ITALY[1]

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On 3 February 2012, the International Court of Justice (ICJ) delivered judgment on the dispute between Germany and Italy, concerning Jurisdictional Immunity of the State.[2]

This dispute originated from the decision of Italian courts to exercise jurisdiction over Germany in respect of civil claims brought before them by Italian citizens, seeking reparation for injuries caused by violations of international humanitarian law committed in Italy by the German Reich

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

[2] *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, Judgment, ICJ Reports, 3 February 2012 <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=60&case=143&code=ai&p3=4>.

during World War II.[3] Through its decision, the ICJ upheld Germany's contention that Italy was in violation of the jurisdictional immunity which Germany enjoys under international law, by allowing civil claims to be brought against it, and by taking measures of constraint against German property (Villa Vigoni, in Milan).[4] It should be remembered that during the proceeding, the applicant and the defendant both agreed on the immunity of the State as to *acta iure imperii* under customary international law. Italy maintained, however, that Germany was not entitled to immunity because the latter did not extend to wrongful acts occasioning death and injury to persons or damage to property committed on the territory of the forum State by the armed forces of a foreign State during an armed conflict. A further argument was that immunity as to *acta iure imperii* did not extend to conduct which violated peremptory norms of international law. In addition, it had been proved that the claimants could not obtain compensation from German courts, or by any other means and therefore, bringing claims before Italian courts was a 'last resort' solution. As noted, the ICJ did not uphold such interpretation.

The ICJ's decision, once cursorily reported and disseminated by the media, raised some concern in Italy. The conclusion of the case was regarded as a sign that the right to compensation of Italian nationals who suffered injuries as a consequence of Nazi crimes committed in Italy during World War II, would not be respected. This fear was fuelled by the fact that a number of civil claims on the same subject are still pending before Italian courts and the technical and complicated issue of what will be the consequences of the ICJ's decision in related proceedings.[5]

The same day of the judgment, the Italian Minister for Foreign Affairs, Mr Giulio Terzi made the following declaration:

> Italy respects the judgment delivered today by the International Court of Justice. The content of the decision does not coincide with the arguments on which Italy has founded its attitude in the case. However, the pronouncement of the Court gives an important contribution of clarification, especially through the reference the Court has made to relevance that must be attached to negotiations between the two parties, with the view of seeking solution. In this way, Italy will persist — as it did until now — in addressing together with Germany any consequences of the painful events that occurred during World War II, in a spirit of dialogue and seeking justice for the victims and their families.[6]

A few days later, a parliamentary question was introduced into the Senate by a member of the 'Partito Democratico' (Democrat Party), addressed to the Presidency of the Council of Ministers and to the Minister for Foreign Affairs. In this question, after recalling the circumstances of the case and the essential features of the ICJ judgment, it was observed:

> Italian courts have sanctioned, rightly and through unequivocal judgments, the faults of the authors and the accountability for the massacres committed by the Nazi régime. The judgment [of the ICJ] … , has no consequence on criminal decisions delivered by the Italian courts … , which remain untouched.
>
> It should be reaffirmed that compensation to the families of the victims can never be sufficient to compensate the loss of their loved ones. However, compensation represents, not only in a symbolic fashion but also as a substantive principle, Germany's accountability for the tragedies caused by the Nazi régime …

[3] See 11 *YIHL* (2008) p. 497 et seq; 13 *YIHL* (2010) p. 531 et seq.
[4] *Jurisdictional Immunities of the State*, Judgment, para. 139.
[5] See 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?', 444 *Rivista di diritto internazionale* (2012).
[6] ASCA, 'Stragi naziste: Berlino vince ricorso all'Aja contro Roma' (Press release, 3 February 2012) <http://www.altalex.com/index.php?idnot=17068>.

> Bearing in mind that the Court of The Hague has recommended that the two governments seek for an agreement through negotiations … , an agreement on compensation to the victims is to be regarded as a mean for recognizing, also and once again, the responsibility of certain persons and the injuries suffered by others. Such an agreement would help Italy and Germany to share memory, and to reaffirm a common truth regarding those tragic events, which must never be forgotten.
>
> For these reasons, we ask the Minister which initiatives the government will take for starting negotiations with Germany as recommended by the International Court of Justice … [7]

On 12 April 2012, a written answer to the question was given by the Vice Minister for Foreign Affairs:

> Through its judgment of 3 February 2012, the International Court of Justice found that Italy has violated the immunity that the Federal Republic of Germany enjoys under international law, 1) by allowing civil claims to be brought against it based on violations of the international humanitarian law committed by the German Reich in the period 1943-1945; 2) by taking measures of constraint against Villa Vigoni, a German property; and 3) by declaring enforceable in Italy the judgment of a Greek court based on violations of international humanitarian law committed in Greece by the German Reich.
>
> On this basis, the Court stated that Italy must 'by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect'.
>
> The Court has rejected the arguments through which Italy, recalling the jurisprudence of the Court of Cassation, has maintained that the Italian courts have been prompted to some restriction in interpreting the principle of State immunity because of exceptional circumstances and by necessity: Germany failed to execute its obligation of reparation, contrary to the legitimate expectations of many victims of Nazi crimes (war crimes and crimes against humanity), and it has been proved that the claimants could not obtain justice by German courts or by any other means. Significantly, these arguments are reflected in the judgment of the ICJ (para. 99), where the Court notes that it is 'a matter of surprise' and 'regret' that a number of the same Italian military internees who were denied treatment as prisoners of war in 1943, have been regarded by the German Government, in 2000, as being ineligible for compensation under the applicable German laws, on the ground that they were entitled to the prisoner-of-war status at the relevant time. The Court has further affirmed (para. 104), that '… the claims arising from the treatment of the Italian military internees …, together with other claims of Italian nationals which have allegedly not been settled — and which formed the basis for the Italian proceedings — could be the subject of further negotiations involving the two States concerned, with a view to resolving the issue.'
>
> These observations of the ICJ are an authoritative recommendation also to Germany. They allow the Italian government to seek the restarting of negotiations, which were suspended in 2008, when Germany decided to submit the dispute to the International Court of Justice. Therefore, the day after that the judgment was delivered (4 February 2012), the Minister for Foreign Affairs Mr Giulio Terzi wrote to his Colleague Westerwelle to confirm that the Italian Government is ready to start bilateral negotiations for solving the unsettled issues. On 7 February, the Minister commenced consultations with the organizations representing the

[7] Act of the Senate, Parliamentary Question No. 4/06841, XVI Legislature, 9 February 2012–12 (April 2012) pp. 1–2 <http://banchedati.camera.it/sindacatoispettivo_16/showXhtml.Asp?idAtto=49249&stile=6&highLight=1>.

> victims, with the view of carrying out negotiations with Germany in a spirit of dialogue and of questing justice for the victims and their families.
>
> Respect for the victims and for those who survived to internment and massacres imposes to speak honestly and clearly. From negotiations carried out in past years, before that the dispute was submitted to the ICJ, it emerges that Germany will hardly agree on compensations *ad personam*, while other forms of reparation seem to be more feasible. These might be compensation to a whole community (Germany has engaged in the reconstruction of Onna, a part of the town of L'Aquila destroyed in the earthquake and which was the theatre, in 1944, of a Nazi massacre) or, also, to promote initiatives for holding the memory of the tragic events of the past among the young generations.
>
> In any case, the Minister is determined to pursue efforts for negotiating with Germany, in the awareness that, as has been noted in the question, the search for truth and justice cannot be prescribed. Response to long unfulfilled expectations on reparation is necessary for enhancing peace and democracy in Europe, and for Europe can hold the memory of its origins and rebirth, after the tragedies and devastation unleashed by the Nazi and Fascist barbarism.[8]

ORNELLA FERRAJOLO[9]

Cases — Implementation of the Judgment of the International Court of Justice Italy v. Germany on Jurisdictional Immunities of the State

- Court of Appeal of Florence, *Federal Republic of Germany v. Manfredi (Italy intervening)*, Judgment of 28 March 2012
- Court of Appeal of Turin, *Federal Republic of Germany v. De Guglielmi and Italian Presidency of the Council of Ministers*, Judgment No. 941 of 3 May 2012
- Court of Cassation, First Criminal Section, Judgment No. 32139 of 9 August 2012

The ICJ's judgment of 3 February 2012, ruling against Italy for denying Germany's immunity from civil jurisdiction in regard to claims for compensation of war crimes committed by Germany during World War II, opened a great debate in Italy on the methods available to implement the ICJ's decision.

In fact, the ICJ's ruling makes specific reference to the implementation of its judgment within the Italian legal order at paragraph 194, stating that:

> Italy must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law ceases to have effect.

Soon after, the problem of the ICJ judgment's implementation was addressed by Italian courts dealing with proceedings in which no final decision had been issued.[10] Such proceedings had been instituted by Italian citizens, or their descendants who were deported to Germany during World War II and forced to work. The victims claimed compensation for material and moral damages they

[8] *Ibid*.

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[10] G. Cataldi, 'The Implementation of the ICJ's Decision in the Jurisdictional Immunities of the State case in the Italian Domestic Order: What Balance should be made between Fundamental Human Rights and International Obligations?', 2 *ESIL Reflections* (2013) <http://www.esil-sedi.eu/sites/default/files/Cataldi%20Reflections.pdf>; A. Ciampi, 'L'Italia attua la sentenza della Corte internazionale di giustizia nel caso Germania c. Italia', 1 *Rivista di diritto internazionale* (2013) pp. 146–149.

suffered through deportation and slavery. Against these trials the German government brought petitions for preliminary rulings on jurisdiction before the Court of Cassation claiming, *inter alia*, the lack of jurisdiction of Italian judges in accordance with the international rule on jurisdictional immunities of States, but the Court of Cassation denied jurisdictional immunities to the Federal Republic of Germany (FRG) for having allegedly committed international crimes against humanity.[11] Following the Court of Cassation's rulings on jurisdiction, the courts decided on the merits and upheld the claims by declaring Italian law applicable according to the *locus commissi delicti* criterion (the claimants were captured in Italy) and rejecting the jurisdiction pleas invoked by Germany (such as the waiver of compensation claims against Germany on the ground of Article 77 of the 1947 *Treaty of Peace with Italy* and Article 2 of the 1961 *Bilateral Treaty between Italy and FRG on the final settlement of the pending compensation claims against Germany*, and the lapse of plaintiff's rights to compensation).[12] The FRG appealed against these judgments on the basis of the same objections and highlighted that a claim by Germany against Italy for the failure to respect its jurisdictional immunity was pending before the ICJ.

In the meantime, the ICJ had issued its judgment and the Italian courts had to face the problem of its enforcement. All of the Courts adopted to apply the ICJ's judgment and the customary rule on jurisdictional immunities directly by declaring Italy's lack of jurisdiction. The courts derived such solution from the mandatory enforcement of ICJ's decisions as made clear by Article 59 of the *Statute of the International Court of Justice*, stating that the decision of the Court has no binding force except between the parties and in respect of that particular case, and Article 94(1), of the *Charter of the United Nations*, according to which each UN Member has to comply with the decision of the ICJ in any case to which it is a party.

It is remarkable that the courts took into consideration the ICJ's decision on the basis that they were obliged by international law to comply with it, but at the same time made efforts to retain the Court of Cassation's rulings on jurisdiction

Firstly, in the case *Federal Republic of Germany v. Manfredi*, the Court of Appeal of Florence decided by judgment of 28 March 2012 that the Court of Cassation's Order No. 14202/2008 had the effect of *res judicata* on the issue of jurisdiction, but it had only legislative status.[13] On the contrary, the obligation to comply with the ICJ's decision came from Article 94 of the *Charter of the United Nations*, in combination with Article 11 of the *Italian Constitution*,[14] and therefore prevailed. The same superior value was assigned to the ICJ's judgment as *ius superveniens* in respect of the Court of Cassation's Order. Therefore, the Court found the compensation claim inadmissible.

In the judgment in *Federal Republic of Germany v. De Guglielmi*, issued on 3 May 2012, the Court of Appeal of Turin determined that it was competent to hear the case, in conformity with the Court of Cassation's Order No. 14201/2008. It grounded its decision on Article 386 of the *Italian Code of Civil Procedure*, which excludes the relevance on the merits of a ruling on jurisdiction and, consequently, indicates the 'actionability' of a claim. Nonetheless, the Court declared that it was aware that a review of the merits of the case would be contrary to the ICJ's decision and therefore it abstained from deciding on the merits.

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[11] *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, Judgment, 3 February 2012 <http://www.icj-cij.org/docket/files/143/16883.pdf>.
[12] See e.g. 12 *YIHL* (2009) pp. 576–579.
[13] See 11 *YIHL* (2008) pp. 498–499.
[14] Article 11 of the *Italian Constitution* allows for a limitation of national sovereignty that may be necessary for a world order ensuring peace and justice among Nations and calls for Italy's commitment to promote and encourage international organizations established for this purpose.

Finally, the First Criminal Section of the Court of Cassation in its final appeal judgment No. 32139 of 9 August 2012 expressed some doubts on the distinction made in the ICJ's judgment between the *jus cogens*, which are material norms prohibiting international crimes, and the customary rule on State immunity, which has a procedural nature and applies regardless of the gravity of the conduct because no conflict exists between them. From the point of view of the Court of Cassation, it appeared unduly restrictive to confine *jus cogens* rules within their substantive scope. Such operation would disregard the fact that their practical efficiency depends precisely on the legal consequences attached to the violation of peremptory norms.

However, the Court of Cassation recognized that its opinion was not supported by the overall jurisprudential practice of foreign courts. That is, there was no international judicial practice to support its own interpretation of the rule and so there was not (yet) a customary rule in the sense it indicated. This fact, accompanied by the 'indisputable authority' of the ICJ decision, forced the Court to take note of the ICJ's decision and, consistent with Italy's obligations, sustain Germany's appeal and reconsider previous decisions. The contested judgment of the Military Court of Appeal of Rome of 10 May 2011, which had asserted the liability of Germany and denied it sovereign immunity, was therefore quashed.

These judgments reveal the novelty of a scenario that Italian courts have attempted to address by developing creative solutions aimed at implementing the ICJ's ruling and solving the conflict with Italian jurisdiction. However, the urgency of implementing an *ad hoc* law governing the implementation of the ICJ's judgment in the Italian legal order at a general level was clear.

Accordingly, on 29 January 2013, Italy adopted the *Law of Adhesion of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property*,[15] Article 3(1) of which refers to proceedings in which no final decision has been issued by domestic courts. In this case, the Law calls for the judge hearing the case to declare formally and directly Italy's lack of jurisdiction. Moreover, the second paragraph of the same Article envisages the possibility of challenging final decisions through a motion to repeal final judgment in disputes in which, Italy being a party, the ICJ has excluded the possibility to subject a specific conduct of another State to civil jurisdiction.[16]

RACHELE CERA[17]

Public Notice of the President of the Republic — Nazi Massacres

☛ Homage to the Victims of Bellona Massacre. Bitterness for the Dismissal of Judicial Proceedings concerning Nazi Massacres, Rome, 5 October 2012 [Omaggio alle vittime

[15] *United Nations Convention on Jurisdictional Immunities of States and Their Property*, opened for signature on 17 January 2007, 44 ILM 803 (not yet entered into force) <http://www.unhcr.org/refworld/docid/4280737b4.html>;
Law No. 5 of 14 January 2013, *Adesione della Repubblica italiana alla Convenzione delle Nazioni Unite sulle immunità giurisdizionali degli Stati e dei loro beni, fatta a New York il 2 dicembre 2004, nonché norme di adeguamento all'ordinamento interno*, entered into force on 30 January 2013. Published in *Gazzetta Ufficiale* No. 24 of 29 January 2013.

[16] It must be recalled that the Italian government already took action in relation to the case pending before the ICJ on jurisdictional immunities of States. By Law No. 98 of June 2010, Italy suspended the executive force of the judgments against a foreign State if such State initiated action before the ICJ in order to verify its immunity from Italian jurisdiction. Law No. 98/2010 was clearly aimed at suspending the measures of constraint ordered by Italian courts against Germany's property. See my comment on Law No. 98/2010 in 13 *YIHL* (2010) pp. 560–564.

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dell'eccidio di Bellona. Rammarico per motivazioni archiviazione procedimenti giudiziari su stragi naziste, Roma, 5 ottobre 2012][18]

On 5 October 2012, the President of the Republic, Giorgio Napolitano, sent a message to the mayor of Bellona to commemorate the victims of the massacre perpetrated by Nazis in October 1943. In the same message, he commented on the decision of the public prosecutors' office of Stuttgart which dismissed the inquiry on the Nazi massacre of Sant'Anna di Stazzema.

The message of the President of the Republic was addressed 'to the 54 innocent victims killed, together with many others, by the inhuman savagery of Nazi Fascism which afflicted Italy in that tragic period'.[19] The 54 people (among them six priests) were shot by Nazis in Bellona, a village in Southern Italy, in retaliation for the killing of one German soldier by an Italian citizen of Bellona. In the message, the President of the Republic wrote that the memory of the slaughter must be preserved because those broken lives should be a warning and a lesson for future generations to make every effort to build a world based on the values of freedom, peace and human dignity which are established in the *Italian Constitution*.

