

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

ITALY¹

Contents

Government Policy — Military Intervention in Libya	1
Cases — Nazi Massacres Reparation Claims.....	5
Treaty Action — Cluster Munitions	7
Legislation — Italian Participation in International Missions	8
Legislation — Piracy	13
Legislation — Institution of the National Memorial Day of Victims of Disasters	16
Legislation — Establishment of the National Ombudsperson for Children and Adolescents, and Other Developments in Italian Legislation on Children's Rights	17
Legislation — Free Circulation and Residence of European Citizens and Return of Irregular Third-County Citizens	22
Cases — Return of Immigrants Illegally Staying in Italy, before and after the El Dridi Case	24
Cases — Denial of International Protection as a Refugee and Recognition of Humanitarian Protection.....	29
Cases — Recognition of the Right of Asylum	32
Cases — Residence Permit for Humanitarian Reasons	33
Cases — Execution of Judgments of the European Court of Human Rights.....	35
Cases — Confirmation of the Decision of the Court of Milan in the Abu Omar Case	37
Treaty Action — Police Transboundary Cooperation	38

Government Policy — Military Intervention in Libya

- Debates and vote of the lower house of the parliament (Camera dei Deputati) on the Military Intervention in Libya, 4 May 2011 [Dibattiti e voto della Camera dei Deputati sull'intervento militare in Libia, *Atti Parlamentari*, VIII, *Camera Dei Deputati* — XVI Legislatura — Seduta del 4 Maggio 2011 — Resoconto Sommario e Stenografico n. 471]
<http://www.camera.it/Camera/view/doc_viewer_full?url=http%3A//www.camera.it/_dati/leg16/lavori/stenografici/sed471/SINTERO.pdf&back_to=http%3A//www.camera.it/410%3FidSeduta%3D471>
- Communication of 22 June 2011 from the Minister for Foreign Affairs to the Senate about the European Council of 23–24 June 2011 [Comunicazioni del ministro degli affari esteri Franco Frattini sul Consiglio europeo del 23–24 giugno 2011, *Atti Parlamentari*, VIII, Senato della Repubblica, 17^a seduta 22 giugno 2011, Resoconto Stenografico n. 17, Commissioni riunite e congiunte 3^a (Affari esteri, emigrazione) e 14^a (Politiche dell'Unione europea) del Senato della Repubblica e III (Affari esteri e comunitari) e XIV (Politiche dell'Unione europea) della Camera dei deputati]
<<http://www.senato.it/service/PDF/PDFServer/DF/252014.pdf> >

On 3–4 May 2011, the lower house of the Italian parliament (Camera dei Deputati), including the Minister for Foreign Affairs, Mr. Franco Frattini, discussed the intervention in Libya.

The political debate on the intervention in Libya was particularly complex in Italy due to the long standing relationship between the two States.² Furthermore, it was directly influenced by the desire to comply with the UN Security Council resolutions on the subject.

¹This Report was prepared by Rachele Cera, Valentina Della Fina, Valeria Eboli, Rosita Forastiero, Ornella Ferrajolo and Silvana Moscatelli on behalf of the Institute for International Legal Studies of the National Research Council (CNR), Rome, Italy.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

As to the long standing relationship between the two States, Italy and Libya were Parties to a bilateral friendship agreement concluded in Benghazi on 30 August 2008. Under this agreement, Italy paid US\$5 billion to compensate Libya for prior colonial rule. In return, Libya engaged itself to stop the flood of African refugees trying to reach Italian territory by boat from the Libyan coast, and to grant favourable terms to Italian companies seeking to establish trade links. The Treaty also included a non-aggression clause which guaranteed that Italy would not allow the use of its territory for any 'hostile act' against Libya.³ After the beginning of hostilities in Libya, Italy suspended the Treaty.⁴

At the international level, the UN Security Council addressed the situation in Libya acting under Chapter VII of the UN Charter, first by the unanimous adoption of UNSC Resolution 1970 on 26 February 2011 and then by UNSC Resolution 1973 on 17 March 2011.⁵ Each resolution stressed the responsibility of the Libyan authorities to protect the Libyan population, condemning the gross and systematic violation of human rights. At the same time, while reaffirming that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians, UNSC Resolution 1973 demanded the immediate establishment of a cease-fire and a complete end to violence and all attacks against and abuse of civilians. Moreover, the resolution stressed the need to intensify efforts to find a solution to the crisis and requested Libyan authorities to comply with their obligations under international law (including international humanitarian law, human rights and refugee law) and take all measures to protect civilians and meet their basic needs, and to ensure the rapid and unimpeded passage of humanitarian assistance. Furthermore, it imposed an arms embargo on the country.

As regards the international community, UNSC Resolution 1973 'authorized Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements ... to take all necessary measures to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya' and to take all necessary measures to enforce compliance with the ban on flights imposed by the same resolution to protect civilians and to provide humanitarian assistance.

² For a comprehensive and detailed overview of the relationship between Italy and Libya based on an analysis of the recently disclosed documents published by the Ministry of Foreign Affairs, see A. Varvelli, *L'Italia e l'ascesa di Gheddafi. La cacciata degli italiani, le armi e il petrolio (1969-1974)* (Roma, Dalai editore, 2009). On the topic of the international intervention in Libya, see U. Villani, 'Aspetti problematici dell'intervento militare nella crisi libica' <<http://www.sidi-isil.org/wp-content/uploads/2010/02/Ugo-Villani-Aspetti-problematici-dell'intervento-militare-nella-crisi-libica.pdf>>.

³ For a comprehensive comment on the Treaty and its nature as a partnership treaty see N. Ronzitti, 'Il trattato Italia-Libia di amicizia, partenariato e cooperazione' <www.iai.it/pdf/Oss_Transatlantico/108.pdf>.

⁴ See <http://articles.cnn.com/2011-02-28/world/libya.italy_1_moammar-gadhafi-friendship-treaty-italian-ministry?_s=PM:WORLD>. On 15 December 2011, the Parties agreed to reactivate the Treaty. See 'Libya and Italy Revive 'Friendship Deal'', *BBC News*, 15 December 2011 <<http://www.bbc.co.uk/news/world-africa-16205827>>.

⁵ See UNSC Res. 1970 (2011), UN Doc. S/RES/1970, 26 February 2011; UNSC Res. 1973 (2011), UN Doc. S/RES/1973, 17 March 2011, adopted by a vote of 10 in favour, none against and five abstentions (Brazil, China, Germany, India and Russian Federation). See UN Department of Public Information, 'Security Council Approves "No-Fly Zone" over Libya, Authorizing "All Necessary Measures" to Protect Civilians, by Vote of 10 In Favour with 5 Abstentions' (17 March 2011) <<http://www.un.org/News/Press/docs/2011/sc10200.doc.htm>>. While excluding the deployment of a foreign occupation force on any part of Libyan territory, UNSC Res. 1973 (2011) stressed the need to intensify efforts to find a solution to the crisis which also responds to the legitimate demands of the Libyan people. For a comment, see P. Picone, 'Considerazioni sulla natura della risoluzione del Consiglio di sicurezza a favore di un intervento "umanitario" in Libia', *5 Diritti umani e diritto internazionale* (2011), pp. 213-231.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011

CORRESPONDENTS' REPORTS

Following the aforementioned Resolution, on 22 March 2011, NATO launched Operation Unified Protector (OUP)⁶ to enforce the arms embargo against the country through the presence of ships in the Mediterranean and to enforce the UN-mandated no-fly zone over Libya. On 31 March 2011, NATO took sole command and control of the international military effort for Libya.

As regards Italy, on 24 March 2011, the parliament deliberated to act in compliance with relevant UNSC Resolutions and to participate in the NATO Operation in Libya.⁷

It was against this background that the debate in the lower house of the Italian parliament took place on 4 May 2011.

First of all, the Minister for Foreign Affairs stressed that Italy supported the wish for freedom and democracy for millions of young people of North African countries, in order to prevent any extremist and radical trends, to ameliorate the local conditions and support the economic development of the area. He also pointed out the need for a strategy aimed at containing migration, in line with the UNSC Resolutions and within the framework of NATO, with the aim of creating conditions for the cessation of hostilities and to favour the transition of Libya to a democratic regime, through a process of national reconciliation.

During the discussion, the parliamentarians also recalled the need to comply with UNSC Resolution 1973 and with previous deliberations of parliament on 24 March 2011, and to respect Article 11 of the *Italian Constitution*.⁸ Furthermore, members of the parliament stressed the strategic importance of Italian participation to protect human rights in Libya. During the session a motion was proposed to vote on the fundamental aspects of Italian involvement in the mission in Libya. It was suggested that the intervention should have been carried out only through aerial forces, without military troops on the territory and a certain deadline for the end of the military intervention should have been established. The lower house approved with the majority of votes supporting this motion.⁹

The Minister for Foreign Affairs' communication dated 22 June 2011 concerned the meeting of the European Council on 23–24 June 2011.¹⁰ The Minister spoke about the situation in Libya and Syria. He stressed the need for a political answer to the Libyan crisis in preference to the military solution and specified that the political means should not maintain Colonel Gaddafi as the Libyan Head of State. He further pointed out the necessity of obtaining more information from NATO

⁶ OUP concluded on 31 October 2011. See NATO, *NATO and Libya* (2012) <http://www.nato.int/cps/en/natolive/topics_71652.htm?>.

⁷ See <[⁸ Article 11 states:](http://www.camera.it/412?idSeduta=452&resoconto=steno grafico&indice=alfabetico&tit=00020&fase=#sed0452.steno grafico.tit00020>.</p></div><div data-bbox=)

Italy rejects war as an instrument of aggression against the freedoms of others peoples and as a means for settling international controversies; it agrees, on conditions of equality with other states, to the limitations of sovereignty necessary for an order that ensures peace and justice among Nations; it promotes and encourages international organizations having such ends.

For a comment on the Italian intervention in Libya, see N. Ronzitti, 'Quale legittimità per le operazioni NATO e italiane in Libia?' (Documenti IAI 11/12) <<http://www.iai.it/pdf/DocIAI/iai1112.pdf>>. The issue of respecting Article 11 of the *Italian Constitution* was also highlighted by the Head of State on 20 June 2011. For the declaration, see <<http://www.ilsole24ore.com/art/notizie/2011-06-20/napolitano-libia-nostro-impegno-165051.shtml?uuid=AaqwUehD>>.

⁹ See Motion No. 1-00636 (2011)

<http://banchedati.camera.it/sindacatoispettivo_16/showXhtml.asp?highLight=0&idAtto=38542&stile=6>.

¹⁰ Among other things, the European Council discussed migration, European asylum policy and adopted a Declaration on the Southern Neighborhood. See European Council, 'Conclusions' (EUCO 23/11, CO EUR 14, CONC 4, 24 June 2011) <<http://register.consilium.europa.eu/pdf/en/11/st00/st00023.en11.pdf>>.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

about the military operation in Libya. In this regard, the Minister urged for a ceasefire and referred to an accident occurring a few days earlier where civilians had been killed by mistake in a strike in Tripoli.¹¹

Furthermore, the Minister for Foreign Affairs made reference to the Cairo Summit of 18 June 2011, which involved the meeting of representatives from the main international organizations involved in the crisis management (Arab League, African Union, EU and UN). During the Summit, the Minister had endorsed the EU's call for a ceasefire on the whole Libyan territory. Indeed, the Minister argued that political negotiation was insufficient and what was also required was a complete cessation of military actions in order to allow the creation of humanitarian corridors.¹² He pointed out that there were no humanitarian cordons (referring to the situation at 22 June 2011) and that an immediate 'humanitarian cessation' ('cessazione umanitaria') or 'humanitarian suspension' ('sospensione umanitaria') of the hostilities was necessary to create them. According to the Minister, the immediate humanitarian suspension of military operations was the sole means to ensure effective humanitarian protection for civilians. Besides this, humanitarian suspension of hostilities was necessary both to avoid the division of the country into two parts and to enable access to isolated areas — such as the province of Misurata, some towns in the West and Tripoli itself — where the population lived under severe conditions.

On political grounds, the Minister stressed the need to support the Transitional Libyan National Council (TLNC). On 17 June 2011, the Italian government and the TLNC signed a Memorandum of Understanding concerning the collaboration to fight human trafficking, which provided for common actions for prevention and assistance.¹³ The Memorandum granted international organizations, in particular, UNHCR, the right to access the location of refugees and other people requiring aid. The government was prepared to support the TLNC largely because it was willing to provide access to the areas it controlled for the purposes of humanitarian assistance. The Minister questioned the fact that the Gaddafi regime had already received some Libyan funds for humanitarian exigencies, which been previously frozen, while the TLNC had not received any financial support because it had not yet been internationally recognized as the legitimate government. Finally, the Minister announced that the International Criminal Court (ICC) was going to issue an arrest warrant against Gaddafi, his son and the chief of intelligence.

In fact, following the UNSC decision of 15 February 2011, which referred the situation in Libya to the ICC Prosecutor, the latter decided to open an investigation. On 16 May 2011, the Prosecutor requested the Pre-Trial Chamber to issue arrest warrants for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi for crimes against humanity (murder and persecution) allegedly committed in Libya from 15 February 2011 until at least 28 February 2011, through the governmental apparatus and security forces.¹⁴ On 27 June 2011, Pre-Trial Chamber I acceded to the request and issued the arrest warrants.¹⁵ In the view of the ICC, their arrests appeared necessary in

¹¹ 'NATO Acknowledges Strike in Tripoli May Have Killed Civilians', *CNN*, 19 June 2011 <http://articles.cnn.com/2011-06-19/world/libya.war_1_nato-strike-civilian-casualties-gadhafi?_s=PM:WORLD>.

¹² Italy suggested the solution of the humanitarian suspension of the hostilities during the Contact Group Summit of Abu Dhabi. See International Contact Group on Libya, 'Co-Chairs' Statement' (9 June 2011) <<https://appablog.wordpress.com/2011/06/10/third-meeting-of-the-international-contact-group-on-libya-abu-dhabi-thursday-9-june-2011-co-chairs%E2%80%99-statement>>.

¹³ 'Memorandum of Understanding Between Italy and Libyan NTC' on *Migrants at Sea* (20 June 2011) <<http://migrantsatsea.wordpress.com/2011/06/20/memorandum-of-understanding-between-italy-and-libyan-nct>>.

¹⁴ The UNSC stressed that those responsible for or complicit in attacks targeting the civilian population, including aerial and naval attacks, must be held to account.

¹⁵ See ICC, 'Case Information Sheet' (27 June 2011) <<http://www.icc-cpi.int/iccdocs/PIDS/publications/GaddafiSaifAlIslamSenussiEng.pdf>>. Muammar Gaddafi died on 20 October 2011.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

order to ensure their appearances before the Court and to prevent them from using their powers to commit other crimes or to obstruct the investigations.

In conclusion, the political debate in the Italian parliament and the Communication of the Minister for Foreign Affairs demonstrate a concern to uphold the human rights of the Libyan people and more generally to promote democratic rule in Libya.

VALERIA EBOLI¹⁶

Cases — Nazi Massacres Reparation Claims

- Military Tribunal of Rome, Section, Judgment No. 8 of 25 May 2011 (Unpublished)
- Military Tribunal of Verona, Section, Judgment No. 43 of 6 July 2011 <http://www.penalecontemporaneo.it/area/3-/16-/-/940-ergastolo_per_gli_eccidi_nazisti_commessi_nel_1944_lungo_l_appennino_tosco_emiliano_esclusi_stato_di_necessit_e_adempimento_del_dovere/#3>

In 2011, two judgments were handed down by Italian courts on Nazi massacres occurring during the later stages of World War II.¹⁷ In Judgment No. 8 of 25 May 2011, the Military Tribunal of Rome addressed the massacre of Padule del Fucecchio on 23 August 1944 where 184 civilians were killed, while in Judgment No. 43 of 6 July 2011, the Military Tribunal of Verona ruled on the massacres at Monchio, Susano and Costrignano on 18 March 1944, where about 140 inhabitants were murdered.

As members of the German Regular Armed Forces were involved in the massacres, the accused of both trials were convicted of ‘concurrency in violence with murder against enemy private citizens’, punishable under Article 185 of the *Italian Military Criminal Code of War*.¹⁸ This article was deemed applicable in the cases inasmuch as all the constitutive elements of the crime existed, such as the military status of the accused,¹⁹ the victims’ ignorance of military operations²⁰ and the war purpose of the act.²¹

¹⁶ Valeria Eboli (PhD International and European Union Law, University ‘Sapienza’ of Rome) is Consultant at the Institute for International Legal Studies of the National Research Council (CNR), Rome and Adjunct Professor of International Law at the University of Pisa — Italian Naval Academy. The opinions expressed are solely those of the author.

¹⁷ These proceedings were instituted after the discovery of the infamous ‘armoire of shame’, a wooden cabinet discovered in 1994 in a large storage room in Cesi-Gaddi Palace, Rome, which, at the time, housed the chancellery of the military attorney’s office. The cabinet contained an archive of 695 files documenting war crimes perpetrated on Italian soil under fascist rule and during Nazi occupation after the armistice between Italy and Allied armed forces on 8 September 1943.

¹⁸ Article 185 of *Italian Military Criminal Code of War* establishes:

Any military person who, unnecessarily or in any case without any justification, does violence, for reasons associated with the war, against enemy persons who are not participating in military operations, shall be punished with military confinement for up to five years.

