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Introduction

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This is the author manuscript version of the following article: Capone, F. and Longobardo, M. 2021. Introduction. International Criminal Law Review, 21. Advanced online publication, DOI:10.1163/15718123-bja10056, which has been published in final form at:

<https://doi.org/10.1163/15718123-bja10056>

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Introduction to the special issue

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In 1998, Theodor Meron authoritatively asked whether international law was moving towards criminalisation.¹ While the response to such a provocative question could never be straightforward, however, the implications of this undeniable trend cannot be overlooked and deserve to be duly analysed from an academic perspective. The present special issue moves from the assumption that the predicted expansion of international law² ultimately resulted in the imposition on States of several and far reaching obligations to criminalise certain offences, in order to, *inter alia*, uniform States' criminal law framework to the maximum extent possible.³

The aim of the special issue is to provide a forum to discuss the many and multifaceted aspects connected to obligations of domestic criminalisation, using Italy as a case study. The papers included in this special issues have been presented at an online workshop held on 20 November 2020. The workshop was organised in the framework of the activities of the research group on International Law and Municipal Law (DIEDI, the Italian acronym), which operates under the aegis of the Italian Society of International Law (SIDI). We are grateful to all the participants to the workshop for the useful feedback provided, and in particular to Professors Fulvio Palombino, Micaela Frulli, Giovanna Adinolfi, and Enzo Cannizzaro, who have chaired the three sessions of the workshops and offered constructive remarks on the papers.

¹ Theodor Meron, 'Is International Law Moving towards Criminalization?', 9(1) *European Journal of International Law* (1998) 18-31.

² Wolfgang Friedmann, *The Changing structure of International Law* (Columbia University Press, New York, 1964) pp. 167-169.

³ Andrea Caligiuri, 'Limiti alla efficacia di norme internazionali generali in materia penale nell'ordinamento italiano', in Giuseppe Puma (ed) *Diritto internazionale e sistema delle fonti: tra modello accentrato e modello diffuso del controllo di costituzionalità* (Bari, Cacucci Editore, 2020) pp. 53-67; Robert Cryer, 'International Criminal Law vs State Sovereignty: Another Round?', 16(5) *European Journal of International Law* (2005) 979-1000; Harmen van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court', 8 *Int. Crim. Law Rev.* (2008) 229-272.

The study of the implementation by Italy of international and EU obligations clearly entails a broad reflection on various and interrelated complex legal issues, such as the nature of said obligations, their implementation at the domestic level, the Constitutional controls exercised by the organs empowered to do so, the mechanisms to ascertain compliance with the international framework, and the determination of both the exact conduct to punish and the sanctions to apply.⁴

The special issue is divided in three sections, addressing, respectively, broad issues of general application, Italy's implementation of obligations to criminalise conducts amounting to international crimes, and further ambits of analysis (i.e. gender based violence, cyber crimes against minors and corruption). The analysis carried out in this special issue does not aim at being exhaustive. Since many areas of international law are nowadays characterized by the phenomenon of criminalisation, we have decided to identify and dissect a number of transversal issues, and to focus on selected areas in which Italy is asked to implement international and EU obligation of domestic criminalisation. The leading factors behind the selection of the areas included in the present study have been, on the one hand, the relevance of certain developments within the Italian framework, both at the legislative and judicial level, and on the other, the personal expertise of the invited authors.

The first section includes three articles on broad issues that are relevant for any field in which Italy has to implement obligations of domestic criminalisation. The first article, by Marco Longobardo, offers an overview on the nature and content of international obligations to adopt certain criminal domestic and the impact that they have on the Italian legislature. The article mainly answers questions as to what is required of a state in order to implement obligations of domestic criminalisation – considering in particular the Italian legislative bodies – and which are the consequences of a state's failure to implement an obligation of domestic criminalisation. The second contribution, authored by Daniele Amoroso, focuses on the duties of criminalisation under international law in the practice of Italian judges. In particular, the article reflects on how the Italian judiciary deals with the underlying tension between openness to international law and safeguarding of the principle of legality in criminal matters. The article aims to shed light on the way(s) said crucial tension unfolds concretely in the Italian case law, and which approaches have been developed and implemented so far to solve the said conflict or, at least, to limit its negative consequences. The first section ends with Beatrice Bonafè's article on Constitutional judicial

⁴ Some of these issues have been explored by Benedetto Conforti and Angelo Labella, *An Introduction to International Law* (Martinus Nijhoff, Leiden/Boston, 2012), p. 17; Luigi Condorelli, *Il giudice italiano e i trattati internazionali. Gli accordi self-executing e non self-executing nell'ottica della giurisprudenza* (CEDAM, Milano, 1974); Roberto Baratta, 'L'effetto diretto delle disposizioni internazionali self-executing', 103 *Rivista di diritto internazionale* (2020) 5-48; Alberto di Martino, 'Inter-Legality and Criminal Law', in Gianluigi Palombella and Jan Klabbers (eds.), *The Challenge of Inter-Legality* (Cambridge University Press, Cambridge, 2019) pp. 250-267.

review of international obligations of criminalisation and their implementation, with a specific focus on the judicial review carried out by the Italian Constitutional Court. In spite of the scant number of constitutional decisions dealing with the review of international obligations of criminalisation, the article provides a thought-revoking analysis of the approach adopted by the Italian Constitutional Court, which is favourable to granting the widest possible effects to international law.

