**The Italian Legislation on War Crimes: Obligations to Implement and Principle of Legality**

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1. **Introduction**

This chapter analyses how Italy has implemented the duty to criminalise war crimes in the Italian domestic legal system.[[2]](#footnote-2) The analysis addresses the obligations of domestic criminalisation incumbent upon Italy in the field of war crimes, the extant implementing legislations (with all its shortcomings), and the role of the constitutionally protected principle of legality in this matter. Other related issues – such as the rules governing the exercise of Italian jurisdiction over war crimes – are outside the purview of this study.

This chapter argues that the Italian domestic legal system related to war crimes is characterised by several shortcomings. The implementation of war crimes legislation is still largely centred on the provisions provided by the War Military Criminal Code (WMCC) adopted in 1941. Only marginal updating to its provisions has occurred since then, in particular as a result of military operations involving Italy in Afghanistan since 2001. As a consequence, Italy lags behind the overall evolution of international humanitarian law (IHL) in the field of the criminalisation of war crimes. The fact that Italy is bound by certain obligations of domestic criminalisation in the field of war crimes is not enough to make them applicable in the Italian domestic legal system because the principle of legality enshrined in the Italian Constitution,[[3]](#footnote-3) as interpreted by the Italian Constitutional Court, demands that offences must be adopted by the Italian Parliament.

Our analysis is structured as follows: section 2 offers a brief overview on the principle of legality in the Italian Constitution, as interpreted and applied by the Italian Constitutional Court. Section 3 explores how war crimes are punished in the WMCC, which is the main Italian legislation implementing war crimes in the Italian domestic legal order, taking into account its peculiar scope of application. Section 4 assesses the lacunas in the implementation of war crimes that can be identified in light of the legislation embodied in the WMCC and other more recent acts. Finally, section 5 provides the conclusions of this research, emphasising that Italy is not fully complying with its duty to criminalise war crimes.

1. **The Italian Constitution, the Principle of Legality, and Obligations of Domestic Criminalisation**

Before analysing the Italian implementation of war crimes, it is necessary to provide a brief overview on the role of the principle of legality enshrined in the Italian Constitution vis-à-vis obligations of domestic criminalisation. The rigidity of the Italian Constitutional Court’s approach to this issue[[4]](#footnote-4) should be taken into account when analysing war crimes legislation.

Article 25(2) of the Italian Constitution states that ‘[n]obody can be punished except by virtue of a law in force at the time the offence was committed.’ This rule is generally interpreted as requiring that criminal offences in the Italian domestic legal system must be embodied in a law adopted by the Italian Parliament.[[5]](#footnote-5) This position has been confirmed by the Italian Constitutional Court, which emphasised that the filter of the Parliament creates a link between the exercise of the state’s *jus puniendi* and the Italian population which elects democratically the Parliament.[[6]](#footnote-6) Accordingly, not only the Constitution demands that there is a previous criminal offence, but rather, that criminal offence must be approved by the Italian democratically elected organ, the Parliament.[[7]](#footnote-7)

Which is the legal situation of war crimes provisions binding upon Italy? Following a strictly dualistic approach, treaties are usually incorporated by the so-called executive order (*ordine di esecuzione*), which reproduces a treaty in the Italian domestic legal system turning it into Italian law.[[8]](#footnote-8) However, for obligations of domestic criminalisation, this is not enough, since in the matter of criminal law Article 25(2) of the Italian Constitution is read as requiring a formal act of the parliament.[[9]](#footnote-9)

Contrary to what happens in international human rights law,[[10]](#footnote-10) the principle of legality under the Italian Constitution is not satisfied by the existence of an international criminal offence. Rather, for the current interpretation of Article 25(2) offered by the Italian Constitution, it is not enough that international criminal offences exist in the Italian domestic legal system by virtue of the *ordine di esecuzione* pertaining to a specific treaty or due to the automatic incorporations of customary international law in the Italian domestic legal system. As affirmed by the Italian Constitutional Court, the main elements of the crimes must be embodied in an act of the Italian Parliament, whereas references to international sources are only permissible if they integrate factual elements of an offence.[[11]](#footnote-11) The doctrinal attempt to align Article 25(2) of the Italian Constitutional Court to the interpretation of the principle of legality enshrined in international human rights law, which allows the recourse to international criminal law sources,[[12]](#footnote-12) has so far received no approval by the Italian Constitutional Court. Article 25(2) of the Italian Constitution is seen as one of the fundamental principles of the Italian Constitution, and thus it prevails also over international rules,[[13]](#footnote-13) which are usually considered to be hierarchical superior to ordinary legislation and – if enshrined in customary international law – over non-fundamental rules of the Italian Constitution itself.[[14]](#footnote-14)

The reasons behind this conservative approach to the principle of legality are different. Generally speaking, they are linked to the Illuminist tradition, which relied on the Parliament as the main actor tasked with the production of criminal law in order to avoid abuses.[[15]](#footnote-15) There are also some reasons that have been advanced with the specific discipline of war crimes in mind. For instance, it is possible that the structure of a war crime included in a treaty or that the common understanding of a customary international law war crime is not detailed enough to be in line with the required detailed character of criminal offences.

