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in Italy**

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Great Expectations: the Implementation of the Rome Statute in Italy

Marco Roscini*

Mere dreams, mere dreams!
W.B. Yeats, *Meditations in Time of Civil War*, I (1928)

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Abstract

The article first explores whether Italy is under an obligation to implement the Rome Statute that it ratified in 1999. It can be maintained that such an obligation is provided both by national and international law. The article then identifies the general sets of inconsistencies between Italian legislation and the Rome Statute and analyses whether and to what extent the former needs to be amended or integrated in order to implement the substantive provisions of the latter, in particular in relation to the definition of crimes, general principles of criminal responsibility, defences and other bars to prosecution. Finally, the exercise of jurisdiction by Italian courts over the International Criminal Court (ICC) crimes is discussed, in the light of the principle of complementarity on which the jurisdiction of the ICC is based.

1. Introduction

Under the dualist approach to the relationship between international and municipal law, the adoption of legislation is necessary for a treaty to produce its effects in the domestic legal order. In Italy, such legislation may assume one of two possible forms. It could consist of a law simply containing one or two provisions ordering the domestic execution of the treaty, the text of which is usually annexed and which will be applied untransformed (*ordine di esecuzione*); or it could be a law which interprets and reformulates the provisions of the treaty and amends existing legislation, if this is necessary to implement them. The first method is the one usually preferred by the Italian Parliament and it has been employed also in the case of the Rome Statute.¹ However, the *ordine di esecuzione* is an adequate way of implementing a treaty in the domestic legal order only to the extent that treaty norms are self-executing. To the extent that they are not, additional implementing legislation needs to be formulated and adopted.²

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¹ Law No. 232 of 12 July 1999.

² T. Treves, *Diritto internazionale. Problemi fondamentali* (Milano: Giuffrè, 2005), 700-703.

The Rome Statute is largely non self-executing: it does not provide for penalties and requires states parties to establish internal procedures for cooperation with the Court. Moreover, crimes under the Rome Statute must also be considered as crimes under the domestic law of the given state for them to be prosecuted before its national courts.³ Indeed, Italian courts and criminal lawyers have always supported the reformulation of international criminal rules in domestic provisions in order to include crimes and specify penalties. The prevailing view is that, in the absence of such reformulation and even if the state had ratified a convention and ordered its domestic execution, its provisions could not be directly enforced before national courts without violating the principle of legality of crimes and penalties and the cognate principles of specificity, certainty, foreseeability and accessibility.⁴

However, the evaluation of the self-executing character of treaty provisions should be made by also taking into account the characteristics of the national legal order into which they have been transposed. Indeed, if domestic law were already consistent with the Rome Statute and provided for an equivalent regime, if penalties were identifiable and if suitable cooperation procedures were already available at the national level, there would be no need to adopt ad hoc legislation.⁵ Hence, this article explores whether and to what extent the existing Italian legislation needs to be amended or integrated in order to fully and effectively implement the Rome Statute.⁶ Section 2 discusses whether Italy is under an obligation to implement the Rome Statute in the national legal order, while Section 3 analyses the general sets of problems with regard to the implementation process and proposes possible solutions. The comparative part (Sections 4 and 5) addresses crimes, general principles of criminal responsibility, defences and other bars to prosecution, and Section 5 discusses the jurisdiction of Italian courts over those responsible for crimes under the Rome Statute in the light of the principle of complementarity.

2. Italy's Obligation to Implement the Rome Statute

A big question mark remains as to whether the relevant Italian organs would be under an obligation to adopt further legislation implementing non self-executing provisions of the Rome Statute.⁷ In the national legal order, it is the present author's view that such an obligation derives from the new wording of Article 117 (1) of the Italian

³ S. Manacorda, 'L'armonizzazione dei sistemi penali: una introduzione', in Centro nazionale di prevenzione e difesa sociale, *La giustizia penale italiana nella prospettiva internazionale* (Milano: Giuffrè, 2000), 35-74, at 51.

⁴ See F. Antolisei, *Manuale di diritto penale*, Parte generale (Milano: Giuffrè, 2003), 77; B. Conforti, *Diritto internazionale* (Napoli: Editoriale Scientifica, 2002), 307; M. Pisani, 'La "penetrazione" del diritto internazionale penale nel diritto penale italiano', 13 *Indice penale* (1979), 5-30, at 8; R. Riz, *Lineamenti di diritto penale*. Parte generale (Milano: Giuffrè, 2001), 34-36.

⁵ G. Werle and S. Manacorda, 'L'adaptation des systèmes pénaux nationaux au Statut de Rome: le paradigme du 'Völkerstrafgesetzbuch' allemand', 58 *Revue de science criminelle et de droit pénal comparé* (2003), 501-515, at 508. According to the Italian Court of Cassation, even in the absence of further implementing legislation, the *ordine di esecuzione* might be sufficient if suitable provisions are already present in the national legislation (*Cassazione civile (Sezioni Unite)*, 27 June 1952, No. 1908, 76 *Foro italiano* (1953), Parte Prima, 22-28).

⁶ This article will focus on the substantive provisions of the Rome Statute, although occasional references to cooperation obligations will be made.

⁷ As of December 2005, Italy has not yet enacted such legislation. For the draft implementing legislation submitted by some members of the Parliament and for the commissions established by several ministers to study the topic and prepare drafts, see R. Bellelli, 'Come adattare l'ordinamento giuridico italiano allo Statuto della Corte dell'Aja', 10 *Diritto penale e processo* (2003), 1299-1304.

Constitution, which provides that the legislative powers of the state and of the regions shall be exercised consistently with, among others, international law. Not only does this norm imply the obligation not to enact legislation in contrast to treaties to which Italy is a party (negative meaning), but also to adopt all necessary steps to fully implement them (positive meaning).⁸

Does Italy's obligation to implement the Rome Statute also exist at the international level, i.e. towards other subjects of international law? As far as cooperation provisions are concerned, such an obligation is expressly spelt out in the Rome Statute. Article 88 provides that 'States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation' which are specified under Part 9 of the Statute. The same can be said about offences against the administration of justice: Article 70 (4) requires the parties to 'extend their criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed in its territory, or by one of its nationals'.

