# ITALY[1]

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

☛ Judgment No. 708 of 19 October 2018 of the Tribunal of Fermo
<Unpublished as of April 2019>

The case brought before the Tribunal of Fermo was based on a claim lodged against the Federal Republic of Germany (as a State successor of the Third Reich) by the descendants of twelve Italian citizens executed by German troops in Massignano on 18 June 1944. The victims, all civilians, had been arrested as a reprisal for the light wounding of a German soldier by Italian partisans. German troops had also launched a terror campaign against the local population of the small municipality of Massignano.

The appellants claimed compensation for damages arising from war crimes and crimes against humanity perpetrated by German troops in Massignano. The municipality of Massignano and the Province of Ascoli Piceno also joined the claim alongside the victims' relatives, demanding compensation for the widespread climate of terror and suffering that the massacre inflicted upon the local community.

In the wake of the Decision of the Constitutional Court No. 238/2014[2] and of the Decisions of the Court of Cassation No. 15812/2016[3] and No. 762/2017 related to the interpretation of the customary norm of international law on State immunity and the right of access to a Court and the protection of

[1] This Report was prepared by Rachele Cera, Andrea Crescenzi, Valentina Della Fina, Ornella Ferrajolo, and Rosita Forastiero on behalf of the Institute for International Legal Studies of the National Research Council (CNR), Rome, Italy.
[2] Decision of the Constitutional Court No. 238 of 22 October 2014, published in *Gazzetta Ufficiale* No. 45 of 29 October 2014. See Rachele Cera et al., Correspondents' Reports – Italy (2014) 17 *YIHL* <https://www.asser.nl/media/2613/italy-yihl-17-2014.pdf > accessed 27 March 2019, pp 1-12. See also Rachele Cera et al., Correspondents' Reports – Italy (2015) 18 *YIHL* <https://www.asser.nl/media/3308/italy-yihl-18-2015.pdf>, accessed 27 March 2019, pp 1-10.
[3] Decision of the Supreme Court of Cassation, Civil United Sections, No. 15812 of 3 May 2016, available at <http://www.giurcost.org/casi_scelti/Cassazione/Cass.-15812-2016.pdf>, accessed 27 March 2019. See Rachele Cera et al., Correspondents' Reports – Italy (2016) 19 *YIHL*, <https://www.asser.nl/media/3912/italy-yihl-19-2016v2.pdf> accessed 27 March 2019, pp 24-25.


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human rights,[4] the Tribunal of Fermo affirmed its jurisdiction and ruled that the Third Reich was responsible for the massacre in Massignano, which was the result of a systematic regime of terror.[5] In its reasoning, the Tribunal of Fermo first recalled the principle established by the Italian Constitutional Court that the customary international law norm on State immunity from the civil jurisdiction of other States does not apply when in conflict with a supreme principle of the Constitution of Italy, such as the right of the victims of Nazi crimes to access a judicial remedy.

The Tribunal of Fermo recognised the Federal Republic of Germany as the legal successor of the Third Reich in accordance with international law on succession of States and, therefore, held it responsible for the crimes committed by the Third Reich. In this regard, the Court pointed out that the issue of continuity with the previous government (i.e. the Third Reich) was never disputed by the Federal Republic of Germany, including during the proceedings before the International Court of Justice (ICJ).

In conclusion, the Tribunal of Fermo stated that Germany should compensate the relatives of the victims of Massignano massacre for non-material damage, namely for damage due to the suffering caused by the loss of a family member. The determination of such damage was settled by the judge on an equitable basis, taking into account the age of the victim, degree of kinship, family conditions, as well as legal interests.

The Tribunal of Fermo also recognised the Municipality of Massignano as having the right to receive compensation for the widespread climate of terror and suffering caused by German troops.[6] Conversely, according to the Tribunal of Fermo, the Province of Ascoli Piceno was not entitled to compensation because the evidence submitted was not sufficient to demonstrate that the Massignano massacre had produced similar suffering among the population of the entire province, a much larger community spread over a vast territorial area.

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[4] Decision of the Supreme Court of Cassation, Civil United Sections, No. 762 of 13 January 2017, available at <http://www.eclegal.it/wp-content/uploads/2017/02/sez-un-762-2017.pdf> accessed 27 March 2019. See Rachele Cera et al., Correspondents' Reports – Italy (2017) 20 *YIHL* <https://www.asser.nl/media/4967/yihl-2017-correspondents-reports-italy.pdf> accessed 27 March 2019, pp 12-16.

[5] Claims brought to Italian courts concerning violations of international humanitarian law perpetrated by the Third Reich during World War II led to controversy between Italy and Germany, culminating in the Decision of the Italian Constitutional Court No. 238 of 22 October 2014. With this ruling, the Constitutional Court discussed the issue of constitutionality raised by the Court of Florence in respect of the customary norm of international law on State immunity as interpreted by the ICJ. In particular, in its decision, the Constitutional Court held that the ICJ ruling could not be applicable in Italy because it was inconsistent with core constitutional principles of the Italian legal system, such as the right of access to a Court (Article 24 of the Constitution) and the protection of fundamental human rights (Article 2 of the Constitution). According to the Constitutional Court, these rights cannot be limited by State immunity in cases of crimes committed in breach of inalienable human rights. This principle, first established by the Constitutional Court's Decision No. 238/2014, has subsequently been confirmed by the Court of Cassation in judgements No. 15812/2016 and No. 762/2017 and in decisions of merit of several Italian courts. See Correspondents' Reports – Italy (2014) 17 *YIHL*, above n. 2.

[6] In this regard, see also the Order of the Tribunal of Sulmona of 2 November 2017 about the massacre in Pietransieri. See Correspondents' Reports – Italy (2017) above n 4, pp 12-16.

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*Cases – War Crimes, State Immunity from Jurisdiction and Legal Charge on Foreign State Asset: The Villa Vigoni Affair*

☛ Supreme Court of Cassation, Third Civil Section, Judgment No. 14885 of 8 June 2018 <http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snciv&id=./20180608/snciv@s30@a2018@n14885@tS.clean.pdf >

In Judgment No. 14885 of 2018, the Italian Court of Cassation again intervened in the affair concerning Germany's immunity from civil jurisdiction related to claims for the Distomo massacre committed by Nazi troops. Following the 1997 Greek judgment against Germany by which the Court of First Instance of Livadia granted reparations to the victims of the Distomo massacre, there has been a succession of jurisprudential decisions and legislative measures resulting in divergent outcomes.