At the end of the message, the President of the Republic expressed his deep bitterness for the 'disconcerting' reasons at the base of German prosecutors' decision to dismiss the judicial proceedings against the German people charged with the direct participation in the heinous Nazi slaughters. In this passage, the President commented on the German magistrates' decision of 1 October 2012 to close the case against eight surviving Nazi soldiers accused of the murder of 560 civilians (including 116 children, women and elderly people) in the village of Sant'Anna di Stazzema (Tuscany) on 12 August 1944.[20] After ten years of investigation, the German public prosecutors of Stuttgart decided to dismiss the case for the lack of evidence concerning the direct participation of the accused in the slaughter.[21] According to the German public prosecutors, the fact that the eight Nazi soldiers charged with the massacre belonged to the division ('Reichsfuehrer SS') was inadequate to establish individual responsibility because it was necessary to prove for each defendant his participation in the massacre and the way in which he participated. Furthermore, the German public prosecutors affirmed that there was no evidence that the massacre was planned to kill civilians in retaliation. The aim of the military action in the village of Sant'Anna di Stazzema could also have been linked to the fight against partisans and the capture of men to be deported to Germany.[22]

The German decision about the dismissal of judicial proceedings against former German SS soldiers is in contrast with the 2005 judgment of the military Court of La Speziam, which convicted

[18] The text of the public note is available on the website of the Presidency of the Republic of Italy <http://www.quirinale.it/elementi/Continua.aspx?tipo=Comunicato&key=14058>.
[19] The message of the President of the Republic has been translated by the author.
[20] Two of the eight have since died.
[21] Gabriele Heinecke, the legal representative of the victims associations of Sant´Anna, filed an appeal against the dismissal of criminal proceedings by the prosecutor. See N. Schulz, 'The Traces of Sant'Anna di Stazzema' <http://q-words.net/qwords_engl_11/?p=125>.
[22] See D. Rising, 'Sant'Anna di Stazzema Massacre By 16th SS-Panzergrenadier Division "Reichsfuehrer SS" Probe Shelved', *Huffingtonpost*, 1 October 2012 <http://www.huffingtonpost.com/2012/10/01/santanna-di-stazzema-massacre_n_1928596.html>; M. Gasperetti, 'Germania, niente processo agli aguzzini di Stazzema', *Corriere della sera* (Milano, Italy) 2 October 2012 <http://www.corriere.it/cultura/12_ottobre_02/gasperetti-germania-niente-processo-aguzzini-stazzema_b70cba0c-0c76-11e2-a61b-cf706c012f27.shtml>; M. Gasperetti, 'la Procura tedesca archivia l'inchiesta sulla strage di Stazzema', *Corriere fiorentino* (Firenze, Italy), 1 October 2012 <http://corrierefiorentino.corriere.it/firenze/notizie/cronaca/2012/1-ottobre-2012/procura-tedesca-archivia-inchiesta-strage-stazzema-2112050403210.shtml>.

ten soldiers of the division 'Reichsfuehrer SS' *in absentia* and sentenced them to life imprisonment,[23] including the eight Nazi survivors under investigation by the public prosecutors of Stuttgart. The Italian judgment was never executed because Germany refused to extradite. After the last decision of the public prosecutors' office of Stuttgart of October 2012, Germany has also renounced its willingness to proceed against them.[24]

The judgment of the ICJ of 3 February 2012, which affirmed Germany's jurisdictional immunity in the proceedings brought by the Italian claimants, and also the decision of the public prosecutors of Stuttgart not to proceed, highlight the difficulties faced by victims of Nazi massacres to find legal reparations for violations of fundamental human rights.

VALENTINA DELLA FINA[25]

Legislation — Further Implementation in Italy of the Rome Statute: Provisions Concerning Cooperation with the International Criminal Court

- Law No. 237 of 20 December 2012, 'Provisions for adaptation to the provisions of the Statute establishing the International Criminal Court' [Legge 20 dicembre 2012, n. 237, Norme per l'adeguamento alle disposizioni dello Statuto istitutivo della Corte penale internazionale]. Entered into force 23 January 2013[26]
  <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2012;237>

On 20 December 2012, the Italian parliament passed Law No. 237, containing norms for adapting the domestic legal system to the provisions of the *Rome Statute of the International Criminal Court*.[27]

This Law puts an end to the non-adoption of further implementing measures at the national level during a period of more than ten years, after Italy ratified the *Rome Statute* through Law No. 232 of 12 July 1999.[28] It is true that this Law also contained an implementing order (so called 'ordine d'esecuzione'), by virtue of which the *Rome Statute*, once in force, became part of Italian law. However, many of the provisions of the *Rome Statute* are non-self-executing. In particular, further legislative measures were needed: *a*) to introduce certain crimes that are included within the competence of the ICC under the *Rome Statute* into Italian criminal law (an example is the crime of torture); and *b*) to make available national procedures on cooperation with, and judicial assistance to the ICC in conformity with Part 9 of the *Rome Statute*.[29]

Considering these gaps in Italian law, the original bill authorizing ratification also delegated authority to the government to adapt criminal legislation, but this authorization was removed from

[23] See 8 *YIHL* (2005) pp. 463–466.
[24] C. Di Pasquale, 'Massacre, Trial and "Choral Memory" in Sant'Anna di Stazzema, Italy (1944–2005)', *The International Journal of Transitional Justice* (2012); N. Zampan, 'Giustizia: colpevoli senza pena', *La Stampa* (Torino, Italy), 30 May 2011 <http://www.micciacorta.it/index.php?view=article&catid=43:nazismo-a-shoah&id=3721:giustizia-colpevoli-senza-pena&format=pdf&ml=2&mlt=yoo_phoenix&tmpl=component>. For information on the treaties of extradition between Italy and Germany, see C. Campiglio, *Scritti di Diritto internazionale privato e penale* (Padova, Cedam, 2009), Vol. 1, p. 775 et seq.
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[26] Published in *Gazzetta Ufficiale* No. 6 of 8 January 2013.
[27] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).
[28] Published in *Gazzetta Ufficiale* No. 167 of 19 July 1999. Law No. 232/1999 entered into force on 20 July 1999.
[29] Article 88 of the *Rome Statute* expressly establishes that 'States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part'.

the final text to speed up the bill's approval. In subsequent years, there have been efforts to complete the adaptation of the domestic legal system.[30] Notably, an *ad hoc* Committee, chaired by professor Benedetto Conforti was established, and it prepared two drafts bills which contained, respectively, substantive norms and procedural rules.[31] However, none was approved as law.[32] On parliamentary initiative, further draft bills were later introduced into both the Chamber of Deputies and the Senate.[33] During this process, substantive and procedural norms were deemed to be of equal importance. This perspective was also originally reflected in draft bill A.S. No. 2769, later approved as Law No. 237/2012. Disappointingly, during parliamentary debate, all the substantive norms were removed from the final text.[34] This choice has not only left substantive gaps in Italian criminal law, but will also have consequences for the interpretation and application of the procedures laid down in Law No. 237/2012.

Law No. 237 is composed of three Chapters. The first contains general provisions, the second regulates the surrender of persons to the ICC and the third establishes procedures for declaring orders and judgments of the ICC enforceable in Italy.

Among the general provisions (Chapter I), Articles 2 and 4 identify the competent national authorities. These authorities are the Minister for Justice (for the political and administrative matters), and the Court of Appeal of Rome, as the competent judicial authority. ICC requests on cooperation or judicial assistance are transmitted to the Minister for Justice. Consultation with others Ministers is at the discretion of the latter. In the case of competing requests by the ICC and by one or more foreign States, the Minister for Justice nominates the priority request in conformity with the relevant provisions of the *Rome Statute*.[35] If an ICC request implies any judicial activities, the Minister for Justice must transmit it to the General Prosecutor at the Court of Appeal of Rome. The General Prosecutor makes the notifications and citations requested, while requests on investigations and on collecting evidence are executed by a decree of the Court of Appeal.

Regarding the applicable norms, Article 3 of Law No. 237 makes a general *renvoi* to the provisions of the *Code of Criminal Procedure* that regulate extradition, international letters rogatory and the effects in Italy of criminal decisions delivered abroad. These norms apply except when differently provided for by Law No. 237.

There are some limits to cooperation for reasons of confidentiality, or for protecting national security interests (Article 5 of Law No. 237). First, acts and documents which have been disclosed to Italian authorities by a foreign State, and which are regarded as confidential by the originator, may not be transmitted to the ICC without the consent of the disclosing State. This norm is without prejudice to Article 73 of the *Rome Statute*.[36] Second, if the Minister for Justice deems that the

[30] See 5 *YIHL* (2002) pp. 555–557.
[31] Committee on the Implementation of the Statute Establishing the International Criminal Court ('Commissione Conforti'). Established by the Minister for Justice on 27 June 2002, the Committee concluded its works in 2003. See <http://www.giustizia.it/giustizia/it/mg_2_7_6_1.wp>.
[32] See Parliamentary Acts, Chamber of Deputies, Draft Bill No. 1439, introduced on 2 July 2008, p. 1.
[33] See Servizio Studi del Senato, 'Disegno di legge A.S. No. 2769. Norme per l'adeguamento alle disposizioni dello Statuto della Corte penale internazionale' (F. Cavallucci ed., November 2011) No. 321, p. 21.
[34] *Ibid*., p. 22. See also Parliamentary Acts, Chamber of Deputies, Draft bill No. 1439, p. 2.
[35] See *Rome Statute*, arts. 90, 93(9).
[36] Article 73 reads:

> If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of

disclosure of information, the making of investigations, or the collecting of evidences on the request of the ICC might prejudice national security, these activities will be suspended. A non-conflict clause is also provided in respect of Article 72 of the *Rome Statute*.[37]

Article 10 deals with 'Criminal offences against the ICC'. It introduces into the criminal code the crime of 'bribery of members of the ICC' and the crime of 'insulting judges and officials of the ICC'. These are the only substantive norms in Law No. 237/2012.

Chapter II (Articles 11–14) regulates, as already noted, the surrender of persons to the ICC on its request. Article 11 deals with provisional measures that may be taken in Italy for the purposes of the surrender. If the ICC has issued an arrest warrant or a final judgment against a person who is on Italian territory, this person is subjected to provisional arrest and custodial detention, through an order of the Court of Appeal of Rome. This order may be appealed to the Court of Cassation. In accordance with Article 59 of the *Rome Statute* and the *Italian Code of Criminal Procedure*, the person arrested is promptly brought before the Court of Appeal, which determines as soon as possible and within a period of not more than three days that the warrant of arrest issued by the ICC applies to the person arrested. The Court of Appeal must also ascertain that the rights of the person arrested have been respected. If the person arrested consents to be surrendered to the ICC, this circumstance is mentioned in the minutes of interrogation. In accordance with Article 59(3) of the *Rome Statute*,[38] the person arrested may apply for interim release pending surrender. The Court of Appeal notifies the competent Pre-Trial Chamber of the ICC of the application for interim release, and on any other application by the person arrested. In these cases, the rules laid down in Article 59 of the *Rome Statute*, regarding consultation between the competent authorities of the custodial State and the competent Pre-Trial Chamber of the ICC shall apply.

The surrender of persons at the request of the ICC requires a decision of the Court of Appeal of Rome, which the latter delivers after presentation of general conclusions by the General Prosecutor and after hearing the defense (Article 13 of Law No. 237). There are only four cases in which the Court of Appeal may decide that the conditions for the surrender are not satisfied: *a*) the ICC has not issued a warrant of arrest or a final judgment; *b*) the person arrested is not the person against whom the ICC has issued an arrest warrant or a final judgment; *c*) the request for surrender contains provisions that are 'contrary to the fundamental principles of the legal system of Italy'; or *d*) the person arrested has been prosecuted in Italy for the same facts, and a final judgment has been delivered (this condition does not prejudice, however, the operation of Article 89(2) of the *Rome Statute*).[39]

> article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

[37] Article 72 states:

> If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. ... Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

[38] Article 59(3) states: 'The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender'.

[39] Article 89(2) states:

Among the above conditions, condition *c*) has raised criticism among commentators on the basis that reference to the 'fundamental principles' of the Italian legal system is too general or vague.[40] However, an analogous formula is found, though with different content, in Article 93(3) of the *Rome Statute*.[41] A further relevant point is that — in contrast to domestic norms on extradition, and to laws concerning the cooperation of Italy with, respectively, the ICTY and the ICTR[42] — Law No. 237 does not require the 'double criminality' principle as a condition of the surrender of persons so that it is not necessary that the conduct of the person subject to arrest is qualified as a criminal offence under both the *Rome Statute* and Italian law. In reality, this further condition was foreseen in the original text of Article 13(3). However, during parliamentary debate, this proviso was deleted as a consequence of the removal from the final text of Law No. 237 of the whole set of norms aimed at criminalizing conduct which was to be regarded as crimes under the *Rome Statute* and not under Italian law. Such derogation from the 'dual criminality' principle has a precedent in the law through which Italy has adapted its domestic legal system to the EU framework decision 2002/584/JHA of 13 June 2002, on the European arrest warrant.[43] However, it remains debatable whether this outcome is consistent with general principles of criminal law and with the *Italian Constitution*.

The fact that Law No. 237/2012 has failed to introduce certain 'new crimes' has been justified in various ways. One argument has been that the greatest part of these crimes may be prosecuted in Italy under existing domestic criminal offences. It has further been noted that the crimes under the *Rome Statute* or at least the so called 'core crimes', are covered by the operation of Article 10(1) of the *Italian Constitution*, by virtue of which the domestic legal system automatically conforms to the customary norms of international law. On the other hand, all the crimes under the *Rome Statute* have been introduced into the Italian legal system through the implementing order contained in Law No. 232/1999. However, the lack of special norms aimed at defining crimes in conformity with the *Rome Statute* and with other relevant treaties, or of norms establishing appropriate penalties, has often proved to be an obstacle to prosecution and punishment. Cases of torture brought before Italian courts are exemplary.

> Where the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem* as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

[40] Cf. M. Castellaneta, 'Nuova legge sulla cooperazione. Luci e ombre tra Italia e Corte penale internazionale', *Affari Internazionali*, 3 January 2013 <http://www.affarinternazionali.it/articolo.asp?ID=2216>.

[41] Article 93(3) states: 'Where execution of a particular measure of assistance detailed in a request ... is prohibited in the requested State *on the basis of an existing fundamental legal principle of general application*, the requested State shall promptly consult with the Court to try to resolve the matter'; if the matter is not resolved through consultation 'the Court shall modify the request as necessary' (emphasis added).

[42] See Decree-law No. 544 of 28 December 1993: 'Provisions concerning cooperation with the International Criminal Tribunal having jurisdiction over serious violations of international humanitarian law committed in the territories of the former Yugoslavia' (published in *Gazzetta Ufficiale* No. 304 of 29 December 1993), entered into force on 30 December 1993, and Law No. 181 of 2 August 2002, containing 'Provisions concerning cooperation with the International Criminal Tribunal having jurisdiction over serious violations of international humanitarian law committed in the territory of Rwanda and neighboring States' (published in *Gazzetta Ufficiale* No. 190 of 14 August 2002), entered into force on 15 August 2002. See also 5 *YIHL* (2002) pp. 546–548.

[43] Law No. 69 of 22 April 2005, 'Provisions for adapting national law to the framework decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States', published in *Gazzetta Ufficiale* No. 98 of 29 April 2005 (entered into force 14 May 2005).

Furthermore, Chapter II of Law No. 237/2012 does not seem to provide sufficient coordination with the *Italian Constitution*. In a study on draft bill A.S. No. 2769, which was prepared for the Senate in 2011, it was recommended that the parliament assess whether the norms regarding the surrender of persons to the ICC were fully consistent with the constitutional principles on human rights and in particular, on the subject of restriction on personal freedom.[44] Moreover, bearing in mind that immunities under international and national law do not bar the ICC from exercising its jurisdiction (Article 27(2) of the *Rome Statute*), the same provisions also raised doubts as to their compatibility with the immunities which are granted to certain persons under the *Italian Constitution* by reason of their official capacity.[45] Modifications to similar constitutional provisions were considered necessary and actually introduced in France and in other States parties to the *Rome Statute*.[46] It does not seem, however, that the parliament has given sufficient attention to these issues,[47] and as a matter of fact, Law No. 237 is silent in this respect.

Coming to Chapter III of Law No. 237/2012, which establishes the procedures for declaring orders and judgments issued by the ICC enforceable in Italy, these rules apply when the ICC has designated Italy as the 'State of enforcement' and has made a request to Italy for enforcement. As with other provisions, the national competent authority is the Court of Appeal of Rome (Article 15). Under the procedure set forth in Article 16, the Minister for Justice transmits the ICC's request to the Court of Appeal, which must ascertain whether the conditions for recognizing and enforcing the judgment in Italy are satisfied. An ICC judgment is not enforceable, if: *a*) it is not a final judgment under the Rome Statute; *b*) it contains provisions that are contrary to the fundamental principles of the legal system of Italy; or *c*) a final decision against the same person and for the same facts has been pronounced in Italy (*ne bis in idem*). The power to control the execution of sentences, which the *Rome Statute* attributes to the ICC, is assured by Article 18 of Law No. 237. This power will be exercised in conformity with the procedures agreed in advance between the ICC and the Italian Minister for Justice. The convicted person may be detained in a special section of an ordinary prison, or in a military prison, depending on the applicable Italian law (Article 20).

In addition to imprisonment, the ICC may order 'a fine under the criteria set forth in the Rule of Procedure and Evidence' and 'a forfeiture of proceeds, property and assets derived directly or indirectly from [the] crime'.[48] As a condition to the execution of these penalties in Italy, the ICC must have issued a final judgment and requested Italy to execute the penalty. The request is executed through an order of the Court of Appeal of Rome. Subsequently, the forfeited proceeds, property and assets will be made available to the ICC by a decree of the Minister for Justice (Article 21 of Law No. 237). Article 21 also sets forth a procedure for executing orders of the ICC on reparations to victims, in conformity with Article 75 of the *Rome Statute*.

