ITALY[1]

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Treaty Action — Jurisdictional Immunities of the State and Further Implementation of the Judgment of the International Court of Justice Italy v. Germany

☛ Law No. 5 of 14 January 2013, 'Adhesion to the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, and provisions for the adaptation of internal law' [Legge n. 5, 14 gennaio 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, nonchè norme di adeguamento all'ordinamento interno']. Entered into force 30 January 2013[2]
<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2013;5>

The Law of adhesion to the 2004 *UN Convention on Jurisdictional Immunities of States and Their Property* filled gaps in the Italian legal system relating to the subject matter of the Convention and clarified the law by providing domestic courts with clear criteria for

[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] Published in *Gazzetta Ufficiale* No. 24 of 29 January 2013.

interpretation. Previously, Italy had never enacted specific legislation on foreign States' immunity from the jurisdiction of the forum State, neither after the Constitutional Court established the invalidity of the Decree-Law No. 1621 of 30 August 1925[3] on the execution over foreign States' property by its judgments of 1963 and 1992.[4] Furthermore, Italy did not ratify the 1972 *European Convention of State Immunity* ('Basel Convention'), concluded under the auspices of the Council of Europe.[5]

In the absence of domestic laws regulating the matter, Italian courts thus far have been directly applying international customary rules on jurisdictional immunity of States by virtue of Article 10, para. 1, of the *Italian Constitution*.[6] However, the scope of these rules is not clearly defined as they are founded on the fine distinction between activities *iure imperii* (i.e. acts of government) and activities *iure gestionis* (i.e. acts of a commercial nature), whose interpretation in domestic courts is not always uniform.

In particular, Italian courts have made recourse to a progressive interpretation of international rules on State immunity. In past years, Italian judicial practice together with that of Belgium has paved the way for the consolidation of the restrictive immunity theory by denying immunity from jurisdiction in respect of acts of a commercial nature. In particular, Italian courts have lifted immunity with respect to acts of the foreign State qualified as *acta iure imperii* in civil proceedings brought by individuals who were victims of serious violations of humanitarian law and fundamental human rights.[7]

This case law became particularly controversial after Germany petitioned the International Court of Justice (ICJ) to declare that Italy had violated international law in relation to the Italian courts' rulings on jurisdictional immunity for allowing civil claims against the Federal Republic of Germany based on breaches of international law committed by German troops during World War II. As a consequence, Italy adopted a legislative measure in April 2010 which suspended the execution of judgments against another State if that State had initiated action before the ICJ to verify its immunity from Italian jurisdiction.[8] However, this temporary suspension expired on 31 December 2011.[9] The urgency of a definitive solution likely accelerated the adhesion process to the UN Convention, especially after the ICJ

[3] Decree-Law No. 1621 of 30 August 1925, amended by Law No. 1263 of 15 July 1926, provided that measures of constraint against foreign States' properties be subject to prior authorization by the Ministry of Justice and to the condition of reciprocity.

[4] Judgment of the Constitutional Court No. 135 of 13 July 1963 declared Decree-Law No. 1621 unconstitutional insofar as it gives the Ministry of Justice authority over executive action in a way that conflicts with generally recognized international norms. Judgment of the Constitutional Court No. 329 of 15 July 1992 declared the last part of the Decree unconstitutional because it denied a party any recourse against the Ministry of Justice's discretion in determining whether or not reciprocity exists.

[5] *European Convention on State Immunity*, opened for signature 16 May 1972, E.T.S. 74 (entered into force 11 June 1976).

[6] Article 10 of the *Italian Constitution* reads as follows: 'The Italian legal system conforms to the generally recognized rules of international law'.

[7] According to Italian judges, the peremptory character of rules prohibiting such conduct would be impaired, and the right to compensation denied, if the violation remained unsanctioned because of the barrier of State immunity. The starting point of this case law is the 2004 *Ferrini* case before the Italian Court of Cassation. See Corte suprema di cassazione, Sezioni unite civili, *Ferrini v. Repubblica federale di Germania*, sentenza 11 marzo 2004, n. 5004, 87 *Rivista di diritto internazionale* (2004), and a number of similar cases deciding subsequently. See 12 *YIHL* (2009) pp. 576–579.

[8] See 13 *YIHL* (2010) pp. 560–564.

[9] Decree-Law No. 63 of 28 April 2010, Art. 1.

delivered its judgment on 3 February 2012 against Italy for violating Germany's jurisdictional immunity.[10]

In line with Italian legislative practice concerning international treaties, Law No. 5/2013 contains the usual provisions for ratification. Articles 1, 2 and 4 respectively provide for the authorisation for the President of the Republic to ratify the international instrument,[11] its consequent implementing order (the so-called 'ordine di esecuzione') and the entry into force of the Law the day after its publication in the Italian Official Gazette.

The core disposition of Law No. 5/2013 is Article 3, which provides for measures directly aimed at implementing the ICJ's judgement on the *Germany v. Italy* case and more generally, other ICJ judgments involving jurisdictional immunities of a foreign State in which Italy is party. Such disposition is consistent with the ICJ's ruling making specific reference to the implementation of its judgment within the Italian legal order:

> 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.[12]

In particular, Article 3, para. 1 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 formally and directly declare Italy's lack of jurisdiction.

Moreover, the second paragraph of the same Article envisages the possibility of challenging final decisions through the process of a motion to repeal final judgment in disputes in which, Italy being a party, the ICJ has excluded the possibility to subject specific conduct of another State to civil jurisdiction.

This provision was necessary to introduce a procedural remedy to any inconsistency between the final decisions issued by Italian domestic courts against Germany and the supervening ICJ judgment of 2012. In fact, the remedy of revocation under Article 395, para. 5 of the *Code of Civil Procedure*, by which in certain qualified cases *res judicata* may be revoked, does not address the case of inconsistency between final domestic decisions and later ICJ judgments denying Italian jurisdiction.

In its Dossier on the Bill, the government addressed the issue of the review of *res judicata* and highlighted relevant judicial precedents.[13] In particular, the Constitutional Court by its judgment No. 113 of 7 April 2011 declared unconstitutional the provision of Article 630 of the *Italian Code of Criminal Procedure* because it did not allow the judicial review following a final judgment of the European Court of Human Rights finding an infringement of the principle of fair trial.[14]

Similarly, several judgments of the European Court of Justice touched upon the principle of *res judicata* in the context of both State liability and revision of decisions. Starting from the 2004 judgment on *Kühne & Heitz* case, the Court held that the principle of cooperation arising under Article 10 of the 1957 *Treaty establishing the European Community* (TEC)

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[10] *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, Judgment, ICJ Reports, 3 February 2012 <http://www.icj-cij.org/docket/files/143/16883.pdf>.

[11] Article 80 of the *Italian Constitution* requires the previous authorisation of the Chambers to the Head of State for the ratification of certain kinds of international treaties, among which are those entailing changes of legislation.

[12] See paragraph 124 of the Judgment.

[13] See the government's Dossier on the Bill at <http://leg16.camera.it/_dati/leg16/lavori/stampati/pdf/16PDL0063140.pdf>.

[14] See 14 *YIHL* (2011) pp. 35–37.

imposes an obligation to review a final administrative decision where an application for review is made, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where *inter alia* the decision in question has become final as a result of a judgment of a national court ruling at last instance.[15]

Article 3, para. 3 of Law No. 5/2013 takes these precedents into account and complies with the 2012 ICJ judgment by adding the new circumstance of revocation for lack of jurisdiction.

Along with the adhesion, Italy deposited an interpretative declaration, very similar in its content to the declarations made by Norway, Sweden and Switzerland, specifying the Italian position towards some dispositions of the 2004 Convention and detailing the general parameters according to which Italy will interpret and apply the Convention in its relationships with other Contracting Parties.

The deposit of this declaration comes as a result of the adoption by the Senate, during the discussion of the bill on the adhesion to the Convention on Jurisdictional Immunities of States and their Property, of an order of the day requiring the government to identify reservations and declarations aimed at guaranteeing the respect of the fundamental principles of international legal order and in particular, those concerning the protection of human rights.[16] Highlighting that Article 12 of the Convention on the so-called tort exception does not make a distinction between a State's sovereign acts and private acts, the order of the day considered that a foreign State's immunity should not be granted to acts implying a violation of international peremptory norms.

The declaration deposited by Italy reflects this proposal, but is deliberately vague, leaving aside any explicit reference to Article 12 of the Convention and other considerations contained in the order of the day.

In particular, the Italian declaration reads as follows:

> In depositing the present instrument of ratification, the Italian Republic wishes to underline that Italy understands that the Convention will be interpreted and applied in accordance with the principles of international law and, in particular, with the principles concerning the protection of human rights from serious violations. In addition, Italy states its understanding that the Convention does not apply to the activities of armed forces and their personnel, whether carried out during an armed conflict as defined by international humanitarian law, or undertaken in the exercise of their official duties.
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> Similarly, the Convention does not apply where there are special immunity regimes, including the ones concerning the status of armed forces and associated personnel following the armed forces, as well as immunities *ratione personae*. Italy understands that the express reference, in Article 3, paragraph 2, of the Convention, to Heads of State cannot be interpreted so as to exclude or affect the immunity *ratione personae* of other State officials according to international law …

It is remarkable that Italy used the occasion of its adherence to the Convention to seek a way of implementing jurisdictional immunity rules compatibly with international principles forbidding gross violations of human rights. It has tried to achieve this by fixing the conformity with the principles of international law and those on human rights as general criteria of interpretation and application of the Convention.

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[15] Case C-453/00 *Kühne & Heitz* [2004] ECR I-10239.

[16] Order of the day No. G/3538/1/3 of 28 November 2012, promoted by Senators Marcenaro and Maritati <http://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=SommComm&leg=16&id=00687893&part=doc_dc-sedetit_isr-ddlbl_as3538adriacdnusigds&parse=no>.

The declaration affirms the Italian understanding of not applying the Convention with respect to two situations. The first one concerns armed forces and their personnel, including not only those acting in wartime or in the exercise of their official duties, but also those under special immunity regimes. This latter clarification likely refers to the regimes regulated by the status of forces agreements (SOFAs) establishing the terms under which foreign armed forces are allowed to operate in a country, including the issue of the exercise of the host State's jurisdiction over their activities and the aspect of pecuniary compensation for death or injury to persons, or damage to or loss of tangible property caused by foreign militaries. According to this interpretation, Italy intends to specify the application of Article 12 of the Convention to armed forces which excludes a State's immunity

> from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

According to some Italian commentators, this clarification marks a manifest turnaround of Italy towards well-established judicial practice excluding a foreign State's immunity for damages and losses caused by the activities of its armed forces in the territory of another State.[17] However, the new Italian position in this regard is aimed at following the ICJ's conclusions in its judgment of 2012 and also at guarding against potential claims in relation to activities carried out by Italian armed forces in the context of international military operations.

The second aspect addressed by the declaration regards special regimes of immunity *ratione personae*, accorded by international customary law to Heads of State, Minister of Foreign Affairs and other high ranking State officials. In this regard, the declaration specifies that the 'reference in Article 3, para. 2, of the Convention, to Heads of State cannot be interpreted so as to exclude or affect the immunity *ratione personae* of other State officials according to international law'.

From a formal point of view, the 2004 UN Convention will only apply to Italy after its entry into force at international level, being the thirtieth day following the date of deposit of the thirtieth instrument of ratification. It is highly unlikely that it will happen soon since, at the time of writing, the Convention has only been ratified by thirteen States. However, taking into consideration the Italian obligations towards the Convention under Article 18 of the *Vienna Convention on the Law of Treaties*,[18] the Convention will represent a point of reference for domestic judges for interpreting and reconstructing the customary rule on jurisdictional immunities of States.

RACHELE CERA[19]

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[17] E. Sciso, 'L'Italia aderisce alla Convenzione di New York sulle immunità giurisdizionali degli Stati e dei loro beni', 2 *Rivista di diritto internazionale* (2013) pp. 543–551.

[18] According to Article 18 of the *Vienna Convention on the Law of Treaties*:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: … (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

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

☛ Court of Cassation, United Sections, Ordinance No. 4284 of 20 November 2012 (registered on 21 February 2013) <http://www.cortedicassazione.it/Notizie/GiurisprudenzaCivile/SezioniUnite/SchedaNews.asp?ID=3199>

Ordinance No. 4284 of 21 February 2013 represents another case concerning the implementation of the ICJ's judgment of 3 February 2012, ruling against Italy for denying Germany's immunity from civil jurisdiction.[20]

The case originated from a civil claim brought by Mr. Bruno Fascà against Germany and Erich Priebke to obtain reparation for the imprisonment and the torture suffered by his father during the period of detention in the prison located in Via Tasso in Rome[21] (from 27 January to 24 March 1944) and his subsequent murder at the Ardeatine Caves, where on 24 March 1944 the massacre of 335 Italian civilians occurred. In 1998, Erich Priebke, former captain of the SS under Kappler who directly took part in the killing of the civilians, was sentenced to life imprisonment after having been extradited to Italy from Argentina in November 1995.[22]

In the Ordinance, the Court of Cassation recalled its case law on the issue of the immunity from civil jurisdiction of Germany, in particular the ruling in the *Ferrini* case of 2004, in which the Supreme Court affirmed that immunity of foreign States was not absolute and did not extend to conduct violating peremptory norms of international law (*jus cogens*), such as war crimes and crimes against humanity committed by Nazi soldiers in Italy during World War II.

Nevertheless, in the case under examination, the Supreme Court was forced to take note of the ICJ decision and to declare its lack of jurisdiction for the compensation claim brought against Germany, in conformity with the First Criminal Section's reasoning on the judgment No. 32139 of 9 August 2012[23] and Law No. 5 of 2013, concerning the Italian adhesion to the 2004 *United Nations Convention on Jurisdictional Immunities of States and Their Property*, adopted before the registration of the Ordinance No. 4284.[24]

VALENTINA DELLA FINA[25]

Cases — Nazi Massacres Reparation Claims

☛ Military Tribunal of Rome, Second Section, Judgment No. 28 of 18 October 2013 (Unpublished)

[20] See 15 *YIHL* (2012) pp. 1–6.

[21] During the German occupation of Rome, a prison was located in Via Tasso where Jewish and political opponents were imprisoned and tortured. In 1957, the prison was transformed in the 'Historical Museum of Liberation'.

[22] S. Marchisio, 'The *Priebke* Case Before the Italian Military Tribunals: A Reaffirmation of the Principle of Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity', 1 *YIHL* (1998) pp. 344–353. Because of his elderly age and ill-health, Priebke was allowed to serve the sentence under house arrest.

[23] See 15 *YIHL* (2012) p. 6.

[24] On the Law No. 5/2013, see Comment on *Treaty Action — Jurisdictional Immunities of the State and Further Implementation of the Judgment of the International Court of Justice Italy v. Germany* in this *YIHL* Report.

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In 2013, an historic decision was handed down by the Italian military court on Nazi massacres which occurred in the Greek island of Cephalonia during the last stages of World War II where about 117 Italian military officers of the 'Acqui' Infantry Division were murdered.

In Judgment No. 28 of 18 October 2013, the Military Tribunal of Rome convicted *in absentia* Alfred Störk, an ex-Nazi corporal of the 54th Regiment of the German Regular Armed Forces known as 'Hunters of the Mountains' (Gebirsg-Jàger). He was sentenced to life imprisonment and to pay reparations to the victims as well as to the organization representatives of the interests of the victims which had instituted civil actions. On 19 October 2012, the preliminary investigation judge of the Military Tribunal of Rome issued a Decree of committal for trial against Alfred Störk for the crimes punishable under, *inter alia*, Article 13 (offences committed by the members of an enemy military force against laws and customs of war)[26] and Article 211 (violence, threats or insults in general against a prisoner of war)[27] of the *Italian Military Criminal Code of War*. In particular, the indictment of Alfred Störk concerned the crime of concurrence in violence resulting in the murder of Italian military personnel, all of whom had the status of 'prisoners of war', committed on 1943 (presumably in the days between 22 and 24 September) as a part of a criminal plan of the German soldiers.[28] This is the first criminal trial in front of an Italian Court for the Cephalonia slaughter.

In order to better understand the legal implications of the Cephalonia's Nazi-massacre for international humanitarian law, it is useful to briefly outline the facts of the incident as presented at trial.

The massacre of Cephalonia was perpetrated after the Armistice of Cassibile of 8 September 1943. At the time, Italy and Germany were military allies pursuant to the Pact of Steel of 22 May 1939, and jointly occupied the whole of Greece. After the overthrow of Mussolini on 25 July 1943 and the surrender of the Italian government, Hitler reacted by ordering both the immediate disarmament of the Italian army and the conquest of the Ionic Islands which were at that time occupied by Italian forces. After an initial attempt to resist, Italian troops commanded by General Antonio Gandin capitulated and during the following week, the mass execution took place. The order, which came from Hitler himself, resulted in the killing of all the Italian military officers who had actively or passively resisted the

[26] Article 13 of the *Italian Military Criminal Code of War* concerns the offences committed by the members of an enemy military force against war laws and customs. It states:

> The provisions of Title IV, Book Three of this Code concerning offences committed against wartime laws and customs also apply to military personnel and any other member of the enemy armed forces when any of these offences have been committed to the detriment of the Italian State or a subject thereof or of an allied state or a subject thereof.

[27] Article 211 of the Title IV of the *Italian Military Criminal Code of War* concerns the crime of violence, threats or insults in general against a prisoner of war. It establishes:

> Fuori dei casi preveduti dai due articoli precedenti, il militare, che usa violenza o minaccia o commette ingiuria contro un prigioniero di guerra, è punito con le stesse pene, che la legge stabilisce per tali fatti quando sono commessi da un militare contro un suo inferiore. La stessa disposizione si applica relativamente al prigioniero di guerra preposto dall'Autorità militare italiana alla disciplina del drappello o reparto di prigionieri, quando egli commette alcuno dei fatti suindicati contro un prigioniero di guerra del drappello o reparto.

[28] Some soldiers were identified, others in the meantime have died and other soldiers are still unidentified.

German forces. The victims were first deprived of all their personal effects[29] and then shot in groups of eight.

The first point to be highlighted concerns the legal classification of the killings. The Italian Military Tribunal stressed that following the Armistice of 8 September 1943, the German forces had to be classified as 'enemy armed forces' and the Italian victims were properly characterised as 'prisoners of war'.

First, this was a crucial point for the Tribunal because it allowed the Tribunal to proceed against the German militaries under Article 13 of the *Military Penal Code of War*, which applies only to crimes perpetrated by enemy soldiers against Italian citizens.[30]

Secondly, according to Article 99 of Royal Decree No.1415/1938, the so-called Italian 'Law of War' which is still in force today, the classification of 'legitimate belligerent enemy' depends on the status of victims as prisoners of war,[31] which in turn gives rise to the obligation of humane treatment under the rules of international humanitarian law. This obligation is primarily derived from the Hague Conventions of 1989 and 1907, the four Geneva Conventions of 1949 and the two Additional Protocols of 1977.[32] The Military Court accepted the argument that the victims could be defined as 'belligerents' under the 1907 *Hague Convention (IV) Respecting the Laws and Customs of War on Land*.[33]

According to the Tribunal of Rome, following the Cassibile's Armistice, the 'Aqui' Division represented the Badoglio's Italian government established on 25 July 1943. The Tribunal also accepted the argument that the German armed forces could be considered 'enemies' before the formal declaration of war on 13 October 1943. Based on the substantial documentation submitted to the Court, the Tribunal found that at the time of the Cephalonia's massacre, it was already in a state of war even though it had not yet been formally declared. Accordingly, the Tribunal recalled the provision of the Common Article 2 of the *Geneva Conventions* which provides that the Conventions 'shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Party even if the state of war is not recognized by them'.[34]

In consideration of all these elements, the Italian Tribunal found the defendant guilty of murders against Italian prisoners of war. In addition, in accordance with Articles 61, 112 and 577 of the *Italian Criminal Code*, the Tribunal recognised four aggravating circumstances,

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[29] Article 6 of the *Geneva Convention relative to the Treatment of Prisoners of War of 27 July 1929* (abrogated by the 1949 *Geneva Convention III*) forbade this practice. It stated:

> All personal effects and articles in personal use — except arms, horses, military equipment and military papers — shall remain in the possession of prisoners of war, as well as their metal helmets and gas-masks.
>
> Sums of money carried by prisoners may only be taken from them on the order of an officer and after the amount has been recorded. A receipt shall be given for them. Sums thus impounded shall be placed to the account of each prisoner.
>
> Their identity tokens, badges of rank, decorations and articles of value may not be taken from prisoners.

[30] See 1 *YIHL* (1998) pp. 344–353.

[31] Article 99 of the Royal Decree No. 1415 of the 8 July 1938 states: 'I legittimi belligeranti nemici, caduti in potere delle forze armate dello Stato sono prigionieri di guerra'.

[32] On the protection under international humanitarian law of prisoners of war, see M.N. Shaw, *International Law* (Cambridge, Cambridge University Press, 2008).

[33] See pp. 26–32 of the Judgment No. 28/2013.

[34] See N. Ronzitti, *Diritto internazionale dei conflitti armati* (Torino, Giappichelli Editore, 2011). See also S. Marchisio, *Corso di diritto internazionale* (Torino, Giappichelli Editore, 2013).

namely the abject motives, the particular cruelty and torture inflicted on the victims, the number of people (more than five) who participated in the offences and the premeditation of the offences.