However, the position of the Italian Constitutional Court on Article 25(2) would bar also the application of the most detailed rule because international obligations on war crimes, even when incorporated in the Italian domestic legal system, do not indicate with sufficient clarity the penalties that are applicable.[[16]](#footnote-16) This is a result of the fact that in the Italian legal system, the Parliament provides statutory penalties for each criminal offence, identifying the minimum and maximum amount of the penalty that the judges can apply. This is considered an intrinsic component of the principle of legality even though, at the international level, international criminal statutes do not embody specific penalties for each crime, but rather, they only provide a generic framework applicable for all crimes.[[17]](#footnote-17) For instance, the ICC Statute provides that the ICC can sentence individuals up to 30 years of imprisonment and, for extremely grave cases, to life imprisonment, without providing more specific indications for each of the crimes under the Court’s jurisdiction.[[18]](#footnote-18) Such a generic framework would be unconstitutional from the standpoint of the Italian Constitutional Court, which has considered that a very wide framework of statutory framework for a crime leaves too much discretion to the judges in the application of the penalty and is, as a result, unconstitutional for lack of foreseeability.[[19]](#footnote-19) It has been noted that the lack of a statutory penalty for war crimes is a procedural issue pertaining to the preparedness of the Italian legal system to implement its international obligations, rather than an issue concerning fundamental values of the Italian Constitution.[[20]](#footnote-20) Nevertheless, it is a fact that the punishment of war crimes presented in the Italian domestic legal system can be paralysed by the need for purely Italian provisions on penalties adopted by the Parliament.[[21]](#footnote-21)

1. **The Main Italian Legislation on War Crimes: The 1941 WMCC and Its Complex Scope of Application**

The Italian legislation on war crimes is still centred around the 1941 WMCC, particularly its Book III, Title IV (Articles 165-230) devoted to ‘offences against the laws and customs of war’. These offences are applicable by the military judicial system, which operates under guarantees of independence from the Ministry of Defence, through the involvement of military tribunals comprising both military judges (i.e. civilian judges specialized in this area) and officers of the armed forces.[[22]](#footnote-22) However, the cases in which the WMCC applies are not easy to identify for two reasons: first, the application of the WMCC echoes an old understanding of the divide between peacetime and wartime embodied in the WMCC, which is no longer in line with contemporary international law.[[23]](#footnote-23) Second, selective and disorganised legislative interventions have manipulated the application of the war crimes provision embodied in the WMCC in a confusing case-by-case way.

The original Article 9 of the WMCC, in force until 2001, stated that ‘the expeditionary forces operating abroad for military operations are subject to the wartime military criminal code, even in peacetime’. Under its Article 3, the WMCC is applicable ‘from the moment when the state of war is declared to the moment of its cessation’ (Article 3). However, until the 2001 military operations in Afghanistan, the application of the WMCC has always been barred by legislative interventions adopted by the Government. Decree-laws enacted by the Government and subsequently approved by the Parliament have always provided that ‘the peacetime military criminal code applies to military personnel’ participating in multinational missions abroad.[[24]](#footnote-24) This solution, based on constitutional and political assessments,[[25]](#footnote-25) barred the application of the WMCC, including its provisions dealing with war crimes, also for operations implying the involvement in armed conflict scenario, such as the air raids in Iraq in 1990-1991. In this, the application of the WMCC, which was enacted before the adoption of the UN Charter, appears to be influenced by the establishment of a state of war in the formal sense, a remnant of an outdated conception on the divide between wartime and peacetime in international law which is present in other provisions of the Italian Constitution as well (e.g., Articles 78, 87(9)).[[26]](#footnote-26)

Only at the time of Italy’s participation in military operations in Afghanistan, the WMCC was formally applied, for the first time, through Decree-Law 421/2001. This piece of legislation required the application of the WMCC on the basis of the nature of the mission, i.e. ‘a military operation, whose basic characteristics are essentially similar to proper armed activities’,[[27]](#footnote-27) and in light of the aim to give effect to WMCC’s war crimes provisions. In this context a reform was made to Article 9 of the WMCC, which now reads that the WMCC applies in ‘armed military operations’ abroad.