As to the crimes contained in Articles 6, 7 and 8 of the Rome Statute, the Statute contains no express obligation for states parties to transpose those provisions into domestic law. However, at least for certain crimes, such an obligation can be inferred from other sources. In the *Furundžija* case, the International Criminal Tribunal for the former Yugoslavia (ICTY) has argued that normally 'failure to pass the required implementing legislation has only a potential effect: the wrongful fact occurs only when administrative or judicial measures are taken which, being contrary to international rules due to the lack of implementing legislation, generate state responsibility'.⁹ In the case of torture, however, the ICTY stated that 'the requirement that states expeditiously institute national implementing measures is an integral part of the international obligation to prohibit this practice' and therefore 'states must immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system to forestall any act of torture or expeditiously put an end to any torture that is occurring'. It also added that '[t]he mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international state responsibility'.¹⁰ The above reasoning is based on the assumption that the prohibition of torture 'has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules'.¹¹ The case can well be made that the conclusions of the ICTY with regard to the crime of torture would also apply to other *jus cogens* provisions contained in the Rome Statute, such as that criminalizing genocide.

With regard to the other crimes and to general principles of criminal responsibility, defences and other bars to prosecution (to the extent that the relevant provisions in the Rome Statute are not already self-executing), it is generally believed that customary international law does not provide for an obligation to enact legislation implementing a treaty that has been previously ratified. Indeed, states parties do not usually complain when the Parliaments of other parties do not enact such legislation

⁸ See P. Ivaldi, 'L'adattamento del diritto interno al diritto internazionale', in S. Carbone, R. Luzzatto and A. Santa Maria (eds), *Istituzioni di diritto internazionale* (Torino: Giappichelli, 2003), 117-149, at 122-123. Art. 117 of the Constitution has been amended by Constitutional Law No. 3 of 18 October 2001, Art. 3.

⁹ Judgment, *Furundžija* (IT-95-17/1), Trial Chamber II, 10 December 1998, para. 149.

¹⁰ *Ibid.*, paras. 149-150.

¹¹ *Ibid.*, para. 153.

and they protest only against the actual breaches of conventional provisions regardless of what might have caused them.¹² The only decisions that have upheld the existence of a general duty to implement a treaty into domestic law are those of the Permanent Court of International Justice in the *Exchange of Greek and Turkish Populations* case (1925)¹³ and of the Inter-American Court of Human Rights in the *Garrido and Baigorria* case of 1998.¹⁴

Be that as it may, the obligation to ensure that crimes under the jurisdiction of the Court are also crimes under national law and that domestic principles of criminal responsibility are consistent with those contained in the Rome Statute must be considered as implicit, because the jurisdiction of the Court is based on the principle of complementarity.¹⁵ Indeed, if states parties failed to comply with this obligation, they would not be able to fulfil their primary duty to investigate and prosecute the crimes contained in the Statute and might be found ‘unable genuinely to carry out the investigation or prosecution’ within the meaning of Article 17 of the Rome Statute: the notion of ‘inability’ can well extend to the absence or inadequacies of domestic provisions.¹⁶ The Court could then exercise its complementary jurisdiction but would probably be overwhelmed with cases and would not be able to handle them all because of its limited financial and human resources. This result would be in marked contrast to the purpose of the Statute, which is to put an end to impunity for the perpetrators of genocide, crimes against humanity, war crimes and, eventually, aggression and to contribute to the prevention of such crimes.¹⁷ States parties not fulfilling their responsibility to ensure that the Court is able to operate effectively would also breach the duty to perform treaties in good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties.

3. Inconsistencies Between the Italian Legislation and the Rome Statute

Four general sets of situations can be identified with regard to the implementation of the substantive provisions of the Rome Statute (crimes, principles of criminal responsibility, defences) in the Italian legal order. First of all, Italian law is sometimes more restrictive than the Rome Statute: it provides for crimes that have not been included in the latter or defines them more broadly, and it contains some defences that are narrower than those permitted in the Rome Statute. Of course, this does not raise any problem: it is a sovereign prerogative of every state to enact whatever criminal laws it considers appropriate, consistently with international human rights standards. Moreover, the fact that Italy goes beyond its implementation obligations will not prevent it from fulfilling its primary duty to investigate and prosecute the crimes within the jurisdiction of the Court.

¹² A. Cassese, *International Law* (Oxford: OUP, 2001), 167.

¹³ 1924 Series B, No. 10, at 20.

¹⁴ Judgment of 27 August 1998, Series C, No. 39, para. 68. The point has been reiterated in *Durand and Ugarte*, 16 August 2000, Series C, No. 68, para. 136; and in *Baena Ricardo et al.*, 2 February 2001, Series C, No. 72, para. 179.

¹⁵ H. Relva, ‘The Implementation of the Rome Statute in Latin American States’, 16 *Leiden Journal of International Law* (2003), at 337-338.

¹⁶ J. K. Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’, 1 *Journal of International Criminal Justice* (2003), 86-113, 89.

¹⁷ Preamble, para. 5. According to Art. 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted, inter alia, in the light of its object and purpose.

Second, the crimes under the Rome Statute might be covered by Italian provisions sanctioning ‘ordinary’ domestic offences. Although national investigations or prosecutions on the basis of such offences instead of the specific international crimes included in the Rome Statute would not automatically make cases admissible before the Court, this situation is very likely to arise. Indeed, ordinary provisions would probably cover a narrower range of conduct than does the Rome Statute and the penalties would not adequately reflect the gravity of the crimes within the jurisdiction of the Court. Furthermore, even if the existing penalties were sufficiently severe, the prosecution would be subject to all restrictions (statutes of limitation, defences, extenuating circumstances, non-applicability of universal jurisdiction, etc.) relevant to ordinary offences. For these reasons, the state might well be found ‘unwilling’ to genuinely carry out the investigation or prosecution if national proceedings based on ordinary offences were designed to shield the accused from criminal responsibility or were inconsistent with an intent to bring the person concerned to justice (Article 17 (2) of the Rome Statute). The state would also risk being deemed ‘otherwise unable to carry out its proceedings’ in the sense explained above (Article 17 (3)). In addition, Article 20 (3) of the Rome Statute provides that the *ne bis in idem* principle does not prevent the Court from exercising its jurisdiction when national proceedings were a sham intended to ensure impunity to the accused. Although not expressly provided in the Rome Statute, an obligation to reject the ‘ordinary crimes approach’ might then result implicitly from Articles 17 and 20 (3), since the classification of conduct as an ordinary crime would considerably increase the number of admissible cases and an overburdened Court might lead to the impunity of perpetrators of genocide, crimes against humanity and war crimes, in contrast to the purpose of the Statute and to the duty to perform treaties in good faith.

