

## **International Criminal Court in National Systems: Italy**

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#### **Abstract**

This paper will first illustrate Italy's role in the fight against impunity and the enforcement of international criminal law (ICL) in general, thereafter focusing on the need to incorporate in domestic law the crimes under the Rome Statute in compliance with the complementarity principle and the obligation to cooperate with the International Criminal Court (ICC).

As we will show, the effective implementation of the Statute in the national system is fundamental to guarantee the prosecution of crimes under international law, and ensure that the ICC is able to operate successfully, thereby adhering to the general obligation of States to implement treaties in good faith as codified in the 1969 Vienna Convention on the Law of Treaties.

**Key Words:** War Crimes, National Legal System of Italy, International Criminal Court, Rome Statute

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## 1. Introduction

As host of the Rome Diplomatic Conference of Plenipotentiaries that gave birth to the International Criminal Court (ICC) Statute (Rome Statute), Italy actively worked toward making the ICC a reality. Nevertheless, in more than 20 years since ratifying the Rome Statute with Law No. 232 of 12 July 1999,<sup>2</sup> Italy has failed to effectively implement the legislation to ensure the systematic investigation and prosecution of the most serious international crimes within the Court's jurisdiction.<sup>3</sup> This *lacuna* emerged before other international jurisdictions, such as the European Court of Human Rights (ECtHR), condemning Italy for the ineffectiveness of the national legal system in relation to criminalizing acts of torture<sup>4</sup>.

In this perspective, to examine the status of the implementation of the ICC Statute in Italy, this paper will first illustrate Italy's role in the fight against impunity and enforcement of international criminal law (ICL) in general, thereafter focusing on the need to incorporate in domestic law the crimes under the Rome Statute, in compliance with the complementarity principle and the obligation to cooperate with the ICC.

As we will show, the effective implementation of the ICC Statute in the national system is fundamental to guarantee the prosecution of crimes under international law, and to ensure that the Court is able to operate successfully, thereby adhering to the general obligation of States to implement treaties in good faith as codified in the 1969 Vienna Convention on the Law of Treaties.<sup>5</sup>

## 2. Italy and the Enforcement of ICL

### 2.1. The Italian Legal System and the Universal Jurisdiction Provisions

As known, international criminal law can be enforced indirectly by national jurisdictions or directly by international courts and tribunals.

Italy has undertaken to cooperate in the prosecution of all serious crimes by adopting multilateral conventions, bilateral and multilateral extradition treaties, and treaties providing mutual legal assistance in criminal matters.<sup>6</sup>

Italian enforcement of international criminal law is also based on the universal jurisdiction principle, traditionally defined as "a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the

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<sup>2</sup> Gazzetta Ufficiale della Repubblica Italiana No. 167, 19 July 1999.

<sup>3</sup> In general see, AMNESTY INTERNATIONAL, ITALY: Law Reform Needed to Implement the Rome Statute of the International Criminal Court, available online at <https://www.amnesty.org/download/Documents/84000/eur300092005en.pdf>. See also, P. Benvenuti, Italy, Implementation of the ICC Statute in National Legislation, Constitutional Aspects, in THE ROME STATUTE AND DOMESTIC LEGAL ORDERS - VOLUME 1 (GENERAL ASPECTS AND CONSTITUTIONAL ISSUES) 123 (C. Kress & F. Lattanzi eds., 2000); M. Roscini, Great Expectations. The Implementation of the Rome Statute in Italy, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 493 (2007); E. Guarducci, Il parziale adeguamento allo Statuto della Corte penale internazionale nella legge n. 237 del 2012, FEDERALISMI.IT, FOCUS HUMAN RIGHTS 1 (2013); M. Castellaneta, Nuova legge sulla cooperazione. Luci e ombre tra Italia e Corte penale internazionale, AFFARI INTERNAZIONALI (3 January 2013), available online at <https://www.affarinternazionali.it/2013/01/luci-e-ombre-tra-italia-e-corte-penale-internazionale/>; M. Crippa, Sulla (perdurante?) necessità di un adeguamento della legislazione interna in materia di crimini internazionali ai sensi dello statuto della Corte Penale Internazionale, DIRITTO PENALE CONTEMPORANEO (2016) available online at [https://www.penalecontemporaneo.it/upload/CRIPPA\\_2016a.pdf](https://www.penalecontemporaneo.it/upload/CRIPPA_2016a.pdf).

