ITALY[1]

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In 2015, there were further developments in Italian case law concerning war crimes and State immunity from the other States' jurisdiction.

The issue has become controversial between Italy and Germany in the course of the last decade, after many Italian courts exercised their competence in respect of compensation claims brought against Germany by Italian nationals who were victims of war crimes during the Second World War. In its judgment of 3 February 2012, in the *Jurisdictional Immunities of the State* case, the ICJ ruled that Italy failed to comply with its international obligations under general international law by exercising jurisdiction over Germany; with the result that

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any such proceedings must be dismissed, and final judgments against Germany revoked.[2] As the court in which many of these proceedings were pursued, the Court in Florence raised, however, a question of constitutionality in respect of the customary norm of international law on State immunity as interpreted by the ICJ – ie, applicable also in the event that an act done *iure imperii* consists of war crimes or crimes against humanity. The Court also challenged the constitutionality of certain implementing provisions in national legislation.[3] In decision No 238/2014, the Constitutional Court found that these norms were all incompatible with the constitutional principles aimed at protecting the inalienable human rights and the right to a judicial remedy (Articles 2 and 24 of the Constitution, respectively). Given that said principles are an essential part of the domestic legal order, which may not be derogated from, it derived that, despite Italy's international obligations, this particular ruling of the ICJ is not domestically enforceable.[4]

At the beginning of 2015, when examining a further recourse from the Court in Florence (Order No 143 of 2014), the Constitutional Court returned to the question.[5] The recourse was rejected as being 'deprived of any substance' and, thus, 'manifestly inadmissible', through Order No 30 of 3 March 2015.[6] The reason was that it only concerned questions already answered by the Constitutional Court through its earlier ruling. Leaving aside technicalities, Order No 30/2015 has done nothing but confirm the conclusions reached by the Constitutional Court in 2014.

It is clear that the above mentioned jurisprudence has raised a number of issues relevant to proceedings still pending before Italian courts. The first and most important issue relates to the fact that the principles established by the Constitutional Court are not, though correct from the perspective of constitutional law, in line with Germany's legitimate expectation that Italy will comply with the ruling in the ICJ decision of 2012. An example of this situation is provided by *Alessi and others v Germany*, one of the proceedings instituted before the Court in Florence and then suspended, pending decision from the Constitutional Court. Soon after resumption of this proceeding, Germany raised an exception concerning lack of Italy's jurisdiction. In the hearing of 19 March 2015, it observed:

> [A] ruling of the Constitutional Court of Italy cannot change the conclusions reached by the International Court of Justice with regard to the content and the extent of the jurisdictional immunity the Federal Republic of Germany enjoys before Italian courts ... [R]esuming or continuing proceedings concerning violations of international

[2] *Jurisdictional Immunities of the State (Germany v Italy)* (*Judgment*) [2012] ICJ Rep 2012, [99]. See also Correspondents Report – Italy (2012) 15 *YIHL*, 1-6.

[3] These provisions were: a) Article 3 of Law No 5/2013 concerning ratification and implementation by Italy of the *United National Convention on Jurisdictional Immunities of States and their Property*, opened for signature 2 December 2004, (not yet in force), which imposed upon the domestic courts an obligation to decline to exercise their competence over Germany in conformity with the ruling of the ICJ in the 2012 judgment, and b) Law No 848/1957, concerning ratification and implementation of the UN Charter, insofar it established upon Italy the same obligation in accordance with Article 94 of the Charter.

[4] The Constitutional Court specified that this was without prejudice to Italy's obligation under international law to comply, generally speaking, with the decisions of the ICJ. See Correspondents Report – Italy (2014) 17 *YIHL*, 1-12.

[5] Order No 143/2014 was one of four identical orders, which the Court in Florence delivered within different proceedings on 21 January 2014; its delayed examination by the Constitutional Court was due to need for translation and other procedural issues.

[6] Order No 30 of 3 March 2015 of the Constitutional Court, *Questione Giustizia,* <http://www.questionegiustizia.it/doc/Corte_Costituzionale_ordinanza_30-2015.pdf>.

> humanitarian law by the Third *Reich* during World War II means that Germany's jurisdictional immunity would be violated again."[7]

For the Court in Florence, the ruling of the Constitutional Court left no doubt about the fact that a customary norm of international law on State immunity as interpreted by the ICJ cannot, and does not make part of Italian legislation; and this despite, generally speaking, the domestic legal order of Italy automatically conforming with 'the generally recognized norms of international law' (Article 10 of the Constitution). On other hand, the Court in Florence was aware of some contradiction in the relevant legal framework when observing:

> [T]he contentious issues that are subjected to the proceeding imply a risk that the conduct of Italy qualifies as internationally wrongful as being in breach of the customary norm whose existence in international law was ascertained by the Court in The Hague ... This circumstance deserves attention, also because it might result in an obstacle to the recognition of the right [to compensation] invoked by the plaintiffs … a right, however, which Germany has never contended with regard to the facts of the case, or its own responsibility".[8]

The Court then noted that the ICJ also regretted that Germany had decided to deny compensation to those Italian military internees who were illegally deprived, at the relevant time, of the status of war prisoners under international humanitarian law.[9] Moreover, the ICJ invited Germany and Italy to renew efforts to resolve all issues that remained unsettled through negotiations.[10] It seemed to the Court in Florence that such a course of action was the most appropriate, and especially so after judgment No 238/2014 of the Constitutional Court. As a conclusion, the Court ordered that the parties in the proceeding seek to reach an agreement to settle their contentious issues in the framework of the conciliation procedure provided for in Article 185 of the Code of Civil Procedure.[11]

However, efforts from the Court in Florence to promote judicial or extra-judicial conciliation in this and in other similar cases remained unsuccessful.[12] This probably prompted the Court to take a different approach in respect of two further cases, where the plaintiffs similarly applied for the Court to declare itself competent to decide, and ascertain Germany's responsibility for the damages they suffered in consequence of deportation to, and detention in Buchenwald (*Bergamini v Germany*) and Mathausen (*Simoncioni v Germany*) after 8 September 1943. The Court decided on these cases in, respectively, decisions No 2468 and No 2469 of 6 July 2015, whose texts are almost identical.[13]

The Court noted, as a first step, that Germany had raised a number of exceptions and preliminary objections (these were the same in both proceedings). For Germany, the claim

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[7] Order No 2012/1300 of 23 March 2015 of the Court of Florence, II Civil Section, *Questione Giustizia*, 2, <http://www.questionegiustizia.it/doc/crimini-di-guerra-germania-conciliazione.pdf>.
[8] Ibid 3.
[9] *Jurisdictional Immunities of the State (Germany v Italy)* (*Judgment*) [2012] ICJ Rep 2012 [99].
[10] Ibid [104].
[11] Under Article 185, the judge may, at a preliminary phase of the proceeding, make an attempt to reconcile the parties and efforts to this end may be renewed at any further stage. If successful, this procedure ends with a *procès-verbal* where the agreement among parties is recorded and, thus, take the place of a judicial decision. In application of Article 185 bis, the Court of Florence submitted to the parties following proposal: the plaintiffs renounced to their action in court, while Germany offered them, as compensation, an opportunity of freely staying in Germany for a period of time, for study and other cultural purposes.
[12] References to this circumstance are found in decision No 2468 and decision No 2469 of 6 July 2015 of the Court of Florence, which are discussed below.
[13] Cf decision No 2468 of 6 July 2015 of the Court of Florence, II Civil Section, *Questione Giustizia*, <http://www.questionegiustizia.it/doc/sent_2468-2015.pdf>, and decision No 2469 of 6 July 2015 of the Court of Florence, II Civil Section, *Questione Giustizia*, <http://www.questionegiustizia.it/doc/sent_2469-2015.pdf>. References below are to decision No 2468/2015.

was inadmissible at the light of Article 10 of Italian Constitution read in conjunction with the ICJ ruling of 2012, or by reason of a general principle of international law under which, Germany argued, the States are not subjected, under any circumstance, to civil jurisdiction for acts done *iure imperii*.[14] In the alternative, Germany argued that the provisions in Article 77(4) of the Peace Treaty of 1947[15] and two Germany–Italy agreements of 1961 concerning compensation for Italian nationals[16] further excluded the admissibility of the claim. Another objection was that the right to compensation invoked by the plaintiffs, if it ever existed in law, was now extinguished by prescription. Had the Court rejected all these arguments, Italy had, allegedly, an obligation to return to Germany any amount that the latter might be ordered to pay in favour of the plaintiffs, either as a consequence of above mentioned treaty provisions, or of Italy's failure to comply with the ruling of the ICJ.[17]

In turn, the Government of Italy asked the Court in Florence to postpone any decision in order to wait for a further determination from the national political authorities about the consequences of the Constitutional Court's decision in relation to the ruling of the ICJ. Later, the Government intervened in both proceedings arguing that a) the Court in Florence lacked jurisdiction over Germany, and b) Italy did not have an obligation to indemnify Germany for the compensation paid, if any.[18]

In decisions No 2468 and No 2469 of 2015, the Court in Florence first noted that it had made recourse, in certain other cases, to the conciliation procedure set forth in Article 185 of the Procedural Code; and this recourse was made 'in tribute to the ruling of the ICJ, and with a view of facilitating an agreed solution among the parties'.[19] As the Court noted, however,

> No sign intervened, until now, that Germany or Italy are ready to conclude or, at least, negotiate an agreement among them, be it within or outside those proceedings. Germany did not even reply to the very cautious conciliation proposal made by this Court under Article 185 bis of the code of civil procedure.[20]

It is a matter of fact that soon after resumption of the proceedings on *Bergamini* and *Simoncioni* cases, Germany withdrew from them. In its last statement of defense, it repeated that any resumed or newly instituted proceeding against Germany represented 'a violation of the principles of international law as laid down by the ICJ'.[21] A *Note Verbale* with the same contents was forwarded to the Ministry of Foreign Affairs by the German Ambassador in Rome.