Moreover, Article 165 of WMCC, namely the opening provision of Book III, Title IV of the WMCC regarding ‘offences against the laws and customs of war’, was modified by Law 6/2002. Now, Article 165 of the WMCC states that ‘[t]he provisions of this title apply to all cases of armed conflict, independently of the declaration of the state of war’. This comprehensive wording implies that war crimes can now be of relevance to any armed conflict involving Italy, i.e. both international (IAC) and non-international (NIAC) ones.[[28]](#footnote-28) This point has been further specified by Law no. 15/2002, according to which ‘[f]or the purposes of wartime military criminal law, “armed conflict” is taken to mean a conflict where at least one of the parties involved makes militarily organised and extended use of arms against another to carry out war operations’. Accordingly, only war crimes committed during an armed conflict fulfilling the characteristics defined in Article 165 of the WMCC, as modified by Law no. 15/2002. This solution is partly unsatisfactory for many reasons and, particularly, because it does not reflect the generally accepted definition of IACs in international law.[[29]](#footnote-29) Furthermore, Article 165 of the WMCC was also modified to specify its application ‘to armed military operations carried out by Italian armed forces abroad’, pending ‘an organic reform in this area’.

Until 2006, legislation authorizing missions in Afghanistan and Iraq expressly subjected the activities of the military personnel involved therein to the WMCC due to the active military operations carried out in such contexts. On the other hand, the application of the Peace Military Criminal Code (PMCC) was imposed on other missions, such as operations in the Balkans or Lebanon. Nevertheless, from 2006, the relevant decree-laws authorising missions abroad expressly required application of the PMCC to all military operations abroad. This issue was finally addressed by Law no. 145/2016 devoted to military missions abroad. In particular, Article 19(1), devoted to penal provisions, adopts a systematic solution, maintaining that the PMCC applies by default to personnel participating and supporting international missions, unless the Government would request to the Parliament for an express application of the WMCC.

There is nevertheless a risk in applying the PMCC rather than the WMCC since the former does not provide for the criminalisation of the war crimes punished by the latter. Accordingly, constantly applying the PMCC would paradoxically prevent the application of provisions related to war crimes included in the WMCC. An interpretive solution out of this issue can still be identified on the basis of the new wording of Article 165 of the WMCC, according to which Book III, Title IV applies in ‘all cases of armed conflict’, and ‘to armed military operations carried out by Italian armed forces abroad [pending] an organic reform in this area’. Accordingly, it could be maintained that this specific section of the WMCC has its own autonomous relevance in case of armed conflicts, regardless of any legislative/political choices imposing the use of the PMCC during missions abroad. This position has been taken by military courts,[[30]](#footnote-30) judges writing in personal capacity,[[31]](#footnote-31) and scholars,[[32]](#footnote-32) as for rendering the prosecution of war crimes possible in any case.

All in all, even if the abovementioned solution could creatively allow for the application of war crimes provisions of the WMCC, it is unable to resolve existing shortcomings in its substantive content, as explored in the subsequent paragraph.

**4. A Review of War Crimes Provided by the Italian Legal System**

***4.1 The Evolution of War Crimes Punished by the WMCC***

When the WMCC was adopted in 1941, its section dealing with ‘offences against the laws and customs of war’ (Articles 165-230) provided for the very comprehensive criminalization of several violations of IHL treaties existing at the time. Its content drew inspiration from the 1929 Geneva Conventions and the Regulations annexed to the 1907 IV Hague Convention, regardless of their lack of ratification by the Kingdom of Italy.

However, subsequent legislative choices relegated issues regarding war crimes to a realm of neglect, resulting in the current shortcomings. Italy is party to the main post-1941 international humanitarian law treaties which include obligations of domestic criminalisation of war crimes, such as the four 1949 Geneva Conventions, the 1954 Hague Convention, the two 1977 Additional Protocols, and the 1998 Statute of the International Criminal Court (ICC). Nevertheless, Parliament limited itself to authorizing the President of the Republic to ratify these treaties and order their execution in the domestic legal system (through a so-called *ordine di esecuzione*), but without introducing any substantial change to the latter.[[33]](#footnote-33) A similar approach was most recently adopted for the Kampala amendments to the ICC Statute, namely those affecting Article 8(2)(e),(xiii), (xiv), and (xv).[[34]](#footnote-34) Only on the occasion of the ratification of the 1999 Second Protocol to the 1954 Hague Convention did Parliament also introduce new ad hoc criminal provisions through Law no. 45/2009, which was detached from the WMCC.[[35]](#footnote-35)

The implementation mechanism offered by the *ordine di esecuzione* is completely inadequate to provide for a proper repression of war crimes at the domestic level. As mentioned above, pursuant to the principle of strict legality in criminal matters embedded in the Italian Constitution, international provisions establishing new criminal offences cannot be directly applied by the Italian judiciary without an intervention of the Parliament.[[36]](#footnote-36) In particular, as these provisions do not provide for any regime of penalties their direct application would violate the corollary principles of specificity, certainty, foreseeability and accessibility.