Third, some Rome Statute provisions might be implemented through the mere reference, contained in a domestic provision, to international treaties to which Italy is a party. Article 185-*bis* of the Military Penal Code of War (MPCW) criminalizes, among others, ‘other inhuman treatment ... and other acts prohibited by international conventions’, and Articles 174 and 175 provide that a commander or other person who authorizes, orders or employs the use of methods and means of war prohibited by Italian law or international conventions incurs criminal responsibility. It is doubtful whether such provisions are consistent with the principle of legality of crimes, and in particular with the sub-principle according to which criminal rules must be as specific and as accurate as possible (*nullum crimen sine lege stricta*). Indeed, the unlawful conduct will have to be determined through an hermeneutic operation by the judge and it will be difficult to establish whether it was known or knowable by the accused. Furthermore, the different international law instruments which Italy has ratified may be inconsistent: for example, Article 8 (2) (b) (iv) of the Rome Statute prohibits a much narrower range of conduct than the corresponding provision in Additional Protocol I (Article 57 (2) (a) (iii)). Articles 174 and 175 do not make it sufficiently clear which international law instrument should be applied in such situation. Hence, to avoid such doubts, it would be advisable that every crime contained in the Rome Statute be specifically defined as a crime in domestic law.

Finally, Italian law does not incorporate certain Rome Statute crimes and defines others more narrowly. The application of some domestic principles of criminal responsibility, defences and bars to prosecution might also lead to impunity in an Italian court on the same facts that would lead to a conviction in the International Criminal Court. As argued in Section 2, Italy is under an obligation both under international and constitutional law to incorporate all crimes and principles

contained in the Statute and to amend existing domestic provisions whenever they are less restrictive. In the following sections, lacunae and weak provisions of Italian law will be identified and discussed, making reference to the corresponding articles of the Rome Statute.

4. Definitions of Crimes

A. Genocide

Law No. 962 of 9 October 1967, which implemented the 1948 Convention for the Prevention and Punishment of the Crime of Genocide, is largely consistent with Article 6 of the Rome Statute and Article II of the Genocide Convention, but is broader, since it criminalizes deportation and the obligation to wear distinguishing marks. Article 1 (2) of Law no. 962 is also broader than Article 6 (c) of the Rome Statute, since the infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part is not required to be ‘intentional’.¹⁸ However, Article 1 of Law no. 962 does not fully implement Article II of the Genocide Convention and Article 6 (b) of the Rome Statute, since it does not include *mental* harm. Furthermore, Article 5 of Law no. 962 limits its scope to the transfer of children under age of 14 years, while neither Article II of the Genocide Convention nor Article 6 (e) of the Rome Statute contains such a limit, and in the Elements of Crimes the age limit is 18 years.

Law no. 962 criminalizes acts which are committed not only by the principal offender, but also - as in Article III of the Genocide Convention - those committed by others in the form of complicity, conspiracy and attempt, as well as public incitement to commit genocide, whether or not the principal crime has been committed. Unlike Article III of the Genocide Convention, Article 8 of Law no. 962 also criminalizes public defence of genocide.

Article 1 of Law no. 962 criminalizes acts which are only *aimed* at causing injuries or the death of members of the group. This provision advances the threshold of criminal responsibility well beyond the attempted crime (which, under Article 56 of the Penal Code, requires the conduct intended to commit an offence to be able (‘idoneo’) and unequivocal) and might include any act which is potentially aimed at genocide even if preliminary and not particularly harmful, such as the purchase of weapons. In contrast, Article 6 of the Rome Statute requires the killing, the causing serious bodily or mental harm, the infliction of certain conditions of life, the imposition of measures intended to prevent births and the forcible transfer of children to take place for criminal responsibility to arise.

B. Crimes Against Humanity

Crimes against humanity are not provided as such in Italy. Most crimes contained in Article 7 of the Rome Statute are partially covered by domestic criminal provisions: murder by Article 575 of the Penal Code, rape and other forms of sexual violence by Articles 609-*bis et seq.*, enslavement by Articles 600, 601 and 602 (as amended by Law No. 228 of 11 August 2003), imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law by Articles 605,

¹⁸ N. Ronzitti, ‘Genocidio’, XVIII *Enciclopedia del diritto* (Milano: Giuffrè, 1969), at 587.

606 and 607, forced disappearances by Articles 606 and 607.¹⁹ Although the crime of enslavement, as defined in the new text of Article 600, is broader than the corresponding definition in Article 7,²⁰ other definitions in the Code fall short of those included in the Rome Statute. In particular, the crime of forced disappearances only includes arrest and detention performed by public officials, and not also those committed with the authorization, support or acquiescence of a state or a political organization.

Rape as an ordinary crime as well as other forms of sexual violence are covered by Articles 609-*bis et seq.* of the Penal Code. However, Article 609-*bis* does not fully appear to be consistent with the most recent international jurisprudence concerning the elements of this crime against humanity, because the definition of rape is based on the presence of violence, threats or abuse of authority rather than on the lack of consent of the victim.²¹ The crimes of sexual slavery and enforced prostitution are covered by the new text of Article 600 of the Penal Code. As to the other sexual crimes listed in Article 7 (1) (g) of the Rome Statute (forced pregnancy, enforced sterilisation), there are currently no corresponding provisions in the Penal Code or elsewhere.

There is no provision in the Penal Code which provides for the crimes against humanity of apartheid,²² extermination, deportation and forcible transfer of population, torture, persecution and other inhuman acts. Some conduct amounting to torture, but presumably not all,²³ could be covered by various provisions of the Penal Code, including Articles 581 (beating), 582-583 (bodily harm), 610 (criminal coercion), 606 (illegal arrest), 607 (unlawful restriction of personal freedom), 608 (abuse of authority against people arrested or detained), 609 (arbitrary search and personal inspection), 612 (threatening) and 605 (kidnapping) of the Penal Code. However, such provisions do not adequately take into account the gravity the crime of torture, the mental element and the circumstances under which it is committed.²⁴

C. War Crimes

Some war crimes in international armed conflicts contained in the Rome Statute are

¹⁹ On these crimes, see A. Cassese, *Crimes Against Humanity*, in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP, 2002), vol. I, 353-377; M. Boot, R. Dixon and C.K. Hall, *Article 7 (Crimes Against Humanity)*, in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos, 1999), 117-172.

²⁰ Apart from the exercise of the powers attaching to the right of ownership over a person, Art. 600 also forbids keeping someone in a state of continuing subjection by means of violence, threat, deception, abuse of authority or by taking advantage of a situation of physical or mental inferiority or of a state of necessity, or by means of promising or giving an amount of money or other advantages to those who have authority over the person.