The Court in Florence did not uphold, however, any of the exceptions concerning a lack of jurisdiction, on the grounds of the same arguments the Constitutional Court had found well-established in its decision of 2014: that declining the exercise of jurisdiction in the cases at hand amounted to an unacceptable sacrifice of Italy's supreme constitutional values.[22]

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[14] Decision No 2468/2015, 2-3.
[15] *Treaty of Peace with Italy*, signed 10 February 1947, 49 UNTS 3. Article 77(4) reads: 'Without prejudice to these and to any other dispositions in favour of Italy and Italian nationals by the Powers occupying Germany, Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939'. Italy has always contested that this Article applies also to claims of, among others, Italian military internees who were illicitly deprived of their legal status of prisoners of war at the relevant time.
[16] On this particular aspect of the dispute see Correspondents Report – Italy (2011) 13 *YIHL*, 531-538.
[17] Decision No 2468, 2-3.
[18] Ibid 3.
[19] Ibid 14.
[20] Ibid 16.
[21] Ibid 17.
[22] Ibid 18-19.

With regard to the merits, the Court in Florence found it established in both proceedings that Germany was responsible for war crimes, essentially because '[t]he Federal Republic of Germany never contested the responsibility of the Third Reich, nor the continuity of the German State'.[23] Having rejected all remaining objections, the Court ordered Germany to pay compensation for the damages resulting from those crimes.[24] It excluded the possibility that Italy had an obligation to indemnify Germany.[25] The Court was satisfied, in this regard, that a State may not, in principle, invoke a provision in its domestic law as justification for failure to comply with international obligations.[26] In the Court's views, however, Italy was 'forced' to disregard the ruling of the ICJ 'by necessity', which excluded the wrongfulness of this conduct (Article 2045 of the Civil Code). In the Court's words, if serious violations of human rights or humanitarian law are involved, 'the constitutional obligation to guarantee, also by judicial remedies, the protection of fundamental values in accordance with the supreme principles of Italian and the EU legal order' necessarily prevails over any other obligations of the State.[27]

Recourses introduced by Germany to have the final judgments against it revised, and their effects revoked, were also unsuccessful. This is true also with regard to the orders with which the Italian judicial authorities had declared enforceable in Italy, in accordance with law No 218/1995,[28] certain decisions of Greek courts that, paralleling those of Italian judges, required Germany to pay compensation for damages resulting from war crimes committed during the Second World War.

We can mention, among others, decision No 9097 of 24 March 2015 of the Supreme Court of Cassation, United Sections.[29] In 2006, the President of the Court of Appeal in Florence ordered to enforce in Italy decision No 137/97 of the Court in Leivadia (Greece), which sentenced Germany to pay 7,600,000,000 drachmas to the Prefecture of Voiotia as the legal representative of the victims of a massacre of civilians committed there by members of the Nazi Army. Germany challenged this order by recourse to the same Court of Appeal, which was unsuccessful. The Supreme Court rejected a further recourse (decision No 11163 of 20 May 2011 of the Court of Cassation, I Civil Section)[30] and the order became final in 2011. In 2013, Germany filed an application for revision before the Supreme Court *ex* Article 395 of the code of civil procedure ('Revision of final decisions') read in conjunction with Article 3 of Law No 5 of 2013.[31] As was foreseeable, the main argument in the application was the following:

> The Federal Republic calls the attention of the Supreme Court, most particularly, on the ruling of the ICJ in its judgment of 3 February 2012. Accordingly, the Italian Republic violated its obligations regarding the immunity the Federal Republic enjoys under

[23] Ibid 21.
[24] Ibid 25-27.
[25] Ibid 27-30.
[26] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 339 (entered into force 27 January 1980) art 27. See also International Law Commission, *Responsibility for Internationally Wrongful Acts,* GA Res 56/83, UN GAOR, 6th Comm, 56th sess, Agenda Item 162, UN Doc A/RES/56/83, annex, , art 32.
[27] Decision No 2468 of 2015, 29-30; Decision No 2469 of 2015, 28.
[28] Law No 218 of 31 May 1995, Title IV, arts 64-67 (concerning reform of private international law) deal with recognition and enforceability of foreign judicial decisions and other acts issued by foreign authorities. Text in *Official Journal* No 128 of 3 June 1995, also available at <http://www.esteri.it/mae/doc/l218_1995.pdf>.
[29] Decision No 9097 of 24 March 2015 of the Court of Cassation, United Sections, *Aldricus. Attualità del diritto internazionale privato e processuale in Italia e in Europa*, <https://aldricus.files.wordpress.com/2015/05/cass-su-9097-2015.pdf>.
[30] The text of decision No 11163 of the I Civil Section is not available at the Court of Cassation official website.
[31] On this law see above n 2.

> international law by declaring enforceable in Italy decisions of Greek courts that concerned breaches to international humanitarian law committed by German *Reich* on Greek territory.[32]

However, the Prefecture of Voiotia counterclaimed:

> The provisions in Article 3 of Law No 5 of 2013 ... on which Germany grounded the application for revision ... established that final judicial decisions contrary to the ruling in decision of 2012 of the ICJ ... are subjected to revision not only for the reasons listed in Article 395 of the Code of Civil Procedure but also for lack of [Italy's] jurisdiction.
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> In decision No 238 of 22 October 2014, the Constitutional Court found, however, that Article 3 of Law No 5 was unconstitutional, as also was Article 1 of Law No 848 of 17 August 1957 (concerning implementation of the UN Charter) insofar latter obliged the Italian judge to decline, in compliance with the ruling of the ICJ, to exercise his jurisdiction in respect of acts of foreign States consisting in war crimes or crimes against humanity and, thus, violating inalienable human rights".[33]

The United Sections of the Supreme Court upheld these arguments, and rejected the application for revision as being inadmissible.[34]

It is clear from what precedes that Italian courts cannot enforce any part of the ruling of the ICJ, as this would amount to ignoring or disregarding the relevance of constitutional principles as interpreted by the Constitutional Court. From this viewpoint, a further aspect deserves attention. Though constituting an authoritative precedent with regard to the relationship that exists between the customary norm on State immunity and the prohibition of war crimes as a peremptory norm of international law, the ruling of the ICJ has no binding force except for between Germany and Italy, and in respect of the case decided in 2012.[35] By contrast, the principles in decision No 238/2014 of the Constitutional Court (as confirmed in Order No 30 of 2015) are binding on all Italian courts, which must adhere to them, if relevant, when deciding on any further cases.

In the course of 2015, the broad scope of application of these principles emerged from, inter alia, decision No 43696 of the Supreme Court of Cassation on the *Opacic Case*,[36] where the responsibility of a foreign State (other than Germany) for international crimes was involved. Some members of the former Yugoslav Army were prosecuted in Italy for directing an attack, in 1992, against two helicopters of the Italian Air Force, which were participating in an EU monitoring mission during hostilities linked to break up of the former Yugoslavia. Mr Opacic was accused, in particular, of having ordered the shooting down of the helicopters and, thus, causing the death of all the soldiers (four Italian and one French) who were on board of one of them. The facts supported a conclusion that he had knowling directed an attack again protected persons, as the helicopters had overt markings, such as their white colour and the initials ECMM for 'European Community Monitoring Mission' on the side, next to the UN flag. In its decision of 22 May 2013,[37] the Assize Court of Appeal in Rome

[32] Decision No 9097 of 24 March 2015 of the Court of Cassation, 1.
[33] Ibid 1-2.
[34] Ibid. They reached the same conclusions in another similar case decided that same day: Decision No 9098 of 24 March 2015 of the Court of Cassation, United Sections, *Aldricus. Attualità del diritto internazionale privato e processuale in Italia e in Europa*, < https://aldricus.files.wordpress.com/2015/05/cass-su-9098-2015.pdf>.
[35] *Statute of the International Court of Justice,* art 59.
[36] Decision No 43696 of 24 June 2015 of the Court of Cassation, I Penal Section, *Federalismi.it. Rivista di diritto pubblico italiano, comparato ed europeo*,
<http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=30688>.
[37] Decision of 22 May 2013 of the Assize Court is not published; the contents are summarized in decision No 43696 of the Court of Cassation.

found that 'the entire chain of command was guilty'.[38] It therefore reformed the verdict of first instance, convicted the accused, and sentenced them to twenty eight years' imprisonment and to pay damages to the heirs of the victims. The Republic of Serbia, as the successor State of the former Yugoslavia, was declared severally liable with the convicted persons to pay compensation. This decision was challenged through recourse to the Supreme Court of Cassation. Serbia raised various exceptions. In its statement of defense of 22 June 2015, it observed:

> It has always been clear from the jurisprudence of the Supreme Court of Cassation – and now also in light of decision No 238 of 22 October 2014 of the Constitutional Court – that foreign States are granted exemption from the other States' civil jurisdiction except for acts that qualify as war crimes or crimes against humanity. No crime was committed in the case at hand, however. The conduct of the accused consisted in an act done in isolation and, thus, not falling within the category of war crimes under Article 8 of the Rome Statute of the International Criminal Court. According to this Article, war crimes consist in most serious violations – because of their intensity or for being systematic – of fundamental human rights, whose protection is provided under peremptory norms of international law. These norms are at the top of the international legal order's hierarchy, and thus prevail over any other provision established in domestic legislation, by treaty, or under international custom".[39]

The Supreme Court extensively relied on the conclusions reached by the Constitutional Court in decision No 238/2014 with regard to war crimes and State immunity from jurisdiction.[40] It was clear from the above statement that Serbia did not contest those conclusions. The point was, rather, whether the principles set forth in decision No 238 were applicable in the case. Having regard to this, the Supreme Court noted:

> The action brought against the Republic of Serbia … made it necessary for this Court to ascertain whether or not the conditions laid down in the decision of the Constitutional Court, which allow the exercise of jurisdiction … are met. [This Court] has to ascertain whether the act done by Mr Opacic – which certainly qualifies as an act done by a State *iure imperii* – also fell within the concept of war crimes or crimes against humanity under the terms of Articles 7 and 8 of the Rome Statute of the International Criminal Court. The Rome Statute was ratified by Italy in conformity with law No 232 of 12 July 1999. In the affirmative, the immunity rule invoked by the foreign State whose civil responsibility is at stake will not apply. [41]