More specifically, war crimes provisions in treaties ratified after 1941 could only be applicable within the Italian legal order under certain circumstances. This is the case where such crimes were already covered by the 1941 WMCC, which provided for the criminalization of certain conducts subsequently qualified as war crimes by relevant treaties. It is also possible to make use of the openly formulated character of some WMCC provisions intended, for instance, to repress the use of weapons prohibited by ‘international conventions’ (e.g. Articles 174-175 of the WMCC); provided that such unlawful conducts are accompanied by provisions regarding penalties, it is possible to integrate these offences with post-1941 conventions widening the number of prohibited weapons. Finally, sometimes it is possible to rely on the few amendments made to the WMCC in 2002, which have partly adapted its content to current paradigms.

This inertia has thus been particularly unfortunate in relation to the 1949 Geneva Conventions and the 1977 First Additional Protocol, as they provide for explicit obligations of domestic criminalization for violations identified by these treaties as serious breaches.[[37]](#footnote-37) The exercise of jurisdiction on these breaches is a duty for every state party, on the basis of the *aut dedere aut iudicare* principle.[[38]](#footnote-38)

A similar reasoning could be applied concerning the ICC Statute. Even if, formally speaking, there is no obligation for states parties to include war crimes provided in the Statute in their domestic legal system,[[39]](#footnote-39) states parties are implicitly encouraged to harmonise their criminal provisions with this instrument because of the principle of complementarity expressed by Articles 1 and 17 of the Statute. Indeed, the principle of complementarity incentives states to uniform their domestic legal systems to core crimes present in the ICC Statute because existing deficiencies in the domestic legal system may potentially trigger the exercise of the ICC’s jurisdiction.[[40]](#footnote-40) Law no. 232/1999 permitted a swift ratification of the Rome Statute by Italy but failed to introduce any substantial reform, limiting itself to requesting its implementation through the *ordine di esecuzione*. Beside this early action by the Parliament, we can only report failed attempts by the Parliament and the Government to adapt the Italian legal system to the crimes provided for in the Rome Statute.[[41]](#footnote-41) So far, only provisions addressing cooperation with the ICC have been introduced through Law no. 237/2012.[[42]](#footnote-42) Such a cooperation, however, may incur potential obstacles because of lack of incorporation of the relevant war crimes in the Italian domestic legal system.[[43]](#footnote-43)

So far, only at the time of abovementioned reforms of the WMCC, urgently imposed in 2002 by the decision to apply this code to the mission in Afghanistan, were some provisions of the WMCC modified to partly adapt its content to current IHL paradigms. Before that, war crimes under the IV Geneva Convention were outside the scope of the WMCC.[[44]](#footnote-44) The first significant development occurred with law no. 6/2002, which added a new provision (Article 184-bis) aimed at criminalizing the taking of hostages in an IAC. Second, a new Article 185-bis was introduced to include additional criminal offences related to the obligations of domestic criminalization required by the grave breaches system of the 1949 Geneva Conventions and the 1977 First Additional Protocol. Article 185-bis criminalizes unlawful conducts carried out by a member of the armed forces ‘to the detriment of prisoners of war or civilians or other persons protected by international conventions’ with a statutory penalty of between two and five years’ imprisonment, making specific reference to torture, inhuman treatment, illegal transfers, biological experiments, unjustified medical treatment and ‘other acts prohibited to him by international conventions’.

This latter openly formulated clause might eventually provide some flexibility in the criminalization of conducts against protected persons not yet included in the WMCC. For instance, it could be relevant for some grave breaches such as the deportation or unlawful confinement of a protected person. However, doubts could be raised about its capacity to constitute a proper basis for domestic criminalization, as clear parameters of reference are lacking. In particular, it is unclear whether this clause only applies to grave breaches or might be extended to further conducts contrary to IHL treaty provisions carried out against protected persons, thus confirming the need for more clarity in this area rather than this potential omnibus clause.

However, the urgency imposed by the mission in Afghanistan allowed for only a few random changes addressing some of the existing shortcomings and prevented a more comprehensive assessment of current lacunae. A comparison between the current WMCC, relevant IHL and international criminal law treaties highlights various shortcomings, which have already been examined elsewhere,[[45]](#footnote-45) and which are examined in the subsequent subsection.

***4.2 Shortcoming of the War Crimes Punished by the WMCC with Particular reference to the ICC Statute***

Due to the limited length of this chapter, it is impossible to conduct an exhaustive analysis of all the shortcomings of the Italian implementation of war crimes. We will therefore focus on the main deficiencies of the system, considering in particular the list of war crimes provided by the ICC Statute.