An *exequatur* decree of the Hellenic judgment was issued by the President of the Florence Court of Appeal in a decision of 2006[8] and, being challenged by the German Government, was confirmed by the judgment of 2008 of the Florence Court of Appeal. [9] Germany's objection was also dismissed by the Court of Cassation in its judgment No. 11163 of 2011, further strengthening this conclusion.[10] In light of Articles 10, para 1, and 11 of the Italian Constitution, as well as the general principles of international law, the Court of Cassation ruled that the protection of inviolable personal rights, such as those to life and human dignity, prevails over any other norm, both conventional and customary, including that of immunity.[11] As a consequence, the Supreme Court of Cassation confirmed the *exequatur* decree. This decision allowed the Greek claimants to enter a legal charge over Villa Vigoni, a property of the German State near Lake Como.

In response, Germany began judicial proceedings before the Court of Como to request a declaration of illegitimacy or erroneous issuance of the enforcement order and consequently the cancellation of the legal charge established against the property of Germany. The conclusions reached by the Court of Como overturned previous case law on this matter. In judgment No. 1188 of 2013, the Court of Como declared the enforcement order ineffective and maintained that the legal charge against the German property should be cancelled.[12]

The progress of the Italian civil proceedings intertwined with the international dispute between Germany and Italy concerning jurisdictional immunity of the State. The case of Villa Vigoni, in fact, together with the civil orders against Germany for massacres and deportations of Italians, gave rise to a contentious case before the ICJ, which delivered its judgment on 3 February 2012.[13]

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[8] Florence Court of Appeal, Decision of 13 June 2006.

[9] Florence Court of Appeal, Judgment No. 1696 of 21 October 2008.

[10] Supreme Court of Cassation, First Civil Section, Judgment No. 11163 of 20 May 2011. <http://www.europeanrights.eu/index.php?funzione=S&op=2&id=2242>, accessed 27 March 2019.

[11] Germany also objected before the Florence Court of Appeal as regards the award of costs made by the Hellenic Supreme Court. This latter decision was confirmed by the Italian Court of Cassation on 6 May 2008. See Giovanni Carlo Bruno et al., Correspondents' Reports – Italy (2008), 11 *YIHL,* pp 496-497.

[12] Court of Como, Judgment No. 1188 of 2 May 2013.

[13] ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, [2012] ICJ Rep 99.


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With respect to Villa Vigoni, the ICJ found that, by allowing Greek claimants to enter a charge against the property, Italy violated Germany's entitlement to immunity from enforcement measures. The ICJ, in fact, deemed not satisfied the conditions under which a measure of constraint may be taken with respect to a property belonging to a foreign State, namely: the use of that property for an activity not pursuing government non-commercial purposes; the express consent of the foreign State to the measure; or the foreign State's allocation of the property for the satisfaction of a judicial claim.[14] Italy further violated Germany's immunity from jurisdiction when the Florence Court of Appeal accorded *exequatur* to the judgment of a Greek Court, upon which the measures of constraint against Villa Vigoni were based.[15]

The Italian Government implemented the ICJ's judgment by adopting Law No. 5/2013, which calls for courts hearing as yet undecided cases against a foreign State to which Italy is party to formally and directly declare Italy's lack of jurisdiction (Article 3, para. 1) and envisages the possibility of challenging final decisions through a process of a motion to repeal final judgments in relation to disputes to which Italy was party, where the possibility of subjecting conduct of another State to civil jurisdiction was excluded in accordance with the decision of the ICJ (Article 3, para. 2).[16]

In line with Law No. 5/2013 the Court of Como declared the enforceable title against Villa Vigoni awarded in the Greek judgment ineffective. The ruling was confirmed by the Milan Court of Appeal by judgment No. 1278 of 2015.[17]

While the appeal proceedings were pending, in decision No. 238 of 2014 the Italian Constitutional Court held that in the case of immunity for international crimes, the absolute sacrifice of the victims' access to justice is unjustifiable.[18] In line with the conclusions of the Constitutional Court, the Milan Court of Appeal ruled that Germany could be subject to civil proceedings. However, it also had to decide whether Villa Vigoni could be subject to execution. The Milan Court of Appeal affirmed that under customary international law enforcement action against the assets of foreign States used in the exercise of their sovereign functions or used for public purposes is prohibited.

Villa Vigoni became German property when it was bequeathed to the German Federal Republic by Ignazio Vigoni in 1983 for political and diplomatic meetings, as well as for scientific, cultural and artistic events. Accordingly, an agreement concluded in 1986 by the two States established a society to carry out and promote a series of initiatives at Villa Vigoni.

The Stereà Ellada Region appealed the decision of the Milan Court of Appeal to the Court of Cassation on the basis of three reasons: the inadequate implementation of the Constitutional Court's decision; the absence of an effective diplomatic use of Villa Vigoni; and Germany's waiver of

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[14] Ibid., para. 118-119.
[15] Ibid. para. 131.
[16] See Rachele Cera et al., Correspondents' Reports – Italy (2013), 16 *YIHL* <http://www.asser.nl/media/3912/italy-yihl-19-2016v2.pdf> accessed 27 March 2019, pp 1-5.
[17] Milan Court of Appeal, Judgment No. 1278 of 25 March 2015.
[18] See Correspondents' Reports – Italy (2014) above n. 2, pp 1-12.


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immunity from execution according to the Convention on Settlement of Matters Arising out of the War and the Occupation[19] and the London Agreement on German External Debts.[20]
The Supreme Court of Cassation reaffirmed the prohibition of enforcement action on State assets intended for the exercise of sovereign functions. The Court found that although a foreign State can be subject to civil jurisdiction, not all of its assets can be subject to execution. Concerning Villa Vigoni, the Court dismissed the claim by excluding its competence to carry out an investigation in this regard.

On the other hand, the Court of Cassation accepted the claim concerning the declaration of ineffectiveness of the executive title decided by the Milan Court of Appeal. The Supreme Court distinguished the question of the possibility of entering a legal charge on the property *de quo* from the issue of the effectiveness of the enforcement title. For the Supreme Court, declaration of the ineffectiveness of enforcement title cannot be grounded on the fact that the property in question cannot be subject to enforcement measures. In fact, although Villa Vigoni cannot be the object of enforcement action, the legal charge can be enforced against other assets. Accordingly, the Court revoked the legal charge over Villa Vigoni.