The Supreme Court found that evidence had been given in the proceeding of the fact that the shooting down of the helicopter was not 'an extemporary act of aggression committed in isolation'; it was, rather, the result of 'determinations from the entire chain of command within the Military Air Force of the Federal Socialist Republic of Yugoslavia'. As a consequence, that conduct was attributable, also, to the former Yugoslavia and the Republic of Serbia as its successor State; it qualified, most precisely, as an act done by a State *iure imperii*.[42]

Having regard then to the question of whether that same conduct could be described as a crime under international law, the Supreme Court found that this was not the case as far crimes against humanity were concerned.[43] Then, the Court observed:

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[38] Cf decision No 43696 of 24 June 2015 of the Court of Cassation, 8.
[39] Ibid 11-12.
[40] Ibid 23-27.
[41] Ibid 28.
[42] Ibid.
[43] Ibid 29. As noted by the Court, crimes against humanity are characterized by the fact that they are committed 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the

> It seems to this Court that that conduct ranges among war crimes as these are set forth in Article 8, paragraph 2 of the Rome Statute of the International Criminal Court and better described in sub-paragraphs (a), (b), (c), (d) and (e) of the Article. War crimes consist in any acts done in armed conflicts that characterize, even if not widespread or systematic …, for being in breach to the principle of respect for human dignity; a value that is universally recognized, and which transcends the particular interests of the State communities facing each other in an armed conflict …
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> It is clear that the conduct of Mr Opacic was in breach of the principles set forth in the Geneva Convention of 12 August 1949, and the Rome Statute of the International Criminal Court, Article 8, paragraph 2 (a)(i) (wilful killing) and (e)(iii) (intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission). … That conduct was therefore so grave that this Court may not recognize, in the case, exemption from civil jurisdiction … and must declare itself competent to decide on the compensation claim brought against the Republic of Serbia.[44]

It is worth noting that the Supreme Court did not uphold the argument of the defendant State that the heirs of the victims had at their disposal other remedies to obtain redress than bringing an action against Serbia before their national courts. This circumstance was at variance with the cases to which decision No 238/2014 of the Constitutional Court related. For the Supreme Court this issue was not a decisive one, however. In its views, references to the lacking of other remedies that are found in decision No 238 only served to increase the integrity of the adopted solution by demonstrating how unfair the consequences of the immunity rule may be under certain circumstances, such as, for example, when the identity of the persons responsible for war crimes is unknown. The core content of that decision is, nonetheless, that the immunities States enjoy under international law or domestic legislation for their acts *iure imperii* succumbs to the right of the individuals to have access to justice any time the protection of inalienable human rights is at stake.[45]

Also relevant for the purposes of this overview is decision No 21946 of 20 October 2015 of the Supreme Court of Cassation, United Sections.[46] It deals with a case concerning a crime of terrorism, in respect of which Italian courts were asked to recognize and enforce a judicial decision issued against a foreign State (Iran) in another foreign State (US).

The facts of the proceeding can be summarized as follows. On 10 April 1995, a young Jewish woman, who was a US national, was killed in Israel following a terrorist attack from the Shaqaql faction of the Islamic Palestinian Jihad (better known as Hamas). Through decision No 97-396 of 11 March 1998, the US District Court for the District of Columbia found that the attack had been carried out 'under the direction of the Iranian Republic, as some persons who were at the top of Iran Administration had provided Shaqaql with resources and support'.[47] On these grounds, the US District Court sentenced Iran – together with some persons who were members, at the relevant time, of the Iranian government – to pay an amount of US$26,002,690 as damage compensation and US$225,000,000 as 'punitive damages' to the heirs of the victim.[48] Some years after, the heirs filed an application before the Court of Appeal in Rome to obtain that the decision be enforced in Italy. Both the Iranian

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attack' – *Rome Statute of the International Criminal Court,* opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002), art 7(1).

[44] Decision No 43696 of 24 June 2015 of the Court of Cassation, 30.

[45] Ibid 31-32. It seems, respectfully, that the set of questions raised by this particular aspect of the case deserved more in-depth analysis.

[46] Decision No 21946 of 20 October 2015 of the Court of Cassation, United Sections, *Federalismi.it. Rivista di diritto pubblico italiano, comparato ed europeo,* <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=30684>.

[47] Ibid 4.

[48] Ibid.

Republic and the Italian Minister for Foreign Affairs on behalf of the Government intervened in the proceeding. They pointed out in their counterclaims that States and their property are exempt from the other States' jurisdiction as established under general international law and the relevant UN Convention of 2004 (not yet in force),[49] which Italy ratified in conformity with law No 5/2013.[50]

Through decision No 3909 of 8 July 2013, the Court of Appeal in Rome rejected the application, with the argument that Italy's domestic law conforms to international customary law (Article 10 of the Constitution); and, based on the ruling of the ICJ in its decision on the dispute between Germany and Italy, 'there [were] no customary norms of international law imposing limits in the jurisdictional immunity of the State as a consequence of serious violations of *ius cogens* norms'.[51]

For the Supreme Court, which delivered its decision in 2015, the conclusions reached by the Court of Appeal were no longer correct; and this because of the content of decision No 238/2014 of the Constitutional Court. The Supreme Court observed, in this regard that:

> The immunity principle does not apply in respect of a defendant State if compensation has been claimed, and is ordered in consequence of an act of terrorism, which ranges among the international crimes committed in breach of inalienable human rights.
>
> Jurisdictional immunity is not a subjective right of the State but a privilege, which may not be granted for "*delicta imperii*", i.e. crimes committed in violation of international *ius cogens* and those universally recognized values that transcend the interests of each particular State.
>
> It emerges from the foreign judgment whose recognition is the object of this proceeding, that the terrorist attack, which caused the death of Ms Alisa Michelle Flatow, was a crime against humanity. It was committed, in fact, as a part of a systematic attack directed, knowingly, against civilian populations with racial, political and religious hatred reasons; and an attack such as to seriously put at risk international security and the rule of law. [52]

The Supreme Court further noted that, on other hand, the case did not fall within the scope of application of the Brussels Convention of 27 September 1968.[53] As the EU Court of Justice has highlighted many times, this Convention does not apply to acts done by Contracting States in the performance of their sovereign powers (irrespective of whether these acts are wrongful under international law). The legal framework for deciding on the case was provided, thus, by law No 218/1995. Most precisely, the Supreme Court had to ascertain whether the principles asserting national jurisdiction, as applied by the US District Court, were compatible with those applicable in Italy, which are laid down in Article 3 of Law No 218. Under this Article, the nationality of the claimant is among the possible criteria for exercising jurisdiction, especially when illicit conduct took place, resulting in damages outside national territory. To fully meet the condition set forth in Article 3, it was however necessary that the defendant State had, at the relevant time, a representative authorized to

[49] *United Nations Convention on Jurisdictional Immunities of States and their Property*, opened for signature 2 December 2004 (not yet in force).
[50] Article 5 of law No 5/2013 established, in particular, that 'States and their property enjoy jurisdictional immunity before the domestic courts of foreign States as provided in the Convention'.
[51] Decision No 21946/2015, 7.
[52] Ibid,13.
[53] *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,* opened for signature 27 September 1968, OJ L 299 (entered into force 31 December 1972).

bring legal proceeding in the US. And, certainly, this was not the case, given that diplomatic relations between US and Iran had remained cut since 1979.[54]

In conclusion, the decision of the Court of Appeal in Rome about the non-enforceability of the US Court's decision in respect of Iran was correct. The reason for that decision, ie granting Iran jurisdictional immunity for a crime against humanity, was wrong, and had to be quashed.[55]

ORNELLA FERRAJOLO[56]

Treaty Action — Enforced Disappearances

- Ratification and implementation of the *International Convention for the Protection of All Persons from Enforced Disappearance* adopted at New York on 20 December 2006 (entered into force on 23 December 2010) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV16&chapter=4&lang=en>
- Law No 131 of 29 July 2015, entered into force on 21 August 2015[57] <http://www.gazzettaufficiale.it/atto/stampa/serie_generale/originario>

With Law No 131 of 29 July 2015, Italy ratified the *International Convention for the Protection of All Persons from Enforced Disappearance* ('CPED') which entered into force on 23 December 2010.[58]

The CPED represents the most important step in international human rights law concerning forced disappearances. For years, the international legal framework addressing forced disappearances has been fragmented and deficient. The CPED is significant because it fills serious gaps in the law and to leads the way towards the criminalization of the complex phenomenon of forced disappearance, which was recorded for the first time during the Second World War and has particularly marked the history of Latin America in the second half of the 20th century.

Currently, enforced disappearances are a global phenomenon. In this regard, the 2015 Report of the UN Working Group on Enforced or Involuntary Disappearances stated that during the reporting period (17 May 2014 - 15 May 2015) 384 new cases of enforced disappearance were transmitted to 33 States.[59]

The CPED is the most appropriate legal tool to address the phenomenon of forced disappearance in a comprehensive manner, by welding together aspects of international human rights law, humanitarian law and international criminal law. Accordingly, Article 1(2) of the Convention establishes that 'no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance'.

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[54] Decision No 21946/2015, 15-17.
[55] Ibid 17-19.
[56] Ornella Ferrajolo is a senior researcher at the Institute for International Legal Studies of the National Research Council of Italy (CNR), Rome.
[57] Published in *Gazzetta Ufficiale* No 192 of 20 August 2015.
[58] *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 6 February 2007, 2716 UNTS 3 (entered into force 23 December 2010). For a deeper analysis of the Convention see K Anderson, 'How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to Be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?' (2006) 7 *Melbourne Journal of International Law* 245.
[59] Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc A/HRC/30/38 (10 August 2015).