The second section of the present special issue tackles the domestic criminalisation of conducts amounting to international crimes. The first article, by Giulio Bartolini, analyses how war crimes have been incorporated in the Italian legal order and the relevant shortcomings of this transposition. The article provides a critical assessment of the Italian domestic framework related to war crimes, arguing that Italian legislation is still largely centred on the provisions present in the 1941 wartime military criminal code. Such provisions have not been subjected to substantial legal restyling, regardless of the explicit and implicit obligations of domestic criminalisation inferred from treaties ratified by Italy. Furthermore, according to the author the amendments to the code introduced at the time of Italian military operations in Afghanistan have failed to fully adapt the code's content to current rules of international humanitarian law and international criminal law. The following article, by Luigi Prospero, focuses on Italy's criminalisation of genocide and crimes against humanity. After offering a thorough insight into the current Italian framework, the author convincingly argues that Italian authorities should adopt legislation ensuring the incorporation of all the substantial norms of international criminal law, and in particular those concerning crimes against humanity under the Statute of the International Criminal Court. Alessandra Gianelli goes on to address the timely issue of Italy's implementation of the obligation to criminalise torture and other inhuman and degrading treatment. As is well known, Italy introduced the crime of torture in its criminal framework only in 2017 with the adoption of Law No. 110. This long awaited legislative effort, aimed also at restoring Italy's credibility in the aftermath of judgments like *Cestaro v. Italy*,⁵ in which the European Court of Human Rights has underlined the continuous absence of legislation in conformity with the prohibition of torture, cannot be regarded as fully satisfactory. In particular, the article highlights the crucial role played by the municipal courts in reconciling the reading of the provision with Italy's commitments at the international level. Finally, this section analyses the criminalisation of terrorist offences in the article authored by Francesca Capone. This contribution discusses in particular the extent to which the lack of a universally accepted definition of terrorism resonates at the domestic level, focussing on both the introduction of new legislative provisions and the Italian growing case law on international terrorism.

⁵ European Court of Human Rights, *Cestaro v. Italy*, no. 6884/11, Judgment, 7 April 2015.

The third section of this special issue addresses further areas in which international and EU law are increasingly asking States to implement criminalisation obligations. The first article, written by Francesca Ippolito, assesses the pitfalls of the Italian response to the international obligations to criminalise gender violence. The author offers a recollection of the existing international legal sources of criminal obligations targeting gender violence and reflects on their implementation at the Italian level, underscoring the existing lacuna and identifying possible solutions to overcome them. The second article, authored by Deborah Russo and Monica Parodi, deals with the protection of children in the cyber space and the crucial role played by international and EU obligations in this domain. In the absence of a treaty specifically dealing with cybercrimes against minors, the protection of children against different cyber risks results from provisions of various treaties ratified by Italy, which are also the source of the relevant obligations to cyber-criminalise. The study analyses Italy's response in light also of the guidance provided by the UN Committee on the Rights of the Child and, due to the evolving character of cyberspace, clarifies the progressive nature of the obligations to criminalise in this field. The last article, by Leonardo Borlini, focuses on Italy's implementation of the current international anti-corruption treaties. The contribution navigates through the piecemeal legislation, which makes the Italian framework look like a "permanent construction site". Moving from the assumption that, in spite of the many laws duly adopted by the Italian legislator, the diffusion of corruption is roughly unchanged in the country, the author questions the effectiveness of the approach in place and identifies possible ways forward.

As emerges from the overview of this special issue, our research served the purpose of filling an important gap in the existing literature. The case of Italy is emblematic in many regards and the recent developments registered in the Parliament as well as in the courtrooms have provided us, and the authors, with a unique opportunity to initiate a far-reaching reflection. Similar projects could be launched in relation to the implementation of international (and EU) obligations of domestic criminalisation in other States. We sincerely hope to have the opportunity, in the future, to broaden our inquiry, by encompassing further areas as well as involving a wider pool of authors. In the meantime, we are eager to thank the ones who contributed to the present special issue, as well as the great pool of anonymous peer reviewers who contributed to the quality of the research presented in the following pages.