ITALY[1]

Cases – Applying the Crime of Torture: First Judgments Convicting Torture committed by State Officials Against Inmates

☛ Court of Siena, Preliminary Hearing Judge, Judgment No. 58, 17 May 2021
Court of Cassation, Fifth Penal Section, Judgment No. 8973, 9 November 2021

In 2021 for the first time the crime of torture, pursuant to Article 613 bis, para. 2, of the Criminal Code, was applied by Italian judges to cases of torture committed by state officials on individuals deprived of their personal freedom.[2] In the past, police violence was punished through less serious or more common crimes due to the inexistence of a provision concerning such forms of violence and this has led to several condemnations of Italy by the European Court of Human Rights (ECtHR).[3]

The two judgments discussed here garner much attention as they are characterised by a peculiar breadth, completeness and precision. The judgments are able to clarify some of the most problematic issues for which Law No. 110, introducing the crime of torture, has been criticised since its adoption in 2017.[4]

Judgement No. 58 issued by the Preliminary Hearing Judge of the Court of Siena stands out since it qualifies the use of torture committed by state officials under Art. 613 bis, para. 2, of the Criminal Code as an autonomous offense, instead of considering it as a mere aggravating circumstance. This issue is of undeniable practical relevance because it has impact on the sanctioning treatment.

In this vein, the judge based its reasoning on structural, literal and semantic arguments.

The judge pointed out that although the conduct foreseen in Article 613 bis, para. 2, of the Criminal Code is described by reference to the first paragraph, there is an element of differentiation not related to the material object, but to the mode of conduct. Such a provision, indeed, punishes the acts of torture committed by a public official or by an officer in charge of a public service "through abuse of power or in violation of the duties inherent in his functions or service". According to the judge, the introduction of the element of distortion of the exercise of public power "offers a further argument in the sense of autonomy of the offense, by virtue of the specification of the methods of committing the crime and of the consequent change in legal objectivity". Moreover, the judge

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[2] The first judgment ever to convict a prison police officer in Italy for torture was issued by the Preliminary Hearing Judge of the Court of Ferrara on 14 January 2021.

[3] As the leading case, see European Court of Human Rights, Fourth Section, *Cestaro v. Italy*, Judgment, 7 April 2015, Application 6884/11 available at <https://hudoc.echr.coe.int/eng?i=001-153901>. See also *Blair and Others v. Italy*, Applications 1442/14, 21319/14 and 21911/14, *Azzolina and Others v. Italy*, Applications nos. 28923/09 and 67599/10, and *Cirino and Renne v. Italia*, Application 2539/13 and 4705/13.

[4] See Rachele Cera et al., Correspondents' Report – Italy (2018) 20 *YIHL* <https://www.asser.nl/media/4967/yihl-2017-correspondents-reports-italy.pdf> accessed 11 May 2022, pp 1-7.

argued that the prediction of the penalty, which is established independently and not by increasing or decreasing the penalty provided for in the first paragraph, is in line with such an interpretation.[5]

In the view of the judge, two further elements confirm, in a semantic interpretation, the autonomous scope of the crime *ex* Article 613 bis, para. 2, of the Criminal Code. First, para. 3 of Article 613 bis of the Criminal Code foresees a limitation of the incriminating scope, since it excludes the application of para. 2 in case of pain deriving only from the execution of lawful measures that exclude or restrict personal rights. As noted by the judge, the clause excluding tortuousness is provided only for autonomous offenses and not for special circumstances.

In the same perspective, the judge found that para. 4 of Article 613 bis of the Criminal Code, providing for an increased penalty in case of torture leading to serious injury or death, also argues for the autonomous nature of the offence in para. 2, otherwise it would consist of 'the aggravating circumstance of an aggravating circumstance', which is not provided for in the Italian criminal law system.

Secondly, Article 613 ter of the Criminal Code establishes the offense of 'incitement' to torture by public officials whose punishment, as highlighted by the judge, is provided in the Italian legal order for particularly serious crimes, and not for an aggravated hypothesis of a crime.

In Judgement No. 8973, the supreme judges applied their (recent) jurisprudence on Article 613 bis of the Criminal Code towards acts of torture committed by state officials. The judgment concerns acts of violence committed by police officers in the prison of Santa Maria di Capua Vetere during an 'extraordinary inspection' carried out on 6 April 2020 in response to protests of detainees against anti-pandemic measures taking place during the preceding days.

By recalling its Judgment No. 47079 of 2019,[6] the Court confirmed that the crime of torture is a 'possibly habitual offense', namely "a crime that can be constituted by several violent, seriously threatening or cruel conducts, repeated over time, or by a single act detrimental to the safety or individual and moral freedom of the victim, which however involves inhuman and degrading treatment for the dignity of the person". A further clarifying step concerned what is meant by 'multiple conducts'. The Court of Cassation stated that "the phrase through several conducts, must refer not only to a plurality of episodes repeated over time, but also to a plurality of violent behaviours held in the same chronological context".

From a subjective point of view, the Court of Cassation, following its Judgment No. 4755 of 2020,[7] reaffirmed that the crime of torture requires a general intent or the consciousness and willingness to engage in the conduct as described by the law. Even when torture is habitually committed, criminal liability is attributed regardless of unitary wilful misconduct, consisting of the initial representation and deliberation of conduct to be carried out. It is enough that *mens rea* is imputable to the accused, from time to time, for every single conduct.

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[5] Article 613 bis, para. 2, of the Criminal Code provides that for torture committed by state officials the penalty is imprisonment from five to 12 years.
[6] See Rachele Cera et al., Correspondents' Report – Italy (2019) 22 *YIHL* <https://www.asser.nl/media/680347/italy-report_2019.pdf> accessed 11 May 2022, pp 1-5.
[7] See Rachele Cera et al., Correspondents' Report – Italy (2020) 23 *YIHL* <https://www.asser.nl/media/795343/italy-report_2020.pdf> accessed 11 May 2022, pp 1-3.
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Legislation – Amendment to the Rome Statute of the ICC concerning the Crime of Aggression

- Law No. 202 of 10 November 2021 'Ratification and execution of the Amendments the Statute establishing the International Criminal Court, ratified by Law 12 July 1999 No. 232, adopted in Kampala on 10 and 11 June 2010'[9] entered into force on 3 December 2021, published in *Gazzetta Ufficiale* No. 287 of 2 December 2021
  < https://www.gazzettaufficiale.it/eli/gu/2021/12/02/287/sg/pdf>

By Law No. 202 of 10 November 2021, Italy ratified the Amendments adopted by the Rome Statute's first Review Conference held in Kampala (Uganda) in 2010.[10] They modified the Rome Statute, which established the International Criminal Court (ICC),[11] by introducing, *inter alia,* the legal definition of aggression (new Article 8 bis of the Rome Statute), and specifying the conditions and modalities for the ICC to exercise its jurisdiction over the same (new Articles 15 bis and 15 ter).[12] According to the Rome Statute Article 121 paragraph 5: "[a]ny amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those State Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance". In case of objection, the Court is prevented from exercising its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

At the 1998 Diplomatic Conference in Rome, the crime of aggression was inserted among those crimes the Court had jurisdiction *ratione materiae.*[13] During the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, the Italian delegation was

[9] Legge n. 202, 10 novembre 2021, Ratifica ed esecuzione degli emendamenti allo Statuto istitutivo della Corte penale internazionale, ratificato ai sensi della legge 12 luglio 1999, n. 232, adottati a Kampala il 10 e l'11 giugno 2010.

[10] 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), <https://asp.icc-cpi.int/sites/asp/files/asp_docs/RC2010/AMENDMENTS/CN.651.2010-ENG-CoA.pdf> accessed 22 April 2022.

