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Abstract

This article explores the nature and content of international and EU obligations to adopt certain criminal domestic legislation, and the impact that they have on the Italian legislature. In light of relevant international, EU, and domestic law provisions, the article investigates what is required of Italy to implement obligations of domestic criminalisation. It is argued that the Italian legislature is bound to implement obligations of domestic criminalisation both under international law and the Italian constitutional law. The article ends with an overview of the consequences under international law that Italy may face for failure to implement international and EU obligations of domestic criminalisation.

Key Words

domestic law; international crimes; international law; positive obligations;

1 Introduction

This article offers an overview on the nature and content of international obligations to adopt certain criminal domestic legislation (hereinafter: 'obligations of domestic criminalisation'),[1] and the impact that they have on the Italian legislature. The article tackles these issue from the perspective of the generalist international lawyer, relying in particular on notions and rules that are applicable to any branch of international law. 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. Since the focus of the article is on the Italian legal system, only international instruments binding Italy are examined here. The expression 'Italian legislature' refers mainly to the Italian Parliament, which is tasked with legislative functions by Article 70 of the Italian Constitution (ItConst), as well as to the Italian government when acting under Articles 76 and 77, and to the Italian Regions pursuant to Article 117.

Although criminal law usually falls in the remit of domestic law, in relation to crimes entailing certain serious violations of human rights and transnational crimes, states cooperate to ensure that certain actions are punished as crimes. To this end, a number of international conventions bind states to adopt criminal legislation in a specific field. Even customary international law sometimes, as in relation to war crimes, requires states to adopt

[1] On procedural criminal obligations – outside the purview of this article –, *see* Stefano Manacorda, 'Dovere di punire? Gli obblighi di tutela penale nell'era della internazionalizzazione del diritto', in Massimo Meccarelli et al. (eds.), *Il lato oscuro dei diritti umani* (Universidad Carlos III, Madrid, 2014), pp. 307-347.

domestic criminal legislation.[2] Moreover, in the last decades, the United Nations (UN) Security Council (SC) has adopted binding resolutions that embody obligations of domestic criminalisation, raising concerns regarding its potential transformation into a global legislative body.[3]

Similarly, under Article 83(1) Treaty on the Functioning of the European Union (TFEU), the European Union (EU) may adopt 'minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.'[4] This provision enables the EU to adopt directives, which do not have direct effects but bind member states to incorporate criminal law provisions in their legal systems through national legislation.[5] In this respect, obligations of domestic criminalisation are seen as a means to implement EU policies when all the other means – different from criminal legislation – are unavailable.[6]

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[2] ICTY, *Prosecutor v. Furundžija*, Case no. IT-95-17/1-T, Judgment, 10 November 1998, para. 148.

[3] *E.g.*, Gaetano Arangio-Ruiz, 'On the Security Council's "Law-Making"', 83 *Rivista di Diritto Internazionale* (2000) 609-725; Catherine Denis, *Le pouvoir normative du Conseil de Security des Nations Unies: Portée et limites* (Bruylant, Brussells, 2004); Stefan Talmon, 'The Security Council as World Legislature', 99 *American Journal of International Law* (2005) 175-193.

[4] The provision continues with a list of relevant crimes. Before the 2009 Lisbon Treaty, under old Article 32 of the Treaty in the European Union (TEU), the EU could adopt 'measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties' in certain fields, through framework decisions or establishing conventions to be recommended to member states (old Article 34(2) TEU).

[5] CJEU, Joined Cases C-387/02, C-391/02 and C-403/02, Judgment, 3 May 2005; Italian Constitutional Court (ItCC), no. 28/2010, judgment, 25 January 2010.

[6] Kai Ambos, *European Criminal Law* (CUP, Cambridge, 2018), p. 322.

All these instruments are a parcel of a wider attempt to use international law 'as a tool for the coordination of the exercise of criminal jurisdiction by states'.[7] These obligations of domestic criminalisation may relate to what are usually called international core crimes (war crimes, crimes against humanity, genocide, and aggression),[8] or may regard different unlawful conduct (e.g., the illicit trade of endangered animal species).[9] An international crime is a conduct that is considered to be criminal by international law itself – thus directly imposing an international law obligation upon individuals[10] –, whereas a duty to adopt domestic criminal legislation binds only the state, without necessarily entailing direct responsibility for individuals.

The ratio of the obligations of domestic criminalisation is that domestic legal orders are presumed to be sufficiently equipped to prevent and punish certain conduct.[11] To make a very simplistic example, the UN has no powers to prosecute all the acts of terrorism that occur around the world; yet, the UN may induce states to accept a treaty obligating them to combat terrorist activities at the domestic level,[12] or force them to do so through a binding

[7] Paola Gaeta, 'International Criminalization of Prohibited Conduct', in Antonio Cassese (ed.) *The Oxford Companion to International Criminal Justice* (OUP, Oxford, 2009), p. 64.

[8] *See* Bartolini, Gianelli, and Prosperi in this Special Issue.

[9] *E.g.*, Article VIII of the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

[10] Edoardo Greppi, *Crimini internazionali dell'individuo* (UTET, Torino, 2012), p. 469; Gerhald Werle and Florian Jessberger, *Principles of International Criminal Law* (4th ed., OUP, Oxford, 2020), p. 36.

[11] In the field of international crimes, the same idea supports the principle of complementarity under Art. 17 of the 1998 International Criminal Court (ICC) Statute.