If the violence is a murder, an attempted murder or a manslaughter or a serious or very serious wound, the punishments provided for in the penal Code shall be applicable. However, the temporary sentence of detention can be increased.

The same punishments shall be applicable to the inhabitants of the enemy territory occupied by the Italian armed forces, who do violence against any member of the foregoing armed forces.

¹⁹ Even if the accused were foreigners, they were subject to Article 185 by virtue of Article 13 of the *Italian Military Criminal Code of War* which extends the dispositions on war crimes to military personnel belonging to enemy armed forces.

²⁰ The Tribunals rejected the argument that the victims could be defined as ‘belligerents’ under the 1907 *Hague Convention (IV) Respecting the Laws and Customs of War on Land* since they were unarmed inhabitants, mostly

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

The Tribunals premised their reasoning on the argument that the slaughters were thoroughly planned as a punitive action against civilians groundlessly suspected of supporting the local militia, in evident contravention of international and domestic law. Moreover, the accused were not able to avail themselves of the defences implicit in Article 185. The Tribunals found that the doctrine of 'military necessity' was inapplicable to the facts as it requires serious and imminent danger. The massacres, by contrast, were calmly planned and the violence was perpetrated against unarmed inhabitants who were not involved in partisan war. In the same way, there was no 'justified reason' for considering the massacres as retaliations because they did not respond to any earlier illegal act by another State and, anyway, it was difficult to qualify the partisans as an Italian body. The Tribunal of Verona did not apply Article 50 of the 1907 *Hague Convention (IV) Respecting the Laws and Customs of War on Land* on the infliction of a *peine collective* upon the population on account of the acts of individuals since the victims could not be regarded as 'jointly and severally responsible' for the partisans' acts.

Furthermore, the Tribunals rejected the defences raised by the accused. In particular, the Courts denied the plea of obedience to superior orders because the performed acts were manifestly unlawful without the need to prove the defendants' awareness. Article 8 of the *Charter of the Nuremberg International Military Tribunal* laid down the principle of absolute liability for orders to commit war crimes through the presumption of manifest unlawfulness of such orders.²² The defence of duress and necessity was also excluded because even though it was cited in many proceedings against Nazi war criminals, there was no evidence of the lynching of German soldiers disobeying orders.

In relation to the criminal acts, the Tribunals also found aggravating circumstances, including military rank of the accused (Article 47(2) of the *Italian Military Criminal Code of Peace*), premeditation (Article 577(3) of the *Italian Criminal Code*) and the abject motives and the cruelty inflicted on victims (Article 61 of the *Italian Criminal Code*).

Furthermore, the Tribunals rejected the arguments of mitigating circumstances related to the young age of the accused at that time of the acts, their present old age or the time elapsed since the events, because of the ferocity of the acts and the absence of repentance of the accused.

In consideration of all these elements, the defendants were sentenced to life imprisonment and ordered to pay reparation to the victims as well as to the entities that had instituted a civil action as representatives of the interests of local communities. The Federal Republic of Germany was declared liable for civil damages of the Nazi massacres and it was called to participate in the payment of the reparation. However, this disposition had to take account of Law No. 98 of 23 June 2010, which suspended the execution measures against another State if that State initiates action before the International Court of Justice (ICJ) in order to verify its immunity from Italian jurisdiction.²³ At the time of the Tribunals' judgments, a claim by the Federal Republic of Germany against Italy for the failure to respect its jurisdictional immunity was pending before the ICJ. On 3 February 2012, the ICJ issued a judgment in favour of Germany obliging Italy to ensure that the

women, old people and children. The Tribunal of Verona also rejected the argument that the victims were not 'enemies', given that the Italian Social Republic had allied with Germany. In the view of the Tribunal, the Italian Social Republic (born on 23 September 1943 and led by Mussolini) was a kind of puppet State without international personality and on this basis, the victims were citizens of the Kingdom of Italy which declared war on Germany on 13 October 1944.

²¹ The massacres were planned with the aim of stopping local militias threatening the line of defence (Gotic Line) whose purpose was to prevent the Allied Armies arriving from southern Italy.

²² On this point, the Tribunals referred to the Judgment of the Court of Cassation No. 211771 of 16 November 1988 on the *Priebke* Case. See 1 *YIHL* (1998) pp. 344–353.

²³ See 13 *YIHL* (2010) pp. 560–564.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

decisions of its courts infringing Germany's immunity 'cease to have effect'. Thus, the Italian Appeals Courts are required to dismiss the cases for lack of jurisdiction. Similarly, the execution measures, suspended by Law No. 98/2010, will have no effect.²⁴

RACHELE CERA²⁵

Treaty Action — Cluster Munitions

- Ratification of the *Convention on Cluster Munitions*, opened for signature on 3 December 2008, 48 ILM 357 (entered into force 1 August 2010)
- Law No. 95 of 14 June 2011, entered into force on 5 July 2011²⁶
<http://www.parlamento.it/leg/ldl_new/v3/sldlelenco062011ordcron.htm>

By Law No. 95/2011, Italy ratified the *Convention on Cluster Munitions* ('CCM'), which entered into force on 1 August 2010. While Italy actively participated in the Oslo process which led to the adoption of the Convention, the ratification has taken time as a result of some financial issues related to the implementation of the Convention.²⁷

In line with the Italian legislative practice concerning international treaties, Law No. 95/2011 contained the usual provisions for ratification. Articles 1–2 and 9 respectively provided the authorisation for the President of the Republic to ratify the international instrument,²⁸ its consequent implementing order (the so-called 'ordine di esecuzione') and the entry into force of the Law the day after its publication in the Italian Official Gazette.

As a stockpiler and former producer of cluster munitions, by ratifying the CCM Italy is legally bound to halt immediately all use, production and trade of the weapon and to destroy its stocks 'as soon as possible but no later than eight years after the entry into force of the Convention' (Article 3(2)). In particular, Article 3 of Law No. 95/2011 entrusted the Ministry of Defence with the destruction of cluster munitions, limiting to one thousand units the number of munitions to be retained for training purposes, in conformity with Article 3(6) of the CCM. Such stock could be renovated through the transferring of cluster munitions from another State Party, as permitted by Article 3(7) of the CCM. With regard to the duration of storage and stockpile destruction activities,²⁹ it must be noted that Article 9 of Law No. 95/2011, concerning the coverage of expenses, provided for covering such activities up to 2015, without foreseeing other assignment in case of delay.

Law No. 95/2011 implemented the CCM humanitarian principles by amending two other laws. Article 5 of Law No. 95/2011 extended the utilization of the Humanitarian Demining Fund

²⁴ M. L. Padelletti, 'L'esecuzione della sentenza della Corte internazionale di giustizia sulle immunità dalla giurisdizione nel caso Germania c. Italia: una strada in salita?', 2 *Rivista di diritto internazionale* (2012) pp. 444-449.

²⁵ Rachele Cera is Researcher at the Institute for International Legal Studies of the National Research Council (CNR), Rome.

²⁶ Published in *Gazzetta Ufficiale* No. 153 of 4 July 2011.

²⁷ See Chamber of Deputies, '(AC 4193) Ratifica ed esecuzione della Convenzione di Oslo sulla messa al bando delle munizioni a grappolo, nonché norme di adeguamento dell'ordinamento interno. Verifica delle quantificazioni', (XVI Legislature, Documentation Dossier) <<http://documenti.camera.it/Leg16/dossier/Testi/NV4193.htm>>.

²⁸ Article 80 of the *Italian Constitution* requires the Head of State to receive prior authorisation of the houses of the parliament in order to ratify certain kinds of international treaties, among which are those involving financial engagement.

²⁹ Article 3 of the CCM requires States Parties to separate cluster munitions from munitions retained for operational use and destroy them within eight years after the treaty has entered into force. If this deadline is not met, in certain situations a Party can request a maximum of two extensions of up to four years each.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

instituted by Law No. 58/2001 to cluster munitions clearance and victim assistance.³⁰ Article 6 amended Law No. 49/1987 on development cooperation by including the assistance of cluster munitions victims in cooperation programmes with developing Countries.³¹

Most notably, Law No. 95/2011 created criminal offences relating to cluster munitions and explosive bomblets and established penal sanctions for their violations as well as fines. Article 7(1) banned all use, acquisition, promotion, storage, possession or transfer, directly or indirectly, of cluster bombs or sub munitions. Furthermore, it introduced the offence of assisting, encouraging, even financially, or inducing another person to commit any of those acts. Such offences are punishable by imprisonment from 3–12 years and by a fine ranging from EUR 258,228 – EUR 516,456. The Law allows for mitigating circumstances in Article 7(2), which reduce up to half the foreseen sanctions if the offence is considered particularly slight ('di particolare tenuità'). However, concern has been raised in relation to the provisions on mitigating circumstances as they appear to be indefinite and leave too wide a discretion to judges, especially as it will be difficult and controversial to qualify the effects of a lethal weapon such as cluster munitions as 'slight'.³²

Some argued, moreover, that Law No. 95/2011 did not explicitly prohibit the financing of cluster munitions producers. This criticism was expressed in a report released by the Cluster Munition Coalition, according to which some of the financial institutions investing in cluster bomb producers were Italian.³³ It is to be recalled that on 26 April 2010, a bill was presented to the Senate with the aim of introducing measures to prohibit the financing of producers of antipersonnel mines, munitions and sub munitions.³⁴

As a NATO State Member, another consequence for Italy arising from the Convention concerns its participation in the Organization's operations. Even though Article 21(3) of the CCM permits military cooperation and joint operations with non-States Parties, participation in such operations is, however, governed by a number of conditions set out in paragraph 4 of the same Article.³⁵ To date, only 16 out of 28 NATO allies are Parties to the Convention.

With the ratification of the Convention, Italy is party to all international legal instruments banning inhuman arms including the 1980 *Conventional Weapons Convention* and the 1997 *Convention on Antipersonnel Mines*.³⁶

RACHELE CERA

Legislation — Italian Participation in International Missions

- Law No. 9 of 22 February 2011, 'Conversion into Law of the Decree-Law No. 228 of 29 December 2010, concerning Extension of Time of Interventions for Development Cooperation, Support of Peace and Stabilization Processes, and Participation of Armed and Police Forces in

³⁰ Legge 7 marzo 2001, No. 58, *Istituzione del Fondo per lo sminamento umanitario*, published in *GazzettaUfficiale* No. 66 of 20 March 2001. See 4 *YIHL* (2001) pp. 557–558.

³¹ Legge 26 febbraio 1987, No. 49, *Nuova disciplina della cooperazione dell'Italia con i Paesi in via di sviluppo*, published in *Gazzetta Ufficiale* No. 49 of 28 February 1987.

³² L. Pistorelli, *Novità legislative: L. 14 giugno 2011, n. 95* (*Gazzetta Uff.* n. 153 del 4 luglio 2011) pp. 2–3 <http://www.cortedicassazione.it/Documenti/Relazione_III_12_11.pdf>.

³³ Cluster Munition Coalition, *Worldwide Investments in Cluster Munitions: a Shared Responsibility* (2011) <<http://www.ikvpaxchristi.nl/stopexplosiveinvestments>>.

³⁴ Disegno di legge n. 2136, *Misure per contrastare il finanziamento delle imprese produttrici di mine antipersona, di munizioni e submunizioni a grappolo* <http://www.senato.it/leg/16/BGT/Schede/Ddliter/testi/35297_testi.htm>. Since 26 May 2010 the Bill is before the Senate's Finance and Treasury Commission.

³⁵ Early versions of the CCM prevented States Parties from assisting non-States Parties engaged in prohibited operations or activities, even though they are allies in the framework of NATO.

³⁶ On the Italian ratification of the 1997 Ottawa Convention, see 3 *YIHL* (2000) pp. 534–535.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

International Missions' [Legge 22 febbraio 2011, n. 9, Conversione in legge, con modificazioni, del decreto-legge 29 dicembre 2010, n. 228, recante proroga degli interventi di cooperazione allo sviluppo e a sostegno dei processi di pace e di stabilizzazione, nonché delle missioni internazionali delle forze armate e di polizia']. Entered into force on 26 February 2011.³⁷

<<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2011;9>>

- Law No. 130 of 2 August 2011, 'Conversion into Law of the Decree-Law No. 107 of 12 July 2011, concerning Extension of Time of Interventions for Development Cooperation, Support of Peace and Stabilization Processes, Participation of Armed and Police Forces in International Missions and Provisions for Implementing UNSC Resolutions 1970 (2011) and 1973 (2011). Urgent Measures against Piracy' [Legge 2 agosto 2011, n. 130, Conversione in legge, con modificazioni, del decreto-legge 12 luglio 2011, n. 107, recante proroga degli interventi di cooperazione allo sviluppo e a sostegno dei processi di pace e di stabilizzazione, nonché delle missioni internazionali delle forze armate e di polizia e disposizioni per l'attuazione delle Risoluzioni 1970 (2011) e 1973 (2011) adottate dal Consiglio di Sicurezza delle Nazioni Unite. Misure urgenti antipirateria]. Entered into force on 6 August 2011.³⁸

<<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2011;130>>

During 2011, Italy employed about 7,411 military units in 32 countries in the framework of international missions established by the United Nations (UN), the European Union (EU), OSCE and NATO.³⁹ In order to authorize and finance such missions, the Italian government adopted two decree-laws, one for each semester, converted into laws by parliament. In Italy, the government guides foreign policy and decides where to intervene in international missions, while the parliament authorizes Italian participation in such missions and their financing by law without holding deep discussions on these issues.⁴⁰

Laws Nos. 9 and 130 regulate all legal, administrative and financial aspects concerning the deployment of civilian and military personnel abroad, including the criminal law applicable to soldiers, and the humanitarian and cooperation activities necessary to support peace processes.⁴¹ In Law No. 130/2011, piracy was also regulated in order to guarantee the freedom of navigation of Italian commercial vessels (Article 5).⁴²

The first act under examination, Law No. 9/2011, authorized Italian participation in international missions from 1 January – 30 June 2011 for a total expenditure of EUR 754,300,000. As were previous laws on the matter, Law No. 9/2011 is an omnibus act and is divided into three parts: the first part (Articles 1–3) regulates Italian cooperation and peace support interventions in favour of troubled countries; the second part (Articles 4–7) is dedicated to international missions of

³⁷ The Law which modified the Decree-law was published in *Gazzetta Ufficiale* No. 46 of 25 February 2011.

³⁸ The Law which modified the Decree-law was published in *Gazzetta Ufficiale* No. 181 of 5 August 2011.

³⁹ See <<http://www.camera.it/561?appro=165&Le+missioni+internazionali+in+corso#testo1>>.

⁴⁰ For an example of critics of this practice, in particular, the lack of parliamentary debate, see M. Nozzoli, *Una strategia organica per le missioni all'estero* (16 February 2011) <<http://www.affarinternazionali.it/articolo.asp?ID=1668>>. A political party, *Radicali Italiani*, abstained from the vote in parliament on Law No. 130/2011 on the basis that the procedure to renew missions abroad each semester should include serious parliamentary debate on the role of Italy in the framework of UN and NATO operations. See <<http://www.radicali.it/comunicati/20110802/missioni-internazionali-radicali-ci-asteniamo-su-decreto-missioni-procedura-parl>>.

⁴¹ Between 2008 and 2011, the financial resources for development cooperation initiatives decreased approximately 42 per cent, while during the same period, the expenditure for the participation in international missions increased by about 50 per cent. Many NGOs and some opposition parties criticized the government's choice.

⁴² See comment on *Legislation — Piracy* in this volume of *YIHL*.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

the armed forces and police personnel; and the third part (Articles 8–9) includes the final provisions on the financing and the entry into force of the act.

In detail, with Article 1 the parliament authorized the expenditure of EUR 16,500,000 for cooperation activities in Afghanistan, including the establishment of a 'House of Civil Society' in Kabul destined to reinforce the cultural relationship between Italy and Afghanistan⁴³ and EUR 1,500,000 for Italian participation in the NATO Trust Fund to support the Afghan army. The same provision authorized Italian participation in a stabilization mission in Afghanistan and Pakistan with social and humanitarian objectives. This mission has the mandate to support the Afghan and Pakistan governments in the development and institution-building process, in particular in the sanitary field, communications, and small and medium enterprises. In the framework of international crisis management operations, Article 1 also financed the Italian civilian component of the Provincial Reconstruction Team (PRT) in Herat (EUR 24,244).⁴⁴

Article 2 is dedicated to cooperation initiatives in support of peace and stabilization processes in different geographical areas, such as Iraq, Lebanon, Pakistan, Sudan and Somalia. The Italian interventions aimed to improve the living conditions of people and refugees in neighbouring countries and to support the civilian reconstruction of the abovementioned countries, with an expenditure of EUR 10,500,000. The same provision also authorized the following projects: Italian participation in the NATO Trust Funds to finance the training of Iraqi federal police and Kosovo security forces; the reintegration of Serb soldiers in surplus into civil society and the destruction of obsolete weapons in Albania (EUR 1,000,000); the financing of the Special Tribunal for Lebanon (EUR 800,000); Italian participation in civil and preventive diplomacy operations and in OSCE cooperation projects;⁴⁵ financial support for stabilization in Iraq and Yemen, and for the Union for the Mediterranean (UfM)⁴⁶ and also operative interventions to protect Italian citizens in war zones or high risk areas; the financing of a fund destined to reinforce the security of Italian diplomatic and consular representatives, cultural institutes and schools abroad; interventions to support peace processes and to reinforce security in Sub-Saharan Africa (EUR 2,750,000); Italian participation in European Security and Defence Policy (ESPD) initiatives (EUR 1,583,328); sending staff to Afghanistan, Iraq and Pakistan and sending an Italian diplomat to Kurdistan; financing the participation of Italian staff from the Ministry of Foreign Affairs in international crisis management operations, including ESPD missions and offices of EU Special Representatives (EUSRs);⁴⁷ the

⁴³ On 30–31 March 2011, the Conference 'Strengthening the Role of Civil Society Organizations in Decision-making Processes' was held in Kabul. This initiative was promoted by *Afgana*, a network of Italian civic associations, trade unions, journalists and academics. See Fabrizio Foschini, *Towards a More United Voice of Civil Society* (Afghanistan Analysts Network, 5 April 2011) <<http://aan-afghanistan.com/index.asp?id=1601>>.

