

# ITALY'S IMPLEMENTATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT AND ITS AMENDMENTS: UNRESOLVED ISSUES

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## Abstract

*The present article investigates whether the international crimes listed in the Rome Statute of the International Criminal Court and its amendments are punished under Italian law and, if not, what changes to domestic law are necessary so that perpetrators can be prosecuted before the Italian courts. To this end, firstly, it recalls Italy's efforts to enact ad hoc legislation implementing the Statute. Secondly, it scrutinizes the existing Italian legislation on international crimes and identifies gaps and inconsistencies with the Statute. Finally, it considers the recent Government's initiative for adopting a code of international crimes. The author finds that the Italian legislation does not provide a proper legal basis for the prosecution of most of the aforementioned international crimes and advocates a major legislative effort to make all of them prosecutable before the domestic courts.*

Keywords: Rome Statute of the International Criminal Court; international crimes; domestic legislation; domestic courts; universal jurisdiction.

## 1. INTRODUCTION

On 26 January 2022, Italy deposited its instrument of ratification of the so-called Kampala amendments to the Rome Statute of the International Criminal Court (ICC) with the Secretary-General of the United Nations (UN).<sup>1</sup> They were the first amendments to the ICC Statute and were adopted by the Review Conference which was held in the capital of Uganda, from 31 May to 11 June 2010. The Kampala amendments consist of an amendment adding three war crimes to Article 8, paragraph 2(e),<sup>2</sup> and several amendments aimed at allowing the ICC to exercise jurisdiction over the crime of aggression, including the deletion of Article 5, paragraph 2, and the insertion of Article 8 *bis*, Article 15 *bis* and

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<sup>1</sup> See UN Doc. C.N.34.2022.TREATIES-XVIII.10.a (Depositary Notification), available at: <<https://treaties.un.org/doc/Publication/CN/2022/CN.34.2022-Eng.pdf>>; UN Doc. C.N.36.2022.TREATIES-XVIII.10.b (Depositary Notification), available at: <<https://treaties.un.org/doc/Publication/CN/2022/CN.36.2022-Eng.pdf>>.

<sup>2</sup> Annex I to Resolution RC/Res. 5, adopted by the Review Conference at the 12th plenary meeting, 10 June 2010, available at: <<https://treaties.un.org/doc/source/docs/RC-Res.5-ENG.pdf>>.

Article 15 *ter* into the Statute.<sup>3</sup> Up to the time of writing (May 2022), they are the only amendments binding on Italy, with the exception of the amendment deleting Article 124, which was adopted by the Assembly of States Parties in 2015<sup>4</sup> and ratified by Italy in 2018.<sup>5</sup>

The Kampala amendments shall enter into force for Italy one year after the deposit of the instrument of ratification, i.e. on 26 January 2023, in accordance with Article 121, paragraph 5, of the Rome Statute. As from their entry into force, the crime of aggression and the war crimes laid down therein should be prosecutable before the Italian courts.

As is well known, the ICC is complementary to national criminal jurisdictions: States parties retain the primary responsibility for prosecuting the international crimes listed in the Rome Statute and the amendments binding on them; the ICC may step in only in case of a State's unwillingness or inability. The question arises whether the aforementioned crimes are punished under Italian law and, if not, what changes to domestic law are necessary to ensure that perpetrators can be prosecuted before the Italian courts.

The present article provides an answer to this question. Firstly, it recalls Italy's efforts to enact ad hoc legislation implementing the ICC Statute. Secondly, it scrutinizes the existing legislation on international crimes and identifies gaps and inconsistencies with the Rome Statute. Finally, it considers the recent Government initiative for adopting a code of international crimes.

## 2. THE IMPLEMENTING ORDER OF THE ROME STATUTE AND THE KAMPALA AMENDMENTS

Italy was the fourth State to deposit its instrument of ratification of the ICC Statute with the UN Secretary-General, on 26 July 1999.<sup>6</sup> The President of the Italian Republic was authorized by the Parliament to ratify the Statute by Law No. 232 of 12 July 1999.<sup>7</sup> As is usual for laws authorizing the ratification of a treaty, Law No. 232/1999 included the so-called implementing order (*ordine di esecuzione*), that is to say a provision stipulating that "full and complete implementation" of the treaty at issue is ensured as from its entry into force for Italy. The implementing order makes the treaty in principle applicable at the domestic level. In practice, however, the application of certain treaty provisions may depend on the

<sup>3</sup> Annex I to Resolution RC/Res.6, adopted by the Review Conference at the 13th plenary meeting, 11 June 2010, available at: <<https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf>>.

