4.1 How to Implement Crimes Against Humanity and Genocide in the Italian System

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1 Introduction: The Extent of International Obligations to Adopt Domestic Provisions on Genocide and Crimes Against Humanity

The Italian legal system represents a particularly significant field of investigation when assessing the scope of domestic implementation of international crimes. Despite the decisive role played by the Italian delegation during the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) in 1998 and the prompt ratification and execution of the treaty, Italian legislation still lacks substantive provisions on international crimes. Law no 962/1967 – implementing the obligations arising from the ratification of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)[1] – is to various extents inadequate. Furthermore, in the absence of domestic provisions, crimes against humanity can be prosecuted by Italian courts only through recourse to corresponding ordinary offences and the general discipline therewith applicable.[2]

Notwithstanding the lack of direct obligations under the Rome Statute of the ICC ~~Statute~~ (Rome Statute) to criminalise genocide, crimes against humanity, war crimes and aggression, States are generally bound by other international conventions that, to various extents, require the adoption of domestic provisions incorporating such offences. For instance, Article 5 of the Genocide Convention imposes on States Parties an explicit obligation to adopt the necessary legislation to implement its provisions, and specifically to provide effective sanctions, commensurate with the seriousness of the conduct. Crimes against humanity, conversely, are currently still not enshrined in a specific international treaty, but remain to a large extent relevant under customary international law.[3] Only some of the offences listed under Article 7 of the Rome Statute (such as torture and other cruel, inhuman and degrading treatment, apartheid, and forced disappearances) are already included in specific conventions. At the same time, however, most scholars agree that an indirect obligation to enact domestic legislation on crimes falling under the jurisdiction of the ICC descends from the enforcement system established under the principle of complementarity (Rome Statute, Articles 1 and 17).[4] The lack of domestic provisions on international crimes may indeed not only

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in theory threaten the judicial intervention of the ICC, but also result in the impossibility for Italian legal judicial authorities "to comply with some of its obligations of cooperation under Part 9 of the Statute".[5] The belated adoption of norms on international crimes would thus represent a most needed step and an unprecedented opportunity for the Italian legislator to comply with international obligations, at the same time ensuring the highest standards of international criminal law. The current moment is indeed particularly noteworthy: on 22 March 2022, the Ministry of Justice appointed the Ministerial Commission Palazzo–Pocar on International Crimes (the "Commission"), tasked with drafting a code of international crimes. The Commission issued its Final Report on 24 June 2022.[6]

Against this backdrop, this chapter aims at assessing the coherence of Italian provisions currently in force with Articles 6 and 7 of the Rome Statute and at envisaging possible solutions for the implementation of crimes against humanity (Section 2) and genocide (Section 3) into the domestic legal system.[7] Finally, some conclusions on the relevance of the issue and on future perspectives will be presented (Section 4).

2 The Lack of Domestic Provisions on Crimes Against Humanity: Shortcomings of Prosecuting International Crimes as Ordinary Offences

Unlike war crimes and genocide, crimes against humanity are still not foreseen in the Italian criminal or military criminal law system.[8] While it is true that most conducts are indeed already incriminated under domestic law,[9] prosecuting international crimes as ordinary offences has noteworthy consequences.[10] First, in the absence of derogatory provisions, general principles apply, even when they lead to solutions that are, at the very least, problematic under international law. This is the case, for instance, for statutes of limitations, whose applicability often leads to the result of impeding the prosecution of international crimes.[11]

Furthermore, domestic crimes lack the definition of the contextual element, which conveys the macro and systematic dimension of international crimes and acknowledges the violation of specific protected interests belonging to the international community. In this regard, various national legislations on crimes against humanity neglected the so-called "policy" element, which requires the commission of multiple acts "pursuant to or in furtherance of a State or organizational policy to commit such attack" (Rome Statute, Article 7), but did not appear in the statutes of international courts and tribunals until the adoption of the Rome Statute. Furthermore, recent ICC jurisprudence seems to downplay the strict interpretation of this element, entailing the formal adoption of such policy, and requires instead that acts amounting to crimes against humanity are "linked" to a State or organisation, thus excluding isolated episodes of violence.[12] For the same reason, the private initiative to draft an Italian code of international crimes (so-called "Progetto Cariplo" of 2015) chose to consider the policy element only as aggravating

circumstance.[13] Adopting a different approach, the Articles on Crimes Against Humanity drafted by the Commission Palazzo-Pocar connected the attack to a State or organisation's "program", in order to "ensure legal certainty and procedural applicability" and to exclude "phenomena that do not seem to amount to international crimes, such as offences committed during spontaneous riots".[14]