[11] Rome Statute of the International Criminal Court, opened for signature on 17 July 1998, 2187 UNTS 3 (entered into force on 1 July 2002). Text available at < https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> accessed 22 April 2022. Italy ratified the Rome Statute establishing the ICC through Law No. 232 of 12 July 1999. This Law also contained an implementation order, by virtue of which the Statute was implemented in 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). See also Rachele Cera et al., 'Correspondents' Reports 2012: Italy' <https://www.asser.nl/media/1424/italy-yihl-15-2012.pdf> accessed 22 April 2022, pp 8-12.

[12] 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 22 April 2022. 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 22 April 2022.

[13] See Andreas Zimmermann, Elisa Freiburg-Braun, 'Article 8bis', in Kai Ambos (ed*), Rome Statute of the International Criminal Court. Article-by-Article Commentary*, Beck, Hart, Nomos, München, 2021, 686, 697; Astrid Reisenger Coracini and Pal Wrange, 'The Specificity of the Crime of Aggression', in Claus Kress and Stefan Barriga (eds), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge, 2017, 307, 311; Enrico Amati and al. (eds), 'Introduzione al diritto penale internazionale' [Introduction to International Criminal Law], Giappichelli, Torino, 2020, 448-449.

in favour of the inclusion of the crime of aggression in the Statute among those under the Court's jurisdiction. It supported the view that a specific definition, including an enumeration of specific acts constituting aggression, was preferable to a general one.

Pursuant to Article 5, para. 2, of the Rome Statute, it was decided that the Court could exercise its jurisdiction over this crime only after an agreement had been reached regarding the definition to be adopted on the occasion of a Review Conference organised no sooner than seven years after the entry into force of the Statute.[14]

Furthermore, the activation of the Court's jurisdiction over the crime of aggression was subjected to further conditions. First, the Court could exercise its jurisdiction only one year after the ratification of the amendment by at least thirty States pursuant to Article 15 bis, para. 2, of the Rome Statute. Second, the present activation of the Court's jurisdiction should have been subjected to a future decision of the Assembly of the States Parties to the Statute to be taken no sooner than in 2017 (Article 15bis, para. 3, of the Rome Statute). In December 2017 the Assembly of the States Parties decided to activate the jurisdiction of the Court from 17 July 2018 onwards.

In 2018, the Italian Senator Alberto Airola[15] submitted a bill aiming to ratify the Kampala amendments, including the one relating to Article 8 bis of the Rome Statute providing a definition of the crime of aggression. On 4 November 2021, the Italian lower Chamber (Camera dei Deputati) adopted Law No. 202,[16] already approved by the Italian Senate back in January 2020.

The Kampala amendment was accepted as such, even though during the Parliamentary debate the Lega Nord Party submitted a series of modifying proposals, especially around the notion of naval blockades, mentioned in para. 2 (c) of Article 8 bis.[17] They were aimed at binding the Government to renegotiate the amendment in order to exclude the naval blockade from the

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[14] See Mauro Politi, *Statement before the Committee of the Whole on 18 June 1998 in United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome*, 15 June – 17 July 1998 (Summary Records of the plenary meetings and of the meetings of the Committee of the Whole), <https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf> accessed 22 April 2022.

[15] Doc. S. 667, < https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2021;202> accessed 22 April 2022.

[16] Doc. C. 2332, < https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2021;202> accessed 22 April 2022.

[17] Article 8bis is formulated as follows:

"Crime of aggression

1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

definition of aggression or at least to exclude it in cases where the armed forces of a state are deployed to block the coasts or ports of another state to protect the former state's national borders and its territorial sovereignty or "to protect the borders of another state from illegal migrant fluxes and to fight human trafficking".[18]

With Law No. 202, Italy became the 42nd state to ratify the Kampala amendment. In the near future, the Italian Parliament would need to adopt another law introducing the crime of aggression in the Italian Criminal Code in order to effectively implement such provisions into the domestic legal system in respect of the principles of certainty and rule of law in criminal matters.

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Cases - War Crimes and State Immunity from Jurisdiction

- Court of Assizes of Appeal of Milan, First Section, Decision No. 31/2020 of 3 November 2020 on the Case against Markiv Vitaliv[20] <https://www.sistemapenale.it/pdf_contenuti/1633776559_corte-assise-appello-milano-2021-omicidio-giornalista-donbass-immunita-giurisdizione-ucraina-responsabile-civile.pdf> accessed 22 April 2022
- Court of Cassation, First Civil Section, Order No. 39391 of 10 December 2021 regarding the immunity of States and the execution of a foreign judgement in Italy[21] <http://www.marinacastellaneta.it/blog/wp-content/uploads/2021/12/immunit%C3%A0-Stati-esteri-1.pdf> accessed 22 April 2022

The Italian Courts had several occasions to deal with war crimes in 2021.

The first sentence under review is related to the case of the murder of Andy Rocchelli, a 30-year-old Italian photojournalist from Pavia. He was killed by mortar fire on 24 May 2014, while reporting in Donbass, the Eastern area of Ukraine occupied by Russian Forces, together with the Russian photoreporter Andrej Mironov, the French journalist William Roguelon and two other unidentified Ukrainian colleagues.[22] Vitaly Markiv, an Italian-Ukrainian former soldier in the Ukrainian National Guard, was accused of causing their deaths.

Markiv, son of the Italian citizen Elisa Signori, has a dual citizenship, Italian and Ukrainian. He moved to Marche when he was 16 years old in 2005. He had been working there as a personal

[18] Doc. 9/2332/1, 3 Donzelli, Lollobrigida, Delmastro Delle Vedove <https://parlamento18.openpolis.it/atti-presentati-in-parlamento/andrea-delmastro-delle-vedove/464557/stato_last_date/desc/page/7> accessed 22 April 2022.
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[20] Corte di Assise di appello di Milano, sentenza 3 novembre 2020, depositata il 21 gennaio 2021, Pres. Est. Ichino, imp. Markiv.
[21] Corte di Cassazione, ordinanza n. 39391 depositata il 10 dicembre 2021 su immunità degli Stati esteri ed esecuzione di una sentenza straniera in Italia.
[22] Court of Assizes of Appeal of Milan, First Section, Decision No. 31/2020 of 3 November 2020 on the Case against Markiv Vitaliv <https://www.sistemapenale.it/pdf_contenuti/1633776559_corte-assise-appello-milano-2021-omicidio-giornalista-donbass-immunita-giurisdizione-ucraina-responsabile-civile.pdf> accessed 22 April 2022, p.1.

trainer and DJ until 2012, when he tried to enlist in the Italian army before returning to Ukraine to fight. He was prosecuted in Italy because of his dual citizenship.

According to the Prosecutor, he was involved in the killing of Rocchelli, because he acted as the 'look-out' "who indicated the photojournalist and his group as suspects near a factory transformed into a weapons depot by the Russian-backed separatists", therefore, contributing "materially" to helping those who fired.

The first instance Court of Assizes of Pavia in July 2019 found Vitaly Markiv guilty of complicity in murder and sentenced him to 24 years of imprisonment, of which he served three while awaiting trial.[23]

According to the judges of the Court of Assizes of Pavia, the murder of civilians was committed in violation of the IV Geneva Convention relative to the protection of civilian persons in time of war of 12 august 1949.[24] Markiv acted as a soldier belonging to the Ukrainian National Guard and executed an order from his chain of command. Therefore, the act performed in execution of the received rules of engagement, was attributable to the Ukrainian State.[25] The latter was also held liable for the damages arising from this murder, because it was demonstrated that the Ukrainian National Guard was a paramilitary militia depending on the Ukrainian State.[26]

Then, the Milan Court of Assizes of Appeal, with decision No. 31/2020 here in review, completely overturned the verdict and fully acquitted Markiv "for not having committed the crime" and he was immediately released from prison. The Court of Assizes of Appeal also revoked the compensation granted in the first instance against the Ukrainian state, which was held civilly liable.