⁴⁴ PRT has the task to promote economic and social development in the Herat Province in order to guarantee a more secure environment, in agreement with Afghan government. See *PRT-XV: Italian Provincial Reconstruction Team* (2010) <<http://www.prtherat.altervista.org/index2.html>>.

⁴⁵ On civil operations and their role, see P. Eriksson, 'Civil-Military Co-ordination in Peace Support Operations — An Impossible Necessity?', *Journal of Humanitarian Assistance* [2000] <<http://sites.tufts.edu/jha/archives/1469>>.

⁴⁶ The UfM was established at the Paris Summit for the Mediterranean on 13 July 2008 to reinforce the 1995 *acquis* of the Barcelona Process by revitalizing efforts to transform the Mediterranean into an area of peace, democracy, cooperation and prosperity. See Union for the Mediterranean, *Institutional Documents* (2010) <<http://www.ufmsecretariat.org/en/institutional-documents>>.

⁴⁷ Currently, the EU has eight EUSRs in different troubled countries and regions of the world. The EUSRs have the mandate to promote the EU's policies and interests in order to consolidate peace, stability and the rule of law and to support the work of the High Representative of the Union for Foreign Affairs and Security Policy (HR), in the regions concerned. See Council of the European Union, *EU Special Representatives* <<http://www.consilium.europa.eu/policies/foreign-policy/eu-special-representatives.aspx?lang=en>>. See, M. Houben, *International Crisis Management: The Approach of European States* (London, Routledge, 2005); E. Gross, *The*

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

Italian financial contribution to the Central European Initiative (CEI) Trust Fund at the European Bank for Reconstruction and Development (EBRD)⁴⁸ for a total amount of EUR 1,000,000; and an exceptional contribution of EUR 250,000 in favour of the Italian Atlantic Committee.⁴⁹ Article 3 regulated the legal aspects of the interventions and initiatives established in previous articles, the role of the Ministry of Foreign Affairs and the participation of its staff in international missions. It also provided for the creation of a 'Task Force' within the Ministry of Foreign Affairs with the mandate to manage and co-ordinate the interventions and for a Control Committee regarding interventions.

As far as international missions are concerned, Article 4 authorized the financing and the participation of Italian military forces in the following operations: International Security Assistance Force (ISAF) and EUPOL AFGHANISTAN; UN Interim Force in Lebanon (UNIFIL); Multinational Specialized Unit (MSU), EU Rule of Law Mission in Kosovo (EULEX Kosovo), Security Force Training Plan in Kosovo and Joint Enterprise in Balkan region; EU Mission ALTHEA in Bosnia-Herzegovina and the Integrated Police Unit (IPU) which operates within ALTHEA; NATO Operation Active Endeavour in the Mediterranean; Temporary International Presence in Hebron (TIPH2); EU Border Assistance Mission in Rafah (EUBAM Rafah); UN/African Union Mission in Darfur (UNAMID); EUPOL RD CONGO; UN Peacekeeping Force in Cyprus (UNFICYP); EU Monitoring Mission in Georgia (EUMMG); EU operation Atalanta and NATO Operation to fight piracy; and the EU military mission in Somalia (EUTM Somalia). The same provision authorized Italian military staff to give assistance to Albanian armed forces, to train Iraqi armed forces and to stay in the United Arab Emirates, Bahrain and Tampa for the exigencies of the international missions in Afghanistan and Iraq. Article 4 also provided for Italian police participation in EU Rule of Law Mission in Kosovo (EULEX) and UN Mission in Kosovo (UMIK); EU Police Mission for the Palestinian Territories (EUPOL COPPS), EU Mission in Bosnia-Herzegovina (EUPM).⁵⁰ Furthermore, Article 4 authorized the participation of Italian 'Guardia di finanza' (Customs Police) in some international operations, such as: missions in Libya, in conformity with Law No. 126/2010⁵¹ and for guaranteeing the maintenance of ships donated by Italy for the implementation of the Cooperation Protocol with Libya on Clandestine Immigration and Human Trafficking signed in Tripoli on 29 December 2007 and the Friendship, Partnership and Cooperation Agreement signed in Bengazi on 30 August 2008; ISAF and EUPOL Afghanistan; EULEX Kosovo; Joint Multimodal Operational Units (JMOUs), which are inter-force coordination units established in Afghanistan, United Arab Emirates and Kosovo. The same provision also provided for the participation of six Italian magistrates, penitentiary police personnel and administrative staff from the Ministry of Justice in EULEX Kosovo, of one magistrate in EU Police Mission for the Palestinian Territories (EUPOL COPPS) and two magistrates in EUPM; for the

Europeanization of National Foreign Policy: Continuity and Change in European Crisis Management (Basingstoke, Palgrave Macmillan, 2009).

⁴⁸ CEI Fund was established by Italy in 1992 through an agreement with EBRD 'to assist the Bank's countries of operation in central and eastern Europe in their economic and social transformation process'. Through this fund, Italy has committed about EUR 32,5 million in the CEI's region. See The European Bank for Reconstruction and Development, 'The CEI Fund at the EBRD' (2012) <<http://www.ebrd.com/downloads/research/factsheets/cei.pdf>>.

⁴⁹ The Committee promotes research activities and training on foreign affairs with a particular focus on Italy's role in NATO. See <<http://www.comitatoatlantico.it/en/comitato-atlantico>>.

⁵⁰ The Italian 'Carabinieri' also participate in this mission.

⁵¹ See 13 *YIHL* (2010) pp. 554–560.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

financing of the operative device of the External Intelligence and Security Agency⁵² to protect armed forces members employed in missions abroad (EUR 5,000,000) and the Ministry of the Defence Fund, established by Legislative-Decree No. 66/2010, for the celebration of the 150th Anniversary of the Unification of Italy within international missions (EUR 2,500,000).

Regarding criminal law, Article 6 reaffirmed the applicability of the *Military Criminal Code of Peace* to soldiers deployed in the aforementioned international missions and of Article 4 (1-*sexies* and 1-*septies*) of Law No. 197/2009.⁵³

The second act under examination is Law No. 130/2011 which extended until 31 December 2011 all interventions for development cooperation, for peace and stabilization processes support, and also international missions established by Law No. 9/2011.⁵⁴ Furthermore, Article 4 of Law No. 130/2011 authorized the expenditure of EUR 58,075,656, from 1 July – 30 September 2011, for the embargo implementation and Italian participation in the military mission in Libya in conformity with UNSC Resolutions 1970 (2011) and 1973 (2011). Resolution 1970 (2011), adopted on 26 February 2011, imposed sanctions against Libya under Article 41 of Chapter VII of the UN Charter for the serious violations of human rights and international humanitarian law committed by the government against the civilian population. Under Resolution 1973 (2011), adopted on 17 March 2011, the Security Council authorized UN Member States, 'acting nationally or through regional organizations or arrangements, to take all necessary measures' to protect civilians and civilian populated areas under threat of attack and decided to establish a 'No Fly Zone' over Libya, except for flights whose sole purpose was humanitarian. On 31 March 2011, NATO took command of the military operations in Libya (Operation Unified Protector) to protect civilians, with the participation of sixteen countries.⁵⁵ The Operation ended on 31 October 2011, after the death of Gaddafi and in conformity with UNSC Resolution 2016 (2011), adopted on 27 October 2011.

Concerning the asset freeze imposed by UNSC Resolution 1970 (2011) and implemented in Italy, Article 2 of Law No. 130/2011 authorized the release of frozen funds and economic resources belonging to Libyan persons, entities or bodies in favour of the Libyan Interim National Council to be used for humanitarian purposes and for assisting the civil population, in conformity with Article

⁵² The Agency ('Agenzia informazioni e sicurezza esterna' or AISE) carries out every security intelligence activity to defend the independence, integrity and security of Italy against threats originating abroad. See *AISE* (2009) <http://www.sicurezzanazionale.gov.it/web.nsf/pagine/en_aise>.

⁵³ On Law No. 197/2009, see 11 *YIHL* (2009) pp. 579–583.

⁵⁴ Law No. 130/2011 authorized some new expenses, such as the voluntary contribution for the UN System Staff College, based in Torino, established by the UN General Assembly in 2001 for running courses and delivering learning initiatives to UN personnel (EUR 250,000); the Italian participation in the Fund of the Contact Group established within UN Office on Drug and Crime (UNODC) to fight piracy in the Gulf of Aden and Indian Ocean and in the STANDEX Project, within the framework of the NATO Russia Council, which has the task to identify low-capacity bombs carried by suicide bombers (EUR 340,000); the donation of two ships to Panama to implement the Memorandum of Understanding on the security sector concluded between Italy and Panama on 30 June 2010.

⁵⁵ Belgium, Canada, Denmark, France, Greece, Italy, Jordan, Netherlands, Norway, Qatar, Spain, Sweden, Turkey, United Arab Emirates, United Kingdom and United States. Aside from authority given to the UNSC to act to maintain international peace and security under Chapter VII of the UN Charter, the intervention in Libya might otherwise be justified on the basis of the new principle of the 'the responsibility to protect' elaborated by the Commission on Intervention and State Sovereignty (ICISS). According to ICISS, each State has the responsibility to protect its own population, but, 'where a population is suffering serious harm, as a result of internal war, insurgency, repression or State failure, and the State in question is unwilling or unable to halt or avert it', the international community has the responsibility to intervene for the purpose of protection. On this subject, see ICISS *'The Responsibility to Protect'* (2001) <<http://www.responsibilitytoprotect.org/index.php/publications/core-rtop-documents>>; High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, UN Doc. A/59/565, 2 December 2004; High-level Plenary Meeting of the General Assembly, *World Summit Outcome Document*, UN Doc. A/RES/60/1, September 2005, paras. 138–139.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

8 of Council Regulation (EU) No. 204/2011 concerning restrictive measures in view of the situation in Libya, as modified by Council Regulation (EU) No. 572/2011.⁵⁶ The same provision also authorized the expenditure of EUR 2,295,224 to support the stabilization processes in Iraq and Libya, while Article 4*bis* was introduced to authorize the use of EUR 10 million to revitalize the economy of those Libyan provinces which had suffered more damage from NATO military operations.

An important innovation of Law No. 130/2011 is contained in Article 9 dedicated to the reduction of military personnel employed in international missions. The provision provided for a reduction of 1,000 units by 30 September 2011 and a further 1,070 units by 31 December 2011 in the framework of a general limitation of the Italian military engagement in missions abroad decided by Italy's Supreme Defence Council in 2011.⁵⁷

VALENTINA DELLA FINA⁵⁸

Legislation — Piracy

• Article 5 of Law No. 130 of 2 August 2011, 'Conversion into Law of the Decree-Law No. 107 of 12 July 2011, concerning the Extension of Time of Interventions for Development Cooperation, Support of Peace and Stabilization Processes, and Participation of Armed and Police Forces in International Missions and Provisions for Implementing UNSC Resolutions 1970 (2011) and 1973 (2011). Urgent Measures against Piracy' [Legge, n. 130 del 2 agosto 2011, Conversione in legge, con modificazioni, del decreto-legge 12 luglio 2011, n. 107, recante proroga degli interventi di cooperazione allo sviluppo e a sostegno dei processi di pace e di stabilizzazione, nonché delle missioni internazionali delle forze armate e di polizia e disposizioni per l'attuazione delle Risoluzioni 1970 (2011) e 1973 (2011) adottate dal Consiglio di Sicurezza delle Nazioni Unite. Misure urgenti antipirateria.]. Entered into force on 3 August 2011.⁵⁹

<<http://www.parlamento.it/parlam/leggi/100301.htm>>

• Memorandum of Understanding of 11 October 2011 between the Ministry of Defence and the Italian Shipowners' Association for Boarding on Italian Merchant Ships Vessels Protection Detachment (VPD) in order to Fight Piracy [Protocollo d'intesa dell'11 ottobre 2011 tra il

⁵⁶ Council Regulation (EU) No. 204/2011 [2011] OJ L 58, 3 March 2011; Council Regulation (EU) No. 572/2011 [2011] OJ L 59, 17 June 2011. Article 8 authorized EU Member States to do the following acts:

the release of frozen funds or economic resources belonging to persons, entities or bodies listed in Annex III, or the making available of certain funds or economic resources to persons, entities or bodies listed in Annex III, under such conditions as they deem appropriate, where they consider it necessary for humanitarian purposes, such as the delivery and facilitation of delivery of humanitarian aid, the delivery of materials and supplies necessary for essential civilian needs, including food and agricultural materials for its production, medical products and the provision of electricity, or for evacuations from Libya. The Member State concerned shall inform other Member States and the Commission of authorisations made under this Article within 2 weeks of the authorization.

⁵⁷ For an English summary of the debate within the Italian Supreme Defense Council on 6 July 2011, see Italian Ministry of Foreign Affairs, *Supreme Defence Council — 'Crucial' Role of Italy, Libya and Foreign Missions* (6 July 2011)

<http://www.esteri.it/MAE/EN/Sala_Stampa/ArchivioNotizie/Approfondimenti/2011/07/20110706_ConsiglioSupremoDifesa.htm>.

⁵⁸ Valentina Della Fina is Senior Researcher at the Institute for International Legal Studies of the National Research Council (CNR), Rome. She coordinates the Institute's team of researchers dedicated to preparing the Italian Report.

⁵⁹ Law No. 130 of 2 August 2011 was published in *Gazzetta Ufficiale* No. 181 del 5 August 2011. Decree-Law No. 107 of 12 July 2011 was published in *Gazzetta Ufficiale* No. 160 of 12 July 2011. See Comment on *Legislation — Italian Participation in International Missions* in this volume of the *YHIL*.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

ministero della Difesa e la Confederazione Italiana Armatori per l'imbarco di nuclei militari di protezione per il contrasto alla pirateria].

<<http://www.trasporti-italia.com/mare/pirateria-confitarma-esprime-soddisfazione-per-le-nuove-misure-281.html>>

<<http://www.trasporti-italia.com/mare/pirateria-nuovo-accordo-tra-ministero-difesa-e-confitarma-268.html>>

<<http://ebookbrowse.com/b-101011-convenzione-difesa-confitarma-ug-pdf-d269673315>>

- Seizure of the Merchant ship *Montecristo* by the Pirates off the Somali Coast. The Prosecutor of Rome starts the First Process for the Crime of Piracy in Italy.

<http://firenze.repubblica.it/cronaca/2011/10/14/news/montecristo_i_pirati_interrogati_in_video_conferenza-23246507/>

Article 5 of Law No. 130 of 2 August 2011, concerning Italian participation in international missions, addressed 'Urgent Measures against Piracy'.

Following an increased number of pirate attacks,⁶⁰ it appeared that the presence of warships as part of multinational operations had been ineffective to combat piracy and that it was necessary to address further the issue of the protection of ships sailing in unsafe waters.⁶¹ To this end, Article 5 of Law No. 130/2011 provided for the possibility to deploy security personnel on merchant ships to deal with pirate attacks.

In particular, the Law authorized the Ministry of Defence to conclude agreements with the Italian Shipowners' Association for the protection of vessels flying the Italian flag and sailing in areas at risk of pirate attack. These areas are designated by the Ministry of Defence by Decree.⁶²

The convention should provide for the deployment aboard relevant merchant ships of Vessels Protection Detachments (VPD),⁶³ comprising Navy personnel or personnel from the other armed forces but under the control of the Italian Navy. The activities of such VPDs must be carried out in conformity with the directives and the rules of engagement issued by the Ministry of Defence, while the commander of each VPD has the exclusive responsibility for the military activity against piracy.

As for the financial provisions, military personnel will receive the same salary as Navy personnel sailing in international maritime spaces⁶⁴ and have the same status as military personnel acting in military missions abroad. The convention will provide for the reimbursement of all the expenses, including those for human resources, by the Shipowners' Association.

Furthermore, according to paragraph 4 of the same Article, when the VPD is not provided, private security guards⁶⁵ may protect merchandise and goods on merchant and fishing vessels flying the Italian flag and sailing in international maritime spaces where there is a risk of piracy.⁶⁶

⁶⁰ See F. Munari, 'La nuova pirateria e il diritto internazionale. Spunti per una riflessione', *Rivista di diritto internazionale* (2009) p. 325.

⁶¹ See T. Treves, 'Piracy, Law of the Sea and Use of the Force', *20 European Journal of International Law* (2009) p. 400.