As an international instrument aimed to prevent enforced disappearances and to combat impunity for this crime in all circumstances, the CPED complements other relevant treaties in the fields of human rights, humanitarian law and international criminal law adopted both at universal and at regional level. In particular, the crime of 'enforced disappearance' may occur either in peacetime or in internal or international armed conflicts. The Convention, therefore, provides for a complementary protection. In this regard, it complements, inter alia, the *Geneva Convention relative to the Protection of Civilian Persons in Time of War* of 1949,[60] the I Additional Protocol to Geneva Conventions,[61] the *Rome Statute of the International Criminal Court* (ICC)[62] and the *Inter-American Convention on Forced Disappearance of Persons* adopted by the Organization of American States in 1994. Additionally, it complements non-binding instruments including the *Declaration on the Protection of All Persons from Enforced Disappearance* adopted by the UN General Assembly in 1992.[63]

The complementary aspect of the CPED with other instruments of international law is evident in Article 43. This provision does not preclude the application of international humanitarian law, including the obligations of the States Parties to the four Geneva Conventions of 1949 and the two Additional Protocols of 1977. In the same vein, Article 16 contains the reference to principle of 'no refoulement' in case of 'consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law'. Finally, Article 37 states that 'nothing in this Convention affect any provisions which are more conductive to the protection of all persons from enforced disappearance and which may be contained in: a) the law of a State Party; b) international law in force for that State'. In sum, the CPED can be applied in parallel with other instruments of international humanitarian law, human rights law and international criminal law, but also domestic laws of a State Party which are more conducive to the protection of victims of the crime of enforced disappearance.

The ratification of the Convention represents an important achievement of the commitment assumed by Italy at the UN Human Rights Council and, in this line, it is a positive response to the two recommendations to ratify the CPED addressed to Italy by

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[60] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950). Article 26 states that:

> Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.

[61] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978). Article 32 establishes that:

> In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives.

Additionally, Article 33 concerns 'Missing persons'.

[62] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002). Article 7 contains a list of such crimes which includes the traditional crimes against humanity, but also defines complex and/or new crimes such as the enforced disappearance of persons. It is worth to underline that the International Criminal Court is the only international Court which has recognized forced disappearance as a crime under its jurisdiction.

[63] GA Res No 47/133, UN GAOR, UN Doc A/RES/47/49 (18 December 1992).

France and Chile within the Universal Periodic Review in 2010.[64] Indeed, while Italy actively participated in the drafting process which led to the adoption of the CPED and signed it on 3 July 2007, the ratification has taken time.[65]

In conformity with the Italian legislative practice regarding international treaties, Law No 131/2015 contained the usual provisions for Italian ratification. In particular, Article 1 of the Law authorized the President of the Republic of Italy to ratify the Convention[66] and Article 2 contained the implementing order, the so-called 'ordine di esecuzione', which implies that once in force the Treaty will become part of the Italian law. Additionally, Article 3 stated that the Treaty entered in force the day after its publication on the Italian Official Journal ('Gazzetta Ufficiale').

By ratifying the Convention, Italy is legally bound to the CPED and has assumed some obligations in order to take appropriate measures to investigate acts of enforced disappearance as defined by Article 2. Said provision defines 'enforced disappearance' as

> the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

These international obligations must be implemented in the legal system of the States Parties by adopting new laws, modifying legislation or practices, and even allocating adequate resources to prevent and combat the crime of enforced disappearance, which, in conformity with Article 5, constitutes a 'crime against humanity' when it is perpetrated as part of a widespread or systematic practice.

In Italian law, although the crime of enforced disappearance is not codified with this *nomen iuris*, there are numerous penalty provisions concerning crimes which present the same features of the crime of enforced disappearance. Most notably, while the Italian Criminal Code does not expressly refer to the crime of enforced disappearance, Article 605 punishes the crime of kidnapping and provides a specific aggravating circumstance in the case that the offence is committed by a public official abusing of his own authority or powers. Furthermore, the criminal actions covered by Article 2 of the Convention accord with other provisions of the Italian Criminal Code, particularly Article 606 concerning the crime of unlawful arrest. Additionally, in conformity with Articles 19-20 of the CPED, which protect the secrecy of personal data of a disappeared person in some specific circumstances, the Legislative Decree No 196/2003 provides an exhaustive legislation on the protection of personal data.[67]

By Article 24 of the CPED rises the obligation of States Parties to take all appropriate measures to ensure that the victims of enforced disappearances obtain 'reparation and prompt, fair and adequate compensation'. At the time of the Italian ratification, the

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[64] Human Rights Council, *Report of the Working Group on the Universal Periodic Review - Italy*, UN GAOR, 14th Sess, Agenda Item 6, UN Doc A/HRC/14/4 (18 March 2010).

[65] Two draft bills on the Ratification and Execution of the CPED were submitted at the examination of the Italian Parliament on 18 July 2014 and on 16 October 2014. See Documents AC 2674 and AC 1374 < http://www.camera.it/leg17/126?tab=5&leg=17&idDocumento=2674&sede=&tipo=>. See also Correspondents Report – Italy (2014) 17 *YIHL*, 14-16.

[66] Article 80 of the Italian Constitution states that the President of the Republic receives prior authorization of the Italian Parliament for ratifying the International treaties which involve, *inter alia*, financial engagements. Indeed, it states: 'Parliament shall authorize by law the ratification of such international treaties as have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation'.

[67] Legislative Decree No 196 of 2003 'Code for the protection of Personal Data', published on the Italian Official Journal No 174 of 29 July 2003, <http://www.parlamento.it/parlam/leggi/deleghe/03196dl.htm>.

Government needed to estimate the possible financial burden. However, in Italy, the only known case of forced disappearance is the abduction of Abu Omar.[68] The lack of useful statistics did not permit the exact estimation of the financial burden.

Therefore, it was decided that the costs for compensation will be charged to the budget of the Program 'Garanzia dei diritti dei cittadini' of the Ministry of Economy, which can be refinanced if necessary.[69]

In sum, it can be observed that the ratification of the CPED by Italy complements the domestic legal framework, strengthening the existing guarantees with further measures of prevention, protection and support to the victims of enforced disappearance.[70]

In order to ensure the effective implementation of its provisions by States Parties, the CPED established an international monitoring mechanism anchored to the Committee on Enforced Disappearances formed by ten experts elected for a term of four years by the States Parties according to equitable geographical distribution. The monitoring procedure is based on reports submitted by Parties to the Committee periodically and on country visits made by the Committee to monitor the Convention's implementation. It is also based on the requests for urgent action in case of disappearance submitted by relatives of the victims or their legal representative, their counsel or any person authorized by them, as well as by any other person having a legitimate interest.[71] In accordance with Article 31, a State Party may at the time of ratification of the Convention or at any time afterwards declare that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation by this State Party of the CPED. Italy has not declared to recognize the competence of the Committee on Enforced Disappearances to receive and consider communications from or on behalf of individuals subject to Italian jurisdiction claiming to be victims of a violation of the provisions of the Convention by Italy.

However, for Italy, the Committee 'is the best way to grant an effective and urgent remedy to the victims of enforced disappearance'.[72] Most notably, for Italy, the CPED is

> a compromise between different positions. Italy would have preferred specific provisions to bind the State always to grant all the information listed in article 18, to exclude the statute of limitations in respect of the crime of enforced disappearance, to prevent trials before special courts for those accused of such a crime and to prohibit pardons or amnesties in favour of the accused.[73]

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[68] See Correspondents Report – Italy (2009) 12 *YIHL*, 571–576; Correspondents Report – Italy (2011) 14 *YIHL*, 37–38; Correspondents Report –Italy (2013) 16 *YIHL*, 28-32.

[69] Chamber of Deputies, 'Verifica delle quantificazioni. Ratifica ed esecuzione della Convenzione internazionale per la protezione di tutte le persone dalle sparizioni forzate adottata dall'Asssemblea Generale delle Nazioni Unite il 20 dicembre 2006' (AC 2674), Doc. No 175 of 15 January 2015, <http://documenti.camera.it/Leg17/Dossier/Pdf/VQ2674.Pdf>.

[70] See Chamber of Deputies, 'Ratifica ed esecuzione della Convenzione internazionale per la protezione di tutte le persone dalle sparizioni forzate adottata dall'Asssemblea Generale delle Nazioni Unite il 20 dicembre 2006" (AC 2674), submitted on 16 October 2014, < http://www.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL 0026500.pdf>; see also Chamber of Deputies 'Convenzione internazionale per la protezione di tutte le persone dalle sparizioni forzate adottata dall'Assemblea Generale delle Nazioni Unite il 20 dicembre 2006 - AC 2674, AC 1374' (XVII Legislature, Documentation Dossier) < http://documenti.camera.it/Leg17/Dossier/Pdf/E S0299.Pdf>.

[71] CEPD, art 30.

[72] Italy, 'Statement in the Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance', UN Doc E/CN.4/2006/57,(2 February 2006), 50.

[73] Ibid.

However, Italy pointed out that 'in certain cases, some appropriate solutions can be considered implicit',[74] such as

> the several conditions set forth in article 20 lead to the practical result that the denial of information can never facilitate any practice of enforced disappearance or secret detention. From article 8, paragraph 2, it can be inferred that the statute of limitations is suspended as long as the victims are deprived of an effective remedy.[75]

ROSITA FORASTIERO[76]

Legislation — International Terrorism

- Law No 43 of 17 April 2015 'Conversion into Law, with modifications, of the Decree-Law No 7 of 18 February 2015 on Urgent Measures for the Fight against Terrorism, including International Terrorism, as well as Extension of the International Missions of the Armed Forces and Police, Cooperation Initiatives for the Development and Support of Reconstruction Processes, and Participation in Initiatives of International Organizations for the Consolidation of Peace and Stabilization Processes'(Articles 1-10)[77] <http://www.gazzettaufficiale.it/eli/id/2015/04/20/15G00060/sg>

Over the years, Italy has developed a composite legal framework to fight against international terrorism. Thanks to the experience gained from the second half of the 1970's in the fight against domestic terrorism, Italy was able to modify its legislation in this field, adjusting the criminal law to the increasing threat from international terrorism.[78] Indeed, with Law No 155 of 2005, Italy introduced some provisions to counter international terrorism and improve the instruments to fight the threat of terrorist organizations.[79]

The Decree-Law No 7/2015, converted into Law No 43/2015, forms part of this regulatory environment. The objectives of the Decree-Law are described in its preamble where it is outlined, among the others, the urgent need to improve the existing legislative and regulatory instruments available to the Italian police and armed forces for anticipating, preventing, and combating acts of terrorism following a number of incidents occurred abroad. The need for an improved criminal punishment framework for individuals or groups involved in acts of terrorism is also mentioned.