The trial also had some diplomatic implications. The Ukrainian Interior Minister Arsen Avakov, who was present in the courtroom when the sentence was given, expressed his "compliments to the Italian justice system",[27] as the Court of Appeal accepted the Ukrainian arguments according to which Markiv had nothing to do with the murder.

Before the Court of Assizes of Appeal, he proclaimed his innocence. His defence counsel sustained that there was no evidence of Markiv's responsibility in the killing.

The National Federation of the Italian Press (FNSI), the Lombard Association of Journalists (ALG) and the Cesura photographic collective were civil parties in the process, together with the Rocchelli family. The compensation granted to them in first instance, and to be given by the Ukrainian state as civilly liable, was also revoked by the Court of Assizes of Appeal of Milan.

After the acquittal decided by this Court, Vitaly Markiv, appearing with a Ukrainian flag on his shoulders, declared that he was glad as he finally got justice, but that he had unfairly spent three years in prison. For this reason, he called upon the judges to examine thoroughly such cases in the

[23] Court of Assizes of Pavia, Decision No. 1/2019 of 12 July 2019, < http://www.giustiziami.it/gm/wp-content/uploads/2019/10/sentenza-rocchelli-markiv-motivazioni_compressed.pdf> accessed 6 May 2022, p.145, 148.
[24] Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).
[25] Court of Assizes of Pavia, Decision No. 1/2019 of 12 July 2019, quoted above, p. 168
[26] Ibidem.
[27] *Rocchelli Trial. The Judgment of the Appeal Court: Markiv Acquitted, No One Is Guilty*, 4 November 2020, <https://www.ossigeno.info/rocchelli-trial-the-judgment-of-the-appeal-court-in-milan-markiv-acquitted-no-one-is-guilty/?lang=en> accessed 22 April 2022.

future.[28] After the appeal of the Attorney General, the case also reached the Supreme Court of Cassation, confirming the acquittal of Markiv.[29]

The second case in review is related to the execution in Italy of a decision of the Federal Court of New York about the compensation of damages suffered by relatives and for the dead in the terrorist attack of 11 September 2001.

The first signatory of the appeal was Angela Stergiopoulos, followed by hundreds of other men and women who lost a family member, at least 260 of them were of Italian origin.[30]

By its Order No. 39391 of 10 December 2021, the Court of Cassation, First Civil Section, accepted the appeal of the families involved.[31]

The Court of Appeal of Rome in December 2020 had not recognised the validity of the verdict with which the Federal Court of New York, in 2018, condemned Iran, its ministers and the Central Bank to compensate such damages.

The Court of Cassation reversed the aforementioned verdict and, on the contrary, stated that Iran will have to compensate the families of the victims of the attacks of 11 September 2001.[32] It established that the Italian court was not called to enter into the merits of the sentence given by the American Court. Instead, it was called to assess the compatibility of the US legislation applied to combat terrorism with the Italian legal order.

According to the reversed Court of Appeal of Rome judgment, the Federal Court of New York applied the Foreign Sovereign Immunities Act which "allegedly introduced an 'inconceivable' absolute presumption of guilt against Iran, Sudan, Syria and North Korea in the judgments brought for damages to American citizens".[33]

In contrast, the Court of Cassation judged the Foreign Sovereign Immunities Act to be in line with the Italian legal system which provides for exceptions to the sovereignty of States when they are responsible for acts in violation of inalienable human rights.

Furthermore, it mentioned the possibility of recognising the compensation of "punitive damage", in addition to traditional pecuniary damage, to discourage foreign governments from supporting terrorism.

The Court of Cassation held that in general a provision for the compensation of damages in favour of the victims of a terrorist attack did not produce effects that were incompatible with public order.

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[28] Ibid

[29] Ibid. See the news reported at <https://www.fnsi.it/caso-rocchelli-la-cassazione-conferma-lassoluzione-per-markiv-fnsi-e-alg-continuare-a-cercare-verita-e-giustizia> accessed 7 May 2022.

[30] *September 11, for the Supreme Court, Iran will have to compensate the relatives of the victims: the appeal of the families accepted*, 10 December 2021 <https://time.news/september-11-for-the-supreme-court-iran-will-have-to-compensate-the-relatives-of-the-victims-the-appeal-of-the-families-accepted/> accessed 22 April 2022.

[31] Court of Cassation, First Civil Section, Order No. 39391 of 10 December 2021 regarding the immunity of States and the execution of a foreign judgment in Italy <http://www.marinacastellaneta.it/blog/wp-content/uploads/2021/12/immunit%C3%A0-Stati-esteri-1.pdf> accessed 22 April 2022.

[32] For a comment see <http://www.marinacastellaneta.it/blog/la-cassazione-su-immunita-degli-stati-esteri-ed-esecuzione-di-una-sentenza-straniera-in-italia.html > last accessed 22 April 2022.

[33] See <https://www.ncnk.org/resources/briefing-papers/all-briefing-papers/private-litigation-against-north-korean-government> accessed 22 April 2022.

Such a decision seems to be in line with the conclusions of the Constitutional Court in Judgment No. 238/2014.[34] According to the judges of the Italian Constitutional Court, the International Court of Justice (ICJ) Decision on *Jurisdictional Immunities of the State (Germany v Italy)* of 2012[35] could not be applicable in Italy because it was inconsistent with some core Italian constitutional principles, 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).[36] In the view of the Constitutional Court, State immunity is not applicable in case of violations of such fundamental rights, so that the exemption from civil jurisdiction of a State for *acta iure imperii* committed in violation of imperative norms of international law is unreceivable.[37]

VALERIA EBOLI

Cases – Serious Crimes against Italian Citizens in Latin America: Follow-up of Judgment of 8 July 2019 of Court of Assizes of Appeal of Rome

☛ Supreme Court of Cassation, First Criminal Section, Decision No. 43693-21 of 9 July 2021 <http://www.24marzo.it/index.php?module=pagemaster&PAGE_user_op=view_page&PAGE_id=585&MMN_position=204:204 >

With the judgment of 8 July 2021, the Court of Cassation rejected the appeals submitted by the defendants against the second instance judgment of 2019 and ruled definitively on the perpetrators of the so-called *Plan Condor* which was established in the 1970s between the military dictatorships of certain Latin American countries (Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay) to coordinate their intelligence services in order to eliminate political opponents through illegal arrests, kidnapping, torture, and enforced disappearances.[38]

In 2019, the Court of Assizes of Appeal of Rome confirmed the life sentences decided in 2017 against Ahumada Valderrama Rafael (Chile), Blanco Juan Carlos (Uruguay), Bermudez Francisco Morales (Peru), Figueroa German Ruiz (Peru), Gomez Luis Arce (Bolivia) and Ramirez Ramirez Hernán Jerónimo (Chile)[39] and condemned eighteen defendants, who had been acquitted in the first

[34] Constitutional Court, Judgment no 238 – Year 2014, English translation provided by the Italian Constitutional Court, www.cortecostituzionale.it/documenti/download/doc/recent_judgments/_S238_2013_en.pdf accessed 22 April 2022. For a comment, see Valeria Eboli, 'The protection of immunity in Italian Law', in *Yearbook of Diplomatic and Consular Law*, Volume 3/2018.

[35] ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment, 3 February 2012, [2012] ICJ Rep 99. The ICJ ruled that Italian courts had violated Germany's immunity from jurisdiction in upholding a 'request for *exequatur*' of judgments rendered by foreign courts. In the Court's view the Italian courts could not exercise their jurisdiction over compensation claims against Germany regarding damages suffered in consequence of international crimes committed by the Third Reich. See also Rachele Cera et al., 'Correspondents' Reports 2012: Italy' <https://www.asser.nl/media/1424/italy-yihl-15-2012.pdf> accessed 22 April 2022, pp 1-6.