²¹ A. Cadoppi, 'Article 3', in A. Cadoppi (ed), *Commentari delle norme contro la violenza sessuale e della legge contro la pedofilia* (Padova: CEDAM, 2002), 27-143, at 125. See *Prosecutor v. Kunarac* (IT-96-23), Judgment, Appeals Chamber, ICTY, 12 June 2002, paras. 129-133.

²² Italy has not ratified the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid.

²³ For example, psychological and moral torture is not covered (A. Marchesi, 'L'attuazione in Italia degli obblighi internazionali di repressione della tortura', 82 *Rivista di diritto internazionale* (1999), 463-475, at 467-468).

²⁴ Committee Against Torture, Considerations of Reports Submitted by States Parties under Art. 19 of the Convention, Second periodic reports, 1994, Italy, UN Doc. A/50/44 No. 157.

already included in the MPCW.²⁵ The war crime of enforced sterilization might be covered by Article 185-*bis*, which criminalizes torture or other inhuman treatment, unlawful transfers and other conduct prohibited by international conventions, including biological experiments or medical treatment not justified by the state of health. However, Article 185-*bis* puts together very different forms of conduct and serious questions can be raised about whether the penalty is adequate to the gravity of the crimes involved (from two to five years of military imprisonment).²⁶ Be that as it may, this Article applies only when conduct does not constitute a more serious crime: conduct that could be qualified as ‘torture’ might, therefore, fall under the scope of provisions dealing with ordinary crimes, such as Article 582 of the Penal Code (bodily harm), Article 609-*bis* (sexual violence), Article 605 (kidnapping), since the penalties for these crimes are more severe.

Other war crimes under Article 8 (2) (a) and (b) of the Rome Statute are included in Articles 35 and 36 of the pioneer Law of War of 1938, which also criminalizes the shooting of those wrecked at sea as the result of shipwreck or the destruction of aircraft (Article 35 (3) no. 3) and the use of explosive or incendiary weapons which weigh less than 400 grams (Article 35 (3) no. 5).²⁷ As far as bacteriological and chemical weapons are concerned, Article 51 of the Law of War refers to the international provisions in force. When no rule of customary international law or treaty provision exists, or if the enemy is not a party to international treaties, such weapons are prohibited by way of reciprocity, providing that the enemy declares that it intends not to use them and does not actually use them (Article 52).

Definitions of crimes in Italian legislation are occasionally broader than those in the Rome Statute. Articles 213 and 214 of the MPCW provide for the protection of the rights of prisoners of war to freedom of religion and worship, and also prohibits appropriation of their valuables.²⁸ Article 212 provides that prisoners of war cannot be compelled to give information or to carry out prohibited works. Article 37 of the 1938 Law of War prohibits compelling prisoners of war to participate in hostile actions against their own country, and also prohibits them being compelled to serve as guides or give information on military issues or in any other way.²⁹ Furthermore, the Law of War defines the war crime of making improper use of the distinctive emblems of the Red Cross more broadly than Article 8 (2) (b) (vii) of the Rome Statute by also prohibiting improper use of the parliamentary flag, the emblems of other humanitarian organizations, hospital ships and medical aircraft, and it also omits the restrictive requirement that improper use must result in death or serious personal injury to be a crime.

In other cases, the relevant provisions of the MPCW are not as broad as the corresponding articles in the Rome Statute. For example, Article 185 of the MPCW provides that a member of the armed forces who uses violence, for reasons related to

²⁵ See, for instance, Articles 182, 184-*bis*, 185-*bis*, 186-188, 191, 193, 224 of the MPCW.

²⁶ If the person were sentenced to two years’ imprisonment, he or she might be accorded the benefit of the suspension of the sentence (A. Lanzi and T. Scovazzi, ‘Una dubbia repressione della tortura e di altri gravi crimini di guerra’, 87 *Rivista di diritto internazionale* (2004), 685-694, at 689-690).

²⁷ Royal Decree No. 1415 of 8 July 1938.

²⁸ The same provision is included in Art. 106 of the 1938 Law of War, which also prohibits the employment of prisoners of war in excessive works or works not suitable for their rank and provides their right to receive payment for such work and to keep their personal objects (with the exception of weapons, horses, equipment and military documents). Money and valuables can be temporarily appropriated under Art. 106.

²⁹ However, this provision does not apply to persons who have dual Italian-foreign nationality or to foreigners who have to perform their military service in Italy.

the war, against *enemy* private individuals who do not take part in military operations is criminally responsible, if he does so without necessity or justified reason.³⁰ This is inconsistent with Article 8 (2) of the Rome Statute and with other international humanitarian law instruments which safeguard *all* protected persons involved in the armed conflict and not just the nationals of the enemy states.³¹ The limited relevance of the nationality of protected persons was confirmed by the ICTY in the *Tadić* judgment of 15 July 1999.³² The reference to the ‘justified reason’ contained in Article 185 also weakens the protection.

Finally, certain war crimes defined in Article 8 (2) (a) and (b) of the Rome Statute are still not defined as crimes in Italian law (such as those included in Article 8 (2) (a) (vi) and (b) (iii), (vii), (xiv) and (xxvi)). Italy also omits rape and other sexual crimes as war crimes from the MPCW, which would result in the application of the relevant provisions of the Penal Code.

War crimes in non-international armed conflicts. According to the new text of Article 165 (1) of the MPCW, as amended by Law No. 6 of 31 January 2002, Section IV of Chapter III of the MPCW now applies to all armed conflicts regardless of a declaration of war. In order to implement this provision, Law No. 15 of 27 February 2002 introduced two new paragraphs to Article 165. The first paragraph defines an armed conflict as a conflict in which at least one of the parties uses weapons in an organized and protracted manner against the other party for the conduct of military operations. This definition does not appear in the Rome Statute, the Geneva Conventions or their Additional Protocols. According to the commentary to Article 2 of the Geneva Conventions, an armed conflict is ‘tout différend surgissant entre deux Etats et provoquant l’intervention de membres des forces armées’, even when isolated and sporadic such as a border incident.³³ Hence, at least as far as international armed conflicts are concerned, the definition contained in Article 165 (2) is more restrictive in scope, since it requires the use of weapons to be organized and protracted, while it might be consistent with the threshold provided in Article 1 (2) of Additional Protocol II and with Article 8 (2) (d) (f) of the Rome Statute with regard to non-international armed conflicts.