[12] *E.g.*, the 1999 International Convention for the Suppression of the Financing of Terrorism.

decision of the UNSC.[13] Accordingly, obligations of domestic criminalisation are a tool to ensure that states prevent and punish certain actions.

In so-called dualistic systems, where international law and domestic law are considered to be separate legal spheres,[14] the fact that a state accepts the obligation to criminalise a certain conduct does not turn that conduct in a domestic crime unless this is the result of one of the constitutional implementation mechanisms of that state. The ItConst, for instance, adopt a dualistic approach[15] and, accordingly, it is necessary to study how Italy has implemented, or should implement, international and EU obligations of domestic criminalisation.[16] Moreover, obligations of domestic criminalisation usually are not directly applicable, but rather, they are not 'sufficiently clear to function as "objective law" in the domestic legal order',[17] and, as result, a legislative intervention is needed. The actual adoption of new legislation may take time, due to the complexities of the domestic

[13] *E.g.*, S/RES/1373 (2001). For more, see Capone in this Special Issue.

[14] *E.g.*, Gaetano Arangio-Ruiz, 'International Law and Interindividual Law', 86 *Rivista di Diritto Internazionale* (2003) 909–999; Giorgio Gaja, 'Dualism: A Review', in Janne E. Nijman and André Nollkaemper (eds.), *New Perspectives on the Divide Between National Law & International Law* (OUP, Oxford, 2007), pp. 52–62.

[15] *See generally* Giuseppe Cataldi, 'Italy', in Dinah Shelton (ed.), *International Law and Domestic Legal Systems* (OUP, Oxford, 2011), pp. 328-359.

[16] See *infra*, section 3.1.

[17] André Nollkaemper, 'The Netherlands', in David L Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (CUP, Cambridge 2009) 333. For more on the direct application of treaties by domestic courts and the related notion of 'self-executing obligations', *see* David L. Sloss, 'Domestic Application of Treaties', in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties* (2nd ed., OUP, Oxford, 2020), pp. 355-381.

legislative procedures or the inactivity of legislative bodies – which are political organs. The possibility that a state accepts an international obligation of domestic legislation without implementing it at domestic level is far from absurd: e.g., for decades, Italy has not implemented the duty to criminalise torture.[18]

This article clarifies the nature and content of international obligations of domestic criminalisation, and the impact that they have on the Italian legislature and the Italian legal system. First, the article explores the nature of obligations of domestic criminalisation in light of the difference between obligations of conduct and obligations of result. The article goes on to demonstrate that the Italian legislature is bound to implement obligations of domestic criminalisation both under international law and the ItConst, offering an overview of the possible measures that the Italian legislation should adopt in light of the specific nature and content of the relevant obligations. Finally, the article assesses the consequences in the field of state responsibility for lack of implementation or for inadequate implementation.[19]

2 Different Kinds of Obligations of Domestic Criminalisation

2.1 Preliminary Remarks

In addressing obligations of domestic criminalisation, it is necessary to keep in mind that there is no such uniform category under international law. Rather, this group may be interpreted as including different kinds of obligations. The following subsections attempts

[18] *See* Gianelli in this Special Issue.

[19] On domestic remedies, *see* Bonafé and Amoroso in this Special Issue.

to systematise some of these obligations, with exclusive reference to instruments binding upon Italy. This exercise is needed since different sub-groups of obligations may entail different actions upon the Italian legislature. Eventually, a correct understanding of the kind of obligation at stake determines some issues of state responsibility.

2.2 Explicit International Obligations of Domestic Criminalisation

There are several obligations embodied in international law treaties, UN resolutions, and EU instruments that *explicitly* demand States to adopt domestic criminal law. For this reason, they are labelled here as explicit international obligations of domestic criminalisation. Indeed, the command to enact domestic criminal legislation is explicit only in this group.

Article VIII of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, e.g., reads that: 'The Parties shall . . . penalize trade in, or possession of, [protected] specimens, or both'. Similarly, paragraph 1(b) on the UN Security Council Resolution 1373 (2001) states that States must 'criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carryout terrorist acts.' Likewise, Article 3(1) of EU Directive 2017/1371 reads: 'Member States shall take the necessary measures to ensure that fraud affecting the Union's financial interests constitutes a criminal offence when committed intentionally'. In these cases, it is clear which is the content of the obligations: states parties must criminalize the relevant conduct as a consequence of an explicit (and, sometimes, quite detailed) obligation of domestic criminalisation.

This kind of explicit obligations is common in relation to international crimes and transnational crimes, whereas only few UN human rights law treaties and none of the most relevant regional ones embody them.[20] Very appropriately, Schwarzenberger considered these obligations as resulting in 'internationally prescribed municipal criminal law'.[21] Correctly, he noted that if States 'should fail to live up to their treaty obligations, they . . . are merely responsible for breach of their treaty obligations.'[22] This means that a violation of the duty to criminalise certain conduct should not be equated to the commission of the prohibited conduct, but rather, it is only a source of state responsibility for the violation of that specific treaty commitment.[23]

As implicitly affirmed by the International Court of Justice (ICJ), the international obligations of domestic criminalisation *stricto sensu* are obligations of result[24] rather than

[20] *E.g.,* Article 4 of the 1984 UN Convention Against Torture (CAT). For more examples, *see* Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford, OUP 2009), pp. 158-188; Steven Malby, *Criminal Theory and International Human Rights Law* (Routledge, Abingdon, 2020), pp. 65-84.

[21] Georg Schwarzenberger, 'The Problem of an International Criminal Law', 3 *Current Legal Problems* (1950) 263, 266.

[22] *Ibid.*, p. 267.