In evaluating the appropriate penalty, the Military Tribunal of Rome excluded the plea of obedience to superior orders as a mitigating circumstance. In reliance on documentary evidence and oral testimony, it became clear that the order to kill Italian prisoners of war was issued directly by the Supreme Command of the Wermarcht and that the defendant was merely carrying out those orders. However, it was also established that the perpetrators had carried out a manifestly criminal order.

According to Article 8 of the *Charter of the Nuremberg International Military Tribunal*, the manifest unlawfulness of orders to commit war crimes gives rise to absolute liability for the German perpetrators of the Cephalonia's massacre. In particular, these murders were committed outside what is permitted by the customary international law of war applying at the time of the violence. Testimony established that there had been a clear violation of these rules and, in particular of Article 23, paragraph c) of the *Regulations concerning the Laws and Customs of War annexed to the 1907 Hague Convention IV* that prohibited the killing or wounding of an enemy who, having laid down his arms, or having no longer means of defence, had surrendered. Furthermore, the Tribunal of Rome found that there had also been a violation of Article 2 of the 1929 Geneva Convention concerning the humane treatment of prisoners of war in all circumstances[35] and of Article 6 concerning the prohibition on depriving prisoners of war of their own personal effects.

The Tribunal refused to accept that there had been mitigating circumstances based on the young age of the accused at that time of the offence or based on the time that had elapsed since the murders because of the ferocity of the acts and the absence of remorse on the part of the defendant. The Tribunal also refused to accept the defendant's plea of duress and necessity based on the alleged threat of severe and irremediable harm to life or limb.

Accordingly, the Military Tribunal of Rome sentenced Alfred Störk to the maximum punishment envisaged by the *Italian Criminal Code*, namely life imprisonment and, to pay compensation to civil parties as well as to the Presidency of Council of Ministers of Italy, the National Association of Partisans of Italy (ANPI), the National Association 'Aqui Division' and the victims' heirs.[36]

The decision resulted in some debate in the Italian press, particularly on the basis that the right to compensation of Italian nationals who suffered injuries as a consequence of the crimes perpetrated in the Greek Island of Cephalonia would not be respected.

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[35] Article 2 of the *Geneva Convention relative to the Treatment of Prisoners of War of 27 July 1929* (abrogated by the 1949 *Geneva Convention III*) stated:

> Prisoners of war are in the power of the hostile Government, but not of the individuals or formation which captured them. They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity. Measures of reprisal against them are forbidden.

[36] In conformity with the ICJ Judgment of 3 February 2012 on Jurisdictional Immunity of Germany, Judgment No. 28/2013, the decision does not contain any reference to liability of the Federal Republic of Germany for civil damages of the Nazi massacre of Cephalonia. On this point 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?', 2 *Rivista di diritto internazionale* (2012) pp. 444–449; N. Ronzitti, 'L'Italia nel sottoporre a giudizio la Germania ha violato l'immunità giurisdizionale degli stati. Nota a Corte internazionale di Giustizia (CIJ), sentenza 3 febbraio 2012 (Germania c. Italia)', 11 *Guida al Diritto* (2012) pp. 89–94. See also, 15 *YIHL* (2012) pp. 1–4; 14 *YIHL* (2011) pp. 5–7; 13 *YIHL* (2010) pp. 560–564.

ROSITA FORASTIERO[37]

Cases — Piracy — The Montecristo Case

☛ Court of Cassation, Second Criminal Section, Ordinance No. 26285 of 4 February 2013 <http://www.avvocatomilitare.it/sentenza.php?id=6248>

The case concerns the attempted hijack of the Italian vessel Montecristo on 10 October 2011 off the Somali coasts.[38] The pirates were captured and delivered to the Italian judicial authorities. In October 2011, proceedings commenced in the court of Rome.[39] All the defendants had pleaded not guilty and maintained that they were fishermen who had been kidnapped by another group of Somali pirates and forced to climb on the Montecristo at gunpoint. They also claimed to have been mistreated by Italian Navy personnel following their transfer to the Andrea Doria after the successful rescue of the Montecristo's crew by a ship of the British Royal Marines. These arguments were rejected by the judges as were the arguments that either a British court was the proper court to exercise criminal jurisdiction (since the British navy had first arrested the Somalis), or that there should have been a proper extradition order by a British magistrate.

The four juvenile offenders were tried and sentenced in the first instance judgment of 16 June 2012 of the Juvenile Court of Rome for the crimes of piracy at sea (Article 1135 of the *Navigation Code*), carrying weapons of war (Article 110 of the *Criminal Code*) and attempted kidnapping for ransom (Articles 56 and 630 of the *Criminal Code*). In relation to this last charge, the Court did not accept the prosecutor's charge of terrorism, denying that the pirates' activities were relevantly connected to the Al-Shabab Islamist militia, which if proven, would have changed the legal qualification of the crime of kidnapping from extortion to terrorism.

Under its judgment of 6 October 2012, the Court of Appeal of Rome, section for minors, confirmed the first instance judgment and sentenced the four defendants to eight years in prison. On the preliminary plea concerning the lack of Italian jurisdiction, the Court recalled Law No. 12/2009 and Law No. 100/2009 charging the Court of Rome with competence on piracy crimes, the duty to cooperate in the repression of piracy under the 1982 UN *Convention on the Law of the Sea* ('UNCLOS')[40] and the relevant UN Security Council resolutions concerning operations 'Ocean Shield' and 'Atalanta'. As for the objection on the violation of the contradictory principle, the Court rejected the plea finding that the change of the legal qualification of the crime would not produce detrimental effects for the offenders.

The accused appealed to the Court of Cassation, which rejected arguments on lack of jurisdiction and on the alleged violation of the right of defense.

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[38] On 10 October 2011, a group of 13 Somali boarded the Italian merchant ship *Montecristo* in international waters off the Gulf of Aden. The attackers seized the ship with automatic weapons, forcing the crew to take refuge in a reinforced area of the ship (the 'citadel'). The ship's crew sent out an alarm which was received by the Italian naval vessel, *Andrea Doria*. After two days' sailing the *Andrea Doria* reached the merchant vessel. Nearby, there was also a British military ship, *RFA Fort Victoria* and a US Navy ship, *USS De Wert*.

[39] See 14 *YHIL* (2011) pp. 15–16.

[40] *United Nations Convention on the Law of the Sea United Nations*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

As for the jurisdiction, the Court grounded its reasoning on international and Italian law. In conformity with UNCLOS dispositions on piracy,[41] the Court excluded the applicability to the pirate vessel of the principle of freedom of navigation on the high seas (Article 87 of UNCLOS) and the rule on State's jurisdiction over ships flying its flag (Article 94 of UNCLOS). Furthermore, the Court recalled the UN Security Council Resolution 1816 (2008)[42] and Resolution 1851 (2008),[43] which allowed States cooperating in the fight against armed piracy off the coast of Somalia to undertake all necessary measures that were appropriate, even entering Somali territorial waters, for the purpose of repressing acts of piracy.

From an Italian law perspective, the Court's starting point was Article 4 of the *Criminal Code*, according to which a person who commits an offence in the territory of the State is punished according to Italian law, specifying that Italian ships and aircraft are considered territory of the State. Furthermore, Article 7 of the *Criminal Code* provides that any person who commits an offence abroad for which special laws or ratified international conventions require the application of Italian law, is to be punished according to Italian law. In this regard, it is relevant that Article 5, para. 4, of Decree-Law No. 209/2008, converted into Law No. 12/2009, contains provisions on anti-piracy operations.[44] Such provisions state that crimes related to Articles 1135 and 1136 of the *Navigation Code*, committed both on the high seas or in territorial waters, are punished in accordance with Article 7 of the *Italian Criminal Code* and the competent authority is the ordinary tribunal based in Rome.

Taking this into account, the Court confirmed that the crime of piracy was punishable under Italian law regardless of whether it occurred in territorial waters, on the high seas or in a foreign State's territorial waters, since it was addressed to an Italian ship in the zone of the NATO's operation 'Ocean Shield'.

The Court rejected the argument that because of the change of the kind of crime in the first instance trial there had been a violation of the right of defense. As a result of the principle *iura novit curia*, Article 521 of the *Code of Criminal Procedure* enables the judge to modify the legal characterization of facts and circumstances, as submitted by the prosecution in the document containing the charges. However, the Court affirmed that such change of charges has to be consistent with the right of the alleged offender to be informed of the nature and reasons for the charges and the right of cross-examination.[45]

The Court found that the right of cross-examination had been respected because the accused had been given an opportunity to object to the different legal qualification of the crime.

The Montecristo case is the first conviction by an Italian court for the crime of naval piracy. Prior to this, Italy had adopted the 'catch and release' policy, according to which it delivered pirates to the States of which the accused were nationals. However, the UN Security Council has criticized this policy because of the impunity resulting from such 'catch

[41] In particular, Article 101 defines piracy; Article 102 concerns acts of piracy as defined in Article 101, committed by a warship, government ship or government aircraft whose crew has mutinied; and Article 103, defines a pirate ship or aircraft.
[42] UNSC Res 1816/2008, UN Doc. S/RES/1816, 2 June 2008.
[43] UNSC Res 1851/2008, UN Doc. S/RES/1851, 16 December 2008.
[44] See 12 *YIHL* (2009) pp. 592–594.
[45] *Italian Constitution*, Article 111, para. 3; *Drassich v. Italy*, European Court of Human Rights, Second Section, Application No. 25575/04, Judgment, 11 December 2007 <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83896>.

and release' practices. Therefore, the UN has called upon member States to take a harder line on piracy by prosecuting alleged pirates and instituting severe punishments.[46]
The case represents an important precedent for Italian criminal justice by confirming the jurisdiction of Italian courts for all cases involving the seizure of Italian ships, even where the seizure occurs in the territorial waters of a foreign State.

RACHELE CERA

Legislation — Piracy

- Decree of the Ministry of the Interior No. 266 of 28 December 2012, Regulation concerning the employment of armed guards on board merchant vessels flying Italian flag, shipping on international waters at risk of piracy [Ministero dell'Interno, Decreto 28 dicembre 2012, n. 266, Regolamento recante l'impiego di guardie giurate a bordo delle navi mercantili battenti bandiera italiana, che transitano in acque internazionali a rischio pirateria], Entered into force on 13 April 2013[47]
  <http://www.gazzettaufficiale.it/eli/id/2013/03/29/13G00072/sg;jsessionid=kiPWXVmbmdtv2WUnSQjbwQ__.ntc-as4-guri2a>

The Decree of the the Ministry of the Interior No. 266/2012 regulates the employment of private security guards on board merchant vessels flying the Italian flag and sailing in international waters at risk of piracy attacks. It implements the second part of Article 5 of Law No. 130 of 2 August 2011 and completes the framework of the instruments that the ship-owners can legitimately use to respond to pirate attacks.[48]

Article 5 of the Law No. 130/2011 authorizes the Ministry of Defence to enter into 'conventions' with the Italian Shipowners' Association for the protection of vessels flying the Italian flag and sailing in areas risk of pirate attacks as nominated by the Ministry of Defence.[49]

The conventions will provide for the boarding of merchant ships by Vessels Protection Detachments (VPD),[50] formed by military personnel of the Italian Navy or coming from other armed forces but under the control of the Italian Navy.[51]

Furthermore, according to paragraph 4 of Article 5, when the VPD is not provided, private security guards[52] may protect goods on merchant ships and fishing ships flying the Italian flag and sailing in international maritime areas at risk of piracy.

Under Decree No. 266/2012, private personnel can be of two kinds: the armed guards can belong to a private institute furnishing security services or each single guard can be directly

[46] For a deeper analysis on this practice and the UN response, see I. R. Pavone, 'La giurisdizione penale sui pirati tra rispetto dei diritti umani ed esigenze di contrasto efficace alla pirateria moderna', 4 *Il diritto marittimo* (2013) pp. 721–735.
[47] Published in *Gazzetta Ufficiale* No. 75 of 29 March 2013.
[48] See 14 *YIHL* (2011) pp. 14–16.
[49] Following Law No. 130/2011, a Memorandum of Understanding (MoU) between the Ministry of Defence and the Italian Shipowners' Association ('Confederazione italiana armatori' or 'Confitarma') was signed on 12 October 2011. See 14 *YIHL* (2011) p. 15.
[50] In the Italian version they are called 'Nuclei militari di protezione' (NMP).
[51] See J. P. Pierini and V. Eboli, 'Coastal State Jurisdiction over Vessel Protection Detachments and Immunity Issues: The *Enrica Lexie* Case', 51(1) *Military Law and the Law of War Review* (2012) p. 117.
[52] Only private security guards authorized by Article 133 of Royal Decree No. 773 of 1931 (Regio Decreto 18 giugno 1931, n. 773, 'Testo unico delle leggi di pubblica sicurezza') published in *Gazzetta Ufficiale* No. 146 of 26 June 1931.

employed by the ship-owner.[53] The first option is related to guards belonging to the so-called *Istituti di vigilanza privata*. They are entities authorized under Article 134 of the *Public Security Unified Law* of 1931 to furnish private security services.[54]

The second option concerns guards directly hired by the ship owner. Before being employed, each armed guard has to pass a six months course and obtain the related final certification. Furthermore, the armed guards should preferably have served as military personnel. Once on board, they are organized in a team comprising at least four guards, one of whom is the team leader.

Armed guards may be deployed to high seas areas nominated as being at risk of private attack by decree of the Ministry of Defence, which is the same territorial limit as for the VPD. Armed guards should only be used where the use of VPDs is impossible.

The norms concerning the use of force are very strict (Articles 5 and 6), allowing the use of arms only for self-defence.[55] Moreover, the use of force is legitimate only where it is strictly necessary and proportionate to face an actual or imminent pirate attack. Decree No. 266/2012 only permits the use of individual weapons, meaning that the use of war weapons is excluded. The number of weapons that can be deployed on a merchant vessel for protection is limited to one weapon for each guard and two additional reserve weapons. The weapons must be locked in a security cabinet and may only be distributed to guards during their rostered shifts by the Security Officer in charge.

Almost all the legal provisions regulating the use of force and the use of weapons on Italian territory also apply to these deployments.[56]

Furthermore, Article 10 of the Decree imposes obligations on the ship commander as far as the duty of communication is concerned. The ship commander is required to inform foreign authorities in any port which the ship enters about the presence and kind of weapons on board as well as the sea lane that the ship will follow in the internal waters.

The ship commander must also inform the Italian Navy Fleet Command and the Ministry of Foreign Affairs about the transit in high seas at risk of pirate attack.

The Italian Shipowners Association ('Confitarma') has expressed skepticism about this regulation,[57] focusing on the fact that although armed guards are required to undertake a six-month training course before being engaged, this training course has not yet been regulated. According to Paolo D'Amico of the Italian Shipowners' Association, the term of 30 June 2013 to employ them had to be delayed to 31 December 2013. The Decree No. 266/2012 risks to remain ineffective if prompt administrative rules of implementation are not adopted.

In comparison with other States' policies to respond to threats of piracy, the Italian legislation appears to be more comprehensive as it allows both the use of VPDs and private

[53] See V. Eboli, 'The Employment of Armed Personnel on Board to Face Pirate Attacks. A Comparison between Spain and Italy?', in G. Andreone et al., eds., *Insecurity at Sea: Piracy and other Risks to Navigation* (Naples, Giannini, 2013).

[54] For instance, on the national territory, they are privately hired and employed to guard banks.

[55] The right of self-defence envisaged in Article 5 of Decree No. 266/2012 is the right of self-defence of human beings recognized in Article 52 of the *Italian Criminal Code*.

[56] See especially Royal Decree No. 773 of 1931, Public Security Unified Law (Regio Decreto 18 giugno 1931, n. 773, 'Testo unico delle leggi di pubblica sicurezza') published in *Gazzetta Ufficiale* No. 146 of 26 June 1931 and Law 18 April 1975 No. 110 concerning the control of weapons, munitions and explosives, published in the *Gazzetta Ufficiale* No. 105 of 21 April 1975.

[57] Fabio Pozzo, 'Niente contractor a bordo delle navi italiane', *La Stampa* (Rome, Italy), 4 April 2013 <http://www.lastampa.it/2013/04/04/societa/mare/niente-contractor-a-bordo-delle-navi-italiane-9dodnlWc0Roe1tutK5bnbL/pagina.html>.

guards. Although priority is given to the use of VPDs, shipowners may also hire private guards under certain conditions where the use of VPDs is impossible.

The rationale of the Italian legislation is to allow alternative ways of fighting piracy besides naval actions. In practice, the deployment of military or private armed personnel on board is more cost-effective than the deployment of a fully-fledged naval response. Furthermore, in the event of a piracy attack, the presence of personnel on board allows a faster reaction than a response by a naval ship, which might arrive too late to respond effectively to an imminent pirate attack on a merchant ship.

VALERIA EBOLI[58]

Cases — Dispute between Italy and India

- Communication on the Denial to Send Back the Two Italian Marines convicted in India, 11 May 2013 <http://www.esteri.it/MAE/IT/Sala_Stampa/ArchivioNotizie/Comunicati/2013/03/20130311_Maro_restano_in_Italia.htm>

On 11 March 2013, the Italian Minister of Foreign Affairs, Gulio Terzi di Sant'Agata, communicated that the two Italian marines, Massimiliano Latorre and Salvatore Girone, who had been delivered to Italy by Indian Authorities on the condition that they be returned to India after a few days, would remain in Italy.[59]

In this regard, the Italian Ambassador in India, Mr. Daniele Mancini, delivered the Indian Authorities a verbal note, which justified Italy's actions on the basis that Italy considered that the behaviour of the Indian Authorities violated general and conventional international law, in particular the principle according to which immunity is granted to foreign State officials abroad and the norms of the *Convention on the Law of the Sea* (UNCLOS) of 1982.

In the aftermath of the decision of the Supreme Court of India of 18 January 2013, Italy formally proposed a diplomatic solution to the Indian government to resolve the dispute. In the absence of an Indian response to this proposal, the Italian government considers that a controversy still exists between Italy and India regarding the content of the UNCLOS provisions and the general principles of International law governing the case. For these reasons, Italy, while recalling its will to reach an agreed solution even through an international arbitration or a judicial decision, called upon India to initiate consultations foreseen by UNCLOS.

Notwithstanding the declaration made by the Italian Minister of Foreign Affairs on 21 March 2013, Prime Minister Monti committed to send the two marines back to India, affirming that he had been assured by the Indian authorities that the two marines would not face the death penalty.

On 26 March 2013, the Minister of Foreign Affairs resigned.

One of the main issues in the political debate on the case concerned the risk that the two marines would receive the death penalty[60] as the indictment includes reference to Article 3 of

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[59] 'Caso marò, Terzi: 'Restano in Italia'. India: 'Li dobbiamo processare noi'', *La Repubblica.it*, 11 March 2013 <http://www.repubblica.it/esteri/2013/03/11/news/terzi_mar_restano_in_italia-54333136/>.

[60] 'Maro, due anni fa l'uccisione dei due pescatori indiani che diede il via al caso', *Rai News*, 16 February 2014 <http://www.rainews.it/dl/rainews/articoli/Due-anni-fa-uccisione-pescatori-indiani-caso-Latorre-Girone-439fa463-6c5a-4f61-a01e-06860348cd02.html>.

the *Suppression of Unlawful Acts Against the Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act* which permits capital punishment.

It should be noted that the Italian legal system does not allow capital punishment in any case. By *Law No. 179 of 15 October 2008,* Italy ratified the *Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in All Circumstances*, entered into force on 11 November 2008.[61] In particular, Article 1 of Protocol No. 13 states that '[t]he death penalty shall be abolished. No one shall be condemned to such penalty or executed'.[62] Prior to the ratification of the Protocol, Italy had already adapted its domestic legislation to conform with Article 1 of the Protocol by repealing every legislative provision that could have allowed capital punishment. In particular, Law No. 589 of 13 October 1994 repealed Article 241 of the *Military Criminal Code of War* on the death penalty and all other related articles.[63] The Constitutional Law No. 1 of 2 October 2007 amended Article 27(4) [64] of the *Constitution*, so that the death penalty is absolutely banned.[65]

Furthermore, according to a decision of the Constitutional Court, no extradition is permitted if the individual risks being subjected to death penalty in the requesting State, even if the latter gives diplomatic assurance that it will not execute the death penalty.[66] This further confirms the absolute nature of the ban on the death penalty in Italian law.

Even though the case of the two marines does not relate to extradition, the same principle of protection granted to foreigners *a fortiori* could be applicable to protect Italian citizens.

In any case, when it returned its two marines to India, Italy did not make any reference to any principle of protection. In so far as the execution of the penalty is concerned, one may recall that by Law No. 183 of 26 October 2012 Italy ratified a bilateral Agreement with India on the transfer of sentenced persons.[67] According to this Agreement the condemned marines could be transferred to Italy in order to serve the sentence and, in case of capital punishment,

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[61] <http://web.camera.it/parlam/leggi/08179l.htm>. The same Law also contains the implementing order ('Ordine di esecuzione') to give the Protocol the full force of Italian Law once ratified, according to Article 80 of the *Italian Constitution*, which provides for the previous authorization by the legislative organ for specifically enumerated matters.

[62] *Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in All Circumstances*, opened for signature 3 May 2002, 187 ETS (entered into force 1 July 2003).