In relation to Article 8(2)(a), regarding the grave breaches of the 1949 Geneva Conventions, the main shortcomings are due to outdated terminologies in the original drafting in 1941, which was unable to properly address the notion of protected persons. For instance, with regard to Article 8(2)(a)(i), on ‘wilful killing’, Article 185 of the WMCC criminalizes such acts against ‘enemy private citizens’. This wording is inadequate with respect to several categories of protected persons. Concerning the hypothesis provided by Article 8(2)(a)(v), on ‘compelling a prisoner of war or other protected person to serve in the forces of a hostile Power’, Article 182 of the WMCC criminalizes this conduct only in relation to ‘enemy subjects’. In other instances, extensive use of the omnibus clause introduced by Article 185-bis through Law no. 6/2002 would need to be made in order to criminalize ‘other acts prohibited by international conventions’ and repress other grave breaches not expressly provided by the WMCC, as in Article 8(2)(a)(vi) and (vii). These examples are merely illustrative of a number of shortcomings of the Italian legislation in relation to grave breaches.[[46]](#footnote-46)

Concerning the war crimes embodied in Article 8(2)(b), addressing ‘[o]ther serious violations of the laws and customs applicable in international armed conflict’, similar shortcomings can be identified. On some occasions the potential use of Article 185-bis of the WMCC could be relevant to address offences against protected persons not expressly included in the WMCC but prohibited by IHL treaties, such as in the hypotheses provided by Article (8)(2)(b)(vi), (x), and (xiv). The same reasoning could be applied regarding Articles 174 and 175 of the WMCC, which prohibit ordering or making use of ‘means and methods of warfare prohibited by laws and international conventions’. These openly formulated provisions could be extended to hypotheses not expressly prohibited by the WMCC, such as those provided for by Article 8(2)(b)(vii), (xi), (xii), (xvii), (xviii), (xix), (xx), (xxiii), and (xxv). This integration looks problematic under the aforementioned case law of the Italian Constitutional Court on the integration of domestic offences with international sources, which demands that the core elements of any offence must be provided by the Italian legislation, while only some factual elements of those offences can be identified through the reference to external sources.[[47]](#footnote-47) Accordingly, to fully comply with Article 25(2) of the Italian Constitution, it would be preferable to introduce ad hoc offences as well as to differentiate among statutory penalties. More in generally, the WMCC is totally or partly unfit to cover certain other offences related to specific conducts which are out of the scope of any provision of the WMCC, as for Article 8(2)(b)(iii) dealing with attacks against humanitarian assistance or peacekeeping missions, just to mention one example.[[48]](#footnote-48)

Finally, it should be noted that the WMCC criminalizes certain conducts in IACs that are not considered as war crimes by Article 8(a) and (b) of the ICC Statute.[[49]](#footnote-49) This is in line with the request made to States to also ‘take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches’,[[50]](#footnote-50) possibly also through ‘a list of war crimes, which goes well beyond the list of grave breaches’.[[51]](#footnote-51) However, it would be opportune to conduct a coherent review of this possibility, currently provided for by certain random solutions adopted in 1941.

The implementation of the war crimes listed in Article 8(2)(c) to (f), addressing war crimes committed in NIACs, is even more problematic. As mentioned previously, the new wording of Article 165 of the WMCC, extending the application of Book III, Title IV of this code to ‘all cases of armed conflict’, implies its application also to NIACs. However, not having been accompanied by a substantial restyling of the WMCC, this solution implies significant challenges for the prosecution of war crimes listed in Article 8(2)(c) to (f), particularly considering the unfit terminology used in relevant WMCC provisions. Indeed, such provisions, drafted with inter-state hostilities in mind, criminalize conducts whether committed against ‘enemy private citizens’ (Article 185), the ‘enemy’ (Articles 174, 175, 192, 193), ‘persons belonging to the enemy State’ (Article 177), or introduce territorial qualifiers to cover offences committed in the ‘territory of the enemy State occupied by the armed forces of the Italian State’ (Article 182) or in an ‘enemy territory’ (Articles 187, 224). Similar expressions are problematic in relation to a NIAC, where there is protracted violence between a state and an organised armed group or between two or more armed groups. Even though the decision to apply the war crimes provided by the WMCC to NIACs may be saluted as part of the trend that favours the unification between rules pertaining to IACs and NIACs,[[52]](#footnote-52) nevertheless similar inaccuracies may be problematic in the field of criminal law.

To overcome these problems, some scholars have to set aside literal interpretation of this provision, for instance ‘qualifying as an “enemy” an individual who is not strictly speaking an enemy, but, de facto, assumes the role that would be covered by the enemy, if it were a war’.[[53]](#footnote-53) However, a comprehensive reform of the WMCC would be required in this area. Furthermore, even if the abovementioned creative interpretation could be maintained, a series of crimes included in the ICC Statute in relation to NIACs are not present in the WMCC at all, such as the taking of hostages in NIACs under Article 8(2)(c)(iii). In several other instances, it would be necessary to make reference to the omnibus provision provided by Article 185-bis for the prosecution of ‘other conduct prohibited by international conventions’ against protected persons in Article 8(2)(c)(iv) or 8(2)(e)(vii), although the compatibility of this solution with constitutional case law on Article 25(2) of the Italian Constitution remains doubtful. Robust intervention by the Parliament would be the correct solution.