Ordinary offences are also often not perfectly equivalent to the material elements required under Article 7 of the Rome Statute for crimes against humanity. Penal code provisions may in fact encompass a broader scope than the international norm. This consideration is, for instance, evident in the definition of "enslavement" under Articles 600 and 601 of the Italian Penal Code, which is not limited to the exercise of powers attaching to the right of ownership but extends to any conduct related to a status of continuous constraint. Again, ordinary norms are often conceived as "*reati propri*" – requiring a specific personal status (eg official capacity) – whilst under the Rome Statute they apply generally to common agents. This appears to be the case of the crime of "illegal arrest or arbitrary deprivation of personal liberty" under Articles 606 and 607 of the Italian Penal Code, which can only be committed by State agents, whilst Article 7(1)(e) of the Rome Statute incriminates the "imprisonment or other severe deprivation of physical liberty" regardless of official capacity.

The same consideration applies with regard to the discipline of sexual offences under Articles 609*bis* and following of the Italian Penal Code, which mainly attains to the exercise of violence, threats, or abuse of authority against the victim in order to force him or her to perform or suffer sexual acts. Conversely, the corresponding international offences encompass a wider range of conduct, such as sterilisation or forced pregnancy, as confirmed by recent ICC jurisprudence in the *Ongwen* case.[15] In light of the diversity of protected legal interests, the German legislator opted for a distinction between offences against sexual self-determination and offences against reproductive self-determination, as provided by Article 7(1) no 6 of the German Code of Crimes Against International Law (*Völkerstrafgesetzbuch*, VStGB).[16]

Although only recently introduced in Article 613*bis* of the Italian Penal Code, the domestic definition of torture is largely considered unsatisfactory when compared to international obligations binding Italy since the ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1988.[17] The issue has been extensively debated and exceeds the scope of this chapter. It is, however, worth highlighting that although torture has been characterised as a common offence, applicable to private agents, the second paragraph of the provision sets out harsher penalties for State agents abusing their official capacity. As emphasised by most scholars, international obligations and a systematic interpretation of the domestic criminal system require interpreting the provision as an autonomous offence, instead of a mere aggravating circumstance.[18] A different reading would in fact allow it to be potentially counterbalanced with mitigating circumstances, thus denying the core character of torture performed

by State agents. Furthermore, the provision omitted the indeed common hypothesis of superior responsibility for negligent omission or facilitation of the crime of torture.

Other conducts amounting to crimes against humanity are still not foreseen under Italian criminal law and need therefore to be criminalised, even when they are already partially included in the definition of genocide under Law no 962/1967.[19] This is the case, for instance, for the crimes against humanity of deportation, forcible transfer of population, extermination, persecution, forced disappearance and apartheid.

As previously anticipated, the belated adoption of international crimes into the Italian domestic system represents an opportunity to ensure the highest standards of international law. At the same time, however, the "domestication" of international crimes needs to comply with the constitutional framework. In this regard, the criminal principle of strict legality led some national legislators to exclude from domestic provisions on crimes against humanity the residual hypothesis of "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" under Article 7(1)(k) of the Rome Statute. This clause aimed at introducing more clarity than the analogous provisions of Article 5 of the ICTY Statute and Article 3 of the ICTR Statute. The ICC jurisprudence interprets it as a residual category, not intended to be "applicable without limits" but related to acts of great suffering or serious injury to body or to mental health, similar in nature and gravity to the other acts referred to in Article 7 of the Rome Statute.[20] Such interpretation would ensure the compliance of the provision with the Italian constitutional jurisprudence on the *ejusdem generis* principle, which forbids heterogeneous norms incriminating structurally similar conducts.[21]

3 Italian Law no 962/1967 on Genocide: Seizing the Opportunity of a Code of International Crimes to Expand the Scope of Domestic Provisions Already in Force

Unlike crimes against humanity, provisions on acts amounting to genocide are already included in the Italian criminal law system. In order to give effect to the Genocide Convention and to "provide effective penalties for persons guilty of genocide" (Genocide Convention, Article V), the Italian legislator adopted Law no 962 in 1967, which incriminates some of the offences listed under Article III of the Genocide Convention.[22] Although Articles 1 to 8 of Law no 962/1967 adopt *verbatim* Articles II and III of the Genocide Convention, the Italian framework shows some inconsistencies when compared to the internationally recognised definition of genocide.

