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Legislation – Fund for the Compensation of Damages Suffered by Victims of War Crimes and Crimes against Humanity

- ☛ Ministry of Economy and Finance, Decree of 28 June 2023 – Access procedure and methods of disbursement of the amounts of the Fund for the compensation of damages suffered by victims of war crimes and crimes against humanity for the violation of inviolable rights of the person, perpetrated on the Italian territory or otherwise harming Italian citizens by the forces of the Third Reich in the period between 1 September 1939 and 8 May 1945.²

<https://www.gazzettaufficiale.it/eli/id/2023/07/01/23A03808/sg>

The Decree was adopted on 28 June 2023 by the Ministry of Economy and Finance, together with the Ministry of Foreign Affairs and the Ministry of Justice, to regulate the access procedure and the methods of disbursement of the amounts from the Fund for the compensation of damages suffered by the victims of war crimes and crimes against humanity committed on Italian territory or otherwise harming Italian citizens by the forces of the Third Reich between 1 September 1939 and 8 May 1945 (Article 1).

This Act complements Article 43 of Law No. 79 of 29 June 2022, which established the Fund.³ Its endowment was 20.000.000 euro for the year 2023, and 13.655.467 euro for each of the years 2024 to 2026.⁴

¹ This report was prepared by Rachele Cera, Andrea Crescenzi, and Valentina Della Fina on behalf of the Institute for International Legal Studies of the National Research Council (CNR), Rome, Italy.

² Ministero dell’Economia e delle Finanze, Decreto 28 giugno 2023, Procedura di accesso e modalità di erogazione degli importi del Fondo per il ristoro dei danni subiti dalle vittime dei crimini di guerra e contro l’umanità per la lesione di diritti inviolabili della persona, compiuti sul territorio italiano o comunque in danno di cittadini italiani dalle forze del Terzo Reich nel periodo tra il 1° settembre 1939 e l’8 maggio 1945, published in *Gazzetta Ufficiale* No. 152 of 1 July 2023.

³ See Rachele Cera et al., ‘Correspondents’ Report – Italy’ (2022) 25 *YIHL*, <https://www.asser.nl/media/797145/italy-report-2022-final.pdf> accessed 28 October 2024, pp 13-14.

⁴ This latter amount, originally set at 11.808.000 euro, was increased by virtue of Article 8, para. 11-quater of Decree Law No. 198 of 29 December 2022, converted into Law No. 14 of 24 February 2023. The amount can be further increased. The State Attorney’s Office noted that in view of the considerable amounts settled by the Italian courts, the legislator will be forced to further increase the Fund.

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Article 2 of the Decree establishes the conditions for accessing the Fund and its operability. It provides that individuals who are victims of war crimes and crimes against humanity are entitled to access the Fund if they initiated legal proceedings by 28 June 2023 and if they meet one of the following two conditions: 1) having obtained a final judgment concerning the assessment of damages; or 2) having put an end to the pending case by a settlement, subject to a prior opinion of the State Attorney’s Office (“Avvocatura dello Stato”).⁵ The same provision states that the Fund covers both the payment of the damages awarded in the judgment or in the settlement agreement, and any court fees, minus any sums received by the claimant as benefits or compensation.

Article 3 regulates the administrative procedure for accessing the Fund, while Article 4 governs the procedures for the disbursement of the compensation. In this regard, the Treasury Services Directorate of the Ministry of Economy and Finance is competent to ascertain the correctness of the settlement request and to disburse the requested amount or to decide to dismiss the claim. This provision specifies that the payment made by the Fund extinguishes all rights or claims for compensation for the facts referred to in Article 1 of the Decree.

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⁵ Under Article 1965 of the Italian Civil Code, a settlement is defined as a contract by which the parties, by making mutual concessions, put an end to a dispute that has already begun or prevent a dispute that may arise between them.

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Cases – Fund for the Compensation of Damages Suffered by Victims of War Crimes and Crimes against Humanity

☛ Constitutional Court Judgment No. 159 of 4 July 2023
<https://www.cortecostituzionale.it/actionSchedaPronuncia.do?param_ecli=ECLI:IT:COST:2023:159>

With judgment No. 159 of 4 July 2023, the Constitutional Court ruled on the question of the constitutionality of Article 43, para. 3, of the Decree-Law No. 36 of 30 April 2022 concerning ‘Further urgent measures for the implementation of the National Recovery and Resilience Plan (PNRR)’, converted into law, with amendments, by Law No. 79 of 29 June 2022.

In 2022, the Court of Rome raised the issue of constitutionality of the provision establishing the Fund for the compensation of damages suffered by the victims of war crimes and crimes against humanity for the violation of inviolable rights of the person perpetrated on Italian territory or otherwise harming Italian citizens by the forces of the Third Reich in the period between 1 September 1939 and 8 May 1945.⁷ According to the Court of Rome, Article 43, para. 3, by providing the termination of the enforcement proceedings and preventing the possibility to institute new enforcement proceedings, deprives the creditor of the right to take legal action in violation of Articles 2, 3, 24 and 111 of the Italian Constitution.⁸

The decision of the Constitutional Court of 2023 is part of the ongoing dispute between Germany and Italy concerning the reparations to victims of World War II, which involves the jurisdictional immunities of foreign States and their property.⁹ With this ruling, the Constitutional Court declared the questions of constitutionality unfounded and clarified the rule on the immunity of States’ assets from foreign enforcement measures.¹⁰ These issues will be addressed shortly.

