Italy and International Law

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GUIDE TO READING OF EDITION No. 3: 2016-2017

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1. In the third edition of the *Survey*, more than 300 'cases' are presented, which cover, as for the previous editions, national legislative acts and case law, or documentation related to international procedures on monitoring the implementation of multilateral treaties, all produced in the period 2016-2017 and relevant to the application of international law in Italy.

This guide intends to point out for readers' convenience, a few examples of most noteworthy cases. Some of them testify of widespread influence of certain international norms or judgments on the Italian domestic legal order. Others reveal, on the contrary, non-full compliance of the latter with obligations resulting from international law, despite the taking of national implementing measures. Moreover, the guide aims to call attention on certain cases where new international profiles are involved, as compared to those already emerged in national practice and recorded in the *Survey* previous editions.

Then, the reader is encouraged to refer to the whole of the selected documentation, according to his or her particular interest, and using the Subject table, the Indexes by treaty or category, or the search engine for key words.

2. The first organic law on Italy's participation in international missions (law No. 145/2016) is one of most noteworthy legislative developments in the two years period. This law set out the general legal framework for the special provisions Parliament adopts on individual missions or group of missions, on a case-by-case basis. The scope of application of law No. 145 entails UN and EU operations, and other missions carried out by international organizations in which Italy participates "or, however, established according to international law". It further includes the deployment of Italian military personnel and assets abroad, on the grounds of alliance or other international treaties, as well as humanitarian

operations carried out "exceptionally", and "in compliance with international law and the Constitution". Additionally, law No. 145 is one of the legal tools for implementing the Italian National Plan on Women, Peace and Security issues, in furtherance of the UN Security Council resolution No. 1325 of 2000 and further resolutions on the matter.
Law No. 110/2017 deserves attention as filling an important gap in the Italian legal order. It introduced the crime of torture in the penal code, a measure repeatedly requested by international and European monitoring bodies. Criminalization of torture through special provisions was waited since Italy's ratification of the UN Convention against torture (12 January 1989) and other relevant treaties of universal or European scope, *in primis* the European Convention on Human Rights (ECHR), which prohibits torture in Article 3. Nevertheless, the notion of torture, as codified by Article 613 *bis* of the criminal code (introduced with Article 1 of law No. 110) does not precisely coincide with the definition of the concept that is well established in international law. First, it includes some further elements that might limit the scope of application. Moreover, the quality of "public official" or "public service officer" of the agent emerges in the domestic provisions not as a constitutive element of the crime, but as a mere aggravating circumstance. Indeed, all cases brought before courts at the law initial stage of application, involved acts of torture committed by private actors.

Throughout and after the parliamentary procedure, international monitoring bodies have moved criticisms on these aspects (*ex pluribus:* COMMITTEE AGAINST TORTURE, *Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure, Fifth and Sixth periodic reports of States parties due in 2016. Italy*, CAT/C/ITA/5-6, 11 April 2016; ID., *Communication No. 598/2014, Decision adopted by the Committee at its fifty-seventh session (18 April-13 May 2016)*, CAT/C/57/D/598/2014, 13 June 2016; ID., *Concluding Observations on the combined fifth and sixth periodic reports of Italy. Italy*, CAT/ C/ITA/CO/5-6, 18 December 2017). Instead, provisions of law No. 110 expressly prohibiting expulsion, rejection and extradition of foreigners for any reason if the risk of torture can result (Article 3), are consistent with international and European obligations. At least, according to the interpretation given to the 'non-refoulement' principle by both the European Court of Human Rights (*Hirsi Jamaa*, 2012) and the EU Court of Justice (Grand Chamber, 14 May 2019, joined cases C-391/16, c-77/17 and C-78/17). Similarly, Article 4 of law No. 110 excludes the recognition of any immunity to persons accused of

torture for the purpose of their extradition towards a requesting State, or surrender to an international criminal court.