[23] *Ibid.*, p. 268.

[24] *See Obligation to Prosecute or Extradite (Belgium v. Senegal),* 20 July 2012, *I.C.J. Reports 2012*, 422, para. 75. *See also* Riccardo Pisillo Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States', 35 *German Yearbook of International Law* (1992) 9, 48; Nienke van der Have, *The Prevention of Gross Human Rights Violations Under International Human Rights Law* (Springer, The Hague, 2018), p. 11; Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (Cambridge, CUP, 2021), pp. 67–68.

obligations of conduct.[25] This means that these obligations are obligations to succeed in introducing that specific offence in the national criminal law system. Although states are free to decide the way in which criminal law should be introduced – e.g., a state may decide to adopt specific legislation whereas another can decide to amend existing acts[26] – nonetheless the fulfilment of that obligation is measured based on whether the state has adopted the relevant criminal provisions, with no room for assessing alternatives or the relevance of the diligence adopted by the state.

2.3 Implicit Obligations of Domestic Criminalisation

Sometimes, treaties are interpreted as if they included obligations of domestic criminalisation, even though there is no explicit duty in the text of the relevant instruments. This phenomenon is particularly common in relation to human rights treaties, which usually establish international courts or non-adjudicative mechanisms to monitor the implementation of human rights. Since these bodies have *de jure* an institutional role on the interpretation of the relevant conventions, and *de facto* are regarded as authoritative

[25] On this difference, *see* Constantin P. Economidés, 'Content of the Obligation: Obligations of Means and Obligations of Result', in James Crawford et al. (eds.), *The Law of International Responsibility* (OUP, Oxford, 2010), p. 371.

[26] More on this, *infra*, section 3.2.

interpreters,[27] their interpretive action results in the creation of implicit[28] obligations of domestic criminalisation.

Two main situations can be distinguished. On the one hand, sometimes states accept duties to protect human rights through generic 'legislative' measures, i.e. measures not involving criminal law. E.g., under Article 2(2) of the International Covenant on Civil and Political Rights (ICCPR), states must 'adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.' Some specific provisions of the Covenant restate this obligation, such as Article 6(1), that affirms that the right to life 'shall be protected by law'. With regard to other rights, the Covenant does not repeat this caveat, such as in relation to the ban on torture under Article 7, which should be read, however, in light of Article 2(2). The Human Rights Committee (HRC) interprets both articles as including obligations of domestic criminalisation. According to the HRC, Article 6(1) means that 'states parties must enact a protective legal framework which includes effective *criminal* prohibitions on all manifestations of violence or incitement to violence

[27] On the weight of the interpretation offered by non-judicial human rights bodies, *see Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 30 November 2010, *I-C.J. Reports 2010 (II)*, 664, para. 66.

[28] *See* Francesco Viganò, 'L'arbitrio del non punire: sugli obblighi di tutela penale dei diritti fondamentali', in Marta Bertolino et al. (eds.), *Studi in onore di Mario Romano* (Jovene, Napoli, 2011), pp. 2651-2662, 2664-2672; van der Have, *supra* note 24, p. 42; Domenico Carolei, '*Cestaro v. Italy*: The European Court of Human Rights on the Duty to Criminalise Torture and Italy's Structural Problem', 17 *International Criminal Law Review* (2017) 567-585, 572.

that are likely to result in a deprivation of life'.[29] Likewise, the Committee held that 'states parties should indicate when presenting their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment'.[30] The fact that the reference to 'law' is read as referring to 'criminal law' is not discussed in greater detail.

Similarly, this is the case of the protection of the right to life under the European Convention of Human Rights (ECHR), which has been interpreted by the European Court of Human Rights (ECtHR) as embodying some obligations of domestic criminalisation.[31] Article 2 states that: 'Everyone's right to life shall be protected by law.' Although there is nothing in this provision about criminal law, the Court has maintained in several judgments that Article 2, read in conjunction with the duty to secure rights under Article 1, should be interpreted as including an obligation to put 'in place effective criminal-law provisions to

[29] HRC, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life* (CCPR/C/GC/36) para. 20 (emphasis added).

[30] HRC, *General comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (A/44/40), para 13.

[31] *See* Francesco Bestagno, *Diritti umani e impunità: obblighi positivi degli stati in materia penale* (Vita&Pensiero, Milan, 2003); Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart, Oxford, 2004); Riccardo Pisillo Mazzeschi, 'Responsabilité de l'État pour violation des obligations positives relatives aux droits de l'homme', (2008) 333 *Recueil des cours* 175-506; Madelaine Colombine, *La technique des obligations positives en droit de la Convention européenne des droits de l'homme* (Dalloz, Paris, 2014).

deter the commission of offences against the person'.[32] The Court has developed a similar case law in relation to the ban on slavery and forced labour under Article 4.[33]

However, other times, human rights obligations are interpreted as including obligations of domestic criminalisation even though there is no reference to protection by the law in the relevant instrument. This is the case of the ban on torture under Article 3 of the ECHR, according to which: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Yet, the ECtHR interpreted this provision by affirming that it 'requires states to put in place effective criminal-law provisions to deter the commission of offences against personal integrity'.[34] Interestingly, and contrary to its case law on the right to life, in most of the cases, the Court refrained from holding that Article 3 embodies a positive obligation of domestic criminalisation, thanks to the reference under Article 1 to the duty to 'secure' the conventional rights. Rather, the Court affirmed that Article 3 embodies a positive obligation to prosecute and punish acts of torture, which requires, as a prerequisite, the fact that torture is criminalised at domestic level.[35] It appears

[32] *Osman v. UK*, no. 87/1997/871/1083, judgment, 28 October 1998, para. 115. See, also, *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, 20 December 2007, para. 57; *Tomašić et al v. Croatia*, no. 46598/06, judgment, 15 January 2009, para. 49; *Tunç and Tunç v. Turkey*, no. 24014/05, judgment, 25 June 2013, para. 171.