[36] See Rachele Cera et al. Correspondents' Reports – Italy (2017) 20 *YIHL,* <https://www.asser.nl/media/4967/yihl-2017-correspondents-reports-italy.pdf> accessed 22 April 2022, pp. 12-15.

[37] See Rachele Cera et al., Correspondents' Reports – Italy (2014) 17 *YIHL,* <https://www.asser.nl/media/2613/italy-yihl-17-2014.pdf>, accessed 22 April 2022, pp 1-12.

[38] See Francesca Lessa, 'The Condor Trials: Transnational Repression and Human Rights in South America', Yale University Press, New Haven, London, 2022.

[39] See Rachele Cera et al., 'Correspondents' Reports 2017: Italy' 20 *YIHL* <https://www.asser.nl/media/4967/yihl-2017-correspondents-reports-italy.pdf> accessed 21 March 2022, pp 20-23.

instance, to the same penalty.[40] The defendants appealed the 2019 ruling to the Court of Cassation on several grounds, some of which deserve to be mentioned for their relevance.

Most of the applicants alleged errors concerning the requirement of Italian citizenship of the victims due to an incorrect application of the Italian rules governing the matter by the Court of Assizes of Appeal of Rome. This element was decisive for beginning the criminal trial in Italy on the *Condor* case, as Italian penal law allows the jurisdiction of Italian judicial authorities on crimes committed against Italian citizens abroad. For the claimants, the Court of Assizes did not apply the relevant legislation correctly. They claimed that Law No. 91 of 1992 on "New provisions on citizenship" was applied instead of Law No. 555 of 1912 concerning "Italian citizenship" which was in force when the events occurred. This last act provided for events causing the loss of Italian citizenship which, according to the defendants, had affected the victims' citizenship but these events were not evaluated by the Court of Assizes. In the appeals stage, the defendants pointed out that the victims' possession of Italian citizenship was ascertained by the Court only on the basis of the certificates issued by the Italian consulates, but these certificates were only administrative acts that did not constitute proof of the victims' nationality.

All the applicants also alleged that the Court of Assizes erred in framing the crime. The Court ruled all the defendants guilty of the crime under Article 81, para. 2 (Continued offense)[41] and Article 110 (Punishment for those who participate in the same offence) of the Criminal Code.[42] However, according to the applicants, the offence was instead that of criminal association under Article 416 of the Criminal Code which punishes those who promote, direct or organise an association to commit crimes consisting of three or more people. For the defendants, the *Plan Condor* had all the requisites of this crime which underlies a permanent and stable criminal agreement.[43] The defendants, who were acquitted in the first instance, further alleged that the Court of Assizes had not re-evaluated the testimonies used by the Court of first instance to acquit them in violation of Article 603, para. 3-bis, of the Code of Criminal Procedure[44] but it limited itself to re-evaluating only the documentary evidence that in the first instance trial had a much less important role than the many witnesses.

Some defendants belonging to intermediate military ranks, including Troccoli Fernández, also challenged the Court's failure to apply Articles 51 and 54 of the Criminal Code concerning the circumstances that prevent the judge from applying the penalty.[45] They alleged that as military

[40] See Rachele Cera et al., 'Correspondents' Reports 2019: Italy' 22 *YIHL* <https://www.asser.nl/media/680347/italy-report_2019.pdf> accessed 21 March 2022, pp 15-18. Since some of the defendants died, in 2019 the number of those sentenced was reduced to twenty.

[41] Article 81, para. 2 of the Criminal Code provides that the offender be judged according to the most severe offense if he or she has committed a plurality of acts or omissions or several violations of the law in order to commit the same criminal design (in the present case the murder of persons).

[42] Article 110 of the Criminal Code establishes that when more than one person participates in the same offence, each shall be subject to the penalty prescribed for such offence. Participatory acts are therefore punishable as principal offences. In the appeals, it was pointed out that the criminal responsibility of the defendants was based only on their participation in the *Plan Condor* as the Court failed to find a direct link between the conduct of each defendant and the death of each victim.

[43] Those who merely participated in the criminal association are punished with imprisonment from one to five years. Article 416 of the Criminal Code also provides for aggravated cases of criminal association punishable by up to fifteen years imprisonment.

[44] This norm was introduced by Law no. 103 of 2017 in compliance with Article 6, para. 3, lett. d), of the European 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). Under Article 603, para. 3-bis, it is necessary to renew on appeal the decisive declaratory evidence for overturning the first instance acquittal decision as the right to a fair trial requires that the evidence cannot be evaluated only based on what was recorded in another trial phase.

[45] Under Article 51: "The exercise of a right or the performance of a duty imposed by a legal provision or a legitimate order of the public authority shall not be subject punishment". Under Article 54: "No one shall be punished for acts

personnel they carried out the orders of their superiors, therefore, they could not be held criminally responsible for the victims' deaths. In particular, in Troccoli's appeal it was underlined that as a lieutenant of the Uruguayan navy he had the duty to obey the superiors' orders including for the purpose of avoiding serious consequences for himself and his family in case he did not obey.

In rejecting all the grounds for appeal, the Court of Cassation made an extensive reasoning on each ground whose relevant points must be mentioned.

First, the Court of Cassation examined the question of the Italian citizenship of the victims which made it possible to prosecute the defendants by the Italian judicial authority pursuant to Article 8 of the Criminal Code (Political crime committed abroad).[46] The Court reconstructed the legislation and the jurisprudence on citizenship and ruled that the status of Italian citizen, which is the effect of being a child of an Italian (*iure sanguinis*), is a permanent and inalienable subjective right. This right can be enforced in court at any time and can be lost only by renunciation by the person concerned (these principles were also established by Law no. 555 of 1912).[47] It follows that the recognition of citizenship has a purely declaratory value and the certificates issued by the Italian consulates are limited to acknowledging an existing, permanent and inalienable right. The Court of Cassation also specified that according to civil jurisprudence the certificates concerning the possession of citizenship issued by an Italian consul abroad might constitute evidence that could be appreciated by the judge. Therefore, the Court of Assizes correctly ascertained the possession of Italian citizenship by the victims.

The other point examined by the Court of Cassation was the failure to address the debate on the renewal of the preliminary investigation by the Court of Assizes under Article 603, para. 3-bis, of the Code of Criminal Procedure. The Court of Cassation clarified that this rule does not oblige the appellate judge to order a general renewal of the preliminary investigation carried out in the first instance proceedings. The appellate Court had the sole obligation to take evidence that had been subject to erroneous assessment by the judge of first instance based on the public prosecutor's appeal and that was considered decisive in order to choose between conviction and acquittal. In the present case, the public prosecutors who appealed the acquittal sentence did not contest the reliability of the testimonies. The Court of Cassation also clarified that the Court of Assizes overturned the first instance acquittal sentence based on evidence acquired during the second level proceedings that the Court of first instance had not examined.[48]

With regard to the qualification of the offence as concurrence of persons in the continued crime of murder rather than in the criminal association, the Court of Cassation rejected all the grounds put forward in the appeals. The Court of Cassation clarified that the first instance Court had

committed under the constraint of necessity to preserve himself or others from the actual danger of a serious personal harm, which is not caused voluntary nor otherwise inevitable, and the acts committed under which are proportionate to the threatened harm. This article does not apply to a person who has a legal duty to expose himself to the danger. The provision of the first paragraph of this article applies even if the state of necessity arises from the threat of another person; in this case, the person who forced him/her to commit it is responsible for the fact".