⁷ See Rachele Cera et al., ‘Correspondents’ Report – Italy’ (2022) 25 *YIHL*, <<https://www.asser.nl/media/797145/italy-report-2022-final.pdf>> accessed 28 October 2024, pp 10-15.

⁸ *Ibid.*

⁹ In 2022, Germany instituted new proceedings before the International Court of Justice (ICJ) against Italy for allegedly failing to respect its jurisdictional immunity as a sovereign state. However, in May 2022 Germany withdrew its request for the indication of provisional measures following the adoption by Italy of the Decree No. 36 of 30 April 2022. In the letter addressed to the ICJ, the Agent of Germany pointed out that “Italian law requires Italian courts to lift measures of enforcement previously taken, and that no further measures of constraint will be taken by Italian courts against German property used for government non-commercial purposes located on Italian territory” (see <<https://www.icj-cij.org/sites/default/files/case-related/183/183-20220506-PRE-01-00-EN.pdf>> accessed 24 September 2024). See also Pietro Franzina, ‘Jurisdictional Immunities: Germany v. Italy, Again’, <<https://eapil.org/2022/05/04/jurisdictional-immunities-germany-v-italy-again/>> accessed 24 September 2024. For an assessment of the compliance of the Fund with the ICJ’s judgment on *Jurisdictional Immunities of the State* of 2012, see Alessandro Bufalini, The Italian Fund for the Victims of Nazi Crimes and the International Court of Justice: between Compliance and Dispute Settlement, <<http://www.sidiblog.org/2023/05/16/the-italian-fund-for-the-victims-of-nazi-crimes-and-the-international-court-of-justice-between-compliance-and-dispute-settlement/>> accessed 24 September 2024.

¹⁰ For a commentary on this judgment, see Giorgia Berrino, La decisione che ci aspettavamo (o quasi): sulla sentenza della corte costituzionale del 4 luglio 2023, n. 159, tra condanne al risarcimento dei danni per crimini nazisti, preclusione dell’esecuzione forzata e fondo ristori (The decision we were expecting (or almost expecting): on the Constitutional Court’s ruling of 4 July 2023, No. 159, on sentencing for damages for Nazi crimes, foreclosure of execution and the restitution fund) <<http://www.sidiblog.org/2023/08/07/la-decisione-che-ci-aspettavamo-o-quasi-sulla-sentenza-della-corte-costituzionale-del-4-luglio-2023-n-159-tra-condanne-al-risarcimento-dei-danni-per->

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It should be noted that on 19 January 2023 the heir of a victim,¹¹ as creditor in the real estate execution proceedings against German assets, and the Greek Region of Sterea Ellada, which was prevented from accessing the Fund, entered an appearance in the constitutionality proceedings.¹²

On 24 January 2023, the President of the Council of Ministers also intervened in the proceedings. It pleaded that the questions raised were inadmissible or, in the alternative, that they were unfounded. The Attorney General’s Office (“Avvocatura dello Stato”), representing the President of the Council of Ministers, argued that Germany is immune from enforcement jurisdiction in Italy because the seized German assets are public in nature, as provided by the rule of customary international law on restrictive state immunity in such cases.¹³

On the merits, the Attorney General’s Office affirmed that Article 43, para. 3, of the Decree-Law No. 36 of 30 April 2022 is the expression of a fair balance between interests both of constitutional rank, such as the right of creditors to obtain compensation based on the final judgments against Germany, and the need to maintain good international relations with this State. In addition, it observed that the establishment of the Fund constitutes a more satisfactory remedy for creditors than enforcement measures over foreign assets, which are subject to the legal limitations on the attachment of foreign States’ properties due to immunity, as well as the uncertain outcomes of real estate execution proceedings. The Attorney General’s Office further observed that even the most recent practice on the matter, including the decisions of the Ukrainian Supreme Court concerning Russia’s immunity,¹⁴ cannot be considered the expression of a new international customary norm that modifies the legal regime of foreign States’ immunity from jurisdiction with respect to acts *iure imperii*, even when gross human rights violations are involved.

On 20 January 2023, an *amicus curiae* brief was also submitted before the Constitutional Court by the Group of Survivors and Relatives of Victims of the Massacre

[crimini-nazisti-preclusione-dellese/](#)> accessed 24 September 2024; Andrea Maria Pelliconi, ‘The Italian Constitutional Court’s new decision on state immunity and the ICJ Germany vs Italy No. 2’ <<https://www.ejiltalk.org/the-italian-constitutional-courts-new-decision-on-state-immunity-and-the-icj-germany-vs-italy-no-2/>> accessed 23 December 2024.

¹¹ M. T. G., as heir of A. G., for the inhuman treatment suffered by the latter during World War II.

¹² See para. 6 of the Constitutional Court judgment No. 159/2023 summarising the position of the Greek Region of Sterea Ellada in the proceedings before the Court.

¹³ Under the restrictive theory, foreign States are immune from suits based on their governmental acts (*acta jure imperii*) but not from suits which are based on their private acts (*acta jure gestionis*). See Hazel Fox, QC, Philippa Webb, ‘The Law of State Immunity’, 3rd ed, Oxford University Press, 2019. On State immunity from execution, see, among others, Victor Grandaubert, Jean-Marc Thouvenin, ‘The Material Scope of State Immunity from Execution’, in Tom Ruys, Nicolas Angelet and Luca Ferro (eds.), ‘The Cambridge Handbook of Immunities and International Law’, Cambridge University Press, 2019, pp 245-265.