However that may be, in the absence of a distinction between international and non-international armed conflict the crimes included in Section IV could be prosecuted even when committed in an armed conflict not of an international character. Accordingly, Italian legislation criminalizes conduct such as the improper use of a flag of truce or other distinctive emblems of the Geneva Conventions (Article 180 of the MPCW) even when committed in a non-international armed conflict, while the Rome Statute only does it with regard to international conflicts. Nonetheless, some provisions contained in Section IV of Chapter III of the MPCW need to be amended, since according to their wording they seem to apply only to international

³⁰ G. Bartolini, ‘Le modifiche al codice penale militare di guerra a seguito della missione italiana in Afghanistan’, 57 *La Comunità internazionale* (2002), 171-199, at 192. Violence is defined in Art. 43 of the MPCW and includes murder, bodily harm, beating, ill-treatment and any attempts to do harm with weapons.

³¹ See, e.g., Art. 4 (1) of the IV Geneva Convention.

³² Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, paras. 168-169.

³³ J. Pictet (ed), *Les Conventions de Genève du 12 août 1949 - Commentaire* (Geneva: CICR, 1952), vol. I, at 34. See also the ICTY decision on the defence motion for interlocutory appeal on jurisdiction in the *Tadić* case (‘an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state’ (IT-94-1, Appeals Chamber, 2 October 1995, para. 70)).

armed conflicts. It is the case of Articles 185 and 187 (which implement Article 8 (2) (c) (i) and (e) (xii) of the Rome Statute, respectively), and Articles 177, 190 and 192 of the MPCW, which all refer to ‘enemies’ and ‘enemy state’, terms normally applicable only to international armed conflict. The same could be said of Article 184-*bis* of the MPCW, which defines the crime of taking of hostages as applying only during international armed conflicts, in contrast to Article 8 (2) (c) (iii) of the Rome Statute.³⁴ Furthermore, there is still no domestic provision in the MPCW penalizing the passing of sentences and the carrying out of executions without a previous judgment (Article 8 (2) (c) (iv)), the intentional attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping missions in accordance with the Charter of the United Nations (Article 8 (2) (e) (iii)), and the conscription and enlistment of children under the age of 15 years into armed forces or using them to participate actively in hostilities (Article 8 (2) (e) (vii)).

5. Principles of Criminal Responsibility, Defences and Other Bars to Prosecution

A. General Principles of Criminal Responsibility

Many general principles of criminal responsibility contained in Part 3 of the Rome Statute are already defined in similar terms in Italian legislation. For example, the *nullum crimen sine lege* and *nulla poena sine lege* principles (Articles 22 and 23 of the Rome Statute) are contained in Article 25 (2) of the Constitution, Article 1 of the Penal Code and Article 37 of the MPCP; the principle of the non-retroactivity of criminal law (Article 24 of the Rome Statute) in Article 25 (2) of the Constitution and Article 2 of the Penal Code; and the principle of the individual character of criminal responsibility (Article 25 of the Rome Statute) in Article 27 (1) of the Constitution.

B. Responsibility of Commanders and Superiors

On the whole, Article 28 of the Rome Statute could be implemented by the broad provision contained in Article 40 (2) of the Italian Penal Code and by the provisions on complicity (Articles 110 *et seq.* of the Penal Code). Article 230 of the MPCW also provides for the criminal responsibility of any member of the armed forces who, because of fear or other inexcusable reason, does not employ all means to prevent the commission of certain crimes. However, Article 230 is narrower than Article 28 of the Rome Statute in its being limited only to the commission of certain crimes.³⁵

C. Defences

Italian legislation provides for the defences of self-defence (Article 52 of the Penal Code and Article 42 of the MPCP), necessity (Article 54 (1) (2) of the Penal Code),

³⁴ N. Ronzitti, ‘Una legge organica per l’invio di corpi di spedizione all’estero?’, 85 *Rivista di diritto internazionale* (2002), 139-143, at 142 .

³⁵ In particular, the crimes set out in Articles 186 (pillage), 187 (arson, destruction and serious damage to an enemy state), 192 (ill-treatment of ill, injured or shipwrecked persons), 193 (dispossession of ill, injured or shipwrecked persons), 202 (collective rebellion) and 203 (collective indiscipline) of the Code.

duress (Article 54 (3) of the Penal Code), mental incapacity (Articles 88 and 89 of the Penal Code) and intoxication (Articles 91 *et seq.* of the Penal Code³⁶) under conditions similar to those indicated in Article 31 of the Rome Statute, and also provides for the defence of physical coercion (Article 46). However, Italian law is more restrictive than Article 31 with regard to intoxication, since it provides that intoxication cannot be used as a defence when a person has become unintentionally intoxicated through his or her own carelessness or negligence (Article 92 (1) of the Penal Code).

Article 42 of the MPCP, which provides for self-defence against existing ('attuale') and unlawful violence, is narrower than Article 52 of the Penal Code (which also envisages the mere threat of an offence being committed as a ground for self-defence) and Article 31 (1) (c) of the Rome Statute (which allows for self-defence where the use of force is 'imminent')³⁷. However, the Italian Constitutional Court has interpreted Article 42 of the MPCP as including self-defence in response to the threat of an offence being committed.³⁸ Furthermore, under the Rome Statute and the MPCP, self-defence can be invoked only against an unlawful use of force, while the Penal Code (which employs the more generic word 'offence') also provides for self-defence in the fact of non-violent or passive conduct.³⁹

Article 47 of the Penal Code provides that the mistake of fact excludes criminal responsibility (providing, in some cases, that it is non-negligent), while Article 32 (1) of the Rome Statute provides for this defence only if it negates the mental element required by the crime. Article 47 (3) is also broader in that, it includes the mistake on a law other than criminal law which has caused a mistake of fact as a ground for excluding criminal responsibility. The mistake of law does not exclude criminal responsibility according to Article 5 of the Penal Code and Article 39 of the MPCP, while under Article 32 (2) of the Rome Statute this defence may be invoked when it negates the mental element required by the crime or as provided for in Article 33. As to the *culpa in causa*, the Italian Constitutional Court has ruled that Article 5 and Article 39 are not consistent with the Constitution where they do not provide for an 'unavoidable' mistake of law as a ground for excluding criminal responsibility, while a clause referring to the 'avoidability' of the mistake of law, previously included in the drafts, was eventually left out in the final text of Article 32 (2).⁴⁰ Therefore, according to the Rome Statute, an avoidable or negligent mistake of law may exclude criminal responsibility (providing, of course, that it negates the mental element required by the crime), while under Italian law it has to be unavoidable.