<sup>4</sup> Annex to Resolution ICC-ASP/14/Res.2, adopted by the Assembly of States Parties at the 11th plenary meeting, 26 November 2015, available at: <<https://treaties.un.org/doc/source/docs/ICC-ASP-14-Res2-ENG.pdf>>.

<sup>5</sup> See UN Doc. C.N.205.2018.TREATIES-XVIII.10.c (Depositary Notification), available at: <C.N.205.2018.TREATIES-XVIII.10.c (Depositary Notification)>.

<sup>6</sup> See UN Doc. C.N.679.1999.TREATIES-18 (Depositary Notification), available at: <<https://treaties.un.org/doc/Publication/CN/1999/CN.679.1999-Eng.pdf>>.

<sup>7</sup> Law No. 232 of 12 July 1999, Suppl. to GU No. 167 of 19 July 1999.

establishment of organs, procedures and/or sanctions by means of additional legislation.<sup>8</sup> This is certainly the case for provisions relating to criminal offences which are not yet proscribed by domestic law. Indeed, under Article 25, paragraph 2, of the Italian Constitution, no one may be prosecuted and punished for acts or omissions which were not criminalized by law at the time they were committed.<sup>9</sup> The existence of legislative provisions explicitly imposing criminal sanctions on those responsible for such acts or omissions is required. In the years following the ratification of the Rome Statute, several draft laws were introduced in the Parliament substantially incorporating the Statute's provisions on genocide, crimes against humanity and war crimes.<sup>10</sup> None of them, however, was passed into law.

At the end of 2012, a law was enacted to regulate the judicial cooperation between Italy and the ICC and to establish the offences against the Court's administration of justice. Law No. 237 of 20 December 2012 amended the Criminal Code by introducing the offences against the ICC's administration of justice laid down in Article 70 of the Rome Statute, and supplemented the Code of Criminal Procedure by setting out procedural rules concerning the execution of requests for surrender of persons and other measures of assistance from the ICC as well as the enforcement of sentences of imprisonment, fines, forfeiture and reparation orders issued by the Court.<sup>11</sup>

An implementing order was also included in Law No. 200 of 4 December 2017, by which the Parliament authorized the President of the Italian Republic to ratify the amendment to Article 124 of the Rome Statute.<sup>12</sup> Additional legislation was not necessary to make such amendment applicable domestically, since it only deletes Article 124, which allows any State, on becoming a party to the Statute, to declare that it does not accept the ICC's jurisdiction with respect to war crimes allegedly committed by its nationals or on its territory, for a period of seven years after the entry into force of the Statute for itself.<sup>13</sup>

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<sup>8</sup> On the incorporation of treaties into Italian domestic law, see *inter alia* FOCARELLI, *International Law*, Cheltenham/Northampton, 2019, p. 253 ff.

<sup>9</sup> The English version of the Constitution of the Italian Republic is available at: <[https://www.senato.it/sites/default/files/media-documents/COST\\_INGLESE.pdf](https://www.senato.it/sites/default/files/media-documents/COST_INGLESE.pdf)>.

<sup>10</sup> See in particular the following draft laws: Draft Law No. 2724 submitted to the Chamber of Deputies on 9 June 2002, on the initiative of Hon. Giovanni Kessler et al. (14th Legislature); Draft Law No. 1638 submitted to the Senate on 24 July 2002, on the initiative of Sen. Nuccio Iovene et al. (14th Legislature); Draft Law No. 3574 submitted to the Senate on 28 July 2005, on the initiative of Sen. Enrico Pianetta et al. (14th Legislature); Draft Law No. 1089 submitted to the Senate on 16 October 2006, on the initiative of Sen. Francesco Martone et al. (15th legislature). All of them are available at: <<https://www.senato.it/ric/sddl/nuovaricerca.do?params.legislatura=18>>.

<sup>11</sup> Law No. 237 of 20 December 2012, GU No. 6 of 8 January 2013. On this law, see: the comment by RABAI, IYIL, 2012, p. 450 ff.; ALTAFIN, "La legge italiana di adeguamento allo Statuto della Corte penale internazionale: un risultato parziale", CI, 2013, p. 359 ff.; LATTANZI, "Un piccolo passo sulla via dell'adeguamento allo Statuto della Corte penale internazionale", RDI, 2013, p. 492 ff.

<sup>12</sup> Law No. 200 of 4 December 2017, GU No. 299 of 23 December 2017.

<sup>13</sup> It is worth noting that the amendment to Art. 124 of the ICC Statute is not yet in force. It will enter into force for all States parties one year after seven-eighths of them have deposited

More recently, an implementing order was included in Law No. 202 of 10 November 2021, under which the President of the Italian Republic was authorized to ratify the Kampala amendments.<sup>14</sup> Additional legislation, however, is required at least to make the amendments on the crime of aggression applicable at the domestic level, as will be explained below.