ORNELLA FERRAJOLO

Treaty Action — Human Rights — Torture

[44] Servizio Studi del Senato, 'Disegno di legge A.S. No. 2769', p. 39.
[45] Immunities are granted to the Head of State, the Head of Government, the Ministries and the members of the parliament (Article 90, 96 and 68 of the *Constitution*), and to the members of the Constitutional Court (Article 3 of Constitutional Law No. 1 of 9 February 1948, published in *Gazzetta Ufficiale* No. 43 of 20 February 1948).
[46] Servizio Studi del Senato, 'Disegno di legge A.S. No. 2769', pp. 40, 44–45.
[47] See e.g. Parliamentary Acts, Chamber of Deputies, Draft bills No. 1439-1695-1782-2445-A, Opinion of the First Standing Committee, on Constitutional Affairs, p. 3. The Committee noted that no provision of the draft bill contravened the constitutional provisions on the division of legislative competences between the State and Regions. No further constitutional issues were taken into consideration.
[48] *Rome Statute*, Art. 77(2).

- Ratification of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006)
- Law No. 195 of 9 November 2012, entered into force on 20 November 2012[49] <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2012;195>

On 9 November 2012, Italy ratified the *Optional Protocol to the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment* ('Optional Protocol'), adopted on 18 December 2002 by UNGA Resolution 57/199 of 18 December 2002.

The Optional Protocol aims to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment (Article 1). According to Article 4(2), 'deprivation of liberty' means 'any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order and any judicial, administrative or other authority'.[50]

In order to achieve its purposes, Article 2 of the Optional Protocol establishes a Subcommittee on Prevention of the Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture.

The Subcommittee consists of ten members, chosen among persons of high moral character and having professional experience in the several fields relevant to the treatment of persons deprived of their liberty. It has the mandate to visit captive persons and make recommendations to State Parties concerning the protection of who is imprisoned and advise and assist the Parties in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty.[51]

Article 3, one of the most significant provisions of the Optional Protocol, foresees that each State Party shall set up, designate or maintain at the domestic level, one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (i.e. a national preventive mechanism). For this purpose, according to Article 17, each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the Optional Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. In conformity with Article 18(1), States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.[52]

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[49] Published in *Gazzetta Ufficiale* No. 270 of 19 November 2012.

[50] See generally R. Murray et al., *The Optional Protocol to the UN Convention against Torture* (Oxford, Oxford University Press, 2011); A. Edwards, 'The Optional Protocol to the UN Convention Against Torture and Refugees', 57(4) *ICLQ* (2008) pp. 789–825; M. Evans 'The Place of the Optional Protocol in the Scheme of International Approaches to Torture and Torture Prevention and Resulting Issues' in H. C. Scheu and S. Hybnerova eds., *International and National Mechanisms against Torture* (University Karlova, Law School Publication, Prague, 2004); M. Evans, 'The OPCAT at 50' in G. Gilbert, F. Hampson, and C. Sandoval eds., *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (Routledge, Oxon, New York, 2011) pp. 85–113; M. Evans and C. Haenni-Dale, 'Preventing Torture? The Development of the Optional Protocol to the UN Convention against Torture' 4 *HRLR* (2004) pp. 19–55.

[51] On 3 April 2013, Italy deposited the instrument of ratification with the Secretary-General of the United Nations without submitting the 'Declaration of postponement the implementation of obligations under parts III and IV of the Protocol' as established under Article 24. See <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en>.

[52] In this regard, it should be said that the bill for the establishment of a national Commission for the promotion and protection of human rights, approved by the Senate and under examination before the Constitutional Affairs Committee

Article 31 of the Optional Protocol clarifies that its provisions shall not affect the obligations of States Parties under any regional treaty instituting a system of visits to places of detention, such as the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* of 1987. The Subcommittee and the bodies established under such regional conventions are encouraged to consult and cooperate with a view to avoiding duplication and promoting the objectives of the Optional Protocol effectively. Furthermore, under Article 32, the provisions of the Optional Protocol shall not affect the obligations of States Parties to the four *Geneva Conventions* of 12 August 1949 or the *Additional Protocols* of 8 June 1977 or the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

In this context, one of the main issues concerning Italy is that the crime of torture is not prescribed in the *Criminal Code*. Despite the obligations of the *UN Convention against Torture*[53] and Italian constitutional provisions requiring the criminalization of torture,[54] Italy has failed to adopt all the required legislation. In particular, certain types of physical or mental torture under the definition of this crime contained in Article 1 of the *UN Convention against Torture* may not be covered by the criminal law, partly because of the absence of a specific crime of 'torture' in the Italian legal system.[55] In this regard, it should be noted that, although Italy ratified several international instruments which punish the crime of torture,[56] in order to restrain conduct of such nature, the Italian legal system requires such conduct to be referred to as injury (Article 582), domestic violence (Article 610) or threats (Article 612) under the *Criminal Code*.[57]

For this reason, during the 14th legislature, the issue concerning the offence of torture was taken up by the Judiciary Commission. Similarly, in the 15th legislature, the parliament addressed the topic of a specific offence relating torture on the basis of the definition of the offence contained in Article 1(1) of the 1984 *UN Convention*. In particular, during the 15th legislature, the Chamber of Deputies approved the bill concerning the introduction of new provisions in the *Criminal Code* at

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of the Chamber of Deputies, could be considered as an attempt for the fulfillment of Protocol's objectives. See Bill no. 2720, 5 May 2011 <http://www.senato.it/service/PDF/PDFServer/BGT/00555278.pdf>.

[53] Italy ratified the 1984 *United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment* through Law No. 498 of 3 November 1988 published in *Gazzetta Ufficiale* No. 271 of 18 November 1988.

[54] In particular, see *Italian Constitution* Arts. 13(4), 27(3), 28.

[55] The absence of the offence of torture in the *Italian Criminal Code* was particularly evident in the process for the violence committed by the police during the G8 Summit which took place in Genoa in 2001. In 2011, the Genoa Court of Appeal issued second instance verdicts in the trials on the torture and other ill-treatment perpetrated by law enforcement officials against G8 protesters. The Court recognized that most of crimes that had taken place at the temporary detention centre of Bolzaneto, including grievous bodily harm and arbitrary inspections and searches, had expired due to the statute of limitations, but still ordered all of the 42 accused to pay civil damages to the victims. The Court also imposed prison sentences of up to three years and two months on eight of the accused. The same Court found 25 of the 28 people accused of similar abuses at the Armando Diaz School guilty, including all high-ranking police officers present at the time of the events, and imposed prison sentences of up to five years. Many of the charges were dropped due to the statute of limitations. According to many authors, if Italy had introduced torture as a specific crime in its *Criminal Code*, the statute of limitations would not have applied.

[56] Italy has ratified the 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Law No. 848 of 4 August 1955 published in *Gazzetta Ufficiale* No. 221 of 24 September 1955); the 1966 *International Covenant on Civil and Political Rights* (Law No. 881 of 15 October 1977, published in *Gazzetta Ufficiale* No. 333 of 17 December 1977); the *Rome Statute of the International Criminal Court* (Law No. 232, 12 July 1999 published in *Gazzetta Ufficiale* No. 167 of 19 July 1999); the 2006 *UN Convention on Rights of Disabled Persons* (Law No. 18 of 3 March 2009 published in *Gazzetta Ufficiale* No. 61 of 14 March 2009).

[57] On this point, see A. Marchesi, 'L'attuazione in Italia degli obblighi internazionali di repressione della tortura', (4) *Rivista di diritto internazionale*, (1999) pp. 463–475.

the first reading, in which Articles 613-*bis* and 613-*ter*[58] referred to torture. Specifically, the new Article 613-*bis* established a penalty of imprisonment of three to 12 years for anyone who, through violence or serious threats, inflicted severe physical or mental suffering, or cruel, inhuman or degrading treatment to a person in order to obtain by him/her or by a third person information or a confession about an act that he/she had committed (or was suspected to have committed). This Article also considered as torture any act aimed at punishing a person for his/her conduct or for racial, political, religious or sexual reasons. Article 613-*bis* also increased the basic punishment in cases where the above-described conduct had been carried out by a public official or a person responsible for a public service, or in the event that the conduct had resulted in a serious injury. However, the examination of the bill by the Senate was interrupted by the early conclusion of the legislature.

Subsequently, the Senate considered a number of bills (nos. 256, 264, 374, 1237, 1596, 1884 and 3267) relating to the introduction of the crime of torture into the *Criminal Code*. In particular, it dealt with the Consolidated Text on 'Introduction of the crime of torture and provisions for the adjustment' prepared by the Judiciary Commission which was intended to implement the *UN Convention against Torture*. This offence is punishable by imprisonment of three to ten years. Moreover, the text provisions did not allow the use of statements obtained through torture, except against persons accused of this crime. The Consolidated Text also foresaw the prohibition of *refoulement*, expulsion or extradition of a person to a State where there are substantial grounds for believing that he/she is likely to be subjected to torture, and the elimination of diplomatic immunity for foreign nationals prosecuted or convicted for the crime of torture in another country or by an international tribunal. Nevertheless, the Senate decided to defer the text to the Judiciary Commission for further analysis.

On numerous occasions, international and regional organizations dealing with torture cases have also recommended to Italy to amend its *Criminal Code* in order to introduce the crime of torture. In particular, in May 2010, during the Universal Peer Review session at the Human Rights Council, many States requested that Italy amend its legal system to introduce the offence. In response, Italy stated that torture was already punishable under various offences and principles of aggravating circumstances can trigger a wider application of such crimes. Italy also affirmed that even though the Italian *Criminal Code* does not treat torture as a separate offence, both the constitutional and legal framework already punish acts of physical and moral violence against persons subject to restrictions of their personal liberty. Both provide sanctions for all criminal conduct covered by the definition of torture as set forth in Article 1 of the *UN Convention*.[59]

In 2013, the absence of a separate offence of torture in the Italian legal system was highlighted by the case *Torreggiani* v. *Italy* at the European Court of Human Rights. The Court ruled that Italy's prisons had violated inmates' basic rights and ordered Italy to make improvements within one year.

The judgment involved a 2009 case brought by seven inmates in two prisons who complained that each had to share a 97-square-foot cell with two other inmates. The men also argued they did not have regular hot water or light. The Court affirmed that the overcrowded living conditions violated Article 3 of the *European Convention on Human Rights*, which forbids torture and inhuman or degrading treatment.[60]

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[58] See Bill No. 915 submitted to the Chamber of Deputies on 26 May 2006 <legxv.camera.it/_dati/lavori/schedela/trovaschedacamera_wai.asp?Pdl=915>.

[59] United Nations, Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Italy*, UN Doc. A/HRC/14/4, 18 March 2010, para. 84(8).

[60] See *Affaire Torreggiani et autres c. Italie*, European Court of Human Rights, Judgment, 8 January 2013.

SILVANA MOSCATELLI[61]

Cases — Tigri Tamil Case and Definition of Terrorism

☛ Court of Naples, Office of the Preliminary Investigation Judge, Judgment of 23 June 2011 (registered on 19 January 2012) <http://www.penalecontemporaneo.it/upload/Sentenza%20Guardiano%20Tigri%20Tamil.pdf>.

The case concerned a group of Sri Lankan citizens who were accused of and indicted for collecting money for the funding of their country's organization known as Tigri Tamil (LTTE, acronym of *Liberation Tigers of Tamil Ealam*) under Article 270*bis*, paras. 1, 2 and 3, of the *Italian Criminal Code*.[62]

The Judge dismissed the charges on the basis that the facts did not satisfy the elements of the crime.

The Judge underlined that a definition of terrorism in wartime does not exist in the current international customary law. In this view, the Judge recalled the decision of the Appeal Chamber of the Special Tribunal for Lebanon, issued on 16 February 2011. According to that decision, even though the *1999 International Convention for the Suppression of the Financing of Terrorism* has been ratified by 170 Countries and has been constantly applied in the context of armed conflict, a clear definition of 'terroristic act' has not yet consolidated within international customary law.
Moreover, the Judge deemed the recourse to the 1999 Convention's dispositions for defining the acts committed during armed conflicts as incorrect, since Article 21 of the Convention establishes that:

> Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions.

According to the Judge, this disposition obliged the courts to harmonise the 1999 Convention with international humanitarian law, in particular the 1949 *Geneva Conventions* and the 1977 *Additional Protocols*.

In accordance with this interpretation, the Judge observed that international humanitarian law did not qualify armed forces' acts against populations as 'terroristic acts', but as war crimes, crimes against humanity or genocide. In this regard, the Judge recalled the 1998 *Rome Statute of the International Criminal Court*, which does not include the crime of terrorism within its jurisdiction, but provides for the above mentioned crimes. In the Judge's opinion, such exclusion derived from the intention of international community not to recognize the acts committed by armed forces and to disregard the existence of a so-called offence of 'State terrorism'.

As a consequence, the Judge affirmed that a violent act against a civil population carried out by an army, a liberation or insurrectional movement during an armed conflict could not be qualified and sentenced as terrorist act, but only as a war crime, crime against humanity or genocide.

According to information in an expert survey requested by the Judge, the dispute between the Tigri Tamil and the Sri Lankan government qualified as an internal armed conflict. Therefore, the Judge concluded that the conduct of the accused, even though it could amount to international

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[62] Article 270 *bis* of the *Italian Criminal Code* deals with conspiracies directed at international terrorism or at the subversion of democracy. This crime is committed when any person promotes, forms, organizes, manages or funds associations whose purpose is to perform acts of violence directed to terrorism or to the subversion of democracy.

crimes, did not correspond to the crime of terrorism as foreseen by Article 270*bis* of the *Italian Criminal Code*.

RACHELE CERA

Legislation — Italian Participation in International Missions

Law No. 13 of 24 February 2012, 'Conversion into Law, with modifications, of the Decree-Law No. 215 of 29 December 2011, concerning Extension of Time of International Missions of Armed and Police Forces, Interventions for Development Cooperation, Support to Reconstruction Processes and Participation in the Initiatives of International Organizations for Consolidation of Peace and Stabilization Processes, and Urgent Provisions for Defence Administration' [Legge 24 febbraio 2012, n. 13, Conversione in legge, con modificazioni, del decreto-legge 29 dicembre 2011, n. 215, recante proroga delle missioni internazionali delle Forze armate e di polizia, iniziative di cooperazione allo sviluppo e sostegno ai processi di ricostruzione e partecipazione alle iniziative delle organizzazioni internazionali per il consolidamento dei processi di pace e di stabilizzazione, nonché disposizioni urgenti per l'amministrazione della difesa']. Entered into force on 28 February 2012[63] <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2012-02-24;13>

☛ Law No. 99 of 6 July 2012, 'Conversion into Law of the Decree-Law No. 58 of 15 May 2012 concerning Urgent Provisions for Italian Participation in the United Nations Mission of Military Observers, called United Nations Supervision Mission in Syria (UNSMIS), established by Resolution 2043 (2012), adopted by UN Security Council' [Legge 6 luglio 2012, n. 99, Conversione in legge del decreto-legge 15 maggio 2012, n. 58, recante disposizioni urgenti per la partecipazione italiana alla missione di osservatori militari delle Nazioni Unite, denominata United Nations Supervision Mission in Syria (UNSMIS), di cui alla Risoluzione 2043 (2012), adottata dal Consiglio di sicurezza delle Nazioni Unite]. Entered into force on 14 July 2012[64] <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2012;99>

With Law No. 13 of 24 February 2012, the parliament authorized the participation of the Italian police and armed forces in international missions for the whole year 2012. In this regard, Law No. 13/2012 represents a novelty compared with previous acts that usually gave authorization for such missions for a period of six months, obliging the parliament to adopt another law during the year.[65]

Law No. 13/2012 confirmed the Italian engagement in several countries characterized by long-lasting or recurring crises, with military and civil staff participating in about thirty international operations established by the UN, NATO, the Organization for Security and Co-operation in Europe and the European Union, and missions of technical assistance in the framework of Italian policy of international cooperation. During 2012, Italy employed 6,500 units in international missions for a total amount of EUR 1.25 billion of which EUR 120 million was targeted at cooperation activities and interventions to support peace and stabilization processes.[66] Most of the Italian military staff

[63] The Law was published in *Gazzetta Ufficiale* No. 48 of 27 February 2012, Ordinary Supplement No. 36.
[64] The Law was published in *Gazzetta Ufficiale* No. 162 of 13 July 2012.
[65] See 14 *YIHL* (2011) pp. 8–13.
[66] For these data see, S. Forte and A. Marrone (eds.), 'L'Italia e le missioni internazionali' (Documenti IAI 12 | 05 – September 2012) <http://www.iai.it/pdf/DocIAI/iai1205.pdf>. See also 'Nota aggiuntiva allo stato di previsione per la difesa per l'anno 2012', presented to the parliament by the Minister of Defence, Giampaolo Di Paola, April 2012 <http://www.difesa.it/Approfondimenti/Nota-aggiuntiva/Documents/Nota%20Aggiuntiva%202012.pdf>.

were engaged in Afghanistan (about 4,000 soldiers) with 1,100 units in Lebanon and 1,200 in the Balkans.[67]

Following the scheme of previous laws, Law No. 13/2012 is divided into three parts: the first one (Articles 1–6) authorizes the extension of international missions, regulates the allowances to be paid to personnel employed abroad and criminal matters, and modifies the measures against piracy contained in Law No. 130/2011.[68] The second part (Articles 7–9) is dedicated to the financing of activities of development cooperation, support to reconstruction processes and participation in the initiatives of international organizations for the consolidation of peace and stabilization processes. The third part (Articles 10, 10*bis* and 11) contains final provisions on financial backing, communications to the parliament and entry into force.