⁶² The designation occurs following consultations with the Ministry for Transportation and the Ministry of Foreign Affairs and taking into account the relevant reports of the International Maritime Organization (IMO), as stated by Article 5(1). The Decree identifying such High Risk Areas (HRA) was adopted on 1 September. See <<http://news.liberoreporter.eu/?p=21220>>.

⁶³ In the Italian version they are called 'Nuclei militari di protezione' (NMP).

⁶⁴ Beside the high seas, international waters include other marine areas such as the exclusive economic zone.

⁶⁵ But only those authorized by Article 133 of the Royal Decree No. 773 of 1931 (Regio Decreto 18 giugno 1931, n. 773, 'Testo unico delle leggi di pubblica sicurezza') published in *Gazzetta Ufficiale* No. 146 of 26 June 1931.

⁶⁶ The first bill presented to the parliament concerned only private security services. See Proposta di legge n. 3406, 'Disposizioni concernenti lo svolgimento di servizi di vigilanza privata per la protezione delle navi mercantili italiane in

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011

CORRESPONDENTS' REPORTS

Decree-Law No. 215 of 29 December 2011 on the extension of international missions of the armed and police forces, the initiatives of cooperation for development and support of peace and stabilization processes confirmed the provision of Article 5, with a few modifications.⁶⁷

Following Law No. 130/2011, a Memorandum of Understanding (MoU) was concluded between the Ministry of Defence and the Italian Shipowners' Association ('Confederazione italiana armatori' or 'Confitarma'). The Chief of Staff of the Italian Navy and the President of 'Confitarma' signed the MoU on 12 October 2011 before the then Minister of Defence, Mr Ignazio La Russa. According to this MoU, 10 VPDs, each comprising 6 personnel, will be deployed on Italian merchant vessels sailing in waters at risk of pirate attacks, at the request of the ship-owner.

The civilian commander of the ship will not have the authority to give orders to the military personnel aboard the ship. Rather, the personnel will only be subject to the orders of the Italian Joint Operations Headquarters (Ministry of Defence) and a command in Djibouti. The owner of the ship aboard which the VPD is deployed will pay for all expenses related to the deployment.

The legislative process concerning Article 5 was accelerated following an incident involving the Italian merchant ship, *Montecristo*,⁶⁸ which, along with its crew, was attacked and seized by pirates off the coast of Somalia in October 2011. In response to the attack, the captain immediately followed the International Maritime Organisation's prescribed safety procedures.⁶⁹ The *Montecristo*'s crew members locked themselves inside an armoured area of the vessel and from there, safe from the pirates' threats, they continued to navigate the ship. The crew wrote a message, placed it in a bottle, and tossed it into the sea through a porthole.

Following the seizure, NATO's counter piracy naval task force 508, as part of NATO's Operation Ocean Shield, sent a naval unit to ascertain what had happened to the *Montecristo*.⁷⁰

Subsequently, NATO warships retrieved the bottle and Royal Marine commandos were dispatched to secure the rescue of the crew.⁷¹ In addition to their rescue, 11 pirates were captured

alto mare contro gli atti di pirateria', see Camera dei Deputati, doc. A.C. 3321 e A.C. 3406 <http://www.camera.it/701?leg=16&file=AC0606_0>.

⁶⁷ Decreto-Legge 29 dicembre 2011, n. 215, '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, nonché disposizioni urgenti per l'amministrazione della difesa', published in *Gazzetta Ufficiale* No. 302 of 29 December 2011 <<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2011;215>>.

⁶⁸ The ship, owned by the Livorno-based D'Alesio group, was flying the Italian flag. There were 23 crew members including 7 Italians, 10 Ukrainians and 6 Indians. See <<http://www.corriere.it/International/english/articoli/2011/10/11/somali-pirates-seize-montecristo.shtml>>.

⁶⁹ See IMO, 'Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia: Best Management Practices for Protection against Somalia Based Piracy' (MSC.1/Circ.1339, 14 September 2011) <<http://www.imo.org/MediaCentre/HotTopics/piracy/Documents/1339.pdf>>.

⁷⁰ Ibid. The Operation Ocean Shield started on 17 August 2009 and continues NATO's previous counter-piracy Operation Allied Protector. It aims to contribute to international efforts to combat piracy off the Horn of Africa. Besides traditional counter-piracy activities, NATO will assist regional States, at their request, to assist them to develop their capacity to combat piracy, with the overall aim to contribute to a lasting maritime security solution off the Horn of Africa. See NATO, *Operation Ocean Shield Current News* (2012) <http://www.manw.nato.int/page_operation_ocean_shield.aspx>.

⁷¹ Richard Norton-Taylor and John Hooper, 'Hijacked Crew Saved from Pirates after Sending Message in Bottle', *The Guardian* (London, UK), 12 October 2011 <<http://www.guardian.co.uk/world/2011/oct/11/somali-pirates-captured-british-forces>>.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

and handed to Italian authorities for trial.⁷² In October 2011, the Prosecutor of Rome instituted the first trial in Italy for the crime of piracy.⁷³

VALERIA EBOLI

Legislation—Institution of the National Memorial Day of Victims of Disasters

• Law No. 101, 14 June 2011, 'Institution of the National Memorial Day of Victims of Environmental and Industrial Disasters Caused by the Negligence of Man' [Legge 14 giugno 2011, n. 101, Istituzione della Giornata nazionale in memoria delle vittime dei disastri ambientali e industriali causati dall'incuria dell'uomo']. Entered into force on 9 July 2011⁷⁴
<<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2011;101>>

With Law No. 101 of 14 June 2011, Italy recognizes the date of 9 October as the National Memorial Day to remember the victims of environmental and industrial disasters caused by human negligence. According to Article 3 of Law No. 260 of 27 May 1949, this Day is considered a civil solemnity.⁷⁵

The date, 9 October, recalls the 1963 incident of Vajont, when, as a result of the construction of the highest dam in the world, 263 million cubic metres of rock fell from Mount Toc into the waters of the reservoir, causing a flood that destroyed Longarone and the towns located along the river Piave, resulting in over 2,000 victims.⁷⁶

Under Article 1 of Law No. 101, the celebration of the National Memorial Day does not affect the working hours of public administration offices, does not produce a holiday if it falls on a weekday and does not affect normal school hours, in conformity with Law No. 54 of 5 March 1977.

Article 2 provides that on the Memorial Day, events may be organised to commemorate the victims of disasters. Meetings and ceremonies may also be arranged in schools, in order to promote activities to raise awareness about the risks connected with activities which might affect the balance of nature, and about the need to protect the environmental heritage of the country.

According to the Bill's Rapporteur, this Law aims at uniting Italy, from North to South, under the banner of those who risk their lives to save others. The establishment of the National Day to honour the memory of victims of tragedies caused by human negligence or by natural events also responds to the need to celebrate the role played by the operators of civil protection in the broadest sense: the Police, the Corps of Fire-fighters, the 'Carabinieri', the Italian Army, the Alpine Corps, the Italian Red Cross volunteers, but also ordinary citizens.

At the international level, the topic of disasters has been addressed by a series of significant acts such as UNGA Resolution 46/182,⁷⁷ which, together with Resolution 6 of the 23rd International

⁷² J.P. Pierini, 'L'aspetto giuridico nazionale', *Pirati di ieri e di oggi. Supplemento alla Rivista marittima* (2009) <[http://www.marina.difesa.it/documentazione/traffico_mercantile/Documents/L'aspetto%20giuridico%20nazionale%20\(diritto%20marittimo%20e%20penale\).pdf](http://www.marina.difesa.it/documentazione/traffico_mercantile/Documents/L'aspetto%20giuridico%20nazionale%20(diritto%20marittimo%20e%20penale).pdf)> .

⁷³ See <http://firenze.repubblica.it/cronaca/2011/10/14/news/montecristo_i_pirati_interrogati_in_videoconferenza-23246507>.

⁷⁴ Published in *Gazzetta Ufficiale* No. 157 of 8 July 2011.

⁷⁵ Article 3 establishes that a civil solemnity is a day during which public administration offices may reduce the working hours and the Italian flag must be displayed in public buildings.

⁷⁶ Other important Italian National Memorial Days include those dedicated to victims of accidents at work (11 October); to the sacrifice of Italian workers in the world (8 August); to sailors lost at sea and to soldiers and civilians who have died while carrying out international missions' (12 November); and the National Memorial Day to remember the Shoa (27 January).

⁷⁷ GA Res 46/182 (1991), UN Doc. A/RES/46/182, 19 December 1991
<<http://www.un.org/documents/ga/res/46/a46r182.htm>>.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

Conference of the Red Cross of 1977 on measures to expedite international relief⁷⁸ and the Hyogo Framework for Action (2005–2015),⁷⁹ constitute the central components of an expanding regulatory framework. In this context, in 2001, the International Federation of Red Cross and Red Crescent Societies (IFRC) initiated its International Disaster Response Laws, Rules and Principles (IDRL) Programme to study global legal frameworks within which disaster assistance is provided and used. The Programme reviewed the international, national and regional frameworks regarding the international response to natural and technological disasters as well as the operational experiences with regulatory problems in disasters. On 30 November 2007, the States Parties to the 1949 *Geneva Conventions* and the International Red Cross and Red Crescent Movement unanimously adopted the 'Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance' (the 'IDRL Guidelines') at the 30th International Conference of the Movement.⁸⁰ On 11 December 2008, the UNGA adopted three resolutions, namely Resolutions 63/137, 63/139 and 63/141, encouraging States to make use of the IDRL Guidelines.

The international law governing disaster response has developed into a complex set of rules governing the initiation of relief, questions of access, issues of status and the provision of relief itself. The process of relief assistance is typically initiated on the basis of a request for assistance issued by the affected State and is based on its consent.

Consideration of the protection of persons in disasters is a necessary component of a complete international disaster relief regime. While it is established that protection remains the primary responsibility of the receiving State, additional actors may play an important role to the extent permitted by international law. And, properly, in this regard, at its fifty-ninth session in 2007, the International Law Commission (ILC) decided to include the topic of 'Protection of persons in the event of disasters' in its programme of work and appointed Mr Eduardo Valencia-Ospina as Special Rapporteur.⁸¹

SILVANA MOSCATELLI⁸²

Legislation — Establishment of the National Ombudsperson for Children and Adolescents, and Other Developments in Italian Legislation on Children's Rights

• Law No. 62 of 21 April 2011, on the Protection of the Relationship between Mothers in Prison and their Minor Children [Modifiche al codice di procedura penale e alla legge 26 luglio 1975, n. 354, e altre disposizioni a tutela del rapporto tra detenute madri e figli minori]. Entered into force on 20 May 2011.⁸³

<<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2011;62>>

⁷⁸ For the text, see Report of the 23rd International Conference of the Red Cross, 201 *International Review of the Red Cross*, (1977) 511–515 (Resolution VI on measures to expedite international relief).

⁷⁹ The Hyogo Framework for Action was adopted by 168 Member States of the UN at the World Disaster Reduction Conference which took place in Kobe, Hyogo (Japan) on 18–22 January 2005. On the Conference, see World Conference on Disaster Reduction, *Brief History of the WCDR Process* <<http://www.unisdr.org/2005/wcdr/wcdr-index.htm>>.

⁸⁰ See International Federation of Red Cross and Red Crescent Societies, *IDRL Guidelines* (2011) <<http://www.ifrc.org/en/what-we-do/idrl/idrl-guidelines>>.

⁸¹ On the ILC's work on this topic, see International Law Commission, *Analytical Guide to the Work of the International Law Commission* (2012) <<http://untreaty.un.org/ilc/guide/gfra.htm>>.

⁸² Silvana Moscatelli has a PhD in Human Rights and International Order and is Consultant at the Institute for International Legal Studies of the National Research Council (CNR), Rome.

⁸³ Published in *Gazzetta Ufficiale* No. 103 of 5 May 2011.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

- Law No. 112 of 12 July 2011, on the Establishment of the National Ombudsperson for Children and Adolescents [Istituzione dell'Autorità garante per per l'infanzia e l'adolescenza]. Entered into force on 3 August 2011.⁸⁴
<<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2011;112>>

During 2011, efforts to enhance Italian legislation on the implementation of children's rights have produced significant results. First, the parliament passed Law No. 62 of 21 April 2011, which introduced some modifications into the *Code for Criminal Procedure*, to enhance protections for the relationship between mothers in prison and their minor children. Second, the parliament successfully concluded the prolonged process for the establishment of a national ombudsperson for children, with the adoption of Law No. 112 of 12 July 2011. These developments are discussed below, starting with Law No. 112, as it has a more general scope of application.

The project later approved as Law No. 112/2011, on the establishment of the National Ombudsperson for Children and Adolescents, was introduced on 11 December 2008 into the Chamber of Deputies on the initiative of the Minister for Equal Opportunities.⁸⁵ Although there were other public bodies and private entities with various competences for the implementation of children's rights including ombudspersons introduced by several Italian regions, the establishment of an ombudsman for children at the national level was regarded as a necessary step to implement a number of treaties ratified by Italy,⁸⁶ and relevant EU legislation. Indeed, Italy's introduction of an ombudsperson had been specifically recommended by the Committee on the Rights of the Child, within the framework of the reporting/monitoring procedure under the 1989 New York Convention.⁸⁷ In addition, this measure further implements Article 31(2) of the *Italian Constitution*, under which the Italian Republic shall protect children and adolescents by appropriate institutions.

Law No. 112 has established the National Ombudsperson for Children and Adolescents (hereinafter, the National Ombudsperson) as an individual body, which, in accordance with the Paris Principles,⁸⁸ is fully independent from any other institutions and has competences and powers of its own (Article 1). The National Ombudsperson must be an independent expert of high moral standing and of recognized competence in the field of children's rights and minors' protection, including family and educational issues and is appointed jointly by the President of the Chamber of

⁸⁴ Published in *Gazzetta Ufficiale* No. 166 of 19 July 2011.

⁸⁵ See Parliamentary Acts, Chamber of Deputies, XVI Legislature, C. 2008, which absorbed other bills on the matter: C.127, C. 349, C. 858, C.1197, C.1591, C.1913, C.2199. See <http://www.parlamento.it/leg/ldl_new/v3/sldlelenco072011ordcron.htm>.

⁸⁶ Most precisely, the 1989 *Convention on the Rights of the Child*, the 1950 *European Convention on Human Rights*, the 1996 *European Convention on the Exercise of Children's Rights* (ratified by Italy on the basis of, respectively, Law No. 176/1991, Law No. 848/1955 and Law No. 77/2003).

⁸⁷ In its 'Concluding Observations' on Italy's submission to the Committee on the Rights of the Child at its Fifty-eight session (19 September – 7 October 2011), the Committee said it was

pleased to note that the National Ombudsperson for Children and Adolescents was established by law in July 2011. ... The Committee regrets that the establishment of an independent national human rights institution has taken considerable time. ... The Committee recommends that the State party ensure that the new office of the National Ombudsperson for Children and Adolescents is promptly established and that it is provided with sufficient human, technical and financial resources to guarantee its independence and efficacy ...

See UN Doc. CRC/C/ITA/CO/3-4, 31 October 2011, paras. 12–13.

⁸⁸ UN Commission on Human Rights, 'Principles relating to the Status of National Institutions', (Resolution 1992/54, 3 March 1992). These principles were adopted by the General Assembly in GA Res 48/134 (1993), UN Doc.A/RES/48/134, 20 December 1993. See also B.G. Ramcharan (ed.), *The Protection Role of National Human Rights Institutions* (Leiden, 2005) p. 179.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

Deputies and the President of the Senate.⁸⁹ The mandate is for four years and may be renewed once (Article 2(2)). As a further guarantee of full independence, the National Ombudsperson may not, during his mandate, carry out other activities, as a professional, consultant, director or employee of public entities or private companies; nor may he hold public offices, or participate in private entities operating in the field of children's rights, or hold offices in political parties (Article 2(3)). The National Ombudsperson shall be the head of the Office of the National Ombudsperson for Children and Adolescent, which is a body composed of no more than ten officials and whose organization is established by decree of the President of the Council of Ministers (Article 5).

The competences and powers of the National Ombudsperson are described in Article 3. In the first place, he is responsible for promoting the implementation of the *Convention on the Rights of the Child* and of other relevant treaties and EU legislation, and for performing all the functions enumerated in Article 12(2) of the *European Convention on the Exercise of Children's Rights*.⁹⁰ He also participates in the international network of the national ombudspersons for children established in other States, and cooperates with any similar bodies or organizations based in foreign countries. He further ensures that ways and means for appropriate consultation with all the competent subjects — whether they act in Italy or abroad — will be implemented; and these subjects must include NGOs, private entities, family associations, individuals, and children.⁹¹

Additionally, the National Ombudsperson assures that all the children within the jurisdiction of Italy have equal opportunities to access medical care, health, and education. He may also make recommendations to the government, the Regions and other competent authorities on the appropriate steps for guaranteeing that all children enjoy, particularly, a right to family, education and health. In cases of neglect of minors, he has the duty to report the case to the judiciary, to determine alternative care options.

The National Ombudsperson also has consultative powers. Under a number of normative acts and other instruments regarding children's rights, his view must be considered. His opinion is required, most particularly, during the drafting of the National Plan of Action for Children,⁹² and for the periodic reports submitted to the Committee on the Rights of the Child, in pursuance of the 1989 New York Convention and Protocols. Moreover, the National Ombudsperson may address recommendations to the government or the parliament, regarding any bill on the subject of children's rights. As a further task, he must ensure that the norms and principles of international law

⁸⁹ This provision was implemented for the first time on 29 November 2011, with the appointment of Mr. Vincenzo Spadafora (at that date, President of the Italian National Committee for UNICEF) as National Ombudsman for Children and Adolescents.