Notwithstanding the broad discretion left upon States to criminalise acts of genocide set out in the Genocide Convention and the absence of a direct obligation descending from Article 6 of the Rome Statute,[23] the adoption of domestic legislation on international crimes may represent an opportunity to reflect on the extent of Italian provisions' adherence to the international norm.

Specifically, the adoption of domestic norms on international crimes requires consideration on the possible extension of the protected groups envisaged by the established definition of genocide. Several national legislations broadened their provisions on genocide in order to include political,[24] social (with reference to either economic status or sexual orientation),[25] and cultural groups.[26] In general, the jurisprudence of international criminal tribunals – albeit not extending the scope of genocide to such entities – seems to give relevance to the subjective attribution of the group character, which is therefore not limited to mere objective criteria.[27] The traditional listing (national, ethnical, racial or religious) would not, thus, be exhaustive, since Article II of the Genocide Convention represents a crystallisation, at a precise historical moment, of the generally accepted notion of genocide at the time. The adoption of subjective criteria in the interpretation of the group character would also allow to fully grasp the nature of collective entities, which "by their nature constitute social constructs, entities 'imagine' entirely dependent on variable and contingent perceptions, and not social facts, which are verifiable as natural phenomena or physical facts".[28]

An extensive notion of the contextual element of genocide is indeed not unknown to the Italian legal system, although not explicitly foreseen. Domestic courts confronted with the political nature of genocide in the *Acosta Jorge Eduardo* case, when the Court of Assizes of Rome sentenced to life imprisonment four soldiers of the Argentinian military navy for the killing of three Italian citizens.[29] In assessing the defendants' criminal liability, the Court traced such conduct to the broader context of the "tragic genocide" committed by the Argentinian regime against political opponents.

Nonetheless, as explained in its *Final Report*, the Commission Palazzo–Pocar defined genocide by relying on the exact wording of Article II of the Genocide Convention and Article 6 of the Rome Statute, with the only extension to linguistic identity.[30]

Minor adjustments seem advisable, moreover, in regard to the material conducts amounting to genocide, such as the abduction and forcible transfer of minors under 18 years – instead of 14 years (Law 962/1967, Article 5)[31] – or the inclusion of serious mental harm in the definition of the violation of personal integrity, as required by both international and domestic provisions.[32]

The belated adoption of norms on genocide shall also encompass offences not included in Law no 962/1967, like the "deprivation of resources indispensable for the survival of the same [group], such as food or medical care, or [in] the systematic expulsion from their homes", as well as sexual violence and forced pregnancy aimed at modifying or altering the ethnic composition of the group or at determining in the victim the decision not to procreate.[33]

Finally, the scope of the crime shall not be unduly restricted to events perpetrated against more than one group member, as currently provided by Article 1(2) of Law no 962/1967. A broadened provision seems rather advisable in light of Article 6(1)(a), (b) and (e) of the Rome Statute, which encompasses the commission of relevant conducts against "one or more members of the group".[34]

4 Conclusions

The late implementation of the Rome Statute in the domestic legal system constitutes, as already anticipated, an opportunity to expand its provisions, overcoming those compromises imposed during the negotiations and complying with the most recent developments of international criminal law.

Furthermore, the long-awaited adoption of domestic norms on international crimes allows the exercise of domestic jurisdiction on such offences by national authorities, thus reinforcing the Italian position in the system of international criminal justice. In this sense, the implementation of the mechanism conceived under the principle of complementarity demands a reconsideration of the relationship between the ICC and Italian national authorities. The challenges that, as the current moment demonstrates, hinder the international community's goal to put "an end to impunity against the perpetrators of these crimes and thus contributing to their prevention",[35] require in fact a coordinated and harmonious enforcement of all mechanisms asserting responsibility for international crimes.

Against this backdrop, the Italian legislator seems to have finally seized the opportunity to reinforce the role of Italian judicial authorities, in light of their efforts in domestic proceedings and in the context of international organisations and agencies. The adoption of the most advanced Code of international crimes will thus allow the Italian legal system not only to fully comply with its international obligations, but also to pursue an effective and functioning system of international criminal justice.