While the Court's conclusions represent a relevant affirmation of principle, they leave the right to compensation of the victims of the Distomo massacre unrealised given the extreme difficulty in finding assets belonging to Germany suitable to be subject to execution.

RACHELE CERA[21]

*Government Policy – Opening of the 2018 Military Judicial Year — War Crimes*

- Speech of Mr. Antonio Scaglione, Vice-President of the Military Judicial Council, 1 March 2018, Rome [Intervento per l'inaugurazione dell'anno giudiziario militare. Assemblea generale della Corte Militare di Appello] <https://portalegiustiziamilitare.difesa.it/display.aspx?Tabella=Contenuti&Download=True&Id=9064>

On 1 March 2018 Mr. Antonio Scaglione, Vice-President of the Military Judiciary Council, gave a speech at the opening of the military judicial year in which he recalled some tragic anniversaries related to the crimes committed in Italy during World War II.

In particular, he recalled that on 14 July 1938 ten fascist scholars and university professors signed the so-called "Manifesto della razza" [Manifesto of Race] which, along with the magazine "La difesa

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[19] Convention on Settlement of Matters Arising out of the War and the Occupation, opened for signature 26 May 1952, 332 UNTS 3, entered into force 4 May 1955.
[20] London Agreement on German External Debts, opened for signature 27 February 1953, 333 UNTS 3, entered into force 16 September 1953.
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della razza" [The Defense of the Race],[22] formed the basis of the racist policies enforced by the Italian fascist regime and the start of the persecution of the Italian Jewish minority.

On 5 September 1938, in the wake of the "Manifesto della razza", King Vittorio Emanuele III promulgated the so-called "Leggi per la difesa della razza" [Racial Laws], subsequently approved by the Italian Parliament. These laws implemented a set of legislative and administrative acts that stripped Italian citizens of Jewish faith of the civil and political rights enshrined in Article 24 of the 1848 Albertine Statute.

In his speech, the Vice-President of the Military Judiciary Council emphasised the need to keep remembrance alive with regard also to the massacres inflicted upon Italian military and civilians by German troops between 1943 and 1945 in Italy and abroad.
He recalled that after the discovery in 1994 of the so-called "armadio della vergogna" [cabinet of shame] containing about 700 illegitimately filed trial dossier on Nazi massacres, the Military Judiciary started hundreds of new trials to ascertain the German soldiers' criminal liability for the mass killings of Italian civilians and military personnel.

Mr. Scaglione pointed out that, between 2006 and 2016, the military judges passed fifty-seven sentences of life imprisonment against German soldiers for war crimes. However, none of these sentences have been executed by Germany. He noted that this issue is part of the unresolved dispute on civil compensation claims brought against Germany by relatives of the Italian deportees and victims of the Nazi massacres that led to the ICJ ruling in 2012[23] and the subsequent Decision of the Italian Constitutional Court No. 238 of 22 October 2014.[24]

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*Cases — Associations for the Purpose of International Terrorism*

- Court of Cassation, Sixth Penal Section, Judgment No. 14503 of 19 December 2017, published on 29 March 2018 <https://www.penalecontemporaneo.it/d/6253-due-sentenze-della-cassazione-in-tema-di-condotta-partecipativa-a-un-associazione-terroristica-di-mhttps://www.penalecontemporaneo.it/d/6253-due-sentenze-della-cassazione-in-tema-di-condotta-partecipativa-a-un-associazione-terroristica-di-m>
- Court of Cassation, Second Penal Section, Judgment No. 38208 of 27 April 2018 <https://www.formazionegiuridica.org/wp-content/uploads/2018/08/20180808_snpen@s20@a2018@n38208@tS.clean_.pdf>
- Court of Cassation, Sixth Penal Section, Judgment No. 40348 of 11 September 2018

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[22] The first issue of the magazine "La difesa della razza" [The defense of the race], headed by Telesio Interlandi, was published on 5 August 1938.
[23] ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment, 3 February 2012, [2012] ICJ Rep 99.
[24] Decision of the Constitutional Court No. 238 of 22 October 2014, published in *Gazzetta Ufficiale* No. 45 of 29 October 2014. See for an analysis Correspondents' Reports – Italy (2014) above n. 2, pp 1-12.


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<http://www.neldiritto.it/appgiurisprudenza.asp?id=16103#.XBIetv7sacw>

Article 270 bis of the Italian Criminal Code mandates imprisonment from seven to 15 years for the offense of "promoting, establishing, organising, directing or financing" terrorist associations (par. 1), and from five to ten years for participating in any such associations (par. 2). These associations are defined in the Article as being established for committing acts of violence, including against foreign States or international organisations, with the purpose of terrorism or of subverting the democratic order. These elements resulted from the modification of an earlier offense, set out in Article 3 of Law No. 15 of 1980,[25] which criminalised acts of terrorism but did not envisage the international dimension of the phenomenon. The reform commenced with Law No. 438 of 2001,[26] enacted in response to '9/11'. Later, Parliament, mostly in application of UN Security Council resolutions, introduced even more sophisticated antiterrorism measures, through enacting Laws No. 155 of 2005 and No. 43 of 2015.[27] These provided for further terrorism offenses to improve the fight against the self-named *Islamic State in Iraq and the Levant* (ISIS) and against new criminal practices such the enrolment of 'foreign fighters', terrorism training and self-training (including via the Internet), and 'lone-actor' terrorism.

Article 270 bis intends to not only repress but also prevent the offense it contains. For this reason, it may also be invoked for inchoate offenses where no act of violence has been committed yet. An expansive interpretation of the Article has developed through the jurisprudence of the criminal courts and the Supreme Court of Cassation, which allows prosecution of preliminary activity possibly leading to terrorist attacks.[28] The question has thus arisen of identifying a minimum threshold for conduct that may be regarded as falling within the scope of Article 270 bis, while maintaining that no one should be prosecuted for his or her political, religious or other opinions. The principle derives

[25] Legge 6 febbraio 1980, n. 15, 'Conversione in legge, con modificazioni, del decreto-legge 15 dicembre 1979, n. 625, concernente misure urgenti per la tutela dell'ordine democratico e della sicurezza pubblica', entered into force on 8 February 1980, published in *Gazzetta Ufficiale* No. 37 of 7 February 1980.