¹⁴ In 2022, the Supreme Court of Ukraine issued some decisions in which it held that from the beginning of Russia’s aggression against Ukraine back in 2014, Russia’s sovereign immunity was to be denied, and Ukrainian courts could accept claims for damages against Russia without the need to request its consent for such proceedings. On these decisions, see, Ielyzaveta Badanova, ‘Jurisdictional Immunities v Grave Crimes: Reflections on New Developments from Ukraine’ <<https://www.ejiltalk.org/jurisdictional-immunities-v-grave-crimes-reflections-on-new-developments-from-ukraine/>> accessed 20 September 2024.

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of Mommio 4-5 May 1944.¹⁵ The brief was in support of the constitutional illegitimacy of Article 43, para. 3, of the Decree-Law No. 36 of 30 April 2022. It also recalled the development of Italian jurisprudence on this matter, including the Ferrini case and judgment No. 238 of 2014 of the Constitutional Court.¹⁶

Looking at the merits of the Constitutional Court’s decision No. 159 of 2023, the Constitutional Court ruled that the question of constitutionality of Article 43, para. 3, was unfounded. In its reasoning, it recalled the customary rule of international law on restricted immunity of foreign States as defined by the International Court of Justice in its judgment of 3 February 2012.¹⁷ It further pointed out that the Constitutional Court in the decision No. 238 of 2014 affirmed the derogation from this rule for judgments concerning compensation for damages suffered by the victims of war crimes and crimes against humanity in connection to the infringement of inviolable human rights. This derogation, however, applies only to cognitive judgment, which are directed to the determination of the law in a dispute through a conviction or the establishment, modification or extinction of a legal relationship. These decisions differ from those made by the courts in the framework of enforcement proceedings that are addressed to the satisfaction of the creditor’s interests to the extent provided for by law, which may include the forced expropriation of property to settle a debt.

The Constitutional Court clarified that, in enforcement proceedings, the rule concerning the restricted immunity of foreign States is not intended to exclude the jurisdiction of the national court, but only to limit the assets liable to be seized. If the assets are linked to a public function of a State, i.e. to activities *iure imperii*, the State concerned enjoys immunity, and its assets are not attachable in the context of a compulsory expropriation procedure. On the contrary, if the assets pertain to the *iure gestionis* activity of the State, they are attachable.

According to the Constitutional Court, this reasoning conforms to the United Nations Convention on Jurisdictional Immunities of States and their Property of 2004 (hereinafter, UN Convention), which is not yet in force but was ratified by Italy with Law No. 5 of 2013.¹⁸ In particular, Part IV of the UN Convention (Articles 18 to 21) provides for the immunity of the foreign State from measures of constraints against its properties

¹⁵ The massacre was a German war crime that took place between 4 and 5 May 1944 in the village of Mommio and in the areas surrounding the municipality of Fivizzano. It was the first of a series of massacres carried out by the Germans in the province of Massa-Carrara (Tuscany) in the period from spring to autumn 1944.

¹⁶ On the *Ferrini* case, see Italian Supreme Court (United Sections), judgment No. 5044 of 6 November 2003 <<https://www.jolau.com/wp-content/uploads/2018/10/Sentenza-Ferrini-5044-04-2.pdf>>, accessed 22 December 2024. On the decision No. 238 of 2014 of the Constitutional Court, see Rachele Cera et al., ‘Correspondents’ Report – Italy’ (2014) 17 *YIHL*, <<https://www.asser.nl/media/2613/italy-yihl-17-2014.pdf>> accessed 28 October 2024, pp 1-12.

¹⁷ Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening), Judgment, ICJ Reports, 3 February 2012 <<https://www.icj-cij.org/sites/default/files/case-related/143/143-20120203-JUD-01-00-EN.pdf>> accessed 28 October 2024. On the ICJ judgment’s implementation in the Italian legal order, see Rachele Cera et al., ‘Correspondents’ Report – Italy’ (2012) 15 *YIHL*, <<https://www.asser.nl/media/1424/italy-yihl-15-2012.pdf>>, accessed 28 October 2024, pp 4-7.

¹⁸ United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet in force) UNGA Res 59/38 (2 December 2004), UN Doc A/59/508, depositary notification C.N.141.2005.TREATIES-4 and C.N.419.2005.TREATIES-6. The UN Convention on the Jurisdictional Immunities of States and Their Property is not yet in force as it has not received the required 30 ratifications.

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in connection with a proceeding before the court of another State. The Constitutional Court also recalled that even the Court of Cassation, with judgment No. 14885 of 8 June 2018 concerning a property belonging to the Federal Republic of Germany, ruled that, under customary international law, an enforcement action is not permitted in respect of a property belonging to foreign States where such property is intended for public purposes.¹⁹ In the present case, all German properties have a public nature.²⁰

After a careful examination of Article 43 of the Decree-Law No. 36 of 30 April 2022, the Constitutional Court held that this provision provides an adequate alternative protection to that achievable by forced execution against German assets as it establishes the compensation from the Fund for the damages suffered by victims of war crimes and crimes against humanity. According to the Court, this rule ensures a reasonable balance between the right of access to a court, as guaranteed by Article 24 of the Constitution, and the protection of fundamental human rights under Article 2 of the Constitution. The Court concluded, therefore, that there was no violation of these Articles.