In detail, Articles 1–6 of the Law No. 13/2012 authorized and financed the following international missions: United Nations Interim Force in Lebanon (UNIFIL), including the employment of naval units in UNIFIL Maritime Task Force; Multinational Specialized Unit (MSU); European Union Rule of Law Mission in Kosovo (EULEX Kosovo),[69] Security Force Training Plan in Kosovo, Joint Enterprise, ALTHEA and IPU,[70] United Nations Mission in Kosovo (UNMIK) in Balkan region; NATO operation Active Endeavour in the Mediterranean; Temporary International Presence in Hebron (TIPH2); European Union Border Assistance Mission in Rafah (EUBAM Rafah); United Nations/African Union Mission in Darfur (UNAMID); United Nations Peacekeeping Force in Cyprus (UNFICYP); EU military operation Atalanta and the NATO operation denominated Ocean Shield to fight against piracy; EU military mission denominated EUTM in Somalia; EU initiatives for the regional maritime capacity building in the Horn of Africa and in Western Indian Ocean;[71] EU Monitoring Mission in Georgia (EUMM Georgia); United Nations Mission in South Sudan (UNMISS); EU Police Mission for the Palestinian Territories (EUPOL COPPS); and EU Police Mission (EUPM).[72]

The same articles also authorized: the prosecution of assistance activities in favour of Albanian armed forces; the extension of employment of military staff in United Arab Emirates, Bahrain, Qatar and Tampa for the exigencies of the missions in Afghanistan; the employment of soldiers to carry out assistance, support and training activities in Libya in conformity with UNSC Resolutions 2009/2011, 2016/2011 and 2022/2011;[73] the cooperation programs of the Italian Police in Albania and in the countries of Balkan region. Furthermore, it also authorized the participation of Italian 'Guardia di finanza' (Customs Police) in the following international missions: EULEX Kosovo; International Security Assistance Force (ISAF) in Afghanistan; and Joint Multimodal Operational Units (JMOUs) established in Afghanistan, United Arab Emirates and Kosovo.

[67] In 2012, Italy was the first troop and police contributor to UN peacekeeping forces among EU and G8 troop contributing countries.
[68] See 14 *YIHL* (2011) pp. 13–16.
[69] Administrative staff of the Ministry of Justice and penitentiary police also participate in this Mission.
[70] ALTHEA is the EU Mission in Bosnia-Herzegovina. The Integrated Police Unit (IPU) operates in its framework.
[71] See EU Council Decision 2012/389/CFSP [2012] OJ L 187/40.
[72] Law No. 13/2012 also provided the participation of magistrates in EUPOL COPPS and in EUPM.
[73] See UN Doc. S/RES/2009, 16 September 2011; UN Doc. S/RES/2016, 27 October 2011, UN Doc. S/RES/2022, 2 December 2011. With Res. 2009/2011, the Security Council established the UN Support Mission in Libya (UNSMIL), under Chapter VII of the UN Charter, with the mandate to assist and support Libyan national efforts in several fields, the mandate was extended by UNSC Res. 2022/2011 and further modified by UNSC Res. 2040/2012 which extended the Mission for 12 more months. With UNSC Res. 2016/2011, the Security Council decided to terminate the provisions of paras. 4–5, 6–12 of UNSC Res.1973/2011 concerning the protection of civilians and the no fly-zone over Libya.

Concerning criminal law, Article 3 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.[74]

As far as the measures against piracy are concerned, Article 6 of Law No. 13/2012 inserted a new paragraph in Article 5(5) of Law No. 130/2011 that provided for the possibility, until 31 December 2012, to employ security guards on merchant ships to protect against pirate attacks on the condition that those guards had participated in international missions of armed forces with operative functions for at least six months. Furthermore, Article 5*bis* of No. 130/2011 was modified in order to allow military staff to use common firearms and to authorize ships equipped with anti-piracy devices to embark and discharge weapons in the ports whose territorial waters are adjacent to piracy high risk areas.

Law No. 13/2012 was not limited to authorize international missions, but, like previous acts, it also financed several international cooperation initiatives aimed at supporting peace and stabilization processes. It is important to observe that the funds allocated by Law No. 13/2012 supplemented those authorized by Law No. 49 of 1987, which regulates Italian development cooperation. In detail, Article 7 of Law No. 13/2012 financed bilateral cooperation activities in the following countries: Afghanistan and Pakistan (EUR 34,700,000); and Iraq, Lebanon, Somalia, Sudan South Sudan, Libya and its neighbouring countries in order to improve the living conditions of people and refugees, and to support civil reconstruction (EUR 33,300,000).[75] Article 8 financed activities aimed at supporting reconstruction processes and authorized Italian participation in multilateral cooperation activities carried out by universal and regional organizations in order to sustain peace processes such as: the reconstruction of countries in conflict or post-conflict situations and the contributions to the Union for the Mediterranean[76] (EUR 5,236,199); Italian participation in the UN Trust Fund DPA for the Middle East and North Africa and in the Trust Fund of the Contact Group established within UN Office on Drug and Crime (UNODC) to fight piracy (EUR 800,000); OSCE civil and preventive diplomacy operations and OSCE cooperation projects (EUR 995,800); Italian participation in the NATO Afghan National Army (ANA) Trust Fund and in the NATO-Russia Council Helicopter Maintenance Trust Fund (EUR 500,000); Italian participation in European Security and Defence Policy (ESPD) initiatives and other international organizations initiatives (EUR 3,167,719); financial contribution for the Special Tribunal for Lebanon (EUR 800,000); financing of 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); Italian participation in initiatives to support peace processes and to reinforce security in Sub-Saharan Africa (EUR 300,000,000); financial contribution to the Central European Initiative (CEI) Trust Fund at the European Bank for Reconstruction and Development (EUR 2,000,000); continuation of emergency and security activities to protect Italian citizens and interests in war zones and high risk areas (EUR 11,500,000); participation of Italian staff from the Ministry of Foreign Affairs in international crisis management operations, including ESPD missions and offices of EU Special Representatives (EUR 616,940); financing of the Office of NATO Senior Civilian Representative in the west region/representative of the Ministry of Foreign Affairs at Heart

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

[75] Article 7(3) provides that, in cases of urgency, the Ministry of Foreign Affairs and the Ministry for International Cooperation and Integration may use, up to 15% of EUR 33,300,000, for initiatives of international cooperation in other areas of crises.

[76] The Union was created by the 43 Euro-Mediterranean Heads of State and Government in Paris on 13 July 2008 and has the objective to promote regional integration and cohesion among Euro-Mediterranean partners in several sectors. See <http://www.ufmsecretariat.org/en/who-we-are>.

in the framework of international crises management operations (EUR 48,000). The same Article also authorized the financing of the following activities: security measures for Italian embassies and consulates located in conflict areas (EUR 8,514,728) and for Italian cultural institutes and school located in high risk countries (EUR 8,200,000); sending staff of the Ministry of Foreign Affairs to Afghanistan, Iraq, Libya, Pakistan, Yemen and in other crises areas (EUR 852,945); financial contribution in favour of the Italian Atlantic Committee (EUR 300,000).

Finally, Law No. 13/2012 provided for control over its implementation through four-monthly communications of the Ministers of Foreign Affairs and Defence to the parliament (Article 10*bis*).

The second act under examination is Law No. 99 of 6 July 2012 which authorized the Italian participation in the UN Supervision Mission in Syria (UNSMIS), established by UNSC Res. 2043 of 21 April 2012.[77] The mandate of the Mission was to monitor the cessation of armed violence by all parties and to support the full implementation of the Joint Special Envoy's six-point plan to end the conflict in Syria.[78] On 19 August 2012, owing to the intensification of armed violence in the country, the Security Council decided to put an end to UNSMIS.[79] With the closing of the UN Mission, Italian observers' engagement in Syria also terminated.

VALENTINA DELLA FINA

Cases — Dispute between Italy and India

☛ The MV *Enrica Lexie* Case between Italy and India

Article 5 of Law No. 130/2011 provides for the possibility to deploy security personnel on merchant ships in order to respond to pirate attacks, as the presence of warships as part of multinational operations appeared to be inadequate to combat piracy and therefore it was considered necessary to take further steps to protect ships sailing in unsafe waters.[80]

Following Law No. 130 of 2 August 2011, a Memorandum of Understanding 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 was signed on 11 October 2011.[81] It provided for the deployment aboard relevant merchant ships of Vessels Protection Detachments (VPD), comprising Navy personnel or personnel from the other armed forces but under the control of the Italian Navy. VPDs must act in conformity with the directives and the rules of engagement issued by the Ministry of Defence as they are performing an act of State. The military personnel are only subject to the orders of the Italian Joint Operations Headquarters (Ministry of Defence) and a command in Djibouti, while the owner of the ship aboard which the VPD is deployed reimburses the Ministry of Defence for all expenses related to the deployment.

[77] The Law contained only one article which authorized Italian participation in the Mission with 17 observers.

[78] The Plan was elaborated by Kofi Annan who, in 2012, was appointed to serve as the high-level representative of the Secretaries-General of the United Nations and the League of Arab States, with the aim to bring an end to all violence and human rights violations in Syria, and to promote a peaceful solution of the Syrian crisis.

[79] On December 2012, UN agencies withdraw staff from Syria and also EU reduced activities in the country. See Martin Chulov, 'UN to withdraw non-essential staff from Syria', *The Guardian* (London, UK), 4 December 2012 <http://www.guardian.co.uk/world/2012/dec/03/un-withdraw-nonessential-staff-syria>.

[80] See 14 *YIHL* (2011) pp. 13–15.

[81] See <http://www.trasporti-italia.com/mare/pirateria-confitarma-esprime-soddisfazione-per-le-nuovemisure-281.html>;
<http://www.trasporti-italia.com/mare/pirateria-nuovo-accordo-tra-ministero-difesa-econfitarma-268.html>. For the text, see <http://ebookbrowse.com/b-101011-convenzione-difesa-confitarma-ug-pdf-d269673315>.

Within this legal framework, a VPD was deployed aboard the MV *Enrica Lexie*.[82]

On 15 February 2012, while it was sailing along the South-Western Indian coast, close to the outer border of the Indian Contiguous Zone and within the Exclusive Economic Zone (EEZ) of India, the vessel reported an alleged piracy attack. There was an exchange of gunfire and two Indian fishermen were killed. After a request by Indian authorities to the *Enrica Lexie* to enter Port Kochi to assist and identify suspected pirates allegedly apprehended by the Indian coast guard, the vessel headed towards Kochi port.[83]

Upon arrival, the master of the vessel and the VPD personnel were informed that a criminal file for murder had been opened under section 302 of the *Indian Penal Code* as two fishermen on a fishing boat named *St. Antony* had been killed. As a result, two members of the Military Protection Detachment who had been on duty on the afternoon of 15 February were arrested and subsequently placed in custody until bail was granted in June 2012.

On 18 May 2012, the charge sheet for the crime of murder was filed by the Kerala police.

The accused and the government of the Republic of Italy have challenged the jurisdiction of the Indian Court and initially filed a writ petition with the High Court. A further petition has been filed under Article 32 of the *Indian Constitution* before the Supreme Court challenging the constitutionality of the detention of the Italian Military Personnel on various grounds. Once the High Court dismissed the petition and asserted the jurisdiction of the Courts of India, the government of the Republic of Italy and the accused submitted a 'special leave petition' to the Supreme Court in order to appeal the High Court decision. The proceeding was later joined to the case filed under Article 32 of the Constitution (proceeding WC 135/2012).

On 18 January 2013, the Indian Supreme Court held that the Union of India is entitled to prosecute the two Italian marines under the criminal justice system as the incident of firing from the Italian vessel on the Indian shipping vessel occurred within the Contiguous Zone (para. 100).[84]

However, the Supreme Court held that the State of Kerala had no jurisdiction over the Contiguous Zone and even if the provisions of the *Indian Penal Code* and the *Code of Criminal Procedure* were extended to the Contiguous Zone, it did not vest the State of Kerala with the powers to investigate and try the offence (para. 84). On this basis, the Court stated that the two Italian marines would be judged by a newly constituted special tribunal.

On the basis that the two marines were performing an official duty, Italy claims the jurisdiction over them is governed by the principle of functional immunity of State officials for official conduct.

As clarified by the ICJ in the judgment in the Case on 'Certain Questions of Mutual Assistance in Criminal Matters' (*Djibouti v. France*) of 4 June 2008, functional immunity cannot be related to private conduct but only to that conduct entailing an official function.[85] The *Enrica Lexie* incident appears to be strictly related to the very purpose of the deployment of a military protection detachment, performing official duties on board a vessel for reasons related to the fight against piracy.

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[82] See V. Eboli and J.P. Pierini, 'The 'Enrica Lexie case' and the limits of the extraterritorial jurisdiction of India', *Quaderni Europei* (2012) pp. 1–27 <http://www.cde.unict.it/sites/default/files/39_2012.pdf>.

[83] Among others, see T. Ramavarman, 'Coast Guard, Fisherman: smart move', *TNN – Chennai Edition*, 18 February 2012.

[84] Supreme Court of India, *Republic of Italy and others v. Union of India and others*, Writ Petition (Civil) No. 135 of 2012 and Special Leave Petition (Civil) No. 20370 of 2012, 18 January 2013. See V. Eboli and J.P. Pierini, 'Coastal State Jurisdiction over Vessel Protection Detachments and Immunity Issues: The *Enrica Lexie* Case', *Mil. L. & L. War Rev* (2013) (forthcoming).

[85] *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*), Judgment, ICJ Reports, 4 June 2008, paras. 181–200.

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Legislation — Italian Red Cross

☛ Legislative Decree No. 178 of 28 September 2012, 'Reorganization of the Red Cross Italian National Society (Italian Red Cross), according to the provisions of Article 2 of the Law No. 183 of 4 November 2010' [Decreto Legislativo 28 settembre 2012, n. 178, Riorganizzazione dell'Associazione italiana della Croce Rossa (C.R.I.), a norma dell'articolo 2 della legge 4 novembre 2010, n. 183]. Entered into force on 3 November 2012[87]
<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2012;178>

The Legislative Decree under review deals with the organization and the structure of the Italian Red Cross National Society. The biggest innovation is that the national society will be transformed into a private law association from 1 January 2014. In order to understand the revolutionary nature of this change, it is useful to recall that until now the Italian National Society was structured as a public entity.

The first Statute of the Italian National Society was approved by Decree No. 1243 of 7 February 1884. Then new Statutes were issued by Royal Decree No. 111 of 21 January 1929 and by the Decree of the President of the Republic No. 613 of 31 July 1980, which stated that the Italian Red Cross was a private body of public relevance as it performed duties of a public character. Even though this definition was aimed at safeguarding the formal independence of the National Society, it was substantially a public body, governed by the relevant rules and was financially supported by the State.

The new Statute issued by Decree of the President of the Council of Ministers No. 208 of 5 July 2002 was mainly concerned with a reorganization of the duties of the Italian Red Cross, without affecting its legal nature.[88]

Another reform took place in 2005. Law No. 1 of 19 January 2005 converted Decree No. 276 of 19 November 2004 concerning the simplification of the structure of the Italian Red Cross National Society into law.[89] It was followed by a new Statute, which for the first time was approved by the volunteers participating in the Society before being approved and enacted by government by Decree of the President of the Council of Ministers No. 97 of 6 May 2005.

Thus, in 2005, the volunteers' role was recognized even though Article 5 of the 2005 Statute expressly qualified the Italian Red Cross as a juridical personality of public law (*ente di diritto pubblico*). The internal organization was modernized by the introduction of new rules for the election of the most important chairs to enhance democratic process and to grant volunteers a chance to participate in the life of the Society. This was a first step towards privatization, which has now been achieved by the 2012 Decree.

Legislative Decree No. 178/2012 was enacted following Article 2 of the Law No. 183 of 2010, which contained provisions on job reform and the reorganization of public entities as part of a

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[87] Published in *Gazzetta Ufficiale* No. 245 of 19 October 2012.
[88] See 5 *YIHL* (2002) pp. 548–549.
[89] See 8 *YIHL* (2005) pp. 462–463.

spending review.[90] Its provisions were mainly aimed at the following goals: eliminating any organizational and functional duplication; the rationalization of the competences of the structures with the same functions; and the limitation of the number of those with the same functions or their unification with a view to reducing them to those strictly necessary to ensure the provision of fundamental health services. It was clear that it was necessary to reduce the number of the components of the relevant entities.

The Italian Red Cross National Society, being a public body under the vigilance of the Health Department, fell within the provision of the Law No. 183/2010. So the Legislative Decree No. 178/2012 was aimed at complying with this provision.

According to Article 1, the new Association will be created according to the provisions of the *Civil Law Code* and will be the only Italian National Society of the Red Cross, so it will be a juridical personality of private law (*persona giuridica di diritto privato*). It will be auxiliary to the public powers in so far as international humanitarian law is concerned and will be under the High Patronage of the President of the Republic, being an association of public interest.

The institutional duties of the new Association will be those arising from the 1949 *Geneva Conventions* and their *Additional Protocols* and from the principles of the International Red Cross and Red Crescent Movement. Article 2 expressly states that the Association will take over from the actual 'CRI' (Italian Red Cross) all the rights and duties, being its successor as far as recognition by the ICRC and participation in the International Federation of Red Cross and Red Crescent Societies are concerned.

Following Law No. 178/2012, on 3 December 2012, a new regulation concerning the Italian Red Cross Volunteers was approved. It changes the internal structure of the Italian Red Cross and, in particular, the organization of the volunteers.[91] Before this Regulation, the Italian Red Cross volunteers were divided into six categories, two of which were military and four were civilian. The latter were the 'Volontari del Soccorso' (First Aid Volunteers), the 'Donatori di Sangue' (Blood Donors), the 'Volontarie della Sezione Femminile' (Female Section) and the 'Giovani' (Young People). The reform replaces those civilian elements with one single group, the 'Volontari della Croce Rossa' (Red Cross Volunteers). The two military categories, the 'Infermiere volontarie' (Voluntary Nurses) and the Military Red Cross Corps, will remain.[92]

The activities of the volunteers are organized into six different areas: (1) protection of life; (2) social activities; (3) response to emergencies and disasters; (4) dissemination of international humanitarian law, fundamental principles, humanitarian values and international cooperation; (5) youth; and (6) volunteering promotion and development.