Other developments concerning crimes under international law are contained in law No. 115 of 2016, which has introduced modification to the existing norms aimed at implementing the UN Convention against racial discrimination. For the offenses of discrimination (racist propaganda crimes, incitement to acts of discrimination committed for racial, ethnic, national or religious reasons), it foresees the aggravating circumstance of "denial". The latter can refer to genocide, other crimes against humanity or war crimes, as these crimes are defined in the Statute of the International Criminal Court (ICC).

With regard to the latter, Parliament authorized, with law No. 200 of 2017, the ratification of the Amendment adopted by the Assembly of States Parties in 2015. By abolishing Article 124 of the Statute, the Amendment suppressed the possibility for States Parties to temporarily exclude from the ICC jurisdiction war crimes committed on their territory or by their nationals (faculty that Italy did not make use of, when ratified the Statute). However, a law for the ratification and implementation of the Amendments to the Statute adopted in 2010 is still lacking. After the decision of the Assembly of States Parties that became operational in 2017, these Amendments allow the ICC to exercise its competence with respect to the crime of aggression.

With regard to developments in anti-terrorism legislation, law No. 153/2016 has authorized the ratification and implementation of the UN Convention of 2005 for the elimination of nuclear terrorism, as well as of other relevant Council of Europe conventions. It further enhanced the fight against terrorism, through new substantive norms. The process of adapting Italian criminal law to internationally agreed rules and standard, in accordance with UN Security Council resolutions, started several years ago. These developments are matched by first rulings of Italian courts on cases where so-called *foreign fighters* or *lone wolves* were involved. Among most relevant ones, are decision No. 598 of 23 February 2016 of the Judge for Preliminary Hearing of the Court of Milan, and two decisions of the Appeal Court of Milan (No. 3 of 25 May 2016; No. 8 of 19 December 2016, on the *Sergio* case).

In 2016, there were, also, important developments at the European Court of Human Rights concerning the 'extraordinary rendition' of the Egyptian suspected of terrorism known as Abu Omar. His abduction took place in Milan in 2003, carried out by CIA agents with the complicity of

members of Italian SISMI intelligence service. In its judgment (IV section, 23 February 2016, *Nasr and Ghali* v. *Italy*), the ECHR Court expressed appreciation for the work done by Italian courts (on these national proceedings extensive documentation was included in the *Survey* past editions). Nonetheless, the ECHR Court found Italy responsible for the violation of the prohibition of torture, due to the omission of acts of prevention, and the violation of the right to an effective remedy. In fact, the repressive action of the judiciary has been substantially nullified by the behaviour of other State authorities. The conduct of covering with state secrecy probative documentation relating to the role played by SISMI agents, not requesting the extradition of foreign defendants, and the granting of pardons to some of them after conviction *in absentia* resulted, actually, in non-punishment, or non-effective punishment of all the convicted persons.

3. In the two-year period under review, other rulings of the ECHR Court – also dealing with criminal issues – have had, or continued to have significant impact on Italian jurisprudence.

Firstly, the follow up of the *Grande Stevens* judgment (2014) should be underlined. The ECHR Court censured with this judgment the accumulation of administrative and criminal penalties for crimes related to market abuses, which may occur under the relevant Italian legislation, in relation to the principle of *ne bis in idem* set out in Article 4 of Protocol No. 7 to the ECHR. New rulings of the Court of Cassation added in 2016 and 2017 to the huge national jurisprudence on the abovementioned decision, further specifying its internal effects. See, among others, judgments No. 4114 of the I Civil Section; No. 3656 of the II Civil Section; No. 25815 and No. 38134 of the III Criminal Section, all issued in 2016; and No. 23171 of 2017 of the IV Criminal Section). In turn, the Constitutional Court's decisions No. 102 and No. 200 of 2016 returned to the *vexata quaestio* of the partial irreconcilability of Article 649 of the Italian code of criminal procedure, on the *ne bis in idem*, with the interpretation of the same principle resulting from *Grande Stevens*. The Constitutional Court further addressed the topic of the compatibility with this judgment of those domestic provisions that implement EU legislation, especially in relation to Article 50 of the EU Charter of Fundamental Rights. In fact, the interpretation given to the *ne bis in idem* by the EU Court of Justice does not completely coincide with that of the ECHR Court, with which Italian judges must comply. As confirmation of such interpretive uncertainty, two order of preliminary rulings to the EU Court of Justice were issued by the Court of Cassation

in 2016 (No. 20675 of the Civil Tax Section, and No. 23232 of the II Civil Section, respectively).