⁹⁰ Article 12 of the Convention reads:

1. Parties shall encourage, through bodies which perform, *inter alia*, the functions set out in paragraph 2, the promotion and the exercise of children's rights.
2. The functions are as follows: *a)* to make proposals to strengthen the law relating to the exercise of children's rights; *b)* to give opinions concerning draft legislation relating to the exercise of children's rights; *c)* to provide general information concerning the exercise of children's rights to the media, the public and persons and bodies dealing with questions relating to children; *d)* to seek the views of children and provide them with relevant information.

⁹¹ This provision conforms to the principle set forth in Article 12 of the 1989 New York Convention, under which children have the right to freely express their views in all matters affecting them, and the right to be heard in related judicial and administrative proceedings, either directly, or through a representative or an appropriate body.

⁹² The National Plan of Action for Children is foreseen in Article 1 of the regulation adopted by Presidential Decree No. 103/2007.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

regarding children's rights are widely known in Italy and may conduct research and studies on the matter, with the assistance of other bodies.⁹³

In performing his monitoring functions, the National Ombudsperson may report any situation in which children's rights seem to be at risk to the Prosecutor at the Court of minors, or to the Prosecutor at the competent court (Article 3(9)). He may report these cases to the competent authorities also on his own initiative, on the basis of information from any source (Article 3(10)). Importantly, under Article 4, the National Ombudsperson may ask public bodies and private entities for information concerning minors on the condition that the right to privacy is respected. He has the right to access, on request, all the relevant data and may also conduct *in situ* inspections at any establishment where minors are present. Additionally, Article 6 provides that anyone may report cases in which children's rights have been infringed to the National Ombudsperson. The manner of this reporting is established by the National Ombudsperson autonomously, guaranteeing, however, free and easy access to all, including by telephone and via the Internet.

Importantly, Law No. 112 addresses the delimitation of competences between the National Ombudsperson and the existing regional Ombudspersons. During the drafting process for Law No. 112, the parliament was certain that it had the constitutional authority to establish an ombudsperson for children at the national level. This is because the exclusive legislative power of the State includes *inter alia*: *a*) the establishment of State bodies; and *b*) the definition of 'the essential levels of the services related to the civil and social rights that must be guaranteed in the whole national territory'.⁹⁴ This wording certainly includes services related to children's rights. Operationally, however, the parliament had to balance the need for establishing a unique legal regime applicable to all children in Italy, with the principle of non-interference of the State in the Regions' autonomous legislative powers. On this, Law No. 112 seems to have reached a good equilibrium by establishing the following balance: *a*) the National Ombudsperson shall perform his functions in accordance with the subsidiary principle (Article 3(2)); *b*) the National Ombudsperson shall respect the competences of the Regions, and collaborate with the regional ombudspersons, including those that might be established in the future, provided that these bodies enjoy the same independence recognized to the National Ombudsperson (Article 3(6)). Furthermore, Law No. 112 has established the National Conference for the Rights of Children and Adolescents — chaired by the National Ombudsperson and in which all the regional Ombudspersons will participate — with the task of adopting common operational guidelines and exchanging relevant data and information (Article 3(7)–(8)). Finally and most importantly, taking into consideration that there can be differences among the levels of services provided in the Northern and in the Southern Regions, Article 3 states that the National Ombudsperson is responsible for making proposals on defining the essential levels of services that must be guaranteed to children in the whole Italian territory, and for monitoring that these levels are effectively respected (Article 3(1)(l)). Once implemented, these provisions should create a legal and institutional framework fully consistent with the recommendations of the Committee on the Rights of the Child.⁹⁵

⁹³ Among them, the National Observatory on the Family (Law No. 296/2006, Article 1, paragraph 1250); the National Observatory on Children and Adolescents, and the National Centre for Documentation and Analysis on Children and Adolescents (regulation adopted through Presidential Decree No. 103/2007, Articles 1–3); the Centre for the Fight against Pedophilia and Child Pornography (Law No. 269/1998, Article 17, paragraph 1 *bis*).

⁹⁴ See *Italian Constitution*, art. 117 (2)(m), (f).

⁹⁵ The Committee said it was

concerned that the devolution of powers from central to regional and other subnational levels of government has contributed to an inequitable implementation of the Convention at the local level. ... The

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

By its terms, Law No. 112/2011 has a very general scope of application. By contrast, Law No. 62 of 21 April 2011, protects only the relationship between mothers in prison and their minor children. It is therefore intended to protect certain rights of children in a particular situation of vulnerability. In 2010, three bills on this matter were introduced into the parliament, and then absorbed into Law No. 62. At the end of the same year, there were 42 women with minor children in Italian prisons, and 43 of these children were aged less than three years.

The presence of children in prisons is plainly incompatible with the *Convention on the Rights of the Child* and with Article 31 of the *Italian Constitution*. For this reason, in cases of women with children less than ten years, parliament has already introduced certain measures other than detention, most notably the 'special home detention' regime under Law No. 40/2001. However, due to the relatively high threshold of application of the Law, it has been invoked infrequently. Moreover, its scope of application *ratione personarum* is limited to persons convicted by final judgment, which therefore excludes cases of detention before trial or sentencing. Law No. 62/2011 is intended to fill these gaps. As a fundamental principle, it aims to avoid the presence of children in prisons. This position is based on the practice of an existing special detention facility, 'Istituto a Custodia Attenuata per Madri' (ICAM), where mothers with minors can be detained out of prison by relying on security systems which are not recognizable to children. The first example of ICAM has been constructed in Milan and the government has announced further sites should be introduced in the future. However, due to the inadequacy of prison facilities generally, this type of detention is far from commonplace.

In the meantime, Law No. 62 has modified Article 275 of the *Code of Criminal Procedure*, by increasing from three to six years the age of the children below which mothers (or, in their absence, the fathers) cannot be subjected to remand, except in extreme circumstances. In any case, the competent judge may decide that the mother (or father) will be detained, with their children, not in ordinary prisons, but in an ICAM.

Additionally, Law No. 62 has modified Article 47 *quinquies* of Law No. 354/1975, concerning rules on the prisons. Under this norm, except when there is a risk of re-offending or a risk of flight, mothers with children less than ten years may obtain 'special home detention' (*i.e.* detention at their own home or at a care house), in order to provide parental care to their children in a more comfortable environment. The pre-amended version of Article 47 *quinquies* further established that these mothers were not entitled to special home detention before having served at least one third of the sentence in prison, or at least fifteen years, if sentenced to life imprisonment. However, Law No. 62/2011 abolished this requirement. Moreover, special home detention may be granted not only at home (there have been, in practice, cases of homeless mothers who, for this reason, could not benefit of this measure), but also: *a*) at an ICAM; or *b*) at a 'protected family home'.⁹⁶ The definition of 'protected family homes' will be established through a decree of the Ministry of Justice at a later stage.

Finally, Law No. 62 recognizes that mothers (or fathers) detained or accused have the right to visit their children when the child is sick, and may be authorized by the court to assist them during visits by doctors in cases of serious medical conditions.

Committee is further concerned that the State-Regions Conference lacks a working group to coordinate the planning and implementation of policies relevant to the rights of children ...

The Committee has recommended that Italy develop 'effective mechanisms to ensure a consistent application of the Convention in all Regions by strengthening the coordination between the national and regional levels'. UN Doc. CRC/C/ITA/CO/3-4, 31 October 2011, p. 3.

⁹⁶ These norms do not apply to mothers with children of less than ten years if they have been convicted of any of the offenses 'of serious social alarm' enumerated in Article 4 *bis* of Law No. 354/1975.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

As a conclusion, Law No. 62/2011 appears to protect the interests of children, putting an end to the presence of minors in prisons without separating them from their mothers. Considering, however, that many provisions of the Law need further implementing measures, it is prudent to postpone any assessment as for results.

ORNELLA FERRAJOLO⁹⁷

Legislation — Free Circulation and Residence of European Citizens and Return of Irregular Third-County Citizens

- Law No. 129, 2 August 2011, 'Conversion into Law of Decree-Law No. 89, 23 June 2011 on Urgent Provisions Concerning the Completion of Implementation of Directive 2004/38/EC relating to the Free Circulation of EU Citizens and the Transposition of Directive 2008/115/EC on the Return of Irregular Citizens of Third-Countries' [Legge 2 agosto 2011, n. 129, Conversione in legge, con modificazioni, del decreto-legge 23 giugno 2011, n. 89, recante disposizioni urgenti per il completamento dell'attuazione della direttiva 2004/38/CE sulla libera circolazione dei cittadini comunitari e per il recepimento della direttiva 2008/115/CE sul rimpatrio dei cittadini di Paesi terzi irregolari] Entered into force on 6 August 2011.⁹⁸
<<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2011;129>>

Law No. 129, adopted by the Italian parliament on 2 August 2011, does not radically change the content of Decree-Law No. 89. It merely introduces some modifications and additions to the formulation of articles of the above-mentioned Decree-Law.

Specifically, Decree-Law No. 89/2011 modifies Legislative Decree No. 30 of 6 February 2007 concerning the implementation of Directive 2004/38/EC on the right of European citizens and their family members to move and reside freely within the territory of the Member States, and implements Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals. Under Article 3, Legislative Decree No. 30/2007 identifies the subjects who enjoy the rights indicated by Directive 2004/38. In particular, it refers to any citizen of the European Union who moves to or resides in a Member State different from that of his nationality, as well as to any family members accompanying or joining him.⁹⁹

Importantly, Article 1 of Decree-Law No. 89/2011 introduces modifications to the requirements for exercising the right of the EU citizen to enter and reside in Italy contained in Article 3 of Legislative Decree No. 30/2007.¹⁰⁰ In particular, the partner of an EU citizen is required to enjoy a stable, officially attested relationship with the EU citizen, while Directive 2004/38 specifically refers to a relationship duly attested.¹⁰¹

⁹⁷ Ornella Ferrajolo is Senior Researcher at the Institute for International Legal Studies of the National Research Council (CNR) of Italy.

⁹⁸ Published in *Gazzetta Ufficiale* No. 181 of 5 August 2011.

⁹⁹ In conformity with Article 2 of Directive 2004/38, Article 3 of Legislative Decree No. 30/2007 includes in the definition of 'family members': a) the spouse; b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State; (c) direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b); (d) the dependent's direct relatives in the ascending line and those of the spouse or partner as defined in point (b).

¹⁰⁰ On the implications concerning the right of residence of EU citizens on Italian territory, see R. Panozzo, 'Il diritto di soggiorno dei cittadini dell'Unione e dei loro familiari tra Direttiva comunitaria, norme di attuazione, chiarimenti ministeriali e perplessità della dottrina', 6 *Lo stato civile italiano* (2008) pp. 433–444.

¹⁰¹ On this aspect, see A. Lang, 'Modifiche al Decreto Legislativo N. 30 del 2007 sui cittadini comunitari', 3–4 *Diritto, immigrazione e cittadinanza* (2008) pp. 120–139.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

The most important modification to Legislative Decree No. 30/2007, made by Decree-Law No. 89/2011, concerns the reasons for the removal of EU citizens on the basis of public order, public security or loss of the requirements which permit the citizen's residence. In particular, these reasons are based on the evaluation of individual conduct representing a concrete, severe or effective threat to the fundamental rights of people and public safety (Articles 20–21 of Decree-Law No. 30/2007).¹⁰²

Decree-Law No. 89/2011 also modifies Legislative Decree No. 286 of 25 July 1998, the 'Consolidated Text on Immigration and the *status* of Aliens' (hereinafter 'Consolidated Text on Immigration') in order to implement Directive 2008/115/CE concerning common standards and procedures in Member States for returning illegally staying third-country nationals.

Directive 2008/115 aims to harmonize national legal systems on the issue of removal, and tries to balance the effectiveness of the removal of irregular immigrants and the protection of individual freedom and rights. It is worth remembering that, according to the Directive, EU Member States have the right to adopt a decision regarding the return of aliens who stay on their territory irregularly (Article 6). Article 7 of the Directive specifies that this decision shall provide for an appropriate period for voluntary departure, from seven to thirty days, which can be extended on the basis of personal reasons. According to Article 7(4), if there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.

In cases where the irregular immigrant does not make provisions for a voluntary return, under Article 8 of Directive 2008/115, Member States shall take all necessary measures to enforce the decision concerning the return, if no period for voluntary departure has been granted in accordance with Article 7(4) or the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7. In the case where it is not possible to enforce the departure of immigrants, a Member State may detain the third-country citizen. All coercive measures, including detention, must be proportionate to the risk posed and respectful of human rights and the dignity of immigrants.¹⁰³

In conformity with Directive 2008/115, Decree-Law No. 89/2011 significantly modifies the administrative expulsion regulated by Legislative Decree No. 286/1998 (Articles 13–14).

Under Decree-Law No. 89/2011, the decision is adopted 'case by case' and the expulsion cannot be carried out by the use of force. The alien can be accompanied to the borders only under any of the following circumstances: danger of escape, refusal of the stay request in the case where it is manifestly unfounded or fraudulent or where there is a danger to public order and security.

According to the new paragraph 4-*bis* added to Article 13 of the 'Consolidated Text on Immigration', the danger of escape exists when the third-country citizen can avoid the execution of an expulsion order for any the following circumstances: *a*) lack of possession of a passport or other identity document; *b*) lack of documentation including an address where the individual may be found; *c*) false declaration of generalities; *d*) violation of the deadline for voluntary return or

¹⁰² On this point, see F. Oberdan, 'Introdotta l'esclusione dei cittadini comunitari e aumenta la durata del trattenimento nei CIO. Le norme modificate del Testo unico immigrazione. Dai rimpatri alla libera circolazione negli Stati il legislatore si mette in regola con le Direttive UE', 28 *Guida al Diritto* (2011) pp. 44–47.

¹⁰³ For a more comprehensive overview on the treatment of irregular immigrants and the respect of human rights, see, G. Parlmisano, 'Trattamento dei migranti clandestini e rispetto degli obblighi internazionali sui diritti umani', 3 *Diritti umani e diritto internazionale* (2009) pp. 509–539.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

removal order or prohibition of entry; or *e*) provisional measure to guarantee the effectiveness of voluntary return or removal provision.¹⁰⁴

Pursuant to the new Article 13(5) of the 'Consolidated Text on Immigration', introduced by Decree-Law No. 89/2011, voluntary return represents the principal modality for an immigrant's return. However, voluntary return is not an automatic consequence of a prefect's order of expulsion; rather, the concerned third-country national must request it. The right to the State to effect a coercive return is conditional upon the absence of a request by the individual to return voluntarily to this State of nationality. Finally, Article 13(5) requires that notification of the return order be given in several languages, otherwise it is invalid.

Decree-Law No. 89/2011 also modifies the provision contained in Article 14 of the 'Consolidated Text on Immigration' concerning the detention and removal of aliens. According to this Article, as a prerequisite for the detention of an alien temporarily detained in a Centre for Identification and Expulsion (CEI), it must be impossible to return or remove the alien because of transitory circumstances (e.g. danger of escape). One of the newest elements contained in Article 1-*bis* to Article 14 of the 'Consolidated Text' as introduced by Decree Law No. 89/2011 is that, where the alien has an identity card or passport and is not subject to an expulsion order, as an alternative to detention in the CEI, the police commissioner can decide to implement one or more of the following provisional administrative measures: *a*) consignment of the passport or equivalent valid document to be returned on departure; *b*) mandatory residence in a previously identified place which can be easily traced; or *c*) requiring the alien to report periodically to a police office. These measures are taken in accordance with the subsidiary principle affirmed under Article 15 of Directive 2008/115.

The most important innovation introduced by Decree-Law No. 89/2011 is the significant reformulation of the penal provisions concerning expulsion. In the last few years, the severe sanction system on the expulsion of aliens has led the European Court of Justice to condemn the Italian system as inconsistent with the objectives of Directive 2008/115. In the *El Dridi* case¹⁰⁵ the EU Court of Justice held that Italy could not introduce a detention penalty in order to compensate for the failure of coercive measures taken to carry out expulsion — foreseen by Article 14 of the 'Consolidated Text on Immigration' — only because an alien remained illegally in Italian territory after he had been served an order to leave the country and the period allowed by that order had expired. According to the Court, such penalty could interfere with the alien's fundamental rights.¹⁰⁶

Decree-Law No. 89/2011 seems to execute the Court's judgment without completely renouncing the repressive measures which characterize the 'Consolidated Text on Immigration'.

SILVANA MOSCATELLI

Cases — Return of Immigrants Illegally Staying in Italy, before and after the El Dridi Case

- Corte d'Appello (Appeal Court) of Trento, Criminal Section, Order No. 451/1 of 2 February 2011, Reference for a Preliminary Ruling under Article 267 of the Treaty on the Functioning of the EU, in the Criminal Proceedings against Hassen El Dridi (alias Karim Soufi)

¹⁰⁴ On this aspect, see M. Castellaneta, 'Esclusione amministrativa degli immigrati irregolari: automatismi ridotti all'adeguamento alle regole UE. Attuazione incompleta per la direttiva rimpatri', 39 *Guida al diritto* (2011) pp. 103–105.