[46] The Court of Cassation recalled its definition of political crimes as "crimes of objective gravity committed against Italian citizens in Argentina in execution of a specific criminal plan aimed at the physical elimination of opponents to the regime without compliance with any procedural guarantee and with the only purpose to counter the political ideas and tendencies of victims who were members of trade unions, political parties or university associations. Such crimes offend not only a political interest of the Italian State, which has the right and the duty to intervene in order to protect its citizens, but also the fundamental rights of the victims themselves". See the judgment of the Court of Cassation, First Section, no. 23181 of 28 April 2004, Suarez Mason, Rv. 2286663.

[47] See Mellone Marco, 'L'accertamento giudiziario della cittadinanza italiana Iure Sanguinis' [The Judicial Assessment of Italian Citizenship Iure Sanguinis], Giappichelli, Turin, 2022.

[48] On this aspect, see Rachele Cera et al., 'Correspondents' Reports 2019: Italy' 22 *YIHL* <https://www.asser.nl/media/680347/italy-report_2019.pdf> accessed 21 March 2022, p 16.

never applied the offence of criminal association, therefore, the second instance judges could not envisage this offence that the Public Prosecutor had never formulated against the accused.

Concerning the defendants belonging to the intermediate military ranks, the Court of Cassation recalled that they were acquitted by the first instance Court as it was not possible to obtain evidence of their "direct involvement" in the murders, tortures or disappearances of the victims. However, according to the Court of Cassation, the arguments put forward by the first instance judges in order to acquit the defendants had several inaccuracies and errors of law. On the contrary, the Court of Assizes examined in detail the conducts of the defendants and how each individual conduct merged with the others in order to lead to the victims' death which was caused with fraud and premeditation. According to the Court of Cassation, the second instance judges correctly framed the offence of the continued crime of murder. In the merit, it recalled that this crime was already applied by the Court of Assizes of Rome in the *ESMA* case of 2008 concerning the death of Italian citizens in Argentina which, according to the Court of Cassation, had relevant similarities with the *Condor* case.[49]

The Court of Cassation also rejected the appellants' claims concerning the application of the exemptions under Articles 51 and 54 of the Criminal Code. The Court of Cassation reaffirmed its relevant case law on the matter and clarified that the exemption pursuant to Article 51 is not applicable if the person acted in accordance with an unlawful order from a superior as in the case in question and *a fortiori* if it is a crime. Even the state of necessity under Article 54 could not be invoked by the defendants because in the event of disobedience to an order, they would not have risked their lives but only incurred disciplinary sanctions, such as arrest or non-advancement in their military careers.

With particular regard to Troccoli Fernández, the Court of Cassation recalled that the second instance judges analysed in detail the documentary evidence and the testimonies of those who had been kidnapped together with the victims. All the evidence revealed Troccoli's active and autonomous role in the *Plan Condor* and his repressive activities carried out both in Argentina and in Uruguay where Italian and Uruguayan citizens were detained, tortured and killed. The Court of Cassation, therefore, rejected all grounds of Troccoli's appeal.

Moreover, the Court of Cassation underlined that the second instance judges found that all the defendants belonging to the intermediate military ranks were close collaborators of the military leaders and heads of government who conceived the *Plan Condor*. They had full awareness of contributing to the elimination of dissidence as planned by superiors and the will to join bodies specifically charged with carrying out clandestine operations for that purpose. In this respect it is worth mentioning the lawyer Speranzoni's pleading, reported in the judgment of the Court of Cassation, in which it was emphasised that the intermediate military ranks had full autonomy and discretion in identifying, capturing and deciding the destiny of the victims.[50] In the pleading, the lawyer also underlined that the exemptions provided for in the Italian Criminal Code could not operate since at the time of the facts international norms of *jus cogens* on crimes against humanity were already in force. Moreover, these norms were reaffirmed in Latin America by Resolution VI of the Inter-American Conference on the problems of war and peace held in Chapultepec in 1945.

The Court of Cassation, after a careful and thorough examination of the reasoning of the Court of Assizes, confirmed the sentence to life imprisonment for fourteen former senior officers

[49] See Giovanni Carlo Bruno et al., Correspondents' Report – Italy (2008) 11 *YIHL*, pp 500-502.
[50] Mr. Speranzoni was one of the lawyers of the victims' relatives who filed pleadings at the Court of Cassation.

convicted by the Court of Assizes in 2019.[51] The Italian-Uruguayan Nestor Troccoli Fernández was the only one who was arrested because he had been living in Italy since 2007; extradition was requested for the other thirteen defendants who had been tried *in absentia*.[52]

VALENTINA DELLA FINA[53]

Cases – International Terrorism: Further Developments in the Case-Law of the Supreme Court of Cassation

- Supreme Court of Cassation, Sixth Penal Section, Judgment No. 5471, 17 November 2020, published on 11 February 2021
  http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snpen&id=./20210212/snpen@s60@a2021@n05471@tS.clean.pdf
- Supreme Court of Cassation, Fifth Penal Section, Judgment No. 8891, 18 December 2020, published on 4 March 2021
  http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snpen&id=./20210304/snpen@s50@a2021@n08891@tS.clean.pdf
- Supreme Court of Cassation, First Penal Section, Judgment No. 11581, 27 January 2021
  http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snpen&id=./20210325/snpen@s10@a2021@n11581@tS.clean.pdf

In 2021, the Supreme Court of Cassation returned once again to the issue of defining the offence of participation in international terrorist associations or for subverting the democratic order, and the offences of instigation to commit crimes and glorification of crime, as per Articles 270–bis and 414 of the Criminal Code, respectively. Indeed, the issue of the correct legal classification of these different offences constitutes the subject of the three judgments examined here, namely Judgment No. 5471 of 17 November 2020 (published on 11 February 2021), Judgment No. 8891 of 18 December 2020 (published on 4 March 2021) and Judgment No. 11581 of 27 January 2021.

Concerning the first offence, namely participation in international terrorist associations under Article 270-bis, it should be noted that the interpretations adopted by the jurisprudence of the Court of Cassation have not always been unambiguous, resulting over time in the consolidation of two different orientations. The different approaches adopted by the Court were largely due to the

[51] The number of defendants decreased because three senior officers had died in the meantime. Furthermore, in July 2021 the Court of Cassation separated from the general case, the cases of three Peruvian defendants to verify whether they were alive: the former dictator Francisco Morales Bermudez and the two soldiers Martín Martínez Garay and Germán Ruiz Figueroa, the latter died in 2019. On 9 February 2022, the Court of Cassation definitively sentenced to life imprisonment Morales Bermudez and Martínez Garay, head of the "Policía de Inteligencia Peruana (PIP)", for having participated in the organisation of dozens of operations under *Plan Condor* in which several political opponents of Italian origin died. See Carmen Forlenza, Il processo Condor e i desaparecidos italiani [The Condor trial and the Italian disappeared], available at <https://www.amistades.info/post/iprocesso-condor-desaparecidos-italiani> accessed 21 March 2022.

[52] See Maria Paola Costantini, La Corte di Cassazione e l'operazione Condor: si confermano le condanne per i reati contro i diritti umani per i desaparecidos di origine italiana [The Court of Cassation and the Condor operation: the convictions for crimes against human rights for the disappeared of Italian origin are confirmed], available at <https://www.unionedirittiumani.it/newsletter/corte-cassazione-operazione-condor/> accessed 21 March 2022.

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difficulty of framing ISIS, since the peculiar, distinguishing characteristics of this organisation make participation in it a somewhat novel phenomenon compared to other forms of participation in organised crime groups. In this respect, the Court of Cassation has reiterated on several occasions, and most recently with the judgments in question, that this jihadist terrorist organisation represents

> a group with subjective boundaries that are not rigidly defined, open to spontaneous adhesions by individuals without the need for ritual celebration, for a suitability assessment or for an explicit or implicit approval by other associates, within which each individual can commit attacks on their own by reason of his/her own will to implement the terrorist program.[54]

This transnational and radical Islamist terrorist organisation is characterised by an extremely flexible internal structure, within which the various 'cells' operate, whether simultaneously, in several States at once, or at different times, and its followers maintain contact either in person, or by telephone or other remote media.