[63] See Law No. 589, 'Abolizione della pena di morte nel codice penale militare di guerra', 13 October 1994, published in *Gazzetta Ufficiale* No. 250 of 25 October 1994. The death penalty was replaced with punishment of 30 years' imprisonment.

[64] Prior to the amendment, Article 27(4) prohibited the death penalty except in those cases in which it was permitted by the military laws of war. See 10 *YIHL* (2007) pp. 364–365.

[65] Italy also supported a moratorium on the abolition of the death penalty, which was approved by the UN General Assembly on 18 December 2007. See GA Res 62/149, UN Doc. A/62/149, 18 December 2007; Third Committee of the General Assembly, 'Moratorium on the Use of the Death Penalty' (UN Doc. A/62/439/Add.2).

[66] See Judgment No. 223 of 27 June 1996. The decision was mainly related to Article 698 of the *Code of Criminal Procedure* concerning political crimes. Furthermore, under Article 19 of the *EU Charter of Fundamental Rights of the European*, 'No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'. The same principle was affirmed in the jurisprudence of the European Court of Human Rights. See *Soering v. United Kingdom*, European Court of Human Rights, Judgment, 7 July 1989; *Jabari v. Turkey*, European Court of Human Rights, Judgment, 11 July 2000; *Harkins and Edwards v. United Kingdom*, 17 January 2012.

[67] Legge 26 ottobre 2012, n. 183 'Ratifica ed esecuzione dell'Accordo tra il Governo della Repubblica italiana e il Governo della Repubblica dell'India sul trasferimento delle persone condannate, fatto a Roma il 10 agosto 2012'.

since Italian legal system bans death penalty, it is reasonably supposable that it would be *de iure* commuted to life imprisonment.

VALERIA EBOLI

Treaty Action — Disarmament

- Ratification and implementation of the *Arms Trade Treaty*, opened for signature on 3 June 2013 (not yet entered into force).
- Law No. 18 of October 4, 2013 Ratification and implementation of the Arms Trade Treaty, adopted in New York by the General Assembly of the United Nations on 2 April 2013 [68] <http://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2013-12-28&atto.codiceRedazionale=13A10469&elenco30giorni=false>

With Law No. 18 of 4 October 2013, Italy ratified the *Arms Trade Treaty* (ATT). The Treaty, opened for signature on 3 June 2013, will enter into force upon ratification by 50 countries.[69] The ATT aims to make the legal trade of conventional weapons more accountable by requiring common international standards on imports, exports and transfers of arms. It provides an assessment of arms transfers as well as measures to prevent the diversion of conventional arms from the exporter and importer States.[70]

The Preamble of the ATT recalls Article 26 of the UN Charter, which refers to the establishment and maintenance of international peace and security. It recognizes that the illicit and unregulated trade in conventional arms has direct humanitarian, social, economic and security consequences. The Preamble affirms the sovereign right of States to regulate internal transfers of weapons without prejudice to the possibility of adoption by the States Parties of more restrictive measures than those laid down in the same ATT.

After the Preamble, a special section of the ATT is dedicated to the principles concerning the maintenance of international peace and ~~international~~ security as defined in the UN Charter. In particular, this section refers to Article 51 of the UN Charter on the inherent right of individual or collective self-defense of States, and Article 2(3) on the obligation of States to settle international disputes by peaceful means in such a way that international peace and security, and justice are not endangered. This section also recalls the obligation for UN Member States to refrain in international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations as affirmed under Article 2(4) of the UN Charter. An important reference is also made to the principle of non-intervention in matters which are essentially within the domestic jurisdiction of any State in accordance with Article 2(7) of the UN Charter.[71]

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[68] Published in *Gazzetta Ufficiale* No. 24 of 15 October 2013.

[69] As at 2013, only 13 Member States had ratified the Treaty.

[70] On the Italian situation for arms trade, see, F. Carlini 'Le esportazioni di armi italiane nel 2012', *Istituto di ricerche internazionali Archivio Disarmo* (2012) <http://www.archiviodisarmo.it/template.php?pag=55535>.

[71] For a comments relating the cited articles of the UN Charter, see, inter alia, B. Conforti, The Law and Practice of the United Nations (Legal Aspects of International Organization) (Leiden, Boston, Martinus Nijoff Publisher, 4th ed., 2010); Chesterman, Franck, Malone, Law and Practice of the United Nations: Documents and Commentary (Oxford University Press, Oxford, 2008); S. Marchisio, *L'Onu. Il diritto delle Nazioni Unite (*Il Mulino, Bologna, 2nd ed., 2011); B. Simma (eds.), *The Charter of the United Nations. A Commentary, Vol. 1,* (Oxford University Press, Oxford, 3rd ed., 2012). On the measures adopted by the

The most significant innovation introduced by the Treaty is the so-called *golden rule* as indicated under Article 6. It essentially refers to the provision of the automatic refusal of the State Party to transfer conventional arms, covered under Article 2(1), or other items covered under Articles 3 or 4, if the transfer would violate its obligations under the measures adopted by the UN Security Council acting under Chapter VII of the UN Charter, in particular those related to arms embargoes.[72]

On the basis of Article 6, a State Party shall not authorize any transfer of conventional arms if the transfer violates its obligations under international agreements to which the State is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms. A State Party shall not permit any transfer of conventional arms covered by the Treaty if it is aware that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the *Geneva Conventions* of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.

Article 7 of the ATT also provides that the national authorities responsible for the authorization of exports take into account a number of factors to assess the potential impact of any transfer of arms, such as the potential risk that the transfer contributes to endanger the peace and security or that weapons might be used to commit or facilitate serious violations of international humanitarian law or human rights, the commission of acts of terrorism or organized crime as defined by international conventions to which the exporting State is a Party.

The ATT covers issues that are within the exclusive competence of the European Union, namely the import and export controls on weapons. EU Member States may decide to become part to the ATT only with the approval of the Council on a proposal from the European Commission. On 8 May 2013, the EU Commission proposed a Council decision authorizing Member States of the European Union to sign the ATT and to initiate its rapid ratification.[73]

More than 20 years after its adoption, Italian Law No. 185 of 9 July 1990 on the control of military armaments represents one of the most advanced and globally stringent regulations on this subject.[74] Italy also adopted Legislative Decree No. 105 of 22 June 2012, which implements Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 on the control of transfers of military goods within the EU.[75]

Italy ratified the United Nations Convention against Transnational Organized Crime and the related Protocol against the illicit manufacturing of and trafficking in firearms, their parts

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Security Council under Chapter VII of the UN Charter, see, inter alia, R. Cadin, *I presupposti dell'azione del Consiglio di sicurezza nell'art. 39 della Carta delle Nazioni Unite* (Giuffrè, Milano, 2008).
On the measures adopted by the Security Council under Chapter VII of the UN Charter, see, inter alia, R. Cadin, *I presupposti dell'azione del Consiglio di sicurezza nell'art. 39 della Carta delle Nazioni Unite* (Giuffrè, Milano, 2008).

[73] See European Union, 'Proposal for a Council Decision authorizing Member States to Sign, in the Interests of the European Union, the Arms Trade Treaty', COM/2013/273 (Final) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52013PC0273:EN:NOT>.

[74] Article 1(6) of Law No. 185 of 1990 prohibits, *inter alia*, the trade of weapons materials into countries in armed conflict in violation of Article 51 of the UN Charter and States whose governments are responsible for serious violations of international conventions on human rights established by the UN, the EU or the Council of Europe.

[75] Directive 2009/43/EC defines a 'European licence system' for the transfer of defence-related-products within the European Union. The main objective of Directive 2009/43/EC is to build an internal market for defence-related products. Defence-related products mean any products listed in the Annex of the Directive. All these products correspond to those listed in the Common Military List of the European Union.

and components and ammunition by Law No. 146 of 16 March 2006. It is also worth highlighting that the abovementioned Protocol has several points of overlap with the ATT relating to the issue of the legality of the arms trade, especially with Article 10, which provides a series of measures relating to firearms import–export.

As a result of the high standards set forth in Italy's legislative plan, the Italian regulatory system seems to be ready to implement the ATT.

SILVANA MOSCATELLI[76]

Government Policy — Use of Chemical Weapons in Syria

- Communications of the Minister of Foreign Affairs Emma Bonino on the recent developments of the situation in Egypt and Syria, 27 August 2013 <http://www.senato.it/application/xmanager/projects/leg17/file/repository/commissioni/stenografici/17/congiunte/3a-III-20130827BOZZA.pdf>
- Declaration of the Prime Minister Enrico Letta on Syria, 31 August 2013 <http://www.governo.it/Presidente/Comunicati/dettaglio.asp?d=72705>

On 27 August 2013, the Italian Minister of Foreign Affairs, Emma Bonino delivered a communication on the political situation in Egypt and Syria to two joint Commissions, the Foreign Affairs and Immigration of the Chamber of Deputies and the Foreign and Community Affairs of the Senate. The Minister concentrated on the dramatic developments of the civil war in Syria, following the use of chemical weapons on 20 August 2013 in Ghouta, located in the eastern suburbs of Damascus.[77] Given that the Minister was in Brussels for a Foreign Affairs Council of the EU at the time of the attack, European Foreign Ministers immediately consulted and decided to contact Iran, Russia, Qatar, Turkey, and the United States to urge them to press Syria to accept UN inspectors in the Damascus suburbs.[78] On 26 August 2013, the Syrian government allowed a UN team to enter the site of the alleged chemical attack for investigations.[79]

In addition, Emma Bonino pointed out that according to the US and some European countries, the Syrian national army had used chemical weapons and in particular, sarin gas.[80] This view was based on information received by national intelligence services and statements of independent NGOs (such as Médecins sans Frontières) which had provided medical treatment to the victims of the attacks, most of whom belonging to the political opposition

[76] Silvana Moscatelli is Technologist at National Research Council of Italy.

[77] See 'Syria Chemical Attack: What we know', *BBC News*, 24 September 2013 <http://www.bbc.co.uk/news/world-middle-east-23927399>.

[78] UN inspectors arrived in Syria in March 2013 to investigate the alleged use of chemical weapons near Aleppo.

[79] See 'Syria: UN Chemical Weapons Team Reaches Inspection Site after Convoy Hit with Sniper Fire' (26 August 2013) <http://www.un.org/apps/news/story.asp/h%3Cspan%20class='pullme'%3EIn%20short,%20when%20you%20empower%20a%20woman,%20you%20change%20the%20world%3C/span%3Ettp://www.unfpa.org/www.fao.org/www.unicef.org/html/story.asp?NewsID=45701&Cr=Syria&Cr1=#.Utkel9GYa1s>. On 16 September 2013, the UN Secretary-General submitted to the Security Council the Report of the UN Missions to Investigate Allegations of the Use of Chemical Weapons on the incident that occurred on 21 August 2013 (UN Doc. A/67/997–S/2013/553) <http://www.un.org/sg/statements/index.asp?nid=7083>, which 'unequivocally and objectively' confirmed the use of such weapons.

[80] Sarin gas is a nerve agent which is highly lethal but evaporates in only a few minutes. For this reason, it is difficult to gather evidence regarding its use.

groups.[81] She further observed that in August, Syria was neither a party to the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* ('CWC') of 1993[82] nor to the *Biological Weapons Convention* ('BWC') of 1972.[83] However, it was party to the *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare* ('Geneva Protocol') of 1925, which according to some commentators had to be 'interpreted as containing the general prohibition of all forms of chemical warfare'.[84] The Minister recalled that the use of chemical weapons is prohibited in internal armed conflicts, such as in Syria, because they constitute an indiscriminate attack on civilians. Furthermore, she emphasized that their use, when it is systematic and intentionally directed against civilians, must be considered as a war crime under the 1998 *Rome Statute of the International Criminal Court* ('ICC Statute').

With regard to this last statement, it should be noted that the ICC Statute does not expressly mention chemical weapons, even if scholars have pointed out that a reference is contained in Article 8 concerning war crimes.[85] In particular, Article 8(2)(b) includes among 'other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law' the employment of: 'poison or poisoned weapons' (xvii); 'asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices' (xviii)); c) 'weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict. . . .' (xx).[86]

Concerning non-international armed conflicts, the 2010 Kampala Review Conference adopted an amendment to introduce in Article 8(2)(e) of the ICC Statute the reference to the 'employing of poison or poisoned weapons' and to 'asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices' as contained in paragraph 2(b).[87]

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[81] The chemical attack killed 1300 people and injured about 3000, including women and children. The victims lived in an area controlled by groups opposed to Assad government. See 'Syria's Darkest Hour: Hundreds of Children's Bodies Piled High after Nerve Gas Attack near Damascus leaves up to 1,300 dead', *The Daily Mail* (London, UK), 21 August 2013 <http://www.dailymail.co.uk/news/article-2398691/Syrias-darkest-hour-Hundreds-childrens-bodies-piled-high-nerve-gas-attack-near-Damascus-leaves-1-300-dead.html>.

[82] Opened for signature 13 January 1993, 1974 UNTS 45 (entered into force 29 April 1997). The CWC prohibits the development, production, acquisition, stockpiling, retention, transfer or use of chemical weapons. The Organisation for the Prohibition of Chemical Weapons (OPCW) ensures the implementation of the CWC. See R. Yepes-Enríquez and L. Tabassi, eds., *Treaty Enforcement and International Cooperation in Criminal Matters with Special Reference to the Chemical Weapons Convention* (The Hague, TMC Asser Press, 2002).

[83] Opened for signature 10 April 1972, 1015 UNTS 163 (entered into force 26 March 1975).

[84] The Protocol was negotiated and signed at a Conference held in Geneva under the auspices of the League of Nations from 4 May to 17 June 1925 (entered into force on 8 February 1928). See M. Bothe, 'War Crimes', in A. Cassese et al., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, Oxford University Press, 2002, p. 407).

[85] See M. Bothe, above n 84. During negotiations, a proposal was made to include in Article 8 of the *ICC Statute* an explicit prohibition of chemical and biological weapons but it did not pass. See D. Akande, 'Can the ICC Prosecute for Use of Chemical Weapons in Syria?' in *EJIL: Talk*!, 23 August 2013 <http://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/>.

[86] This last provision required the adoption of an annex to *ICC Statute* in order to list the prohibited weapons but States Parties have not adopted it. See W. A. Schabas, Chemical Weapons: Is it a Crime? (2013) <http://humanrightsdoctorate.blogspot.co.uk/2013/04/chemical-weapons-is-it-crime.html>.

[87] See Resolution RC/Res.5, 10 June 2010 (adopted by consensus). The provision, like Article 8(2)(b)(xviii), is based on the *Geneva Protocol of 1925*. As at 11 February 2014, sixteen States Parties have accepted the amendment in conformity with Article 121(5) of the *ICC Statute*. Italy has not yet accepted. See United Nations Treaty Collection, *Amendment to Article 8 of the Rome Statute of the International Criminal Court* <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-

More generally, chemical weapons are banned under the Geneva Protocol of 1925 and the CWC which also apply to armed conflicts, even to those that do not have an international character.[88] For this kind of weapons, the ICRC has affirmed the existence of a norm of customary international humanitarian law which prohibits their use both in international and internal armed conflicts.[89] It is noteworthy to remember also that the ICTY Appeals Chamber in the *Tadic Case* of 1995 stated 'there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons [chemical weapons] is also prohibited in internal armed conflicts'.[90]

On these grounds, following the chemical attack in the suburbs of Damascus, France, the United Kingdom[91] and the United States proposed a military intervention in Syria (regardless of UN Security Council (UNSC) authorization) and accused President Assad of having used chemical weapons against his own people.[92]

With regard to a unilateral military intervention in Syria, Emma Bonino expressed the Italian government's firm opposition, recalling that only the UNSC has the power to authorize military action. Nevertheless, the Minister highlighted that the use of chemical weapons represents a 'war crime', above all when it is directed against unarmed civilians, and, at the same time, amounts to a 'crime against humanity' as was suggested by the UN

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a&chapter=18&lang=en=en>. Belgium, supported by various groups of co-sponsors, proposed to add other weapons to the lists of those prohibited both in international and non-international armed conflict, including chemical weapons, but this proposal did not pass. See R. S. Clark, 'Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court, Kampala, 31 May-11 June 2010', 2 *Goettingen Journal of International Law* (2010) p. 2.

[88] See A. Gioia, 'The Chemical Weapons Convention and Its Application in Time of Armed Conflict', in M. Bothe, N. Ronzitti and A. Rosas, eds., *The New Chemical Weapons Convention-Implementation and Prospects* (The Hague, Kluwer Law International, 1998) p. 384, in which the author also affirmed: 'It may well be, of course, that the prohibition on the use of chemical weapons has since become a rule of general customary law, and that such a rule applies to non-international as well as international armed conflicts'. See also R. Price and N. Tannenwald, 'Norms and Deterrence: the Nuclear and Chemical Weapons Taboos', in P. J. Katzenstein, ed., *The Culture of National Security: Norms and Identity in World Policy* (New York, Columbia University Press, 1996).

[89] See International Committee of the Red Cross, *Rule 74: Chemical Weapons* <http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter24_rule74>. Nevertheless, some scholars underline that while international humanitarian law and international criminal law provide a clear ban on the use of chemical weapons in international armed conflict, the existence of this prohibition is less clear in non-international armed conflict. See, J. Blake and A. Mahmud, 'A Legal "Red Line"?: Syria and the Use of Chemical Weapons in Civil Conflict', 61 *UCLA L. Rev. Disc.* (2013) <http://www.uclalawreview.org/pdf/discourse/61-16.pdf>.

[90] See *Prosecutor v. Tadic,* Case No IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 120–124 <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>. In the Decision, the Court specified that 'the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife'. This is the case of chemical weapons.

[91] In the UK, the Prime Minister, David Cameron presented to the Parliament a motion supporting military action in Syria if UN inspectors confirmed the use of chemical weapons. However, on 30 August 2013, the House of Commons rejected the motion. See 'Syria Crisis: Cameron Loses Commons Vote on Syria Action', *BBC News*, 30 August 2013 <http://www.bbc.co.uk/news/uk-politics-23892783>.

[92] For critical observations concerning a unilateral military intervention in Syria, see J. Blake and A. Mahmud, 'A Legal 'Red Line'?: Syria and the Use of Chemical Weapons in Civil Conflict', quoted; N. Ronzitti, 'Siria, le labili ragioni di un intervento', *Affari internazionali. Rivista online di politica, strategia ed economia* (2013) <http://www.affarinternazionali.it/articolo.asp?ID=2396>.

Secretary-General.[93] In this context, the Minister emphasized that Italy supported only a political solution to the Syrian crisis and the negotiations for Geneva II Conference.[94]

On 31 August 2013, Prime Minister Enrico Letta made a declaration on Syria in which he recognised that the Assad regime has a chemical weapons armoury and the use of such weapons amounts to a crime against humanity. With regard to the hypothesis of a unilateral military intervention in Syria, Letta reiterated the Italian opposition to an action without the UNSC's authorization and its support for a political solution of the crises.

On 14 September 2013, Syria deposited its instrument of accession to the CWC and agreed to its provisional implementation pending the entry into force on 14 October 2013.[95] After the accession of Syria to the CWC, the US and Russia agreed on a 'Joint Framework on Destruction of Syrian CW' which provided for an expeditious destruction of the Syrian chemical weapons under OPCW and UN control.[96] On 27 September 2013, the UNSC unanimously adopted Resolution 2118 (2013) which condemned the chemical attack of August 2013 and considered the use of chemical weapons as a 'serious violation of international law'. The UNSC also decided to regularly review Syria's implementation of the OPCW decision on the special procedures for the expeditious and verifiable destruction of Syrian chemical weapons and to take measures under Chapter VII of the UN Charter in case of non-compliance.

VALENTINA DELLA FINA

Cases — The Lacking of the Crime of Torture in Italian Legislation: Consequences on the Aldrovandi, Cucchi and Bolzaneto Cases.

- Order No. 1281 of 21 May 2013 of the Surveillance Court of Bologna <http://www.penalecontemporaneo.it/upload/1372290619ordinanza%20Aldrovandi.pdf>
- Decision of 5 June 2013 of the Third Assize Court of Rome <http://www.penalecontemporaneo.it/upload/1378826307Motivazioni%20Cucchi_redacted.pdf>
- Decision No. 37088 of 14 June 2013 of the Court of Cassation, V Criminal Section <http://www.penalecontemporaneo.it/upload/1379326908sentenza%20bolzaneto%2037088-2013.pdf>

As was reported in the 2012 edition of the *Yearbook of International Humanitarian Law*, the absence of a specific offense of torture in national legislation has been a critical issue as

[93] On 23 August 2013, the Secretary-General said that the use of any chemical weapons in Syria would amount to a 'crime against humanity' and there would be 'serious consequences' for the perpetrators. See 'Use of chemical weapons in Syria would be 'crime against humanity' – Ban', *UN News Centre*, 23 August 2013 <http://www.un.org/apps/news/story.asp?NewsID=45684#.UvNlbdGYa1s>.

[94] The political solution for Syria was invoked by most of world leaders speaking at the UN General Assembly's annual debate which took place on September 2013. See 'World leaders urge collective push for speedy, political solution to Syria crisis', *UN News Centre*, 26 September 2013 <http://www.un.org/apps/news/story.asp?NewsID=46056&Cr=general+debate&Cr1=#.UvDi8dGYa1s>. The UN Secretary-General was also contrary to a military intervention and supported the political solution. See 'Ban Ki-moon: Military Solution 'Not Possible' in Syria', *AL Monitor*, October 2013 <http://www.al-monitor.com/pulse/politics/2013/10/ban-ki-moon-un-interview-syria-geneva.html>. The Geneva II Conference on Syria was held in January 2014.