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[74] Ibid.
[75] Ibid.
[76] Rosita Forastiero is a technologist/researcher at the Institute for International Legal Studies of the National Research Council of Italy (CNR).
[77] *Legge 17 aprile 2015, n. 43 Conversione in legge, con modificazioni, del decreto-legge 18 febbraio 2015, n. 7, recante misure urgenti per il contrasto del terrorismo, anche di matrice internazionale, nonche' proroga delle missioni internazionali delle Forze armate e di polizia, iniziative di cooperazione allo sviluppo e sostegno ai processi di ricostruzione e partecipazione alle iniziative delle Organizzazioni internazionali per il consolidamento dei processi di pace e di stabilizzazione*, entered into force on 21 April 2015, published in *Gazzetta Ufficiale* No 91 of 20 April 2015.
[78] See Committee of Experts on Terrorism (Codexter), Profiles On Counter-Terrorist Capacity, Italy (2008), <http://www.coe.int/t/dlapil/codexter/Source/country_profiles/CODEXTER%20Profile%20(2008)%20ITALY.pdf>; S Praduroux, 'Italy' in K Roach (ed) 'Comparative Counter-Terrorism Law' (Cambridge University Press, 2015), 269-296.
[79] See Correspondents Report – Italy (2005) 8 *YIHL*, 453-455.

The Decree-Law No 7/2015 has further strengthened the Italian legal framework on the matter by introducing new offenses to the Criminal Code[80] in line with the UN Security Council Resolution 2178 of 24 September 2014. This resolution, based on Chapter VII of the UN Charter, requested to all Member States to ensure that 'any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice'.[81] The UN Security Council also detailed the 'serious criminal offenses' to be established in the domestic laws and regulations in order to prosecute perpetrators and to penalize their 'seriousness'.[82]

In conformity with this resolution, Article 1 of the Decree-Law No 7/2015 introduced in Article 270-quater ('Recruiting for terrorist purposes, including international terrorism') and 270-quinquies ('Training for acts of terrorism, including international terrorism') of the Italian Criminal Code the following crimes and related penalties:

a) a person recruited for the purpose of terrorism, even outside cases of participation in criminal groups operating for this purpose, will be punished with imprisonment from five to eight years;
b) those who organize, finance and promote travel in a foreign territory with the aim to commit terrorist acts are to be punished with imprisonment from five to eight years;
c) persons found guilty of training themselves in terrorist methods on their own and carrying out terrorist acts are to be punished with imprisonment from five to ten years.[83]

In addition, the penalties provided for in Article 270-quinquies are increased if the training or the instructions are performed through digital or telecommunications instruments.[84]

Article 2 of the Decree-law No 7/2015 laid down some measures to prevent and to counteract terrorist activities by amending specific provisions of the Criminal Code and the Code of Criminal Procedure. In general, the new norms aim to counter the use of the internet for purposes of proselytism by so called 'foreign fighters',[85] providing in these cases an increase of the penalty. The new legislation allows the police to acquire computer documents and data, even when stored abroad.[86] In such cases, the prosecutor may authorize the preservation of the acquired data, for a period not exceeding twenty-four months, when they are necessary for the prevention of terrorism. The judicial authority may also instruct internet service providers to immediately block access to websites used to commit crimes for

[80] Articles 1-10 of the Decree-Law No 7/2015 concern the fight against terrorism, while the remaining articles authorize the extension of several international missions and the funding of initiatives for the consolidation of peace processes and stabilization. See the comment to the provisions of the Decree-Law No 7/2015 on international missions (Articles 11-20) in this Report.

[81] See [6] of the resolution 2178/2014.

[82] Ibid. It is worth recalling that the UN Security Council resolution was criticized because it does not contain a definition of terrorism, but also for the indeterminacy of criminal offenses which it establishes, see I Caracciolo and U Montuoro (eds) 'Conflitti armati interni e regionalizzazione delle guerre civili' (Giappichelli, 2016), 149.

[83] By extending the offense to the training of the so-called 'lone wolves', the Decree-law went beyond what required by the UN Security Council resolution. This crime is instead provided in French criminal law which Italy has taken as a model (see Press release of the Council of Ministers No 49 - Contrast of terrorism and international missions, 10 February 2015, http://www.governo.it/articolo/comunicato-stampa-del-consiglio-dei-ministri-n-49-contrasto-del-terrorismo-e-missioni). This criminal offense is not foreseen in the Additional Protocol to the *Council of Europe Convention on the Prevention of Terrorism*, CETS No 2017 (22 October 2015) which merely provides for the punishment of those who receive training. See Caracciolo and Montuoro, above n 83, 149.

[84] The accessory conviction for the offenses provided for by Articles 270-ter, 270-quater, 270-quater1 and 270-quinquies leads to the loss of parental rights when a minor is involved.

[85] See A de Guttry, F Capone and C Paulussen (eds) 'Foreign Fighters under International Law and Beyond' (Springer, 2016).

[86] See also Article 4-bis of the Decree-law which regulates the retention of telephone and internet traffic data.

purposes of terrorism.[87] For this purpose, the Postal and Communications Police Service is empowered to update the 'black list' of internet websites utilized for terrorist recruiting activities.

In line with one of the main objectives of the new legislation concerning the prevention of terrorist acts, Article 3 introduced to the Criminal Code new offenses relating to the use and storage of explosive substances. The new provisions punish those who, without legal authority, introduce or provide within the national territory substances or mixtures that serve as precursors of explosives under Annex I of Regulation (EC) No 98/2013 of the European Parliament and of the Council of 15 January 2013 on the marketing and use of explosives precursors. The failure to provide notice to the authorities about the theft or disappearance of such substances or mixtures is also punishable.[88] Finally, the same provision establishes the duty of businesses to collect data concerning explosives for civil uses in order to ensure that information on arms, ammunition and explosive substances are immediately available to the Ministry of Interior.

Another measure introduced into Italian criminal law to combat international terrorism is contained in Article 3-bis of the Decree-law No 7/2015, which provided the penalty of the arrest in *flagrante delicto* for the crime of smuggling of migrants by amending Article 380 of the Code of Criminal Procedure. It is worth noting that this new norm is consistent with Article 6 of the *Protocol against the Smuggling of Migrants by Land, Sea and Air*, supplementing the United Nations *Convention against Transnational Organized Crime* ratified by Italy with Law No 146 of 16 March 2006.[89]

In terms of instruments of prevention, the measures introduced by the Decree-law No 7/2015 cover the possibility of applying some special preventive measures to potential foreign fighters. Article 4 modified the anti-mafia Code[90] by introducing amendments to the regulations concerning preventive personal measures and expulsion of foreigners. In particular, the new legislation extends the application of the preventive personal measures (Article 4 of the anti-mafia Code) to those who take part in a conflict in foreign territory to support an organization pursuing terrorist purposes. Furthermore, under the new regime the prosecuting authorities are granted the power to temporarily withdraw suspects' passports.

Article 5 of the Decree-law No 7/2015 provided additional preventive measures, including the extension of the so called 'safe streets Operation' until 30 June 2015 in order to carry out territorial control activities, surveillance at sensitive sites and targets, and prevention of organized crime phenomena.[91]

Article 6 modified the above mentioned Law No 155 of 2005 providing a greater involvement of intelligence services in the fight against international terrorism. The new provisions authorize (until 30 June 2016) the President of the Council of Ministers, through the General Director of the Department for Security Information, to permit the directors of Italian security agencies to interview detainees for the sole purpose of acquiring information

[87] The new provisions set out specific obligations for ISPs. In particular, they must immediately (or at the maximum within 48 hours) remove from a website all illegal cyber contents at the request of the public prosecutor.

[88] See Article 678-bis of the Criminal Code, devoted to 'illegal detention of explosives precursors'. This crime is punished by a maximum term of imprisonment of eighteen months and a fine of up to €1,000. Under the new Article 679-bis of the Criminal Code, titled 'Omissions in the field of explosives precursors', the punishment is a maximum term of imprisonment of twelve months and a fine of up to €371,00. An administrative fine from €1,000 to €5,000 is established for anyone who fails to report to the competent authority suspicious transactions involving the substances listed in Annexes I and II of Regulation (EC) No 98/2013.

[89] See Correspondents Report – Italy (2006) 9 *YIHL*, 529-531.

[90] See Legislative Decree No 159 of 6 September 2011 the so-called *Codice Unico Antimafia*.

[91] On this Operation see <http://www.difesa.it/EN/Operations/NationalOperation/Pagine /OperationStradeSicure.aspx>.

to prevent terrorist crimes of an international character.[92] Another measure in favour of the intelligence personnel is contained in Article 8 which introduced new provisions concerning the protection of secret service agents involved in judicial proceedings. Article 7 amended the Data Protection Code (Legislative Decree No 196/2003) to extend the exceptions to the protection of personal data when such data is used by State security organs for purposes of protection of public order and security as well as prevention and suppression of crimes, including terrorism.