[26] Legge 15 dicembre 2001, n. 438, 'Conversione in legge, con modificazioni, del decreto-legge 18 ottobre 2001, n. 374, recante misure urgenti per contrastare il terrorismo internazionale', entered into force 19 December 2001, published in *Gazzetta Ufficiale* No. 293 of 18 December 2001.

[27] Law No. 155 of 2005 (Legge 31 luglio 2005, n. 155, 'Conversione in legge, con modificazioni, del decreto-legge 27 luglio 2005, n. 144, recante misure urgenti per il contrasto del terrorismo internazionale', entered into force 2 August 2005, published in *Gazzetta Ufficiale* No. 177 of 1 August 2005) and Law No. 43 of 2015 (Legge 17 aprile 2015, n. 43, 'Conversione in legge, con modificazioni, del decreto-legge 18 febbraio 2015, n. 7, recante misure urgenti per il contrasto del terrorismo, anche di matrice internazionale nonché proroga delle missioni internazionali delle Forze armate e di polizia, iniziative di cooperazione allo sviluppo e sostegno ai processi di ricostruzione e partecipazione alle iniziative delle organizzazioni internazionali per il consolidamento dei processi di pace e di stabilizzazione', entered into force 21 April 2015, published in *Gazzetta Ufficiale* No 91 of 20 April 2015). See Fabio Raspadori et al., Correspondents' Reports – Italy (2005) 8 *YIHL*, pp 453-455; Rachele Cera et al., Correspondents' Reports – Italy (2015) above n. 2, pp 14-18.

[28] See Correspondents' Reports – Italy (2017) above n. 4, pp 16-20; Correspondents' Reports – Italy (2016) above n.3, pp 22-24; Correspondents' Reports – Italy (2015) above n. 2, pp 19-20.


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from the constitutional protection of the individual rights and freedoms in conjunction with Article 25 of the Constitution,[29] and in line with the *European Convention on Human Rights* (ECHR).[30]

Two judgments of the Supreme Court's Sixth Penal Section are significant in this regard. They address, most specifically, under what circumstances Article 270 bis allows for the imposition on suspected terrorists of special preventive measures that affect their personal freedom.

One of these cases, judgment No. 14503 of 2018,[31] concerned a Moroccan national suspected (mostly on the grounds of phone call interceptions) of having joined ISIS and inciting others to engage in terrorist conduct. For the "Tribunale della Libertà" ("Court of Freedom") of Perugia, the evidence collected during the preliminary investigation proved the suspect's deeply-rooted and fanatical adherence to Islamic fundamentalism, but not "a behaviour actually and effectively concurring to reinforce the operation of the criminal organisation known as ISIS".[32] Therefore, the Tribunal ordered the cessation of the pre-trial detention of the suspect on 30 May 2017. The Public Prosecutor challenged this order with an appeal, which the Supreme Court upheld in judgment No. 14503.

The reasoning of the Court was as follows. In the relevant jurisprudence, the prevailing interpretation has widened the scope of application of Article 270 bis. Moreover, both Parliament and the judiciary are increasingly taking into consideration so-called 'preliminary activity' as being relevant to the repression of terrorism. As a result, proselytizing, preparing a terrorist attack, financing or otherwise supporting a terrorist association have become conduct relevant to criminal law in the Italian legal order.[33] In applying Article 270 bis, the judge must be satisfied that (a) a criminal structure is in place and is able to carry out a criminal programme and (b) the adherence of the suspected person to this organisation has been substantiated in some concrete activity. Because the offense provided for in Article 270 bis is an offense of 'presumed danger' the actual commission of acts of violence is not a requirement; on the other hand, the offense does not consist of "a mere aspiration to subversion, if not accompanied by real and concrete criminal intent".[34]

Regarding in particular so-called 'lone terrorists', the judgment put an emphasis on the fact that the criminal organisation has to be, at least, aware of their existence and intentions. For the Court, "[t]he durable insertion into the organisation's structure or the fact of being in charge with particular tasks is not necessary; to participate in, and reinforce such an organisation it suffices that the suspect

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[29] Article 25 of the Constitution laid down some fundamental principles applicable to criminal matters. It reads, "No case may be removed from the court seized with it as established by law. No punishment may be inflicted except by virtue of a law in force at the time the offence was committed. No restriction may be placed on a person's liberty save for as provided by law."

[30] 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].

[31] Court of Cassation, Sixth Penal Section, Judgment No. 14503 of 19 December 2017 (published 29 March 2018), <https://www.penalecontemporaneo.it/d/6253-due-sentenze-della-cassazione-in-tema-di-condotta-partecipativa-a-un-associazione-terroristica-di-mhttps://www.penalecontemporaneo.it/d/6253-due-sentenze-della-cassazione-in-tema-di-condotta-partecipativa-a-un-associazione-terroristica-di-m> accessed 30 March 2019.

[32] Ibid., "Conclusions in point of law", para 2.

[33] Ibid., para 5.

[34] Ibid., para 7.


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has put himself at the disposal of the network for implementing a terrorist programme, and his behaviour is known to the organisation".[35]

In judgment No. 40348 of 11 September 2018,[36] the Court of Cassation reached the same conclusion with regard to the pre-trial detention of Tunisian nationals suspected of participating in a terrorist association. The measure had been imposed upon them, and confirmed by the Tribunal of Freedom in Rome, because of serious indications that they had established a terrorist group in Italy. These indications consisted of speeches, which glorified the actions of Al Qaida and, subsequently, of ISIS, and in the friendly relationship the suspects maintained with some nationals of their country of origin, who had travelled to Syria and were there acting as 'foreign fighters' for *jihad*. The suspects challenged the decision of the Tribunal of Freedom with an appeal to the Supreme Court. They argued that the Tribunal had erroneously applied the provisions in Article 270 bis to their conduct, which according to them could at worst be described as 'apology of crimes' (Article 414.4 of the Criminal Code), if not regarded as a legitimate expression of their freedom of thought.