[33] *Siliadin v. France*, no. 73316/01, judgment, 26 October 2005, para. 89.

[34] *Beganović v. Croatia*, no. 46423/06, judgment, 25 June 2009, para. 71. See, also, *O'Keeffe v. Ireland* [GC], no. 35810/09, judgment, 28 February 2014, para. 148; *Cestaro v. Italy*, no. 6884/11, judgment, 7 April 2015, para. 209.

[35] *Gäfgen v. Germany*, no. 22978/05, judgment, 1 June 2010, para. 117; *Cestaro v. Italy*, *supra* note 34, para. 209.

that the Court is adopting a more cautious approach: states that do not criminalise torture breach the positive obligation to investigate/prosecute torture since investigation/prosecution is impossible without previous criminalisation. However, the position of the Court is far from settled since, in some other cases, the Court held that the ban on torture embodies an 'inherent' duty to criminalise the relevant acts, with no indication that this is just a prerequisite to comply with the duty to prosecute torture.[36]

A caveat is needed in this regard: it is not always possible to interpret the reference to the 'law' in this kind of obligations as a reference to 'criminal law', and it is not always possible to include in the duty to 'secure' one right an obligation of domestic criminalisation. Rather, the relevant international courts and monitoring bodies, *in primis* the ECtHR, have sometimes referred to an obligation to adopt legal regulations not involving criminal responsibility[37] or to non-legislative measures. Apparently, the subject matter of the rights at stake guides case-by-case the Court's approach, which is based on axiological reasons, rather than on the interpretation of the relevant provisions following consolidated interpretive rules.[38] The ECtHR appears to be guided by the nature of the interest protected by a specific right and by the seriousness of the offence.[39]

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[36] *E.g.*, in relation to duties under Articles 3 and 8 of the ECHR, *M.C. v. Bulgaria*, no. 39272/98, judgment, 4 December 2003, para. 153 (however, the Court reaches this conclusion after having mentioned the obligation to investigate, para. 151).

[37] *See* the decisions studied by Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge, Abingdon, 2012), pp. 107-110; Laurens Lavrysen, *Human Rights in a Positive State* (Intersentia, Antwerp, 2016), pp. 123-130.

[38] *X and Y v. The Netherlands*, no. 8978/80, judgment, 26 March 1985, paras. 24-27; *Siliadin v. France* (n 52), para. 122 (referring to the gravity of the acts prohibited by Article 4 and their inderogable character).

Coming to the nature of these obligations, generic duties of prevention and to ensure/secure/protect rights are usually considered obligations of diligent conduct,[40] which require states to 'deploy adequate means, to do the utmost, to obtain [a certain] result'.[41] If the desired result is the prevention of torture or the protection of individuals from torture, a state is under the duty to strive diligently to obtain that result, but if an act of torture occurs, the state is not responsible if it demonstrates that it has acted with the requested due diligence to prevent that act or protect that person.[42] This possibility usually leads states to include generic obligations of protection/prevention along with explicit obligations of domestic criminalization,[43] which, albeit playing a preventive function,[44] should be

[39] Manacorda, *supra* note 1, p. 327; Seibert-Fohr, *supra* note 20, p. 113.

[40] *See* Riccardo Pisillo Mazzeschi, *Due diligence e responsabilità internazionale degli Stati* (Giuffrè, Milan, 1989); José Fernando Lozano Contreras, *La noción de debida diligencia en derecho internacional público* (Atelier, Madrid, 2007); Joanna Kulesza, *Due Diligence in International Law* (Brill, Leiden, 2016); Sarah Cassella (ed.), *Le standard de due diligence et la responsabilité internationale* (Pedone, Paris, 2018); Samantha Besson, 'La due diligence en droit international', (2020) 409 *Recueil des Cours* 154-398; Heike Krieger, Anne Peters, Leonhard Kreuzer (eds.), *Due Diligence in the International Legal Order* (OUP, Oxford, 2020).

[41] ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, *I.T.L.O.S. Reports 2011*, para. 110.

classified differently as obligations of result under international law.[45] Accordingly, *prima facie*, these are not obligations that demand the criminalisation of certain conduct, but such a criminalisation can be a diligent way to implement the generic duty of prevention or protection.

Although, originally, these international law obligations did not demand explicitly domestic criminalisation, over time, the consolidated jurisprudence of international courts and monitoring bodies tasked with the interpretation of the relevant conventions has turned some of these obligations into obligations of domestic criminalisation. In other words, the ECtHR's and the HRC's authoritativeness in the interpretation of the ECHR and the ICCPR is so well-established that it cannot be challenged. This is particularly the case of the ECtHR, which is the ultimate authority, with binding powers, in relation to the interpretation of the ECHR. Accordingly, it is possible to conclude that some implicit obligations of

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[42] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, *I.C.J. Reports 2007*, p. 43, para. 430; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, *I.C.J. Reports 2015*, p. 168, Declaration of Judge Tomka, para. 4.

[43] *E.g.*, Articles 2(1) and 4 of the CAT; Articles 1 and 49-50 of the 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Chapters II and III of the 2003 UN Convention against Corruption; subparagraphs (a) and (b) of Resolution 1373 (S/RES/1373 (2001)), para. 1.