¹⁰⁵ *El Dridi* (European Court of Justice, C-61/11, Judgment, 28 April 2011).

¹⁰⁶ See comment on *Cases — Return of Immigrants Illegally Staying in Italy, before and after the El Dridi Case* in this volume of *YIHL*. For the implications of the *El Dridi* case on Italian domestic law, see A. Gilberto, 'Immigrazione: alcune conseguenze della sentenza *El Dridi* della Corte di Giustizia europea sull'ordinamento italiano', 3 *Il Giudice di pace* (2011) pp. 247–254. See also, C. Favilli 'L'attuazione della Direttiva rimpatri: dall'inerzia all'urgenza con scarsa cooperazione', 3 *Rivista di diritto internazionale* (2011) pp. 693–730.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

<<http://www.penalecontemporaneo.it/upload/Appello%20Trento%20-%20Ordinanza%20Corte%20Giustizia%20UE.pdf>>

☛ EU Court of Justice, Judgment of 28 April 2011

<<http://curia.europa.eu/juris/document/document.jsf?text=&docid=82038&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2468>>

On 2 February 2011, the Corte d'Appello (Appeal Court) of Trento issued order No. 451/1, containing a request for a preliminary ruling by the EU Court of Justice in the *El Dridi* case. Under Article 276 of the *Treaty on the Functioning of the EU* ('TFEU') (former Article 234 of the *Treaty on the European Community*), courts or tribunals of Member States may refer to the EU Court of Justice any question concerning the interpretation of EU legislation if they consider that a decision on this question is necessary to enable them to give judgment in a particular proceeding. In the present case, the Corte d'Appello of Trento had to decide on an appeal by Mr El Dridi (alias Karim Soufi) against the Court of Trento's decision to sentence him to one year's imprisonment for the offence of having stayed illegally on Italian territory after being issued with an order of expulsion by the competent administrative authority (Prefetto of Turin) of 8 May 2010 and a subsequent order of removal aimed at enforcing the expulsion order, issued by the Questore (Chief of Police) of Udine on 21 May 2010.

These administrative decisions, as well as the judgment of the Court of Trento, had been issued in pursuance of Legislative Decree No. 286 of 1998 ('Immigration Act and Norms on the Status of Foreigners'), which regulates *inter alia* the repatriation or return of irregular immigrants illegally staying on Italian territory. In relation to the execution of expulsion orders, Article 14 of the Legislative Decree establishes that, if it is not possible to give effect immediately to an expulsion order of the Prefetto, by deportation or return, the foreign national has to be detained, for the length of time that is strictly necessary, in the nearest specialized detention centre (Article 14(1)). If, however, this is not possible, the Chief of Police shall order the foreign national to leave the territory of Italy 'within five days' (Article 14(5)). At the date of the facts from which the *El Dridi* case originated, Article 14 further established that a foreign national who was the recipient of an expulsion order and of a subsequent removal order, and who nevertheless remained, was liable to a term of imprisonment of one to four years and, in case of non-compliance with further removal orders, to a term of imprisonment of between one and five years.

These provisions, in conjunction with Article 10*bis* of Legislative Decree No. 286/1998, regarding the 'Illegal Entry and Stay on the Territory of the State', clearly criminalised the entry or the stay of an irregular immigrant in Italy. In the opinion of many scholars, the criminalization of illegal immigration resulting from Legislative Decree No. 286/1998 was inconsistent with international human rights law and more specifically with EU directive 2008/115/EC of the European parliament and of the Council of 16 December 2008, on common standards and procedures in Member States for returning illegally staying third-countries nationals.¹⁰⁷ It should be added, however, that the Constitutional Court had already concluded that the so-called 'crime of illegal immigration' was consistent with the *Italian Constitution*.¹⁰⁸ However, the Court later clarified that the principle of non-discrimination under Article 3 of the Constitution meant that

¹⁰⁷ See G. Palmisano, 'Trattamento dei migranti clandestini e rispetto degli obblighi internazionali sui diritti umani', 3 *Diritti umani e diritto internazionale* (2009) pp. 509–533, 535. See also Directive 2008/115 [2008] OJ No. L 348, 24 December 2008, p. 98107.

¹⁰⁸ See e.g., Constitutional Court, Orders No. 252/2010, No. 193/2011.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

illegal immigration could not be regarded as an aggravating circumstance when sentencing for other offenses.¹⁰⁹

In the views of the Corte d'Appello, Legislative Decree No. 286/1998 could not be challenged on the grounds that it criminalized illegal immigration in contravention of EU legislation, since the latter does not prohibit Member States from criminalizing the illegal entry or stay of immigrants in their territory.¹¹⁰ Rather, it seemed that the coercive measures set forth in Article 14 of the Legislative Decree were, possibly, in conflict with the common standards and procedures for returning illegal immigrants set forth in Directive 2008/115. In the words of the Corte d'Appello:

[Directive 2008/115] is aimed at balancing the need of ensuring the removal of irregular non-EU member states nationals with that of preventing any disproportionate sacrifices of fundamentals rights of the persons involved, in accordance to the European Convention on Human Rights.¹¹¹

In fact, the Directive's guiding principle is to adopt a 'gradual approach' in introducing measures to ensure the effective execution of the orders of expulsion issued against third-country nationals who stay illegally in EU Member States' territory. First, the repatriation or return of these foreign nationals must take place on a voluntary basis. Second, any decision by the competent administrative authorities to return a foreign national must provide an appropriate period for voluntary departure, 'of between seven and thirty days', except in particular circumstances (Article 7(1)).¹¹² At the end of this period, if a return decision has not been complied with, Member States may take all necessary measures to enforce the decision (Article 8(1)). However, under the Directive, any coercive measures must: *a*) be regarded as 'of last resort'; *b*) be proportionate and may not exceed 'reasonable force'; and *c*) be implemented 'in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned' (Article 8(4)).

In this context, the Directive does not prohibit Member States from detaining third-country nationals illegally remaining in their territory if less coercive measures cannot be effectively applied, provided that this is in order to prepare the repatriation or return of these persons. Article 15 adopts the following principles applicable to these situations of detention. First, detention is permitted, most particularly, when there is a risk of absconding, or if the third-country national concerned avoids or hampers the return process. Second, the period of detention must be as short as possible and may only continue as long as the removal arrangements are in progress. In particular, it may not exceed six months and if an extension of this period is necessary, it must be subject to judicial supervision and may not exceed a period of a further twelve months. Furthermore, under Article 16 of the Directive, in such cases detention must take place in specialized detention facilities and if this is not possible, the Member States must ensure the third-country nationals who are detained in prisons are kept separate from ordinary prisoners.

Regarding the present case, the competent authorities were initially precluded from expelling Mr El Dridi by deportation or return because he had no identity documents. As the Corte d'Appello observed, the procedure under Legislative Decree No. 286/1998 did not conflict with the requirements of Directive 2008/115 when authorities issued both the order of expulsion and the

¹⁰⁹ Constitutional Court, Judgment No. 249/2010. See 13 *YIHL* (2010) pp. 552–554.

¹¹⁰ See Corte d'Appello of Trento, Criminal Section, Order No. 451/1, 2 February 2011, p. 34.

¹¹¹ *Ibid.*, p. 2.

¹¹² That is: 'if there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security'; in these cases, Member States may decide not to grant any period for voluntary departure, or to grant a period shorter than seven days. See Directive 2008/115 [2008] OJ No. L 348, 24 December 2008, art. 7(4).

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

order of removal. However, when Mr. El Dridi was sentenced to imprisonment for failing to comply with the orders of expulsion and removal while the administrative procedure for his expulsion was still in progress, there was a question as to the compatibility of this procedure under the Legislative Decree with the Directive. In this respect, the Corte d'Appello observed that the Legislative Decree might be in contravention of the 'gradual approach' to coercive measures required under the EU Directive. This was especially the case considering the severity of the criminal sanctions applicable under Article 14(5)(b) and (c).¹¹³

The Corte d'Appello further observed that the deadline for adapting national legislation to Directive 2008/115 had expired on 24 December 2010 and that at this date, Italy had not fully implemented the Directive into national law. However, the provisions of the Directive most relevant to the case (Articles 15–16) were self-executing and thus applicable in any proceeding brought before national judges by an individual against the State (so called direct 'vertical' effect of EU directives). This principle, which has been repeatedly affirmed by the Court of Justice and the Italian Constitutional Court, is undisputed.¹¹⁴ As a consequence, the fact that non-compliance with orders of expulsions against third-country nationals illegally staying on Italian territory was to be sanctioned by imprisonment at an intermediate stage of the related administrative procedure seemed to be in contradiction with the duty of sincere cooperation with the EU institutions and the duty not to undermine the effectiveness of EU directives.¹¹⁵

On these grounds, the Corte d'Appello found that a preliminary ruling under Article 276 of the TFEU was necessary for deciding on the appeal brought before it. On this basis, it referred the following questions to the Court of Justice for interpretation:

In the light of the principle of sincere cooperation, the purpose of which is to ensure the attainment of the objectives of the directive, and the principle that the penalty must be proportionate, appropriate and reasonable, do Articles 15 and 16 of Directive 2008/115/EC preclude:

- (1) the possibility that criminal sanctions may be imposed in respect of a breach of an intermediate stage in the administrative return procedure, before that procedure is completed, by having recourse to the most severe administrative measure of constraint which remains available?
- (2) the possibility of a sentence of up to four years' imprisonment being imposed in respect of a simple failure to cooperate in the deportation procedure on the part of the person concerned, in particular where the first removal order issued by the administrative authorities has not been complied with.¹¹⁶

In its judgment of 28 April 2011, the Court of Justice upheld the reasoning of the judge of the main proceeding. Regarding the coercive measures available to Member States under Article 8 of Directive 2008/115, in order to enforce the removal of third-country nationals who stay illegally in their territory, the Court observed, *inter alia*, that:

[T]he order in which the stages of the return procedure established by Directive 2008/115 are to take place corresponds to a gradation ... which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialized facility; the principle of

¹¹³ See Corte d'Appello of Trento, Order No. 451/1, p. 34.

¹¹⁴ *Ibid.*, p. 3.

¹¹⁵ *Ibid.*, p. 4.

¹¹⁶ [2008] OJ 348, p. 98.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

proportionality must be observed throughout those stages.¹¹⁷ ... [I]t is clear that in a situation where such measures [decisions of expulsion or removal] have not led to the expected result being attained ... the Member States remain free to adopt measures, including criminal law measures, aimed inter alia at dissuading those nationals from remain illegally on those States' territory.¹¹⁸

On the other hand, it is clear from the directive that 'those States may not apply rules, even criminal law rules, which are liable to jeopardize the achievement of the objectives pursued by a directive'¹¹⁹ and that the use of coercive measures to enforce return decisions '[is] expressly subject to the principles of proportionality and effectiveness with regard to the means used and the objectives pursued.'¹²⁰ Consequently, Member States may not provide for a custodial sentence on the sole ground that a third-country national continues to stay illegally on their territory, after an order to leave that territory was notified to them and the period granted for voluntary departure has expired. In such a situation, Member States must pursue efforts to enforce the return decision.

By contrast, Article 14(5)(b) and (c) of Legislative Decree No. 286/1998 delayed the enforcement of the return decision by imposing a penalty and thereby frustrated the application of Directive 2008/115.¹²¹ On these grounds, the Court ruled that

Articles 15 and 16 [of directive 2008/115] must be interpreted as precluding a member State's legislation, such as that at issue in the main proceeding, which provide for a sentence of imprisonment to be imposed on an illegally-staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.¹²²

Since it is true that Articles 15–16 of Directive 2008/115 'are unconditional and sufficiently precise', it was for the court of the main proceeding, within the exercise of its jurisdiction, to apply fully and give effect to these Articles, and to refuse to apply the provisions of Legislative Decree No. 286/1998 contrary to the objectives of the Directive. The Court of Justice further recommended that the referring judge take due account of the principle regarding the retroactive application of the more lenient penalty, which results from the constitutional traditions of all the EU Member States.¹²³

Commentators consider that the Court's decision implies that the interpretation of Articles 15–16 of Directive 2008/115 was immediately mandatory for any Italian public authority, including police authorities and prosecutors at the competent courts.¹²⁴ More explicitly, the Corte di Cassazione (Court of Cassation) later affirmed that the offense referred to in Article 14(5)(c) of

¹¹⁷ *El Dridi* (European Court of Justice, C-61/11, Judgment, 28 April 2011) para. 41.

¹¹⁸ *Ibid.*, para. 52.

¹¹⁹ *Ibid.*, para. 55.

¹²⁰ *Ibid.*, para. 57. This principle is enshrined in recital 16 of the preamble of the Directive:

The use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and in circumstances where the application of less coercive measures would not be sufficient.

¹²¹ *El Dridi* (European Court of Justice, C-61/11, Judgment, 28 April 2011) para. 59.

¹²² *Ibid.*, p. 1011.

¹²³ *Ibid.*, paras. 46–47, 61.

¹²⁴ See F. Viganò, 'La Corte di Giustizia dichiara incompatibile con la direttiva rimpatri l'incriminazione di cui all'art. 14 co. 5 ter t.u. imm.', *Diritto penale contemporaneo* (2011).

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

Legislative Decree No. 286/1998 had been attained by a sort of *abolitio criminis*, as a consequence of the judgment of the Court of Justice.¹²⁵

Consequently, in order to make the domestic legal system consistent with Directive 2008/115, the government adopted Decree-Law No. 89 of 23 June 2011, then converted into Law No. 129 of 2 August 2011.¹²⁶ Through these acts, Italy has modified Article 14 of Legislative Decree No. 286/1998, substituting the term of imprisonment with the penalty fine, thus maintaining the effectiveness of Directive 2008/115.

ORNELLA FERRAJOLO

Cases — Denial of International Protection as a Refugee and Recognition of Humanitarian Protection

• Judgment of the Tribunal of Naples No. 30 of 24 February 2011 concerning a Case of Denial of a Request of International Protection [Tribunale di Napoli, sentenza n. 30 del 24 febbraio 2011, *rigetto domanda di protezione internazionale come rifugiato e previsione del rilascio del permesso per protezione umanitaria ai sensi dell'art. 5 comma 6 TUI*].
<http://www.meltingpot.org/IMG/pdf/Sentenza_30-2011_del_Tribunale_di_Napoli_-_Protezione_Umanitaria.pdf>

The Tribunal of Naples rendered the judgment under examination here at the request of a Kenyan national who had been denied refugee status and subsidiary international protection for humanitarian reasons by the Territorial Commission for Immigration.

Italian domestic law recognises refugee status according to the State's obligations arising under the *Convention relating to the Status of Refugees*, the provisions of which are implemented by Law No. 722 of 1954.¹²⁷ In addition, Legislative Decree No. 251 of 19 November 2007 implemented Directive 2004/83/EC,¹²⁸ a set of minimum standards regulating both refugee status and other international protection.

In this framework, 'refugee' is defined as a person, who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹²⁹

¹²⁵ Corte di Cassazione, First Section, Judgment No. 24009 of 28 April 2011.

¹²⁶ *Gazzetta Ufficiale* No. 181 of 5 August 2011 <<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2011;129>>. See Comment on *Legislation — Free Circulation and Residence of European Citizens and Return of Irregular Third-Country Citizens* in this volume of *YIHL*.

¹²⁷ Legge 24 luglio 1954, n. 722, *Ratifica ed esecuzione della Convenzione relativa allo statuto dei rifugiati*, firmata a Ginevra il 28 luglio 1951, published in *Gazzetta Ufficiale* No. 196 of 27 August 1954 <<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1954-07-24;722>>.

¹²⁸ *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted* [2004] OJ L 304, p. 12. This directive was updated by *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted* [2011] OJ L 337/9.

¹²⁹ The Italian version is the following 'rifugiato':

cittadino straniero il quale, per il timore fondato di essere perseguitato per motivi di razza, religione, nazionalità, appartenenza ad un determinato gruppo sociale o opinione politica, si trova fuori dal territorio

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

Under Article 2 of the Legislative Decree No. 251/2007, subsidiary international protection can be granted to those foreign citizens or stateless persons who do not satisfy the requirements for refugee status, but for whom there is a risk of grave prejudice ('danno grave') if he or she were returned to the State of nationality or in case of statelessness, to the State where he or she used to live. The aforementioned grave prejudice ('danno grave') is described in Article 14 of Legislative Decree No. 251/2007 as one of the following: death penalty or execution of a death penalty; torture or another inhumane or degrading treatment;¹³⁰ threat to the life or the integrity of the person arising from a situation of indiscriminate violence due to an ongoing international or internal armed conflict. In all these circumstances, the subsidiary protection can be recognized on a case-by-case basis.

Furthermore, according to Article 5(6) of the Legislative Decree No. 286 of 1998, a special residence permit for humanitarian matters can be granted for serious reasons of a humanitarian nature or arising from Italy's constitutional or international obligations.¹³¹ Although Italy has no specific law regulating the provision of asylum, the right to asylum is granted on the basis of refugee status, international protection or temporary residence permit.