Until the end of 2013, the territorial structure will be organized into three levels of dependent committees: regional, provincial and local committees. From 1 January 2014, there will only be two levels of committees. However, there has not yet been a final decision taken on which committee will be removed. In the course of the year 2013, several executive regulations are expected to give effect to the principles stated in the Law No. 178/2012 and in the subsequent Regulation OC 567/12.

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[90] Law No. 183 of 4 November 2010 published in *Gazzetta Ufficiale* No. 262 of 9 November 2010, Ordinary Supplement No. 243, entered into force on 24 November 2010 <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2010-10-04;183>.

[91] Ordinanza Commissariale (OC) 0567-12 of 3 December 2012 <http://cri.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/15376>.

[92] While the 'Infermiere volontarie' do not suffer any substantial change, the military corps is reorganized and in particular the permanent personnel is sensitively reduced (from about 1,600 units to about 300 units).

Legislation — Code of Military Rules

- ☛ Legislative Decree No. 20 of 24 February 2012, 'Modification and Integration of the Legislative Decree 15 March 2012, No. 66, Code of Military Rules, according to Article 14, paragraph 18, of the Law 28 November 2005, No. 246' [Decreto Legislativo 24 febbraio 2012, n. 20, Modifiche ed integrazioni al decreto legislativo 15 marzo 2010, n. 66, recante codice dell'ordinamento militare, a norma dell'articolo 14, comma 18, della legge 28 novembre 2005, n. 246]. Entered into force on 27 March 2012[93]
  <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2012;020>

The Legislative Decree No. 20 of 24 February 2012 contains provisions aimed at modifying the *Code of Military Rules* [Codice dell'ordinamento militare], enacted by Legislative Decree No. 66 of 15 March 2010.[94] The Code is a collection of all the laws concerning the armed forces and was issued to order them in a systematic way. It also includes a collection of all the related regulations.[95] The collected laws mainly concern administrative issues, such as the applicable internal procedures, the legal statute of the military personnel and the rights and duties of the military in respect of the Public Administration.

Legislative Decree No. 20/2012 amends the *Code of Military Rules* contained in Legislative Decree No. 66/2010. The main modifications are related to provisions concerning the structure and reorganization of the army, the career of officers and insurance provisions. There are also a few provisions indirectly relevant for international humanitarian law.

One of the modified provisions is Article 22 which addresses the procedures for the implementation of the disarmament obligations. Originally Article 22 including obligations on antipersonnel booby traps, chemical weapons and unmarked explosive devices.[96] It stated that the Ministry of Defence has the responsibility to destroy all booby traps owned by the armed forces, except for a small quantity to be used for minesweeper training (no more than 8 thousand units), which quantity is renewable through importation. It also stated that the Ministry of Defence was required to comply with all the obligations under Article 3 of the *Convention on Chemical Weapons* of 1993 and Part IV of its Annex on verifications.[97] The Ministry is charged to send all relevant information and communication about the quantity and type of chemical weapons found in areas under its direct control and also to provide information about the destruction of such weapons.

The 2012 amendment expands the duties of the Ministry of Defence in so far as the remnants of war are concerned. On 11 February 2010, Italy ratified Protocol V on *Explosive Remnants of War, additional to the Convention on Certain Conventional Weapons* **(**CCW) ratified by Law No. 173 of

[93] Published in *Gazzetta Ufficiale* No. 60 of 12 March 2012.

[94] Legislative Decree No. 66 of 15 March 2010 'Code of Military Rules' [Decreto legislativo 15 Marzo 2010 No. 66 'Codice dell'ordinamento militare'] <http://www.normattiva.it/uri res/N2Ls?urn:nir:stato:decreto.legislativo:2010;66>.

[95] Decree of the President of the Republic No. 90 of 15 March 2010 [Decreto Del Presidente Della Repubblica 15 marzo 2010, n. 90 'Testo unico delle disposizioni regolamentari in materia di ordinamento militare, a norma dell'articolo 14 della legge 28 novembre 2005, n. 246] <http://www.normattiva.it/uri-res/N2Ls?urn:nir:presidente.repubblica:decreto:2010;90> .

[96] *Convention on the Marking of Plastic Explosives for the Purpose of Detection (Montreal Convention)*, opened for signature 1 March 1991 (entered into force on 21 June 1998) <http://cns.miis.edu/inventory/pdfs/pexplo.pdf>. Italy ratified it by Law No. 420 of 20 December 2000 <http://www.camera.it/parlam/leggi/00420l.htm>.

[97] *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* (Chemical Weapons Convention or CWC), opened for signature on 13 January 1993, (entered into force on 29 April 1997) <http://www.opcw.org/chemical-weapons-convention/>. Italy ratified the Convention by Law No. 496 of 18 November 1995 <http://www.esteri.it/MAE/doc/Legge496.pdf>.

12 November 2009[98] and became a State Party to the Protocol V system. The modifications to the *Code of Military Rules* implement the provisions of the Protocol, by nominating the organs in charge of the relevant activities. The amendment states that the Ministry of Defence will organize the service (search and destruction of remnants of war), train personnel and generally supervise all the relevant activities. The Ministry may also delegate the activities to a private company so long as it remains seized of supervision.

Furthermore, the Code allocates the activities of defusing, detonating and removing explosive remnants of war through specialized armed forces personnel. These activities are coordinated by the governmental territorial authority [Prefetto].

The *Code of Military Rules* is a primary source of law and therefore the attribution of the competence on matters of disarmament and destruction of non-conventional weapons must be done in accordance with the law. These provisions are important as they do not simply state internal administrative provisions, but impose clear obligations on relevant competent organs.

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Cases — Extraordinary Rendition — The Abu Omar Case before the Court of Cassation

☛ Decision No. 46340 of 19 September 2012 of the Corte di Cassazione (Court of Cassation), Fifth Section, in *Federalismi.it. Rivista di Diritto pubblico italiano, comunitario e comparato* <http://www.federalismi.it/ApplMostraDoc.cfm?Artid=21338>

On 19 September 2012, the Fifth Section of the Corte di Cassazione (Court of Cassation) handed down its decision in the *Abu Omar* case.

As was reported in the 2009 and 2011 editions of the *Yearbook of International Humanitarian Law*, the abduction of the suspected terrorist, Abu Omar, which took place in Milan in 2003, was an extraordinary rendition operation conducted jointly by US (CIA) and Italian (SISMI) intelligence agents. The case gave rise to a conflict of competences between the Court of Milan, which had commenced a criminal proceeding against the accused, and the Italian government, which repeatedly invoked State secrecy with regard to information and documents concerning the SISMI officers involved. Leaving aside technicalities about the interpretation of the applicable laws, the principal argument of the Court of Milan was that State secrecy could not be invoked in the Italian legal system to cover information necessary for prosecuting serious violations of human rights. The conflict was resolved in the Constitutional Court, which held that the competence of the government to invoke State secrecy and the power of the judiciary to exercise jurisdiction, having both constitutional guarantee, must be balanced. In the opinion of the Court, a fair balance had been reached in the case because State secrecy covered only certain circumstances, and not the whole case. In this way, the judiciary was not prevented from exercising jurisdiction, but only from relying on certain documents and evidence= in the proceeding. As a result of this decision, in 2009, the Court of Milan delivered a decision in which it sentenced 23 CIA agents for Abu Omar's abduction (who were prosecuted *in absentia*), while the proceeding against the SISMI officers was dismissed.[99] The Corte d'Appello (Court of Appeal) of Milan confirmed these conclusions in 2011.[100]

[98] See 12 *YIHL* (2009) pp. 597–598.
[99] See 12 *YIHL* (2009) pp. 571–576. See also P.A. Pillitu, 'Crimini internazionali, immunità diplomatiche e segreto di Stato nella sentenza del Tribunale di Milano nel caso Abu Omar', 666 *Rivista di diritto internazionale* (2010).
[100] See 14 *YIHL* (2011) pp. 37–38.

The Prosecutor, the plaintiffs and certain defendants all appealed the latter decision to the Supreme Court.[101] Two issues raised in these appeals deserve attention. The first one is a preliminary issue raised by the defendants, who contended that Italian courts had no jurisdiction over them on the grounds of the applicable treaties between Italy and the US (appeal by Colonel Joseph Romano), or on the grounds of principles concerning immunities of State officials (appeals by Mr Robert Seldon Lady and by Ms Sabrina De Sousa). A second issue regarded the consequences of State secrecy in the proceeding according to the previously mentioned decision of the Constitutional Court.

Regarding the appeal of Colonel Romano, at the date of the abduction, the applicant was a member of US military forces operating at the NATO base in Aviano, Italy. He was found guilty of having collaborated with CIA agents in the abduction of Abu Omar and his forcible transfer to the NATO base in Ramstein, Germany (from where Abu Omar was further transferred to Egypt, where he was illegally detained and subjected to torture). The applicant argued that the Italian Courts had failed to recognize the prevailing jurisdiction of the US over him, notwithstanding the fact that the US Military Prosecutor had claimed its own competence at an earlier stage of the proceeding without opposition by the Italian Minister for Justice.

As a first point, the Supreme Court noted that the applicable treaty was the 1951 *Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces*,[102] which Italy had ratified through Law No. 1335 of 30 November 1955.[103] Under Article VII.3, the military authorities of the sending State have prevailing jurisdiction in relation to 'offences solely against the property or security of that State' and to 'offences arising out of any act or omission done in the performance of official duty'. According to the Supreme Court, the conduct of the applicant did not fall within any of these criteria. Furthermore, paragraph 3 of Article VII applies in case of concurrent jurisdiction. For the Court, the applicable norm in the case was contained in the second paragraph of the Article, which gives exclusive jurisdiction to the sending State or the receiving State, depending on whether the crime is punishable by the law of one of them and not by the law of the other. Looking at the acts on counter-terrorism adopted in the US before and after 11 September 2001,[104] extraordinary rendition operations may not be regarded as criminal offences under US law. By contrast, such conduct is a crime punishable as kidnapping under Article 605 of the *Italian Penal Code*.[105] The request of the US Military Prosecutor that Italy waive its jurisdiction was inadmissible because waiver of jurisdiction is conceivable only in the presence of concurrent jurisdiction. In this case, however, 'waiver of jurisdiction would have the sole effect of preventing the ascertainment of truth regarding a crime — a serious crime — committed in the territory of Italy, and would result in impunity for the authors.'[106]

The principal submission of the two defendants who were in charge of consular functions at the relevant time (Mr Lady and Ms de Sousa) was, in turn, that in proceeding against them, the Italian Courts had violated the immunities which consular officers enjoyed under international law.[107] The

[101] See Court of Cassation, Fifth Section, decision No. 46340 of 19 September 2012, pp. 1–2.
[102] *Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces*, opened for signature 19 June 1951, 199 UNTS 67 (entered into force 23 August 1953).
[103] Published in *Gazzetta Ufficiale* No. 7, 10 January 1956, p. 82 ff. Law No. 1335/1955 entered into force on 11 January 1956.
[104] Among these acts, the Supreme Court has mentioned the 'Omnibus Counterterrorism Act' and the 'Antiterrorism Amendment Act', both of 1995, and the 'Comprehensive Terrorism Prevention Act' of 24 September 2001 (see Decision No. 46304/2012, pp. 68–69).
[105] *Ibid*., pp. 64–77.
[106] *Ibid*., p. 75.
[107] *Ibid*., pp. 100–110.

relevant principles have been codified by the 1963 *Vienna Convention on Consular Relations*,[108] which Italy ratified through Law No. 804 of 9 August 1967.[109]

The *Vienna Convention* does not allow arrest and detention pending trial of consular officers, except 'in the case of a grave crime and pursuant to a decision by the competent judicial authorities' (Article 41.1). The Supreme Court found that the arrest and detention of the applicants satisfied these conditions. In addition, the crime of 'kidnapping' is included in the concept of 'grave crime' as defined for the purposes of the Vienna Convention, by Law No. 804/1967.

A second strand of argument focused on the exemption of the consular officers from the jurisdiction of the receiving State. Under international law, this exemption is limited to acts done in the performance of official duties (Article 43, *Vienna Convention*). One of the applicants' arguments was that the abduction of Abu Omar, which was realized within the framework of a CIA anti-terrorism program, was directed to protect fundamental interests of the US and of US citizens, if not of the whole of humankind. As such, the conduct should have been regarded by Italian courts as an act done in the performance of consular functions.

The Court recalled the concept of 'consular functions' under the *Vienna Convention*, mentioning also Article 5.m, which allows consular officers to perform 'any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State'. For the Court, no interpretation of these provisions — no matter how extensive — could include in the concept of 'consular functions':

> the kidnapping of an individual and his forcible transfer in a place where he has been subjected to interrogation with brutal methods, or torture; a conduct which, in addition, is expressly prohibited by the law of the receiving State.[110]

In the same appeal, it was argued in the alternative that only States bear responsibility for extraordinary rendition operations and, as a consequence, State officials were not liable for activities of this kind. According to this reasoning, the abduction of Abu Omar should be exempted from the jurisdiction of Italy, in conformity with the principle of *par in parem non habet jurisdictionem*. The CIA agents involved should have been regarded by the Italian Courts as being the members of a US special mission, and should have enjoyed functional immunity.

However, the Court rejected this argument:

> As noted by authoritative scholars, the alleged principle of international law does not exist. It is true that the sovereign States are exempt from civil jurisdiction under international law … however, one may not infer from this circumstance that a further principle exists which provide exemption from criminal jurisdiction; moreover, even if existent, such a principle would not apply to sovereign States, but to individuals'. [111]

For the Court, it was required to ascertain whether a norm preventing domestic courts from exercising criminal jurisdiction against officials of foreign States existed in customary international law. The Court noted that before a recent decision (Court of Cassation, Section I, No. 31171 of 19 June-24 July 2008, *Lozano* case)[112] this issue had never been discussed in the Italian courts, except in cases of special international norms. These norms concerned diplomatic and consular immunities

[108] *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967).
[109] See Article 1(b) of Law No. 804/1967 (published in *Gazzetta Ufficiale* No. 235 of 19 September 1967, p. 2, entered into force 4 October 1967).
[110] Decision No. 46304/2012, p. 106.
[111] *Ibid*., p. 108.
[112] See 11 *YIHL* (2010) pp. 504–511.

(which extend, customarily, to the Head of State, the Head of Government and the Minister for Foreign Affairs), or the status of military forces operating abroad. Leaving aside these cases, an examination of the pertinent literature, jurisprudence and, most importantly, State practice shows that the issue of exempting State officials from foreign criminal jurisdiction is still controversial in international law, and that no general principle exists on the matter. In particular, a customary rule exempting State officials acting on the territory of a foreign State from the criminal jurisdiction of the latter has not yet crystalized.[113]

According to the Court, this reasoning was sufficient for it to conclude that the submission of the applicants was unfounded.

Nevertheless, the Court took into consideration the possible qualification of the abduction of Abu Omar as a violation of international humanitarian law, bearing in mind that such a classification would imply a derogation from the functional immunity principle:

> the arguments put forwards on this point in the appeal by Ms De Sousa, though accurately expressed, are not convincing. They are based, in fact, on the assumption that the kidnapping of an individual is not *per se* a breach of humanitarian law, if it does not involve the multiple commissions of acts of this kind. The applicant did not take into consideration, however, that the abduction of Abu Omar had the purpose of transferring him in Egypt, a country where interrogation with torture is permitted, and where Abu Omar was actually tortured, as has been ascertained by the competent Courts.
>
> The purpose of the abduction of Abu Omar, which is — generally speaking — one of the objectives of all the extraordinary rendition operations, implies that the conduct of the defendants may be described as a violation of humanitarian law, considering that torture is prohibited by European law (*European Convention on Human Rights* of 1950),[114] and by UN treaties (*UN Covenant on Civil and Political Rights*, New York, 1966[115] and *Convention against Torture*, New York, 1984; [116] not to speak of the *Convention on Forced Disappearance*, Paris, 2007,[117] which, stipulated after the commission of the crime, is not applicable in the case under the principle of non-retroactivity of treaties).[118]

Coming to the consequences of State secrecy, it should be noted that the decision of dismissing the proceeding against all the SISMI officers was challenged before the Court not only by the General Prosecutor at the Court of Appeal of Milan and by the plaintiffs, but also by five of the same officers.[119] All the applicants complained that the Court of Milan and, subsequently, the Court of Appeal gave an erroneous interpretation of the Constitutional Court's decision, when they deemed that the responsibility of the SISMI officers could not be ascertained by reason of State secrecy. In this way, the Courts dismissed the proceeding against a whole category of accused, without

[113] Decision No. 46304/2012, p. 108–110. As a matter of fact, the topic still is under examination by the International Law Commission. See ILC, 'Immunity of State officials from foreign criminal jurisdiction' <http://untreaty.un.org/ilc/guide/4_2.htm>.

[114] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

[115] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

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

[117] *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 20 December 2006, UN General Assembly resolution 61/177 of 12 January 2007 (entered into force 23 December 2010).

[118] Decision No. 46304/2012, p. 111.

[119] These were the then SISMI Director Niccolò Pollari and the officers Marco Mancini, Giuseppe Ciorra, Raffaele Di Troia and Luciano Di Gregori. Cf. decision No. 46304/2012, p. 113.

ascertaining the responsibility of each one. In the view of the General Prosecutor and of the plaintiffs, this decision resulted in impunity for co-perpetrators or accomplices, while, for the defendants, it violated their rights to defence.