[44] *Bosnia v. Serbia*, *supra* note 42, para. 426; *Belgium v. Senegal*, *supra* note 24, para. 75; *Çamdereli v. Turkey*, no. 28433/02, judgment, 1 December 2008, para. 38. *See* Pasquale De Sena, 'Responsabilité internationale et prévention des violations des droits de l'homme', in Emmanuel Decaux and Sébastien Touzé (eds.), *La prevention des violations des droits de l'homme* (Pedone, Paris, 2015), pp. 41-43.

[45] *See supra*, section 2.2. On the relevance of this difference, *see infra*, section 4.

domestic criminalisation are created by the interpretive action of relevant monitoring mechanisms and international courts, which have turned due diligence obligations of prevention and protection in specific obligations of result regarding the domestic criminalisation of certain conduct.

3 The Italian Legislature versus International Law Obligations of Domestic Criminalisation

3.1 A Legal Duty Upon the Italian Legislature

After having explored the nature and content of the obligations of domestic criminalisation, it is necessary to assess the role played by Italian legislature in relation to the implementation of these obligations. As noted, the fact that Italy is bound by an obligation of domestic criminalisation does not transplant into the Italian legal system the relevant offence: a legislative act is needed to incorporate the relevant treaty in the Italian legal order, and a legislative act may be needed to provide the details that are necessary in order to apply the treaty rules as criminal law. Usually treaties are implemented through ad hoc legislation, which transforms the international obligations into Italian law through *renvoir* or by adopting corresponding domestic rules.[46] In the case of criminal law, domestic legislation is required under the human rights law principle of legality, which is protected both at international level[47] and by Article 25(2) of the ItConst, and which bars the direct

[46] The proposal to adapt automatically the Italian legal systems to treaty obligations was rejected during the drafting of the ItConst. *See* the relevant documents in 40 *Rivista di diritto internazionale* (1977) 334-353.

[47] *See generally* Claus Kreß, '*Nulla poena nullum crimen sine lege*', MPEPIL online (2010).

applicability of criminal law of international or EU origin.[48] Indeed, even the most detailed international list of crimes needs some intervention from the domestic legislature, at least to determine the penalties that can be imposed.[49] Moreover, in most cases, international obligations of domestic criminalisation are not sufficiently specific to respect the principle of legality under the ItConst. This is particularly the case of those obligations created or, at least, brought to the light by the interpretive action of international courts and monitoring bodies. In these cases, the need of an intervention of the domestic legislature is essential.

The first step is to acknowledge that, in principle, the Italian Parliament is usually free to adopt the legislation that it considers necessary, as long as the said legislation does not conflict with the ItConst.[50] However, the Constitution itself may require the Parliament to adopt criminal legislation in a certain field. This is the case of Article 13(4), according to which, 'any act of physical and moral violence against a person subjected to restriction of

[48] Giuseppe Tesauro, 'Costituzione e norme esterne', 14 *Diritto dell'Unione Europea* (2009) 195-229, 228; Viganò, *supra* note 28, pp. 2648, 2650; Andrea Pugiotto, 'Repressione penale della tortura e Costituzione: anatomia di un reato che non c'è', *Diritto Penale Contemporaneo* (7 February 2014), 5-6, https://archiviodpc.dirittopenaleuomo.org/d/2841-repressione-penale-della-tortura-e-costituzione-anatomia-di-un-reato-che-non-c-e, accessed 8 March 2021. *Contra*, Francesco Salerno, 'Il limite – non il contro-limite – della riserva di legge all'attuazione diretta della norma internazionale «generalmente riconosciuta» in materia penale', in Umberto Leanza et al. (eds.), *Studi in onore di Giuseppe Tesauro* (Editoriale Scientifica, Napoli, 2014), pp. 2868-2863 (arguing that international customary obligations of domestic criminalisation are directly applicable).

[49] Pugiotto, *supra* note 48, pp. 5-6; Salerno, *supra* note 48, p. 2887.

[50] Articles 134 and 136 of the ItConst; Law no. 87, 11 March 1953.

personal liberty shall be punished.' Accordingly, the idea that the Italian legislature is bound to criminalise certain conduct is not specific of international obligations.[51]

There is no doubt that the Italian legislature is bound under Italian constitutional law to adopt such a legislation. Several constitutional provisions play a crucial role, depending on the source that embodies the relevant obligation. Article 10(1) of the ItConst demands Italy to comply with international customary obligations of domestic criminalisation. Article 11 binds Italy to give effect to secondary legislation enacted by the UN and the EU, including obligations of domestic criminalisation.[52] Moreover, Article 117(1) affirms that legislative powers shall be exercised 'in compliance with . . . the constraints deriving from EU legislation and international obligations.' A consolidated trend in the case law of the Italian Constitutional Court (ItCC) affirms that this provision is the source of the binding power of treaty law in the Italian legal system, with the exception of obligations under UN and EU law.[53] Accordingly, the duty to implement treaty obligations of domestic criminalisation outside the cases of EU and UN law is based on Article 117(1). In sum, the Italian participation in international organisations and multilateral treaties has widened the

[51] *See* Domenico Pulitanò, 'Obblighi costituzionali di tutela penale?', 26 *Rivista Italiana di Diritto e Procedura Penale* (1983) 484-531; Caterina Paonessa, *Gli obblighi di tutela penale* (ETS, Pisa 2009).