The Constitutional Court also pointed out that the access to the Fund, as governed by the Decree of 28 June 2023 of the Ministry of Economy and Finance regulating the procedure for access to and disbursement of the Fund, is a subjective right which has its legal basis in a conviction against Germany.²¹ According to the Court, the Fund strikes a fair balance between the obligation of reparation and the judicial protection of the victims of war crimes. Therefore, the questions of constitutionality concerning Articles 3 and 111 of the Italian Constitution are unfounded. On these grounds, the Constitutional Court also declared unfounded the questions of constitutional legitimacy of Article 43, para. 3, of the Decree-Law No. 36 of 30 April 2022 converted, with amendments, into Law No. 79 of 29 June 2022.

¹⁹ On this decision concerned with the Villa Vigoni, see Rachele Cera et al., ‘Correspondents’ Report – Italy’ (2018) 21 *YIHL*, <<https://www.asser.nl/media/679452/yihl-2018-correspondents-reports-italy-final-copy-clean.pdf>> accessed 24 October 2024, pp. 3-5. The Constitutional Court also recalled in detail the legal framework of the issue of reparation for war damages caused during World War II, which was regulated by several international treaties.

²⁰ German assets subject to enforcement measures were the following: German Historical Institute, German Archaeological Institute, Goethe Institute and German School.

²¹ On this Decree see, *supra*, in this Report, pp 1-2.

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- ☛ Court of Florence, Second Civil Section, Judgment N.R.G. 2022/11914, 29 November 2023 < <https://www.asser.nl/media/797683/sentenza-mannini.pdf> >

The judgment of the Court of Florence of 29 November 2023 concerns the Niccioleta massacre of 13 June 1944 in which 92 men, including 77 miners as well as some partisans taken from the Maschio prison in Volterra, were killed by German soldiers.²² The lawsuit for damages against Germany was brought by Giuliana and Maria Pia Mannini, daughters of Adamo Mannini, a miner who was killed during the Niccioleta massacre because he was considered to be a collaborator with the partisans.²³ This decision is relevant to understanding the operation of the Fund for the compensation of damages suffered by victims of war crimes and crimes against humanity, to which the applicants’ claim for compensation was addressed.

In their appeal, the Mannini sisters asserted the full jurisdiction of the Italian State over judicial actions for damages brought by relatives of victims of war crimes perpetrated by Nazi Germany in the period between 1943 and 1945. The applicants, whose mother had already passed away prior to the massacre, sought damages for the loss of the parental relationship resulting from the killing of their father. This allegedly caused them to endure a difficult life, spending their years in boarding school until the age of 18 and then constantly working hard to make a living.

Based on the particularly heinous nature of the massacre of Niccioleta and the commission of crimes against humanity, the Court of Florence awarded a compensation of 269.200 euros (to be revalued with interest at the legal rate for each year) for each of the applicants. According to the Court, these amounts should be reimbursed from the Fund.

Article 43, para. 3, of the Decree-Law No. 36 of 30 April 2022, which established the Fund, provides some procedural requirements for the eligibility to access it including, *inter alia*, the notification of the claim to the State Attorney’s Office.²⁴ The State Attorney’s Office examined the Mannini sisters’ claim and held that the offences covered were extinguished by the statute of limitations.²⁵ According to the State Attorney’s Office, an examination of international law shows that the rule concerning the a bar on the possibility of applying statutes of limitations for international crimes became

²² Niccioleta is a small village in the Colline Metallifere located in the municipality of Massa Marittima (Grosseto), whose 20th century history is mainly linked to mining. At the time of the massacre, the Niccioleta mine was an important strategic point for the partisans in the area. In the first days of June 1944, a detachment of partisans hid in Niccioleta with the support of the local miners. However, they were betrayed by the village fascists. On 13 June 1944 at dawn, German police units surrounded the village of Niccioleta and carried out a round-up of all the men in the village, during which they shot six, recognised by the local fascists as collaborators of the partisans.

²³ At the time of the massacre, the two applicants were minors, aged 4 and 2 respectively.

²⁴ The claim was also brought against the Italian State, in the person of the President of the Council of Ministers, and the Ministry of the Economy and Finance, as the Fund’s depositary body, in their capacity as persons jointly obliged by law to pay compensation for the damages suffered.

²⁵ See para. 2.1 of the judgment of the Court of Florence of 29 November 2023.

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established at the end of the 1990s, when the Statute of the International Criminal Court was drafted.²⁶ Before that time, States had never agreed on the existence of this rule.

According to the State Attorney’s Office, in the present case, the rule of no statute of limitations for international crimes cannot be applied *ratione temporis*, given that the offence ended in 1945 when the rule in question had not yet emerged. It also ruled that the right to damages was time-barred and, in the absence of a specific provision of international law on the matter, the rules of domestic law governing civil liability apply. In the present case, Article 2947, para. 3, of the Italian Civil Code on the statute of limitations of the right to compensation for damages applied. The State Attorney’s Office pointed out that the persons who materially committed the offence were likely deceased, since the facts occurred almost 80 years earlier. The limitation period for the right to compensation, as provided for in Article 2947, para. 1, of the Italian Civil Code, is five years from the date of the offender’s death. Accordingly, the right to damages claimed by the applicants by notice served on 27 October 2022 in respect of the events that occurred in June 1944 must be deemed time-barred.