### 3. THE EXISTING LEGISLATION ON INTERNATIONAL CRIMES

Italy's legislation does not provide an adequate legal basis for the prosecution of most of the international crimes listed in the Rome Statute and its amendments. Law provisions relating to each category of international crimes will be examined in turn.

#### 3.1. *Genocide*

Italy has been a party to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide since 1952.<sup>15</sup> Law No. 153 of 11 March 1952 included the authorization for ratification as well as the implementing order of the Convention, whose definition of genocide (Article II) is reproduced *verbatim* in Article 6 of the Rome Statute.<sup>16</sup> To be precise, “full and complete implementation” of the Convention was ordered as from the entry into force of legislation giving effect to its provisions, which States parties are bound to enact under its Article V. Such legislation was passed only in 1967.<sup>17</sup> It consists of Constitutional Law No. 1 of 21 June 1967<sup>18</sup> and Law No. 962 of 9 October of the same year.<sup>19</sup>

Constitutional Law No. 1/1967 excludes the offences relating to genocide (*delitti di genocidio*) from the scope of application of Article 10, paragraph 4, and Article 26, paragraph 2, of the Italian Constitution, under which the extradition of foreigners and citizens respectively for political crimes is prohibited. Hence, extradition for such offences cannot be refused based on any purported political nature of the crimes, in accordance with Article VII, paragraph 1, of the Genocide Convention.

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their instruments of ratification or acceptance with the UN Secretary-General, in accordance with Art. 121, para. 4, of the Statute.

<sup>14</sup> Law No. 202 of 10 November 2021, GU No. 287 of 2 December 2021.

<sup>15</sup> See UN Doc. C.N.85.1952.TREATIES, available at: <<https://treaties.un.org/doc/Publication/CN/1952/CN.85.1952-Eng.pdf>>.

<sup>16</sup> Law No. 153 of 11 March 1952, GU No. 74 of 27 March 1952.

<sup>17</sup> On the Italian legislation on genocide, see *inter alia*: RONZITTI, “Genocidio”, EdD, 1969, vol. XVIII, p. 573 ff., p. 582 ff.; GRASSO, “Genocidio”, *Digesto delle discipline penali-stiche*, 1991, vol. V, p. 399 ff.; MIRAGLIA, “Genocide: The Italian Perspective”, *International Criminal Law Review*, 2005, p. 351 ff.

<sup>18</sup> Constitutional Law No. 1 of 21 June 1967, GU No. 164 of 3 July 1967.

<sup>19</sup> Law No. 962 of 9 October 1967, GU No. 272 of 30 October 1967.

Law No. 962/1967 criminalizes the following acts, when committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group:

(a) acts aimed at causing serious personal harm to members of the group (Article 1, paragraph 1);

(b) acts aimed at causing very serious personal harm or death to members of the group (Article 1, paragraph 2);

(c) deportation of members of the group (Article 2);

(d) imposing or carrying out measures intended to prevent or limit births within the group (Article 4);

(e) forcibly transferring minors up to the age of fourteen from the group to another group (Article 5).

As to the offences under letters (a), (b) and (c), the death of the victims is an aggravating circumstance (Article 3). The threshold of individual criminal responsibility is therefore lower than that established in Article II(a) and (b) of the Genocide Convention, which requires, respectively, killing members of the group and causing serious bodily or mental harm to them.

On the contrary, with regard to the forcible transfer of children, Law No. 962/1967 is more limited than the Genocide Convention, whose Article II(e) does not set an age limit. Indeed, the Elements of Crimes, adopted by the Assembly of States Parties to the Rome Statute in 2002, expressly refer to persons under the age of 18 years (Article 6(e), paragraph 5).

Law No. 962/1967 also criminalizes the following acts:

(f) inflicting on members of a national, ethnic, racial or religious group such conditions of life as to bring about the physical destruction, in whole or in part, of the group itself (Article 1, paragraph 2);

(g) coercing members of the group to wear distinctive marks (Article 6, paragraph 1).

As to the latter, the aim to bring about the destruction of the group is an aggravating circumstance (Article 6, paragraph 2).

Moreover, Law No. 962/1967 specifically proscribes conspiracy and direct and public incitement to commit the offences under letters (a), (b), (c), (d), (e) and (f) as well as conspiracy to commit the offence under letter (g) (Articles 7 and 8, paragraph 1).<sup>20</sup> Attempt to commit any of the aforementioned offences and complicity in them are covered by the general provisions on attempt and complicity in crimes, which are laid down respectively in Articles 56 and 110 of the Criminal Code.<sup>21</sup>

<sup>20</sup> Art. 8, para. 2, of Law No. 962/1967 also criminalizes defending any of the offences mentioned above under letters (a), (b), (c), (d), (e) and (f).