[52] *See generally* Natalino Ronzitti (ed.), *L'articolo 11 della Costituzione: Baluardo della vocazione internazionalistica dell'Italia* (Editoriale Scientifica, Napoli, 2013).

[53] *See in particular* no. 348/2007, judgment, 22 October 2007, and no. 349/2007, judgment, 22 October 2007.

number of constitutionally relevant obligations of domestic criminalisation that bind the Italian legislature.[54]

This conclusion is applicable to explicit obligations of domestic criminalisation, as well as to implicit obligations of domestic criminalisation. Indeed, the ItCC has affirmed that the obligations descending from the ECHR should be applied following the *consolidated* case law of the ECtHR, which the states parties tasked with delivering the 'last word' on the interpretation and application of the Convention.[55] According to the ItCC, Italy is bound by the *rules* embodied in the ECHR, rather than by the mere *wording of the relevant provisions*, in the sense that Italy must implement the text of the ECHR as interpreted and applied by the ECtHR in its case law.[56] The reference to the 'consolidated' case law of the ECtHR[57] includes the ECtHR's views on implicit obligations of domestic criminalisation under Articles 2, 3, and 4 of the ECHR, which have been acknowledged in more than sixty-five judgments.[58]

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[54] Viganò, *supra* note 28, pp. 2650-2651; Angela Colella, 'La repressione penale della tortura: riflessioni de iure condendo', *Diritto Penale Contemporaneo* (22 July 2014), https://archiviodpc.dirittopenaleuomo.org/autori/34-angela-colella, accessed 8 March 2021.

[55] Decision no. 349/2007, *supra* note 53.

[56] Decision no. 348/2007, *supra* note 53.

[57] On this notion, *see* Pierfrancesco Rossi, 'La rilevanza per il giudice nazionale della giurisprudenza "consolidata" della Corte europea dei diritti dell'uomo', in Giuseppe Palmisano (ed.), *Il diritto internazionale ed europeo nei giudizi interni* (Editoriale Scientifica, Napoli, 2020), pp. 233-261, and the sources discussed therein.

[58] Malby, *supra* note 20, p. 69.

The Government and the Parliament are involved in the implementation of the relevant ECtHR's judgments. Indeed, Article 5(3)(a-bis) of the Law no. 400 of 1988 tasks the President of the Council of Ministers with implementing ECtHR's decisions as far as expected by the Government, with informing the Parliament on any ECtHR's decision against Italy, and with presenting an annual report to the Parliament on the Italian implementation of said judgments.

The only limit that the Italian legislature can impose on the duty of domestic criminalisation is in respect to the ItConst itself. In particular, international obligations covered by Articles 10(1) and 11 cannot be implemented if they conflict with the *fundamental principles* of the Constitution,[59] whereas international obligations binding pursuant to Article 117(1) are subject to the respect of the *entire Constitution*.[60] Accordingly, considering that an international obligation of domestic criminalisation binds the Italian legislature under Articles 10(1) and 11 or under Article 117(1),[61] different grounds of non-compliance under Italian constitutional law may exist.

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[59] *E.g.*, ItCC, no. 183, judgment, 27 December 1973; no. 48, judgment, 18 June 1979; no. 238, judgment, 22 October 2014.

[60] *E.g.*, ItCC, decision no. 348/2007, *supra* note 53, and decision no. 349/2007, *supra* note 53.

[61] *See generally* Francesco Salerno, 'La coerenza dell'ordinamento interno ai trattati internazionali in ragione della Costituzione e della loro diversa natura', 16 *Osservatorio delle fonti* (2018) 1-33. In relation to the ICC Statute, some authors invoke Article 11 (*e.g.*, Flavia Lattanzi, 'Un piccolo passo sulla via dell'adeguamento allo Statuto della Corte penale internazionale', 96 *Rivista di diritto internazionale* (2013) 492, 509; Alessandra Annoni, 'La compatibilità dello statuto della corte penale internazionale con la Constituzione italiana', in Giovanni Priori Posada (ed.), *Constitución, Derecho y Derechos* (Palestra, Lima, 2016) p. 282), others Article 117(1) (Marco Roscini, 'Great Expectations: The Implementation of the Rome Statute in Italy', 5 *Journal International Criminal Justice* (2007) 493, 495).

3.2 The Measures That the Italian Legislature Must Adopt

International and EU obligations of domestic criminalisation do not require the Italian legislature to adopt a specific criminal law act. Accordingly, from the standpoint of international and EU law it is irrelevant whether a specific obligation is implemented by a law enacted by the Parliament, or by a regional law, or by a legislative act of the Government. The only relevant issue is the content of the criminal law act. To this end, the distinction between different kinds of obligations of domestic criminalisation is relevant to determine which is the content of the criminal law instrument that the Italian legislature must enact.

First, it should be emphasised that international and EU obligations of domestic criminalisation lay the bare minimum description of the conduct that a State must criminalise. This means that states are free to adopt a more restrictive criminal legislation with the aim to protect the same values at the basis of the international or EU obligation. E.g., although the UN Genocide Convention requires the criminalisation of certain acts against national, ethnical, racial or religious groups, nothing prevents Italy or other states from adopting broader rules to protect other groups (e.g., political ones) under the label of genocide.[62]

Second, the *nomen juris* under which a certain conduct is criminalised is largely irrelevant. This is uncontested in relation to implicit obligations of domestic criminalisation, which are fulfilled if a state adequately criminalises in its legal system actions that violate

[62] Ben Saul, 'The Implementation of the Genocide Convention at the National Level', in Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary* (OUP, Oxford, 2009), pp. 58-84.

or endanger a certain protected human right.[63] For this reason, Italy does not have to adopt ad hoc legislation to implement ECHR's obligations, but rather, it may be possible that its domestic legal system is already sufficiently adequate, or that minor changes are needed. In other words, the scrutiny of the ECtHR and other monitoring mechanisms is not on the form of the implementation of the obligations of domestic criminalisation, but rather, on the substance of its effectiveness to deter and punish violations of the protected rights.