<sup>4</sup> ECtHR, Cestaro v. Italy, Application No. 6884/11, Fourth Section, Judgment of 7 April 2005. See also infra note 32 and corresponding text.

<sup>5</sup> Vienna Convention on the law of treaties, 23 May 1969.

<sup>6</sup> See Permanent Mission of Italy to the United Nations, Note Verbale 2496, 24 May 2011.

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nationality of the perpetrator or the victim”<sup>7</sup>. The reasoning derives from the broader notion that “certain crimes are so harmful to universal interests that also criminal jurisdiction is universal, without the need of any connection with the crime or the criminal to prosecuting it”<sup>8</sup>.

Universal jurisdiction at the international level takes two main forms: ‘unconditional universal jurisdiction’, including prosecutions *in absentia*, amongst others, and ‘conditional universal jurisdiction’ calling for the fulfillment of certain requirements to ensure extraterritorial jurisdiction is reasonably exercised (e.g., the presence of the alleged offender in the forum of the State’s territory, the veto of extradition to the State’s territory, a specific request from the Minister of Justice).<sup>9</sup>

The Italian legal system has no effective provision of universal jurisdiction covering all crimes under international law, i.e., expressly stating jurisdiction over *crimina juris gentium*, regardless of whether these were committed abroad or by a foreigner, and without the requirement for suspects to be present for an adequate period of time before trial to prepare a defense.

Italian legislation establishes universal jurisdiction in criminal matters in three general provisions contained in section one, book one of the Italian Penal Code dedicated to the general rules on the application of criminal law.<sup>10</sup>

Article 7(5) of the Penal Code contains a broad provision that effectively allows Italian jurisdiction over a foreign national for crimes committed abroad when there is a specific law or treaty that establishes the applicability of Italian criminal law (such as the 1949 Geneva Conventions and 1977 Additional Protocol I – but only for ‘grave breaches’ – and the 1984 Torture Convention), but only when these treaties have been enacted in Italian law. In such cases, there is no requirement for the accused to be present at the time the investigation is opened and may be tried *in absentia*.<sup>11</sup>

Article 10(2) of the Penal Code contains a conditional version of universal jurisdiction: foreigners who commit crimes abroad may be punished under Italian law but only under particular circumstances. Specifically, custodial universal jurisdiction over non-political crimes committed abroad by foreigners against foreigners or the European Union or foreign states applies if the crime committed calls for a penalty of no less than three years. However, the Minister of Justice, a political official, must request the prosecution, and the accused must be present in the Italian territory, although unclear is at what stage of the proceedings such presence is required. In addition, extradition must not have been granted or accepted by the territorial state or the accused’s state of nationality.<sup>12</sup>

Article 3(2) of the Penal Code states that the Italian criminal law is binding on all those who, whether citizens or foreigners, are in the territory of the State, subject to exceptions laid down in domestic public law or international law. This provision is reinforced in Article 10(1) of

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<sup>7</sup> K. C. Randall, Universal Jurisdiction under International Law, 66 TEXAS LAW REVIEW 785 (1988).

<sup>8</sup> M. Robinson, Foreword, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 16 (2001).

<sup>9</sup> See Information provided by Italy on the scope of universal jurisdiction in accordance with General Assembly resolution 64/117 of 16 December 2009, The scope and application of the principle of universal jurisdiction (Agenda item 86), General Assembly of the United Nations, Sixth Committee (Legal), sixty-fifth session (4 October to 11 November 2010).