Finally, Articles 9-10 of the Decree-law No 7/2015 give the National Anti-Mafia Prosecutor (*Procuratore Nazionale Antimafia*) powers relating to counter-terrorism and accordingly the necessary organizational adjustments were provided.[93] Indeed, Article 10 modified Article 103 of the anti-mafia Code establishing the 'National Anti-Mafia and Anti-Terrorism Directorate' (*Direzione nazionale antimafia e antiterrorismo*) within the General Prosecutor at the Court of Cassation.[94]

By way of conclusion, it is interesting to observe that the Decree-Law No 7/2015 was adopted without a parliamentary debate on the merits, and for this reason it has been strongly criticized by opposition parties. In particular, they highlighted that the measures concerning counter terrorism were strictly linked with the respect of individual rights and freedoms, which in times of emergency may also be restricted.[95] Considering the sensitivity and importance of such issues, the Italian Parliament should have discussed extensively about the contents of the Decree-law.[96]

In addition to political criticisms, scholars have made critical remarks on the merits of the measures adopted to counter international terrorism.[97] It was also highlighted that the choice to link the extension of all missions abroad with the fight against international terrorism was a rather obvious attempt to mask a parliamentary blanket and 'en bloc' approval of all the missions in breach of Article 11 of the Italian Constitution.[98] As has already been observed in

[92] Under Article 6 for such interviews the time limit was fixed at 31 January 2016. Article 6-bis changed some rules on the collaborators of justice contained in the Decree-law No 9/1991, converted into Law No 82/1991, in order to include counter-terrorism tasks among the competences of the National Anti-Mafia Prosecutor (*Procuratore Nazionale Antimafia*), see also Articles 19-10.

[93] These articles form Chapter II titled 'National coordination of investigations in proceedings for terrorist crimes, including international terrorism'.

[94] The former National Anti-Mafia Directorate (*Direzione Nazionale Antimafia, DNA*) was created in 1991 as a judicial coordinating body with the task to enforce anti-mafia legislation.

[95] See O Gross, F Ní Aoláin, 'Law in Times of Crisis: Emergency Powers in Theory and Practice' (Cambridge University Press, 2006). On the new criminal offenses introduced by the Decree-law No 7/2015 and the threat to individual freedoms, see S Colaiocco 'Le nuove norme antiterrorismo e le libertà della persona: quale equlibrio?' (2015) 2 *Archivio penale,* <http://www.archiviopenale.it/apw/wp-content/uploads/2015/04/web.05.2015.Questioni.Antiterrorismo.Colaiocco.pdf>.

[96] Intervention of Senator De Cristofaro, Stenographic report of Italian Senate Proceedings, <www.senato.it/service/PDF/PDFServer/BGT/912522.pdf>, 16.

[97] For some critical remarks see A Cavaliere 'Considerazioni critiche intorno al d.l. antiterrorismo, n. 7 del 18 febbraio 2015' (2015) *Diritto penale contemporaneo,* <http://www.penalecontemporaneo.it/upload/1427701889CAVALIERE_2015a.pdf>; Colaiocco, above n 95; Caracciolo and Montuoro, above n 83, 146 ff.

[98] See Cavaliere, above n 97. Article 11 of the Italian Constitution reads as follows:

> Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy shall promote and encourage international organisations furthering such ends.

On the relationship between Article 11 of the Constitution and the role of Italy in international relations, including missions abroad, see N Ronzitti (ed), 'L'articolo 11 della Costituzione. Baluardo della vocazione internazionale dell'Italia', (Editoriale scientifica, 2013).

previous commentaries on the Italian legislation concerning international missions, the practice to adopt emergency decrees for authorizing international missions does not allow a political debate on the matter.[99] The role of the Parliament in this field is very limited and consists only in the conversion of the decrees into laws without going into the substance of the acts.

VALENTINA DELLA FINA[100]

Case Law — International Terrorism

- Supreme Court of Cassation, I Penal Section, Decision of 9 September 2015 No 40699 on a case concerning the enrolment of foreign fighters for the Islamic State <http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/40699_10_15.pdf>
- Supreme Court of Cassation, I Penal Section, Decision 1 December 2015 No. 47489 in a case concerning the Italian criminal jurisdiction for the crime of apology of terrorism <http://renatodisa.com/2015/12/09/corte-di-cassazione-sezione-i-sentenza-1-dicembre-2015-n-47489-ai-fini-dellaffermazione-della-giurisdizione-italiana-e-sufficiente-che-nel-territorio-dello-stato-si-sia-verificato-levento-o-s/>

Both the cases concern the prosecution of crimes related to international terrorism in Italy.

The first case is related to the 'enrolment' of a minor as a fighter for the Islamic State in Syria. Elezi Elvis, an Albanian citizen resident in Italy, allegedly acted to liaise with Ben Ammar Mahmoud with the purpose to enlist him in the terrorist group named 'Islamic State (IS)' operating in Syria, through his uncle Elezi Alban, resident in Albania with connections with Syrian 'recruiters'.

According to Article 270-quarter of the Italian Criminal Code, according to which, in its applicable text at the time where the events occurred,[101] the conduct of anyone who enrolls someone else with the aim to commit acts of violence or sabotage of essential public services for the purposes of terrorism, even if directed against a foreign State, an international institution or organization, is criminal. This crime does not require a link between the enrollment and a terrorist organization as Article 270-bis of the Criminal Code does. The concept of enrollment has to be considered in a wide sense, as any kind of engagement in a military type structure, regular or irregular. These articles were introduced in the Italian criminal law in 2005 by the Decree-law 27 July 2005, No 144, converted into Law 31 July 2005 No 155.[102]

[99] See Correspondents Report – Italy (2009) 12 *YIHL*, 579-583; Correspondents Report – Italy (2013) *YIHL* 16, 33-35.

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[101] This Article was amended by Decree-Law No 7 of 18 February 2015, <http://www.gazzettaufficiale.it/eli/id/2015/04/20/15A02961/sg>. The new Article provides for the punishment of the enrolled person too. It is not applicable to the case, because the related provision entered into force after the facts took place. On criminal provisions introduced by Decree-Law No 7/2015 to counter international terrorism see the comment in this Report.

[102] See Correspondents Report – Italy (2005) 8 *YIHL*, 453-455.

The judge at first instance denied that Elvis committed any crime because the enrolment did not took place as there were only contacts with Ben Ammar, but Elvis had not yet joined the Syrian IS fighters. It also affirmed that an attempt to commit such an offence (Article 56 of the Italian Criminal Code) is not admissible for such a crime.

The Court of Cassation reversed that reasoning. It affirmed that the crime of enrolment was committed and that as a matter of principle the attempt to commit such offence is admissible.

The motivation is based on an interpretation of Article 270 quater of the Criminal Code in line with the 2005 Warsaw *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* of the Council of Europe,[103] due to the fact that the criminal provision was introduced in Italy following its signature and in view of its ratification.

According to the Convention, it seems that the criminalization is anticipated, so an agreement between the enroller and the enrollee is enough for the configuration of the enrolment. However, in the view of the Court, the term 'enrolment' is not appropriate because it is referable only to a regular army and it has to be interpreted instead as an 'engagement' ('ingaggio' in Italian). Article 270 quarter, as interpreted correctly by the Court, refers to any case of enrolment aimed at contributing to the enlargement of the fighting capacities of an armed group, such as the IS fighters.[104]

This is a landmark decision for at least two reasons. First, it clarifies in a sound way the meaning of newly introduced criminal norms which have not been interpreted in this way in the previous case law. Second, such an interpretation is apt to put the Italian criminal provisions in line with the new kinds of armed conflicts that are currently ongoing.

The second decision in comment is related to the crime of apology through the web. In this case the defendant, HEM, published a booklet (entitled 'Lo Stato islamico: una realtà che ti vorrebbe comunicare'[105]) on the internet calling to fight for the jihad and emphasizing how important it is on religious grounds.[106]

The Court of Cassation pointed out at least three issues. First, it affirmed that to amount to an apology, it is necessary that it is not a mere admonishment, but it is something apt to have a concrete effect. In this case, it was because the pamphlet was written in Italian and its motivation, based on religious grounds, was apt to effectively convince people.

Another point is that even if Article 266 of the Italian Criminal Code states that a crime has to be considered as public when committed through the press, the publication on the internet can be equated to the press, as it pursues the same scope to communicate something to a wide public.

The most important assertion is that there is the criminal jurisdiction of Italy for such a crime at anytime, even if only part of the conduct is committed on Italian territory or the effect is produced in Italy. The judges pointed out that whilst, often, international terrorism is a transnational crime, it is enough that only a part has a relation with the Italian territory to be punishable under Italian law. This has a far-reaching effect, especially if one considers the implications that such affirmation can have for the abetment of such offending.

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[103] *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism*, CETS No 198 (16 May 2005). Italy has not yet ratified the Convention.

[104] See <http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/40699_10_15.pdf>, p. 16.

[105] The translation is 'The Islamic State: a reality that would like to communicate with you'.

[106] See <http://renatodisa.com/2015/12/09/corte-di-cassazione-sezione-i-sentenza-1-dicembre-2015-n-47489-ai-fini-dellaffermazione-della-giurisdizione-italiana-e-sufficiente-che-nel-territorio-dello-stato-si-sia-verificato-levento-o-s/>.

This decision is in line with the trend of the Italian courts to claim to have jurisdiction for transnational crimes when only the effect has been produced in Italy, as for instance the case of migrant smuggling and human trafficking.

VALERIA EBOLI[107]

Legislation — Italian Participation in International Missions

- Law No 43 of 17 April 2015 'Conversion into Law, with modifications, of the Decree-Law No 7 of 18 February 2015, 'Urgent Measures for the Fight Against Terrorism, Including International Terrorism, as well as Extension of the International Missions of the Armed Forces and Police, Cooperation Initiatives for the Development and Support of Reconstruction Processes, and Participation in Initiatives of International Organizations for the Consolidation of Peace and Stabilization Processes', [108] <http://www.gazzettaufficiale.it/eli/id/2015/04/20/15G00060/sg>.
- Law No 117 of 4 August 2015 'Conversion into Law of the Decree-Law No 99 of 8 July 2015, 'Urgent Measures on the Participation of personnel in the EUNAVFOR MED military operation in the Central-Southern Mediterranean',[109] <http://www.gazzettauffi ciale.it/eli/id/2015/08/6/15G00133/sg>.
- Law No 198 of 11 December 2015 'Conversion into Law, with modifications, of the Decree-Law No 174 of 30 October 2015, 'Extension of Time of the Missions of the Armed and Police Forces, Interventions for Development Cooperation and Support of Reconstruction Processes and Participation to the Initiatives of the International Organizations for the Enhancement of the Peace and Stabilization Processes, as well as provisions on the renewal of the Committees of Italians Abroad', [110] <http://www.gazzettaufficiale.it/eli/id/2015/12/16/15G00212/sg>.