<sup>21</sup> For the Criminal Code, see Royal Decree No. 1398 of 19 October 1930, as amended, in Normattiva, available at: <<https://www.normattiva.it>>.

### 3.2. *Crimes against humanity*

Crimes against humanity are not a discrete category of criminal offences in the Italian legal order. The Criminal Code makes explicit reference to crimes against humanity in only two provisions: Article 414, paragraph 4, which criminalizes *inter alia* instigating the commission of such crimes and defending them, and Article 604-*bis*, paragraph 3, which sets the punishment *inter alia* for disseminating propaganda based on the denial or minimization of genocide, crimes against humanity or war crimes and for instigating the commission of offences based on those ideas.

The underlying acts of several crimes against humanity listed in Article 7, paragraph 1, of the Rome Statute are covered by Criminal Code provisions on ordinary offences. This is the case for the crimes against humanity of murder (Article 575), enslavement (Articles 600, 601 and 602), imprisonment or other severe deprivation of physical liberty (Article 605, 606 and 607), torture (Article 613 *bis*), rape (Article 609 *bis*), sexual slavery (Article 600), enforced prostitution (Article 600) and sexual violence (Article 609 *bis*). However, the Criminal Code provisions fail to capture the essence of crimes against humanity, as they do not require that those acts be committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”, as set forth in the *chapeau* of Article 7, paragraph 1, of the ICC Statute. The absence of this contextual element in the relevant ordinary offences means that the penalties imposed on those responsible for the aforementioned crimes against humanity are totally inadequate.

What is more, the underlying acts of many crimes against humanity listed in Article 7, paragraph 1, of the Rome Statute are not covered by Criminal Code provisions on ordinary offences. Those crimes include: extermination; deportation or forcible transfer of population; forced pregnancy; enforced sterilization; persecution; enforced disappearance of persons; apartheid; and other inhumane acts.<sup>22</sup>

### 3.3. *War crimes*

In Italy war crimes are mainly defined in Title IV of Book III of the Wartime Military Criminal Code (WMCC), which is headed “*Dei reati contro le leggi e gli usi della guerra*”.<sup>23</sup> This code was adopted in 1941, while the Second World War was raging, and it has been subject only to minor amendments since then. In particular, Law No. 6 of 31 January 2002 amended Article 165 of the WMCC, so as to extend the scope of application of Title IV of Book III, which originally only covered war crimes committed during a state of war between Italy and other

<sup>22</sup> On this point, see ROSCINI, “Great Expectations: The Implementation of the Rome Statute in Italy”, JICJ, 2007, p. 493 ff., p. 500.

<sup>23</sup> For the Wartime Military Criminal Code, see Royal Decree No. 303 of 20 February 1941, as amended, in Normattiva, available at: <<https://www.normattiva.it>>.

States, to all cases of “armed conflict” involving Italy, even if a state of war is not declared (Article 2).<sup>24</sup> The meaning of the expression “armed conflict” was subsequently clarified by Law No. 15 of 27 February 2002, which added to Article 165 a provision stating that armed conflict means “a conflict in which at least one of the parties makes use of arms against the other in a militarily organized and protracted manner for the conduct of military operations” (Article 2).<sup>25</sup> Hence, nowadays, the war crimes provisions of the WMCC in principle apply to both international and non-international armed conflicts involving Italy. In practice, however, the prosecution of war crimes committed in a non-international armed conflict would be extremely difficult, since those provisions were conceived with regard to international armed conflicts and worded accordingly and they have not been amended so far.<sup>26</sup>

Moreover, Law No. 6/2002 added Article 184 *bis* and Article 185 *bis* to the WMCC (Article 2). Article 184 *bis* expressly criminalizes the taking of hostages to the extent that it is prohibited by the law of international armed conflict. The taking of hostages as forbidden under the law of non-international armed conflict is inexplicably forgotten, although hostage-taking is a serious violation of Article 3 common to the 1949 Geneva Conventions and, consequently, a war crime under Article 8, paragraph 2(c)(iii) of the ICC Statute, when committed against persons taking no active part in the hostilities in a non-international armed conflict.