In examining these arguments, the Court stressed, in the first place, that Italian laws on State secrecy are not aimed at preventing the judiciary from exercising jurisdiction against the members of the national intelligence community. These laws prohibit only that courts obtain or utilize information covered by State secrecy in order to protect fundamental interests of the State, such as national security, or the relationship of Italy with the foreign States. It follows that

> [t]he competent courts may, and must, proceed and investigate in respect of any conduct which may be qualified as a criminal offence, in compliance with the principle under which the prosecution of crimes is mandatory.[120] The courts must refrain, however, from utilizing, in proceeding, any sources of evidence covered with State secrecy. [121]

The Court further noted that the Constitutional Court, in deciding on the conflict of competence between the government and the judiciary, attached importance to the fact that the government had not invoked State secrecy with regard to the kidnapping of Abu Omar generally. State secrecy only covers information whose disclosure could prejudice national security or relevantly, the relationship between Italy and the US.[122] In the view of the Constitutional Court, a balance had to be reached between the protection of those interests and the right of the judiciary to exercise jurisdiction. However, the Constitutional Court has further specified that 'it is a task for the competent Courts to individuate which should be the consequences [of invoking the State secrecy clause] in the proceeding'.[123] In other words, and according to the right interpretation of the Constitutional Court's decision:

> the competent courts must eliminate from the proceeding any sources of evidence which may not be utilized by reason of State secrecy, bearing in mind that in an interrogation of witness and in other evidences there can be parts that are classified as secret and parts which are not. Then, courts must assess the residual evidences. If the latter are not sufficient for deciding, and the evidences not usable are necessary for deciding, the proceeding has to be dismissed under Article 202.3 of the *Code of Criminal Procedure*… [124]

> In the case, the competent Courts should have individuated with precision, which evidences were covered with State secrecy and, then, should have assessed the residual evidences. As it has been argued, rightly, by the General Prosecutor, the Courts should not have concluded — as they did after cursory examination — that a 'black curtain' had fallen on any evidences against the SISMI officers, … which impeded to ascertain individual responsibilities and imposed the dismissal of the proceeding against all of them ….[125]

A further point raised in the appeals, and already debated in the proceeding, was the fact that the government had invoked State secrecy in respect of certain documents after the latter had been utilized in the proceeding and, thus, disclosed to the public. In the view of the Court of Cassation,

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[120] Article 112 of the Constitution reads: 'The Prosecutor has the duty to prosecute'.
[121] Decision No. 46304/2012, p. 115.
[122] On this particular aspect, see T. Scovazzi, 'La Repubblica riconosce e garantisce i diritti inviolabili della segretezza delle relazioni tra servizi informativi italiani e stranieri?', 959 *Rivista di diritto internazionale* (2009).
[123] Decision No. 46304/2012, p. 118.
[124] This provision establishes that, in the case that the government confirms State secrecy on facts or documents the knowledge of which is necessary for deciding, courts must pronounce a dismissal of proceeding 'by reason of State secrecy'. In the view of the Supreme Court, the Court of Appeal of Milan has failed to sufficiently motivate, among others, its decision on this point: cf. decision No. 46304/2012, p. 140.
[125] *Ibid*., pp. 118–119.

there was no reason to believe that these documents were no longer usable as a source of evidence, considering that they had not been obtained illegally. The Court further observed:

> the European Court of Human Rights has repeatedly stated that if acts, facts or information covered with State secrecy have been disclosed, these may no longer be considered as protected. In these cases, limits to further dissemination and use are not able to safeguard national security, because of the previous disclosure …
>
> On the other hand, norms on State secrecy must be interpreted strictly, because resorting to State secrecy implies, in any case, a *vulnus* to the correct functioning of democracy, which is based on transparency and on knowledge by the citizens of the government's acts and decisions. For this reason, resort to State secrecy should be limited to strict necessity. [126]

The Court deemed, however, that the appeals by the defendants were unfounded. In its view, it was true that State secrecy implies, in some cases and to a certain extent, a sacrifice of the rights of the defence. However, the applicable laws require a balance between Article 41.1 of Law No. 124 of 2007 (which was in force at the relevant time) prohibited an accused or a defendant from disclosing information covered by State secrecy. Such restriction on the rights of the defence is balanced by Article 202.3 of the *Code of Criminal Procedure*, according to which, if the knowledge of facts or documents covered with State secrecy is necessary for deciding on the merits of a proceeding, the latter is to be dismissed.[127]

On this basis, the Court of Cassation, through decision No. 46340 of 2012: *a*) rejected the appeals of the defendants; *b*) upheld the appeal of the Prosecutor and annulled the decision of the Court of Appeal of Milan with regard to the dismissal of the proceeding against the SISMI officers. The proceeding will resume before a different section of the Court of Appeal of Milan, which must respect the findings of the Court of Cassation. This re-examination should lead the competent Court to issue a decision on the merits.

ORNELLA FERRAJOLO

Treaty Action — Human Rights

- Ratification of the *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, opened for signature 25 October 2007, CETS No. 201 (entered into force 1 July 2010)
  <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>
- Law No. 172 of 1 October 2012, entered into force on 23 October 2012, published in *Gazzetta Ufficiale* No. 235 of 8 October 2012
  <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2012-01-10;172!vig=>

During 2012, efforts to enhance Italian legislation on the implementation of children's rights have produced a new and important result.[128] On 7 November 2007, Italy signed the *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* of the Council of Europe (CETS No. 201), commonly known as 'Lanzarote Convention', and ratified it with Law No. 172 of

[126] *Ibid*., pp. 130–131.
[127] *Ibid*., pp. 133 et seq.
[128] During 2011, Italy adopted two important laws enhancing Italian legislation on the implementation of children's rights. Italian parliament passed Law No. 62 of 21 April 2011, which introduced some modifications into the *Code of Criminal Procedure*, to enhance protections for the relationship between mothers in prison and their minor children. It also adopted Law No. 112 of 12 July 2011, which established a national ombudsperson for children. See 14 *YIHL* (2011) pp. 18–22.

1 October 2012.[129] By Law No. 172/2012, Italy has become a State Party to the Convention, which is a legally binding instrument under Italian law.

The 'Lanzarote Convention' represents the first international human rights treaty regulating sexual abuse against children as well as introducing relevant criminal offences.[130] The Convention criminalizes many different kinds of sexual abuse of children, including abuses perpetrated through the use of new technologies like the internet. Indeed, the Convention criminalizes the traditional forms of sexual abuse of children committed in different contexts such as engaging in sexual activities with a child below legal age, offences concerning child prostitution, child pornography, the participation of a minor in pornographic performances as well as sexual harm or abuse of children resulting from the internet and children sex tourism.

The criminalisation of soliciting children through new technologies for sexual purposes is a major innovation of the 'Lanzarote Convention' because at present no other international instrument provides for this offence. This increasingly worrying phenomenon is more commonly known as 'child grooming' and refers to the cases of children being sexually harmed during meetings with adults whom they initially encounter in cyberspace (usually in chat rooms or game sites). In order to engage criminal liability, the notion of 'child grooming' requires that the contact be followed by a proposal to meet with the child for sexual relations. Therefore, merely exchanging sexual messages with a child is not enough to establish criminal liability under the new crime.

The Convention also establishes preventive measures concerning the screening, recruitment, training and awareness-raising of persons working in contact with children.[131]

In conformity with the Italian legislative practice regarding international treaties, Law No. 172/2012 contained the usual provisions for Italian ratification. In particular, Article 1 of the Law authorised the President of the Republic of Italy to ratify the Convention[132] and Article 2 contained the implementing order, the so-called 'ordine di esecuzione', which implies that once in force the Treaty will become part of the Italian legal system. Additionally, Article 3 established the Ministry of the Interior as the competent national authority for the recording and storage of data on convicted sex offenders. The recording and storage of data will be carried out in accordance with the so-called 'Prüm Treaty' on the Stepping up of Cross-border Cooperation, particularly in Combating Terrorism, Cross-border Crime and Illegal Migration of 2005.[133]

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[129] The project later approved as Law No. 172/2012 on the Ratification and Execution of the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of the Council of Europe, opened for signature in Lanzarote on 25 October 2007 and the implementation of the Italian Legislation, was introduced on 23 March 2009 into the Chamber of Deputies on the initiative of the Minister for Foreign Affairs together with the Minister of Justice and the Minister of Equal Opportunities. See Italian Parliamentary Acts, Chamber of Deputies, XVI Legislature, C. 2326. See <http://leg16.camera.it/126?tab=1&leg=16&idDocumento=2326&sede=&tipo=>.

[130] The Convention, opened for signature by the member States of the Council of Europe and for the non-member States which had participated in its elaboration, as the European Union, in Lanzarote on 25 October 2007, entered into force on 1 July 2010.

[131] Article 5(1) states: 'Each Party shall take the necessary legislative or other measures to encourage awareness of the protection and rights of children among persons who have regular contacts with children in the education, health, social protection, judicial and law-enforcement sectors and in areas relating to sport, culture and leisure activities'.

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

[133] The so-called 'Prüm Treaty' entered into force on 1 November 2006 with the aim of enhancing European cooperation, especially by means of exchanging information, particularly in combating terrorism, cross-border crime and illegal migration. At present, only seven EU member States namely Belgium, Germany, Spain, France, Luxembourg, Netherlands and Austria are Parties of the Treaty. Italy ratified the Treaty with the Law No. 85 of 30 June

Articles 4–9 of Law No. 172/2012 contained the provisions necessary to ensure Italian legislation on children's rights conforms with the 'Lanzarote Convention' and other relevant international treaties. First of all, Law No. 172/2012 introduced certain modifications into the *Italian Criminal Code* and created new criminal offences relating to sexual abuse of children. Additionally, it established penal sanctions for their violations.

One of the most important innovations introduced by Law No. 172/2012 is the new Article 609 *undecies* of the *Italian Criminal Code* which establishes the crime of 'child grooming'. According to Article 609 *undecies* this crime consists of any act aimed at gaining the trust of a child aged under sixteen through artifices, flattery or threats and also by using the internet or other networks or means of communication with the intent to commit offences related to sexual abuse and exploitation of children. The offence of child grooming is punishable by imprisonment from one to three years.
Furthermore, Law No. 172/2012 established the crime of public incitement to paedophilia and child pornography (Article 414 *bis* of the *Italian Criminal Code*). It consists of the conduct of a person who, by whatever means and forms of expression, publicly incites another person to commit one or more offences against children laid down in the *Italian Criminal Code*. Law No. 172/2012 has filled a gap of Italian criminal law, which did not provide for the crimes of 'child grooming' or of public incitement to paedophilia and child pornography.

In line with the 'Lanzarote Convention' provisions, the Law amended Article 609 *quinquies* of the *Italian Criminal Code* regulating the corruption of children. The new provision imposes tougher penalties for persons engaging in sexual activities in the presence of a child under the age of fourteen for the purpose of making the child a witness to such activities. It also punishes the conduct of making the child a witness to sexual acts and showing a child aged less than fourteen pornographic material with the aim of making the child perform or submit to sexual acts. Other important amendments in the framework of Italian criminal law include: increasing the number of offences against children in relation to which the offender will not be allowed to plead the ignorance of the age of the victim;[134] doubling the statute of limitation periods for offences related to sexual abuse and sexual exploitation of children;[135] the introduction of new conduct integrating the already existing crime of child prostitution such as, *inter alia*, the recruitment of a child into prostitution as well as the management, control and organization of child prostitution.[136]

In the meantime, Law No. 172/2012 has modified the *Code of Criminal Procedure*. In particular, it has introduced the opportunity for child victims to be assisted during all stages of criminal proceedings through the provision of emotional and psychological support.[137]

Additionally, Law No. 172/2012 implemented the obligations of the 'Lanzarote Convention' by amending certain laws. In particular, Article 7 amended Law No. 354/1975 on the granting of benefits to offenders against children.[138] It established psychological treatment for offenders convicted of sexual offences against children aimed at ensuring their rehabilitation and reducing the risk of recidivism. The modifications introduced by Articles 8 and 9 of Law No. 172/2012 to the

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2009 (Published in *Gazzetta Ufficiale* No. 160 of 13 July 2009). See <http://www.governo.it/biotecnologie/documenti/LEGGE_30_giugno_2009_n_85.pdf>. On Italian adhesion to the Treaty, see 12 *YIHL* (2009) pp. 589–592.

[134] Article 609 *sexies* of the *Italian Criminal Code* (Ignorance of the Age of the Victim). It states that the victim's age limit is eighteen.

[135] Article 157(6) of the *Italian Criminal Code* (Statute of limitations).

[136] Article 600 *bis* of the *Italian Criminal Code* (Child Prostitution).

[137] Article 5 of the Law No. 172/2012.

[138] Law No. 354 of 26 July 1975, *Norme sull'ordinamento penitenziario e sulla esecuzione delle misure privative e limitative della libertà*, published in *Gazzetta Ufficiale* No. 212 of 9 August 1975. See <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1975-07-26;354!vig=>.

Decree of the President of Italian Republic No. 115 of 30 May 2002[139] on the right of victims to free legal aid and to the Decree-Law No. 306 of 8 June 1992[140] on confiscation are more limited. The amendment of Legislative Decree No. 159 of 6 September 2011[141] (commonly known as 'Antimafia Code') appears more significant. It establishes a restraining order to places usually attended by children for the authors of criminal offences against them.

Law No. 172/2012 completes the Italian legal framework concerning the protection of children against sexual exploitation and abuse. In particular, it must be noted that with Law No. 269 of 3 August 1989[142] and Law No. 38 of 6 February 2006,[143] Italy has implemented the 1989 *Convention on the Rights of the Child*[144] and the EU Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography.[145] Additionally, with Law No. 46 of 11 March 2002,[146] Italy ratified the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*.[147]

The Optional Protocol must be interpreted in light of the 1989 Convention as a whole and particularly, in the light of the principles of non-discrimination, the best interests of the child and

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[139] Decree of the President of Italian Republic No. 115 of 30 May 2002, *Testo unico delle disposizioni legislative e regolamentari in materia di spese di giustizia*, published in *Gazzetta Ufficiale* No. 139 of 15 June 2002. See <http://www.parlamento.it/parlam/leggi/deleghe/02113dla.htm>.

[140] Decree-Law No. 306 of 8 June 1992, *Modifiche urgenti al nuovo codice di procedura penale e provvedimenti di contrasto alla criminalita' mafiosa*, published in *Gazzetta Ufficiale* No. 133 of 8 June 1992. See <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:1992-06-08;306>.

[141] Legislative Decree No. 159 of 6 September 2011, *Codice delle leggi antimafia e delle misure di prevenzione, nonche' nuove disposizioni in materia di documentazione antimafia, a norma degli articoli 1 e 2 della legge 13 agosto 2010, n. 136*, (11G0201) published in *Gazzetta Ufficiale* No.226 of 28 September 2011. See <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2011-09-06;159>.

[142] Law No. 269 of 3 August 1998, n. 269, *Norme contro lo sfruttamento della prostituzione, della pornografia, del turismo sessuale in danno di minori, quali nuove forme di riduzione in schiavitù*, published in *Gazzetta Ufficiale* No. 185 of 10 August 1998. See <http://www.camera.it/parlam/leggi/98269l.htm>.

[143] Law No. 38 of 6 February 2006, *Disposizioni in materia di lotta contro lo sfruttamento sessuale dei bambini e la pedopornografia anche a mezzo Internet*, published in *Gazzetta Ufficiale* No. 38 of 15 febbraio 2006. See <http://www.camera.it/parlam/leggi/06038l.htm>.

[144] Italy ratified the 1989 *Convention on the Rights of the Child* with Law No. 176 of 27 May 1991, *Ratifica ed esecuzione della convenzione sui diritti del fanciullo, fatta a New York il 20 novembre 1989*, published in *Gazzetta Ufficiale* No. 135 of 11 June 1991. See <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1991-05-27;176!vig=>.

[145] Published in Official Journal of European Union L 013 of 20 January 2004. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004F0068:EN:HTML>. The Decision 2004/68/JHA was replaced by Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011. Article 27 of Directive states: 'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 December 2013'. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:335:0001:0014:EN:PDF>.

[146] Law No. 46 of 11 March 2002, *Ratifica ed esecuzione dei protocolli opzionali alla Convenzione dei diritti del fanciullo, concernenti rispettivamente la vendita dei bambini, la prostituzione dei bambini e la pornografia rappresentante bambini ed il coinvolgimento dei bambini nei conflitti armati, fatti a New York il 6 settembre 2000*, published in *Gazzetta Ufficiale* No. 77 of 2 April 2002. See <http://www.camera.it/parlam/leggi/02046l.htm>.

[147] The *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* was adopted by resolution A/RES/54/263 of 25 May 2000 at the fifty-fourth session of the UN General Assembly and entered into force on 18 January 2002 (2171 UNTS 227). At the present, 163 States are Parties of the Protocol. On the international protection of the children's rights, see M. C. Maffei, 'La tutela internazionale dei Diritti del bambino', in L. Pineschi, ed., La tutela internazionale dei diritti umani (Milano, Giuffrè Editore, 2006); see also, C. Focarelli, 'La Convenzione di New York sui diritti del fanciullo e il concetto di *Best Interests of the Child*', 4 *Rivista di diritto internazionale* (2010).

child participation. In conformity with Articles 34 and 35 of the 1989 *Convention on the Rights of the Child*, which state that governments should protect children from all forms of sexual exploitation and abuse and take all measures possible to ensure that they are not abducted, sold or trafficked, the Optional Protocol establishes additional legal mechanisms that complement the Convention by providing to States Parties means to combat sexual exploitation and abuse of children in their domestic legal systems. It also protects children from being sold for non-sexual purposes, such as other forms of forced labour, illegal adoption and organ donation.