According to the State Attorney’s Office, the claim must also be dismissed on the merits. Indeed, it disputed the requirements for the compensation of damages resulting from the loss of parental relationship. The question raised by the State Attorney’s Office concerned whether the parental relationship alone was sufficient to compensate the damage suffered by the Mannini sisters, as a result of the death of a relative. According to the most recent Italian case law, the damage from the loss of the parental relationship imposes strict burdens of proof; the judge must, in fact, be provided with elements of evidence that justify the ‘quality and intensity’ of the affective relationship that has been damaged. The question focused on whether the parental relationship alone was sufficient for the compensation of the damages suffered as a consequence of the death of one’s relatives. According to the State Attorney’s Office, given the age of the applicants at the time of their father’s death (two and four years), there was no indemnifiable harm suffered by the minors, nor with reference to non-material damage not resulting from the loss of the parental relationship. The State Attorney’s Office therefore rejected the claim for compensation as inadmissible and unfounded in law and in fact.

The Court of Florence challenged the State Attorney’s Office’s reasoning. It reaffirmed that Giuliana Mannini and Maria Pia Mannini were the daughters of Adamo Mannini, who died on 13 June 1944 as a victim of crimes against humanity perpetrated by the Third Reich. As a result, Germany was liable to pay compensation to the victim’s heirs. Given the establishment of the Fund by Italy in 2022, the applicants were entitled to be compensated by it.

The Court of Florence also challenged the decision of the State Attorney’s Office on the statute of limitations for international crimes. On the merits, the Court pointed out that Italy expressly recognized that no statute of limitations applies for these crimes for

²⁶ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90. Article 29 of the Rome Statute establishes that ‘The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations’.

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the very fact of having established the Fund to compensate the victims of such crimes even though they occurred 80 years ago. In addition, the Court affirmed that Italy cannot claim that international crimes are statute-barred since a rule of customary international law establishes that no statute of limitations applies to war crimes and crimes against humanity.²⁷

In any case, regardless of international law, the Court of Florence noted that according to Italian tort law, the statute of limitations is the same as for the crime at issue in the case. In the present case, the crime of aggravated intentional homicide carried out in a brutal manner against a defenseless civilian without any war necessity was committed. Under Italian criminal law, this crime is punishable with life imprisonment and no statute of limitations applies to this offence pursuant to Article 157, para. 8, of the Italian Criminal Code which states that “[t]he statute of limitations does not extinguish offences for which the law provides for life imprisonment, even as an effect of the application of aggravating circumstances”.

Following this reasoning, the Court of Florence ordered Germany to pay compensation to the victims and declared the applicants’ right to access the Fund established by Article 43 of Decree-Law No. 36/2022.

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²⁷ As has been observed, international legal instruments affirm the non-applicability of statutes of limitations to criminal proceedings and penalties for crimes against humanity, while the extension of the rule to civil, administrative or other actions to seek reparation is not often explicitly mentioned. See Gabriella Citroni, Pamela Capizzi, Adrijana Hanušić Bećirović, ‘About Time: Statutory Limitations and Crimes against Humanity’, <<https://opiniojuris.org/2024/04/06/about-time-statutory-limitations-and-crimes-against-humanity/#:~:text=On%20its%20part%2C%20Article%2029,to%20any%20statute%20of%20limitations>> accessed 24 September 2024.

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Cases – Divergent Trends on “Public” Torture Committed by State Officers

- Court of Siena, Judgment No. 211, 5 September 2023
<https://www.questionegiustizia.it/data/doc/3712/trib_siena_anonimizzata.pdf>
- Constitutional Court, Judgment No. 192, 26 October 2023
<https://www.cortecostituzionale.it/actionSchedaPronuncia.do?param_ecli=ECLI:IT:OST:2023:192>

Since the first judgments in 2021 that applied Article 613 bis, para. 2, of the Italian Criminal Code to cases involving acts of torture committed by state officials, the consolidation of this crime in the Italian legal order still appears uncertain. Through a series of judicial decisions, Italian judges have progressively clarified the most problematic issues deriving from Law No. 110 of 2017,²⁸ introducing the crime of torture, in order to provide an interpretation in line with the relevant international legal instruments, in particular with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).²⁹

By Judgement No. 211, the Court of Siena sentenced five defendants for the crimes of torture, personal injury, threat, forgery and abuse of authority against prisoners. The events, dating back to 2018, occurred inside the prison of San Gimignano (Tuscany), where the defendants served in the Penitentiary Police.

In broad terms, the reasoning of the ruling of the Court of Siena pinpoints relevant principles applicable to similar cases, in which the qualifying element is the deprivation of liberty in prison (torture in prison), to cases in which the qualifying element is the asymmetrical position of the citizen in relation to legitimate holders of force (police torture),³⁰ and to cases of private torture already examined by the Italian judges.³¹

Notably, the Court elaborated on torture as a “constitutionally imposed and required crime” through references to the relevant international law instruments, such as the 1949 Geneva Convention relative to the Treatment of Prisoners of War,³² the 1966 International Covenant on Civil and Political Rights,³³ the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,³⁴ the 1950

²⁸ See Rachele Cera et al., ‘Correspondents’ Report – Italy’ (2018) 20 *YIHL* <<https://www.asser.nl/media/4967/yihl-2017-correspondents-reports-italy.pdf>> accessed 3 October 2024, pp 1-7.

²⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85, entered into force 26 June 1987 [CAT].