Article 185 *bis* criminalizes “torture and other inhumane treatment, illegal transfers and *any other conduct prohibited by international conventions*, including biological experiments and medical treatments which are not justified by the state of health of the persons concerned, *to the detriment of prisoners of war, civilians or other persons protected by those conventions*”.<sup>27</sup> It is submitted that only acts outlawed by treaties to which Italy was a party at the time of their commission fall within this provision. Nowadays, the provision certainly applies to acts constituting grave breaches of the 1949 Geneva Conventions and the 1977 Additional Protocol I.<sup>28</sup>

Article 185 *bis* is modelled on Articles 174 and 175 of the WMCC. These articles criminalize, respectively, the authorization or order to employ “any of the means or methods of warfare prohibited by law or international conventions”

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<sup>24</sup> Law No. 6 of 31 January 2002, GU No. 28 of 2 February 2002. On this law, see *inter alia* RIVELLO, “Conflitti armati e missioni internazionali”, in ID. (ed.), *Manuale del diritto e della procedura penale militare*, Torino, 2021, p. 447 ff., p. 456 ff.

<sup>25</sup> Law No. 15 of 27 February 2002, GU No. 49 of 27 February 2002.

<sup>26</sup> On this point, see BARTOLINI, “The Criminalization of War Crimes in Italy and the Shortcomings of the Domestic Legal Framework”, *International Criminal Law Review*, 2021, p. 1 ff., p. 16.

<sup>27</sup> Emphasis added. Art. 185 *bis* has a residual character: it applies when the conduct does not constitute a more serious criminal offence.

<sup>28</sup> Italy ratified the 1949 Geneva Conventions in 1951 and the 1977 Additional Protocol I in 1986. See details on the website of the Federal Department of Foreign Affairs of Switzerland, which acts as depositary (available at: <<https://www.dfae.admin.ch/eda/fr/dfaepolitique-exterieure/droit-international-public/traites-internationaux/depositaire/protection-des-victimes-de-la-guerre.html>>).

and the actual employment of any such means or methods.<sup>29</sup> Reference should be made to means and methods of warfare outlawed by the legislation in force in Italy or by treaties to which this country was a party, at the time of the events. They undoubtedly comprise the following means of warfare:

- poison and poisoned weapons, whose use was first prohibited, at the international level, by Article 23(a) of the 1899 Hague Convention II<sup>30</sup> and, nationally, by Article 35 of the Italian Law of War, annexed to the Royal Decree No. 1415 of 8 July 1938,<sup>31</sup> and constitutes a war crime in international and non-international armed conflicts under Article 8, paragraph 2(b)(xvii) and (e)(xiii) of the Rome Statute;

- asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, whose employment was first outlawed, at the international level, by the 1925 Geneva Protocol<sup>32</sup> and, domestically, by Article 51 of the Italian Law of War and constitutes a war crime in international and non-international armed conflicts under Article 8, paragraph 2(b)(xviii) and (e)(xiii) of the ICC Statute;

- bullets which expand or flatten easily in the human body, whose use was first prohibited by the 1899 Hague Declaration concerning expanding bullets<sup>33</sup> and constitutes a war crime in international and non-international armed conflicts under Article 8, paragraph 2(b)(xix) and (e)(xiv) of the Rome Statute.

It is worth noting that the war crimes of employing the aforementioned means of warfare in non-international armed conflicts were added to the list of war crimes falling within the jurisdiction of the ICC, through the amendment to Article 8 of the Rome Statute that was adopted by the Kampala Review Conference and recently ratified by Italy.<sup>34</sup> In this author's view, such war crimes are covered by Articles 174 and 175 of the WMCC, which – following the 2002 amendments to Article 165 – apply to all cases of armed conflict involving Italy, either international or non-international. Therefore, although desirable for clarity, no additional legislation is required to make them prosecutable before the Italian courts.

However, notwithstanding the wide recourse to the “legislation by reference” technique in Articles 174, 175 and 185 *bis* of the WMCC, numerous war crimes

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<sup>29</sup> Arts. 174 and 175 of the WMCC have a residual character: they apply whenever the conduct is not criminalized under a specific provision of law (see Art. 174, para. 1).

<sup>30</sup> Italy has been a party to the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land since 1900. See details in the treaty database of the Ministry of Foreign Affairs of the Netherlands, which acts as depositary (<<https://treatydatabase.overheid.nl/en/Treaty/Details/002338>>).

<sup>31</sup> Royal Decree No. 1415 of 8 July 1938, Suppl. to GU No. 211 of 15 September 1938.

<sup>32</sup> Italy has been a party to the 1925 Geneva Protocol for the prohibition of the use of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare since 1928. See details in the treaty database of the Ministry of Foreign Affairs of France, which acts as depositary (<[https://basedoc.diplomatie.gouv.fr/exl-php/recherche/mae\\_internet\\_\\_traites](https://basedoc.diplomatie.gouv.fr/exl-php/recherche/mae_internet__traites)>).