It is effectively a network that brings together subjects subscribing to a shared political-military project. The atypical, highly fluid organisational model of ISIS has made it very complex to identify the exact framework of the offence referred to in Article 270-bis and, in particular, the minimum conditions for considering a subject's participation in a jihadist terrorist association as proven. This is a delicate and crucial point to avoid criminalising behaviours of mere psychological adherence, which would not pertain to Article 270–bis but fall instead within the hypotheses of mere apologia and instigation to commit crimes pursuant to Article 414 of the Criminal Code.

According to the initial interpretation of the jurisprudence of the Court, for the offence to be configured under Article 270–bis, it is sufficient that the subject's conduct of ideological adhesion to an organised criminal structure translates into serious criminal intent to pursue one of the associative goals. In this view, the commencement of the material execution of the criminal plan would not be a necessary prerequisite.[55] On this basis, the same Court stated that propaganda activities carried out via the web and social media, apology, and proselytism constituted proof of "participation in the association for the purpose of international terrorism" under Article 270-bis, rather than incitement to commit a crime pursuant to Article 414.[56]

In line with a different interpretation of the Court, without prejudice to the open structure of ISIS and the possibility of recruitment into the organisation through radical propaganda activities (such as messages, images and documents celebrating the holy war and terrorist martyrdom), in order to prove a 'participation in the association' under Article 270-bis, it is necessary that "the action of the individual is linked to the organised structure, i.e. that there is a concrete, albeit flexible, operational contact between the individual and the organisation, which is thus aware, even indirectly, of the acting subject's adhesion".[57]

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[54] In this respect, see Judgment of the Supreme Court of Cassation, Sixth Penal Section, No. 5471 of 17 November 2020 <http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snpen&id=./20210212/snpen@s60@a2021@n05471@tS.clean.pdf> accessed 14 November 2022, p. 3; Judgment of the Supreme Court of Cassation, Fifth Penal Section, No. 8891 of 18 December 2020 <http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snpen&id=./20210304/snpen@s50@a2021@n08891@tS.clean.pdf> accessed 14 November 2022, p. 16.

[55] In this line, see Court of Cassation, Second Penal Section, Judgment No. 14704, 22 April 2020, unpublished.

[56] The Supreme Court of Cassation referred in this regard to its Judgment No. 22163 of the Court of Cassation (Second Penal Section) of 21 February 2019, already reported in Rachele Cera et al., 'Correspondents' Reports 2019: Italy' 22 YIHL <https://www.asser.nl/media/680347/italy-report_2019.pdf> accessed 9 April 2022, pp 7-12.

[57] In this respect, see Judgments of the Supreme Court of Cassation, Sixth Penal Section, No. 14503 of 19 December 2017 and No. 40348 of 11 September 2018 reported in Rachele Cera et al., 'Correspondents' Reports 2018: Italy' 21 YIHL <https://www.asser.nl/media/679452/yihl-2018-correspondents-reports-italy-final-copy-clean.pdf> accessed 9 April 2022, pp 6-12.

Both Judgments No. 5471/2020 and No. 8891/2020 fall within this last jurisprudential orientation. In particular, in Judgment 5471/2020, the judges of the Sixth Section of the Court of Cassation stated that ascertaining the individual's participation in an organised structure devoted to carrying out a terrorist criminal plan implies, *in primis*, "the verification of the 'bilaterality' of the relationship". According to the judges, mere adherence to a system of values, such as a radical ideology aimed at jihadism and/or terrorist purposes, is not sufficient in itself to prove the subject's participation in a jihadist criminal organisation. In order to provide evidence to prove the participation required by Article 270-bis, there must be an effective 'availability' that contributes to the realisation of terrorist purposes. This implies that the organisation has the ability to reach, contact and involve (i.e. to 'call') the individual member in order to implement its criminal programme. In this regard, the Court highlighted how

> the extreme danger, insidiousness and pervasiveness of the Islamist-fundamentalist terrorist phenomenon cannot lead to denying the general principles of 'materiality' and 'offensiveness' of the conduct, and to subverting the general categories of associative crime, where they postulate the proof of an "effective", not merely potential, insertion of the individual into the organised structure for the purpose of carrying out the criminal plan.[58]

On these grounds, the Court upheld the Judgment of 27 November 2018 of the Court of Assizes of Appeal of Genoa, which confirmed the first instance conviction of Nabil Benamir for the crime of participation in the ISIS ex Article 270-bis of the Criminal Code. In particular, the accused had been found guilty on the basis of material conduct that proved, beyond any reasonable doubt, his actual and operational participation in the organisation. In fact, he had circulated videos and other materials related to terrorist activities within private social media groups sharing jihadist ideology, such as the so-called 'Lone wolves' group, limited to only eight participants. Furthermore, he had direct contacts with the so-called Information Office of the Islamic State, from which, on 30 July 2017, he received a film celebrating the suicide missions of the mujahedeen; he had been found in possession of a telephone of the type used in the videos as a trigger/detonator for explosive devices; he had tried to obtain weapons and support in France through a cellmate affiliated to organised crime; he had declared on several occasions, and to different individuals, that he was an ISIS fighter, and that he had received 'the call' and was ready to 'leave'.

According to the Court of Cassation, the second instance judges had sufficiently substantiated the existence of a relationship between the defendant and ISIS. In other words, they had proved the existence of the necessary 'bilaterality' for classifying the conduct under Article 270-bis of the Criminal Code. In this light, the Court of Cassation rejected the request of annulment of the judgment of the second instance Court submitted by the defendant and sentenced him to pay the legal costs of proceedings.

This interpretation of Article 270-bis is also central to the second Judgment under examination, namely Judgment No. 8891/2020. The case concerned a Congolese citizen, Lutumba Nkanga, who had been found in Ancona, waiting to embark for Patras in the company of another man, Amri Souflane, flagged as a foreign fighter by German authorities. The two had left Germany for Turkey via Italy and Greece. The first-instance Judgment issued by the Court of Lecce, upheld in the second instance by the Court of Assizes of Appeal of Lecce,[59] had highlighted the defendant's

[58] With this regard, the Judgment reaffirmed what the Court ruled in previous case law. In particular, by Judgment No. 14503/2017, the Court of Cassation had already established that an individual's participation in a criminal plan may not necessarily be based on direct evidence: availability to leave to 'wage jihad', a vocation to martyrdom, and indoctrination activities, may all be seen as symptomatic of a participation in the association under Article 270-bis, in so far as such intents are not mere abstract statements but concrete indications of an actual operational connection between the individual and the 'structure', which enables the implementation of terrorist intents. See Judgment No. 14503/2017 (Messaoudi), above n 3, pp 6-12.

[59] The Court of Appeal of Lecce reduced the prison sentence from six to five years.

participation in ISIS. Among the several pieces of evidence gathered during the proceedings, the link between the defendant's traveling companion and one of the perpetrators of the 2016 Christmas markets attack in Berlin was also proved.

With Judgment No. 8891/2020, the Court of Cassation rejected the accused's appeal, deeming all the grounds for appeal unfounded. In particular, the Court of Cassation confirmed the full jurisdiction of the Italian court, which comes into effect once even a small fraction of the criminal conduct is carried out in Italy. As the first and second instance Courts noted, the defendant had put in place many 'fragments' of his 'availability' to the Islamic State in Italy, starting with entry into and stay on the national territory without a visa or residency permit. Moreover, while travelling to Italy for the purpose of carrying out activities under the cause of ISIS, he was in constant contact with other members of the terrorist organisation, and was found in possession of data and digital content aimed at a proselytising campaign and symptomatic of his radicalisation to jihad. Therefore, these elements constituted evidence of the accused's participation in the terrorist organisation under Article 270-bis and founded the full jurisdiction of Italian courts.