The Legislative Decree No. 25 of 28 January 2008, which implemented the Directive 2005/85/EC, contains the rules on the procedure for the request and recognition of refugee status and subsidiary international protection.¹³² Furthermore, along with Legislative Decree No. 140 of 2005, which implemented the Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers in the EU member States, it lists the rights and duties of asylum seekers.¹³³

The Ministry of the Interior has the competence to process asylum seekers. Other bodies, such as Territorial Commissions, also play important roles in this regard, such as interviewing asylum seekers.¹³⁴ In response to request for asylum, these Commissions can either recognize refugee status, grant subsidiary protection or a residence permit for humanitarian reasons, which allow the

del Paese di cui ha la cittadinanza e non può o, a causa di tale timore, non vuole avvalersi della protezione di tale Paese, oppure apolide che si trova fuori dal territorio nel quale aveva precedentemente la dimora abituale per le stesse ragioni succitate e non può o, a causa di siffatto timore, non vuole farvi ritorno ...

Legislative Decree No. 251/2007, art. 2(e).

¹³⁰ This fully complies with Article 3 of the European Convention of Human Rights and the related case-law of the Court of Strasbourg. See V. Eboli, 'Gli effetti extraterritoriali della Convenzione europea dei diritti dell'uomo', *Giurisprudenza italiana* (2003) pp. 2427–2437.

¹³¹ Decreto Legislativo 25 luglio 1998, n. 286, *Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*, published in *Gazzetta Ufficiale* No. 191 of 18 August 1998 - Suppl. Ordinario No. 139 <<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:1998-07-25;2861vig=>>. It makes reference to 'seri motivi, in particolare di carattere umanitario o risultanti da obblighi costituzionali o internazionali dello Stato italiano'. At art. 5(6).

¹³² Decreto Legislativo 28 gennaio 2008, n. 25, *Attuazione della direttiva 2005/85/CE recante norme minime per le procedure applicate negli Stati membri ai fini del riconoscimento e della revoca dello status di rifugiato*, published in *Gazzetta Ufficiale* No. 40 of 16 February 2008 <<http://www.camera.it/parlam/leggi/deleghe/testi/08025dl.htm>>.

¹³³ Decreto Legislativo 30 maggio 2005, n. 140, *Attuazione della direttiva 2003/9/CE che stabilisce norme minime relative all'accoglienza dei richiedenti asilo negli Stati membri*, published in the *Gazzetta Ufficiale* No. 168 of 21 July 2005 <<http://www.camera.it/parlam/leggi/deleghe/testi/05140dl.htm>>.

¹³⁴ Territorial Commissions are located in Gorizia, Milano, Roma, Foggia, Siracusa, Crotone, Trapani, Bari, Caserta and Torino. See <http://www.interno.it/mininterno/export/sites/default/it/temi/asilo/sottotema0021/Le_Commissioni_Territorialix_funzioni_e_composizione.html>.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

applicant to stay in Italy for five, three or one year, respectively.¹³⁵ If the request is denied, the interested person can apply to the tribunal for a review.¹³⁶

In the case under examination, the Tribunal of Naples heard a review of a decision delivered by the Territorial Commission of Caserta to deny a request for international protection by an anonymous applicant.

The applicant, a Kenyan national, alleged he had been persecuted by a criminal organization called 'Mungiki', which was apparently supported by the Kenyan government. According to the applicant, when he refused to join the organization, he was captured and beaten. After his escape, he made a statement to the Kenyan police, who allegedly did nothing because of the connection between the organization and the government. This evidence was supported by a certificate issued by an Italian physician who attested that the applicant had ugly scars on his body consistent with past lesions and that he suffered from post-traumatic stress disorder.

The Judge of the Tribunal of Naples considered that in cases concerning international protection, the applicable standard of proof is lower than in other cases, due to the difficulty of obtaining relevant evidence. Accordingly, evidence in such trials may include a generic analysis of the internal situation in the applicant's country of origin and other elements useful to assist the judge to reach a decision in the case.¹³⁷

According to the judge, the situation described by the applicant satisfied the relatively low standard of proof as it was plausible and consistent with documents published by the Immigration and Refugee Board of Canada in 2007 and by Amnesty International which suggested the Kenyan government was involved with criminal organizations in Kenya, notably, the Mungiki.¹³⁸

In light of this evidence, it was possible to infer that if the applicant were returned to Kenya, he would receive no protection from the police and would therefore be exposed to the risk of further persecution or mistreatment.

The judge considered the applicant was reliable as his evidence was generally internally consistent and any confusion could be attributable to his post-traumatic stress. Furthermore, he made every reasonable effort to produce evidence.

In the light of these considerations, although the judge believed that the applicant was not entitled to refugee status or subsidiary protection, the applicant was granted a temporary residence permit for humanitarian reasons as provided by Article 5(6) of Legislative Decree No. 286 of 1998.¹³⁹

Concerning the applicant's request related to the right of asylum, as provided by Article 10(3) of the *Italian Constitution*,¹⁴⁰ the judge clarified that in the absence of a comprehensive and specific law on the political asylum, the constitutional right must be qualified as the right to enter national territory and apply for refugee status.¹⁴¹ He added that the right of asylum in any case would not

¹³⁵ See <<http://www.interno.it/mininterno/export/sites/default/it/temi/asilo/sottotema001.html>>.

¹³⁶ See C. Taglienti, 'Diritto d'asilo e status di rifugiato nell'ordinamento italiano' <http://www.giustizia-amministrativa.it/webcds/%5C%5C.%5Cdocumentazione%5Cstudi_contributi%5Cdiritto_asilo.htm>.

¹³⁷ As provided by Legislative Decree No. 251/2007, art. 3.

¹³⁸ The documents are quoted in Judgment, p. 8.

¹³⁹ Judgment, p. 11.

¹⁴⁰ See M. Pedrazzi, 'Il diritto d'asilo nell'ordinamento internazionale agli albori del terzo millennio', in L. Zagato (ed.), *Verso una disciplina comune europea del diritto d'asilo* (Padova, Cedam, 2006) p. 19.

¹⁴¹ In this sense, see also the sentences of the Court of Cassation No. 18940 of 2006 and No. 18353 of 2006, quoted by the Judge of the Tribunal of Naples: Judgment, p. 12.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

have granted anything more than the temporary residence permit as regulated by Law Decree No. 416 of 1989, then converted into Law No. 39 of 1990.¹⁴²

VALERIA EBOLI

Cases — Recognition of the Right of Asylum

- Court of Cassation, Civil Section I, Order No.20912 of 11 October 2011
<http://www.meltingpot.org/IMG/pdf/cassazione_11ottobre2011.pdf>

The case involved an application for recognition of the right of asylum based on Article 10(3) of the *Italian Constitution* which states that a foreigner who cannot exercise democratic freedoms in his own country as guaranteed by the *Italian Constitution* has the right of asylum in Italian territory in conformity with the conditions established by law. Although various bills have been presented over many years, parliament has never adopted a law on this right and therefore Article 10(3) of the *Italian Constitution* has never been implemented into domestic law.¹⁴³ For this reason, asylum seekers can only apply for asylum through the procedures already established for refugee status.¹⁴⁴

In Italy, the recognition of refugee status is consistent with the 1951 *Convention Relating to the Status of Refugees*, ratified by Italy in 1954,¹⁴⁵ and the procedures established by EU directives and regulations on asylum.¹⁴⁶ Furthermore, the definition of the term 'refugee' is taken directly from the 1951 Convention according to which a 'refugee' is a person who has

well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁴⁷

This definition is reaffirmed in EU law.¹⁴⁸

The case under examination originated when the Territorial Commission of Milan¹⁴⁹ rejected the application for refugee status made by a Togo national who claimed to have been persecuted in

¹⁴² Decreto Legislativo del 30 dicembre 1989 n. 416, *Norme urgenti in materia di asilo politico, di ingresso e soggiorno dei cittadini extracomunitari e di regolarizzazione dei cittadini extracomunitari ed apolidi già presenti nel territorio dello stato*, published in *Gazzetta Ufficiale* No. 303 of 30 December 1989 converted into Law No. 39/1990 published in *Gazzetta Ufficiale* No. 49 of 28 February 1990.

¹⁴³ The last bills on the issue are dated 2008. For the text of the bills, see the Italian Chamber of Deputies <http://www.camera.it/119?q=diritto+di+asilo&spell=1&client=camera_xmanager_progetti_legge&output=xml_no_dt_d&site=prod_xmanager&proxystylesheet=camera_xmanager&ie=UTF-8&access=p>.

¹⁴⁴ See L. Neri, 'Profili sostanziali: lo statuto di rifugiato', in B. Nascimbene, (ed.), *Diritto degli stranieri* (Padova, Cedam, 2004).

¹⁴⁵ Italy ratified and implemented the 1951 Geneva Convention with Law No. 722 of 24 July 1954. On the Convention, see J. Hathaway, *The Rights of Refugees under International Law* (Cambridge, Cambridge University Press, 2005); A. Zimmermann, *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford, Oxford University Press, 2011).

¹⁴⁶ I. Boccardi, *Europe and Refugees: Towards an EU Asylum Policy* (The Hague, Kluwer Law International, 2002); J. Hathaway, *The Rights of Refugees under International Law* (Cambridge, Cambridge University Press, 2005); H. Battjes, *European Asylum Law and International Law* (Leiden, Martinus Nijhoff Publishers, 2006).

¹⁴⁷ The same definition is contained in Legislative Decree No. 251/2007, art. 2(e).

¹⁴⁸ See *Directive 2011/95/EU of the Parliament and the Council of 13 December 2011, on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted* [2011] OJ L 337, art. 2(f).

¹⁴⁹ The Territorial Commissions have been established by the Decree of the President of the Republic No. 303/2004 for examining asylum seekers' applications.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

his country for political reasons. As a result of belonging to an opposition political party, he alleged he had been subjected to physical and psychological violence by the authorities of Togo. Furthermore, he is the son of an influential member of the same opposition party, who had been imprisoned and who subsequently died in jail. In conformity with Italian legislation that grants a third-country national the right to access tribunals for judicial review when an application for refugee status is rejected by a Territorial Commission, the applicant appealed to the Tribunal of Milan, which recognized his right of asylum on the basis of Article 10(3) of the *Italian Constitution*. The Ministry of the Interior appealed against this decision, while the applicant submitted an incidental appeal. Following the decision of the Court of Appeal of Milan to grant only the first appeal and to reject the second, the applicant appealed to the Court of Cassation. In the view of the applicant, the Court of Appeal had not sufficiently investigated the facts of his story and the grounds on which he was persecuted, in violation of the Article 1 of the 1951 *Convention Relating to the Status of Refugees* and Legislative Decree No. 251/2007, implementing Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.¹⁵⁰

The Court of Cassation upheld the appeal, affirming that the Court of Appeal had rejected the application without exercising appropriate powers of inquiry into the existence of conditions for granting refugee status. The Court found that in conformity with Italian legislation and EU law concerning the recognition of refugee status, both the administrative authorities and the judges must independently make every effort to gather all necessary information and documentation regarding any persecution alleged by the asylum seeker. In the case under examination, the Court of Appeal had underestimated the violations suffered by the applicant's father and the persecution of the applicant himself. For this reason, the case was referred back to the Court of Appeal for reconsideration.

VALENTINA DELLA FINA

Cases — Residence Permit for Humanitarian Reasons

- Regional Administrative Tribunal of Sicily (TAR-Sicilia), Section IV (Catania), Judgment No. 2799 of 28 November 2011¹⁵¹

The judgment of the Regional Administrative Tribunal of Sicily deals with the implementation in Italy of EU rules on the 'Common European Asylum System'. As agreed by the European Council, at its special meeting in Tampere in 1999, this System is based on the 1951 *Convention Relating to the Status of Refugees* principles¹⁵² and includes, among other things: common minimum conditions of reception of asylum seekers; the determination of the Member State responsible for the examination of an asylum application; and measures on subsidiary forms of protection, such as those concerning humanitarian protection.¹⁵³

¹⁵⁰ Directive 2004/83/EC was replaced with Directive 2011/95/EU [2011] OJ L 337.

¹⁵¹ For the text, see <<http://www.venetoimmigrazione.it/Portals/0/pdf/normativa/2799.pdf>>.

¹⁵² Italy ratified and implemented the 1951 Geneva Convention with Law No. 722 of 24 July 1954.

¹⁵³ See S. Peers in N. Rogers (ed.), *EU Immigration and Asylum Law: Text and Commentary* (Leiden, Martinus Nijhoff, 2006); V. Della Fina, 'Rifugiati' in *XV Enciclopedia giuridica Treccani* (2007); P. Craig and G. De Búrca, *EU Law: Text, Cases and Materials* (New York, 4th ed., Oxford University Press, 2008); C. Barnard, *The Substantive Law of the EU — The Four Freedoms* (New York, 3rd ed., Oxford University Press, 2010).

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011

CORRESPONDENTS' REPORTS

The case originated from the application of a Roma woman born in Italy to parents who had fled the city of Mitrovica during the conflict in the former Yugoslavia in the 1990s¹⁵⁴ because of ethnic cleansing of Roma people by ethnic Albanians.¹⁵⁵ Despite the fact that the woman has lived in Italy with her mother and brothers since she was born and also that she has never been to the former Yugoslavia and is unfamiliar with the culture of her ethnic group, when she came of age she was unable to obtain Italian citizenship or any other lawful residence permit because her mother had no documentation concerning their stay in Italian territory.¹⁵⁶

In 2008, the Roma woman joined her elder sister in France, who was a beneficiary of subsidiary protection status. It is important to observe that in the EU legal framework on asylum 'subsidiary protection status' differs from 'refugee status'. According to Article 2(f) of the Directive 2011/95/EU of the Parliament and the Council of 13 December 2011, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted,¹⁵⁷ a person eligible for subsidiary protection means a

third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.¹⁵⁸

In France, the Roma woman submitted an application for international protection.¹⁵⁹ According to Article 5 of the Directive 2011/95/EU, international protection is provided when applicants demonstrate

a well-founded fear of being persecuted or a real risk of suffering serious harm based on events which have taken place since the applicant left the country of origin or activities which have been carried out by the applicant since he left the country of origin, in particular where these activities constitute the expression and continuation of convictions or orientations held in the country of origin.

The Roma woman submitted an application for international protection because of the risk of persecution if she went to Kosovo, where the Roma ethnic group continues to suffer discrimination.

¹⁵⁴ Today the city of Mitrovica belongs to the Kosovo State, which declared its independence from Serbia in 2008.

¹⁵⁵ The Statutes of the International Criminal Tribunal for the Former Yugoslavia (Article 5) and of the International Criminal Court (Article 7) defined the ethnic cleansing as a crime against humanity. See also UNGA Res. 47/80 (1992), UN Doc. A/RES/47/80, 16 December 1992, on 'Ethnic cleansing and racial hatred'.

¹⁵⁶ Law No. 91 of 5 February 1992, which regulates Italian citizenship, is principally based on *jus sanguinis*. According to this Law a person can acquire the Italian citizenship on the basis of the principle of *jus soli* only if he or she was born on Italian territory to stateless or unknown parents or to parents who cannot enjoy their own nationality.

¹⁵⁷ This Directive substituted Directive 2004/83/EC of 29 April 2004.

¹⁵⁸ Article 17(1) of the Directive 2011/95/EU [2011] OJ L 337 states that a third-country national is ineligible for subsidiary protection if he or she has committed a crime against peace, war crime, crime against humanity, or serious crime; has been guilty of acts contrary to the purposes and principles established in the Preamble and Articles 1 and 2 of the Charter of the United Nations; or constitutes a danger to the community or to the security of the Member State in which he or she is present. Article 17(2) specifies that paragraph 2 'applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein'.

¹⁵⁹ An application for international protection means 'a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately'. See Article 2.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

Notwithstanding this risk, French authorities rejected the application and she was obliged to return to Italy, where she lives with her mother and brothers in the gypsy camp of S. Ranieri in Messina (Sicily).

On 9 March 2010, she submitted another application for international protection, this time in Italy.¹⁶⁰ However, in conformity with the Council Regulation (EC) No. 343/2003 of 18 February 2003, which establishes the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (the so called 'Dublin II Regulation'), it was rejected.¹⁶¹ On 19 March 2010, the Roma woman submitted a further application for a residence permit for humanitarian reasons to the chief of police of Messina to legalize her position in Italy. Otherwise, she could be charged with the offence of illegal staying on Italian territory as provided by Law No. 94/2009.¹⁶² The application was based on Article 11(1)(c-ter) of the Decree of the President of the Republic No. 394/1999, Regulation Implementing the Consolidated Text on Immigration, concerning the issuing of residence permits for humanitarian reasons. In conformity with this Article, a foreigner may submit an application for humanitarian reasons only for grave personal objective situations that would prevent Italian authorities from expelling the person.

On 11 June 2010, the chief of police of Messina rejected the application and the Roma woman appealed to the Regional Administrative Tribunal of Sicily in order to obtain the annulment of the measure passed by the chief of police of Messina. The Tribunal found the claim admissible observing that the chief of police of Messina had based his measure only on information received by the Italian Embassy in Pristina concerning the protection of the Roma ethnic group in Kosovo. According to this information, both the Constitution¹⁶³ and the laws of the Republic of Kosovo protect the rights of minorities living in the Kosovo territory, including the Roma minority. Furthermore, this evidence stated that the last episodes of intolerance against the Roma people occurred in Kosovo more than ten years ago. The Tribunal observed that the chief of police of Messina failed to consider relevant reports of international organizations and NGOs on human rights protection in Kosovo produced by the Roma woman in her documentation, in particular, the Amnesty International Annual Report 2011 which stated that discrimination against the Roma people in Kosovo was still widespread and that they were at a serious risk of human rights violations.¹⁶⁴

On the basis of this reasoning, the Regional Administrative Tribunal of Sicily annulled the measure of the chief of police of Messina and ordered the Italian administrative authorities to execute the judgment, granting humanitarian protection to the applicant.