[95] On 14 October 2013, the number of States Parties to CWC was 190. Only four States had neither signed nor acceded to the CWC: Angola, Democratic People's Republic of Korea, Egypt and South Sudan. See OPCW, Doc. S/1131/2013, 14 October 2013.

[96] For the text of the document see *The US-Russia Agreement on Syria's Chemical Weapons — Deal in Full* (15 September 2013) <http://vineyardsaker.blogspot.it/2013/09/the-us-russia-agreement-on-syrias.html>.

regards the full implementation of a number of international instruments to which Italy is a Party, with the most recently ratified instrument being the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.[97] This lacuna has been repeatedly highlighted by various human rights treaty bodies as well as by Italian jurists.[98] However, none of the numerous draft bills introduced into the Parliament for filling the gap was approved until now. Moreover, Law No. 237 of 2012 on cooperation with the International Criminal Court (ICC) is silent on the fact that certain serious international crimes listed in Articles 5–8 of the ICC Statute are not prescribed as specific offenses in national legislation.[99]

This situation not only violates international law, but is also inconsistent with the Italian Constitution, whose Article 13, paragraph 4 affirms the principle of non-impunity for acts of torture or inhuman or degrading treatment or punishment.[100] During 2013, certain cases have showed that the offenses prescribed in the *Criminal Code* to which national courts must refer for pursuing acts of violence ascribable to torture or inhuman or degrading treatment under Article 3 of the *European Convention on Human Rights* (ECHR) are insufficient to ensure non-impunity, or adequate sanctions. In this context, the *Aldrovandi*, *Cucchi* and *Bolzaneto* cases will be examined here.

Federico Aldrovandi, an eighteen year old boy, died on 25 September 2005 during his arrest in Ferrara by four police agents who were pursued by the Court of Ferrara for a disproportionate use of force in performing their functions. The legal basis for proceeding was Article 589 of the *Criminal Code* on manslaughter ('omicidio colposo'), in conjunction with Article 51, which regulates the exercise of a right or the performance of a duty ('esercizio di un diritto o adempimento di un dovere') and Article 55, regarding the abuse of power ('eccesso colposo'). The latter Article applies when limits on the legitimate use of means necessary for performing a duty have been exceeded because of an erroneous assessment of the factual situation, or for negligent, unskillful, or imprudent conduct. On 6 July 2009, each accused was sentenced by the Court of Ferrara to three and half years of imprisonment. On 10 June 2011, this decision was confirmed by the Court of Appeal of Bologna and on 21 June 2012, the Supreme Court of Cassation upheld the decision.[101]

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[97] *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). Italy ratified the *Optional Protocol* on 3 April 2013 (<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en>).

[98] See A. Gianelli, M.P. Paternò, eds., *Tortura di Stato. Le ferite della democrazia* (Rome, Carocci, 2004); A. Marchesi, 'L'attuazione in Italia degli obblighi internazionali di repressione della tortura', 463 *Rivista di diritto internazionale* (1999); A. Lanzi and T. Scovazzi, 'Una dubbia repressione della tortura e di altri gravi crimini di guerra', 685 *Rivista di diritto internazionale* (2004); N. Ronzitti, 'Tortura: l'Italia ratifica il Protocollo ma nel Cp manca la fattispecie criminosa', *Guida al diritto*, 4 February 2013 <http://www.diritto24.ilsole24ore.com/guidaAlDiritto/penale/primiPiani/2013/01/litalia-ratifica-il-protocollo-sulla-tortura-ma-nel-cp-manca-la-fattispecie-criminosa.html>.

[99] See 8 *YIHL* (2012).

[100] This Article reads 'Any mental or physical violence inflicted to persons who are deprived of their freedom shall be punished'. Implementing this principle requires, of course, the adoption of adequate legislative and other measures: cf. A. Pugiotto, 'Repressione penale della tortura e Costituzione: un reato che non c'è', *Diritto penale contemporaneo*, 17 February 2014 <http://www.penalecontemporaneo.it/area/3-/18-/-/2841-repressione_penale_della_tortura_e_costituzione__anatomia_di_un_reato_che_non_c__/>.

[101] Cf. Zavagli, 'Aldrovandi, La Cassazione conferma le condanne ai poliziotti per omicidio', Il Fatto quotidiano 21 June 2012 <http://www.ilfattoquotidiano.it/2012/06/21/caso-aldrovandi-la-cassazione-conferma-le-condanne-ai-poliziotti/271326/>.

On 21 May 2013, the Court of Bologna decided, through Order No. 1281,[102] on the appeal of one of the sentenced police agents against an order of the competent Surveillance Judge, which had rejected his application for serving the remaining sentence under house arrest. For the sake of clarity, the term of imprisonment had already been reduced due to the grant of a pardon, so that the remaining sentence was only 6 months. The application was based on Law No. 199 of 2010 which enlarged the scope of availability of house arrest as a means of reducing the chronic overcrowding in Italian prisons.[103]

In its Order No. 1281, the Court of Bologna confirmed that the detainee was not entitled to any measures alternative to detention in prison. After noting that such benefits were in line with the constitutional principle that punishment must aim at rehabilitation, the Court clarified that, on the other hand, the granting of such benefits is at the discretion of the surveillance judges who must make decisions on a case-by-case basis, and in light of two criteria: (1) the gravity of the offense; and (2) the behavior of the detainee. Regarding the first criterion, the Court recalled that the case had involved serious breaches of fundamental human rights by state agents. The Court then highlighted the fact that the victim was alone and in a state of confusion, probably because of the use of substances that had altered his psycho-physical conditions, when he was stopped by the four police agents and — after a futile attempt to escape from capture through a karate move — was brutally beaten and handcuffed, until he died. According to the Court:

> even if the indictment was based, technically speaking, on Articles 589, 51, 55 and 113[104] of the *Criminal Code*, these acts of violence must be regarded as a *crime* of torture (and not, merely, an offense, according to a distinction, which is made into some legal orders, according to the gravity of the wrongful acts committed by state agents, or other persons acting in an official capacity). The crime of torture is defined in international law according to certain customary rules and treaties that are mandatory for Italy, although Italy has failed to execute the obligation of adapting its domestic legal order accordingly. It is certain that conducts of this kind must be regarded as being, at least, a inhuman or degrading treatment, in breach of Article 3 of the *ECHR*. Such a conclusion results from the judgment of the European Court of Human Rights of 4 October 2011 in the case *Guler and Ongel* v. *Turkey* (where the Court described a disproportionate use of force by state agents as 'an attack against human dignity', when the factual situation does not imply strict necessity of preserving the physical integrity of the agents, or of other persons) and, again, in judgment of 25 November 2011 on the case *Ivan Kuzmin* v. *Russia* (concerning the use of force that, if not strictly necessary because of the circumstances of the case, is 'degrading for human dignity' and, thus, contrary to

[102] Order No. 1281 of 21 May 2013 of the Surveillance Court of Bologna, *Diritto penale contemporaneo* (2013) <http://www.penalecontemporaneo.it/upload/1372290619ordinanza%20Aldrovandi.pdf>.

[103] Law No. 199 of 26 November 2010, 'Provisions concerning the Execution of Imprisonment not Exceeding 18 Months under House Arrest', *O.J.* No. 281 of 1 December 2010 (entered into force 16 December 2010).

[104] Article 113 of the *Criminal Code* regards cooperation in a culpable offense ('cooperazione nel delitto colposo'). It should be noted that the police agent who introduced the appeal before the Court of Bologna, though having actively participated in the beating, was not among the persons who had caused Aldrovandi's death. For the Court, however,

> the awareness [by all the police agents involved] of the fact that they were acting in cooperation implied that each one had the duty of not only acting in a lawful manner, but also considering whether the conduct of the others was lawful and, if necessary, of intervening for preventing or putting an end to wrongful conducts by the others.

It was proved in the proceeding that mutual surveillance had been completely absent. Cf. Order No. 1281 of 21 May 2013 of the Surveillance Court of Bologna, p. 7.

> the substantive content of Article 3 of the *ECHR*). The European Court also ruled (judgment of 8 April 2010, *Lotarev* v. *Ukraine*) that, under the above circumstances, police agents who have any persons under control must guarantee their mental and physical health conditions, and even more when they had made recourse to the use of force against these persons.[105]

In relation to the second criterion, the Court said that the conduct of the four police agents seemed to imply 'a culture of violence', which was even more inexcusable because it was totally incompatible with their positions as state agents whose duty was to protect the citizens and, any other persons on the national territory. The Court considered whether the detainee had recognised the gravity of his acts, but concluded that nothing in his conduct displayed any repentance or regret. In particular, during proceedings, he never recognized his participation in the crime and was generally uncooperative. Even the apologies he subsequently addressed to the mother of the victim were ambiguous to the point of being insincere and appeared only to indulge the Court.[106] Additionally, the detainee's public statements had discredited the police force to the point where the Police Chief, the Superintendent (Questore) of Ferrara and the Minister of the Interiors deemed it necessary to publicly apologize for his opinions. The Court concluded:

> According to a well-established interpretation of the European Court, this Court has competence to monitor, inter alia, whether Contracting Parties observe their obligations under the *ECHR* in such a manner as to render the prosecution and the sanctioning of criminal conducts against human rights effective; and this not only through indictment for these crimes, but also through applying effective sanctions … and by ensuring, in the first place, that the punishment be executed. … The punishment cannot be symbolic or without concrete consequences, it must be effective … [107]

On these grounds, the Court confirmed the rejection of the application.[108]

Despite the result in this case, it is clear that sanctions for serious breaches of fundamental human rights must not only be effective, but also adequate and therefore, punishment must be appropriate to the gravity of the offense. Accordingly, the courts which examined the *Aldrovandi* case could not align their decisions with international standards because of the absence of appropriate norms in Italian criminal legislation.

Similar problems arose in the case concerning Stefano Cucchi, a young man who was arrested in Rome for possession of drugs on 15 October 2009, and died in unclear circumstances seven days later, at the correctional section of the 'Sandro Pertini' hospital. Thanks to a strong reaction by Cucchi's family, the case became immediately known, raising dismay and concern in the country. Three prison officers were suspected to have beaten and injured Cucchi while he was in their custody, waiting for the validation of the arrest, and were prosecuted for these acts by the Third Assize Court of Rome. In the same proceeding, nine members of the medical and managing staff of the 'Sandro Pertini' hospital were charged with having omitted to care and assist the detainee, after his hospitalization. The proceeding took almost four years. The Third Assize Court decided on the case on 5 June 2013.[109] All the prison officers were acquitted from the indictment of 'personal injury' (Article 582 of the *Criminal Code*) and 'abuse of authority against arrested or detained

[105] Ibid., p. 6.
[106] Ibid., p. 10.
[107] Ibid., p. 9.
[108] Ibid., p. 12.
[109] Decision of 5 June 2013 of the Third Assize Court of Rome, *Diritto penale contemporaneo* (2013) <http://www.penalecontemporaneo.it/upload/1378826307Motivazioni%20Cucchi_redacted.pdf>

persons' (Article 608), plus 'cooperation in criminal offenses' (Article 110), with various aggravating circumstances (Articles 61 and 585). The acquittal was due to contradictory evidences, which had made it impossible to prove, for the Court, that the accused had inflicted violence to the victim.[110] To the contrary, five members of the medical staff were sentenced for 'manslaughter' (Article 589 of the *Criminal Code*), because they had completely abandoned the detainee, by deliberately omitting to give him medical assistance including, in the final phase, those minimal therapies that would have saved his life.[111]

Regarding the *de facto* qualification of the facts, the Third Assize Court of Rome noted:

> From the interaction between the principles enounced in Articles 2, 3 and 32 of the Constitution[112] it emerges that protecting the right to health is of outmost importance also for treatment of the persons in prison, because this right must be guaranteed … within any community, and in any place where the individuals live and exert their personality. Right to health is one of the fundamental rights of the individuals, which must be not only protected from any attack by other persons, but also enjoyed vis-à-vis the State authorities; these latter have the obligation of making available ways and means for any person may enjoy this right, and must put in place adequate measures to prevent and redress any cause of prejudice to the population's mental and physical health. … In addition, health protection is linked to the principle that the punishment must aim at rehabilitation, as provided in Article 27 of the Constitution ('Punishment shall not consist in any treatments contrary to human dignity and shall be aimed at rehabilitating the convicted persons'). … Also the *ECHR* implicitly includes a duty to safeguard the health of persons in prison in the prohibition of torture and other inhuman treatment or punishment; this same principle is explicit in the 'Minimum Standards on the treatment of detainees' adopted by the Council of Europe in 1987. [113]

All the accused were each one sentenced to one year and four months of imprisonment and to damage compensation.[114] Moreover, some members of the managing staff of the 'Sandro Pertini' hospital, who had falsely certified that the health conditions of the detainee were sufficiently good and, later, that his death had occurred 'by natural causes', were convicted for the offense of 'forgery committed by state officials in the drafting of public documents' (Article 479 of the *Criminal Code*). For the Court, these accused deliberately omitted to inform the judiciary, despite their duty to do so.[115]

In the same judgment, the suspension of detention penalty was granted to all the convicted persons.[116] The case has enlightened, once again, the existing lacunae in the *Criminal Code*.

Turning, now, to the *Bolzaneto* case, it is, among the three, the one better known outside Italy, as it is linked to so called 'no global' protestation, which took place during the G8 Summit in Genoa, in 2001. As was reported in the 2012 edition of the *Yearbook of*

[110] Ibid., p. 160.
[111] Although his body displayed signs of physical trauma, the origin of this trauma could not be determined and it was proved that the victim's death did not result from this trauma. Rather, his death occurred as a result the persistent refusal of Cucchi to eat or drink combined with the doctors' omission to provide any alternative therapy and 'even the minimal ones, such as the administration of sugar water ... a measure that would have been able, if taken, to avert his death'. See Decision of 5 June 2013 of the Third Assize Court of Rome, p. 6.
[112] Article 2 of the *Italian Constitution* ensures respect for the inalienable rights of individuals. Article 3 concerns the protection of human dignity and enshrines the principle of equality before the law. Article 32 protects the right to health.
[113] Decision of 5 June 2013 of the Third Assize Court of Rome, pp. 157–158.
[114] Ibid., p. 162.
[115] Ibid., pp. 6, 162
[116] Ibid., p. 162.

International Humanitarian Law,[117] the Court of Appeal of Genoa imposed sentences of up to five years, in 2011, for the grave abuses and the acts of violence committed by law enforcement officials against the protesters, at the temporary detention centre of the Bolzaneto barracks (and at the 'Armando Diaz' school); however, many of the charges were dropped because of the statute of limitations.

The follow-up of the case was, in 2013, judgment No. 37088 of 14 June of the Supreme Court of Cassation, V section, which confirmed the verdict of second instance, including the conviction of certain high-ranking police officers. Rightly, this decision was welcomed as the hoped conclusion of a court case concerning 'one of the worst events ever occurred in Italy'.[118] Through judgment No. 37088, however, the Supreme Court also rejected the appeal of the Genoa General Prosecutor against the judgment, on the point of the applicability of statutory limitations. The appeal recalled that the application of the statute of limitations *ex* Article 157 of the *Criminal Code* had led to drop all the charges in the proceeding, except for one case of 'serious personal injury' and a limited number of other cases, concerning the offense of 'forgery with aggravating circumstances'. Therefore, the General Prosecutor asked the Supreme Court to raise a question on the constitutional legitimacy of Article 157, for the part in which this Article does not provide for non-applicability of statutory limitations to those criminal offenses that consist in an attack against human dignity, and which amount to inhuman or degrading treatment under the *ECHR*. In this respect, Article 157 seemed to the General Prosecutor to be inconsistent with Article 117.1 of the Constitution, which requires respect for international obligations on the basis that the *ECHR* and other pertinent treaties exclude the applicability of statutory limitations to torture. On the same grounds, the General Prosecutor further asked the Supreme Court to raise the question of the constitutional legitimacy of Article 1 of Law No. 241 of 2006, which in regulating grant of pardon, does not exclude the offense of 'serious personal injury' from its own sphere of application, not even in the case in which a serious personal injury has been deliberately committed and is ascribable to torture.[119]

It should be remembered that Italy is not a party to the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*,[120] a circumstance not mentioned in the appeal.[121]

In any case, according to the Supreme Court, the questions of constitutional legitimacy raised in the appeal were manifestly unfounded, and irrelevant to decide on the case. In the Court's words,

> The General Prosecutor has based his appeal on certain supra national principles present in the *ECHR* and as interpreted by the European Court of Human Rights, which are mandatory into the domestic legal orders of Contracting Parties and complement the parameter set forth in Article 117.1 of the Italian Constitution. For the General

[117] 14 *YIHL* (2012) fn 55.
[118] V. Zagrebelsky, 'Bolzaneto, giusta la sentenza della Cassazione, guai per i vertici della polizia', *La Stampa* (Turin, Italy), 6 July 2012.
[119] Decision No. 37088 of 14 June 2013 of the Court of Cassation, V Criminal Section, pp. 7–8.
[120] *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, opened for signature 26 November 1968, 754 UNTS 73 (entered into force 11 November 1970).
[121] It is true, on the one hand, that torture is prohibited by a customary (and peremptory) norm of international law, to which the Italian legal order automatically conforms by virtue of Article 10 of the *Italian Constitution*. However, whether or not certain principles that assist the application of this prohibition, including non-applicability of statutory limitations for the crime of torture, must be regarded as being part of customary international law is a further issue. On the topic see E. de Wet, 'The Prohibition of Torture as an International Norm of *ius cogens* and Its Implications for National and Customary Law', 97 *EJIL* (2004).

> Prosecutor, these parameters include the principle that any offense implying an attack against human dignity and amounting to inhuman or degrading treatment must be sanctioned effectively and should not be subjected, accordingly, to the statute of limitations.… In this reasoning, the Constitutional Court might decide to increase, by judgment, the number of cases in which statutory limitations do not apply, which the existing national legislation circumscribes to the offenses punishable by life sentence. However, a judgment with this content would be outside the competences of the Constitutional Court, because, according to Article 25, paragraph 2 of the Constitution, criminal matters may not be regulated if not by law.[122] … [A]nd even assuming that the Constitutional Court would decide to expand the sphere of non-application of statutory limitations for including cases not contemplated, currently, in Article 157 of the *Criminal Code*, such a course of action would exceed the competence of the Court, and would infringe one of the cardinal principles of the constitutional system concerning criminal matters; a principle that cannot be sacrificed for implementing other principles (which should be rather implemented by the Parliament, in the execution of the obligations resulting from mentioned treaties).[123]

These observations refer to so called 'additive judgments' ('sentenze additive'), through which the Constitutional Court may complement those norms that it finds unconstitutional not for what they provide, but because of the lack of further prescriptions, which the Constitutional Court deems necessary for avoiding conflicts with the Constitution. As is evident, the questions raised by the General Prosecutor were of this kind. As noted by the Supreme Court, however, additive judgments cannot regard criminal matters because of the presence of the fundamental principle in Article 25.2 of the Constitution. So said, it seems, respectfully, that another principle has been completely neglected in the reasoning of the Supreme Court, namely the well-established principle under which if a question of constitutional legitimacy involves Article 117.1 and through it, those supranational parameters that are mandatory for Italy (so called 'parametri interposti di costituzionalità'), the question must be solved through balancing *all* the principles involved; and the balancing is, of course, a competence of the Constitutional Court. From this standpoint, the fact that the Supreme Court decided by itself, without balancing the principles involved or making recourse to other legal arguments,[124] that Article 25.2 of the Constitution 'cannot be sacrificed' to implement the non-impunity principle is not convincing; and much more, bearing in mind that non-impunity for the crime of torture is imposed not only by the *ECHR*, but also by Article 13, paragraph 4, of the Constitution.

The conclusions of the Supreme Court are, however, entirely acceptable as regards non-retroactivity of criminal law:

> The irrelevance of the question [for deciding on the case] also results from the second meaning of the proviso in Article 25, paragraph 1 [recte: 2], under which no one shall be subjected to criminal punishment, if not by virtue of a law that entered into force before the offense was committed. The last phrase of the proviso conforms to a strict legal principle, which has reinforced legal effects because of its constitutional rank, and under which those responsible for a criminal offense must not be subjected to the consequences of the modifications that might occur in criminal legislation after the offense was

[122] Article 25, paragraph 2 states that no one shall be subjected to criminal punishment if not by virtue of a law which was in force at the relevant time ('Nessuno può essere punito se non in forza di una legge che sia entrata in vigore prima del fatto commesso').
[123] Decision No. 37088 of 14 June 2013 of the Court of Cassation, V Criminal Section, pp. 55–56.
[124] In the judgment, the examination of the General Prosecutor's appeal takes a little more than one page, out of a total of 110.

> committed. Should even the Constitutional Court assume that it is competent for making additions in a criminal norm and should decide, contrary to its established jurisprudence, to expand non-applicability of statutory limitations by judgment (and in such a case, moreover, how to identify the further offenses to which statutory limitations do not apply, in the absence of *ad hoc* legislative provisions?), a judgment with this content would remain without consequences for the trial, because the facts of the proceeding would be precedent to this decision of the Constitutional Court.
>
> For the same reasons, the question of the constitutional legitimacy of Article 1 of Law No. 241 of 2006 is manifestly unfounded and irrelevant.[125]

On these grounds, the Supreme Court of Cassation rejected the appeal entirely.[126]

What renders this part of the *Bolzaneto* case interesting from a legal viewpoint is not so much that the Genoa General Prosecutor pointed out certain contradictions, already known, between criminal law and the Constitution, but the attempt he made, and which failed, to seek a remedy from the Constitutional Court. On the other hand, how to not share the Supreme Court's conclusions? Making law is not a job for the judiciary, but for Parliaments.