As clarified in Section 2, the domestic adoption of provisions on crimes against humanity proves to be particularly crucial in light of the limited overlap between ordinary offences and the corresponding international crimes. On the one hand, the consideration is especially striking in relation to the absence under ~~the~~ domestic criminal law of the contextual element, which expresses the typical disvalue and the macro-systematic dimension of international crimes. On the other hand, the recourse to ordinary offences is unsatisfactory in consideration of the conducts listed under Article 7 of the Rome Statute, as shown by recent investigations and proceedings conducted by Italian judicial authorities on crimes committed against migrants in Libyan detention camps or on their *routes* to European borders. Section 3 assessed that a new discipline on genocide would overcome the shortcomings of provisions already in force under Law no 962/1967, which proves to be largely outdated and does not fully reflect the international discipline of the crime.

In conclusion, the recent initiative undertaken by the Commission Palazzo–Pocar is therefore to be welcomed, as it aims at systematically overcoming the above-mentioned shortcomings of provisions already in force and at introducing the long-awaited domestic implementation of the Rome Statute. It remains, however, to be seen if the discipline and its future jurisprudential applications would constitute a reference model in the international scenario.

Notes

1 UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277.
2 See Marco Pedrazzi, Chapter 2.2, Previous Italian Legislative Drafts.
3 Draft articles on Prevention and Punishment of Crimes Against Humanity 2019, UN General Assembly (A/74/10), *Yearbook of the International Law Commission 2019*, vol II (part two).
4 Marco Longobardo, 'The Italian Legislature and International and EU Obligations of Domestic Criminalisation' (2021) 21 International Criminal Law Review 623, 628.
5 ibid. See also Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (OUP 2020) 34. On the relationship between implicit obligations to criminalise arising from the Rome Statute and the Italian legal system, *see* Luigi Prosperi, ' "With or Without You": Why Italy Should Incorporate Crimes Against Humanity and Genocide Into Its National Legal System' (2021) 21 International Criminal Law Review 707.
6 Commission Palazzo–Pocar on International Crimes, *Final Report*, 24 June 2022: www.giustizia.it/giustizia/it/mg_1_36_0.page?contentId=COS372730.
7 See Luigi Prosperi, Chapter 4.3, Prosecuting Genocide and Crimes Against Humanity as Ordinary Offences: What Consequences?
8 On war crimes, see Giulio Bartolini and Marco Longobardo, Chapter 4.2, The Italian Legislation on War Crimes: Obligations to Implement and Principle of Legality.
9 Commission Palazzo–Pocar on International Crimes (n 5) 22.
10 On the extent of the obligation upon States to incriminate acts amounting to genocide and the consequences of prosecuting them as ordinary offences, see again Luigi Prosperi, Chapter 4.3.
11 Court of Cassation, Sect VI, 17 July 2014, 46634; Court of Assizes of Rome, 17 January 2017 (10 April 2017) no 31079; Emanuela Fronza, 'Il processo italiano al Plan Cóndor. Uno stress test superato dall'ordinamento italiano', in Roberto Acquaroli, Emanuela Fronza and Alessandro Gamberini (eds), La giustizia penale tra ragione e prevaricazione. Dialogando con Gaetano Insolera (Aracne 2021) 477.
12 ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *The Prosecutor v Germain Katanga*, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG, 1111ff; Pre-Trial Chamber III, Situation in the Central African Republic, *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 12 June 2008, ICC-01/05-01/08-14-tENG, 33ff.
13 See Fausto Pocar, Chapter 2.1, The Domestic Codification of International Crimes: the Private Initiative "Cariplo Project".
14 Commission Palazzo–Pocar on International Crimes (n 5) 22. Translation by the Author.
15 ICC, Trial Chamber IX, Situation in Uganda, *The Prosecutor v Dominic Ongwen*, Trial Judgement, 4 February 2021, ICC-02/04-01/15-1762-Red.

16 The recent proposals to reform the current formulation of VStGB, Art 7 are motivated by the need for a more effective prosecution of such crimes (ie sexual slavery, forced pregnancy and the residual clause of conduct of equal gravity), as well as by systematic reasons, imposed by recent amendment of the corresponding offences in the ordinary penal code (StGB, Art 177). Tanja Altunjan and Leonie Steinl, 'Zum Schutz der sexuellen und reproduktiven Selbstbestimmung – Aktuelle Entwicklungen und Reformbedarf im Völkerstrafgesetzbuch' (2021) 12(3) RW Rechtswissenschaft 335, 337.