VALENTINA DELLA FINA

Cases — Execution of Judgments of the European Court of Human Rights

¹⁶⁰ Italy implemented Directive 2004/83/EC with Legislative Decree No. 251 of 19 November 2007.

¹⁶¹ *Council Regulation (EC) No. 343/2003* [2003] OJ L 222 has substituted the *Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities*, opened for signature 15 June 1990, 2144 UNTS 492 (entered into force 1 September 1997). The Dublin II Regulation is based on the so called *one chance rule*: a third-country national can submit just one application for international protection in the EU territory.

¹⁶² On this offence, see 13 *YIHL* (2010) pp. 552–554. See also *El Dridi* (European Court of Justice, C-61/11, Judgment, 28 April 2011), in which the European Court of Justice ruled against the Italian legislation providing for third-country nationals' imprisonment for the offence of illegally staying in Italy if they refused to obey an order to leave the territory. See the comment on this case in this volume of *YIHL*.

¹⁶³ See e.g. *Kosovo Constitution* arts. 58–62.

¹⁶⁴ See <<http://50.amnesty.it/rapportoannuale2011/europa-asia-centrale>>.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

- Supreme Court of Cassation, Judgment No. 19985 of 30 September 2011
<<http://static.ilsole24ore.com/DocStore/Professionisti/AltraDocumentazione/body/12700001-12800000/12753835.pdf>>

The Supreme Court of Cassation pronounced again on the duties of the Italian judiciary with regard to the implementation of the 1950 *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights),¹⁶⁵ in its judgment No. 19985 of 30 September 2011. The facts of the case were as follows.

The applicant, who was a candidate in the 1996 parliamentary elections, had lodged a criminal complaint against a political opponent, a senator, accusing him of defamation in the course of an interview given by the latter to the Italian newspaper 'Il Messaggero'. The applicant also instigated civil proceedings in order to obtain redress for the damage he had sustained. In a resolution of 11 March 1998, the Senate held that the impugned statements contained in the interview were opinions expressed by a member of parliament in the performance of his duties and should therefore be covered by Article 68 of the *Italian Constitution* concerning parliamentary immunity.¹⁶⁶ On the basis of the resolution, the criminal proceedings instituted by the applicant were discontinued and his civil action was dismissed.

Referring to Article 6 of the *European Convention of Human Rights* concerning the right to a fair hearing,¹⁶⁷ the applicant submitted a claim to the European Court of Human Rights ('ECHR') affirming that the immunity granted to the senator had infringed his own right of access to a court.

On 3 June 2004, the ECHR submitted its judgment in *De Jorio v Italy*, deciding that since the statements had been made in an interview with a journalist, and hence outside a parliamentary chamber, they had not been connected with the performance of parliamentary duties. Furthermore, Article 68 of the *Italian Constitution* had not covered the statements. In such circumstances, the denial of access to a court could not be justified purely on the basis that the quarrel might be political in nature or connected with a political activity. For this reason, the ECHR held unanimously that a violation of Article 6 of the Convention had occurred.

¹⁶⁵ The Convention was ratified and implemented by Italy with Law No. 848 of 4 August 1955, published in *Gazzetta Ufficiale* No. 221 of 24 September 1955.

¹⁶⁶ The text of Article 68 states:

Members of Parliament cannot be held accountable for the opinions expressed or votes cast in the performance of their function. In default of the authorisation of his House, no Member of Parliament may be submitted to personal or home search, nor may he be arrested or otherwise deprived of his personal freedom, nor held in detention, except when a final court sentence is enforced, or when the Member is apprehended in the act of committing an offence for which arrest *flagrante delicto* is mandatory.

¹⁶⁷ The text of Article 6(1) of the European Convention on Human Rights enunciates the principle of a fair trial in criminal as well as civil proceedings. It reads:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

This is a generic notion covering also the more specific guarantees set out in paragraphs 2–3 which detail specific rights of the defence.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

The judgment of the Strasbourg Court was given while the applicant's civil proceedings were pending in Italy, but the Court of Appeal of Rome had dismissed the civil action without taking the ECHR judgment into account. The question was then brought before the Supreme Court of Cassation of Italy.

The core issues before the Supreme Court concerned three main questions. First, the Supreme Court judge noted that the ECHR had held Article 68 of the *Italian Constitution* to be inapplicable to a quarrel between private citizens. As to the second question, substantive in nature, the Court of Cassation underlined the effects of the ECHR judgments on the Italian legal system. In particular, the Court confirmed the obligation of the Italian judiciary to apply directly the norms of the European Convention. Furthermore, it established that the judgments of the ECHR must be executed even if they have been given during trial proceedings still pending before domestic courts. Finally, the Court rightly pointed out that the norms of the *European Convention of Human Rights* are linked to Article 2 of the *Italian Constitution*, which concerns the inviolable rights of the person.¹⁶⁸ As a consequence, the Italian judiciary is obliged to consider Italian constitutional rights and European conventional rights as complementary.

This judgment represents a further contribution of Italian jurisprudence to the domestic implementation process of the *European Convention on Human Rights* into the Italian legal system. It follows the two judgments of the Italian Constitutional Court No. 348 and No. 349 of 24 October 2007, which established that Article 117(1) of the *Italian Constitution*¹⁶⁹ grants a superior legal authority to the *European Convention on Human Rights* over ordinary domestic law.¹⁷⁰ This means that an ordinary domestic law in conflict with the norms of the Convention violates Article 117 of the *Italian Constitution*, and must be declared unconstitutional by the Italian Constitutional Court.

The solution adopted by the Supreme Court of Cassation and by the Constitutional Court underlines the new place accorded to the *European Convention on Human Rights* and to the judgments of the ECHR in the Italian legal system.¹⁷¹ It represents a pivotal step forward for improving the rights covered by the Convention in Italy and for realizing a more effective link between the Italian judiciary and the European human rights regime.

ROSITA FORASTIERO¹⁷²

Cases — Confirmation of the Decision of the Court of Milan in the Abu Omar Case

- Corte d'Appello (Appeal Court) of Milan, Criminal Section, Decision No. 3688/10 of 15 December 2010 – 15 March 2011
<<http://www.penalecontemporaneo.it/upload/C.%20App.%20Milano,%2015.12.10,%20caso%200Abu%20Omar.pdf>>

¹⁶⁸ Article 2 reads: 'The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity shall be fulfilled'.

¹⁶⁹ Article 117(1) states: 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations'.

¹⁷⁰ S. Mirate, 'A New Status for the ECHR in Italy: the Italian Constitutional Court and the New 'Conventional Review' on National Laws', 15 *European Public Law* (2009) pp. 89–109. See also, M. Immediato, 'Il futuro dei diritti fondamentali nel sistema Cedu-Carta', 3 *Diritto comunitario e degli scambi internazionali* (2011) pp. 339–354.

¹⁷¹ On the reception of the *European Convention on Human Rights* into national legal orders, see E. Cannizzaro, 'The Effect of the ECHR on the Italian Legal Order: Direct Effect and Supremacy', 19 *Italian Yearbook of International Law* (2009) pp. 173–185. See also, A. Caligiuri and N. Napoletano, 'The Application of the ECHR in the Domestic Systems', 20 *Italian Yearbook of International Law* (2011) pp. 125–159; A. S. Sweet and H. Keller, 'The Reception of the ECHR in National Legal Orders' (2008) <http://digitalcommons.law.yale.edu/fss_papers/89>.

¹⁷² Rosita Forastiero is Researcher at the Institute for International Legal Studies of the National Research Council (CNR) of Italy.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

The Corte d'Appello (Appeal Court) of Milan decided on the appeals against the Court of Milan's decision in the *Abu Omar* case.

On 4 November 2009, the Court of Milan found 23 CIA agents guilty for the 'extraordinary rendition' of a suspected terrorist known as Abu Omar, which had taken place in Milan in 2003. At the same time, the Court dismissed a case against the former director of the Italian Intelligence Service (SISMI), Nicola Pollari and other SISMI officers who had allegedly collaborated in the crime. During the proceedings, the Italian government had repeatedly invoked State secrecy regarding certain documents and information, including the names of the SISMI officers involved, whose disclosure would have prejudiced, according to the government, the State's military defence and the relationship between Italy and the US. The reliance on State secrecy in this case raised issues as to the correct balance of competence between the judiciary, which was willing to exercise jurisdiction over the case to enquire into the actions of SISMI officers, and the executive, which maintained that State secrecy was legitimately invoked. The Constitutional Court, which was asked to resolve the issue relating to the proper balance of authority, deemed that the government was justified to invoke the State secrecy clause with regard to certain information and not the whole case as this was consistent with the Constitution, preserving, on the one hand, State security and, on the other, the right of the judiciary to exercise jurisdiction.¹⁷³

The Prosecutor, the plaintiffs, and nearly all the defendants appealed to the Corte d'Appello of Milan against the decision of the Court of Milan.

The Prosecutor challenged the dismissal of the proceedings against the SISMI officers and asked the Corte d'Appello to submit the question again to the Constitutional Court from a different point of view. The new issue was framed as whether or not Articles 41 and 39 of Law No. 124/2007 on State secrecy contravened the Constitution to the extent that they allowed reliance on the State secrecy clause not only at an early stage of investigations, but also after the judiciary had decided to exercise its competence and a proceeding had commenced.¹⁷⁴

On this point, the Corte d'Appello observed:

Any principle enunciated in a decision of the Constitutional Court is mandatory and must be duly taken into account by judges. Judges must respect and apply these principles and may not defer the same matter to the Constitutional Court, although in a different form, such as, for instance, the form of a question concerning the consistency of a given law with the Constitution.¹⁷⁵

On this basis, the decision of the Corte d'Appello has substantially confirmed the previous decision on the *Abu Omar* case with the decision of the Constitutional Court seemingly leaving no room for a different conclusion.

ORNELLA FERRAJOLO

Treaty Action — Police Transboundary Cooperation

- Ratification and Implementation of the *Agreement between the Government of the Italian Republic and the Government of the Republic of Slovenia on Police Transboundary Cooperation*, signed at Ljubljana on 27 August 2007 (entered into force on 18 July 2011)

¹⁷³ See 12 *YIHL* (2009) pp. 571–576.

¹⁷⁴ Corte d'Appello (Appeal Court) of Milan, Criminal Section, Decision No. 3688/10 of 15 December 2010 – 15 March 2011, p. 24.

¹⁷⁵ *Ibid.*, p. 73.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

- ☛ Law No. 60 of 7 April 2011, entered into force on 3 May 2011¹⁷⁶
<<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2011;60>>

With Law No. 60 of 7 April 2011, the Italian parliament ratified and implemented the Agreement between Italy and Slovenia concerning police transboundary cooperation, signed at Ljubljana on 27 August 2007. This Agreement consolidates cross-border cooperation and mutual assistance between the two countries in order to protect public safety and security and enhance activities to combat international organized crime and illegal immigration. It is part of a broader context of cooperation in policing already in place at international and European level.¹⁷⁷

The Agreement incorporates international treaty action previously taken between Italy and Slovenia. In particular, it completes the Agreement between the Italian and Slovenian Ministries of the Interior to counter illicit traffic in narcotic drugs and psychotropic substances and organized crime, signed in Rome on 28 May 1993 and entered into force on 27 March 1995.¹⁷⁸

Under Article 1, the Agreement on police transboundary cooperation identifies the border areas concerned and the relevant bodies necessary to achieve its objectives. These objectives include greater cooperation to protect public order and security and the prevention and repression of crimes. The Agreement identifies the Italian Ministry of the Interior, the Italian Department of Public Safety, the Slovenian Ministry of the Interior and the Slovenian Directorate-General of Police and Police organizational units as the bodies charged with the responsibility of carrying out the duties provided in the Agreement. According to Article 1, the border areas under the competence of Italy are the provinces of Trieste, Udine and Gorizia, while Slovenia is responsible for the territories of Koper, Nova Gorica and Kraj.

Pursuant to Article 2, the Parties endeavour to exchange information on situations concerning security and pledge to carry out, on schedule and if necessary, a joint analysis of issues concerning the transboundary context. The police bodies of the Contracting Parties, within the framework of their competence, are to provide mutual assistance, on request, to maintain order and public security and to prevent and repress crimes. In accordance with the national law of the Parties, requests may include, among other things, checks on the owners and drivers of road, air and maritime vehicles, driving licenses, identity documents, authorizations of residence, provenience of objects (e.g. weapons), information on cross-border tracking, verification of evidence, etc. (Article 3). Security organs of the Parties will work together in training, updating and exchanging study programmes, organizing joint seminars and training courses with an exchange of teachers, and sending representatives to attend demonstrations (Article 5).

The Agreement regulates particular forms of police cooperation, including transboundary observation and shadowing of suspected persons or those for whom a request for extradition has been made. These activities are connected with investigations conducted by the competent national bodies which shall indicate procedures to be followed in urgent cases. Transboundary observation and shadowing can be undertaken if they are permitted in the domestic law of the Parties and can be continued beyond the borders if the other contracting Party consents. When it is impossible to ask

¹⁷⁶ Published in *Gazzetta Ufficiale* No. 100 of 2 May 2011.

¹⁷⁷ INTERPOL and EUROPOL are the two main agencies dealing with police cooperation at international and European levels respectively. In October 2011, the two agencies extended their close collaboration against transnational organized crime by a Memorandum of Understanding in order to link up the secure networks of both agencies to facilitate and simplify the exchange of operational and strategic crime information, including via their respective liaison officers based at Interpol in Lyon and at Europol in The Hague. Italy and Slovenia are both Member States of INTERPOL and EUROPOL.

¹⁷⁸ On bilateral agreements between Italy and Slovenia, see
<http://www.ambclubiana.esteri.it/Ambasciata_Lubiana/Menu/Ambasciata>.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

for the consent of the other Party, the Party involved in the observation and shadowing must inform the competent body of the other contracting Party immediately once they cross the border (Articles 6–7).

Article 8 of the Agreement regulates transboundary tracking, identifying the types of offences to which the action is applicable. It provides that, in urgent cases either Party may track without prior consent of the other Party. However, the activity must be stopped immediately upon request. The tracking can be also undertaken within 30 kilometres within the territory of the other State when the person is beyond police control (Article 9).

In accordance with Article 17 of the Agreement, the Parties can adopt special agreements to establish contact points to facilitate the exchange of information and cooperation.

Importantly, this Agreement provides for the adequate protection of processing information and sensitive data. They must be protected on the basis of relevant national laws. The data can be transmitted to third parties only by competent authorities with the prior consent of the Party which previously communicated them.¹⁷⁹

Article 19 of the Agreement specifies the rights and obligations of police officers in the framework of the cooperation established by the Agreement. In particular, it requires officers to wear the correct uniform and to carry the standard issued weapons as well as other means of coercion, except where the other Contracting Party requires otherwise and in the case of self-defence.

It is important to underline that, pursuant to Article 21, if police officers of the Contracting Party cause any damage to the territory of the other Contracting Party during the execution of the activities under the Agreement the latter is entitled to third party damages to the same extent as if the damage had been caused by its own police officers.

If a Contracting Party considers that the implementation of cooperation under the Agreement limits its sovereignty, threatens its safety or other primary interests, or violates its national law, it can communicate to the other Contracting Party its decision to waive, totally or partially, the fulfilment of cooperation. It can also decide to define other conditions for its implementation.

Any disputes regarding the application and interpretation of the Agreement which cannot be resolved by consultation between the Italian Department of Public Safety and the Slovenian General Directorate of Police will be resolved through diplomatic means (Article 25).

With the entry into force of this Agreement, Article 27 provides for the abrogation of the following acts stipulated between Italy and Slovenia: *a*) Memorandum on police cooperation between Italy and Slovenia, 14 November 1997; *b*) Agreement between Italy and Slovenia on police, 5 July 1998; and *c*) Minutes of the meeting between the two Ministries of the Interior for the exchange of computerized information on illicit drug trafficking along the Balkan route and the Mediterranean Basin, on 28 May 1993.

¹⁷⁹ In 2005, seven EU Members, namely Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Spain signed at Prüm (Germany) the Treaty on the Stepping up of Cross-border Cooperation, particularly in Combating Terrorism, Cross-border Crime and Illegal Migration. The objective of the Prüm Treaty is to enhance European cooperation, to play a pioneering role in establishing the highest possible standard of cooperation especially by means of exchanging information, particularly in combating terrorism, cross-border crime and illegal migration, while leaving participation in such cooperation open to all other Member States of the European Union. The Prüm Treaty, which entered into force on 1 November 2006, breaks new ground in cooperation in the area of internal security as it provides the Parties with certain rights of access to DNA data only in a repressive context (prosecution of crime), fingerprint data, personal and non-personal data, as well as vehicle registration data in both preventive and repressive context. Italy and Slovenia are both Parties to the Prüm Treaty. On Italian adhesion to the Treaty, see 12 *YIHL* (2009) pp. 589–592.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

The Agreement on transboundary police cooperation will have an unlimited duration and may be terminated by either Party, through diplomatic channels, by written notice of at least six months.

SILVANA MOSCATELLI