In any case, we should be grateful to the judiciary for remembering that violence inflicted by State agents to persons in their custody or under their control is not abuse of power, personal injury or manslaughter: it has a name, and the name is 'torture'.[127]

ORNELLA FERRAJOLO[128]

Cases — 'Extraordinary Rendition', State Secrecy, Immunity of State Agents: further Developments in so called Abu Omar Case.

- Decision of the Court of Appeal of Milan, III Criminal Section, 1 February 2013 <http://www.penalecontemporaneo.it/upload/1362301674Sentenza%20Medero%20dpc.pdf>
- Decision of the Court of Appeal of Milan, IV Criminal Section, No. 985 of 12 February 2013 <http://www.penalecontemporaneo.it/upload/13652377772.pdf>

During 2013, further developments occurred in the *Abu Omar* case.[129] The facts of the proceeding, which have been qualified as 'kidnapping' under Article 605 of the *Criminal Code*, have been described by the competent courts as an 'extraordinary rendition' operation carried out by CIA agents on Italian territory with the complicity of members of the Italian intelligence community (SISMI) in breach of relevant human rights obligations and Italy's sovereignty. From an international law perspective, two issues have been discussed in the proceeding: first, whether the Italian government was permitted to rely on state secrecy to prevent the Court from assessing certain information and evidence in prosecuting the SISMI

[125] Decision No. 37088 of 14 June 2013 of the Court of Cassation, V Criminal Section, pp. 55–56.
[126] Ibid., p. 110.
[127] At the beginning of 2014, and following these cases, the Senate passed a draft bill on 'Introduction of the offense of torture into the Italian legal order' (5 March 2014, Act of the Senate No. 874) <http://www.senato.it/service/PDF/PDFServer/BGT/00750920.pdf>. The draft bill is currently under examination by the other branch of the Parliament. See Act of the Chamber of Deputies No. 2168 <http://www.camera.it/leg17/126?tab=&leg=17&idDocumento=2168&sede=&tipo=>.
[128] Ornella Ferrajolo is a senior researcher at the Institute for International Legal Studies of the National Research Council of Italy (CNR), Rome.
[129] As was reported in previous editions of the *Yearbook of International Humanitarian Law*, the case relates to the abduction of the suspected terrorist Abu Omar, which took place in Milan on 17 February 2003 and was followed by the illicit transfer of the victim to Egypt, where he was illegally detained and tortured.

personnel, particularly considering the fact that the allegations involved serious violations of fundamental human rights;[130] and second, the question of whether Italy had or did not have jurisdiction over US citizens who were in charge of diplomatic and consular functions at the relevant time.

On 1 February 2013, a further judgment was issued by the Court of Appeal of Milan, III criminal section[131] in a separate proceeding brought against three US citizens, namely J. Castelli, R.H. Russomando and B. Medero. The three accused were members of the diplomatic or administrative and technical staff of the US Embassy in Rome at the time the relevant acts occurred.[132] The accused had been among the accused in the main proceeding. However, in 2009, the Court of Milan ruled that they could not be prosecuted by reason of their diplomatic immunity under international law. Although the prosecutor appealed this decision, the Court of Appeal was prevented from rendering a decision on the issue due to a defect in service process and as a consequence, the trial against these three persons was deleted from the parent process and continued separately.[133]

In its judgment of 2013, the Court of Appeal of Milan noted, as a first step, that the conclusions regarding the functional immunity of consular agents reached by the Supreme Court in its judgment No. 46340 of 2012, though significant, were not binding in a separate proceeding.[134] Furthermore, the immunity issues under examination were similar, but not identical in the two cases because the exemption from jurisdiction that diplomatic agents enjoy under the 1961 Vienna Convention[135] is broader than that recognized under the 1963 Vienna Convention in respect of consular agents.[136] On the other hand, one of the observations made by the Supreme Court in relation to the official functions of the accused was of a general character, namely that the extraordinary rendition of Abu Omar did not occur in the performance of their duties as consular agents, but in their capacity as CIA agents. For the Court of Appeal, this point was also relevant in assessing whether Italy had jurisdiction over the diplomatic agents accused of having participated in the same offense.[137]

As a second step, the Court of Appeal recalled the arguments on which the Court of first instance had founded its decision in respect of Mrs. Castelli and Russomando and Ms. Medero:

> [A]n absolute immunity from criminal, civil and administrative jurisdiction is recognized to the diplomatic agents, for any acts committed in the performance of their functions. … In the case in which a person accused or indicted in a proceeding in Italy enjoys absolute functional immunity (as it is the case for the Chief and the members of a diplomatic staff, or the members of the administrative and technical staff of a diplomatic mission), this person cannot be prosecuted during his/her staying in Italy, nor after he/she has left the

[130] State secrecy was opposed, at different stages of the proceeding, by three subsequent Presidents of the Council of Ministers (Mr. Berlusconi, Mr. Prodi and Mr. Monti).
[131] Decision of the Court of Appeal of Milan, III criminal section, *Diritto penale contemporaneo* (1 February 2013) <http://www.penalecontemporaneo.it/upload/1362301674Sentenza%20Medero%20dpc.pdf>.
[132] Most precisely, Mr. Castelli, who was indicated by the Court of Milan as the CIA responsible in Italy, was accredited as a member of the US diplomatic staff, while Mr. Russomando and Ms. Medero were, respectively, First and Second Secretary at the US Embassy. See ibid., pp. 14–15.
[133] These facts are summarized in the Decision of the Court of Appeal of Milan, pp. 6–7.
[134] Ibid., p. 32.
[135] *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964).
[136] *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967).
[137] Decision of the Court of Appeal of Milan, p. 35.

> Italian territory, for any offense he/she might have committed in performing diplomatic functions.[138]

The Court of Appeal also considered the opposing arguments of the Prosecutor:

> A kidnapping has been regarded [by the Court of Milan] as being included in the functions of diplomatic agents. … However, the Vienna Convention does not, and may not include among these functions the abduction of persons, a conduct which is qualified as a criminal offense into the domestic legal order, and which is wrongful, in addition, under international law, where it takes the disturbing name of 'enforced disappearance'. The Prosecutor also observed that, though Italy did not ratify the 2007 Paris *Convention for the Protection of All Persons from Enforced Disappearance*,[139] nonetheless, the factual situation inherent to any enforced disappearance is a serious breach of fundamental human rights. The Prosecutor further noted that the Court of Milan had asserted, in its judgment, that the conduct of the accused had complied with norms and guidelines issued by the U.S. authorities, without mentioning, however, any evidence of this fact. Moreover, according to the Prosecutor, the judgment was contradictory on this particular point, considering that, on the other hand, the Court of Milan had rejected an instance of the accused aimed at applying the exempting circumstance set forth in Article 51 of the *Criminal Code*, i.e. the circumstance that the accused had carried out the 'extraordinary rendition' of Abu Omar in the performance of an official duty.[140]

The Court of Appeal further observed:

> Even in the case that the accused had put in place this conduct in the performance of their official duties (and we know this was not the case), there are limits to recognition of functional immunity under international law. It is necessary to assess whether the activity in question was in breach of national legislation. Everybody sees that the kidnapping of a person with such a purpose (torture) is a violation of fundamental human rights. … The kidnapping of Abu Omar was carried out, indeed, in view of his transfer in a country (Egypt) where interrogation under torture is admitted, and where Abu Omar was actually tortured. It is just the purpose of the kidnapping, inherent to any 'extraordinary rendition' operation, that renders the conduct of the accused contrary to international humanitarian law. Torture is prohibited not only by the pertinent European norms (*Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 1950), but also under certain UN conventions (*UN Covenant on Civil and Political Rights*, New York, 1966, and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, New York, 1984), and this circumstance suffices to conclude that the conduct in question cannot be a protected one. …
>
> As a conclusion and by reason of the conduct of the accused, no functional immunity can be recognized to them; it derives that Italy has full jurisdiction over them.[141]

On these grounds, the Court of Appeal declared all the accused guilty of having participated in Abu Omar's kidnapping. Ms. Medero and Mr. Russomando were sentenced to six years' imprisonment and Mr. Castelli was sentenced to seven years.[142]

Following this judgment, on 12 February 2013, the Court of Appeal of Milan ruled that each of the five SISMI members involved in the case was guilty of 'kidnapping', with

[138] Ibid., p. 19.
[139] *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 20 December 2006, 2715 UNTS, Doc.A/61/448 (entered into force 23 December 2010).
[140] Decision of the Court of Appeal of Milan, pp. 25–26.
[141] Ibid., pp. 35–36.
[142] Ibid., p. 49.

various aggravating circumstances, for having cooperated with the CIA agents who carried out Abu Omar's extraordinary rendition in Milan. Three of them (Mrs. L. Di Gregori, R. Di Troia and G. Ciorra) were sentenced to a six-year term of imprisonment and two high-ranking officers (Mrs. M. Mancini and N. Pollari) were sentenced to nine years and ten years, respectively.[143] This conclusion was different to the one reached by the same Court in 2011 because of a different role played by state secrecy. In 2011, due to the refusal of the government to permit the Court to rely on State secrecy, the Court of Appeal had not taken into account any of the evidence concerning the conduct of the SISMI members involved. By contrast, in this latest ruling, the Court of Appeal was bound by judgment No. 46340 of 2012 of the Supreme Court and therefore had to distinguish between evidence properly excluded by State secrecy, on the one hand, and other evidence which was admissible, on the other hand. The Court of Appeal found that the admissible evidence was sufficient to establish the criminal responsibility of the SISMI members.

Although the arguments and reasoning of the Court of Appeal repeat, for the most part, those of the Supreme Court in its decision of 2012, one point deserves attention, in that it illuminates certain legal concepts which had been improperly invoked to attempt to justify the extraordinary rendition of Abu Omar and the reliance on state secrecy by the Executive:

> It is useful to repeat, once again, that the fact that certain of the accused persons were SISMI members does not suffice *per se* for qualifying the conduct in question, which was illicit, as an activity carried out in performing official functions; and, in the same way, the fact that the persons who conducted this operation were CIA agents is not enough to regard this operation as part of the institutional relations that exist between the two intelligence communities. In a democratic state, institutional relations cannot include any activity prohibited by law.[144]

Ten years after the extraordinary rendition operation, Italian courts have recognised that neither functional immunity nor State secrecy were permissible obstacles to the punishment of those responsible for the crime. This result is even more important because the *Abu Omar* case has been the first — and perhaps will be the only — case in which authors of an 'extraordinary rendition' operation pertaining to the CIA antiterrorism program have been prosecuted in an EU member State.

Despite this, the sentencing of the two high-ranking officers and the other SISMI members was at risk of being overturned by a new decision of the Constitutional Court. Pending the (supposed) final decision in respect of the SISMI members, the Italian government has again invoked the jurisdiction of the Constitutional Court in relation to the continuing conflict of competence between the Executive and the judiciary concerning this particular aspect of the case. On 21 October 2013, the Constitutional Court issued Order No. 244,[145] which declared the proceeding admissible on the basis that *a*) ~~that~~ the Supreme Court of Cassation had given, in its judgment No. 46340 of 2012, an erroneous interpretation of the legislation on State secrecy as regards the respective competences of the executive and the judiciary; and *b*) ~~that~~ the Court of Appeal (IV criminal section) had violated the principle of cooperation between the institutions by relying on documents covered by state secrecy and, further, by not suspending the proceeding to wait for the Constitutional Court to render its decision on an issue relevant to the case.[146]

[143] Ibid., p. 135.
[144] Ibid., p. 108.
[145] *O.J.* No. 43 of 23 October 2013.
[146] The prevision has been confirmed by judgment No. 24 of 14 January 2014 of the Constitutional Court <http://www.cortecostituzionale.it/actionPronuncia.do>. Subsequently, in February, a further judgment of the

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Legislation — NATO Status of Armed Forces

- Decree of the President of the Italian Republic No. 27 of 11 May 2013 concerning the Regulation on the Implementation of Article VII of the North Atlantic Treaty on the Status of their Armed Forces [DPR 11 marzo 2013, n. 27, Regolamento recante applicazione dell'articolo VII della Convenzione fra i paesi aderenti al Trattato del Nord Atlantico sullo «status» delle loro Forze armate]. Entered into Force on 31 March 2013[147] <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:presidente.repubblica:decreto:2013-03-11;27>

The Regulation enacted by the President of the Republic aimed to update the implementing Act related to Article VII of the North Atlantic Treaty on the Status of their Armed Forces. The original regulation was enacted by Decree of the President of the Republic No. 1666 of 2 December 1956, concerning the renunciation to the Italian criminal jurisdiction on military personnel. The Decree No. 1666/56 was adopted before the entry into force of the actual *Code of Criminal Procedure* and made reference to institutions that do not exist anymore.

The Decree No. 27 of 2013 updates the former regulation in order to bring it into line with the current judicial system. For example, any reference to the 'Pretore', a judicial organ which was removed by laws reforming Italian criminal procedure, is substituted with a reference to the 'Prosecutor'. Furthermore the new Decree of 2013 states that the acceptance of the jurisdiction by the Italian State can be made at any stage of the proceeding, removing the pre-existing provision fixing a term in which the State could accept jurisdiction. This is consistent with the *Code of Criminal Procedure* of 1988, according to which any evidence can be admitted during the proceeding so that any right can be exercised until the end of the proceeding.

Presidential Pardon — Abu Omar Case

- President of the Republic, *Grazia del Presidente Napolitano ai sensi dell'art.87 comma 11 della Costituzione* (5 April 2013) <http://www.quirinale.it/elementi/Continua.aspx?tipo=4&key=14800>

On 5 April 2013, the President of the Republic, Giorgio Napolitano, pardoned the American Colonel Joseph Romano III in relation to the decision of the Milan Court of Appeal on 15 December 2010. Colonel Joseph L. Romano III was working with NATO and was condemned for its participation in the extraordinary rendition of the Egyptian citizen Osama Moustafa Hassan Nasr (better known as the imam Abu Omar), abducted and sent to Cairo, where he was tortured.[148] The legal basis invoked by the Head of State is the Decree No. 27 of 2013. The other motivations invoked are mainly political in nature.[149]

Court of Cassation annulled the sentencing of all the SISMI members by reason of state secrecy. Cf. 'Caso Abu Omar, La Cassazione proscioglie Pollari e Mancini grazie al segreto di stato', ADNkronos, 24 February 2014 <http://www.adnkronos.com/IGN/News/Cronaca/Caso-Abu-Omar-la-Cassazione-proscioglie-Pollari-e-Mancini-grazie-al-segreto-di-Stato_321263272020.html>. If one considers that all the CIA agents involved in the case were sentenced *in absentia*, it is clear that, at the end of the criminal proceeding for the Abu Omar 'extraordinary rendition', none of the convicted persons was effectively punished.

[147] Published in *Gazzetta Ufficiale* No. 76 of 30 March 2013.

[148] See 14 *YIHL* (2011) pp. 37–38.

[149] A. Pugiotto, 'Fuori dalla regola e dalla regolarità: la grazia del Quirinale al colonnello USA' <http://www.rivistaaic.it/sites/default/files/rivista/articoli/allegati/2_2013_Pugiotto.pdf>.

In his public notice announcing the pardon, the President recalled the sensitive historical context in which the crime was committed, referring to the 11 September attacks. The President also made reference to the Obama Administration's new approach to national security, the necessity to maintain friendly relationships with the US (as both Italy and the US were engaged together in the promotion of the democratic values), and the fact that the decision was based on the same principles that Italy would like to be applied for its two marines in India.

The pardon was given notwithstanding a dissenting advisory opinion of the General Prosecutor of Milan. Some questions arise by the mention of the new Decree as a legal basis for the pardon, as, even if it was in force when Col. Romano was condemned, it was not applicable to that case because it was under the *exclusive* (and not concurrent) jurisdiction of Italy.[150]

Under Article 87 (9) of the *Italian Constitution*, the President of the Republic may grant pardons, but according to the Constitutional Court, he can exercise this faculty only when, in the light of Article 27 of the Constitution, the pardon is functional to the rehabilitation of the pardoned or when it can be justified for 'humanitarian reasons' (to be nominated on a case by case basis). These limits are designed to safeguard the rule of law, ensuring a balance among the constitutional powers, and avoid excessive interference of the executive in the domain of the judiciary.

VALERIA EBOLI

Legislation — Italian Participation in International Missions

- Law No. 12 of 1 February 2013 'Conversion into Law of the Decree-Law No. 102 of 28 December 2012, 'Extension of Time of the Missions of the Armed and Police Forces, Interventions for Development Cooperation and Support of Reconstruction Processes and Participation to the Initiatives of the International Organizations for the Enhancement of the Peace and Stabilization Processes' [Legge 1 febbraio 2013, n. 12, Conversione in legge, con modificazioni, del decreto-legge 28 dicembre 2012, n. 227, 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]. *E*ntered into force on 5 February 2013.[151]
  <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2013-02-04&atto.codiceRedazionale=13G00037&currentPage=1>
- Law No. 135 of 9 December 2013 'Conversion into Law of the Decree-Law No. 114 of 10 October 2013, 'Extension of Time of the Missions of the Armed and Police Forces, Interventions for Development Cooperation and Support of Reconstruction Processes and Participation to the Initiatives of the International Organizations for the Enhancement of the Peace and Stabilization Processes' [Legge 9 dicembre 2013, n. 135, Conversione in legge del Decreto-Legge 10 ottobre 2013, n. 114, '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

[150] Court of Cassation, V Penal Section, Decision No. 2099 of 19 September 2012, registered on 29 November 2012 pp. 67–71. It would not be a case of concurrent jurisdiction because in the US the extraordinary renditions are lawful as based on orders enacted by the Congress or the President.
[151] Published in *Gazzetta Ufficiale* No. 29 of 4 February 2013.

internazionali per il consolidamento dei processi di pace e di stabilizzazione]. *E*ntered into force on 10 December 2013.[152]
<http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2013-12-09&atto.codiceRedazionale=13G00179&currentPage=1>

In 2013, the Italian government issued two decree-laws — which were subsequently converted into law by the Parliament — aimed at authorizing the participation of the Italian armed and police forces, and civilians in international missions and to finance such missions. The 2013 laws under review concerned the general aspects related to the missions such as the financing, administrative procedures necessary for deploying military staff abroad, legal and economic treatment of such staff (including civilians), criminal law applicable to soldiers and humanitarian activities carried out to sustain civilians in areas of crisis.

The issuance of such laws is necessary as Italy lacks a general legal framework to regulate missions abroad and therefore specific acts are needed from time to time. Some bills providing for an overall regulatory system of international missions (including administration, financing, governmental and parliamentarian authorizations, execution of humanitarian activities) have not yet been approved.[153] The adoption of such an overall bill would prevent the Parliament from adopting two or more specific authorizing laws each year.

By Law No. 12 of 1 February 2013 and Law No. 135 of 9 December 2013, the Parliament regulated the deployment of several missions for the first and the second part of the year, respectively, authorizing the employment of 5564 military personnel. They were employed within the framework of missions established by the UN, EU and NATO in 25 Countries.[154]

The first act, Law No. 12/2013, authorized the continuation of the Italian participation in international missions until 30 September 2013 and in particular the participation of military personnel in the following missions: International Security Assistance Force (ISAF) and EUPOL AFGHANISTAN in Afghanistan; United Nations Interim Force in Lebanon (UNIFIL), comprehensive of UNIFIL Maritime Task Force; Multinational Specialized Unit (MSU); European Union Rule of Law Mission in Kosovo (EULEX Kosovo), Security Force Training Plan in Kosovo and Joint Enterprise in the Balkans; EU mission ALTHEA in Bosnia-Erzegovina, in whose framework the Integrated Police Unit (IPU) is also operating; Active Endeavour in the Mediterranean Sea; 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); mission for the assistance of the Albanian Armed Forces; EU antipiracy mission Atalanta and NATO Operation Ocean Shield; missions for the support of military personnel employed in Afghanistan in United Arab Emirates, Bahrain, Qatar and Tampa; EU missions EUTM Somalia and EUCAP Nestor and other EU initiatives for the regional maritime capacity building in the Horn of Africa and the Western Indian Ocean; employ of personnel for supporting, training and assisting Libya; EU surveillance mission in Georgia (EUMM Georgia); United Nations Mission in South Sudan (UNMISS); EU mission EUCAP Sahel Niger and other initiatives for Mali.

The Law also authorized the participation of police personnel in the following missions: EU Rule of Law Mission in Kosovo (EULEX Kosovo) and UN Mission in Kosovo (UNMIK); EU Police Mission for the Palestinian Territories (EUPOL COPPS). Personnel

[152] Published in *Gazzetta Ufficiale* No. 288 of 9 December 2013.
[153] Bills No. A.C. 1820, A.C. 2605 and A.C. 2849 were presented in 2008. For the related debate, see <nuovo.camera.it/126?pdl=1820&tab=1&leg=16>.
[154] For the Official Report, see <http://www.difesa.it/OperazioniMilitari/Pagine/RiepilogoMissioni.aspx>.

of the 'Corpo della guardia di finanza' (custom officers) were authorized to take part in the International Security Assistance Force (ISAF) mission in Afghanistan and the EU Rule of Law Mission in Kosovo (EULEX Kosovo), the mission in Libya.