Article 51 of the Italian Penal Code provides that compliance with a *lawful*

³⁶ However, Art. 91 provides that intoxication can be invoked as a defence only if it derives from a fortuitous event or *force majeure*.

³⁷ As to the object of the threat, it is to be noted that the Penal Code admits self-defence also when property is threatened, while according to the MPCP self-defence can be invoked only if the rights to life and physical integrity are threatened. Under the Rome Statute, danger to property can be relevant for self-defence only with regard to war crimes, when it is essential for the survival of the person or another person or for accomplishing a military mission, and according to Art. 2 (2) of the 1950 European Convention on Human Rights, which Italy has ratified, killing in self defence is lawful only to save another life, not property.

³⁸ Constitutional Court, (3) 11 June 1987, No. 225, 32 *Giurisprudenza costituzionale* (1987-II), 1703-1707. See D. Brunelli and G. Mazzi, *Diritto penale militare* (Milano: Giuffrè, 2002), at 90-91.

³⁹ F. Antolisei, *supra* note 4, 300-301.

⁴⁰ Constitutional Court 23-24 March 1988, No. 364 (111 *Foro italiano* (1988), Parte Prima, 1385-1412), and 24 February 1995, No. 61 (35 *Cassazione penale* (1995-II), 1754-1761), respectively. The mistake is 'unavoidable' when it is due to a fortuitous event or *force majeure*.

order or provision relieves from criminal responsibility.⁴¹ The person who obeys an *unlawful* order is not responsible if he or she believed, due to a mistake of fact, that the order was lawful, or could not challenge the lawfulness of the order. As to the second case, however, Article 4 of Law No. 382 of 11 July 1978, which contains the principles governing military discipline, states that a subordinate has a duty not to carry out an order which is manifestly directed against the institutions of the state or which is manifestly unlawful: the latter part of this article seems to be consistent with Article 33 of the Rome Statute, but it goes further by expressly imposing a duty to disobey manifestly unlawful orders.⁴² The lawfulness of an order should in any case be established in the light of international law, rather than only in the light of national legislation, so that an order to carry out genocide, crimes against humanity or war crimes could never be a lawful order, even if such conduct were not criminalised under national law.⁴³

D. Other Bars To Prosecution

1. Immunities

Article 27 of the Rome Statute recognises the irrelevance of official capacity as far as responsibility for crimes within the jurisdiction of the Court is concerned, but according to Article 90 of the Italian Constitution the President of the Republic cannot be held responsible for his official acts, with the exceptions of an attack on the Constitution and high treason.⁴⁴ An ‘attack on the Constitution’, which is defined neither in the Penal Code nor in the Constitution itself, includes any conduct aimed at subverting the state institutions or at deliberately violating the Constitution.⁴⁵ Furthermore, members of the Parliament cannot be held responsible for the opinions expressed and the votes given while carrying out their duties and cannot be prosecuted or deprived of their freedom in the absence of the authorization of the Chamber to which he or she belongs, unless they have been convicted or have been caught in the act of committing a crime for which obligatory arrest *in flagrante delicto* is provided (Article 68 of the Constitution, as amended by Constitutional Law No. 3 of 29 October 1993).⁴⁶ Under Article 122 of the Constitution, members of regional councils cannot be held responsible for the opinions expressed and the votes given while carrying out their duties. Finally, the Prime Minister and ministers can be held responsible for crimes committed while carrying out their duties but can be prosecuted only upon authorization by the Parliament (Article 96, as amended by Constitutional Law No. 1 of 16 January 1989).

⁴¹ By Law No. 382 of 11 July 1978 (which repealed former Art. 40 of the MPCP), Art. 51 also applies to military crimes.

⁴² On the notion of ‘manifestly unlawful order’, see *Tribunale Militare di Roma*, 1 August 1996, in *Rassegna di giustizia militare*, No. 1, 2, 3, January-June 1999, 27 ff. See also Art. 25 of the *Regolamento di disciplina militare* (Presidential Decree No. 545 of 18 July 1986).

⁴³ Art. 59 of the MPCP, which can also be applied to war crimes under Art. 47 of the MPCW, provides that superior orders may constitute a ground for reduction of sentence: however, unlike Art. 27 on the irrelevance of official capacity, this possibility is not excluded by Art. 33 of the Rome Statute.

⁴⁴ The President of the Republic must be impeached by the absolute majority of the members of the Parliament (Art. 90 (2) of the Constitution).

⁴⁵ T. Martines, *Diritto costituzionale* (Milano: Giuffrè, 2003), 293.

⁴⁶ A member of the Parliament might for example submit to the Parliament a draft law authorising conduct amounting to a crime under international law, such as the use of methods amounting to torture during interrogations, or could give a speech inciting racial hatred.

As highlighted by the European Commission for Democracy Through Law (the ‘Venice Commission’), established by the Council of Ministers of the Council of Europe, there could be three ways to make a Constitution which provides for immunities for state officials consistent with the Rome Statute: making reference to customary international law, interpreting national provisions in such a way as to avoid conflict with the Statute, and, if all else fails, amending the Constitution.⁴⁷ As to the first argument, it may be that the President of the Republic, Prime Minister, ministers, members of Parliament and members of regional councils can be held criminally responsible for genocide, crimes against humanity and war crimes under Article 10 (1) of the Constitution, according to which the Italian legal order conforms to the generally recognized norms of international law.⁴⁸ However, this argument is not entirely persuasive, because customary international law only provides for the irrelevance of functional immunities granted to certain state officials by international law in proceedings before foreign or international courts, and not of immunities granted by national law before national courts.⁴⁹

The apparent contradiction between Article 27 of the Rome Statute and Articles 68, 90, 96 and 122 of the Italian Constitution might then be solved interpreting them in the light of Article 11 of the Constitution, according to which ‘Italy ... on conditions of parity with other states, agrees to the limitations of sovereignty necessary for an order that ensures peace and justice among Nations; promotes and encourages international organizations having such ends in view’. Indeed, the International Criminal Court can be included among those organizations. The Preamble of the Rome Statute provides that grave crimes within the jurisdiction of the Court threaten the peace, security and well-being of the world (para. 3) and that the aim of the Court is to put an end to impunity for the perpetrators of such crimes, to contribute to their prevention and to guarantee lasting respect for and the enforcement of international justice (paras. 5 and 11). However, the application of Article 11 has always been problematic and referred only to European Community law.