Following the same line of reasoning, in Judgment No. 8891/2020 the Court of Cassation reiterated that in order to configure the offence of association for terrorist purposes, there is the necessity for

> the existence of a criminal structure that aims to carry out violent conducts qualified by this purpose and has the ability to give them actual realisation. A mere activity of proselytising and indoctrination, aimed at inculcating a positive vision of martyrdom for the Islamic cause and eliciting a general willingness to join those who fight in its name, is not sufficient.[60]

To further consolidate its conclusion, the Court of Cassation referred to Judgment No. 191 of 31 July 2020 of Italian Constitutional Court, which upheld the interpretation provided for in the case law of the Supreme Court of Cassation of Article 270-bis concerning the offence of participation in international terrorist association or in subverting the democratic order.[61] Based on that case-law orientation, the Constitutional Court stated the presumption in irrebuttable terms of adequacy of the measure of precautionary detention in prison for the offence of participation in international terrorist association.

In conclusion, it should be noted that in Judgments No. 5471/2020 and No. 8891/2020, the Court of Cassation has made a significant effort to give greater determination and materiality to the offence of participation in international terrorist associations. In this regard, of particular significance is the fact that in both rulings the Court referenced the necessity of proving the existence of a two-way operational contact between the alleged participant and the terrorist organisation.

As stated above, the litmus test for distinguishing between the crime of participation in a terrorist association covered by Article 270-bis and the crime of instigation and incitement to commit terrorist crimes under Article 414 is the presence of concrete conducts that reveal the existence of a partnership with the terrorist organisation and are not limited to mere proselytism and indoctrination in favour of martyrdom for the cause of ISIS. This boundary is often very thin and not clearly defined.

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[60] In this line, see also Court of Cassation, Fifth Penal Section, Judgment No 48001, 14 July 2016 reported in Rachele Cera et al., 'Correspondents' Reports 2016: Italy' 19 YIHL <https://www.asser.nl/media/3912/italy-yihl-19-2016v2.pdf> accessed 9 April 2022, pp 22-24.

[61] With the Judgment No. 191 of 31 July 2020, the Constitutional Court ruled that Article 275, para. 3, of the Code of Criminal Procedure (Selection Criteria for Precautionary Measures) is not inconsistent with Articles 3, 13 para. 1, and 27, para. 2, of the Constitution of Italy.

With regard to the offence of instigation to commit a crime aggravated by the purpose of terrorism, in particular when committed through IT or telematics tools, in Judgment No. 11581 of 27 January 2021 the Court of Cassation emphasised that it is an offence of 'actual danger'.

In this Judgment, the Court of Cassation ruled that the appeal of the defendant Khemiri Mohamed Kamel Edine was unfounded. He had been sentenced by the Court of second instance for the crime of apologia of international Islamic terrorism committed through the use of telematics tools ex Article 414 of the Criminal Code. In particular, he was found guilty, *inter alia*, of having shared a post commenting on the Charlie Hebdo attacks in Paris, expressing support for Islamic State with anti-Western overtones; of having posted content exalting symbolic figures of international Islamic terrorism, including Sheikh Anwar El Awlaqi, by whom the Paris attackers had claimed to have been inspired; to have also shared on his Facebook profile the audio track posted by the perpetrator of the double attack of 14 -15 February 2015 in Copenhagen.

In the appeal submitted to the Court of Cassation, the defendant's lawyers contested the application of Article 414 of the Criminal Code arguing that the content posted on the defendant's Facebook profile lacked the potential to influence other subjects to any significant extent, especially taking into account the limited number of shares and 'like' reactions received. According to the defendant's lawyers, the offence referred to in Article 414 cannot simply consist of expressing appreciation towards the perpetrator of an unlawful conduct; instead, the public exaltation of terrorist acts should involve a concrete possibility for the perpetration of further crimes by other subjects. In this regard, however, the Court of Cassation already noted that

> the conduct of those who share links to jihadist propaganda material on social networks (such as, in this case, Facebook), even without publishing them independently, since, by enhancing the dissemination of said material, such conduct increases the danger not only of emulation of acts of violence but also of accession, in open and fluid forms, to the terrorist association that advocates them.[62]

Furthermore, according to the Court, the small number of followers of the defendant's Facebook profile and of 'like' reactions to the content he shared or posted is in no way relevant to the purpose of establishing the existence of an offence of apologia of terrorist crimes. In particular, the Court stated that in order to configure the offence covered by Article 414, it is sufficient to establish the substantial possibility that disseminating apologetic and propaganda content praising ISIS and its terrorist activities may pose or increase the risk of perpetration of other crimes of the same nature, and/or lead others to joining the terrorist organisation.

In light of these arguments, the Supreme Court held that conducts taken by the defendant fell fully within the crime of apologia of the terrorist organisation of ISIS by electronic means under Article 414 of the Criminal Code and confirmed the penalty ordered by the Court of Appeal.

ROSITA FORASTIERO[63]

Legislation – Countering the Financing of Companies Involved in Anti-Personnel Mines and Cluster Munitions

[62] Court of Cassation, First Penal Section, Judgment No. 51654, 9 October 2018 http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snpen&id=./20181115/snpen@s10@a2018@n51654@tS.clean.pdf.

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- Law No. 220 of 9 December 2021 'Measures to counteract the financing of companies producing anti-personnel mines, cluster munitions and submunitions'[64]
  <https://www.gazzettaufficiale.it/atto/stampa/serie_generale/originario>

International arms control treaties do not explicitly ban the financing of companies involved in controversial weapons. However, several of these treaties prohibit "assistance" in the development, production, and stockpiling of such weapons, a term which is widely interpreted as to include the financing of companies involved in these activities. In this framework, several countries, including Italy, adopted a legislation explicitly prohibiting the financing of these companies after the ratification of the main relevant treaties such as the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention) of 1997[65] and the Convention on Cluster Munitions (CCM) of 2008.[66]

The aim of Law No. 220/2021 is therefore the introduction into the Italian legal system of a strict prohibition on financing of companies involved in activities (such as production, development, assembly, repair, maintenance, use, storage, possession, promotion, sale, distribution, import, export, transfer and transport) concerning anti-personnel mines, cluster munitions or components of these weapons.[67] To this end, Article 1 of Law No. 220/2021 establishes a range of prohibited and permitted activities. In particular, pursuant to para. 1, the financing of any company that carries out the above-mentioned activities in Italy and abroad, either directly or by using subsidiary or associated companies, is prohibited.[68] Article 1, para.1, also forbids carrying out technological research, production, sale and transfer for any reason whatsoever, and possession of anti-personnel mines, cluster munitions and submunitions or components of these weapons. This provision complements Article 1 of Law No. 374/1997 which bans a wide range of activities concerning anti-personnel mines and Article 7 of Law No. 95 of 2011 that prohibits the development, production, acquisition in any way, storage, conservation and transfer of cluster munitions.[69]

A derogation to the prohibitions under Article 1, para.1, of Law No. 220/2021 is contained in para. 2, which establishes that such prohibitions do not operate in relation to the activities expressly permitted by the Ottawa Convention and the CCM.[70] This norm was introduced to allow the