The participation of a judge in the mission EUJUST LEX-Iraq was authorized, as well as the participation of military personnel of the military corps of the Italian Red Cross in the international missions in Afghanistan and the United Arab Emirates.

Furthermore, the law authorised expenses necessary to satisfy the primary needs of the local population in Afghanistan (up to EUR 5,635,000), in Lebanon (up to EUR 800,000), in the Balkans (up to EUR 104,400) and the Horn of Africa (up to EUR 20,000).

As far as the applicable criminal law to the military personnel abroad is concerned, Article 3 provided for the application of the provisions contained in Article 5 of the Decree-Law No. 209/2008 as converted into Law No. 12/2009, and the Decree-law No. 152/2009 as converted by law No. 197/2009.

Article 5 gave details about the development cooperation initiatives, indicating the funds to be used. In particular, funds have been granted for Afghanistan, Iraq, Libya and neighbouring countries, Myanmar, Syria and its neighbouring countries, Sudan, South Sudan, in order to ensure the improvement of living conditions of the people and the refugees, civilian reconstruction and humanitarian demining.

With regard to the support for the reconstruction and stabilization processes, EUR 3,948,126 has been granted to the benefit of fragile countries and those in conflict or post-conflict situations, and in favour of the Union for the Mediterranean Sea. Furthermore, EUR 700,000 was given to the UN DPA Trust Fund for Middle East and North Africa and the trust fund for the UN contact Group for the fight against piracy. Other civilian and diplomatic activities, such as those done in the framework of the OSCE, were funded.

Law No. 135/2013 was adopted to extend the Italian participation in international missions authorized by Law No. 12/2013 from 1 October to 31 December 2013. The first part of the Law 135/2013 regulated the extension of the military and police missions authorized by the previous law. The second part concerned the interventions for development cooperation, in support of peace processes and the enhancement of stabilization.

Other provisions related to the renewal of the authorization for the participation of the armed or police forces and custom officers in such missions.

The missions envisaged are substantially the same as the previous decree-law relating to the first part of the year. It is only worth recalling that the provisions on the mission in Mali are more detailed, with reference to the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA).[155] The Law also contained certain financial provisions, providing more stringent obligations for financial reporting, in line with domestic legislation on spending reviews.

VALERIA EBOLI

Cases — Mare Nostrum Operation: An Humanitarian and Military Mission

☛ Statement of the Italian Presidency of the Council of Ministers, 14 October 2013 <http://www.governo.it/GovernoInforma/Multimedia/dettaglio.asp?d=73287>

[155] The Mission was established by UNSC Res. 2100/2013, UN Doc. S7RES/2100, 25 April 2013.

On 14 October 2013, after a meeting on immigration emergency, the Italian government announced the launch of the humanitarian and military operation called *Mare Nostrum*.[156]

Following the shipwreck of 3 October 2013, which resulted in the deaths of 366 migrants off the Lampedusa coast, the government unilaterally decided to strengthen the national surveillance system in the Sicily Channel and the Libyan Sea through the operation *Mare Nostrum*, with the purpose of rescuing migrants and preventing further maritime disasters.

According to the then Minister of Defence, Mario Mauro, the humanitarian military operation, which started on 18 October 2013, aimed to 'boost [the current] surveillance and rescue system on the high seas, and to increase security for human lives and facilitate control of migration channels'.

The Minister of the Interior, Angelino Alfano, highlighted that Italy's border position would also be strengthened by the operation *Mare Nostrum*. Minister Mauro noted that the ships would be used both to identify the mother ships used by the traffickers and once spotted, the ships would be escorted to the nearest safe port in compliance with international law. Minister Mauro said that '[i]f there are not any migrants in need of medical assistance and if the ship is able to sail, it will be taken to the safest and nearest port, not necessarily Italian'. The operation allows the opportunity to intercept and confiscate the ships and arrest the crews.[157]

The operation, which included experts from different Italian humanitarian aid organizations, also played a deterrence role as participating units were tasked to approach the home ports of migrant boats in order to intercept traffickers before they could 'jump ship'. Furthermore, it aimed at discouraging and stemming human trafficking, human smuggling as well as illegal migration.

Italy has ratified relevant international conventions concerning the fight against human trafficking including the UN Convention against Transnational Organized Crime and its supplementing Protocols and the Council of Europe Convention on Action against Trafficking in Human Beings.[158]

The *Mare Nostrum* mission fits within the scope of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) established by the Council of the European on 26 October 2004.[159]

During the European Council of 24–25 October 2013, the Italian government, building upon a national initiative, moved for a strengthening of the Frontex Agency in order to support the humanitarian action of *Mare Nostrum.*

This resulted in the launch of EUROSUR, a pan-European system of land and sea border surveillance, under which Member States can exchange information and data in real time to facilitate the analysis of intervention strategies.

The EUROSUR Regulation reads:

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[156] The *Mare Nostrum* operation is composed of personnel from the Military Navy, Army, Air Force, Carabinieri, Costumers Officers (Guardia di Finanza) and Coast Guard, flanked by staff from the Ministry of the Interior and the State Police.

[157] Statement of the Italian Minister of the Interior, Mr. Angelino Alfano, and Statement of the Italian Minister of Defence, Mr. Mario Mauro (14 October 2013) <http://www.governo.it/Notizie/Palazzo%20Chigi/dettaglio.asp?d=73282>.

[158] See 13 *YIHL* (2010) pp. 564–568.

[159] European Council, Regulation No. 2007/2004, *Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, 26 October 2004 <http://frontex.europa.eu/assets/About_Frontex/frontex_regulation_en.pdf>.

> The establishment of a European Border Surveillance System ('EUROSUR') is necessary in order to strengthen the exchange of information and the operational cooperation between national authorities of Member States as well as with the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union established by European Council Regulation No 2007/2004.[160]

EUROSUR will provide those authorities and the Agency with the infrastructure and tools needed to improve their situational awareness and reaction capability at the external borders of the Member States of the Union for the purpose of detecting, preventing and combating illegal immigration and cross-border crime and contributing to ensuring the protection and safety of migrants.

The operation Mare Nostrum continues throughout 2014.

ANDREA CRESCENZI[161]

Cases — Terrorist Attack in Nassiriya

☛ Court of Cassation, First Criminal section, Judgment No. 11994 of 30 January 2013 <http://static.ilsole24ore.com/content/AltraDocumentazione/body/13800001-13900000/13874213.pdf>

The decision of the Court of Cassation concerned proceedings against the Colonel of the 'Carabinieri', Georg Di Pauli, one of the three Italian officers[162] accused of not having put in place all necessary measures to ensure the safety of the Italian base 'Maestrale' in Nassiriya (Iraq) during a terrorist attack on 12 November 2003. On this date, a vehicle crashed the gate of the headquarters of the MSU (Multinational Specialized Unit) of the Italian 'Carabinieri', causing the explosion of the ammunition depot base and the deaths of several people, including 19 Italians.[163]

The investigation of the attack began soon after the massacre, when the military prosecutor of Rome acquired documentation and heard several witnesses. In the beginning, the military prosecutor asked the Military Court of Rome to proceed against the three officers for 'omission of military defense measures' under Articles 47, 98 and 99 of the *Military Criminal Code of War*. Pursuant to the entry into force of the Law No. 247 of 2006, which applied the Military Criminal Code of Peace to offences committed by military personnel employed in international missions, including the Mission 'Antica Babilonia', the charge was changed to 'malicious and aggravated destruction of military property' ('*distruzione pluriaggravata colposa di opere militari*') under Articles 40 of the Criminal Code, and 47 (2, 3 and 5), 167 (1st and last paragraph) of the *Military Criminal Code of Peace*. The

[160] Regulation No 1052/2013 of the European Parliament and of the Council, *Establishing the European Border Surveillance System (Eurosur)*, 22 October 2013 <http://frontex.europa.eu/assets/Legal_basis/Eurosur_Regulation_2013.pdf>.

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[162] Colonel Di Pauli was responsible for the security at the base main gate. The other two were Army Generals Vincenzo Lops and Bruno Stano, respectively commanders of the Italian base from 20 June 2003 – 7 October 2003 and from 8 October 2003 until the attack. They were responsible for the overall security, including identifying possible threats.

[163] See 6 *YIHL* (2003) p. 536. The Italian military mission in Iraq (Operation 'Antica Babilonia') was carried out in the context of the Anglo-American military Operation 'Iraqi Freedom', which began in March 2003 and terminated in December 2011. On the Italian Mission see 6 *YIHL* (2003) pp. 527–528, 529–531.

defendants were charged with the offence of a failure to adopt adequate security measures at the Italian base in connection with repeated threats of terrorist attacks.

The cases concerning the three officers followed different trial proceedings because Generals Lops and Stano chose the summary procedure.[164] In the decision under examination, the Court of Cassation ruled on the appeal brought by the civil parties against Judgment No. 37/2011 of the Military Court of Appeal of Rome which discharged Colonel Di Pauli. The civil parties contested the decision on several legal grounds. First of all, they affirmed that when the terrorist attack of Nassiriya occurred the *Military Criminal Code of War* applied to Italian military staff employed in the Mission 'Antica Babilonia' and therefore, the Military Court of Appeal had erred when it applied the *Military Criminal Code of Peace* to the case. In the second place, the civil parties argued that the reasoning of the Military Court of Appeal was illogical and contradictory since it ignored that the accused had the duty to adopt specific security measures for the Italian base, including passive defence measures aimed at preventing or at least reducing the damages of a terrorist attack. The plaintiffs alleged that by virtue of Italian intelligence, the commanders had warning of an 'imminent attack' on the base but that despite this information, the accused did not reinforce the base and ignored the warning, in breach of his duty to protect the safety of the base and soldiers.

With regard to this omission, the Military Court of Appeal found the accused not guilty ruling that the officer did not have the power to move the base to a safer place such as outside the city of Nassiriya because the humanitarian character of the Italian Mission forced the soldiers to maintain a direct contact with the Iraqi people. Furthermore, the Military Court of Appeal specified that the accused had indeed adopted some measures to reinforce the Italian base against mortar attack but not against car bombs because this risk was considered less probable. According to the Military Court, even though Di Pauli was acquainted with this risk, he did not commit to the only effective remedy to avoiding the terrorist attack, namely closing the street to the Italian base, because the intelligence information suggested that a car bomb attack was highly improbable.

With Judgment No. 11994 of 2013, the Court of Cassation reiterated the applicability of the *Military Criminal Code of Peace* to the case in accordance with its previous case law.[165] With regard to the non-guilty verdict, the Court of Cassation affirmed that the ruling of the Military Court of Appeal was illogical and incoherent. For these reasons, the Supreme Court annulled the decision of the Military Court of Appeal with regard to its civil effects and remanded it to the competent civil court for a new judgment.

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[164] With judgment of 20 December 2008, the Military Tribunal of Rome acquitted Lops and sentenced Stano to two years of military imprisonment and ordered compensation for damages in favour of the civil parties. This judgment was appealed and with the decision of the Military Court of Appeal of 24 November 2009, Lops and Stano were discharged under Article 51 of the *Criminal Code*, which excludes punishment for those who exercise a right under or obey a lawful order prescribed by a law or by a public authority. According to the Military Court of Appeal's reasoning the field commanders were obliged to maintain the base in the center of the city (and not to move it to another safer place) in order to respect the humanitarian purpose of the Mission which required direct contact with the Iraqi people. For the Military Court of Appeal 'the synthesis between the exigencies to realize the Mission's objectives and to guarantee the security of the base was not up to the field commanders but to the superior authorities', such as the Italian Parliament and the government. The judgment of the Military Court of Appeal was appealed by the civil parties and the Court of Cassation's Decision of 20 May 2011 decided that: a) concerning the position of the General Stano the judgment of Military Court of Appeal was quashed only in respect of civil liability and was remanded to the Court of Appeal of Rome for a new decision; and b) regarding General Lops the appeal was rejected.

[165] Judgments No. 25811 of 2007, 26316 of 27 May 2008, and 31420 of 28 May 2008. See 10 *YIHL* (2007) pp. 368–369; 11 *YIHL* (2008) p. 513.

As for the Nassiriya Massacre, it is important to recall that on 12 November 2013, the 'Day of remembrance in honor of the civilian and military victims of international peacekeeping missions' was celebrated to commemorate the 10th Anniversary of the terrorist attack. On this occasion, the Italian President of the Republic delivered a message to the Minister of Defense in which he paid tribute to those who died performing a duty while serving Italy and the international community. According to the President:

> The military and civilians who, even at the risk of their life, working in crisis areas, in many troubled regions of the world, are the expression of a country that believes in the need of joint efforts for the safety and stability. They are the symbols of a strong engagement for the protection of human rights and the peaceful cooperation among peoples.

VALENTINA DELLA FINA

Cases —Transnational Organized Crime

☛ Supreme Court of Cassation, United Criminal Section, Judgment No. 18374 of 31 January 2013
<http://www.penalecontemporaneo.it/upload/1366821077SSUU%2018374%2013.pdf>

By Judgment No. 18374/2013, the Supreme Court of Cassation of Italy clarified the meaning and the limitations of 'transnational organized crime' and the concept of 'criminal organized group'. The Court rejected the appeal of Marco Adami and Paolo Verrengia who were sentenced for criminal conspiracy in accordance with Article 416, paragraphs 1-3 and 5, of the *Italian Criminal Code*[166] with the aggravating circumstance provided by Article 4 of the Law No. 146 of 16 March 2006.

With Law No. 146/2006, Italy ratified and implemented in its domestic legal system the *United Nations Convention against Transnational Organized Crime and its Protocols* adopted by the UN General Assembly on 15 November 2000 and 31 May 2001, the so-called Palermo's Convention.[167] The Convention marked the achievement of efforts undertaken by the UN since 1994 to harmonize methodologies, structures and procedures to tackle transnational organized crimes namely a multi-faceted phenomenon which represents one of the major threats to human security.[168]

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[166] *Italian Criminal Code* art. 416, paras. 1–3, 5 concerning the crime of 'conspiracy' states that:

> when three or more persons associate together in order to commit more than one crime, the persons who promote, direct or organize the association shall be punished, for this unique offence, with imprisonment for 3 to 7 years. For the unique fact of participating in the association, punishment shall be imprisonment for 1 to 5 years. The heads are subject to the same penalty for the promoters. If the association is aimed at committing any of the offences referred to in the articles 600, 601, and 602 of the *Criminal Code*, as well as in Article 12, paragraph 3 bis, of the Legislative Decree No. 286 of 25 July 1998 (Consolidated text of provisions concerning immigration and the status of foreigners), the term of imprisonment shall be from 5 to 15 years in the cases foreseen in the first paragraph and from four to nine years in the cases foreseen in the second paragraph. [Not official translation].

[167] The Law was published in *Gazzetta Ufficiale* No. 85 of 11 April 2006 (S.O. No. 91) and entered into force on 12 April 2006. For a comment see 9 *YIHL* (2006) pp. 529–531.

[168] The *Palermo Convention* realized a comprehensive legal framework to respond effectively to transnational organized crimes. It was opened for signature by UN Member States at a High-level Political Conference of Palermo (Italy) on 12–15 December 2000 and entered into force on 29 September 2003. The Convention is further supplemented by three Protocols which target specific areas and manifestations of organized crime: the 'Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children', adopted by

The Court ruling recalled that, as provided by Article 1, the purpose of the Palermo Convention is to promote cooperation between States Parties to prevent and combat transnational organized crime more effectively. However, the perception of the inherent harmfulness of organized criminal groups operating in a transnational context has been apparent for a long time and has been widespread even at the European level. In this context, it is important to recall the Joint action 98/733/JHA of 21 December 1998 adopted by the Council of European Union on making it a criminal offence to participate in a criminal organization in the EU Member States.[169]

In order to bring the Italian legal system into conformity with these international obligations, Article 3 of the Law No. 146/2006 introduced the new concept of 'transnational crime' by laying the foundations for a modern doctrine of criminal liability[170] and assumed the existence of the 'organized criminal group', without regulating it.[171] Furthermore, Article 4 established a special aggravating circumstance for the crimes that were committed with the participation of a criminal organized group carrying out illicit activity on the territory of more than one State.

The case under examination concerned a complex mechanism of fraud in which the defendants played a prominent role as organizers. In particular, the two defendants were accused of associating with each other and with others for the purpose of committing an indeterminate number of crimes of fraudulent bankruptcy, money laundering activities, embezzlement and other illicit aimed at evading direct and indirect taxation. According to the findings, through an articulated fraudulent scheme based on the creation of dummy corporations, the defendants had misappropriated the assets of several companies. They also provided for the establishment of fictitious companies registered abroad, particularly in Bulgaria and the United Kingdom.

On these grounds, the 'Giudice dell'udienza preliminare' (Judge of the Preliminary Hearing) of the Tribunal of Rome on 26 April 2012 handed down its decision according to plea bargaining with the Public Prosecutor. In particular, the Tribunal sentenced the first of

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the General Assembly on 15 November 2000 (Resolution A/RES/55/25, Annex II); the 'Protocol against the Smuggling of Migrants by Land, Sea and Air' adopted by the General Assembly on 15 November 2000 (Resolution A/RES/55/25, Annex III); and the 'Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition' adopted by the General Assembly on 31 May 2001 (Resolution A/RES/55/255). See S. Betti, 'New prospects for inter-state co-operation in criminal matters: The Palermo Convention', 3 *Int'l Crim. L. Rev.* (2003); D. McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford, Oxford University Press, 2007); and G. Palmisano, 'Strumenti internazionali per la lotta al traffico dei migranti' in M. Carta, ed., *Immigrazione, frontiere esterne e diritti umani: profili internazionali, europei ed interni* (Roma, Teseo Editore, 2009).

[169] See 98/733/JHA Joint Action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the *Treaty on European Union*, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, published in EU *Official Journal* L 351 of 29 December 1998 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998F0733:EN:HTML>. Under Article 1 of the EU Joint Action 98/733/JHA 'criminal organization' means:

> a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities.

[170] See A. Centonze and G. Marino, 'I reati transnazionali e la Convenzione di Palermo', in B. Romano and G. Tinebra, eds., *Il diritto penale della criminalità organizzata* (Milano, Giuffrè Editore, 2013).

[171] Article 3 devolved to judges the power to rebuild this new concept on the basis of existing criminal figures in the *Italian Criminal Code*.

two defendants, Marco Adami, to imprisonment of 4 years and 6 months, and sentenced Paolo Verrengia to imprisonment of 3 years and 7 months. In determining the applicable penalties in both cases, the Judge took into account the special aggravating circumstance provided by Article 4 of the Law No. 146/2006.

The two prisoners appealed to the Court of Cassation claiming that the decision was based, *inter alia*, on an incorrect interpretation of Article 416 of the *Criminal Code* and of Article 4 of the Law No. 146/2006.

On 12 November 2012, the Court of Cassation found that it was competent to hear the case and submitted the case to the United Criminal Sections, which was required to resolve a conflict of interpretation arising from the decisions of individual sections of the same Court.[172]

As a first point, the Supreme Court clarified the meaning of 'transnational organized crime'. In particular, the Court noted that Article 3 anchored the qualification of transnationality on a combination of up to three factors. These factors are: the seriousness of the criminal activity determined by reference to the maximum penalty (a custodial sentence of not less than four years); the involvement of an organized criminal group; and the presence of a transnational element. In particular, under Palermo Convention an offence is transnational if: a) it is committed in more than one State; b) it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; c) it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; and d) it is committed in one State but produce its substantial effects in another State.

The Court pointed out that a series of substantive and procedural legal effects arise from the notion of transnational offence, even if Article 3 of the Law No. 146/2006 does not introduce any criminal punishment.

In resolving the conflict of legitimacy, the Court of Cassation also clarified the concept of 'organized criminal group'. Reaffirming the interpretation of the prevailing case law, the Court premised its reasoning on the argument that in the Italian criminal legislation the concept of 'organized criminal group' differs from the notions of 'concorso di persone' (participation in a crime) under Article 110 of the *Criminal Code* and of 'associazione per delinquere' (conspiracy) under Article 416 of the *Criminal Code*.[173] Moreover, the Court pointed out that the concept of 'organized criminal group' in Article 4 of the Law No. 146/2006 is to be found in Article 2, (a) and (c), of the Palermo Convention. This provision establishes that 'organized criminal group' means

> [a] structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit; … "Structured group" shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have

[172] A first strand of argument focused on the exemption of the drug-trafficking Association crime for which the Supreme Court of Cassation ruled that the special aggravating circumstance provided by Article 4 was incompatible with the association crime. See Supreme Court of Cassation (Section V), Judgment No. 1937 of 15 December 2010. This Court's decision disagreed with the prevailing interpretation given by the Court itself. Otherwise, the consolidated opinion of the Court provided for the application of the aggravating circumstance of transnationality also to the association crime.

[173] Among these different types of offences provided by the Italian criminal law, the Court pointed out that the notion of 'organized criminal group' is a *quid pluris* than 'concorso di persone' (Participation in a crime), but a *minus* than 'associazione a delinquere' (Criminal conspiracy).

> formally defined roles for its members, continuity of its membership or a developed structure.