<sup>10</sup> See also, Article 17 of the Military Penal Code of Peace that provides for limited universal jurisdiction over crimes committed by the armed forces in occupied, transit, or sojourn territories, as provided by international conventions and customs (according to Article 18, for other crimes committed abroad by the military the request of the competent minister is necessary), and Article 1080 of the Naval Code that provides that the Code applies to Italian nationals or foreigners on duty on an Italian ship or aircraft if he or she commits a crime abroad.

<sup>11</sup> AMNESTY INTERNATIONAL, *supra* note 3, at 31.

<sup>12</sup> *Id.*

the Italian Constitution, according to which the Italian legal order conforms to the generally recognized norms of international law (i.e., customary international law).<sup>13</sup>

Finally, Article 8 of the Penal Code establishes that where a foreigner commits a political offence abroad (implicitly against Italy), he or she may be brought before Italian courts if the Minister of Justice so requires. It is however doubtful that international crimes can be characterized as political offences under Article 8.<sup>14</sup>

As part of these general provisions, Article 3 of Law No. 498 of 3 November 1988 on the ratification and domestic execution of the 1984 Convention against Torture provides another example of conditional universal jurisdiction concerning acts of torture committed abroad by a foreigner if the accused is in Italy and extradition has not been granted. Further, the authorization of the Minister of Justice is required.<sup>15</sup> However, in the absence of incorporating the crime of torture in domestic law, this provision is in practice futile in Italian courts.

## 2.2. Italian Cooperation with ICTY and ICTR

As for the direct enforcement of international criminal law by international courts and tribunals, with Law No. 130 of 14 February 1994, Italy regulated cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>16</sup>, and with Law No. 181 of 2 August 2002, cooperation with the International Tribunal responsible for Serious Violations of Human Rights Committed in the Territory of Rwanda and Adjacent States (ICTR).<sup>17</sup>

In fact, Italy was the first State to sign the Agreement on the enforcement of ICTY Sentences<sup>18</sup>, drafted by the Tribunal on behalf of the United Nations, under Article 27 of the ICTY Statute, and ratified with Italian Law No. 207 of 7 June 1999.<sup>19</sup> The analogous agreement concerning the enforcement of ICTR sentences was ratified and executed in Italy with Law No. 64 of 6 February 2006.<sup>20</sup>

According to these agreements, upon consultation with the Tribunal's President and the Chamber's Presiding Judge, the Registrar determines the place of enforcement of a Tribunal sentence. Indeed, under Article 2, if the Registrar considers that a sentence should be served in Italy, he/she will ask the Italian authorities to accept the convicted person.<sup>21</sup>

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<sup>13</sup> Id., at 32.

<sup>14</sup> Id.

<sup>15</sup> Id., at 33.

<sup>16</sup> Gazzetta Ufficiale della Repubblica Italiana, No. 43, 22 February 1994.

<sup>17</sup> Gazzetta Ufficiale della Repubblica Italiana, No. 190, 14 August 2002.

<sup>18</sup> Law No. 207 of 7 June 1999 on the Ratification and Implementation of the Agreement between the Government of the Italian Republic and the United Nations concerning the enforcement of penalties of the International Criminal Tribunal for the former Yugoslavia), Gazzetta Ufficiale della Repubblica Italiana, No. 151, 30 June 1999.

<sup>19</sup> Article 27 of the ICTY Statute provides that the sentences handed down by the Judges "shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal".

<sup>20</sup> Gazzetta Ufficiale della Repubblica Italiana, No. 64, 17 March 2006.

<sup>21</sup> Article 2 of the Agreement states: "1. A request to the Government of the Republic of Poland to enforce a sentence shall be made by the Registrar of the International Tribunal (hereinafter: "the Registrar"), with the approval of the President of the International Tribunal. 2. The Registrar shall provide the following documents to the Minister of Justice of the requested State when making the request: a) a certified copy of the judgement; b) a statement indicating how much of the sentence has already been served, including information on any pre-trial detention; c) when appropriate, any medical or psychological reports on the convicted person, any recommendation for his or her further treatment in the requested State and any other factor relevant to the enforcement of the sentence. 3. The Minister of Justice of the requested State shall submit the request to the competent national authorities, in

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If Italy complies with the request, the Registrar will make the necessary arrangements to transfer such person from the Tribunal into the custody of the enforcing State.