With the above judgment, the Supreme Court (Sixth Penal Section) rejected the appeal through judgment No. 4034 of 11 September 2018,[37] on the basis of the same interpretive criteria applied in previous decisions. Among others, the Court referred to its judgments No. 22719 of 22 March 2013 (First Penal Section), No. 2651 of 8 October 2015 (Fifth Penal Section), No. 14503 of 19 December 2017 (Sixth Penal Section).[38] A point of interest of the case is that it gave the Court an opportunity for more in-depth analysis of the issue of how to prove that a terrorist association within the meaning of Article 270 bis is established. The Court ruled that if the defendants participate in a group that operates, in Italy or abroad, as an ISIS cell or a part of the ISIS global network, there is no need to prove that they have established an autonomous, local association. The reason is that the qualification of ISIS as a terrorist association (in accordance with the relevant Security Council resolutions) is undisputed, and covers any group part of that criminal network.

The cases above show that, in many instances, ascertaining whether a real link exists between individual behaviour and the ISIS terrorist programme is not easy. Evidence of this link is necessary for the courts to qualify individual conduct as 'participation in terrorist associations'. On the other hand, the peculiarities of ISIS and its operation through a global, flexible network require the courts to reinterpret the traditional pattern of participation in criminal associations (in Italy, early legislation and jurisprudence on the matter mostly concern 'mafia' associations, whose *modus operandi* is completely different).[39]

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[35] Ibid., para 11.
[36] Court of Cassation, Sixth Penal Section, Judgment No. 40348 of 11 September 2018 <http://www.neldiritto.it/appgiurisprudenza.asp?id=16103#.XBIetv7sacw> accessed 28 March 2019.
[37] Court of Cassation, Sixth Penal Section, Judgment No. 40348 of 11 September 2018 <http://www.neldiritto.it/appgiurisprudenza.asp?id=16103#.XBIetv7sacw> accessed 28 March 2019.
[38] Ibid., para 8.
[39] Concerning 'mafia' associations the principle is well-established in the jurisprudence that "participant" means a person who is "permanently and organically inserted into the structure of the mafia organisation … and also considering his effective role and the tasks he is charged with for achieving the purposes of the organisation …" (Court of Cassation, United Sections, judgment No. 33748 of 12 July 2005, *Mannino*, quoted in Court of Cassation, Sixth Penal Section, Judgment No. 40348, para 6).


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This issue has shown itself to be particularly relevant in the proceedings brought against so-called 'lone terrorists', namely persons living in Italy who adhered to *jihad* and then acted for the purpose of terrorism, without being effectively in touch with ISIS leaders or members. Judgment No. 38208 of the Supreme Court (Second Penal Section) of 27 April 2018[40] is relevant in this regard. It concerns the case of a Tunisian and a Pakistani, whom the Assize Court of Appeal of Milan found guilty for participating in ISIS on the grounds of Article 270 bis of the Criminal Code (judgment of 25 May 2016). Both defendants challenged this decision through appeal to the Court of Cassation. One argument in the claims was that the Assize Court of Appeal had erroneously applied Article 270 bis by overstating the relevance of the peculiarities of ISIS. Despite these peculiarities, it was absurd, the claimants said, to consider their oath of allegiance to the caliphate and its publication on social networks as evidence of not only their mental adherence, but also their concrete participation in ISIS.[41] Moreover, any crime committed in association presupposes the utilisation of "an organisation involving persons and tools that are functional to the execution of a criminal program";[42] by contrast, the claimants had acted in isolation, using rudimentary tools of their own. One further argument concerning the legal concept of 'participation' was raised. As traditionally established in the jurisprudence of the Court of Cassation, this concept "coincides with the durable and organic presence in an associative structure" and may not consist "in mere psychological adherence" to a criminal organisation.[43] In addition, the 'preliminary conduct' that the Assize Court of Appeal found to be covered by Article 270 bis consisted of the use of a training manual ("How to survive in the West") arguably unrelated to any criminal plan, and in various attempts made by the defendants of proselytising and recruiting other persons, which however remained without consequence.[44]

On this basis, the Supreme Court of Cassation was requested to reverse the conviction. Should the Court consider that the appeal was unfounded, it was asked to defer to its United Sections the issue of exactly defining the concept of 'participation' in a terrorist association, "when the participation consists, merely, in the proclaimed adherence to a terrorist organisation, and no activity has be done, which is effectual to the realisation of this organisation's programme."[45]

As a first step, the Supreme Court observed that any criminal offense must be clear and sufficiently specific in content to be compatible with Article 25 of the Constitution. With regard to this, the phenomenon under examination is not of relevance to criminal law, except when its character is such as to make the danger of terrorist attacks more concrete ("no longer a mere hypothesis or possibility").[46] The signs from which the judge may infer this are the existence of an organisational apparatus having tools and persons at its disposal, and the ability of the apparatus to execute a

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[40] Court of Cassation, Second Penal Section, Judgment No. 38208 of 27 April 2018, <https://www.formazionegiuridica.org/wp-content/uploads/2018/08/20180808_snpen@s20@a2018@n38208@tS.clean_.pdf> accessed 28 March 2019.
[41] Ibid., "Conclusions in point of fact", par. 3.1.
[42] Ibid..
[43] Ibid..
[44] Ibid., para 3.2. Further arguments put forward in the recourses concerned an alleged illogical and contradictory motivation of the challenged decision (ibid., paras 3.3-3.5).
[45] Ibid., para 5.
[46] Ibid., "Conclusions in point of law", para 2.2.2.


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programme of criminal acts that qualify as "terrorist conduct" under Article 270 sexies of the Criminal Code.[47] For the Supreme Court, these legal requirements ensure the certainty and clarity that any criminal norms must have to be consistent with constitutional principles.