* 1. ***Criminalisation of War Crimes Outside the WMCC***

Even if the WMCC represents the main source for the prosecution for war crimes in Italy, some other relevant provisions are embodied in different pieces of legislation. For instance, at the occasion of the ratification of the 1999 Second Additional Protocol to the 1954 Hague Convention, the abovementioned Law no 45/2009 introduced substantive criminal provisions through its Articles 7-13.[[54]](#footnote-54) These articles implement the explicit obligation of domestic criminalization provided by Article 15(2) of the Protocol. The prosecution of such crimes could occur ‘during an armed conflict or international missions’, as provided by Article 6 of Law no. 45/2009. Furthermore, criminal prosecutions for the use (as well as other prohibited conducts as production or transfer) or of certain prohibited weapons were included at the time of the implementation of the Ottawa and Oslo Conventions in the Italian legal order, respectively Law No. 374 of 29 October 1997[[55]](#footnote-55) and Law No. 95 of 14 June 2011.[[56]](#footnote-56)

1. **Conclusions**

Italy has not implemented its duty to criminalise war crimes in an adequate way, notwithstanding the fact that the lack of full implementation can be a source of state responsibility.[[57]](#footnote-57) The main responsibility to overcome this delay rests on the Italian Parliament because the principle of legality embodied in the Italian constitution, as interpreted by the Italian Constitutional Court, prevents the direct application of criminal offences embodied in international treaties into the Italian legal order. As a result, several war crimes could not be prosecuted in the Italian legal order, but rather, the extant legislation is still largely based on the 1941 WMCC as slightly modified subsequently. For all these reasons, the Italian implementation of international obligations of domestic criminalisation pertaining to war crimes is currently unsatisfactory and requires substantive reforms. Therefore, the recent establishment by the Ministry of Justice of a Commission charged to elaborate a code for international crimes should be welcomed in light of the possibility to systematically address abovementioned shortcomings.[[58]](#footnote-58) However the project finally elaborated by this Commission did not have the chance to be approved due to the end of the legislature.[[59]](#footnote-59) Its results might nonetheless be the starting point for further efforts in the next future.