This Agreement seeks a middle ground between the primacy of the Tribunal and the need of enforcing States to conform with their own domestic legislation.<sup>22</sup> Thus, while the Agreement with Italy upholds the primacy of the International Tribunal, it allows the authorities a certain degree of flexibility in enforcing the Tribunal's sentences, subject to supervision.

### 3. Italy and the International Criminal Court

#### 3.1. Treaty Law and the Rome Statute in the Italian Legal Order

In Italy, the so-called 'dualist approach' implies that a treaty also produces effects on the domestic legal order if an implementing legislation has been adopted at the national level.

Such legislation might take two forms: first, a law that interprets and reformulates the provisions of the treaty, amending the national legislation if necessary to implement these; second, a law that simply contains one or two provisions ordering the domestic execution of a certain treaty (*ordine di esecuzione*), usually annexing and applying the text unchanged, as in the case of the Rome Statute.

Article 2 of Italian Law No. 232 of 1999 contains an execution order stating that "*full and complete execution shall be given to the Statute referred to in Article 1 [the Rome Statute of the International Criminal Court], as from the date of its entry into force, in accordance with Article 126 of the Statute*".

However, this is not enough for the substantive provisions of the Rome Statute to be invoked before Italian courts, since the Statute is largely non self-executing, namely, further implementing legislation is necessary to define the crimes under the jurisdiction of the Court as crimes under domestic law, expressly specifying the relevant penalties and determining the national organs adept at cooperating with the Court and the related procedures.

The prevailing view is that in the absence of such legislation, and even if the State ratifies an international criminal law convention and orders its domestic execution, its provisions cannot be 'directly' enforced before national courts without violating the principle of legality of crimes and penalties and the principle of specificity (i.e., criminal law provisions must be as specific and as clear as possible).

To study in-depth what modifications to national legislation were needed to adapt it to the Rome Statute, with a separate draft law (*Atto del Senato No. 3594-bis, XIIIa Legislatura, 9 February 1999*), the Italian Parliament delegated the Government to promptly enact the specific implementing provisions, establishing several ministerial commissions with this specific goal.<sup>23</sup>

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accordance with the national law of the requested State. 4. The competent national authorities of the requested State shall promptly decide upon the request of the Registrar, in accordance with national law."

<sup>22</sup> On the primacy of the Tribunals, see e.g., Article 3 of the Agreement: "2. The enforcement of sentences imposed by the International Tribunal shall be possible also when the convicted person is not a Polish national and not permanently residing within the territory of the Republic of Poland or when he/she does not consent to the enforcement of the sentence in Poland. 3. In the event that the sentence pronounced by the International Tribunal exceeds the upper limit of the statutory penalty stipulated in the Polish law for the same kind of offence, the part of the sentence amounting to the upper limit of penalty envisaged for a given offence in the Polish domestic law shall be enforceable in Poland. The Minister of Justice of the requested State shall notify the Registrar, six months in advance, in writing, of the date of the completion of the part of the sentence enforceable in Poland; in that case Article 10 of this Agreement shall be applied accordingly. 4. The conditions of imprisonment shall be governed by the law of the requested State, subject to the supervision of the International Tribunal [...]"

<sup>23</sup> See e.g., the 1998 Pranzetti Commission, the 1999 La Greca-Lattanzi Commission, the 2002 Conforti Commission and the 2002 Scandurra Commission.

In addition to these commissions, other parliamentary initiatives have been introduced to pursue the national implementation of the Rome Statute.<sup>24</sup> This approach has led to some criticism for not visibly sharing the power of implementation of international treaties and the lack of any co-management between Italian Legislative Power (Parliament) and Executive Power (Ministry of Justice) in implementing the ICC Statute.