With regard to Article 270 bis, the Supreme Court once again stressed the relevance of 'anticipatory' intent, which is the rationale behind this provision. With this provision, Parliament intended to prevent the commission of any single act of violence that might be planned and/or perpetrated as part of a terrorist association's programme.[48] Indeed, the conduct proscribed at an early stage of the offense provided for in this provision requires that the 'preliminary activities' carried out by the accused must amount to making a substantive, and not merely psychological, contribution to the effective realisation of this programme. Similarly, the courts must ascertain that there are "objective elements" concerning the individual's participation in a terrorist association. In other words, the judge must be satisfied that an individual's behaviour has increased the risk of terrorist attacks, in accordance with the association's programme. Additionally, there must be significant evidence that a terrorist association exists and is effective, and the evidence must show that "… the individual conduct is functional to the aims and the object of the association".[49]

For the Supreme Court, the characterisation of the ruling of the Assize Court of Appeal made by the claimants was erroneous. The Assize Court had not ruled that public adherence to ISIS is evidence of participation in that organisation; a line of reasoning extraneous to the interpretive criteria laid down by the Supreme Court in its relevant jurisprudence.[50] From another point of view, the claims did not pay sufficient attention to the particular character of ISIS, which make it necessary to re-draw the traditional concept of criminal association. ISIS is characterised by religious fanaticism, hatred and intent to destroy the 'infidels', and by the extreme flexibility of a terrorist network acting at the global level. This implies that individuals and groups adhering to ISIS often have no concrete relationship between them and with the organisation's leaders and members. In this framework, the Assize Court of Appeal correctly characterised the response to the ISIS call to *jihad* as the factual circumstance that created a link between the defendants and that organisation (and not as evidence of their participation in it). In the light of this link, the Assize Court of Appeal rightly interpreted all of the subsequent behaviour of the defendants as being directed to sharing the ISIS ideology, fundamentalist culture and terrorist techniques. This behaviour, which the defense tried to minimise, represented, as a whole, the expression of "an ideological adherence which was substantiated in

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[47] Article 270 sexies echoes the relevant UN Security Council resolutions, in establishing that 'terrorist conduct' is conduct that, by its nature or context, is such to cause serious prejudice to a country or an international organisation. Moreover, it aims to intimidate a population or compel public bodies or an international organisation to do or abstain from doing something; or to destabilize or destroy the fundamental political, constitutional, economic and social structures of a country or of an international organisation. The norm covers any further behavior that is defined as 'terrorist' or 'committed with the purpose of terrorism' by the conventions or other norms of international law that are binding for Italy.

[48] Court of Cassation, Second Penal Section, Judgment No. 38208 of 2018, "Conclusions in point of law", para 2.2.2.

[49] Ibid., paras 2.2.3-2.2.4.

[50] The Supreme Court referred in this regard, among others, to decisions No. 14503 of 19 December 2017, *Messaoudi*; No. 22719 of 22 March 2013, *Lo Turco*; No. 30824 of 15 June 2006, *Tartag*; and No. 1072 of 11 October 2006, *Bouyahia Maher*.


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serious criminal intents; most specifically, the intention of realising the association's criminal program."[51] Since the crime of participation in terrorist associations in Article 270 bis is, by its nature, an offense 'of alleged danger', it was not necessary for the Court to further demonstrate on the merits that the accused had actually carried out a criminal plan.[52]

On these grounds, the Court of Cassation declared the claims unfounded, thus, confirming the conviction. Finding no interpretive contradiction with its previous decisions, the Court further ruled that there were no reasons for deferring to the United Section any question concerning the definition of 'participation in terrorist associations' under Article 270 bis.[53]

ORNELLA FERRAJOLO[54]

*Legislation — Inquiry into Mafias and Foreign Organised Crime*

☛ Law No. 99 of 7 August 2018, 'Establishment of a parliamentary committee of inquiry into the phenomenon of mafias and other criminal associations, including foreign associations'[55] <http://www.gazzettaufficiale.it/eli/id/2018/08/20/18G00125/sg>

Foreign organised crime and mafias ('*mafie*') have become a transnational phenomenon and constitute a serious emergency in all States. The presence and infiltration of foreign criminal organisations into the economy and society of many countries pose a threat to their growth, political stability and security.

Furthermore, over the years, there has been a process of internationalisation and cooperation of mafias with other criminal organisations, including foreign groups, in order to manage new forms of illegal activities such as smuggling of human beings, drug trafficking, illegal arms trade and environmental crimes, such as trafficking and illegal dumping of waste.[56]

Changes in the structural organisation of the Italian mafias and their *modus operandi* led Parliament to establish a committee of inquiry in 2013[57] and again in 2018 to investigate Italian mafia-type criminal organisations and their relationship with foreign organised crime.

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[51] Court of Cassation, Second Penal Section, Judgment No. 38208 of 2018, "Conclusions in point of law", paras 2.5 and 2.6.

[52] Ibid., para 2.6.

[53] Ibidem, par. 7

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[55] Legge n. 99, 7 agosto 2018, 'Istituzione di una Commissione parlamentare di inchiesta sul fenomeno delle mafie e sulle altre associazioni criminali, anche straniere', entered into force on 21 August 2018, published in *Gazzetta Ufficiale* No. 192 of 20 August 2018.

[56] Cf. Letizia Paoli, Organised Crime in Italy: Mafia and Illegal Markets – Exception and Normality, in Cyrille Fijnaut, Letizia Paoli (ed), *Organised Crime in Europe: Concepts, Patterns and Control Policies in the European Union and Beyond,* Springer, Dordrecht, 2004.

[57] See Law No. 87 of 19 July 2013, 'Establishment of a parliamentary committee of inquiry into the phenomenon of mafias and other criminal associations, including foreign associations', entered into force on 28 July 2013, published in *Gazzetta Ufficiale* No. 175 of 27 July 2013.


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By Law No. 99/2018 Parliament set up a parliamentary committee of inquiry, for the duration of the XVIII legislature,[58] in order to examine the political, economic and social ramifications of organised crime in Italy, including foreign crime, and make proposals to reinforce international and domestic law to combat it.[59]

Under Article 1 of Law No. 99/2018 the parliamentary committee of inquiry is competent to investigate foreign or transnational criminal groups pursuant to Article 3 of the Law No. 146 of 16 March 2006,[60] all mafia-type associations in conformity with Article 416-bis of the penal code[61] and all criminal associations that represent a danger to the social, economic and institutional system of Italy.[62] The parliamentary committee of inquiry therefore plays a role with regard to transnational organised criminal groups under the United Nations Convention against Transnational Organised Crime and its Protocols of 2000, ratified by Italy with Law No. 146/2006 expressly referred to in Article 1 of Law No. 99/2018.[63]

The wide range of tasks assigned to the parliamentary committee of inquiry are listed in Article 1 of Law No. 99/2018. With a view to fighting against foreign and transnational criminal groups, the committee is endowed with a set of tasks including the assessment of the adequacy of domestic legislation on databases and information systems used by judicial offices and police forces in order to make prevention measures more effective, and to advance the knowledge of the areas of origin of domestic and foreign criminal organisations. It is also charged with the examination of the process of internationalisation and cooperation among criminal organisations in managing new forms of illicit activities, including illegal trafficking in arms[64] and drugs, exploitation of illegal migration flows and the illicit art trade. In addition, the competences of the committee include the evaluation of

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[58] The XVIII legislature started on 23 March 2018. In accordance with Article 60 of the Constitution, it lasts five years.