³⁰ See Rachele Cera et al., ‘Correspondents’ Report – Italy’ (2021) 24 *YIHL* <https://www.asser.nl/media/796060/italy-report_2021.pdf> accessed 3 October 2024, pp 1-2.

³¹ See Rachele Cera et al., ‘Correspondents’ Report – Italy’ (2020) 23 *YIHL* <https://www.asser.nl/media/795343/italy-report_2020.pdf> accessed 3 October 2024, pp 1-3.

³² Geneva Convention relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 135, entered into force 21 October 1950.

³³ Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3, entered into force 1 July 2002 [Rome Statute].

³⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85, entered into force 26 June 1987 [CAT].

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European Convention on Human Rights³⁵ and the 1998 Rome Statute of the International Criminal Court.³⁶

The judgment highlights the specificity of the punitive provision expressed in Article 13 of the Italian Constitution stating that “[a]ny act of physical and moral violence against a person subjected to restriction of personal liberty shall be punished”.³⁷ The necessity of such provision was stressed by Umberto Tupini in his speech, during the session of the Constituent Assembly of 10 April 1947, reiterating the humanitarian reasons and “a condemnation of a disastrous period of our political history, during which the police believed to serve tyranny with systems that were anything but respectful of the dignity of man and citizens. This is why we want to give future legislators a precise directive, in order to ensure that citizens, whatever the reason for their detention, are fully respected for their integrity and personal dignity”.³⁸ From this speech, the Judge derives the *intentio legis* of the Constituent Assembly, namely the obligation to criminalize not the phenomenon of common torture (so-called private or improper or horizontal), but rather the phenomenon of state torture (so-called public or proper or vertical).

Taking into account these premises, the Judgement clearly identifies the parameters of legitimate conduct in a prison context. The rule that generally establishes the requirements and prerequisites enabling the legitimate use of physical force by public officers is found in Article 53 of the Italian Criminal Code,³⁹ according to which: “a public officer shall not be punished if, for the purpose of performing a duty of his office, he uses or orders the use of arms or other means of physical coercion when he is compelled to do so by the necessity of repelling violence or overcoming resistance to authority or to prevent the crimes of massacre, shipwreck, sinking, aviation disaster, railway disaster, wilful homicide, armed robbery, and false imprisonment”. The same provision further states that “the Law shall define the other cases in which use of arms or other means of physical coercion is authorized”. Among these “other cases” in the penitentiary context, the use of physical force is subject to specific regulation in Article 41 of Law 354 of 1975 (prison system), which provides that no means of physical coercion can be used for disciplinary purposes, unless necessary to avoid damage to persons or property or to guarantee the safety of the subject.

In the Court’s view, this provision expressly excludes the use of force for disciplinary purposes or to maintain order in institutions.⁴⁰ In other words, it strictly

³⁵ 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].

³⁶ Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3, entered into force 1 July 2002 [Rome Statute].

³⁷ Costituzione italiana, January 1948, <<https://www.governo.it/it/costituzione-italiana/2836>> accessed 24 January 2025.

³⁸ Translation of the speech contained in para. 44.6 of the Judgment of the Constitutional Court. Umberto Tupini was Minister of various departments. Elected to the Constituent Assembly in 1946, he contributed to the discussion of relevant issues for the elaboration of the Italian Constitution, such as fundamental freedoms.

³⁹ Italian Criminal Code (Codice Penale) (approved by Royal Decree No 1398 of 19 October 1930, entered into force 1 July 1931).

⁴⁰ See para. 42.14 of the Judgment No. 211/2023.

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prohibits and precludes the prison staff from organising and carrying out collective actions that are aimed at punishing prisoners for their insubordination, or at repressing protests, disorders or other behaviours that are in any case incorrect and poorly tolerated.

The relevance of such ruling lies in its reconstruction of the autonomous offence of the provision contained in Article 613 bis, para. 2, of the Italian Criminal Code concerning torture committed by a public official to which the Judge assigned a constitutional value.

In the Court’s opinion, the subjective qualification of the agent underpins the legal scope of “public torture” being “placed as a barrier, protection and prevention of those serious forms of distortion and perversion impressed on public powers by those who, as members of public institutions, carry out those acts of torture[...], thus radically betraying their institutional mandate and at the same time damaging the image and dignity of the public institutions of which they are part”. Indeed, such illicit behaviours compromise “the regular unfolding of the relationship between State and citizen, between public authority and person, in the most critical and delicate moment in which such a relationship can manifest itself: which is the one in which the citizen and the person are entrusted to the care, supervision and custody of the State and public authority”.

Afterwards, in its Judgement No. 192, the Constitutional Court reinforced the constitutional foundation of the crime of torture operating a wise balance between principles and constitutional rights in order to avoid any “free zone” of impunity. In particular, the Court declared the constitutional illegitimacy of Article 420bis, para. 3, of the Italian Code of Criminal Procedure,⁴¹ in the part in which it does not provide that the judge shall proceed in the absence of the accused from the hearing, when, due to the lack of cooperation by the State of origin of the accused, it is impossible to have proof that the latter was made aware of the pending proceedings.