In other words, the concept of 'organized criminal group' requires an aggregation with a certain stability between individuals joining together, a minimum level of organization, the non-random nature, aggregation for acting with the aim to commit only one specific crime and obtaining a financial or other material benefit. In conformity with Articles 3 and 4 of the Law No. 146/2006, the Court observed that this notion revealed a greater degree of dangerousness of the offense which justified the application of the aggravating circumstance. Therefore, in the opinion of the Court, it represented the *ratio* of the aggravating circumstance provided by Article 4 of the Law No. 146/2006.

Despite the difficulty of defining the different criminal figures, the Court clarified the interpretation of the criminal provisions on 'transnational organized crime' and 'organized criminal group' which has contributed to the implementation of the Palermo Convention in the Italian legal system.

ROSITA FORASTIERO

Cases — Definition of Terrorism

☛ Court of Florence, Office of the Preliminary Investigation Judge, Ordinance of 7 February 2013
<http://www.penalecontemporaneo.it/upload/1360261820Ordinanza%20terrorismo%20Firenze.pd>

The Ordinance of the Court of Florence dealt with the definition of terrorism in force in the Italian criminal law. The case originated from the arson of eight vans belonging to a cheese factory which was carried out by three members of the *Animal Liberation Front* (ALF), an international association whose objectives include liberating animals from places of abuse (such as laboratories, factories, breeding farms) through non-violent direct action and causing economic damage to factories exploiting animals. The arson was the last episode in a long list of actions carried out by ALF in Tuscany in a short period of time.

On 5 January 2013, one of the activists was kept in custody for a charge of terrorist acts and subversion of the democratic order. The Preliminary Investigation Judge considered as applicable to the case the aggravating circumstance set forth in Decree-law No. 625 of 1979, as converted into Law No. 15 of 1980, which provides that the penalty for 'terrorist offenses' is increased by half. In order to assess the aggravating circumstance, the Judge recalled the Article 270*sexies* of the *Criminal Code* concerning 'conducts for terrorist purposes'.[174] Under this provision 'conducts' having terrorist purposes are those:

> which, due to their nature or context, can cause considerable damage to a country or international organization and are committed in order to intimidate the population and force public authorities or an international organization to perform or restrain from performing any act or destabilize or destroy the fundamental political, constitutional, economic and social structures of a country or international organization, as well as the other conducts defined as terrorist or committed for the purpose of terrorism by conventions or other international law provisions which are binding for Italy.

According to the Judge, the case under examination came under Article 270*sexies* of the *Criminal Code* for the following reasons: a) the arson caused material damage with the aim

[174] The Article was introduced in the *Criminal Code* by Law No. 155 of 2005.

of intimidating the workers in the sector;[175] b) the acts were carried out by members of an association known at international level to be a terrorist association; and c) the transmission of the arson via internet meant that the act could provoke 'considerable damage' to the State because the public dissemination of the images was intended to garner support among people to carry out similar actions. Furthermore, the Judge underlined that the accused had written the objectives of the ALF (such as causing economic damage and revealing the mistreatment of animals) on the wall of the factory and transmitted them online following the arson and that this amounted to the offence concerning 'the destabilization or destruction of the fundamental political, constitutional, economic and social structures of a country' set forth in the Article 270*sexies*.

With regard to the Italian anti-terrorism legislation, it should be noted that the legislation has been refined over the years to take into account the development of the notion of terrorism, which is no longer necessarily limited to a single country, but has an increasingly transnational dimension.[176]

Most of the provisions introduced in the domestic legal system have been adopted to implement international obligations imposed by treaties, such as the 1997 *International Convention for the Suppression of Terrorist Bombings*[177] and the 1999 *International Convention for the Suppression of the Financing of Terrorism*,[178] as a means of responding to the threat posed by Islamic fundamentalist terrorism after the events of 11 September 2001[179] and also to apply EU law.[180]

Following the terrorist attack in the London tube underground on 7 July 2005, Italy adopted Decree-law No. 144 of 2005, 'Urgent measures to counter international terrorism', then converted with amendments into Law No. 155/2005. Although this Law did not define the concept of 'international terrorism',[181] it did introduce provisions on combatting terrorism

[175] The burned vans were parked in the area in front of the factory, but the fire also damaged an adjacent building.

[176] Since the 1970s, Italy has adopted anti-terrorist laws to fight against national terrorism. See C. Walter, S. Vöneky, V. Röben and F. Schorkopf, eds., *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Berlin, Heidelberg Springer 2003); G. Tappero Merlo and S. Marchisio, 'Italy', in Y. Alexander ed., *Counterterrorism Strategies. Successes and Failures of Six Nations* (Washington D.C., Potomac Books, Inc., 2006).

[177] With Law No. 34 of 2003, Italy ratified and executed the *International Convention for the Suppression of Terrorist Bombings* and Article 280 of the *Criminal Code* was modified to introduce the offences contained in the Convention. See 6 *YIHL* (2003) pp. 523 et seq.

[178] Italy ratified and executed the *International Convention for the Suppression of the Financing of Terrorism* with Law No. 7 of 14 January 2003 which establishes a series of pecuniary sanctions for those charged with terrorist offences.

[179] See Decree-Law No. 374 of 2001, 'Urgent measures to prevent and suppress crimes committed for the purposes of international terrorism', converted into Law No. 438 of 2001. The Law amended the *Criminal Code* to introduce the offence of conspiracy to commit acts of international terrorism or to provide assistance to criminal conspirators.

[180] See Council Regulation (EC) No. 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, implementing UN Security Council Resolutions 1267 (1999) and 1333 (2000); Council Regulation (EC) No. 2580 /2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, implementing UN Security Council Resolution 1373 (2001).

[181] Currently, there is not a universal definition of 'terrorism'. The divergences among UN Member States about the formulation of this definition prevented the adoption of a Comprehensive Convention on International Terrorism whose negotiations began at the end of 2000. See S. Marchisio, 'Recent Developments in Anti-Terrorism Law: How to Fill Normative Gaps', in D. S. Hamilton, ed., *Terrorism and International Relations* (SAIS Center for Transatlantic Relations, Johns Hopkins University, Washington, 2006).

into the *Criminal Code*.[182] In the formulation of these new criminal norms, the Italian legislature also took into account relevant EU law. In particular, the wording of the Article 270*sexies* reflects the first part of the Article 1(1) of the EU Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA) which reads as follows:

> Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organization where committed with the aim of:
>
> - seriously intimidating a population, or
>
> - unduly compelling a Government or international organization to perform or abstain from performing any act, or
>
> - seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization[183]

Contrary to the EU Council Framework Decision, the Italian legislature preferred not to include a detailed series of terrorist offenses in the Criminal Code in order to avoid the risk of having a non-exhaustive list. The consequence of this decision is that Article 270*sexies* only identifies the 'potential' of an act to cause damage to a country or international organization, without outlining the characteristics of such acts. This lacuna permitted the Preliminary Investigation Judge of Florence to apply Article 270*sexies* to the ALF member, even if it is unclear whether the criteria for terrorist act according to the abovementioned international conventions and the EU Council Framework Decision were satisfied.[184]

The extensive interpretation of the Article 270*sexies,* given by the Preliminary Investigation Judge, raises again the question of the lack of a clear-cut and universally accepted definition of terrorism. Such a definition should also be useful for domestic legal operators in order to interpret national criminal norms in the field and to fill possible domestic counterterrorism legislation gaps.

VALENTINA DELLA FINA

Treaty Action — Human Rights — Violence against Women

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[182] See 8 *YIHL* (2005) pp. 453 et seq. The *Criminal Code* currently in force punishes terrorist conduct both in the form of individual acts and actions committed by subversive or terrorist associations. See *Italian Criminal Code*, Title I 'Offences against the personality of the State', Chapter I, 'Offences against the international personality of the State' (Articles 270 et seq.).

[183] Article 1(1) lists a series of terrorist offences that Member States should punish in their domestic legislations. In the Ordinance under examination, the Preliminary Investigation Judge stated that the conduct of the accused was included in the list of the Article 1(1) of the EU Council Framework Decision of 13 June 2002, and that in particular, the conduct amounted to the terrorist offences 'causing extensive destruction to ... private property likely to endanger human life or result in major economic loss' (point d).

[184] See A. Valsecchi, 'I requisiti oggettivi della condotta terroristica ai sensi dell'art. 270 *sexies* c.p. (prendendo spunto da un'azione dimostrativa dell'*animal liberation front*)', *Diritto penale contemporaneo* (2013). The Author underlines that under the *International Convention for the Suppression of the Financing of Terrorism* terrorist conduct is that which is:

> intended to cause *death or serious bodily injury to a civilian*, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is *to intimidate a population*, or to compel a government or an international organization to do or to abstain from doing any act (emphasis added).

- Ratification of the *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence,* opened for signature on 11 May 2011, CETS No. 210 (not yet entered into force) <http://www.conventions.coe.int/Treaty/EN/Treaties/Html/210.htm>
- Law No. 77 of 27 June 2013, entered into force on 2 July 2013[185] <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2013;77>

With Law No. 77/2013, Italy ratified the *Convention on Preventing and Combating Violence against Women and Domestic Violence*, adopted by the Committee of the Ministers of the Council of Europe in Istanbul on 7 April 2011 ('Istanbul Convention').[186]

The Convention is the result of a series of instruments adopted by the Council of Europe to promote the protection of women against violence.[187]

As a regional binding instrument aimed at protecting women's human rights in the field of gender-based violence, the Istanbul Convention complements other relevant treaties on the same matter adopted both at the universal level, in particular the UN *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) of 1979 and its Optional Protocol of 1999, and at the regional level, such as the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* of 1994, and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* of 2003.

According to the UN Committee on the Elimination of Discrimination against Women's (CEDAW Committee) general recommendation No. 19 (1992) on violence against women, '[g]ender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'. The Committee also stated that the definition of discrimination contained in Article 1 of the CEDAW includes gender-based violence that is violence 'directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.'[188]

This violence may occur either in peacetime or in armed conflicts and therefore, Article 2(3) of the Istanbul Convention also provides for its application in situations of armed conflicts. The Convention represents a good example of the interaction between international human rights law (IHRL) and international humanitarian law (IHL), two sets of rules that, although different in scope, provide a complementary and mutually reinforcing protection for civilians not participating directly in the armed conflict and for those people who are directly involved.[189] As the International Court of Justice (ICJ) stated in its Advisory Opinion of 9

[185] Published in *Gazzetta Ufficiale* No. 152 of 1 July 2013.

[186] The Convention entered into force on 1 August 2014. The Convention is open for signature by the non-member States of the Council of Europe which have participated in its elaboration and by the European Union, and is open for accession by other non-member States (Articles 75–76).

[187] These include the Recommendation Rec(2002)5 on the protection of women against violence, the Recommendation CM/Rec(2007)17 on gender equality standards and mechanisms, and the Recommendation CM/Rec(2010)10 on the role of women and men in conflict prevention and resolution and in peace building.

[188] Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19* (11th session, 1992) <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>. The UN General Assembly, with Resolution 48/104 of 20 December 1993, adopted the Declaration on the Elimination of Violence against Women. The 1995 Beijing Declaration and Platform for Action identified the eradication of violence against women as a strategic objective to realize gender equality.

[189] Office of the High Commissioner of Human Rights, 'International Legal protection of Human Rights in Armed Conflicts' (New York, United Nations Publications, 2011) <http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf>. See F. J. Hampson, 'The

July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*:

> the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situation: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[190]

The right of women to be protected against violence falls within the ICJ's suggested framework, as the Istanbul Convention makes clear. The strict relationship between IHRL and IHL to combat gender violence is affirmed in the Preamble which recalls the most relevant universal and regional treaties on human rights, the *Rome Statute of the International Criminal Court*[191] and the basic principles of international humanitarian law, especially the *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War* (1949) and the Additional Protocols I and II (1977). Furthermore, in the Preamble, the Parties recognize 'the ongoing human rights violations during armed conflicts that affect the civilian population, especially women in the form of widespread or systematic rape and sexual violence and the potential for increased gender-based violence both during and after conflicts'.

It is important to highlight that with the adoption of the Istanbul Convention, the Council of Europe has strengthened the respect of both sources of international law (IHRL and IHL) in relation to the question of gender violence, in conformity with the Recommendation Rec(2002)5 on the protection of women against violence[192] and the Recommendation CM/Rec(2010)10 on the role of women and men in conflict prevention and resolution and in peace building. In line with the recognition of the complementarity between IHRL and IHL, Article 2(3) of the Convention provides for its application in times of peace and during armed conflicts.[193] Under the Istanbul Convention, therefore, the protection of women against violence does not cease during armed conflicts or periods of occupation.

For the purpose of the Convention, Article 3(1) contains the definition of 'violence against women'[194] that is understood as:

> a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual,

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Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body', 90 *International Review of the Red Cross* (2008).

[190] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports, 2004, p. 178, para. 106. See also *Legality or Threat of Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports, 8 July 1996, para. 25; *Case concerning Armed Activity on the Territory of the Congo (Democratic Republic of the Congo v. Uganda*), Judgment, ICJ Reports, 19 December 2005, paras. 216–220.

[191] Article 7 of the *Rome Statute* (crimes against humanity committed as part of a widespread or systematic attack directed against any civilian population) and Article 8 (war crimes) include crimes of violence committed largely against women such as rape and sexual violence.

[192] The Recommendation Rec(2002)5 of the Committee of Ministers is the milestone of the Council of Europe action to combat violence against women. The Recommendation defines violence against women as all forms of gender-based violence, whether perpetrated by family members, strangers within the community, state officials and/or in armed conflict.

[193] See Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, para. 38.

[194] The term 'women' includes girls under the age of 18 (Article 3(f)).

> psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

In becoming a party to the Istanbul Convention, Italy has assumed a series of obligations in order to protect women against all forms of violence, and to prevent, prosecute and eliminate violence against women, including domestic violence. These international obligations must be implemented in the Italian legal system by adopting new laws, modifying current legislation or practices, and even allocating adequate resources to prevent and combat all forms of violence covered by the Convention.[195]

Under the Convention, the Parties must refrain from engaging in any act of violence against women and ensure that public authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with its provisions (Article 5, para. 1). Furthermore, States Parties must take all necessary measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the Convention that are perpetrated by non-State actors (Article 5, para. 2). More generally, under Article 4, all legislative and other measures taken by the Parties to implement the Convention in the domestic legal orders must respect the principles of equality and non-discrimination between women and men.

In order to ensure the effective implementation of its provisions by the Parties, the Istanbul Convention has established a monitoring mechanism anchored by the Group of experts on action against violence against women and domestic violence (GREVIO)[196] and the Committee of the Parties. The monitoring procedure is based on reports that States Parties are required to submit periodically to GREVIO and on country visits made by the Group to monitor the implementation of the Istanbul Convention.[197]

VALENTINA DELLA FINA

Government Policy — Prison Overcrowding in Italy

☛ Message of the President of Italian Republic to the Houses of the Parliament concerning prison situation, 8 October 2013 <http://www.quirinale.it/elementi/Continua.aspx?tipo=Discorso&key=2764>

According to the Council of Europe's 2001 annual report on penal institutes,[198] the number of inmates in Italy corresponds to 110.7 prisoners per 100,000 inhabitants. In comparison with other European countries, this ratio is substantially comparable to that of Greece and France (respectively, 110.3 and 111.3), but Italy has one of the highest numbers of inmates in respect of available places (i.e. the index of 'prison overcrowding'). The latest data from the

[195] Chapters III, IV, V, VI, and VII of the Convention detail the obligations of States parties concerning 'Prevention', 'Protection and support', 'Substantive law', 'Investigation, prosecution, procedural law and protective measures', 'Migration and asylum'.

[196] GREVIO is an expert body composed of (a minimum of 10 and a maximum of 15) independent and highly qualified experts in the fields of human rights, gender equality, violence against women and domestic violence, criminal law and in assistance to and protection of victims of violence against women and domestic violence (Article 66).

[197] The monitoring mechanism is regulated in Chapter IX of the Convention. The report and conclusions of GREVIO are made public as from their adoption together with eventual comments by the Party concerned. The Committee of the Parties may adopt recommendations for the Party, on the basis of the GREVIO report. It is important to observe that, under Article 10, each Party must designate or establish one or more official bodies responsible for the co-ordination, implementation, monitoring and evaluation of policies and measures to prevent and combat all forms of violence covered by the Convention.

[198] On this report, see <http://www3.unil.ch/wpmu/space/files/2013/05/SPACE-1_2011_English.pdf >.

Department of Prison Administration (DAP) of the Italian Ministry of Justice, updated to 31 December 2013, shows that the number of detainees was 62,536, while capacity is 47, 615.[199]

On 8 October 2013, President of the Italian Republic, Giorgio Napolitano, addressed both houses of parliament on prison issues. During his mandate and according to the second paragraph of Article 87 of the *Italian Constitution*, he took several opportunities to address messages directly to parliament in order to focus attention on general matters relating to the state of the country and the Republican institutions.[200]

In his speech of 8 October 2013, the President recalled the ruling of the European Court of Human Rights on this issue. With the pilot judgment issued on 8 January concerning the case *Torreggiani and six other applicants v. Italy*, the Court affirmed that Italy had violated Article 3 (Prohibition of torture and other inhuman and degrading treatments) of the *European Convention on Human Rights*.[201] In this case, the Court held that the violation of the applicants' right to adequate detention conditions is not the result of an isolated incident. Rather, it derives from a chronic malfunctioning of the whole Italian prison system, which has affected and may continue to affect detainees. According to the Court, the circumstances of the case constituted a practice which was incompatible with the *European Convention of Human Rights*.[202]

As for the remedies to the structural and systemic prison overcrowding in Italy, the Court recalled the Council of Europe's recommendation to employ alternative penal measures to the greatest extent possible and to redirect penal policy toward the minimum recourse to incarceration to address the problem of the increase in the prison population.[203]

With regard to the implementation of the Convention, the Court of Strasbourg affirmed that, in relation to the conditions of detention, preventive and compensatory remedies have to be considered as complementary measures and for this reason, they should be employed together. Besides that, according to the Court, the best possible remedy is the rapid cessation of the violation of the right not to suffer inhuman and degrading treatment.[204]

Under Article 46 of the European Convention, States undertake to comply with the final judgment of the Court in which they are involved. According to the Italian Constitutional Court (starting from judgments No. 348 and 349 of 2007),[205] this commitment falls within the scope of application of Article 117 of the *Italian Constitution* which provides that the

[199] On statistical data on Italian prison population see, <https://www.giustizia.it/giustizia/it/mg_1_14.wp?facetNode_1=1_5_2&facetNode_2=3_1_6&facetNodeToRemove=2_0&all=true>.

[200] On the faculty of the President of the Republic to address messages to the Houses of Parliament, see, inter alia, R. Bin, G. Pitruzella, *Diritto costituzionale,* (Giappichelli, Torino, 2012) 272 et seq.

[201] *Torreggiani and others v. Italy*, European Court of Human Rights, Judgment, 8 January 2013.

[202] On doctrinal positions related to the case *Torreggiani*, see, inter alia, G. Della Morte, 'La *situazione carceraria italiana viola strutturalemente gli standard sui diritti umani* (a margine della sentenza Torreggiani c. Italia)', 1 *Diritti umani e diritto internazionale* (2013) pp. 147–158.

[203] See Council of Europe, Recommendation Rec (2006) 13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, adopted on 27 September 2006.

[204] It is worth mentioning that the Court's judgment of January 2013 follows the judgment through which in 2009, the European Court affirmed that the prison conditions in Italy were not consistent with Article 3 of the Convention (*Sulejmanovic v. Italy*, European Court of Human Rights, Judgment, 16 July 2009), and decided to set a deadline for the introduction of suitable internal remedies. The same decision, adopted by a unanimous vote by the Court, fixed the period of one year so that Italy could comply with that judgment. The annual term commenced on the date on which the judgment became final, i.e. from 28 of May 2013. The Italian request for referral to the Grand Chamber of the Court, in order to obtain a review of the judgment, was rejected.

[205] On this point, see, inter alia, C. Zanghì, 'La Corte Costituzionale risolve un primo contrasto con la Corte europea dei diritti dell'uomo ed interpreta l'art. 117 della Costituzione : le Sentenze del 24 ottobre 2007' <http://www.sidi-isil.org/wp-content/uploads/2010/01/Zanghi-Claudio-Costituz.pdf>.

legislative power is exercised by the State and the Regions in respect of the Constitution and those constraints deriving from EU and international obligations.[206]

The Italian Constitutional Court has held that where the European Court of Human Rights finds a State Party has violated the provisions of the Convention, 'it is compulsory for the State powers, in strict compliance with their own competences, to ensure that the negative normative effects which contravene the Convention terminate'.[207] In his message, with reference to the case *Torreggiani,* the President underlined that the judgment represents 'a mortifying confirmation of the continuing inability of our state to ensure basic rights of inmates in awaiting trial and execution of the punishment and, at the same time, an urgent request by the Court to take an effective way to overcome this unjustifiable state of affairs'.

Articles 27 and 117 of Constitution define the duty of all national institutions to end the situation of prison overcrowding within the period laid down by the European Court, and to adopt measures which must be consistent with the *European Convention on Human Rights*. The breach of this duty entails, inter alia, huge costs arising from convictions of the Italian State to the payment of just compensation as established under Article 41 of the Convention.