During 2015, Italy adopted three Decrees-Law to regulate mission-related normative profiles and to provide a legal framework on specific aspects such as the economic and social security treatment of the military personnel, as well as accountability and penal discipline. This was done mainly by reference to laws already in force, specifically to the Law No 331

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[108] *Legge 17 aprile 2015, n. 43, Conversione in legge, con modificazioni, del decreto-legge 18 febbraio 2015, n. 7, recante misure urgenti per il contrasto del terrorismo, anche di matrice internazionale, nonché proroga delle missioni internazionali delle Forze armate e di polizia, iniziative di cooperazione allo sviluppo e sostegno ai processi di ricostruzione e partecipazione alle iniziative delle Organizzazioni internazionali per il consolidamento dei processi di pace e di stabilizzazione*, entered into force on 21 April 2015, published in *Gazzetta Ufficiale* No 91 of 20 April 2015.

[109] *Legge 4 agosto 2015, n. 117, Conversione in legge del decreto-legge 8 luglio 2015, n. 99, recante disposizioni urgenti per la partecipazione di personale militare all'operazione militare dell'Unione europea nel Mediterraneo centromeridionale denominata EUNAVFOR MED*, entered into force on 7 August 2015, published in *Gazzetta Ufficiale* No 181 of 6 August 2015.

[110] *Legge 11 dicembre 2015, n. 198, Conversione in legge, con modificazioni, del decreto-legge 30 ottobre 2015, n.174, recante proroga delle missioni internazionali delle Forze armate e di polizia, iniziative di cooperazione allo sviluppo e sostegno ai processi di ricostruzione e partecipazione alle iniziative delle organizzazioni internazionali per il consolidamento dei processi di pace e di stabilizzazione*, entered into force on 17 December 2015, published in *Gazzetta Ufficiale* No 292 of 16 December 2015.

of 14 November 2000 which provides for the deployment of the Italian armed forces abroad for purposes of peace-keeping and stabilization, in accordance with international law.

It should be noted that the Italian Constitution, aside from norms on conduct during a state of war, does not include specific provisions on the deployment of military missions abroad. However, recently the Chamber of Deputies approved a bill on international missions.[111] The bill, currently under discussion in the Senate, establishes as a principle that its provisions apply specifically outside of a state of war and in line with Article 11 of the Constitution, as well as with general international law, international human rights law, international humanitarian law and international criminal law. In addition, according to the bill, Italian participation in international missions should be approved by a resolution by the Council of Ministers following notification to the President of the Republic and – if necessary – to the Supreme Defence Council. This formulation seems to imply that authorization would no longer take place in a legislative form.

Turning to the Decrees No 7 and No 174 of 2015, they cover respectively the time period from 1 January 2015 to 30 September 2015, and from 1 October 2015 to 31 December 2015.

The two Decrees contain substantially identical norms on a specific set of missions. However, Decree-Law No 7 of February 2015 also includes specific provisions on countering international terrorism.[112] The Decree, issued only a few months before the terrorist attacks in France (November 2015), enforces UN Security Council Resolution No 2718 adopted on 24 September 2014.

Common elements between the two decrees are the norms on expenditure authorizations for the Italian participation in international missions, here divided into geographic groups: Europe (Georgia, the Balkans, Bosnia-Herzegovina, Albania, Kosovo, Cyprus and the Mediterranean); Asia (Afghanistan, Qatar, UAE, Bahrain, Lebanon); Africa (Libya, Mali, the Horn of Africa, the Central African Republic, the Indian Ocean and Somalia).

Another similarity is found in the provisions on cooperation and development initiatives. These aim to improve the living conditions of the general population and refugees, as well as support civil reconstruction, in Afghanistan, Ethiopia, the Central African Republic, Iraq, Libya, Mali, Niger, Myanmar, Pakistan, Palestine, Syria, Somalia, Sudan, South Sudan, Yemen, Ukraine, Nepal and Haiti; and to contribute to initiatives in the fields of migration and development.

From a financial point of view, in 2015 Italy allocated €1,122,527,160 for financing international military missions[113] and €106,500,000 to fund initiatives of development cooperation.[114]

One of the novel aspects of the two 2015 Decrees is the expenditure authorization for the participation of military personnel in the new NATO mission in Afghanistan (Resolute Support Mission) and in the international coalition's efforts to counter the terrorist threat posed by IS.[115]

In contrast with the provisions adopted in 2014, the participation of personnel in the NATO anti-piracy mission 'Ocean Shield' has been discontinued; the Decrees also abrogated the previously existing option for the Ministry of Defence to enter into agreements with

[111] Bill No AC 45. For the related debate, see <http://www.camera.it/leg17/126?tab=6&leg=17&idDocumento=45&sede=&tipo=>.

[112] See the comment in this Report.

[113] The first Decree authorized the expenditure of €806,926,998, while the second Decree €301,170,078.

[114] The first Decree authorized the expenditure of €68,000,000, while the second Decree €38,500,000.

[115] Resolute Support Mission was launched on 1 January 2015 following the completion of the mission of the International Security Assistance Force. Its purpose is providing assistance in training the Afghan National Security Force. The Operation involves NATO allies and 14 partner nations.

private Italian naval companies to safeguard vessels flying the Italian flag journeying on international waters in areas with a high-risk of piracy.

With regard to the EU Naval Force Mediterranean Mission ('EUNAVFOR MED') mission, the Decree-Law No 174 of October 2015 extended Italian participation in the mission. The Decree-Law No 99 of 8 July 2015 had previously authorized a €26,000,000 expenditure for the participation of 1,020 military personnel as well as naval materiel and aircraft for the time period between 27 June 2015 and 30 September 2015. It should be recalled that the Operation EUNAVFOR MED was established by Decision 2015/778 of the EU Foreign Affairs Council on 18 May 2015 in order to identify, track and disarm the vessels used (or suspected to be used) by human traffickers in the Mediterranean Sea.

One last noteworthy element of Decree Law No 174/2015 is that, upon its conversion into law, the President of the Council of Ministers has been afforded the option to adopt specific intelligence measures, in cooperation with the special forces of the Defence Forces, during situations of crisis or emergency on foreign soil that affect national security or the safety of Italian citizens abroad. This option may only be exerted following consultation with the Parliament's Committee for the Security of the Republic.

A further provision is that Armed Forces personnel deployed in such circumstances may enjoy the functional warranties of secret service agents, ie impunity for crimes committed as part of duty and the faculty to operate under false identity.

ANDREA CRESCENZI[116]

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

- UNCLOS, Dispute concerning the Enrica Lexie Incident, The Italian Republic V. The Republic of India, Notification under Article 287and Annex VII, Article 1 of UNCLOS and Statement of Claim and Grounds on which it is based, 26 June 2015 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/Request/Notification_of_the_Italian_Republic_r.pdf>
- ITLOS, The Enrica Lexie Incident, The Italian Republic V. The Republic of India, Request of the Italian Republic for the Prescription of Provisional Measures under Article 290, paragraph 5, of the United Nations Convention on the Law of the Sea, 21 July 2015 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/Request/Request_of_the_Italian_Republic_r.pdf>

On 26 June 2015, Italy sued India[117] before the International Tribunal on the Law of the Sea, under Article 287and Annex VII, Article 1 of the United Nations *Convention on the Law*

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[117] See Correspondents Report – Italy (2014) 17 *YHIL*, 364-365. In brief, the Dispute between Italy and India begun on 15 February 2012. In that day, the Italian Flagged MV Enrica Lexie reported a piracy attack, while was sailing, in transit along the Indian coast and outside the Indian territorial waters, from the port of Galle in Sri Lanka, to Djibouti, an IMO-designated high-risk area in international waters. A Vessel Protection Detachment (VPD) consisting of six marines from the Italian Navy had been deployed onboard MV Enrica Lexie, in accordance with Italian Law No. 130 (2011). The same day criminal investigations started in India for the alleged killing of two fishermen on board the Indian Ship St. Anthony. Once the Enrica Lexie entered the Indian Port of Kochi, having answered a request for cooperation by Indian authorities, two Italian marines,

of the Sea ('UNCLOS').[118] The notification, and Statement of Claim and Grounds on which it is based, were then followed by a request on 21 July 2015 by the Italian Republic for the prescription of provisional measures under Article 290, paragraph 5, of UNCLOS.[119]

Italy contests the legality, under UNCLOS, of India's exercise of criminal jurisdiction over the Italian Marines. The dispute focuses on Parts II, V, and VII of UNCLOS regarding the exercise of criminal jurisdiction over foreign-flagged vessels in the circumstances in issue, including as regards the immunity of foreign State officials, and the duty of States under the Convention to cooperate in the repression of piracy.[120]

The Italian action is based on UNCLOS Part XV, which establishes a regime for the settlement of disputes concerning the interpretation and application of the Convention. Italy and India are both Parties to UNCLOS, having ratified the Convention on 13 January 1995 and 29 June 1995 respectively. According to Article 279, the States Parties have to peacefully solve any dispute in accordance with the UN Charter. Furthermore Article 283(1) requires that when a dispute arises between States Parties, they should proceed expeditiously to negotiation or other peaceful means. Where no settlement has been reached, any dispute concerning the interpretation or application of this Convention shall be submitted at the request of any Party to the Court or tribunal having jurisdiction (Article 286 of UNCLOS). By its declaration of 26 February 1997, Italy has chosen, as appropriate means for settling disputes concerning the interpretation or application of the Convention, both the International Tribunal for the Law of the Sea and the International Court of Justice. By application of Article 287(5) of UNCLOS, both the Parties are deemed to have accepted arbitration in accordance with Annex VII of the Convention. Therefore, Italy submitted the dispute with India to an arbitral tribunal constituted in accordance with Annex VII, in conformity with the aforementioned Article 286.