[59] The committee is composed of twenty-five senators and twenty-five deputies respectively selected from the Presidents of the Senate and of the Chamber of the Deputies, in proportion to the number of the components of the parliamentary groups (Article 2 of Law No. 99/2018).

[60] Law No. 146 of 16 March 2006, 'Ratification and execution of the United Nations Convention against Transnational Organised Crime and its Protocols adopted by the General Assembly on 15 November 2000 and 31 May 2001', entered into force on 12 April 2006, published in *Gazzetta Ufficiale* No. 85 of 11 April 2006. Article 3 of Law No. 146/2006 contains the definition of 'transnational crime'. See Valentina Della Fina et al., Correspondents' Reports – Italy (2006) 9 *YIHL*, pp 529-531.

[61] Article 416-bis of the penal code defines 'mafia-type associations, including foreign associations.'

[62] See UNICRI, Organized Crime and the Legal Economy: the Italian Case, Torino, 2016 available at <http://files.unicri.it/UNICRI_Organized_Crime_and_Legal_Economy_report.pdf> accessed 28 March 2019.

[63] Under Article 2 paragraph (a) of the United Nations Convention against Transnational Organised Crime, an "[o]rganised criminal group shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit."

[64] On 19 November 2018 the Council of the EU adopted a new EU Strategy on illicit firearms, small arms and light weapons (SALW) with the aim, inter alia, to coordinate a European action to prevent the illicit acquisition of SALW by terrorist groups, organised crime and other unauthorised actors. See Council of the European Union, Council Conclusions on the Adoption of an EU Strategy Against Illicit Firearms, Small Arms and Light Weapons and their Ammunition, Brussels, 19 November 2018, 13581/18. For a comment, cf. Nils Duquet, The 2018 EU SALW Strategy: Towards an Integrated and Comprehensive Approach, *EU Non-Proliferation and Disarmament Papers*, No. 62, April 2019, <https://www.nonproliferation.eu/2018-eu-salw-strategy> accessed 27 March 2019. At the international level, the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, opened for signature 2 July 2001, 2326 UNTS 208, entered into force 3 July 2005, is the first legally binding instrument aimed at eradicating the illicit trafficking in firearms. Italy ratified the Protocol with Law No. 146/2006.


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infiltration of foreign criminal associations in the national territory and their operating methods in order to identify specific law enforcement measures, including the possibility of using anti-terrorism legislation, for fighting against these associations.
The parliamentary committee of inquiry is also competent to propose new regulatory acts aimed at reinforcing international instruments on the prevention of criminal activities, judicial assistance and cooperation in order to build an EU legal anti-mafia space.

These broad competencies are complemented by the power of the parliamentary committee of inquiry to carry out investigations as a judicial authority, but without the possibility of ordering measures limiting a person's freedom, and to hear witnesses, such as law enforcement officials, government representatives and anti-mafia activists. The committee may also obtain documents relating to proceedings and investigations pending before the judicial authority or other investigative bodies, as well as copies of documents relating to parliamentary investigations and inquiries.[65]
The committee of inquiry must report to the Chambers at the end of its work as well as whenever it deems it appropriate, and in any case annually.

In giving this broad mandate to the committee of inquiry, the Parliament intended to set up an organ able to play a crucial role in fighting organised crime in Italy. It is well known that Italy, for its strategic location and coastlines, has increasingly become a crossroads for illegal trafficking managed by numerous mafia associations. These circumstances led EUROPOL to monitor Italian mafia-type organisations in order to identify actions to successfully combat international organised crime, which EUROPOL considers a threat to the entire EU.[66]

VALENTINA DELLA FINA[67]

*Legislation — Italian Participation in International Missions*

- Decision No. 1 of 28 November 2018, 'Italy's participation to additional international missions for the period from 1 October to 31 December 2018'[68] <http://documenti.camera.it/_dati/leg18/lavori/documentiparlamentari/IndiceETesti/025/001/INTERO.pdf>

[65] Under Article 6 of Law No. 99/2018 the members of the committee of inquiry, its officials and staff are bound to secrecy for everything concerning documents and acts of inquiry. The meetings of the committee are public; it may meet in non-public meetings if it deems appropriate (Article 7).
[66] Cf. EUROPOL, Threat Assessment - Italian Organised Crime, The Hague, 2013 available at <https://www.europol.europa.eu/publications-documents/threat-assessment-italian-organised-crime> accessed 28 March 2019.
[67] Valentina Della Fina is a senior researcher at the Institute for International Legal Studies of the National Research Council of Italy (ISGI-CNR) and coordinates the Institute's team of researchers which prepares the Italian Report.
[68] Deliberazione del Consiglio dei Ministri in merito alla partecipazione dell'Italia a ulteriori missioni internazionali per il periodo dal 1 ottobre al 31 dicembre 2018, adottata il 28 Novembre 2018 [Deliberation of the Council of Ministers regarding Italy's participation in additional international missions for the period from 1 October to 31 December 2018, adopted on 28 November 2018].


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- Law No. 145 of 30 December 2018, 'Public budget for the 2019 financial year (2019 Budget Law) and three-year budget for 2019-2021'[69] <https://www.gazzettaufficiale.it/eli/gu/2018/12/31/302/so/62/sg/pdf>
- Law No. 98 of 9 August 2018, 'Conversion in Law, with modifications, of the Decree-Law No. 84 of 10 July 2018, setting out urgent provisions for the transfer of Italian vessels to support the Libyan Coastguard of the Ministry of Defence and the coastal security organs of the Libyan Ministry of the Interior' [70] <https://www.gazzettaufficiale.it/eli/id/2018/08/16/18G00124/sg>

On 28 November 2018, following a proposal from the President of the Council of Ministers, the Italian Council of Ministers adopted Decision No. 1 on Italy's participation in additional international missions for the period from 1 October to 31 December 2018. This Decision consists of two documents concerning respectively the Italian participation in a new NATO mission (Annex I) and an analytical report on international missions carried out in the first nine months of 2018 (Annex II).