The conclusion can be reached in relation to international and EU explicit obligations of domestic criminalisation as well. Again, the example of torture elucidates the issue in a clear way. The UN Committee Against Torture (ComAT) criticised Italy on many occasions for failure of criminalising torture under the CAT.[64] The Italian defence that ordinary crimes in the Italian Criminal Code were enough to fulfil the obligation of domestic criminalisation was dismissed as irrelevant.[65] Accordingly, one could wonder whether ad hoc legislation was due. Yet, at a close scrutiny, it is apparent that the Committee was not criticising the *nomen juris* of the relevant crimes, but rather, their actual correspondence with the

[63] Paolo Lobba, 'Punire la tortura in Italia. Spunti ricostruttivi a cavallo tra diritti umani e diritto penale', 10 *Diritto Penale Contemporaneo* (2017) 181-250, 205, 208.

[64] *E.g.*, ComAT, *Consideration of reports submitted by States parties under Article 19 of the Convention* (CAT/C/9/Add.9); ComAT, *Consideration of reports submitted by States parties under Article 19 of the Convention* (CAT/C/25/Add.4), para. 5.

[65] *E.g.*, ComAT, *Report to the General Assembly* (A/47/44), para. 314; ComAT, *Consideration of reports submitted by States parties under Article 19 of the Convention* (CAT/C/44/Add.2), paras. 7-10; ComAT, *Consideration of reports submitted by States parties under Article 19 of the Convention* (CAT/C/67/Add.3), paras. 12-18.

obligations embodied in the CAT.[66] Consequently, a specific criminal legislation is the better solution not because it is the *only* way to implement the Convention, but because it is the *most efficient* way to ensure that domestic criminal legislation covers all the relevant aspects of the ban on torture and related procedural issues.[67]

Finally, it is possible that Italy is bound to adopt some criminal provisions to implement international instruments which, as such, do not embody obligations of domestic criminalisation. The best example is that of the ICC Statute. Under this treaty, states do not have a legal duty to enact domestic criminal legislation in relation to the crimes punished therein,[68] with the exception of a (rather marginal) obligation to criminalise offences against the administration of justice under Article 70(4)(a). If states do not criminalise domestically international crimes, the only consequence is that the resulting lack of domestic prosecution may trigger the exercise of the Court's jurisdiction under the principle of complementarity.[69]

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[66] *See* the discussion in Antonio Marchesi, 'Delitto di tortura e obblighi internazionali di punizione', 101 *Rivista di diritto internazionale* (2018) 131-150, 133-134.

[67] Lutz Oette, 'Implementing the prohibition of torture: the contribution and limits of national legislation and jurisprudence', 16 *International Journal of Human Rights* (2012) 717-736, 720; Nóra Katona, 'Art. 4: Obligation to Criminalize Torture', in Manfred Nowak et al. (eds.), *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (2nd ed., OUP, Oxford, 2019), pp. 182-184.

[68] *See* Enrico Amati et al., *Introduzione al diritto penale internazionale* (4th ed., Giappichelli, Torino, 2020), pp. 46; William A. Schabas, *An Introduction to the International Criminal Court* (6th ed., CUP, Cambridge, 2020), pp. 190-192; Werle and Jessberger, *supra* note 10, p. 181. *Contra*, Roscini, *supra* note 61, pp. 495-497; Annoni, *supra* note 61, p. 277.

[69] Olympia Bekou, 'In the Hands of the State: Implementing Legislation and Complementarity', in Carten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (CUP, Cambridge, 2011), pp. 838-841.

However, the lack of incorporation of the crimes in the Italian legal system may make it difficult for Italy to comply with some of its obligations of cooperation under Part 9 of the Statute, which may require, for instance in the case of surrender of suspects, that the charges are criminalised at domestic level.[70] Accordingly, it is possible to argue that Italy, in order to fully implement some obligations under the ICC Statute, should incorporate in its legal system criminal law provisions corresponding to those embodied in the Statute, even if they are not the object of obligations of domestic criminalisation.[71]

4 Consequences of Failure to Implement Obligations of Domestic Criminalisation

Any violation of an international obligation, whether through omission or commission, if attributable to a state, entails the responsibility of that state.[72] This principle covers also omissions of the legislative organs.[73] Accordingly, state responsibility ensues any failure to implement positive obligations[74] such as obligations of domestic criminalisation: if a state does not enact the relevant legislation, that state violates

[70] Luigi Prosperi, 'L'applicazione giudiziale delle norme dello Statuto di Roma sulla cooperazione con la Corte penale internazionale', in Palmisano, *supra* note 57, pp. 209-214.

[71] *See* Luigi Prosperi in this Special Issue.

[72] Articles 1 and 2 of the Articles on Responsibility of States for Internationally Wrongful Acts (2001) (ARSIWA).

[73] *Ibid.*, Article 4(1). *See* Edoardo Vitta, *La responsabilità internazionale dello Stato per atti legislativi* (Giuffrè, Milano, 1953).