Furthermore, in contrast to other States parties to the Rome Statute, the Italian ministerial commissions, consisting of advisory bodies of experts convened by ministries, do not generally meet in public or formally consult with civil society, and the Ministry of Justice has not submitted any draft legislation to Parliament with regard to implementing the Rome Statute.<sup>25</sup>

On 20 December 2012, the Italian Parliament adopted Law No. 247 on cooperation with the ICC (*Norme per l'adeguamento alle disposizioni dello statuto istitutivo della Corte penale internazionale*) consisting of 24 Articles and 3 Chapters mainly concerning general dispositions on cooperation, surrender, and execution decisions, but failing to define crimes under the ICC Statute.<sup>26</sup>

### **3.2 Italian Legislation and the Definition of Crimes Listed in the Rome Statute**

#### ***Genocide***

As for the definition of genocide, with Law No. 153 of 11 March 1952<sup>27</sup>, Italy ratified the 1948 Genocide Convention implemented with Law No. 962 of 9 October 1967.<sup>28</sup> To allow prosecution against genocide, Italian Constitutional Law No. 1 of 21 June 1967 amended Articles 10 and 26 of the Constitution, providing that the prohibition of extradition for political crimes does not apply to the crime of genocide.

However, Italian legislation on genocide is not fully consistent with Article 6 of the Rome Statute and Article II of the Genocide Convention, since it does not include, for example, mental harm, and the *actus reus* of the 'transfer of children' only applies to minors under the age of 14.<sup>29</sup>

#### ***Crimes against humanity***

While most crimes against humanity under Article 7 of the Rome Statute are not codified as such in Italy, they are partly covered by domestic criminal provisions:<sup>30</sup> murder under Article 575 of the Penal Code, rape and other forms of sexual violence under Articles 609-*bis et seq.*, enslavement under Articles 600<sup>31</sup>, 601<sup>32</sup>, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law under Articles 605, 606, and 607.

Crimes against humanity including apartheid, forced pregnancy, enforced sterilization, extermination, deportation, and forcible transfer of a population, torture, persecution, and other inhuman acts are not included in Italian law.

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<sup>24</sup> The first draft law was submitted to the Italian Chamber of Deputies on 9 May 2002 by some members of the opposition parties (Atto della Camera No. 2724, On. Kessler e altri, XIVa Legislatura), while an identical draft was submitted to the Senate on 24 July 2002 (Atto del Senato No. 1638, Sen. Iovene e altri).

<sup>25</sup> AMNESTY INTERNATIONAL, supra note 3, at 2, footnote 4.

<sup>26</sup> Gazzetta Ufficiale della Repubblica Italiana No. 6, 8 January 2013.

<sup>27</sup> Gazzetta Ufficiale della Repubblica Italiana No. 74, 23 March 1952.

<sup>28</sup> Gazzetta Ufficiale della Repubblica Italiana No. 272, 30 October 1967.

<sup>29</sup> AMNESTY INTERNATIONAL, supra note 3, at 13 et seq.

<sup>30</sup> Id., at 14 et seq.

<sup>31</sup> As amended with Law No. 228 of 11 August 2003, Gazzetta Ufficiale della Repubblica Italiana No. 195, 23 August 2003.

<sup>32</sup> As modified by Legislative Decree No. 24, 4 March 2014.

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As anticipated, in April 2015, the ECtHR ruled that Italian legislation is inadequate with regard to criminalizing acts of torture. Following the ECtHR's decision, the Italian Parliament approved Law No. 110 of 14 July 2017, which aimed to introduce the crime of torture (Article 613-*bis*) in the Italian Penal Code<sup>33</sup>. However, this new provision does not seem to comply with the definition of torture according to international law.<sup>34</sup>

### *War Crimes*

In Italy, war crimes are mainly regulated with two instruments: the Law of War of 1938 and the Military Penal Code of War of 1941, neither of which are consistent with the evolution of the definition of the crimes. For example, in their original version, they did not include sexual crimes and other war crimes foreseen in the 1949 Geneva Conventions and the 1977 Additional Protocols, nor crimes committed in non-international armed conflicts.