With regard to ECHR Court decision on *Contrada* case (IV Section, 14 April 2015), the principle of the non-retroactivity of criminal law, and more in general, the principle of legality *ex* Article 7 of the ECHR was at stake (*nullum crimen, nulla poena sine lege*). In fact, the Court ruled that the conviction of Bruno Contrada for "concorso esterno in associazione mafiosa" (external competition in mafia association) – a crime derived from the combined provisions of Articles 110 and 416 bis of the criminal code – integrated a violation of Article 7. This, because the conduct alleged against the accused was prior to the consolidation of this criminal offense in the Italian legal system (according to the ECHR Court, it would have taken place through jurisprudence and would have come to fruition only with the *Demitry* judgment of 1994). This decision raised domestic law issues; including on the revision of a final judgment in consequence of an overriding ruling of the ECHR Court (Article 46 of the ECHR). After the initial rejection of the request for revision (Court of Appeal of Caltanissetta, 18 November 2015, published in 2016), the issue was resolved by the Court of Cassation (I Criminal Section), with judgment No. 43112 of 2017. For the Court, there is not a margin of discretion of Italian judges in complying with the decisions of the ECHR Court. Therefore, the execution judge could declare the ineffectiveness of the final sentence against Contrada in the performance of his ordinary powers. As for the effects on proceedings still pending for the same offense, the jurisprudence of the Court of Cassation has shown an articulated position: see, most particularly, decisions No. 42996 of 2016 of the V Criminal Section and No. 44193 of 2016 of the I Criminal Section, *Dell'Utri*. Further, decision No. 53610 of 2017 of the I Criminal Section is of interest for wide examination of the peculiar effects of ECHR Court's pilot judgments or, at least those judgments that are an expression of its consolidated jurisprudence.

The necessary 'degree of consolidation' for the Italian judge to be obliged to comply with the rulings of the ECHR Court has also become relevant in relation to the decision of the Grand Chamber of 23 February 2017 on the case *de Tommaso v. Italy*. This judgment raised the question of legal certainty concerning Italian norms on preventive measures of public security – restricting the freedom of movement and the economic rights of socially dangerous persons –, which the ECHR Court found to be formulated, for many aspects, in too vague manner. No. 3 of the *Survey* offers a range of relevant cases. In some of these decisions, the

judges considered the obligation of conforming interpretation as non-existent because the *de Tommaso* ruling is not expression of a consolidated orientation of the ECHR Court (Court of Milan No. 13 of 2017; furthermore, Court of Palermo, I Criminal Section - Prevention Measures, of 28 March 2017, 16-9 May 2017 and 1 June 2017, respectively). Instead, other decisions affirm the binding nature of the *de Tommaso* ruling, and then resolving the conflict trough interpretation (Court of Rome, Prevention Measures Section, No. 30 of 2017, and, mostly, Court of Cassation, Criminal United Sections, No. 40076 of 2017). Through orders however, first, two courts on the merits (Court of Appeal of Naples, VIII Criminal Section, 15 March 2017, and Court of Udine, Criminal Section, 4 April 2017), and then the Court of Cassation (II Criminal Section, No. 49194 of 2017) have referred the issue to the Constitutional Court.

4. As usual, documentation concerning human rights protection is very broad. It largely regards the protection of vulnerable people for whom international law provides for specific safeguards. In this framework, for in-depth studies, the *Survey* No. 3 chose the topic of the (still insufficient) measures fighting the discrimination and violence against women. The opportunity to dwell on the topic is given by the publication of the 'Concluding Observations' of the Committee on the Elimination of Discrimination against Women on the 7th Periodic Report of Italy (CEDAW/C/ITA/CO/7, 24 July 2017). Moreover, the adaptation to relevant conventions ratified by Italy is currently under a legislative and jurisprudential process (see *Focus*).

