicated in the technical sheet, the mission is intended to pursue a number of additional tasks compared to Operation *Mare Sicuro*. In particular, it provides for support to Libyan security forces in controlling and countering illegal immigration and human trafficking, as well as the acquisition of intelligence, surveillance and reconnaissance information. The Decision was authorised by the Chambers with a resolution of 2 August 2017.

The latest decision was adopted by Decree of the President of the Council of Ministers No. 3 of 28 December 2017 and concerned new international missions and on-going missions to be extended to 2018. This Decision was sent to the Chambers for discussion and ensuing decisions. Similarly, for each mission the Decision details the area of intervention, legal basis, number and composition of

[101] Joint Enterprise in the Balkans (KFOR, MSU, MLO Belgrade, NATO HQ Sarajevo, NLO Skopje, 1); EU Rule of Law Mission in Kosovo (EULEX Kosovo, 2-4); UN Mission in Kosovo (UNMIK, 5); EUFOR ALTHEA in Bosnia-Herzegovina (6); Bilateral cooperation mission of the Italian Police Forces in Albania and in the Balkan countries (7); UN Peacekeeping Force in Cyprus (UNFICYP, 8); NATO Active Endeavour in the Mediterranean Sea (9); EUNAVFOR MED Operation SOPHIA (10).

[102] NATO Resolute Support-Mission in Afghanistan (11); UN Interim Force in Lebanon (UNIFIL, 12-13); Temporary International Presence in Hebron (TIPH, 14); Bilateral training mission of the Palestinian security forces (15); EU Border Assistance Mission in Rafah (EUBAM Rafah, 16); EU Police Mission for the Palestinian Territories (EUPOL COPPS, 17-18); global coalition against the terrorist threat of Daesh (19); UN Military Observer Group in India and Pakistan (UNMOGIP, 20); Military personnel employed in the United Arab Emirates, Bahrain, Qatar and Tampa for the needs associated with missions in the Middle East and Asia (21).

[103] Operation 'Hippocrates' for Health Support in Libya (22); UN Support Mission in Libya (UNSMIL, 23); Assistance to the Libyan Navy Coast Guard (24); EUNAVFOR 'Atalanta' in Somalia (25); EU Training Mission Somalia (EUTM Somalia, 26); EU Regional Maritime Capacity Building Somalia (EUCAP, 27); Bilateral training mission for Somali and Gibutian police forces (Sheets 28-29); Multidimensional Integrated Stabilisation Mission in Mali (MINUSMA, 30); EU Training Mission Mali (EUTM Mali, 31); EU Capacity Building Sahel Mali (EUCAP Sahel Mali, 32); EU Capacity Building Sahel Niger (EUCAP Sahel Niger, 33); Multination Force and Observers in Egypt (MFO, 34); EU Border Assistance Mission in Libya (EUBAM Libya, 35).

[104] NATO Active Fence (37); strengthening NATO's airspace surveillance device in the Alliance's south-eastern area (38); strengthening NATO's naval surveillance device in the southern Alliance area (39); participation of military personnel in the strengthening of NATO device in Latvia (40); NATO Air Policing (Bulgaria, 41); NATO Interim Air Policing (Island, 42).

personnel to be sent (including the maximum number of personnel involved), planned length of the intervention, and financial budget for 2018, as provided for in the new framework law on international missions.[105]

ANDREA CRESCENZI[106]

[105] In April 2018, the Decision is being examined by the Parliament. The funds allocated for 2018 amount to €995 million.
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