With Law No. 6 of 2002, Italian legislation on war crimes was amended to apply to all armed conflicts, unlawful transfers, and other acts outlawed under international conventions, including biological experiments and unjustified medical treatment.<sup>35</sup>

As for compliance with the Rome Statute, Italy's legislation raises several concerns. First, it fails to include some war crimes listed in Article 8 of the Rome Statute, and other international humanitarian provisions, such as enforced sterilization, sexual crimes, certain crimes committed in non-international armed conflicts (e.g., use of child soldiers), and above all, passing sentence and carrying out executions without a previous judgment, which according to the International Court of Justice, reflects 'elementary considerations of humanity', and thus applicable in all armed conflicts.<sup>36</sup> Second, penalties for war crimes are not fully consistent with the ICTY, ICTR, and ICC systems. For example, the inclusion of the war crime of enforced sterilization under Article 185-*bis* of the Penal Code concerning unjustified medical treatment could imply a relatively lenient penalty, as it does not take into account either the particular gravity or the circumstances under which such crimes are committed.<sup>37</sup>

Furthermore, Italian Law No. 589 of 13 October 1994<sup>38</sup> eliminated the death penalty under the Military Penal Codes of War and Peace, replacing it with life imprisonment in line with the Rome Statute, the ICTY and ICTR Statutes, the Regulation establishing the East Timor Special Panels for Serious Crimes, the Statute of the Special Court for Sierra Leone, and the Law establishing the Extraordinary Chambers in Cambodia, reflecting the worldwide trend of abolishing the death penalty as cruel, inhumane, and degrading punishment.

Nevertheless, the current legislation on war crimes appears to be in contrast with the ICC penalty system, since Article 27(4) of the Italian Constitution states that that the death penalty may be imposed in cases specified by military laws in time of war.<sup>39</sup>

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<sup>33</sup> Gazzetta Ufficiale della Repubblica Italiana No. 166, 18 July 2017.

<sup>34</sup> The complaint concerned the acts of violence and abuses suffered by the applicant (then aged 62) at the Diaz-Pertini school during a police raid that occurred at the end of the G8 summit in Genoa in 2001. The ECtHR said in Cestaro's case that "the Italian criminal legislation applied in the instant case [...] proved both inadequate in terms of the requirement to punish the acts of torture in issue and devoid of any deterrent effect capable of preventing similar future violations" (ECtHR, Cestaro, supra note 3, para. 225).

<sup>35</sup> Gazzetta Ufficiale della Repubblica Italiana No 28, 2 February 2002. See AMNESTY INTERNATIONAL, supra note 3, at 18 et seq.

<sup>36</sup> Id., at 25.

<sup>37</sup> Id., at 21, 26.

<sup>38</sup> Gazzetta Ufficiale della Repubblica Italiana No. 250, 25 October 1954.

<sup>39</sup> Id., at 26.

### ***Aggression***

Italy is currently working on the ratification of the amendments on the crime of aggression, as defined in Article 8-bis of the Rome Statute adopted at the 2010 Review Conference held in Kampala.

The draft legislation for the ratification of the Kampala Amendments approved by the Italian Senate (Act No. C. 667) and transmitted to the Italian Chamber of Deputies on 9 January 2020 (Act No. C. 2332) is yet to be examined by the Commission of Foreign Affairs (Commissione degli affari esteri).

### **3.3. General Principles of ICL and Constitutional Issues**

Some of the Rome Statute provisions may be deemed as not entirely consistent with the Italian Constitution of 1948. Specifically, the irrelevance of official capacities (Article 27(2) of the Rome Statute, with reference to Articles 68, 90, 96, and 122 of the Constitution, and Article 3(2) of Constitutional Law No. 1 of 9 February 1948), the obligation to surrender (Article 89 of the Rome Statute on the prohibition of extradition for political crimes under Articles 10 and 26 of the Constitution), and the ICC's competence in the execution of sentences (Articles 105, 106, and 110 of the Rome Statute in relation to Article 87(11) of the Constitution).