<sup>33</sup> Italy has been a party to the 1899 Hague Declaration concerning the prohibition of the use of bullets which can easily expand or change their form inside the human body since 1900. See details in the treaty database of the Ministry of Foreign Affairs of the Netherlands, which acts as depositary (<<https://treatydatabase.overheid.nl/en/Treaty/Details/002423>>).

<sup>34</sup> See *supra* Section 1.



listed in Article 8 of the ICC Statute are not covered by any provision of the WMCC. They include the following:

- denying a fair trial to protected persons (Article 8, paragraph 2(a)(vi));
- sentencing or execution without due process (Article 8, paragraph 2(c)(iv));
- attacking personnel or objects involved in a humanitarian assistance or peace-keeping mission (Article 8, paragraph 2(b)(iii) and (e)(iii));
- launching an attack in the knowledge that it will cause excessive incidental death, injury, or damage (Article 8, paragraph 2(b)(iv));
- attacking undefended places (Article 8, paragraph 2(b)(v));
- depriving the nationals of the hostile power of rights or actions (Article 8, paragraph 2(b)(xiv));
- using protected persons as shields (Article 8, paragraph 2(b)(xxiii));
- attacking objects or persons using the distinctive emblems of the Geneva Conventions (Article 8, paragraph 2(b)(xxiv) and (e)(ii));
- using, conscripting or enlisting children (Article 8, paragraph 2(b)(xxvi) and (e)(vii)).<sup>35</sup>

As for the war crime of attacking civilian objects (Article 8, paragraph 2(b)(ii)), it falls within the scope of Article 179 of the WMCC only when the attack is directed against hospitals or other places where the sick and the wounded are treated, historic monuments or buildings dedicated to art, science, religion or charitable purposes.

As to serious violations of the 1999 Additional Protocol II to the 1954 Hague Convention, corresponding military criminal offences were established in Articles 7-10 of Law No. 45 of 16 April 2009, by which the Parliament authorized the President of the Italian Republic to ratify the Protocol.<sup>36</sup> Law No. 45/2009 contained the implementing order as well as various provisions aimed at making the Protocol fully applicable at the domestic level.

### 3.4. *Crime of aggression*

Italy's legislation contains no provision whatsoever on the crime of aggression. The 1947 Peace Treaty between the Allied and Associated Powers and Italy only bound the latter to take all necessary measures to arrest and surrender to the former for trial "persons accused of having committed, ordered or abetted war crimes and *crimes against peace* or humanity" (Article 45, paragraph 1).<sup>37</sup> It did not establish any obligation to introduce such crimes into the Italian legal system.

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<sup>35</sup> On this point, see ROSCINI, *cit. supra* note 22, p. 502 ff.; BARTOLINI, *cit. supra* note 26, pp. 15-16.

<sup>36</sup> Law No. 45 of 16 April 2009, GU No. 105 of 8 May 2009. On this law, see the comment of CASOLARI, IYIL, 2009, p. 482 ff.; MAUGERI, "La tutela dei beni culturali nell'ambito dei conflitti armati: la l. 16.4.2009 n. 45", *La legislazione penale*, 2010, p. 5 ff.

<sup>37</sup> Treaty of Peace with Italy, Paris, 10 February 1947, entered into force 15 September 1947. Emphasis added.

In fact, neither crimes against peace nor crimes against humanity were proscribed domestically.<sup>38</sup>

Following Italy's ratification of the Kampala amendments on the crime of aggression, it is highly desirable, although not obligatory, to incorporate this crime into the Italian legal order, so as to enable domestic courts to prosecute it, like many other States ratifying those amendments have already done.<sup>39</sup> It is submitted that the national courts' jurisdiction should cover the crime of aggression, whether Italy is the aggressor or the victim State. As to the cases where Italy is only a bystander State, it is worth noting that it is controversial whether under customary international law, third States are entitled to exercise universal jurisdiction over the crime of aggression.<sup>40</sup> Therefore, it is not advisable to extend Italian courts' jurisdiction to those cases.

#### 4. THE DRAFT CODE OF INTERNATIONAL CRIMES

On 22 March 2022, the Italian Minister of Justice, Marta Cartabia, set up a commission of experts to draft a code of international crimes, with the ultimate objective to ensure the full alignment of domestic law with the ICC Statute.<sup>41</sup> The commission was co-chaired by Professors Francesco Palazzo and Fausto Pocar,<sup>42</sup> and required to complete its work by the end of May 2022.<sup>43</sup> In fact, it submitted the draft code of international crimes and the accompanying report to the Ministry of Justice on 31 May 2022.<sup>44</sup>

The Minister of Justice's initiative is commendable. The adoption of a single piece of legislation is indeed preferable to multiple amendments to the laws in force, in particular the Criminal Code and the WMCC, in order to ensure the incorporation of all the international crimes listed in the ICC Statute and its amendments into the Italian legal order. A code of international crimes has the advan-

<sup>38</sup> As to crimes against humanity, see *supra* Section 3.2.