[74] Economides, *supra* note 25, p. 374.

international law.[75] In such a case there is no doubt that the omission is attributable to the state since legislative measures are a monopoly of states organs.[76]

In particular, a distinction must be made. If a state does not implement an explicit obligation of domestic criminalisation, that state would be immediately responsible for the breach of that obligation. According to the ICJ, the duty to criminalise torture under the CAT 'has to be implemented by the State concerned *as soon as it is bound by the Convention*'.[77] The International Criminal Tribunal for the former Yugoslavia, similarly, held that 'states must *immediately* set in motion all those procedures and measures that may make it possible, within their municipal legal system' to punish torture.[78] Most scholars support this view.[79]

More complex is the case in which a state violates an implicit obligation of domestic criminalisation. If we consider these obligations as specifications of a more generic duty of prevention, it could be possible to argue that the breach occurs only when the prevention or

[75] Vitta, *supra* note 73, p. 90; Ian Brownlie, *State Responsibility* (Clarendon Press, Oxford, 1983), pp. 142-143; Pisillo Mazzeschi, *supra* note 31, p. 313; James Crawford, *State Responsibility: The General Part* (CUP, Cambridge, 2013), pp. 120-121; Guido Acquaviva, *La repressione dei crimini di guerra nel diritto internazionale e nel diritto italiano* (Giuffrè, Milano, 2014), p. 76.

[76] Benedetto Conforti, 'Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations', in Malgosia Fitzmaurice, Dan Sarooshi (eds.), *Issues of State Responsibility Before International Judicial Institutions* (Hart, Oxford, 2004), p. 134.

[77] *Belgium v. Senegal*, *supra* note 24, para. 75 (emphasis added).

[78] *Furundžija* case, *supra* note 2, para. 149 (emphasis added).

[79] *E.g.*, Vitta, *supra* note 73, p. 90; Pisillo Mazzeschi, *supra* note 31, p. 313; Francesco Salerno, *Diritto internazionale* (4th ed., Cedam, Padova, 2017), pp. 472-473; van der Have, *supra* note 24, pp. 17, 40.

protection fails because of the lack of a criminal law provision.[80] This position, which reflects the views of the ILC and the ICJ on the moment in which the breach of similar obligations of diligent conduct occurs,[81] is challenged by a growing body of academic literature that stresses that even obligations of due diligence are immediately due.[82] In any case, as mentioned above, the international courts and monitoring mechanisms that have addressed this issue in relation to human rights obligations have turned these obligations into implicit obligations of result. Accordingly, they consider that a violation occurs when the state fails to adopt the relevant legislation.[83] Therefore, states may invoke only the time that is strictly needed to adopt the said legislation,[84] which, in the framework of EU obligations, is usually provided by the specific Directive,[85] whereas in international law, it is not determined clearly.

In general international law, depending on whether the relevant obligations are reciprocal in nature or, as it happens for some human rights law obligations, are obligations

[80] *See Furundžija* case, *supra* note 2, para. 149.

[81] Article 14(3) ARSIWA; *Bosnia v. Serbia*, *supra* note 42, para. 431.

[82] Pasquale De Sena, 'Questioni in tema di responsabilità internazionale per attività spaziali', 73 *Rivista di Diritto Internazionale* (1990) 294-319, 301; Pisillo Mazzeschi, *supra* note 31, p. 313; Robert Kolb, *Advanced Introduction to International Humanitarian Law* (Edward Elgar, Cheltenham, 2014), p. 168; Marco Longobardo, 'L'obbligo di prevenzione del genocidio e la distinzione fra obblighi di condotta e obblighi di risultato', 13 *Diritti Umani e Diritto Internazionale* (2019) 237-256, 254-255; Riccardo Pisillo Mazzeschi, *Diritto internazionale dei diritti umani* (Giappichelli, Torino, 2020), p. 111.

[83] ECtHR, *Cestaro v. Italy*, *supra* note 34, paras. 209 and 225. See also Vitta, *supra* note 73, pp. 90-91.

[84] Pisillo Mazzeschi, *supra* note 31, p. 313.

[85] Damian Chalmers et al., *European Union Law: Text and Materials* (3rd ed., CUP, Cambridge, 2018), p. 112.

erga omnes partes, the injured state or all states parties to the relevant treaty[86] may invoke the violation of the obligation of domestic criminalisation, even though relevant practice is scarce. In the EU legal system, obligations of domestic criminalisation embodied in directives after the entry in force of the Lisbon Treaty can be the object of an infringement procedure started by the European Commission or by another member state.[87]

5 Conclusions

Obligations of domestic criminalisation, both under international and EU law, should be taken seriously by states, including Italy, because they enhance the goals of the international community in the field of human rights and fight against international and transnational crime. As demonstrated by this study, their violation is a source of international responsibility. Accordingly, states must understand which is the content of the relevant obligations in order to implement them in the proper way. The Italian legislature is bound to adopt the relevant domestic legislation both as an organ of Italy and under the ItConst, which requires Italy to comply with international and EU law obligations. As a result, the inactivity of the Italian legislature where obligations of domestic criminalisation are pending should be framed as an international wrongful act, and acted upon accordingly, rather than as a mere political choice in the context of the discretion of Italian legislative bodies.

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[86] *See* Articles 42 and 48(1) ARSIWA; *Belgium v. Senegal*, *supra* note 24, paras. 68-70; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of 23 January 2020, para. 41.

[87] Articles 258-259 TFUE. *See also* Angela Colella, *Gli obblighi sovranazionali di tutela penale* (PhD Dissertation, University of Milan 2012), pp. 337-339.