In accordance with the Venice Commission of the Council of Europe Report, several solutions are available to States to enable ratifying the Rome Statute, despite the constitutional issues.<sup>40</sup> These include, for example, the insertion of a new article in the Constitution, which allows all relevant constitutional problems to be settled, and avoids the need to include exceptions for all the relevant articles, a measure that France and Luxembourg have adopted, or the systematic revision of all constitutional articles that must be changed to comply with the Statute, as foreseen by the Czech Republic, or interpreting certain provisions of the Constitution so as to avoid conflict with the ICC Statute, as substantiated in Italy.<sup>41</sup>

In fact, Article 11 of Italian Constitution states that Italy “*shall agree, on condition of reciprocity, to such limitations of sovereignty as may be necessary to a legal system ensuring peace and justice between nations*”.

As clarified in the Preamble of the Rome Statute, the ICC aimed to put an end to impunity for the perpetrators of crimes that threaten the peace, security, and well-being of the world<sup>42</sup>, and to contribute to the enforcement of international justice<sup>43</sup>. In this perspective, the ICC could be included among organizations promoting peace and justice under Article 11 of the Italian Constitution.

In addition to this ‘interpretative’ approach, important to note is that since 2001, a new constitutional disposition ‘expressly’ regulates the primacy of treaties (and thus also the ICC Statute) in the Italian legal systems. More precisely, the new Article 117 of the Constitution states that “*Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations*”.

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<sup>40</sup> European Commission for Democracy through Law (Venice Commission), Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the International Criminal Court adopted by the Commission at its 45th Plenary Meeting (Venice, 15-16 December 2000), at 3 ss.

<sup>41</sup> Id.

<sup>42</sup> ICC Statute, Preamble, para. 3.

<sup>43</sup> Id., Preamble, paras. 5, 11.



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### 4. Conclusions: Cross-Fertilization between International Criminal Tribunals and Human Rights Courts to Improve the Effectiveness of International Criminal Justice

Italy must promptly ensure the effective implementation of the Rome Statute in its legal system.

In the absence of national legislation fully aligned with the provisions of the ICC Statute, Italy might be considered by the Court as “*unwilling or unable genuinely to carry out the investigation or prosecution*” of genocide, war crimes, crimes against humanity and aggression in compliance with the principle of complementarity under paragraph 10 of the Preamble and Articles 1 and 17 of the Rome Statute.

The failure to adopt a national legislative framework for the effective investigation and prosecution of crimes within ICC’s jurisdiction also implies a violation of the obligation to cooperate under Article 88 of the ICC Statute requiring State parties to “*ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under the Statute*”. Furthermore, Italy might be deemed to breach the duty to perform treaties in good faith as codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties.

In our view, while awaiting the adoption of implementing legislation in Italy and other State parties to the Rome Statute that is as effective as possible, cross-fertilization between international criminal tribunals and human rights courts could improve the effectiveness of international criminal justice and satisfy the rights of victims.<sup>44</sup>

First, human rights courts could operate as alternative mechanisms to criminal proceedings in the determination of the facts, the identification of those responsible, and the declaration of their responsibility.<sup>45</sup>

Second, the assessment of the *inertia* and/or inadequacy of national systems of human rights courts could legitimate third States to exercise extraterritorial jurisdiction over criminals. In these situations, prosecution by a third State may be also an adequate alternative: “*If permitted by the scope of the principle of legality, these other jurisdictions could qualify the repression as crimes under international law and directly apply the international law in force at the time of its commission.*”<sup>46</sup>

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<sup>44</sup> A.A. Cançado Trindade, *Contemporary International Tribunals: Their Continuing Jurisprudential Cross-Fertilization Pertaining to Human Rights Protection*, 13 THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 155 (2013). See also A. Oriolo, *Right to the Truth and International Jurisprudence as the “Conscience” of Humanity. Comparative Insights from the European and Inter-American Courts of Human Rights*, GLOBAL JURIST 175 (2016).

<sup>45</sup> ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case ICC-01/04-01/07, Pre-Trial Chamber I, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May, 2008, footnote 39.

<sup>46</sup> A. Galinsoga-Jordà, *The Activity of the European Court of Human Rights*, 13 THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 753 (2013) at 787 ss.