The Decision, submitted for approval to Parliament,[71] was taken by the Chamber of Deputies on 19 December 2018 (Resolution No 6-00039).[72] This was the fourth decision on Italy's participation in international missions adopted by the Government since the entry into force of Law No 145/2016.[73]

As already mentioned, Annex I concerns Italian participation in a new NATO mission starting in the last quarter of 2018, aimed at helping the Iraqi Government stabilise the country and fight terrorism.[74] The Government recalled that NATO has launched a training mission for Iraqi security forces (NATO *Mission in Iraq* - NM-l) during the Brussels Summit in July 2018.[75] The aim was to further develop *Training and Capacity Building* activities, which NATO has been conducting in Iraq since 2017.

This new NATO mission involves twelve Italian military personnel tasked to provide consultancy to and training for Iraqi officials and military instructors. The financial resources needed

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[69] Legge 30 dicembre 2018, n. 145, Bilancio di previsione dello Stato per l'anno finanziario 2019 e bilancio pluriennale per il triennio 2019-2021, entered into force on 1 January 2019 (with the exception of paras 254, 801, 877, 878, 879, 881, 882, 883, 884, 885, 886, 989, 1006 e 1007 and Art. 1, entered into force on 31 December 2018), published in *Gazzetta Ufficiale* No. 302 of 31 December 2018.

[70] Legge 9 agosto 2018, n. 98, Conversione in legge, con modificazioni, del decreto-legge 10 luglio 2018, n. 84, recante disposizioni urgenti per la cessione di unità navali italiane a supporto della Guardia costiera del Ministero della difesa e degli organi per la sicurezza costiera del Ministero dell'interno libici, entered into force on 17 August 2018, published in *Gazzetta Ufficiale* No. 189 of 16 August 2018.

[71] The Decision was approved by Parliament on 7 February 2019, <https://temi.camera.it/leg18/provvedimento/autorizzazione-e-proroga-missioni-internazionali-ultimo-trimestre-2018-doc-xxv-n-1-e-doc-xxvi-n-1.html> accessed 27 March 2019.

[72] Camera dei deputati, Risoluzione n. 6/00039 del 19 Dicembre 2018 [Chamber of Deputies, Resolution No. 6/00039, 19 December 2018], <https://aic.camera.it/aic/scheda.html?numero=6-00039&ramo=C&leg=18> accessed 27 March 2019.

[73] See Correspondents' Reports – Italy (2016) above n.3, pp 1-6.

[74] Doc. XXV, No. 1.

[75] Summit Declaration issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Brussels 11-12 July 2018, para 54, <https://www.nato.int/cps/en/natohq/official_texts_156624.htm> accessed 27 March 2019.


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for this mission were taken from the funds already allocated for the international mission aimed at fighting Daesh.[76]

Annex 2 contains a report on international missions in which Italy is currently engaged and the progress of cooperation initiatives aimed at supporting peace and stabilisation processes. Mission extensions are also included in the document.[77] As required by Law No. 145/2016, Annex 2 details for each mission the area of intervention, goals, legal basis, composition and number of personnel involved, planned length of the interventions, and financial budget for 2019.

Decision No. 1 of 28 November 2018 concerns Italian participation in eleven missions. Four of these eleven missions are carried out in Europe: the NATO Sea Guardian mission, taking over the Active Endeavour mission in the Mediterranean (Sheet 9); the EU operation in the southern Central Mediterranean, EUNAVFOR Med Operation Sophia (Sheet 10); the air and maritime patrolling, surveillance, and security operation in the Central Mediterranean, *Mare Sicuro* (Sheet 36); and NATO Support to Turkey (Sheet 37). Two missions are deployed in Asia: the international coalition against the Daesh terrorist threat (Sheet 19) and the UN Military Observer Group in India and Pakistan (UNMOGIP) (Sheet 20). Five missions are carried out in Africa: the bilateral support mission in the Republic of Niger (Sheet 2); the NATO support mission in Tunisia for the development of joint capabilities of Tunisian armed forces (Sheet 3); the UN Mission for the Referendum in Western Sahara (MINURSO) (Sheet 4); the EU counter-piracy operation, EUNAVFOR Atalanta, off the Somali coast (Sheet 25); and the Mission of the Multinational Force and Observers (MFO) in Egypt (Sheet 34).

From a financial perspective, the 2019 Budget Law has allocated €997,247,320 to the international mission fund for 2019.

Moreover, it should be recalled that Decree-Law No. 84/2018, converted with modifications into Law No. 98 of 9 August 2018, sets out urgent provisions for the transfer of Italian vessels to support the Libyan Coastguard. To justify the urgent adoption of Decree-Law No 84/2018, the Government recalled the need to guarantee safe navigation in the Mediterranean, the fight against human trafficking, and the protection of human life at sea.

The Decree-Law is part of an existing legal framework concerning cooperation in combating illegal immigration between Libya and Italy that includes the following acts: the Protocol on Cooperation between Italy and Libya aimed at tackling illegal immigration (29 December 2007); the Treaty on Friendship, Partnership, and Cooperation between Italy and Libya (30 August 2008) which, inter alia, provides for collaboration against terrorism, organised crime, and illegal immigration; and the Memorandum of Understanding on Cooperation in the Development Sector, to Combat Illegal Immigration, Human Trafficking and Contraband, and on Reinforcing Border Security (2 February 2017).

Law No. 98/2018 consists of five articles. Article 1 authorises the free transfer of twelve vessels to the Libyan Government for patrolling and security activities aimed at countering illegal immigration and human trafficking, as well as rescue at sea. The remaining articles provide for the

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[76] Doc. XXVI, No. 1, Sheet 19.
[77] Doc. XXVI, No. 1.


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allocation of funds for maintaining the transferred vessels and training Libyan personnel (Article 2), instructions for the use of Unmanned Aerial Vehicles (Article 2-bis), financial coverage (Article 3), and entry into force (Article 4).

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