[64] Legge n. 220, 9 dicembre 2021, 'Misure per contrastare il finanziamento delle imprese produttrici di mine antipersona, di munizioni e submunizioni a grappolo', published in *Gazzetta Ufficiale* No. 303 of 22 December 2021.
[65] See the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, opened for signature 3 December 1997, 2056 UNTS 211 (entered into force 1 March 1999). Italy ratified the Convention by Law No. 106 of 1999, see Valentina Della Fina et al., 'Correspondents' Reports – Italy (2000)' 3 *YIHL*, pp 534-535.
[66] See the Convention on Cluster Munitions, opened for signature 3 December 2008, 2688 UNTS 39 (entered into force 1 August 2010). Italy ratified the Convention by Law No. 95 of 14 June 2011. See Rachele Cera et al., 'Correspondents' Report – Italy (2011)' 14 *YIHL*, accessed 5 April 2022, pp 7-8.
[67] Article 2 of Law No. 220/2021 defines "financing" as "any form of financial support also made through subsidiaries, based in Italy or abroad, including, by way of example but not limited to, the granting of credit in any form, the issue of financial guarantees, the acquisition of shareholdings, the purchase or underwriting of financial instruments".
[68] Pursuant to Article 1, para. 3, such companies are prevented from participating in any public tender or financing program.
[69] Under Article 7 of Law No. 95/2011 those who carry out such activities are punished with imprisonment from three to twelve years and a fine.
[70] On these Conventions, see among the others Ramesh Thakur, William Maley, 'The Ottawa Convention on Landmines: A Landmark Humanitarian Treaty in Arms Control?', in 5 *Global Governance*, 1999, 273-302; Stuart Casey-Maslen, 'The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction', Vol. 1, 2nd ed., Oxford University Press, Oxford, 2005; Gro Nystuen, Stuart Casey-Maslen, 'The *Convention* on Cluster Munitions: A Commentary', Oxford University Press, Oxford, 2010.

activities of destruction of stockpiles, transport for storage and preservation of some samples of anti-personnel mines for training in mine detection, mine clearance, or mine destruction techniques under the Ottawa Convention and the retention or acquisition of a limited number of cluster munitions and explosive submunitions for the development of and training in cluster munition and explosive submunition detection, clearance or destruction techniques, or for the development of cluster munition counter-measures, under the CCM.

Article 1, para. 4, specifies that the above-mentioned prohibitions "apply to all authorised intermediaries" as defined by Article 2.[71] Furthermore, the same provision prohibits foundations and pension funds from investing their assets in the activities set out in Article 1, para. 1.

Pursuant to Article 3 of Law No. 220/2021, it is the responsibility of the supervisory bodies (the Bank of Italy, the Institute for the insurance supervision, the Supervisory Commission on pension funds and other bodies) to issue specific instructions for the exercise of reinforced controls on the work of authorised intermediaries in order to counteract the financing of production, use, assembly, repair, promotion, sale, distribution, importation, exportation, storage, possession, or transport of anti-personnel mines, cluster munitions and submunitions, and individual components of these weapons. The supervisory bodies also have the duty to publish the list of companies involved in these activities and to indicate the office responsible for the annual publication of list.[72] The Financial Intelligence Unit for Italy, established at the Bank of Italy by Legislative Decree No. 231 of 21 November 2007 but endowed with functional autonomy, is tasked with the controls of financial flows of companies under Article 1, para. 1.

In order to verify compliance with the prohibitions, pursuant to Article 5 of Law No. 220/2021 the Bank of Italy may request data, news, deeds and documents from the authorised intermediaries and, if necessary, it can carry out checks at their headquarters. Moreover, under Article 6 any authorised intermediary who fails to comply with the prohibitions set out in Article 1 shall be punished with a series of administrative sanctions.

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Legislation – International Participation in International Mission

☛ Decision of 17 June 2021, 'Italy's participation to international missions 2021'[73] <https://temi.camera.it/leg18/provvedimento/autorizzazione-e-proroga-missioni-internazionali-ultimo-trimestre-2019_d_d.html>

[71] The "authorised intermediaries" within the meaning of the definition referred to in Article 2 are: Italian securities brokerage firms, Italian banks, Italian asset management companies, investment companies with variable capital, financial intermediaries registered in the list of financial intermediaries, investment companies, financial intermediaries registered in the list as per Article 106 of Legislative Decree no. 385/1993, including credit consortia, banks and investment firms from EU Member States, non-EU banks, stockbrokers registered in the single national register as well as banking foundations and pension funds.

[72] Under Article 4 within ninety days of the publication of the list, the financial intermediaries shall exclude from the products offered any component that constitutes financial support to the companies included in the aforementioned list. The latest update of the Worldwide Investments in Cluster Munitions Report still found two investments from Italian financial institutions in cluster munition producers, <https://stopexplosiveinvestments.org/italy-bans-investments-in-cluster-bomb-producers/> accessed 14 April 2022.

[73] Deliberazione del Consiglio dei ministri in merito alla partecipazione dell'Italia a ulteriori missioni internazionali, adottata il 17 Giugno 2021 [Deliberation of the Council of Ministers regarding Italy's participation in additional international missions, adopted on 17 June 2021].

On 17 June 2021, the Italian Council of Ministers adopted a decision enabling Italy's participation in six new international missions (Document XXV, No. 4) as well as an analytical report detailing international missions carried out in 2020 and a relevant extension in 2021 (Document XXVI, No. 4).

The Government specified the intervention's area, objectives, legal basis, composition of assets, mission length and financial requirements for each mission. The decision was approved by Parliament on 15 July 2021 (Resolution No. 6-00194).

Document XXV, No. 4 covers the participation of civilian and military personnel in six new international missions (in 2020 there were five new missions, three by the armed forces (Operation 'Cedar Emergency' in Lebanon - Sheet 9-bis, p. 4; Operation UNSOM - United Nations Assistance Mission in Somalia - Sheet 31-bis, p. 10; Operation EMASOH in the Strait of Hormuz - Sheet 35-bis, p. 12) and three by police forces (EUAM Ukraine, European Union Advisory Mission Ukraine - Sheet 43-bis, p. 20; EUBAM LIBYA, European Union Border Assistance Mission in Libya - Sheet 47-bis, p. 50; EUBAM LIBYA, European Union Border Assistance Mission in Libya – Sheet 47-ter, p. 18)).

Document XXV, No. 4 includes an analytical report covering ongoing international missions as well as the progress of the development of cooperation interventions aimed at supporting peace and stabilisation processes in 2020, and mission extensions (for the period 1 January 2021–31 December 2021).

The Decision provides for a total of forty missions in three continents, for a maximum commitment of 9449 military personnel (as against 8613 in 2020) and an average of 6511 (as against 6494 in 2020).

Of these fourth missions, the missions conducted within the frameworks of NATO, the EU and the UN were nine, twelve and three respectively. Moreover, three involved the 'Coalition of the willing'[74], and eight were Italian missions.

In 2021, as in the previous year, Africa was the continent in which Italy had the largest number of missions (nineteen), followed by Europe (eleven) and Asia (ten).

In 2021, Asia was once again the continent with the largest number of Italian military troops, engaged in the Resolute Support Mission in Afghanistan (1000) and in UNIFIL in Lebanon (1000). Regarding Europe, the missions that engaged the largest number of Italian military personnel were the NATO mission Joint Enterprise in the Balkans (638 personnel) and mission EUNAVFORMED Irini (596 personnel). In Africa, the largest number of Italian troops (400) was engaged in a support mission in Libya.

On 2 September 2021, following the changed circumstances in Afghanistan, the Italian Council of Ministers amended Sheet 52, setting up a Humanitarian Support Fund for the Afghan people.

From a financial viewpoint, the 2021 spending allocated to international military missions amounted to EUR 1,254.6 million (as against EUR 1,129.4 in 2020).

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[74] The term "Coalition of the willing" refers to an international alliance formed in September 2014 with the aim of defeating to Daesh terrorist organization, to dismantling its networks and countering its global ambitions. Some 80 countries and international organizations have since joined.

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