According to Italy, India has breached several international obligations. Among these, Italy alleges that it has violated Article 27(5) of UNCLOS by interrogating and detaining the Italian Marines and commencing proceedings against them in connection with an incident that occurred beyond India's territorial waters. It alleges that India violated Italy's freedom of navigation enjoyed under Articles 87 and 300 of UNCLOS because the conduct towards MV Enrica Lexie was an abuse of rights. Italy claims that India, by arresting, detaining, and exercising criminal jurisdiction over the Italian Marines (contrary to Article 92 of UNCLOS), violated Italy's right of exclusive jurisdiction to entertain criminal proceedings in connection with the Enrica Lexie incident. Italy points out that the principle of exclusive jurisdiction of the flag State is derived from Articles 27, 56, 94, 97(1) and 97(3) of UNCLOS. According to Article 97(1) the authorities of the flag State and the State of which the Italian Marines are

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employed in the framework of the VPD on board, Massimiliano Latorre and Salvatore Girone, were taken into custody by the Indian Authorities. They are still into their custody.

Italy questions the jurisdiction of the Indian judges, recalling the principle of functional immunity for the officials acting on behalf of the State, such as the military personnel embarked on board in order to solve the State anti-piracy commitments.See Correspondents Report – Italy (2014) 17 *YHIL*, 364-365.

[118] *United Nations Convention on the Law of the Sea,* opened for signature 10 December 1982, 1833 UNTS, (entered into force 16 November 1994); 'Dispute concerning the Enrica Lexie Incident, The Italian Republic v The Republic of India, Notification under Article 287and Annex VII, Article 1 of UNCLOS and Statement of Claim and Grounds on Which it is Based', (26 June 2015), <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/Request/Notification_of_the_Italian_Republic_r.pdf>.

[119] International Tribunal of the Law of the Sea (ITLOS), 'The Enrica Lexie Incident, The Italian Republic v The Republic of India, Request of the Italian Republic for the Prescription of Provisional Measures under Article 290, paragraph 5, of the United Nations Convention on the Law of the Sea', (21 July 2015),<https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/Request/Request_of_the_Italian_Republic_r.pdf>.

[120] Notification, above n 119, [25].

agents and officials, exercise exclusive jurisdiction over matters involving any question concerning their criminal responsibility. Furthermore, Italy states that India violates Article 100 of UNCLOS as it contravenes its duty to cooperate in the repression of piracy.

According to Italy, the Marines are State officials who were at all times exercising official public functions, including as regards the repression of piracy in international waters, pursuant to lawful authority so that India breached and continues to breach the immunity of Italy and of its officials. Furthermore, Italy claims that India acted in a manner incompatible with Articles 56(2) and 89 of UNCLOS by exercising its jurisdiction as a coastal State in the contiguous zone and the exclusive economic zone. Indeed, India, by extending the application of its domestic criminal laws and, consequently, its jurisdiction over an incident occurring in international waters, acted in excess of the limits prescribed in the UNCLOS.

On 21 July 2015, Italy submitted a request for the prescription of provisional measures under Article 290(5) of UNCLOS. Its motivation lies in the fact that 'as of the date of this Request, India has not given any formal response to Italy's Notification'.[121] In the Notification, Italy requested that India adopt and implement provisional measures within two weeks from the date of the Notification. At the time of writing, approximately a month after the date of the Notification, the Indian Government had not yet implemented any provisional measures.

Italy submits that, as a consequence of India's failure to accede to the measures requested, it would suffer irreversible prejudice or be faced with a very significant risk of such prejudice. The request by Italy was followed by written observations submitted by India on 6 August 2015[122] and an ITLOS Order No 24 on 24 August 2015.[123]

India requested the Tribunal to reject the submissions made by Italy because, in its view, it would delay the final trial of the two accused persons; furthermore, Italy is not ready to impose measures of control and restriction of movement on them required in case of persons accused of murder; and after the arbitral tribunal decision, the two accused could not be obliged to go back to India.

By Order No 24, ITLOS made the following order:

> [P]ending a decision by the Annex VII arbitral tribunal, the following provisional measure under article 290, paragraph 5, of the Convention: Italy and India shall both suspend all court proceedings and shall refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render.[124]

The proceeding is still ongoing, as well as the dispute between Italy and India.

VALERIA EBOLI[125]

Treaty Action —Protecting Nuclear Material and Installations from Terrorist Diversion

[121] Request, above n 120. .
[122] See <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/Response/VOL_1.pdf>.
[123] See <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/C24_Order_24.08.2015_orig_Eng.pdf>.
[124] Ibid [141].
[125] Valeria Eboli (PhD in International and European Union Law, University 'Sapienza' of Rome) is a consultant of the Institute of International Legal Studies (National Research Council, Rome). The views and opinions expressed are those of the author only.

☛ Law No 58 of 28 April 2015, 'Ratification and Execution of Amendment to the Convention on the Physical Protection of Nuclear Material of 3 March 1980, adopted in Vienna on 8 July 2005, and Provisions for the Adaptation of Internal Law' [Legge n. 58, 28 aprile 2015, 'Ratifica ed esecuzione degli Emendamenti alla Convenzione sulla protezione fisica dei materiali nucleari del 3 marzo 1980, adottati a Vienna l'8 luglio 2005, e norme di adeguamento dell'ordinamento interno']. Entered into force on 28 May 2015[126] < http://www.gazzettaufficiale.it/atto/stampa/serie_generale/originario>

Law No 58 is aimed at adapting Italian legislation to the mutated conditions of global security following the 11 September 2011 attacks, in particular by regulating the transport of nuclear material, the general use of such material and the protection of installations from sabotage risks.

The 1979 *Convention on the Physical Protection of Nuclear Material*,[127] in fact, is the unique international legal instrument obliging States Parties to protect nuclear material and nuclear facilities from acts such as theft and sabotage.[128] Its Amendment strengthens treaty provisions to enable a coordinated international response to combating and preventing nuclear terrorism and ensuring global security.[129] Since Italy was the only EU State Party of the Convention not having yet ratified the Amendment, Law No 58 fills a gap of the Italian legal system towards both international and European laws.[130]

Law No 58 contains relevant provisions for the effective implementation of the Amendment. In particular, Article 3, in conformity with the Amendment, introduces additional definitions and to identify the specific responsibilities for every action in matter of protection of nuclear materials and installations. Article 3 distinguishes the 'active physical protection' supplied by the security force, from the 'passive physical protection' deriving from the security systems and procedures arranged at nuclear facilities. The whole active and passive measures of protection constitute the 'plan of physical protection'.

Article 4 identifies the responsible authorities for the treaty implementation. In particular, the Ministry of Foreign Affairs is appointed as the central authority and point of contact requested by Article 5 of the Convention to have responsibility for physical protection of nuclear material and for co-ordinating recovery and response operations in the event of any unauthorized removal, use or alteration of nuclear material or in the event of credible threat of the same. The Ministry of Interior is responsible of the active physical protection of nuclear installations and materials even during their transport, the Minister of Economic Development is in charge of their passive physical protection and the Ministry of Environment is called to carry out State's environmental obligations as well as to formulate technical advices, to ascertain violations and to make regulations. Under Article 5, it is up to the Ministry of Interior to define the 'reference scenarios of physical protection' on grounds of which the plan of physical protection is arranged.

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[126] Published in *Gazzetta Ufficiale* No 109 of 13 May 2015.

[127] *Convention on the Physical Protection of Nuclear Material*, opened for signature 26 October 1979, 1456 UNTS (entered into force 8 February 1987).

[128] For a deeper analysis of the Convention, see Correspondents Report – Italy (2014) 17 YIHL, 54-60.

[129] Amendment to the *Convention on the Physical Protection of Nuclear Material*, adopted on 8 July 2005 (not yet in force).

[130] In line with the Italian legislative practice concerning international treaties, Law No 58 contains the ritual provisions for ratification. Articles 1 and 2 respectively provide for the authorisation for the President of the Republic (Head of State) to ratify the international instrument and its consequent implementing order (the so-called "ordine di esecuzione") stating the date of entry into force of the Law. Article 80 of the Italian Constitution requires the previous authorisation of the Chambers to the Head of State for the ratification of certain kinds of international treaties, among which are those involving changes of legislation.

According with Article 6 of Law No 58, the owner of nuclear installations or the shipper of nuclear materials need of a clearance to passive physical protection released by the Ministry of Economic Development. On the basis of the plan of protection, the Ministry of Interior establishes the level of the active physical protection. Under Article 7, the Ministry of Interior is also entrusted of coordinating action for recovering and securing nuclear materials.

Worthy of mention are the criminal provisions of Law No 58. In particular, Article 8 introduces the crime of attempt on the safety of nuclear installations, which is punishable by four to eight years' imprisonment. The conduct is deemed unlawful when it is directed against nuclear installations, or means for storing or transporting nuclear materials, by posing a risk to the public safety. If the attempt causes a disaster, that aggravating factor can lead to a sentence of five to 20 years' imprisonment.

Further provisions address the violation of rules on clearnances. Article 9 establishes that if the protection conditions foreseen in the permission are interrupted and not restored, the permission is suspended or, in the case of serious and repeated non-observances, revoked. Such illicit administrative conduct is subject to pecuniary penalties as established by Article 10.

It must be noted that the bill provided also for the crime of traffic and abandonment of nuclear materials and the related sanctions, but the provision has been suppressed in the final text because an analogous criminal case was contained in the bill reforming the law on environmental crimes adopted on 22 May 2015.[131]

RACHELE CERA[132]

[131] Law No 68 of 22 May 2015, 'Rules on Crimes Against Environment'. Entered into force on 9 May 2015. <http://www.gazzettaufficiale.it/eli/id/2015/05/28/15G00082/sg>.

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