Finally, it could be maintained that, as far as the President of the Republic is concerned, the commission of crimes under the Rome Statute amounts to an attack on the Constitution (and in particular on its Articles 2, 10 and 11), for which – as noted above – there is no constitutional immunity.

Be that as it may, it would be more convenient to include a provision having constitutional status in the implementing legislation providing that, in cases of crimes under the Rome Statute, no official capacity is relevant. Such an amendment would ensure that any official could be prosecuted under national law for such crimes or surrendered to the Court.

2. Statutes of Limitation

Article 29 of the Rome Statute provides for the non-applicability of statutes of

⁴⁷ Venice Commission, *Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the International Criminal Court*, 4 December 2000, available on line at [http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)001-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)001-e.asp) (visited December 2005).

⁴⁸ P. Benvenuti, ‘Italy, Implementation of the ICC Statute in National Legislation, Constitutional Aspects’, in C. Kreß and F. Lattanzi (eds), *The Rome Statute and Domestic Legal Orders. General Aspects and Constitutional Issues* (Baden Baden: Nomos - Ripa di Fagnano Alto: Sirente, 2000), vol. I, 123-137, at 134.

⁴⁹ P. Gaeta, ‘L’incidenza dello Statuto di Roma sulle norme costituzionali italiane in materia di immunità’, 2 *Diritto pubblico comparato ed europeo* (2000-I), 594-605, at 602.

limitation to crimes within the jurisdiction of the Court, but under Article 157 of the Italian Penal Code statutes of limitation are inapplicable only when the relevant offence would entail life imprisonment.⁵⁰ However, in Italian law the maximum penalty for certain Rome Statute crimes (for example, those included in Article 185-*bis* of the MPCW) is not commensurate with the severity of the circumstances under which they are committed. Moreover, for certain crimes to be punished by life imprisonment it is necessary that aggravating circumstances are deemed to apply and that they prevail over extenuating circumstances.⁵¹ It may be that the non-applicability of statutory limitations to genocide, crimes against humanity and war crimes is already established in Italy through Article 10 (1) of the Constitution, which gives effect to customary international law in the Italian legal order. This has been upheld by the Military Court of Rome on 22 July 1997, No. 322 in the *Priebke* case.⁵²

6. The Exercise of Jurisdiction by Italian Courts over Those Responsible for Genocide, Crimes Against Humanity and War Crimes

According to the Preamble of the Rome Statute, each state has the duty ‘to exercise its criminal jurisdiction over those responsible for international crimes’. On the basis of the principle of complementarity, failure to do so might result in the exercise of the jurisdiction by the Court (Article 17 of the Rome Statute). Italian courts might have jurisdiction over crimes under the Rome Statute on the basis of the following principles.

Territorial Jurisdiction. Italian courts have jurisdiction over any crime perpetrated in Italian territory, regardless of the nationality of the victim or of the perpetrator (Article 6 (1) of the Penal Code).⁵³

Active Personality Jurisdiction. Article 9 of the Penal Code provides for the jurisdiction of Italian courts over Italian nationals who have committed abroad a non-political crime sanctioned with no less than three years’ imprisonment, if the suspect is present in Italy. For minor crimes, the prosecution must be requested by the Minister of Justice or by the victim. The request of the Minister of Justice is always necessary if the offence has been committed against a foreign state or national, and extradition must not have been granted or accepted by the state where the offence was committed. Furthermore, Article 604 of the Penal Code (as amended by Law No. 269 of 3 August 1998) provides for the application of Italian criminal law to some crimes (e.g. enslavement, prostitution and pornography involving minors), even when the crime has been committed abroad by an Italian, or by a foreigner in complicity with an Italian. Finally, according to Article 3 (a) of Law No. 498 of 3 November 1988 on the ratification and domestic execution of the UN Convention against Torture, Italian courts have jurisdiction over crimes of torture committed abroad by an Italian, but the request of the Minister of Justice is necessary.

⁵⁰ Statutory limitations for crimes are addressed in Articles 157 to 161 of the Penal Code. Italy has not yet ratified the 1968 United Nations and the 1974 European Conventions on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

⁵¹ See, e.g., Art. 575 *et seq.* of the Penal Code with regard to murder.

⁵² The text can be read in 38 *Cassazione penale* (1998-I), 689-691.

⁵³ According to Art. 22 of the Lateran Treaty, Italy also has jurisdiction over crimes perpetrated in the territory of Vatican City if the author is present in Italy.

Passive Personality Jurisdiction. Article 10 (1) of the Penal Code provides for the Italian jurisdiction over non-political crimes committed abroad by foreigners against the Italian state or nationals if the crime is one for which the penalty is no less than one year. The perpetrator must be present on Italian territory and the prosecution must be requested by the Minister of Justice or by the victim. Article 604 of the Penal Code provides that the provisions on enslavement, prostitution and pornography involving minors, sexual tourism involving minors, trafficking, sale and purchase of slaves, sexual violence, sexual intercourse with minors, corruption of minors also apply when such crimes are committed abroad to the detriment of an Italian citizen. According to Article 3 (b) of Law No. 498 of 1988, Italian courts have jurisdiction over crimes of torture committed by a foreigner abroad against an Italian national, at the request of the Minister of Justice. It is also to be noted that the legislation authorizing or extending the participation of Italian military personnel to international operations in Afghanistan and Iraq contains a provision according to which the Tribunal of Rome has jurisdiction over crimes committed by a foreigner in Afghanistan or Iraq against the Italian state or an Italian national participating in the mission, at the request of the Minister of Justice, after consultation with the Minister of Defence if the victim is a member of the armed forces.⁵⁴

Protective Jurisdiction. Article 8 of the Penal Code provides for protective jurisdiction over ‘political crimes’.⁵⁵ As used in Article 8, this term can be interpreted in a way which would include crimes under international law. Indeed, according to the jurisprudence, Article 8 must be read in the light of Article 10 (1) of the Constitution and of the international conventions protecting human rights, relying on a broader concept of state political interest which includes the protection of the rights of the citizens.⁵⁶ The Minister of Justice must however authorize a prosecution based on Article 8 and, in some cases, prosecution must be requested by the victim.