Law No. 172/2012 represents an important point of arrival, but also a new starting point for strengthening the rights of children at a national level and for implementing a number of international instruments and EU law into the Italian legal system aimed at protecting this vulnerable group.

ROSITA FORASTIERO[148]

Government Policy — Follow-up of the Case of Hirsi Jamaa and Others v. Italy

- Statement of the Italian Minister of the Interior, Mrs. Annamaria Cancellieri, of 23 February 2012
- Statement of the Italian Minister for International Cooperation and Integration, Mr. Andrea Riccardi, of 23 February 2012
- Official Record (*processo verbale*) of the Meeting between the Italian and Libyan Ministers of Interior of 3 April 2012

By its judgment of 23 February 2012, in the case of *Hirsi Jamaa and Others v. Italy*, the European Court of Human Rights (ECtHR) condemned the 'push-back policy' enacted by Italy towards foreign nationals who have been returned to Libya in contravention of the prohibition on non-refoulement.[149] The policy was pursued following several agreements concluded between Italy (during the Presidency of Mr. Silvio Berlusconi) and Libya (then under the rule of Colonel Muammar el-Qaddafi) to combat clandestine immigration, particularly the *Treaty of Partnership, Friendship and Cooperation* between Italy and Libya signed on 30 August 2008 in Benghazi (and the *Additional Protocol on Cooperation in the Fight Against Clandestine Immigration* signed in Tripoli on 4 February 2009, which partially amended the agreement of 29 December 2007).[150]

Italy was under an obligation to ensure that the authorities of the country to which the foreigners were returned (in the instant case, Libya) would treat them in conformity with the ECHR — particularly Article 3 on the protection from torture and inhuman or degrading treatment — and would not repatriate them to their countries of origin (in the instant case, Eritrea and Somalia), and to take all possible measures to prevent similar situations from occurring in the future.

The reaction of the new Italian government appointed in 2011 (under the Presidency of Mr. Mario Monti) to the ECtHR's judgment was of observance and collaboration.

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[149] *Hirsi Jamaa v. Italy*, European Court of Human Rights, Application No. 27765/09, Judgment, 23 February 2012 <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231>. See J. A.Hessbruegge, 'European Court of Human Rights Protects Migrants Against "Push Back" Operations on the High Seas', 16 *ASIL Insight* (April 2012) <http://www.asil.org/insights120417.cfm>; B. Nascimbene, 12 *Documenti Iai* (March 2012) <http://www.iai.it/pdf/DocIAI/iai1202E.pdf>.

[150] On the fight against clandestine immigration. On the same date an additional Protocol was stipulated on the operative and technical measures to execute the agreement. On the Treaty see N. Ronzitti, 'The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?', *Documenti Iai* (May 2009) <http://www.iai.it/pdf/DocIAI/IAI0909.pdf>.

The Minister of Interior, Mrs. Annamaria Cancellieri, declared that the ECtHR's judgment, as it was issued by a high European institution, 'had to be respected and not commented on'. She announced that Italy was keeping in strict contact with the new Libyan leadership in order to restart the operative cooperation between the two countries, but that any new initiative in this matter would be adopted against a background of full respect of human rights and the protection of human life at sea. The Minister added that, in any case, irregular immigration would be firmly opposed, especially when it involves human trafficking.

This point of view was shared by the Minister for International Cooperation and Integration, Mr. Andrea Riccardi, who qualified the ECtHR's judgment as a reason for rethinking the Italian policy on immigration. He highlighted that the government's aim was to have a clear, transparent and correct immigration policy.

On 18 June 2012, the newspaper *La Stampa* published the official record (*processo verbale*)[151] of the meeting between a delegation led by Mrs Cancellieri, and Libyan authorities, including the Minister of Interior, Fawzi Al-Taher Abdulali, in Tripoli on 3 April 2012, concerning cooperation between the two States to stem the arrival of irregular immigrants in Italy.[152]

These consultations sought to identify ways and means to improve bilateral cooperation in the field of migration 'within an agreed framework and with a spirit of partnership and active solidarity'. During the meeting, the two Ministers agreed that outstanding legally justifiable claims by Libyan and Italian entities towards the two countries would be settled, that up to 1,500 wounded people would be admitted to Italian hospitals for treatment over a six-month period and that negotiations on visa facilitation for the two countries' citizens would commence to strengthen the links between the two peoples.

The official record of the meeting between the Ministers of Interior detailed agreements that were reached in the following fields: training; reception centers; border monitoring; voluntary returns and repatriation; setting up a residents' register; and mechanisms to monitor and coordinate progress (*follow-up mechanisms*).[153]

Following the publication of the official record, there were concerns regarding the current situation in Libya, the reliability and nature of the new Libyan authorities and the widespread human rights violations that previous agreements in this field with Libya had given rise to, including on-going problems such as Libya's failure to sign the 1951 *Geneva Convention Relating to the Status of Refugees*.[154]

In an interview on 20 June 2012, Mrs. Cancellieri responded to critics by accusing them of dishonesty and ideological prejudice, in view of their failure to acknowledge that there are 'at least two passages in the text [of the Convention] in which explicit reference is made to respect for basic

[151] For the official record see <http://www.stranieriinitalia.it/images/accordolibia18giu2012.pdf>.

[152] The meeting was preceded by the visit of the Italian Prime Minister, Mr. Mario Monti, to Libya on 21 January 2012, where he said that 'strengthening the privileged relationship in countering illegal immigration' was deemed a priority requiring consolidation through operational measures. This meeting was held to celebrate the success of the 17 February Revolution in Libya, to explore possibilities to widen horizons in 'mutual cooperation' for the benefit of these two 'friendly peoples' and to realize a 'new vision of Libya.' The *Tripoli Declaration* signed by Mr. Monti and his counterpart Mr. El-Keib highlighted Libya's determination to 'found a new State based on democracy and on universally recognized human rights principles', as well as respecting the 12 December 2000 Palermo *Convention against Transnational Organized Crime* and its additional protocols against the trafficking of persons and smuggling of migrants.

[153] The agreements' contents were presented by Mrs. Cancellieri on 16 May 2012 in the Italian Senate's Commission on the safeguard and promotion of human rights. See <http://www.senato.it/service/PDF/PDFServer/DF/283163.pdf>.

[154] See Amnesty International, 'L'Italia deve mettere da parte gli accordi con la Libia sul controllo dell'immigrazione' (19 June 2012) <http://www.amnesty.it/Italia-Libia-controllo-immigrazione>.

human rights'.[155] Asked about Libya's failure to sign the Convention, Mrs. Cancellieri replied: 'I solemnly announce that we will invite our Libyan friends to sign the Convention on every occasion'. The Minister added that the governments must develop a common agenda on which to work, while Italy would 'continue to support ... its commitment for the respect of human rights and will do everything it can to open a virtuous circle of cooperation, in Libya, between local authorities and international humanitarian agencies'.

Finally, in answering a question on whether Italy would resort to returning migrants intercepted at sea to Libya, Mrs. Cancellieri affirmed that Italy would respect the ECtHR's judgment, indicating that the Italian government would not reintroduce such practice in view of the undergoing cooperation with Libya aimed at enabling it to improve control over its borders and to prevent departures from its shores.

RACHELE CERA

Legislation — Charter of Rights and Duties of Detainees

- Decree of the President of the Republic No. 136 of 5 June 2012, Regulation with modifications of the Decree of the President of the Republic No. 230 of 30 June 2000 on the Charter of Rights and Duties of Detainees [Decreto del Presidente della Repubblica n. 136 del 5 giugno 2012, Regolamento recante modifiche al Decreto del Presidente della Repubblica 30 giugno 2000, n. 230, in materia di Carta dei diritti e dei doveri del detenuto e dell'internato]. Entered into force on 29 of August 2012[156]
  <http://www.normattiva.it/uri-res/N2Ls?urn:nir:presidente.repubblica:decreto:2012-06-05;136>
- Charter of Rights and Duties of Detainees attached to the Decree of the Minister of Justice of 5 of December 2012 [Carta dei diritti e dei doveri dei detenuti e degli internati allegata al Decreto del Ministro della Giustizia del 5 dicembre 2012]. Entered into force on 5 of December 2012
  <http://www.giustizia.it/giustizia/it/mg_1_8_1.wp?previsiousPage=mg_1_8&contentId=SDC804746>

The *Charter of Rights and Duties of Detainees* is a relevant act in the framework of governmental initiatives aimed at improving the living conditions of inmates in Italy and guaranteeing them the most important human rights recognized by the Italian legal order. In recent years, the situation of the Italian prison system has become very serious for several reasons including an increasing number of detainees, most of them foreigners,[157] which accentuates overcrowding in detention facilities; the length of proceedings, with many people in custody while they await trial (about 42% of detainees); and the failure to adopt a bill concerning alternative measures to imprisonment presented by the Minister of Justice in February 2012.[158] During 2012, the problem of prisons was also denounced by certain political parties (in particular 'Radicali italiani'), the President of the

[155] Interview of 20 June 2012 to the Minister of Interior, Mrs. Annamaria Cancellieri, published on *La Stampa* <http://www.interno.gov.it/mininterno/export/sites/default/it/sezioni/sala_stampa/interview/Interviste/2099_500_ministro/0979_2012_6_20_intervista_la_stampa.html_229301894.html>.

[156] The Decree of the President of the Republic No. 136/2012 was published in *Gazzetta Ufficiale* No. 189 of 14 August 2012.

[157] Foreigners represent the 35.6% of detainees, the most elevated percentage in Europe.

[158] See Chamber of Deputies, Bill. No. 5019 of 29 February 2012 <http://www.leggioggi.it/wp-content/uploads/2012/12/ddl_severino.pdf>. For a synthesis of the measures adopted by the government to improve the situation of the prison system see 'Pacchetto giustizia: il nuovo concordato e lo 'svuota carceri', Guida al diritto, Il Sole 24 ore, No. 16, December 2011
<http://www.diritto24.ilsole24ore.com/content/dam/law24/Gad/Il%20Pacchetto%20Giustizia.pdf>. In 2012, there were 60 suicides within the penitentiary system.

Republic and many civil associations, such as 'Antigone'. The latter published the IX Report on the situation of jails in Italy entitled 'Without Dignity',[159] in which it observed, among other things, that in the EU, Italy represents the country with the most overcrowded prisons with a percentage of overcrowding of 142.5% against the European average of 99.6%.[160] In 2012, the Special Commission on the protection and promotion of human rights of the Senate analyzed the living conditions of convicts in the most important Italian prisons.[161] On 16 March 2012, the Commission published a report identifying overcrowding as the most serious problem of prisons, which also results in violations of many fundamental human rights of inmates. It is noteworthy to recall that in the pilot-judgment of 8 January 2013 on the case *Torreggiani and Others v. Italy*, the ECtHR ordered the Italian government to pay compensation to seven detainees imprisoned in the jails Busto Arsizio and Piacenza as a result of overcrowding giving rise to violations of Article 3 of the ECHR, which prohibits torture and inhuman or degrading treatment or punishment.[162] In the judgment, the Court pointed out 'that overcrowding in Italian prisons did not affect the applicants alone' and that the 'structural nature of the problem was confirmed by the fact that several hundred applications were currently pending before the Court raising the issue of the compatibility of the conditions of detention in a number of Italian prisons with Article 3 of the Convention'. Furthermore, the Court requested Italy to put in place, within one year, a remedy to resolve the 'systemic problem' of overcrowding.

During 2012, the Italian government adopted certain measures to improve inmates' living conditions and to ease the problem of prison overcrowding. In particular, Law No. 9 of 17 February 2012 modified various provisions of the *Code of Criminal Procedure* in order to introduce a ban on imprisoning persons arrested for crimes which are not sufficiently 'serious', and to extend the possibility to be sentenced to house arrest.[163] Furthermore, the Decree of the President of the Republic No. 136/2012 introduced certain modifications to the Decree of the President of the Republic No. 230/2000 containing the regulation of the prison system and provisions on measures depriving and limiting personal freedom.[164] The most relevant amendment concerns Article 69(2), which in the new version, requires that the Minister of Justice adopts the *Charter of Rights and Duties of Detainees* which must be consigned to convicts and their relatives. The aim of the Charter is to inform detainees on their guaranteed human rights in prison and the duties they must respect

[159] A synthesis of the Report is available on the website of the Association <http://www.osservatorioantigone.it/upload/images/7103Sintesi%20IX%20Rapporto.pdf>.

[160] For a synthesis of the Report see <http://www.osservatorioantigone.it/upload/images/7103Sintesi%20IX%20Rapporto.pdf>.

[161] For the Report see <http://www.stranieriinitalia.it/briguglio/immigrazione-e-asilo/2012/marzo/sint-rapp-senato-deten.pdf>.

[162] The Chamber judgment on the case of *Torreggiani and Others v. Italy* (Application No. 43517/09), which is not final, is available at <http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-4212710-5000451>. In 2009, Italy was condemned by the European Court of Human Rights for violation of Article 3 of the European Convention for overcrowding in prisons. See *Sulejmanovic v. Italy*, European Court of Human Rights, Application No 22635/03, <http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2802468-3069791>.

[163] The Law No. 9/2012 also reduced the time to be sentenced in cases of arrest in flagrancy. The Law was published in *Gazzetta Ufficiale* No. 42 of 20 February 2012.

[164] The Decree of the President of the Republic was published in *Gazzetta Ufficiale* No. 195 of 22 August 2000. On the Italian prison system and its legal sources see A. Di Amato, *Criminal Law in Italy* (Alphen aan Den Rijn, Kluwer Law International, 2011).

during their time in jail.[165] For this reason, Article 69(2) provides for the translation of the Charter in the most common foreign languages used among inmates.

Pursuant to Article 69(2), the Charter was approved with a Ministerial Decree on 5 December 2012 together with two attachments: one on the sources of the penitentiary legal system and the other one containing a glossary of the most common terms used in the Charter. It is noteworthy to observe that the Charter represents the first act laying down the relevant human rights of inmates established in the Constitution, other than in the laws regulating the penitentiary system, in the treaties on human rights ratified by Italy and in some non-binding international acts relevant for the protection of fundamental rights of detainees. In particular, the Charter mentions the *Universal Declaration of Human Rights* of 1948; the *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 1950;[166] the *International Covenant on Civil and Political Rights* of 1966;[167] the *Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* of 2002;[168] relevant recommendations of the Committee of Ministers of the Council of Europe, such as Recommendation Rec(2006)2 on the European Prison Rule, Recommendation No. R (99) 22 concerning Prison Overcrowding and Prison Population Inflation, Recommendation (2006) 13 on the Use of Remand Custody, the Conditions in which it Takes Place and the Provision of Safeguards against Abuse, Recommendation CM/Rec (2010) 1 on the Council of Europe Probation Rules, and Recommendation R(2012) 12 concerning Foreign Prisoners.

Domestic laws and international rules on the treatment of prisoners establish specific rights and safeguards that must be granted in jail in order to meet the personal needs of inmates obliged to live in difficult conditions and also for lack of space. In this regard, the Charter of Rights and Duties of Detainees provides that jails must have the necessary space to guarantee a decent life to inmates. In particular, the Charter specifies that every prison must have rooms destined to detainees' individual life and places where they are able to engage in activities in common. All rooms must be sufficiently wide, with fresh air, heating, and equipped with restrooms. Furthermore, the Charter establishes that detainees have the right to stay out of doors for at least two hours a day and those in particular custodial conditions for at least one hour. It is important to observe that the availability of indoors and outdoors spaces for the exigencies of daily life of detainees correspondents to the enjoyment of certain human rights, such as the right to health, to healthy nutrition and to practise the detainee's own religion. According to the Charter, all these rights must be guaranteed in prisons.

Other human rights recognized in the Charter are those linked to the convict's family relation and, in general, to his external relations, such as the right to inform his relatives of the arrest, or his transfer to another jail, or to advise them in case of death or grave infirmity. The right of the inmate to have private talks with members of his own family or other people (in particular with defence counsel and the guarantor of the rights of prisoners[169]) is also guaranteed. This should take place in

[165] Above all, the duties concern the behavior to follow orders in prison and the obligation to undergo a frisk search, every time it is necessary for security reasons. Detainees have the right not to undergo means of physical coercion, such as handcuff and to file a claim to the surveillance judge ('Magistrato di sorveglianza') when the disciplinary power is employed in an illegal way.

[166] 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.

[167] The Covenant was ratified and implemented by Italy with Law No. 881 of 25 October 1977, published in *Gazzetta Ufficiale* No. 333 of 7 December 1977.

[168] For the text of CPT Standards' amended in 2011, see <http://www.cpt.coe.int/en/documents/eng-standards.pdf>.

[169] In Italy, there is no national guarantor of the rights of prisoners. Rather, there are only regional, provincial and municipal guarantors. Their job is to ensure the rights of detainees are being met. They can also receive complaints from detainees concerning violations of the provisions regulating the prison system.

rooms specially equipped for this purpose and under visual control of penitentiary police. Other rights include the right: to make and receive telephone calls; to receive correspondence from relatives, members of the Parliament, institutions for the protection of human rights, and in the case of a foreigner, diplomatic or consular representation of the State of nationality;[170] and to use a radio, a personal computer, tape players and portable compact disc for work or study.

Furthermore, the Charter states that detainees have the right to their own defence through the appointment of defence counsel or the assignment of a court-appointed counsel, in conformity with Article 24 of the *Constitution*. Political rights must also be guaranteed in prison and therefore, the Charter establishes that convicts have the right to vote in elections. Those who elect to exercise this right must inform the mayor of the town where the prison is located.