<sup>39</sup> For a survey of national legislation on the crime of aggression, see REISINGER CORACINI, "(Extended) Synopsis: The Crime of Aggression under Domestic Criminal Law", in KRESS and BARRIGA (eds.), *The Crime of Aggression: A Commentary*, Cambridge, 2017, p. 1038 ff.; HARTIG, "Post Kampala: The Early Implementers of the Crime of Aggression", JICJ, 2019, p. 485 ff.

<sup>40</sup> On this point, see *inter alia* CLARK, "Complementarity and the Crime of Aggression", in STAHN and EL ZEIDY (eds.), *The International Criminal Court and Complementarity. From Theory to Practice*, Cambridge, 2011, p. 721 ff., p. 730 ff.; WRANGE, "The Crime of Aggression, Domestic Prosecutions and Complementarity", in KRESS and BARRIGA (eds.), *cit. supra* note 39, p. 704 ff., p. 717 ff.; HARTIG, *cit. supra* note 39, p. 490 ff.

<sup>41</sup> Decree of the Minister of Justice of 22 March 2022, available at: <[https://www.giustizia.it/giustizia/it/mg\\_1\\_8\\_1.page?contentId=SDC372746&previousPage=mg\\_1\\_8](https://www.giustizia.it/giustizia/it/mg_1_8_1.page?contentId=SDC372746&previousPage=mg_1_8)>.

<sup>42</sup> Francesco Palazzo and Fausto Pocar are, respectively, Professor Emeritus of Criminal Law at the University of Florence and Professor Emeritus of International Law at the University of Milan.

<sup>43</sup> Arts. 2 and 8 of the Decree of the Minister of Justice, *cit. supra* note 41.

<sup>44</sup> As of the time of completion of this article, neither of them is publicly available.

tage of closing gaps and removing inconsistencies between the domestic law and the Rome Statute, while providing a unitary and coherent set of rules.<sup>45</sup>

The Italian code of international crimes should list all the international crimes that may be prosecuted before the domestic courts, using the German Code of Crimes against International Law as a model, and should replace the existing legislative provisions.<sup>46</sup> It should include:

- the crime of genocide, which is now punished by Law No. 962/1967;
- war crimes, whose punishment is now mainly provided by the WMCC;
- crimes against humanity, which would be introduced as a discrete category of criminal offences;
- the crime of aggression, which is not yet punished under domestic law.

The international crimes set forth in the code at issue should be made punishable by appropriate penalties and not be subject to any statute of limitations, in conformity with Article 29 of the Rome Statute. Nowadays, most war crimes listed in the WMCC are punishable with disproportionately low penalties.<sup>47</sup> Moreover, under Article 157, paragraph 8, of the Criminal Code, only criminal offences punishable with life imprisonment are not subject to any statute of limitations.

In this author's view, the Italian code of international crimes should also provide for universal jurisdiction over war crimes, crimes against humanity and genocide, in order to prevent the perpetrators of abominable crimes committed abroad from finding refuge in Italy. The domestic courts should be empowered to prosecute the alleged offender, whenever he/she is present in Italian territory, irrespective of his/her nationality, the nationality of the victims, the place of commission of the crime or any other jurisdictional link. Universal jurisdiction is expressly provided for by the 1949 Geneva Conventions and 1977 Additional Protocol I over grave breaches<sup>48</sup> and by the 1999 Additional Protocol II to the 1954 Hague Convention over serious violations under Article 15, paragraph 1(a), (b) and (c),<sup>49</sup> and made conditional by the latter only to the presence of the alleged

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<sup>45</sup> It is worth noting that under Art. 3 *bis* of the Criminal Code, new criminal offences can be introduced into the Italian legal system only by amending the Criminal Code or by enacting or amending laws which systematically regulate the subject.

<sup>46</sup> The English version of the German Code of Crimes against International Law of 26 June 2002, as last amended by Art. 1 of the Act of 22 December 2016, is available at: <[https://www.gesetze-im-internet.de/englisch\\_vstgb/englisch\\_vstgb.html#p0115](https://www.gesetze-im-internet.de/englisch_vstgb/englisch_vstgb.html#p0115)>. On such code, see *inter alia* WERLE and JESSBERGER, *Principles of International Criminal Law*, 4th ed., Oxford, 2020, p. 187 ff.