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4. See, generally, Beatrice I Bonafè, ‘Constitutional Judicial Review and International Obligations of Criminalization’ (2021) 21 *International Criminal Law Review* 660. [↑](#footnote-ref-4)
5. Carlo Federico Grosso et als, *Manuale di Diritto Penale: Parte Generale* (3rd edn, Giuffrè 2017) 88; Ferrando Mantovani, *Diritto Penale: Parte Generale* (11th edn, CEDAM 2020) 45. [↑](#footnote-ref-5)
6. Italian Constitutional Court, Decision no 487/1989, para. 3. [↑](#footnote-ref-6)
7. Grosso (n 4) 88; Mantovani (n 4) 45. [↑](#footnote-ref-7)
8. Generally, on the Italian implementation of international law, see Carlo Focarelli, *International Law* (Edward Elgar 2019) 247-266. [↑](#footnote-ref-8)
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10. See Art 7(1) of the European Convention on Human Rights and : ‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or *international law* at the time when it was committed’ (emphasis added); Article 15(1) of the International Covenant on Civil and Political Rights: ‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or *international law*, at the time when it was committed’ (emphasis added). [↑](#footnote-ref-10)
11. See, e.g., Italian Constitutional Court, decision no 21/2009, para 4. For more analysis of the relevant case law, see Daniele Amoroso, ‘The Duties of Criminalization under International Law in the Practice of Italian Judges: An Overview’ (2021) 21 *International Criminal Law Review* 641, 652-655; Bonafè (n 3) 669-673. [↑](#footnote-ref-11)
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13. Italian Constitutional Court, decision no. 238/2014, para 2.1. [↑](#footnote-ref-13)
14. See the case law discussed in Focarelli (n 7) 249-252, 256-257. [↑](#footnote-ref-14)
15. Italian Constitutional Court, decision no 487/1989, para. 3. [↑](#footnote-ref-15)
16. Natalino Ronzitti, ‘Intervention’ in Michael Bothe (ed), *National Implementation of International Humanitarian Law* (Martinus Nijhoff 1990) 56, 56. [↑](#footnote-ref-16)
17. See generally Silvia D’Ascoli, *Sentencing in International Criminal Law: The UN Ad Hoc Tribunals and Future Perspectives for the ICC* (Hart 2011). [↑](#footnote-ref-17)
18. Art 77 of the ICC Statute. See generally Alessandra Lanciotti, ‘Le pene comminabili dalla Corte penale internazionale’ in Gaetano Carlizzi et als (eds), *La Corte Penale Internazionale: problemi e prospettive* (Vivarium 2003) 405. [↑](#footnote-ref-18)
19. See, e.g., Italian Constitutional Court, decision no. 299/1992, para. 4; decision no 230/2012, para. 7. [↑](#footnote-ref-19)
20. Salerno (n 11) 2885-2887. [↑](#footnote-ref-20)
21. Other penal effects of the relevant war crimes provisions, even in the abscence of implementation legislation, are outside the purview of this chapter. See, generally, Salerno (n 11) 2887-2891; Amoroso (n 10) 644-651, 655-657; Bonafè (n 3) 673-677. [↑](#footnote-ref-21)
22. David Brunelli and Giuseppe Mazzi, *Diritto penale militare* (Giuffrè 2007) 425-473; Pierpaolo Rivello, *Manuale del diritto penale militare e dell’ordinamento giudiziario militare* (Giappichelli 2019) 427-461. [↑](#footnote-ref-22)
23. See Natalino Ronzitti, ‘Intervention’ in Bothe (n 15) 36. On the demise of the relevance of the state of war, see generally Andrew Clapham, *War* (Oxford University Press 2021). [↑](#footnote-ref-23)
24. Art 1(2) of Decree-law no. 13/1998, in Official Gazette no. 18, 23 January 1988. [↑](#footnote-ref-24)
25. Maurizio Block, ‘Introduzione’ in Ida Caracciolo and Umberto Montuoro (eds), *Ricostruzione della pace, giustizia e tutela dei diritti umani* (Giappichelli 2021) xi, xii-xiii. [↑](#footnote-ref-25)
26. This is just an echo, since there is no legal correspondence between the establishment of the state of war and/or the issuance of a declaration of war, and the application of the WMCC. See Block (n 24) xi. [↑](#footnote-ref-26)
27. See Senate of the Republic, *Relazione al disegno di legge S.914,* 4 December 2013, [www.senato.it/service/PDF/PDFServer/BGT/00009807.pdf](http://www.senato.it/service/PDF/PDFServer/BGT/00009807.pdf). [↑](#footnote-ref-27)
28. Natalino Ronzitti, ‘Una legge organica per l’invio di corpi di spedizione all’estero?’ (2002) 85 *Rivista di diritto internazionale* 139,142-143; Giulio Bartolini, ‘Le modifiche al codice penale militare di guerra a seguito della missione italiana in Afghanistan’ (2002) 57 *La Comunità internazionale* 171, 185-186. [↑](#footnote-ref-28)
29. See ICTY, *Prosecutor v D. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70: ‘an armed conflict exists whenever there is a resort to armed force between States’. [↑](#footnote-ref-29)
30. Military Tribunal in Rome, *Stival and Allocca*, no. 33/2007, Judgment, 9 May 2007, [www.difesa.it/Giustizia\_Militare/rassegna/Bimestrale/2008/Pagine/Sent-GUP-Trib-mil-Roma-9maggio2007-allocca-stival.aspx](http://www.difesa.it/Giustizia_Militare/rassegna/Bimestrale/2008/Pagine/Sent-GUP-Trib-mil-Roma-9maggio2007-allocca-stival.aspx) [↑](#footnote-ref-30)
31. Brunelli and Mazzi (n 21) 513, Marco De Paolis, ‘Sull’applicazione dei codici penali militari di guerra e di pace nelle operazioni militari all’estero’ (2017) *Il Filangieri. Quaderno* 125, 129-13; Rivello (n 21) 419. [↑](#footnote-ref-31)
32. Natalino Ronzitti, ‘La legge italiana sulle missioni internazionali’ (2017) 100 *Rivista di diritto internazionale* 474, 492-493; Bartolini (n 1) 688. [↑](#footnote-ref-32)