With his message, the President submitted to the attention of the Parliament the necessity to overhaul the condition of Italian prisons because, according to him, this represents not only a legal and political imperative, but, at the same time, it constitutes a moral imperative. In order to resolve the issue of prison overcrowding, the President suggested different solutions which can be summarized as follows: a) reduction of the total number of prisoners through structural innovations; b) increase of the total capacity of prison institutes; and c) need for extraordinary remedies.[208]

On the first point, the President recommended the introduction of probationary mechanisms. In this respect, the Bill on the prison situation approved by the House of Deputies provides for certain crimes, and where there is no social danger, the possibility for the courts to apply probation as the principal penalty.[209] In this way, the condemned will avoid prison and immediately take steps to reintegrate.

Among the measures indicated by the President, there is also the reduction of the application of pre-trial detention. In the perspective of reducing the recourse to detention, Law no. 94 of 2013, converting the Decree-law No. 78 of 2013, has amended Article 280 of the *Code of Criminal Procedure* raising from four to five years the limit of the punishment of imprisonment which may justify the application of custody in prison. In his message, the President also stated that a remedy was introduced by the Law No. 94 of 2013 which allows the deduction, with reference to the time spent in prison, for periods of 'good behavior', thereby increasing the chances of access to prison benefits. Finally, according to the President, in order to reduce the number of detainees, it is also important to ensure that foreign prisoners may serve their penalty imposed by an Italian court in their countries of origin.

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[206] On these aspects, see inter alia, U. Leanza, 'Le Regioni nei rapporti internazionali e con l'Unione europea a seguito della riforma del Titolo V della Costituzione', *Rivista di diritto internazionale* (2003) pp. 23–69; E. Cannizzaro, 'Gli effetti degli obblighi internazionali e le competenze e le competenze estere di Stato e Regioni', *Le istituzioni del federalismo*, (2002) pp. 13–27.

[207] See Constitutional Court, Judgment No. 348 of 22 October 2007, para. 8.1, <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2007&numero=348>.

[208] On each one of these remedies, see, inter alia, F. Fiorentin, *Esecuzione penale e misure alternative alla detenzione* (Giuffrè Milano, 2013); D. Flore (ed.), *Probation Measures and Alternative Sanctions in European Union* (Cambridge, Antwerp, Portland – Intersetia, 2012); S. Raimondi, *Le misure alternative alla detenzione: le istanze del condannato* (Giuffrè, Milano, 2013).

[209] On this issue, see Atto Senato <http://www.senato.it/leg/17/BGT/Schede/Ddliter/41545.htm>.

On the second measure indicated by the President related to the need of increase of the total capacity of prison institutes, Decree-Law No. 78 of 2013 on urgent measures for enforcements of penalties, converted with amendments by Law No. 94 of 9 August 2013, gave a new impetus to the *Prisons Plan* (whose interventions should be concluded by the end of 2015).[210] The completion of the *Prisons Plan* will increase the total capacity of prisons to 10,000 units available for detention. In the view of President, the hypothesized increase of the prison receptivity – certainly appreciable – appears, in relation to the planned 'timing', insufficient with respect to the objective to promptly and fully comply with the judgments of the European Court of Human Rights.

This was necessary to solve the problem of prison overcrowding because the deadline set by the judgment in *Torreggiani* would expire in May 2014 and, for this reason, he suggested the use of 'extraordinary remedies'. He intended to draw the attention of parliament to the pardon[211] which could be applied to a wide scope of crimes (except for some particularly terrible crimes).

In order to avoid the danger of a significant proportion of relapse into crime by convicts released from prison by virtue of pardon, this measure of clemency has to be accompanied by appropriate measures, especially administrative, aimed at the effective reintegration of people released from prison. The pardon could be added to the remedy of amnesty.[212]

Regarding the scope of the amnesty,[213] the opportunity to jointly adopt amnesty and pardon (as historically occurred until the Law No. 241 of 2006, only granting the pardon) comes from different characteristics of the two instruments of clemency. Unlike amnesty, the pardon requires a determination of guilt of those accused and, where appropriate, the application of the total or partial reduction of the penalty imposed. The combined effect of the two measures could quickly achieve the following positive results: a) the pardon would have the immediate effect of considerably reducing the prison population; b) the amnesty would immediately define a number of trials destined to prescription at the first instance, or at following stages, allowing the judges to devote themselves to trials for more severe offenses with inmates in preventive detention; c) in addition, a general measure of clemency — with the resulting significant decrease in the workload of the office — could certainly facilitate the implementation of the reform of the judicial geography, recently became operational.

According to the President, the significant overall reduction in the number of detainees resulting from the measures of amnesty and pardon would promptly fulfill the requirements of the European Court, and, in the meantime, they would also respect the constitutional principles regarding the execution of the penalty.

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[210] The *Prison Plan*, approved by the Steering Control Committee on 24 June 2010 provided for the creation of 9,150 new detention units with resources amounting to EUR 675 million. The Plan was updated in June 2011 with the addition of 150 seats in the light of the creation of a new penal institution in Reggio Calabria. The last Prison Plan, approved in 2012, increased the detention available seats to 11,573 units. On this issue, see <http://www.camera.it/Camera/browse/561?appro=538&Il+nuovo+Piano+carceri>.

[211] The pardon is a measure of clemency that does not affect the crime, but implies only the elimination of a part of penalty.

[212] On measures of clemency, see F. Lessa, L. Payen, *Amnesty in the Age of Human Rights Accountability* (Cambridge University Press, Cambridge, 2012); Senato della Repubblica, Servizio Studi, *I provvedimenti legislativi di amnistia e indulto dal 1948 ad oggi* (Roma, 2013).

[213] From 1953 to 1990, only thirteen provisions concerning pardon or amnesty, or both, were adopted. The last provision relating to amnesty was provided by Presidential Decree No. 75 of 1990. After sixteen years, the Parliament adopted the Law No. 24172006 related only to pardon.

The rehabilitation of convicted persons needs some preconditions (such as non-distance between the place of residence of the atonement and that one his/her family members; the distinction between persons awaiting trial and convicted, the adequate protection of the right to health; decent conditions of detention) that can be realized through the elimination of prison overcrowding.

The President underlined that the latter should be accompanied by the commitment of the parliament and the government to pursue structural reforms — as well as the urgent innovations already mentioned in his message — in order to avoid the phenomenon of prison overcrowding. This highlights the deep connection between this phenomenon and the need for the renewal of the administration of justice.

According to the President, one of the most serious problems is the unreasonable length of time of the processes and their effects on the congestion of prisons. In this respect, it is worth mentioning Decree Law No. 146 of 23 December 2013, converted with amendments into Law No. 10 of 21 February 2014, on the protection of fundamental rights of detainees and controlled reduction of prison population. The Law No. 10 introduces more rights for detainees and measures such the probation and the 'discount of penalty' to the most deserving.

SILVANA MOSCATELLI

Cases — Prison Overcrowding: Abiding by the Judgment of the European Court of Human Rights in the Torreggiani v. Italy Case

☛ Constitutional Court, Judgment No. 279 of 9 October 2013
<http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2013&numero=279>

By its judgment No. 279 of 2013, the Constitutional Court addressed the problem of prison overcrowding in Italy. This issue has already considered by the European Court of Human Rights, which found that Italy violated Article 3 of the European Convention on Human Rights (ECHR) which prohibits torture, and inhuman or degrading treatment or punishment for the inhuman conditions suffered by prisoners.[214]

By its judgment of 8 January 2013 in the *Torreggiani v. Italy* case, the European Court acknowledged the structural problem of overcrowding in Italian prisons and issued a pilot judgment which called on Italian authorities to put in place, by the deadline of 27 May 2014, a combination of remedies capable of affording, in accordance with the Convention, adequate and sufficient redress in cases of overcrowding in prison.

In anticipation of action by the legislature to implement the European Court's judgment, the Surveillance Courts of Venice and Milan,[215] by their ordinances of 13 February and 12 March 2013, respectively, attempted to push the Constitutional Court to issue an 'additive' judgment to introduce a remedy in the Italian legal order.[216] In particular, the submissions of the Surveillance Courts concerned Article 147 of the *Criminal Code* providing for the

[214] *Sulejmanovic v. Italy*, European Court of Human Rights, Application No. 22635/03, Judgment, 16 June 2009 <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-93563>; *Torreggiani and others v. Italy*, European Court of Human Rights, Application No. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 e 37818/10, Judgment, 8 January 2013 <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115860>.

[215] The Surveillance Court (*Tribunale di Sorveglianza*) operates as a court of first instance, and as a court of appeal towards the decisions of the Surveillance Judge. The Surveillance Court's jurisdiction encompasses a district of the Courts of Appeal.

[216] By the 'additive' judgments, the Constitutional Court declares a statute unconstitutional not for what it provides but for what it fails to provide. In this way, the Court manages to insert new rules into the legal system which cannot be found in the statutory text.

facultative respite of sentence execution in certain established situations, such as in cases of clemency petition, persons with serious physical infirmity or mothers of tender age children. In relation to these situations, the Surveillance Courts raised the unconstitutionality issue so that it does not provide to differ the sentence execution when the punishment has to be expiated under conditions violating the sense of humanity, in contrast with the principles of inviolable rights and human dignity enshrined in the Italian Constitution (Articles 2, 3 and 27) and with the prohibition of torture established in the European Convention of Human Rights (Article 3). In their views, the respite of sentence execution would result in various benefits such as by extending the cases of house detention, reducing the overcrowding in prisons, and requiring imprisonment only for those who are most dangerous.

Even though it qualified the actual overcrowding in prisons as 'intolerable', the Constitutional Court declared inadmissible the issue of constitutional legality regarding Article 147 of the Criminal Code by appealing to the existence of alternative strategies which are available to address the problem.

As highlighted by commentators, this conclusion is in line with the traditional *modus operandi* of the Constitutional Court in taking a backward step in order not to intrude upon a space reserved to the legislature.[217]

However, the Court was not fully persuaded about the efficacy of applicant's proposal since, as it underlined, a convicted person might not prefer the remedy of the respite of sentence execution which could leave open their own legal situation for a long time.

The Court outlined some preventive remedies considered necessary to protect detainees. Some of such measures can be already recovered within the penitentiary legal order, through an appropriate strategy of prisoners' positioning and transfer in a context of effective jurisdictional protection (this to say that the detainee should be in the condition to activate a jurisdictional remedy in case of the administration's inactivity).

Given the structural nature of the problem, the Court also suggested other extreme remedies which would allow the prisoner to undertake his or her punishment outside the penitentiary system, such as through home detention or other sanctioning and control measures.

Such arguments led the Court to refuse the modification of Article 147 of the *Criminal Code* as proposed by the applicants. However, it is remarkable that the Court took a clear position towards the legislature's responsibility to cope with the problem of prison overcrowding. In fact, in its judgment the Court warned the legislature to take action to redress the violation of the Constitution and of the *European Convention on Human Rights*.

As a result of this warning and also in order to abide by the judgment of the European Court of Human Rights, on 17 December 2013 the Italian Council of Ministers approved Decree-Law No. 146 on *Urgent Measures on the Protection of Fundamental Rights of Detainees and the Controlled Reduction of Prisoners* converted with modifications into Law No. 10 of 21 February 2014. [218] Such measures concern both the influx of entry in prison (by reducing the punishment for small crimes) and the exit from prison (by facilitating the advanced liberation). Moreover, the Law established the National Guarantor of Detainees

[217] A. Della Bella, 'Il termine per adempiere alla sentenza Torreggiani si avvicina a scadenza: dalla Corte costituzionale alcune preziose indicazioni sulla strategia da seguire', *Diritto penale contemporaneo* (2013) <http://www.penalecontemporaneo.it/upload/1387530532DELLA%20BELLA%202013a.pdf>.

[218] Legge 21 febbraio 2014, n. 10, 'Conversione in legge, con modificazioni, del decreto-legge 23 dicembre 2013, n. 146, recante misure urgenti in tema di tutela dei diritti fondamentali dei detenuti e di riduzione controllata della popolazione carceraria'. Entered into force 22 February 2013 (Published in *Gazzetta Ufficiale* No. 43 of 21 February 2013).

Rights and introduced a new procedure before the Surveillance Judge aimed at protecting the rights of prisoners.

RACHELE CERA

Cases — Border Rejection of Foreigners

☛ Court of Cassation, First Criminal Section, Judgment No. 15115 of 17 June 2013 <http://www.magistraturademocratica.it/mdem/qg/doc/Cassazione_sentenza_17_giugno_2013,_n._15115.pdf.pdf >

By its judgment, the Court of Cassation stepped-in and filled the gaps contained in Legislative Decree No. 286/98 (better known as 'Bossi-Fini Law') on immigration.[219] In particular, the Court affirmed that on the legitimacy of 'deferred' rejection decisions, implemented by the *Questore*[220] pursuant to Article 10, para. 2, of Legislative Decree No. 286/1998, competence is charged on an ordinary judge and not on a regional administrative court.

The case was originated by a Tunisian national who, after arriving at Lampedusa island, was hosted in the Lampedusa immigrant reception center and then rejected to the border. Following the applicant's removal to the Turin centre of identification and expulsion (CIE), the applicant appealed against the rejection decision to the Agrigento justice of the peace, who denied the competence highlighting the discretional nature of such merely administrative measure and therefore referred the decision to the administrative judge. Against the decree of the Agrigento justice of the peace, the applicant submitted a petition to the Court of Cassation.

The Court of Cassation agreed with the application to review the declining of jurisdiction by the Agrigento justice of the peace. In fact, the norm regulating 'immediate' and 'deferred' rejections appeared to be vague since it did not identify the judge before whom foreign nationals can invoke the protection of their own legal situation.

In particular, Article 10, para. 1, of Legislative Decree No. 286/1998 provides that the border police may refuse entry to foreigners unable to meet legal requirements foreseen by the Legislative Decree ('immediate' rejection). Moreover, under Article 10, para. 2, the rejection with accompaniment to the border ordered by the *Questore* may be applied to foreigners: a) who were stopped at the entry, while escaping border controls, or immediately after; b) who were temporarily allowed in the national territory on the ground of public assistance ('deferred' rejection).

In the absence of a clear provision, the allocation of jurisdiction between an administrative and an ordinary judge was debated both in literature and jurisprudence.

As recalled by the Court, a part of jurisprudence deemed that such measures are a *species* within the *genus* of expulsion decrees, being similar 'in content and function'. Therefore, disputes on measures of rejection with accompaniment to the border were to be assigned to an ordinary judge as Article 13 of Legislative Decree prescribes for expulsion decrees ordered by the Prefect.

[219] 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.

[220] The *Questura* is an office of the *Polizia di Stato* that is under the authority of the Ministry of the Interior and is competent in the territory of the province (*Provincia*) where it is located. *Questura*'s main function consists in maintaining order and ensuring public security within the territory of the province. The *Questore* is the head of the Italian *Questura*.

By contrast, other case law referred to Article 103, para. 1, of the Constitution in order to assert the competence of an administrative judge over rejection measures considering their authoritative nature.[221]

By its judgment, the Court established the competence of an ordinary judge in this matter in order to strengthen the jurisdictional protection of immigrants affected by deferred border rejections.

In particular, the Court affirmed that the *Questore*'s measure of border rejection entail individual rights being connected to the verification of the inexistence of prerequisites for the application of dispositions regulating international protection of foreigners, such as those granting refugee status or subsidiary protection, or providing for the adoption of temporary protection measures for humanitarian reasons. As highlighted by the Court, this affirmation is in line with its well-established case-law. The right to humanitarian protection, the right to refugee status and the constitutional right to seek asylum are fundamental rights granted to any foreigner 'nevertheless present at the borders or in the territory of the State' under Article 2 of Legislative Decree No. 286/1998, whereby the term 'nevertheless present' includes both regular and irregular foreigners.

The protection of such fundamental rights is under the competence of the legislature and consequently the jurisdiction over them is given to the ordinary judge, acting in conformity with international treaties ratified by Italy, especially Article 3 of the European Convention of Human Rights prohibiting torture and inhuman or degrading treatment.

On confirming its reasoning, the Court cited the judgment of 23 February 2012 in the case of *Hirsi Jamaa and Others v. Italy* of the European Court of Human Rights (ECHR) that, condemning the 'push-back policy' enacted by Italy towards foreign nationals who have been *refoulés* towards Libya, reiterated that difficulties in coping with the increasing influx of migrants and asylum-seekers cannot absolve a State of its obligations under Article 3 of the Convention prohibiting torture, inhuman and degrading treatment. In particular, Italy is not exempt from complying with its obligations under this provision because the applicants failed to ask for asylum or to describe the risks faced as a result.[222]

RACHELE CERA

Legislation — Cessation of Humanitarian Measures of Temporary Protection

☛ Decree of the President of the Council of Ministers of 28 February 2013 <http://www.interno.gov.it/mininterno/site/it/sezioni/servizi/legislazione/immigrazione/2013_03_13_DPCM_280213_cessazione_misure_protezione_temporanea_cittadini_NordAfrica.html>

[221] Article 103, para. 1 of the Italian Constitution reads as follows:

> The Council of State and the other bodies of judicial administration have jurisdiction over the protection of legitimate rights before the public administration and, in particular matters laid out by law, also of subjective rights.

[222] *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>.

The Decree of the President of the Council of Ministers of 28 February 2013 announced the cessation of humanitarian measures offering temporary protection to citizens of North African countries who had entered Italy between 1 January and 5 April 2011.[223]

Such measures had been adopted on 5 April 2011 (Decree of the President of the Council of Ministers on humanitarian measures of temporary protection) and consisted in the issue of a six-months humanitarian residence permit (subsequently extended for a further six months by Decrees of the President of the Council of Ministers of 6 October 2011 and 15 May 2012).[224]

The adoption of humanitarian measures of temporary protection followed the Decree of the President of the Council of Ministers No. 3924 of 12 February 2011, which declared a state of humanitarian emergency in Italy until 31 December 2011 due to the exceptionally high influx of migrants fleeing from political unrest across North African countries, resulting from the Arab Spring. The state of emergency was subsequently extended until 31 December 2012.[225]

The Decree of April 2011, which granted a six-months humanitarian residence permit, in its introductory part referenced Article 20 of Decree-law No. 286 of 25 July 1998 (*Consolidated Act on Immigration*), which establishes the adoption of humanitarian protection measures in case of conflicts, [natural] disasters or other grave events occurring in countries outside the European Union; and Article 11.1, *c-ter*, of the Decree of the President of the Republic No. 394 of 31 August 1999, according to which a residence permit may also be issued on humanitarian grounds.[226]

The Italian government decreed the cessation of the humanitarian measures of temporary protection by the adoption of the Decree of 28 February 2013 (Article 1), considering that by the end of the state of emergency on 31 December 2012, the grounds for a further extension of said measures were no longer extant.

The government therefore decreed that foreign citizens holding a residence permit on humanitarian grounds could apply for assisted repatriation to the country of origin, or for conversion of the residence permit on humanitarian grounds into work, family, study or professional training permit by 31 March 2013. Upon choosing between these two options, the residence permits on humanitarian grounds would have been extended until the conclusion of the procedures.

On the contrary, foreigners who failed to apply for either assisted repatriation or permit conversion within the terms of the Decree would have faced, on a case by case basis, expulsion and removal from Italian territory, according to legislation in force.

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[223] Published in *Gazzetta Ufficiale* No. 60 of 19 March 2013.

[224] Decree of the President of the Council of Ministers of 5 April 2011, on Humanitarian Measures of Temporary Protection, published in *Gazzetta Ufficiale* No. 81 of 8 April 2011; Decree of the President of the Council of Ministers of 6 October 2011, on Renewal of Residence Permits for Humanitarian Grounds, published in *Gazzetta Ufficiale* No. 238 of 8 October 2011; Decree of the President of the Council of Ministers of 21 Mat 2012, on Humanitarian Permits for North Africans Renewed for a further six months, published in *Gazzetta Ufficiale* No. 117 of 21 May 2012.

[225] Decree of the President of the Council of Ministers of 6 October 2011, on Renewal of the State of Humanitarian Emergency in the Nation, published in *Gazzetta Ufficiale* No. 235 of 8 October 2011.

[226] Decree-law No. 286 of 25 July 1998 and subsequent amendments, on Consolidated Act of Provisions Related to Immigration Control and Rules on the Condition of Foreigners, published in *Gazzetta Ufficiale* No. 191 of 18 August 1998; Decree of the President of Italian Republic No. 394 of 31 August 1999, Regulation on Norms Implementing the Consolidated Act on Dispositions Concerning the Immigration Regulations and Stranger Conditions Norms, modified by the Presidential Decree n. 334 of 18 October 2004 on immigration, published in *Gazzetta Ufficiale* No. 258 of 3 November 1999.

The Decree specifically excluded the expulsion or assisted repatriation of the following: minors; foreigners holding a residence card; foreigners living with relatives (up to the second degree) or spouses of Italian nationality; women in pregnancy or in the six months following delivery of a child; people who could demonstrate severe health conditions barring their return to the country of origin for the duration of their condition; persons who could demonstrate grave humanitarian reasons that made repatriation impossible or unreasonable; members of family units with minors attending school, until the end of the school year (Article 2).

Lastly, the Decree established that foreign citizens who applied for assisted repatriation to their country of origin may join one of the voluntary assisted return programmes run by the Ministry of the Interior via the European Return Fund, established by Decision No. 575/2007/EC of the European Parliament and of the Council of 23 May 2007 as part of the General Programme 'Solidarity and management of migration flows'.[227]

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[227] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:144:0045:0065:EN:PDF>.