17 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85. Law of 3 November 1988, no 498, *Ratifica ed esecuzione della convenzione contro la tortura ed altre pene o trattamenti crudeli, disumani o degradanti, firmata a New York il 10 dicembre 1984*, *Gazzetta Ufficiale* Serie Generale no 271 of 18 November 1988.

18 Angela Colella, 'Il nuovo delitto di tortura', in Roberto Garofoli and Tiziano Treu, *Voce per "Il libro dell'anno del diritto Treccani 2018"* (Istituto della Enciclopedia Italiana 2018).

19 See below, Section 3.

20 Elements of Crimes, Art 7(1)(k); ICC, Pre-Trial Chamber I, *The Prosecutor v Germain Katanga*, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, 445ff; Pre-Trial Chamber II, *The Prosecutor v Uhuru Muigai Kenyatta*, Decision on the confirmation of charges, 29 January 2012, ICC-01/09-02/11-382-Red, 267ff.

21 *Ex multis*, Italian Constitutional Court, 1 August 2008, no 327.

22 Law of 9 October 1967 no 962, *Prevenzione e repressione del delitto di genocidio*, *Gazzetta Ufficiale* no 272 of 30 October 1967. Italy ratified the Genocide Convention with Law of 11 March 1952, no 153, *Gazzetta Ufficiale* no 74 of 27 March 1952 (accession occurred on 4 June 1952, with publication in the *Gazzetta Ufficiale* no 161 of 14 July 1952 and entered into force on 2 August 1952).

23 Again, see Luigi Prosperi, Chapter 4.3.

24 Ethiopian Penal Code, Art 269; Bangladesh Act on Courts for International Crimes, Art 3(2)(c); Ivorian Penal Code, Art 137; Costa Rican Penal Code, Art 375; Colombian Penal Code, Art 101; Lithuanian Penal Code, Art 99; Swiss Penal Code, Art 264.

25 Estonian Penal Code, Art 90 ("a national, ethnic, racial or religious group, or a group that resists an occupation or another social group"); Latvian Penal Code, Art 71; Lithuanian Penal Code, Art 99; Paraguayan Penal Code, Art 319; Peruvian Penal Code, Art 319; Swiss Penal Code, Art 264.

26 Werle and Jeßberger (n 4) 347ff.

27 ICTR, ICTY and ICC jurisprudence departed from an objective determination of the protected groups under the Genocide Convention. Instead, the decisions by international tribunals increasingly rely on a subjective approach, with an emphasis on the perpetrator's perception of the victim group. William A Schabas, 'Part 2 Jurisdiction, Admissibility, and Applicable Law: Compétence, Recevabilité, Et Droit Applicable, Art.6 Genocide/Crime de génocide', in William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford Scholarly Authorities on International Law 2016) 124ff.

28 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005, para 494.

29 Court of Assizes of Rome, 17 January 2017 (10 April 2017) no 31079.
30 Commission Palazzo–Pocar on International Crimes (n 5) 22.
31 See Note 5 to Art 6(e) of the Elements of Crimes (EoC). Such age limit is, however, not provided for under Genocide Convention, Art II.
32 Genocide Convention, Art II; Rome Statute, Art 6(b); see also ICTR, *The Prosecutor v T Muvuni*, 11 February 2010, ICTR-2000-55A-T, par. 486. The ordinary offence of personal injury pursuant to the Italian Penal Code, Art 582 expressly criminalises the causation of a "disease in the body or mind", defined as an "anatomical or functional alteration of the organism, even if localized, destined to persist until the [...] alteration process is underway" (eg Court of Cassation, Sect V, 25 October 2012, no 8351; Sect V, 29 September 2010, no 43763; Sect V, 25 October 2012, no 8351; Sect V, 29 September 2010, no 43763). Translation by the Author.
33 Note 4 to Art 6(e) EoC.
34 VStGB, Art 6 and Spanish Penal Code, Art 607(1) require, according to the prevailing interpretation of Art 6 of the Rome Statute, the commission of at least one conduct constituting genocide against at least one member of the attacked group.
35 Preamble of the Rome Statute.

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