Other human rights recognized in the Charter are linked to recreational, cultural and educational activities. Inmates have the right to practise sport and to study, including in university courses, with the possibility for those who distinguish themselves by particular commitment in educational courses to obtain compensations (such as grace, suspended sentence or other benefits) and the reimbursement of registration fees. These activities, which are facultative, have a rehabilitative objective and also aim at improving social reintegration after the prisoner's release. In conformity with Article 27(3) of the *Constitution*, the right to work must also be guaranteed in prisons as a fundamental component of re-education programs. According to the Charter, inmates may be employed in jail or outside. Employment outside the institution is considered as a way to execute the penalty, and for this reason, it is different according to the crime committed. In particular, people sentenced for common offences may work outside without limitations, while detainees sentenced for serious crimes may only work outside after serving one third of the penalty and those who have been sentenced to life terms may only work outside after serving 10 years.

In the framework of re-education programs, inmates may also receive rewards. According to the Charter, the judicial authority may grant special licenses for cultural and work activities or for reasons linked to personal relationships, to detainees who are considered not to be dangerous people, those who have a good behaviour record and those who have served most of their sentence. Those permissions may last 15 days at most and cannot exceed 45 days a year. The judiciary authority may also grant an early release ('liberazione anticipata') to convicts who distinguish themselves for good behaviour and take part in re-education programs.[171] Furthermore, the Charter lays down a series of alternative measures to imprisonment, such as probation in the care of social services, house arrest, parole, and custodial sentences allowing part-time study or work outside prison.[172]

The Charter also specifies the duties and rights of detainees under special detention regimes (such as continuous isolation or close surveillance) applicable for those sentenced for terrorism, subversion of the democratic order, Mafia or crimes committed to benefit the activities of Mafia associations, subjugation and traffic of human beings, kidnapping, cigarette smuggling, and drug trafficking.[173]

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[170] Domestic provisions establish that inmates' correspondence with lawyers, diplomatic or consular representations and human rights institutions cannot be controlled.

[171] The early release consists of a reduction of the penalty of 45 days every 6 months passed in prison or in-house arrest.

[172] For each measure, the Charter establishes the necessary conditions which must be fulfilled by detainees to obtain such measures.

[173] These are the offences established in Article 4 *bis* of Law No. 354 of 26 July 1975, 'Rules on the Prison System and the Execution of Measures Depriving or Limiting Liberty', published in *Gazzetta Ufficiale* No. 212 of 9 August 1975. The Charter specifies that isolation can be applied also for sick convicts who are contagious.

In the Charter, special protection is provided for certain vulnerable categories of convicts, such as pregnant women, mothers with children, foreigners, drug addicts, and alcoholics. In particular, the Charter establishes the postponement of the execution of prison sentences for women who are pregnant or who have children who are between one and three years old, while women with children less than ten years old may take care of them outside the prison. As far as foreign detainees are concerned, the Charter specifies that they have the right to inform the consular authority of their country, to receive an extract of the norms regulating the Italian prison system translated in their languages, to make telephone calls and to meet the lawyer with the help of an interpreter. In addition, foreign convicts' eating habits and religious customs must be accommodated. Furthermore, the Charter provides that foreign detainees sentenced for a period of less than two years can be expelled to the countries of origin. This measure cannot be applied if the convict risks being persecuted in his own country for reasons of race, religion, political opinion, sex, language, nationality or other grounds. The foreign detainee may also file a request to the Minister of Justice to be transferred to his country of nationality to execute the penalty if the period to be served is more than six months.

Even through it is merely an administrative act, the Charter of Rights and Duties of Detainees represents the first measure aimed at informing people in prison of their most relevant human rights.

VALENTINA DELLA FINA

Cases — Prohibition of Incitement to Racial Hatred

☛ Court of Cassation, Criminal Section I, Judgment No. 47894 of 11 December 2012 <http://www.asgi.it/public/parser_download/save/cass_penale_47894_2012.pdf>

Judgment No. 47894/2012 of the Court of Cassation has clarified criminal provisions prohibiting 'hate speech'[174] and the limitations of the right to freedom of expression established in the Italian legal system.

The Court of Cassation annulled the decision of the Court of Appeal of Trento which had acquitted a city councilman of the offence of 'propaganda or instigation of ideas based on racial hatred or racial discrimination' punished in accordance with Article 3(1) of Law No. 654 of 13 October 1975 and Article 13 of Law No. 85 of 24 February 2006.

With Law No. 654/1975, Italy ratified and implemented in its domestic legal system the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) adopted by the UN General Assembly on 21 December 1965.[175] In order to satisfy international obligations deriving from the *Convention*, in particular those concerning the criminal law, Law No. 654/1975 introduced certain offences concerning racial discrimination into the Italian legal order. In particular, Article 3(1) of Law No. 654/1975 (as modified by Article 13 of Law No. 85/2006),

[174] '"Hate speech" expresses, advocates, encourages, promotes or incites hatred of a group of individuals distinguished by a particular feature or set of features, that are targeted for hostility' (see this definition in T. K. Hernández, 'Hate Speech and The Language of Racism in Latin America: A Lens for Reconsidering Global Hate Speech Restrictions' http://lapa.princeton.edu/uploads/2010-1108-Hernandez-Seminar-Paper.pdf). 'Hate speech' is widely prohibited with the exception of United States, see L. Scaffardi, *Oltre i confini della libertà di espressione: l'istigazione all'odio razziale* (Milano, Wolters Kluwer Italia, 2009); A. Tsesis, 'Dignity and Speech: the Regulation of Hate Speech in a Democracy', 44 *Wake Forest Law Review* (2009).

[175] See UNGA Res. 2106 (XX), UN Doc. A/RES/2106 (XX), 21 December 1965. The International Convention on the Elimination of All Forms Racial Discrimination was opened for signature on 21 December 1965, 660 U.N.T.S. 195 (entered into force on 4 January 1969). See, N. Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1980).

recalling Article 4 of the ICERD,[176] provides the punishment for those who 'push' forward ideas based on superiority or on racial or ethnic hatred and also for those who 'instigate' to commit or commit acts of discrimination based on racial, ethnic, national or religious grounds.[177]

In the Italian legal system, hate crimes are also punishable by Law No. 205 of 1993 (the so-called 'Legge Mancino') which modified Law No. 654/1975 and also supplemented it by introducing the punishment for those who join associations, movements or groups inciting racial hatred and violence based on racial, ethnic, national or religious grounds.[178]

The case under examination concerned a councilman's speech given at a public meeting of the city council of Trento during which the councilman disseminated ideas based on hate and racial discrimination towards Roma people. The councilman, speaking about the facts that Roma children did not attend the schools and that the canteen which was built in the camp where they lived was frequented by Roma adults, pronounced insulting words such as 'gypsies' ('zingari'[179]) or 'delinquents, murderers', and expressions like 'lazy and vain people'.

In 2009, the Tribunal of Trento acquitted the accused of a charge of 'propaganda or instigation of ideas based on racial hatred or racial discrimination' on the basis that the ideas expressed during the city council, although disgraceful, were not based on racial hatred but rather on a feeling of dislike that could only constitute defamation. The Tribunal pointed out that the term 'propagandare' contained in Article 3(1) of Law No. 654/1975, as modified by Law No. 85/2006, evoked something more than just disseminating ideas; it presupposes a multiplicity of interventions aimed at instigating other people to racial hatred.

The Court of Appeal of Trento upheld the judgment delivered by the Tribunal of first instance. In particular, the Court clarified that the term 'propagandare' entails the dissemination of ideas of racial hatred with the aim of influencing the behaviours and the psychology of many people and gathering adhesion on these ideas. According to the Court, the councilman's speech did not have this aim because it was delivered during a meeting of a city council where there was no evidence of the event's publicity through media or video recordings and the potential audience was unknown. Furthermore, the Court pointed out that the exercise of the right of expression of persons holding an elective office, such as a city councilman, requires fewer limitations than common people. Accordingly, in the case under examination, criminal provisions on 'hate speech' had to be interpreted in a less restrictive manner.

The Attorney General of Trento appealed against the judgment of the Court, claiming that the decision was based, among other things, on an incorrect interpretation of criminal law concerning 'hate speech'. The Court of Cassation accepted the appeal and referred the matter back to the Court of Appeal for a new decision.

The Court of Cassation did not share the reasoning of the lower courts concerning the interpretation of Article 3(1) of Law No. 654/1975. Reaffirming the expansive interpretation of this

[176] According to Article 4 (b) of the ICERD, States parties 'shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.'

[177] Pursuant to Article 3(1) the punishment may take the form either of the imprisonment up to 18 months or a fine up to EUR 6,000. It is important to recall that at the international level, the dissemination of ideas based on racial hatred is also prohibited by Article 7 of the *Universal Declaration of Human Rights* of 1948, Article 20 of the *International Covenant on Civil and Political Rights* of 1966, while at regional level by the *Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems* of 2003, adopted in the framework of the Council of Europe, ETS No. 189 (2003).

[178] Law No. 205 of 25 June 1993 was published in *Gazzetta Ufficiale* No. 148 of 26 June 1993.

[179] In the Italian language the term 'zingaro' has a negative meaning and is regarded as an insult.

provision given with Judgment No. 37581 of 7 May 2008,[180] the Court clarified that the new formulation of Article 3(1) introduced in 2006 did not narrow the range of criminal offences concerning 'hate speech'. In particular, according to the Court, the notion of 'propaganda' is equivalent to 'dissemination' and therefore, the offence of 'propaganda' of racial hatred consists of spreading ideas based on racial hatred or racial superiority even if addressed towards an ethnic group as such and not towards single persons.[181] Furthermore, the Court pointed out that it is not necessary to repeat these ideas on multiple occasions, it being sufficient that they are communicated only once (in this case, being the speech of the city councilman). The Court also underlined that people carrying out public functions, such as the role of city councilman, are not permitted to use offensive expressions against ethnic groups or to disseminate ideas based on cultural inferiority of a minority.

It is important to remember that in 2008, the UN Committee on the Elimination of Racial Discrimination (CERD) issued a report on Italy expressing concern about hate speech, targeting foreign nationals and Roma, attributed to some Italian politicians and the role of the media in spreading anti-Roma messages. CERD recommended Italy 'increase its efforts to prevent racially motivated offences and hate speech, to ensure that relevant criminal law provisions are effectively implemented' and take action to counter any tendency to use racist propaganda for political purposes.[182]

The judgment of the Court of Cassation, clarifying the legal interpretation of the criminal provisions on hate speech, has contributed to the implemention of CERD recommendations.

VALENTINA DELLA FINA

Cases — Foreign Father's Permanent Status in Italy

☛ Court of Cassation, Civil Section VI, Order No. 15025 of 7 September 2012 <http://www.asgi.it/home_asgi.php?n=documenti&id=2308&l=it>

The Court of Cassation, with Order No. 15025 of 7 September 2012, ruled that the presence of emergency situations or extraordinary health circumstances is not a requirement for the concession of a residence permit to a minor's parent as set forth in Article 31 of the *Consolidated Act on Immigration*, since the damage suffered by the minor owing to the separation from his parents or the severance from his family encompasses other actual, concrete, perceptible and objectively severe damage.

Article 31(3) of Decree-Law No. 286 of 25 July 1998 (*Consolidated Act on Immigration*) provides that 'the Juvenile Court, in the presence of severe grounds of psychophysical development and taking into account the age and health condition of the minor resident on Italian territory, may grant entry and residence to a relative for a set period of time, notwithstanding other provisions of the current law', and that 'authorization is revoked when the severe grounds for its concession are

[180] Court of Cassation, Criminal Section III, Judgment No. 37581 of 7 May 2008 available at http://www.asgi.it/home_asgi.php?n=documenti&id=2063&l=it.

[181] The Court of Cassation, in the judgment No. 13234 of 28 March 2008, underlined that the discrimination is punishable when it is founded on the 'quality' of the person (Roma, Jewish, etc.) and not on the behavior of such persons.

[182] See UN Doc. CERD/C/ITA/CO/15_March 2008 (para. 15), available at <http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD-C-ITA-CO-15.pdf>.

no longer extant, or due to the relative's activities should they be incompatible with the minor's needs or with [the relative's] permanence in Italy'.[183]

In the case under review, the Juvenile Court, considering that separation from the father would result in damage to the minor children's healthy psychophysical development, had acknowledged the provisions of Article 31(3) and extended the father's residence permit for one year.

However, by upholding the action of the Prosecutor of the Republic, the Court of Appeal of Potenza revoked this decision, ruling that the main purpose of the provision invoked by the applicant (Article 31(3) of the *Consolidated Act*) was not to protect the minor's right to live with his parents, but rather to allow leeway to deal with exceptional contingencies. Therefore, the Court refused to extend the applicant's residence permit for one more year as a parent of minor child.

On appeal to the Court of Cassation, the applicant complained of a breach of Article 31(3) of Decree-Law No. 286/1998 and of Article 3 of the *United Nations Convention on the Rights of the Child*, whereby 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.[184]

The Court of Cassation, drawing upon previous orders, particularly orders No. 21199 and 7516 of 2010, ruled that temporary authorization to the child's relative's permanent status in Italy — as provided by Article 31 of Decree-Law No. 286/1998 in the presence of severe grounds pertaining the child's psychophysical development — does not necessarily require exceptional or urgent circumstances related to the minor's health.

According to the Court, it is sufficient that the minor might incur any actual, concrete, perceptible and objectively severe damage owing to the separation from his relative or removal from his familiar environment, also taking into account the minor's age or such health conditions that might jeopardize his psychophysical well-being as a whole.

Observing that the applicant's age would justify a prediction of grave damage following the separation from the parent, on these grounds the Court ruled in favour of the appeal and remitted the case to the competent court.

ANDREA CRESCENZI[185]

Cases — Refugee Status Granted to Homosexual Immigrant

☛ Court of Cassation, Civil Section VI, Order No. 15981 of 20 September 2012 <http://www.meltingpot.org/IMG/pdf/2012_Cass_15981-asilo.pdf>

By Order No. 15981 of 20 September 2012, the Court of Cassation accepted the recourse filed by a Senegalese citizen who had been denied refugee status both in the first instance and on appeal. The Court ruled that asylum rights must be granted whenever a foreign country prevents one if its citizens to fully enjoy a fundamental civil right.

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[183] 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 – Ordinary Supplement No. 139 <http://www.altalex.com/index.php?idnot=836>.

[184] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 1 July 2002). Italy ratified and implemented the UN Convention on the Rights of the Child with Law. No. 176 of 27 May 1991 <http://www.camera.it/_bicamerali/infanzia/leggi/l176.htm>. On the Convention, see A. André, *The UN Children's Rights Convention* (Antwerpen, Intersentia, 2007).

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The case began in April 2010, when a Senegalese citizen applied to the Tribunal of Trieste for either political refugee status, and subsidiary protection, or a residence permit, recalling Article 319 of the *Senegalese Penal Code*, whereby

> Sans préjudice des peines plus graves prévues par les alinéas qui précédent ou par les articles 320 et 321 du présent Code. sera puni d'un emprisonnement d'un à cinq ans et d'une amende de 100.000 à 1.500.000 francs, quiconque aura commis un acte impudique ou contre natura avec un individu de son sexe. Si l'acte a été commis avec un mineur de 21 ans, le maximum de la peine sera toujours prononcé.[186]

In a judgment issued on 25 October 2010, the Tribunal of Trieste rejected the application.

On 9 February 2011, upon rejecting the applicant's appeal against the judgment of first instance, the Court of Appeal ruled that 'the circumstances whereby homosexuality is considered a criminal offence by Senegalese jurisdiction are immaterial towards the concession of international protection'. According to the Court, it could not be verified whether the applicant's homosexuality had caused him violence and/or threats at the hands of the Senegalese authorities to the point of forcing him to leave the country. Similarly, it could not be established that dispositions contained in the *Senegalese Penal Code* had indeed been enforced by organs of the State.

Upon appealing to the Court of Cassation, the Senegalese citizen complained of breach and/or misapplication of Article 3 of Decree-Law No. 251 of 19 November 2007, enforcing European Directive 2004/83/CE on the minimum requirements for the recognition of refugee status (or the status of person otherwise in need of international protection) and on the minimum terms of the extent of protection granted[187] and of Article 8 of Decree-Law No. 25 of 28 January 2008 on the terms for evaluation of international protection applications.[188] According to the applicant, the Court was wrong in ruling that his individual condition as a victim of persecution could not be inferred from the overall condition of his home country. The victim highlighted that criminal repression of homosexuality necessarily implies the impossibility for gay citizens to enjoy their sexual and emotional life freely, and results in the deprivation of a fundamental right.

The Court of Cassation has recognized the validity of the appeal on both grounds. According to the Court, repression of homosexuality, which is regarded as a felony by the *Senegalese Penal Code*, constitutes a severe infringement upon the private life of Senegalese citizens and constitutes *de facto* deprivation of the right to a free sexual and emotional life. Consequently, homosexual people are in a condition of undeniable persecution and have the right to international protection.

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[186] <http://www.justice.gouv.sn/droitp/CODE%20PENAL.PDF>. This translates as: 'Without prejudice to the most serious punishments foreseen by the subsections above or by Articles 320 and 321 of this Code, a person who commits an indecent act or an act against nature with another person of the same sex shall be liable to punishment by imprisonment of between 1 and 5 years and a fine of between 100,000 and 1,500,000 francs. If the act was committed with a person under 21 years of age, the person shall be sentenced to the maximum penalty.'

[187] Article 3 concerning the verification of the facts and circumstances which have led the applicant to seek protection in Italy < http://www.meltingpot.org/articolo11867.html >.

[188] Article 8 concerning the criteria for examining an application for international protection <http://www.camera.it/parlam/leggi/deleghe/08025dl.htm>.