As outlined in the referring order, the Public Prosecutor at the Court of Rome requested the indictment of four officials of the Egyptian National Security Agency, accusing them of kidnapping Giulio Regeni, in collaboration with other unidentified individuals, inside the Cairo subway. The act allegedly deprived him of his personal freedom for nine days, from 25 January to 2 February 2016.⁴² Moreover, one of them was charged with aggravated personal injury and murder, for having, in collaboration with other unidentified individuals, caused torture and cruel injuries to the victim, causing his death. The judge *a quo* added that the judge of the preliminary hearing of the Court of Rome ordered to hold the proceedings in the absence of the accused. However, the Court of Assises of Rome declared the declaration of absence null and returned the case to the judge for the preliminary hearing. Following the negative outcome of further research,

⁴¹ Italian Code of Criminal Procedure (Codice di Procedura Penale) (approved by Presidential Decree No 447 of 22 September 1988, entered into force 24 October 1989).

⁴² See para. 2 of the Judgment No. 192/2023.

the latter ordered the suspension of the trial, in accordance with the provisions of Article 420 quater, para. 2, of the Italian Code of Criminal Procedure.⁴³

In this context, the provisions on jurisdiction aimed at avoiding impunity contained in the CAT are relevant. The Convention allows for double or triple national jurisdiction over torture crimes (Article 5), which must be prosecuted both by the territorial State in which the crime was committed (para. 1, lett. a), and by the State of the alleged perpetrator (para. 1, lett. b), while it is at the discretion of the State to which the victim belongs to decide whether to exercise its own jurisdiction (para. 1, lett. c). Italy exercised such a possibility through Law No. 498 of 1988, Article 3, para.1, letter b, establishing that, at the request of the Ministry of Justice, a perpetrator who allegedly commits torture abroad against an Italian citizen shall be punished under Italian law.⁴⁴

In the same vein, the Convention obligates States to cooperate for criminal proceedings relating to torture (Article 9), which in this case would have required the Egyptian authorities to communicate the addresses of the four officials of the National Security Agency involved in the case.

The Constitutional Court observed that the indefinite paralysis of the trial for the crime of torture committed by public officials, deriving from the impossibility of personally notifying the accused of the beginning of the trial due to the lack of cooperation of the State of origin, creates a *de facto* immunity. Such immunity conflicts with the inviolable rights of the victim, as torture is a crime against human dignity (Article 2 of the Constitution), and the principle of reasonableness, by creating unreasonable disparity of treatment between the parties, since, while remedies are provided in favor of the absent defendant, the victim has no means to overcome the procedural obstacle (Article 3 of the Constitution); and the international standards on the protection of human rights, accepted and promoted by the 1984 CAT (Article 117, para. 1, of the Constitution).

However, in order to provide for a rebalancing of the constitutional guarantees, the constitutional judges also emphasized the fundamental nature of the accused’s right to be present at the trial. This right is guaranteed by Article 111 of the Constitution and Article 6 of the European Convention on Human Rights, in particular through the full exercise of adversarial proceedings. In its reasoning, the Constitutional Court stated that “the constitutional *vulnus* claimed by the referring court can and must be remedied by means of a reorganisation of the defendant’s participatory guarantees, a reorganisation that is neither qualitative nor quantitative, but exclusively temporal, always within the path traced by the discipline of absence”.⁴⁵

In sum, the constitutional need to avoid the stagnation of the process can be satisfied without any reduction of the defendant’s participatory rights, but by providing

⁴³ A reconstruction of the case is described in Maria Rosaria Donnarumma, ‘La sentenza della Corte costituzionale sul caso Regeni. Processo *in absentia* per i crimini di tortura di Stato’ (‘The ruling of the Constitutional Court on the Regeni case. Trial in absentia for crimes of state torture’) (2023) 11 *Giustizia Penale* <https://www.giurisprudenzapenale.com/wp-content/uploads/2023/11/Donnarumma_gp_2023_11.pdf> accessed 3 October 2024, pp 1-10.

⁴⁴ In the Regeni case, the Ministry of Justice made such request on 23 March 2016.

⁴⁵ See para. 15 of the Judgment No. 192/2023.

for a different time frame, given the right of the defendant to obtain the reopening of the process at every stage and level.

In addition to its content, the Court’s ruling is also distinctive for being an additive ruling aimed at censuring a rule not for what it provides, but rather for what it omits, although within stringent conditions mirroring the future of the specific case.⁴⁶ The unconstitutionality of the censored provision and the consequent addition of a new hypothesis of non-preventative absence to proceed are limited to specific conditions. In particular, the addition applies exclusively to the crime of torture, only when the absence of the accused is due to the obstructive conduct of the accused’s State of origin and the accused is a State officer. In addition, the right to a new trial in persons for the accused contemplates the reversal of the burden of proof on the authorities denying such a right.

Regarding public torture, it is questionable which trend the normative evolution will follow, given divergent directions of some legislative initiatives. On one side, Bill No. 661, presented by Senator Bilotti on 13 April 2023, aims to update the legislation on torture and incitement of a public officer to commit torture in line with the developments in jurisprudence.⁴⁷ An opposite path is followed by three Bills composing the so-called “security package”, proposed by the Minister of Interior with the Minister of Justice and the Minister of Defence on 22 January 2024, which seem to move towards the disempowerment of Article 613 bis, para. 2, of the Criminal Code, with the apparent aim of protecting police officers from their depiction as “torturers par excellence”.⁴⁸

As interesting as it will be to observe such developments within the legislative power, it is hoped that the interpretation undertaken by the Italian judges to configure public torture in terms more consistent with constitutional values continues in the wake of their latest jurisprudence.