<sup>47</sup> With regard to the penalties established by Art. 185 *bis* of the WMCC, see LANZI and SCOVAZZI, "Una dubbia repressione della tortura e di altri gravi crimini di guerra", RDI, 2004, p. 685 ff., p. 689 ff.; ACQUAVIVA, *La repressione dei crimini di guerra nel diritto internazionale e nel diritto italiano*, Milan, 2014, pp. 225-226.

<sup>48</sup> See Art. 49, para. 2, of Geneva Convention I; Art. 50, para. 2, of Geneva Convention II; Art. 129, para. 2, of Geneva Convention III; Art. 146, para. 2, of Geneva Convention IV; Art. 85, para. 1, of Additional Protocol I.

<sup>49</sup> See Art. 17, para. 1, of Additional Protocol II to the 1954 Hague Convention.

perpetrator in the territory of the prosecuting State.<sup>50</sup> Furthermore, it is widely acknowledged that, under customary international law, all States are allowed to establish universal jurisdiction over war crimes, crimes against humanity and genocide, whenever the alleged offender is present in their territory.<sup>51</sup> As for the crime of aggression, it is submitted that the domestic courts should be enabled to prosecute the alleged perpetrator, provided that he/she is present on Italian soil and that Italy is either the aggressor or the victim State.<sup>52</sup>

## 5. CONCLUSION

The analysis above shows that the Italian legislation does not provide a proper legal basis for the prosecution of most of the international crimes listed in the Rome Statute and its amendments. A major legislative effort is needed to make all those crimes prosecutable before the domestic courts, so as to deny their perpetrators a safe haven in Italy and to contribute to the efficient functioning of the international criminal justice system created by the Rome Statute, under which the primary jurisdiction over such crimes rests with the States parties.

A code of international crimes replacing the deficient legislation in force might constitute the required legislative framework. It would close the gaps and remove the inconsistencies between the domestic law and the ICC Statute, while providing a unitary and coherent set of rules. All the international crimes listed in Articles 6, 7, 8 and 8 *bis* of the Rome Statute should be covered. It would be advisable to include also the war crimes added to Article 8 by the amendments which were adopted by the Assembly of States Parties in 2017<sup>53</sup> and 2019<sup>54</sup> and, it is hoped, will be soon ratified by Italy. No statute of limitations should apply to any of the aforementioned crimes, in accordance with Article 29 of the Statute.

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<sup>50</sup> The presence of the alleged offender in the territory of the prosecuting State is not expressly required by the 1949 Geneva Conventions and 1977 Additional Protocol I, but it is imposed as a condition for exercising jurisdiction over grave breaches by the legislation of many States parties. See *inter alia* LAFONTAINE, “Universal Jurisdiction – The Realistic Utopia”, JICJ, 2012, p. 1277 ff., p. 1280 ff.; LA HAYE, “Article 49”, in ICRC, *Commentary on the First Geneva Convention*, Cambridge, 2016, p. 999 ff., p. 1019, para. 2866.

<sup>51</sup> See para. 3(a) and (b) of the Resolution of the Institute of International Law on “Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes”, which was adopted at the Krakow Session in 2005, available at: <[https://www.idi-iil.org/app/uploads/2017/06/2005\\_kra\\_03\\_en.pdf](https://www.idi-iil.org/app/uploads/2017/06/2005_kra_03_en.pdf)>. As for universal jurisdiction over crimes against humanity, see also International Law Commission, Draft Articles on Prevention and Punishment of Crimes against Humanity (2019), Art. 7, para. 2.

<sup>52</sup> With regard to the requirement that Italy be the aggressor or the victim of aggression, see *supra* Section 3.4.

<sup>53</sup> Annexes I, II and III to Resolution ICC-ASP/16/Res.4, adopted by the Assembly of States Parties at the 12th plenary meeting, 14 December 2017, available at: <[https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/Resolutions/ASP16/ICC-ASP-16-Res4-ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res4-ENG.pdf)>.

<sup>54</sup> Annex I to Resolution ICC-ASP/18/Res.5, adopted at the 9th plenary meeting, 6 December 2019, available at: <[https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/ASP18/ICC-ASP-18-Res5-ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/ICC-ASP-18-Res5-ENG.pdf)>.

Moreover, universal jurisdiction over perpetrators of genocide, crimes against humanity and war crimes should be provided and made conditional only upon their presence in Italian territory. The same framework should be established for the prosecution before the domestic courts of those responsible for the crime of aggression, except that it would be appropriate to confine domestic jurisdiction to cases involving Italy as the aggressor or victim State.