With regard to minors, the law against 'cyberbullying' (No. 71 of 2017) is noteworthy for its novelty. Moreover, the V and VI joint Periodic Reports of Italy on the domestic implementation of the Convention on the Rights of the Child were presented to the relevant Committee in 2017 (CRC/C/ITA/5-6, 5 July 2017). Regarding national jurisprudence, besides several rulings concerning crimes of abuse and sexual exploitation of children, a progressive decision deserves attention, taken by the Court of Reggio Calabria in 2016. It has deprived two spouses, leading exponents of the local 'mafia', of their parental authority, as unable to direct the formation of the child towards socially shared values.

Migrants are a further category of vulnerable people. Once again, the relevant cases in the *Survey* are marked by criticism from international bodies concerning Italy's maritime operations in Libyan territorial sea (see the Letter from the Commissioner for Human Rights of the Council of Europe to the Minister of Interior Marco Minniti, CommHR/INM sf 0345-2017, and the Minister's reply, CommDH/GovRep(2017)15).

Further, law decree No. 13 of 2017 (so-called 'Minniti-Orlando decree'), converted into law No. 46 of the same year, should be considered. In fact, it introduced some modification to the legislation in force, mainly to speed up the procedure for the recognition of the status of refugee or other forms of international protection. However, those measures also appear as weakening some pre-existing guarantees of the rights of asylum seekers. Also in 2017, Parliament passed law No. 47, which has strengthened the provisions of migration law concerning the protection of unaccompanied minors.

With regard to the progressive consolidation of 'new' individual rights and freedoms, law No. 76/2016 introduced the regulation of 'civil unions', including of same-sex couples, previously unknown to the Italian legal system (see also implementing legislative decrees No. 5, 6 and 7 of 2017). Although the law is a step forward in overcoming consolidated gender discrimination, special provisions on the adoption of the child of one of the members of the homo-parental couple by the other member (so-called 'stepchild adoption') are still lacking. Express regulation of the matter is in force in other European countries. On this aspect, several cases of the *Survey* – new and old – testify the Italian courts' efforts to fill the legislative gap by applying the norms on "adoption in special cases". Additionally, the Court of Cassation has affirmed another important principle: the recognition in Italy of the birth certificate of a child born abroad through surrogacy by a homo-parental couple is not contrary to public order. However, this practice must be legitimate in the State of birth (Court of Cassation No. 19599 of 2016). Similarly, the right of children of homo-parental couples to maintain a legally recognized family relationship even with the non-biological parent (so-called "social parent": Cassation No. 12692 of 2016) can be now regarded as well established by the jurisprudence.

Furthermore, law No. 219 of 2017 marked important developments in the Italian legal order. In fact, it has at least partially implemented the principle of self-determination of individuals with respect to serious illness and the issue of 'end of life'. Law No. 219 allows adults in full possession of capacity to express their own wishes regarding health treatments, and accepting or refusing certain diagnostic means or therapeutic choices, through so-called "disposizioni anticipate di trattamento-DAT" (a sort of "do-not-resuscitate" order), in view of the possibility of future mental or physical impossibility to do so. However, even in this case, the most controversial aspects of the matter have not been regulated. In fact, on this ground, Marco Cappato was condemned

for the assistance given to Fabiano Antoniani, suffering from a serious irreversible disease, in committing suicide abroad (a medical practice not allowed in Italy). By the way, in 2018, the Constitutional Court solicited the Parliament for legislating on the topic. Due to time limits, No. 3 of the *Survey* contains only the initial act of the complex judicial case, not yet concluded. This is the order for referral to trial of the suspect, issued by the Judge for Preliminary Investigation at the Court of Milan on 10 July 2017.