33. For the 1949 Geneva Conventions see law 27 October 1951, no. 1739, in Official Gazette*,* Ordinary Supplement no.53, 1 March 1952, while for the 1977 Additional Protocols see law 11 December 1985, no. 762, in Official Gazette, Ordinary Supplement no. 303, 27 December 1985. The ICC Statute was implemented through law 12 July 1999, no. 232, in Official Gazette no. 167, Ordinary Supplement no. 135. [↑](#footnote-ref-33)
34. See Law 10 November 2021, no. 202, in Official Gazette, Ordinary Supplement no. 287, 2 December 2021. The amendments extend the jurisdiction of the Court to the war crimes of employing certain weapons and substances in armed conflicts not of an international character, particularly with regard to poison or poisoned weapons, asphyxiating, poisonous or other gases, and bullets which expand or flatten easily in the human body. [↑](#footnote-ref-34)
35. See below, section 4.3. [↑](#footnote-ref-35)
36. See above, section 2. [↑](#footnote-ref-36)
37. See in particular obligations of criminalization provided by Art. 50 of the I Geneva Convention; Art 51 of the II Geneva Convention; Art 130 of the III Geneva Convention; Art 147 of the IV Geneva Conventions; Arts 11 and 85 of the I AP. [↑](#footnote-ref-37)
38. Various shortcomings in their implementation are identified as analysed below, section 4.2. [↑](#footnote-ref-38)
39. William A. Schabas, *An Introduction to the International Criminal Court* (6th edn, Cambridge University Press, 2020) 190–192; [↑](#footnote-ref-39)
40. Marco Roscini, ‘Great Expectations: The Implementation of the Rome Statute in Italy’ (2007) 5 *Journal of International Criminal Justice* 493, 496-497. [↑](#footnote-ref-40)
41. Roberto Belelli, ‘Come adattare l’ordinamento giuridico italiano allo Statuto della Corte dell’Aja’ (2003) 9 *Diritto penale e processo* 1299. [↑](#footnote-ref-41)
42. Flavia Lattanzi, ‘Un piccolo passo sulla via dell’adeguamento allo Statuto della Corte Penale Internazionale’ (2013) 96 *Rivista di diritto internazionale* 492. [↑](#footnote-ref-42)
43. Limited space in this chapter does not allow for more analysis on this. See, generally, Luigi Prosperi, ‘L’applicazione giudiziale delle norme dello Statuto di Roma sulla cooperazione con la Corte penale internazionale’ in Giuseppe Palmisano (ed), *Il diritto internazionale ed europeo nei giudizi interni* (Editoriale Scientifica 2020) 209. [↑](#footnote-ref-43)
44. Mario Pisani, ‘La penetrazione del diritto penale internazionale nel diritto penale sostanziale italiano (genocidio, pirateria e pirateria aerea, reati di guerra, droga ecc.)’ (1979) *Il Consiglio Superiore della Magistratura - Supplmento: Diritto Penale Internazionale* 45, 57; Paolo Benvenuti, ‘Il ritardo della legislazione italiana nell’adeguamento al diritto internazionale umanitario, con particolare riferimento alla disciplina dei conflitti armati non internazionali’ in Pierluigi Lamberti Zanardi and Gabriella Venturini (eds), *Crimini di guerra e competenza delle giurisdizioni nazionali* (Giuffrè 1998) 107. [↑](#footnote-ref-44)
45. Report for Amnesty International Italy on ‘L’Italia e l’adeguamento allo Statuto della Corte penale internazionale’, drafted by Brando Ranalli under the supervision of Giulio Bartolini and Alice Riccardi in the framework of the Roma Tre IHL Legal Clinic (July 2019, on file with the author) 16-30; Bartolini (n 1). [↑](#footnote-ref-45)
46. See Bartolini (n 1). [↑](#footnote-ref-46)
47. See above, section 2. [↑](#footnote-ref-47)
48. For similar shortcomings see for instance Article 8(2)(b), (iv), (v), and (xxvi). [↑](#footnote-ref-48)
49. See for example crimes affecting prisoners of war provided at Arts 213 of the WMCC (violations of the freedom of religion) and 214 of the WMCC (stealing of personal belongings). [↑](#footnote-ref-49)
50. See Art 49 of the 1949 First Geneva Convention. [↑](#footnote-ref-50)
51. Eve La Haye, ‘Art. 49: Penal Sanctions’, in ICRC (ed), *Commentary on the First Geneva Convention* (Cambridge University Press 2016), para. 2897, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3ED0B7D33BF425F3C1257F7D00589C84>. [↑](#footnote-ref-51)
52. See generally the analysis by Marco Sassòli, ‘The Convergence of the International Humanitarian Law of Non-International and International Armed Conflicts: The Dark Side of a Good Idea’ in Giovanni Biaggini, Oliver Diggelmann, and Christine Kaufmann (eds), *Polis und Kosmopolis - Festschrift für Daniel Thürer* (Nomos 2015) 679. [↑](#footnote-ref-52)
53. Tullio Padovani, ‘La legge penale militare di guerra, i conflitti armati e le operazioni militari all’estero’ in Alberto Gargani (ed), *Il diritto penale militare tra passato e futuro* (Giappichelli 2009) 66. [↑](#footnote-ref-53)
54. Anna Maria Maugeri, ‘La tutela dei beni culturali nell’ambito di conflitti armati: la l. 16.4.2009, n. 45’ (2010) 30(1) *La legislazione penale* 5. [↑](#footnote-ref-54)
55. Law 26 March 1999, no. 106, in Official Gazette, Ordinary Supplement no. 94, 23 April 1999. [↑](#footnote-ref-55)
56. Law 14 June 2011, no. 95, in Official Gazette, Ordinary Supplement no. 153, 4 July 2011. [↑](#footnote-ref-56)
57. See generally Marco Longobardo, ‘The Italian Legislature and International and EU Obligations of Domestic Criminalisation’ (2021) 21 *International Criminal Law Review* 623. [↑](#footnote-ref-57)
58. Italian Ministry of Justice, Decree, 22 March 2022, [https://www.giustizia.it/giustizia/it/mg\_1\_36\_0.page?contentId=COS372730#](https://www.giustizia.it/giustizia/it/mg_1_36_0.page?contentId=COS372730). [↑](#footnote-ref-58)
59. For the text containing the main results of activities carried out by the Commission see <https://www.giustizia.it/cmsresources/cms/documents/commissione_PALAZZO_POCAR_relazione_finale_31mag22.pdf>. [↑](#footnote-ref-59)