Article 13 of the MPCW also establishes the jurisdiction of Italian courts over certain crimes committed by members of the enemy armed forces against Italy or an allied state or its nationals.⁵⁷

Universal Jurisdiction. Article 10 (2) of the Penal Code expressly provides for

⁵⁴ Art. 16 of d.l. No. 165 of 10 July 2003 (enacted by Law No. 219 of 1 August 2003) and Art. 12 of Law No. 231 of 11 August 2003; Art. 12 of d.l. No. 9 of 20 January 2004 (enacted by Law No. 68 of 12 March 2004); Art. 10 of d.l. No. 160 of 24 June 2004 (enacted by Law No. 207 of 30 July 2004) and Art. 7 of Law No. 208 of 30 July 2004; Art. 13 of d.l. No. 3 of 19 January 2005 (enacted by Law No. 37 of 18 March 2005) and Art. 9 of Law No. 39 of 21 March 2005; Art. 11 of d.l. No. 111 of 28 June 2005 (enacted by Law No. 157 of 31 July 2005) and Art. 9 of d.l. No. 112 of 28 June 2005 (enacted by Law No. 158 of 31 July 2005).

⁵⁵ Art. 8 (3) of the Penal Code provides that a political crime is any crime which offends a political interest of the state, or a political right of citizens. An ordinary crime which is wholly or partly driven by political reasons is also regarded as a political crime. On the concept of ‘political crime’ in the Penal Code, see G. Fiandaca and E. Musco, *Diritto penale*, Parte generale (Bologna: Zanichelli, 2004), 121-122.

⁵⁶ See the decision of the *Corte d’Assise d’Appello* of Rome of 17 March 2003 in the trial against some Argentine military officers charged with crimes committed against Italian citizens during the military regime, as confirmed by the Court of Cassation (*Cassazione penale (Sez. I)*, 17 May 2004, No. 23181, 245 *Rivista penale* (2004), 829-832). According to both Courts, such crimes were undeniably political crimes under Art. 8, being clear that their motivations were political and that the Italian state had a political interest to repress actions in violation of the fundamental rights of its citizens.

⁵⁷ For crimes committed against Italy in Afghanistan and Iraq by a foreigner, see the above discussion on the passive personality principle.

custodial universal jurisdiction over non-political crimes committed abroad by foreigners against foreigners or the European Communities or foreign states if the crime is one for which the penalty is no less than three years. However, the prosecution must be requested by the Minister of Justice and the perpetrator must be present on Italian territory. In addition, extradition must not have been granted or accepted by the territorial state or the state of the perpetrator's nationality.

Article 3 (2) of the Penal Code provides that Italian criminal law is binding on every citizen or foreigner who is abroad when provided by Italian or international law, and according to Article 7 (5) Italian courts have jurisdiction over a foreign national for crimes committed abroad when there is a specific law or treaty which establishes the applicability of Italian criminal law (such as the Geneva Conventions and Additional Protocol I (but only for 'grave breaches') and the Convention against Torture). In this case, there is no requirement that the perpetrator be present in the territory at the time an investigation is opened and he or she may be tried *in absentia*. However, it is not entirely clear to what extent Italian courts can exercise universal jurisdiction under Article 7 (5), since, according to some commentators, this provision cannot be applied directly and courts may apply the jurisdictional provisions of a treaty only when they have been transposed into Italian law. Furthermore, the reference to 'international treaties [which] establish that Italian criminal law shall apply' prevents Italy from exercising universal jurisdiction over genocide,⁵⁸ crimes against humanity and war crimes that are not grave breaches of the Geneva Conventions and of Protocol I;⁵⁹ over crimes under international law over which universal jurisdiction is established only under customary law; and over those crimes that are not prohibited by a treaty.

Norms contained in other Codes which might also be relevant are Articles 17 and 18 of the MPCP, which provide for a limited universal jurisdiction over crimes committed abroad by those submitted to military penal law, and Article 3 (c) of the above mentioned Law No. 498 of 1988, which provides that Italian courts have jurisdiction over crimes amounting to torture under Article 1 of the Convention even when committed abroad by a foreigner, provided that the accused is present in Italy and extradition has not been granted. The request of the Minister of Justice is necessary. However, in the absence of a domestic provision which defines the crime of torture in domestic law, the tribunal should apply norms on ordinary crimes and therefore should deny its universal jurisdiction as established by Law No. 498.⁶⁰

7. Concluding Remarks

It is a matter of concern that Italy, which played a leading role in the establishment of the International Criminal Court, has not yet enacted effective implementing legislation for the Rome Statute. It can be maintained that Italy's obligation to fully

⁵⁸ The 1948 Genocide Convention does not provide for universal jurisdiction for this crime (W. Schabas, *Genocide in International Law* (Cambridge: CUP, 2000), 367). See, *contra*, S. Zappalà, 'Droit italien', in A. Cassese and M. Delmas-Marty (eds), *Juridictions nationales et crimes internationaux* (Paris: PUF, 2002), 193-215, at 203, according to whom Art. 7 (5) refers not only to international conventions but also to specific laws, including the Italian law that has implemented the Genocide Convention in Italy (the above mentioned Law no. 962 of 1967). Such law does not make any distinction on the basis of the nationality of the victim or of the perpetrator or on the *locus commissi delicti*.

⁵⁹ Art. 49 of the I Geneva Convention; Art. 50 of the II Geneva Convention; Art. 129 of the III Geneva Convention; Art. 146 of the IV Geneva Convention; Art. 86 (1) of Additional Protocol I.

⁶⁰ A. Marchesi, *supra* note 23, at 473.

implement the Statute derives from the new text of Article 117 (1) of the Italian Constitution. However, Italy's failure to adopt such legislation would also imply its international responsibility. In the case of cooperation obligations and offences against the administration of justice, the obligation is expressly provided in the Rome Statute. For certain crimes (genocide, torture), the obligation derives from *jus cogens*, as stated by the ICTY. In the other cases, the obligation to ensure that crimes under the jurisdiction of the Court are also crimes under national law and that domestic principles of criminal responsibility, defences and other bars to prosecution are consistent with those contained in the Rome Statute is implicit in the Statute itself, because the jurisdiction of the Court is based on the principle of complementarity.

This article has demonstrated that there are many inconsistencies between the Italian legislation and the Rome Statute. In particular, many crimes within the jurisdiction of the Court are still omitted from Italian law while others are defined more narrowly, especially when conduct amounting to an international crime is classified as an ordinary offence in domestic law. Principles of criminal responsibility and defences are also not always consistent with those embodied in the Rome Statute, and immunities and statutes of limitation might be invoked to bar the prosecution of those accused of genocide, crimes against humanity and war crimes. The extent of the universal jurisdiction of Italian courts over such crimes is also dubious. For these reasons, implementing legislation should be enacted as soon as possible, if Italy does not want to become a safe haven for persons accused of the worst crimes known to humanity.