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⁴⁶ The decision technique used by the Court, as observed by scholars, seems more akin to a measure aimed at resolving the case than a constitutional ruling. See Eleonora Santoro, *ibid.*

⁴⁷ Senato della Repubblica, Atti Parlamentari, Atto No. 661, XIX Legislatura – Disegni di legge, rapporti e documentazione, Disegno di legge presentato alla Presidenza il 13 aprile 2023 d’iniziativa della Senatrice Belotti [Senate of the Republic, Parliamentary Acts, Act No. 661, XIX Legislature - Drafts of Law, Reports and Documentation, ‘Bill presented to the Presidency on March 13, 2023 by Senators Belotti’] <<https://www.senato.it/service/PDF/PDFServer/BGT/01375530.pdf>>, accessed 3 October 2024.

⁴⁸ Camera dei Deputati, Atti Parlamenti, XIX Legislatura, Atto No. 1660, Disposizioni in materia di sicurezza pubblica, di tutela del personale in servizio, nonché di vittime dell’usura e di ordinamento penitenziario [Chamber of Deputies, Parliamentary Acts, Act No. 1660, XIX Legislature, Provisions on Public Safety, Protection of Staff in Service, as well as Victims of Usury and Prison Regulations]. The Bill has been approved by the Chamber of Deputies on 18 September 2024 and is now being examined by the Senate.

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Legislation – Participation in International Mission

- Decision of 1 May 2023, ‘Italy’s participation in international missions 2023’⁵⁰
<<https://temi.camera.it/leg19/provvedimento/autorizzazione-e-proroga-delle-missioni-internazionali-nel-2023.html>>

On 1 May 2023, the Italian Council of Ministers adopted a decision enabling Italy’s participation in four new international missions (Document XXV, No. 1), as well as an analytical report detailing international missions carried out in 2022, with a view to extending them in 2023 (Document XXVI, No. 1).

In particular, Document XXV No. 1 deals with the launching of four new international missions: one in Europe (EU Military Assistance Mission in support of Ukraine - EUMAM, Sheet 6-bis), and three in Africa (European Union Border Assistance Mission in Libya - EUBAM, Sheet 16-bis; EU Military Partnership Mission in Niger - EUMPM, Sheet 21-bis; and a Bilateral Support Mission in Burkina Faso, Sheet 25).

Of the newly authorised missions, two deserve special mention. Firstly, the EUMAM, adopted within the framework of the European Union (EU), is aimed at the military training of Ukrainian armed forces, with a maximum involvement of 80 Italian personnel who have the task of contributing to the special training of the Ukrainian armed forces. Training support also includes integrating the concerns of international humanitarian law, human rights and civilian protection (including against gender-based violence), together with the ‘Women, peace and security’, ‘Youth, peace and security’ and ‘Children and armed conflict’ agendas.⁵¹

Secondly, the Bilateral Support Mission in Burkina Faso, adopted on the basis of a Defence Cooperation Agreement signed by both countries on 1 July 2019, aims to develop and strengthen defence and security capabilities, with a maximum involvement of 50 Italian personnel. Under the Defence Cooperation Agreement, the Italian mission has the task of strengthening defence and security capabilities of the Burkina Faso Armed Forces with special focus on, inter alia, special forces, strategic studies, operational information and military healthcare.

It should also be noted that, in 2023, the participation of Italian forces in NATO’s Very High Readiness Joint Task Force (VJTF) and the bilateral mission supporting Qatar’s Armed Forces (to the 2022 Football World Cup) came to an end. Moreover, following the deterioration of security conditions, the Italian participation in EU missions in Mali (EUTM Mali) and in the Central African Republic (EUTM RCA) were discontinued. In Mali the political context has changed radically from the conditions

⁵⁰ Deliberazione del Consiglio dei ministri del 1° maggio 2023 sulla partecipazione dell'Italia a quattro nuove missioni internazionali, nonché in ordine alla relazione analitica sulle missioni internazionali svolte nel 2022, anche ai fini della loro prosecuzione per l'anno 2023 [Decision enabling Italy’s participation in four new international missions (Document XXV, No 1), as well as an analytical report detailing international missions carried out in 2022, with a view to extending them in 2023 (Document XXVI, No 1)].

⁵¹ NATO, Women, Peace and Security (October 2024), <https://www.nato.int/cps/en/natohq/topics_91091.htm#:~:text=The%20Women%2C%20Peace%20and%20Security,2422%2C%202467%20and%202493%29>, accessed 3 October 2024.

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which gave rise to the operation; in the Central African Republic there has been a strong increase presence of mercenaries and foreign fighters.

In 2023, Italian personnel were engaged in 43 international missions, involving an average of 7.720 and a maximum of 11.499 personnel. These figures are largely similar to those of 2022 (7.600 and 12.055, respectively). Of these 43 missions, eight were led by the UN, nine by NATO, 13 by the EU, and two were part of a “coalition of the willing”. The remainder were national missions. As a result of the war in Ukraine, NATO missions engaged a large number of Italian military personnel in 2023 (5.447, i.e. almost half the total).

From a geographical point of view, the Italian military is mostly present in Europe (6.755 personnel, i.e. 59% of the total, an increase compared to 2022). The number of military personnel in Asia (2984) and Africa (1756) decreased compared to previous years (accounting for 26% and 15% of the total, respectively).

Finally, the total financial requirement for supporting international missions and cooperation interventions was quantified at €1.720.424.576: a decrease compared to 2022 (€1.855.788.608).

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