



The prosecution of the Rome Statute's core crimes

An international overview & the Italian perspective

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DISCLAIMER

- ▶ I would highlight that the opinions here expressed represent neither those of the Italian Ministry of Defence, nor the ones of the Military General Prosecutor's Office at the Supreme Court of Cassation, nor those of the Universities where I teach, but are solely personal ideas.
- ▶ About this presentation it's the case to mention the relevant publication that I committed as Chief editor of the "Military Justice Review" titled "*New Wars and Ancient Crimes. Legal Reflections on the Reception in Italy of the Rules on War Crimes*", edited by Ida Caracciolo, Sebastiano La Piscopia and Umberto Montuoro. (Cfr. 'Supplement No. 1 to No. 3/2023').

The First Provisions Coming from the International Treaty Law

- ▶ The functional role of domestic measures, including criminal provisions, **to ensure the repression of violations of international humanitarian law** was explicitly recognized in **Article 29 of the Geneva Convention on the Wounded and Sick (1929)** which, for the first time, comprehensively required States to *“take the necessary steps to prosecute, in accordance with their laws, individuals who have committed or ordered to be committed any of the grave breaches of the present Convention”*;
- ▶ Thus departing from earlier, more **limited provisions** aimed at imposing domestic criminalization only for a **few specific violations of international humanitarian law** or **for the improper use of the protective emblem**.

The 1949 Geneva Conventions outputs

- Specifically, Articles 49, 50, 129, and 146 of the 1949 Geneva Conventions, with identical text, first provided for the regime of grave breaches, specifically imposing an obligation "to enact *legislation necessary to provide effective penal sanctions*" to repress these violations, as opposed to the mere obligation 'to propose' provided for by the 1929 Geneva Convention.



What changes with the Rome Statute of the International Criminal Court ?

- The Statute of the International Criminal Court (ICC), approved on July 17, 1998, at the end of the Conference held in Rome with the participation of 143 delegations, came into force on July 1, 2002, as a multilateral international treaty. It represents the culmination of more than 50 years of proposals and initiatives, inspired by the first international military tribunals:

The Nuremberg Tribunal



The Tokyo Tribunal



Differences with other International Tribunals

The International Criminal Court (ICC) is not an *ad hoc* Tribunal created *post factum** as :

- The International Criminal Tribunal for the former Yugoslavia, and the one for Ruanda (international jurisdictions);
- The Sierra Leone Tribunal, the Timor Est one, the Cambodia Tribunal and the Special Tribunal for Lebanon (internationalized jurisdictions).

and the ICC Jurisdiction



represents the full implementation of the principle of legality

both from the standpoint of non-retroactivity of substantive criminal law and pre-constitution of the Court, thus eliminating one of the previous structural weaknesses.

* With extraordinary judges (so called in the Italian Constitution)



The problem of **discrepancies** between the different National Criminal Codes (military or not)

- ▶ The prosecution of war crimes through common criminal laws is in fact generally accompanied by a failure to apply the special regime relating to international crimes, e.g., with respect to universal jurisdiction, non-applicability of immunities and prescriptibility, and the regime of permissible defences, and thus does not allow for an effective reflection of the seriousness of the crimes, their international nature, and related legal-political topics.
- ▶ In addition, ordinary legislation rarely adequately reflects or addresses the content of war crimes, particularly those related to the conduct of hostilities, so as to result in regulatory gaps, potential misapplication, and inconsistencies in possible repression.
- ▶ Examples of **discrepancies** from
- ▶ **Denmark**



and from **Italy**



The technique of static (or dynamic) deferral to the Rome Statute

- Under an approach characterized by static deferral, domestic provisions aimed at criminalizing violations of international humanitarian law define offenses by referring to conduct prohibited by specific and pre-identified relevant treaties, supplementing this framework with the determination of a relevant sanction regime at the domestic level.
- Examples from:

Canada



Argentina



Latvia



The establishment of an “*ad hoc*” national legislation

- ▶ Redefining war crimes in domestic laws adding specific Sections in national Criminal Codes as for example in the cases of:

Panama,



Portugal



or

Tajikistan



- ▶ Or adopting specific Military Criminal Codes, as for example in the cases of:

Germany,



Italy



or

Niger



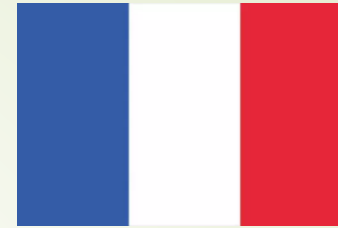
The limit of the possible over-implementation

- Phenomena of **over-implementation** may be related to the adoption of particularly zealous attitudes by States toward combating impunity.
- In this context, it is possible that, in their domestic war crimes legislation, States proceed to **criminalize a broader range of conduct** than that which qualifies as war crimes under international law.
- This may be the case, for example, when domestic provisions criminalize in a generic way all “violations of the laws and customs of war”, as – for some scholars – in the case of **South Africa** (South Africa Genève Convention Act, 2012) or of the **Netherlands** (International Crimes Act, 2003, Section 7), or through the extension of the scope of certain prohibitions.
- It is necessary to bear in mind the Latin principle “***nullum crimen sine lege***” (no crime in absence of law): the limit of the so called over-implementation stay in the strategic way used, potentially, to carry on some political approaches with the risk to persecute offences perpetrated in the absence of an “already written” law.

The problems of: statute of limitations for the offences;

- ▶ Even when States transpose war crimes through specific criminal legislation on the subject, domestic repression may encounter a number of **obstacles** that can limit or delay the activation of criminal prosecutions, limiting the effectiveness of the transposition (into law) effort.
- ▶ This is normally the result of inadequate consideration of the special regime to which the criminal prosecution of war crimes is subject. This regime notoriously provides that the repression of war crimes is accompanied by the provision of the **imprescriptibility of crimes**, the inapplicability of immunities and amnesties, limitations on the exculpatory nature of the order of the superior officer, and special modalities of participation in the crime.

A French case



- ▶ Although generally considered a customary norm, **the inapplicability of prescriptive time limits to international crimes** continues to meet with some **resistance** from States. Such resistance is particularly evident with regard to the applicability of this norm to war crimes. A case in point is that of France, which since the **Barbie case** has repeatedly argued in favor of the need to distinguish between war crimes and crimes against humanity, believing that the statute of limitations exclusion applies only to the latter, on the assumption that war crimes have a “different rationale”.

Thus...

- ▶ ...it is possible that domestic legislation does not associate a specific statute of limitations with the prosecution of war crimes. This may occur either as a result of the failure to transpose war crimes *tout court*, or in the event that the system transposes the incriminating norms relating to war crimes but does not provide for their imprescriptibility.

An Italian case



....and so....

...under the above mention circumstances, the effectiveness of the criminal prosecution of war crimes will eventually depend on the ordinary regime of imprescriptibility provided by the relevant legal system.

- ▶ In Italy, for example, the conviction of **Erich Priebke** for war crimes was made possible solely by the circumstance that the crimes for which he was charged were among those punishable by **life imprisonment**, crimes that the Italian legal system already considers imprescriptible.

The Italian perspective (DE LEX LATA)

War Crimes



War crimes are mainly defined in **Title IV of Book III of the Wartime Military Criminal Code (WMCC), adopted in 1941 and further implementations**, which has been subject only to minor amendments since then.

- It is applied, in principle, to both international and non-international armed conflicts involving Italy.

More precisely, **up until 2002**, the WMCC **only** covered **war crimes committed during a state of war** between Italy and other States.

But **in 2002** the scope of application of the Code, war crimes provisions was:

- ✓ extended to all cases of “armed conflict” involving Italy, even if a state of war is not declared;

- ★ In a context of “armed conflict”, meaning it as “a conflict in which at least one of the parties makes use of arms against the other in a militarily organized and protracted manner for the conduct of military operations”.

War Crimes

Unfortunately, right now, **numerous war crimes** listed in Article 8 of the International Criminal Court (ICC) Statute **are not yet covered by** any provision of the **IT WMCC**.

They include the following:

- ▶ denying a fair trial to protected persons (Article 8, para. 2(a)(vi));
- ▶ attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission (Article 8, para. 2(b)(iii) and (e)(iii));
- ▶ launching an attack in the knowledge that it will cause excessive incidental death, injury, or damage (Article 8, para. 2(b)(iv));
- ▶ attacking undefended places (Article 8, para. 2(b)(v));
- ▶ depriving the nationals of the hostile power of rights or actions (Article 8, para. 2(b)(xiv));
- ▶ using protected persons as shields (Article 8, para. 2(b)(xxiii));
- ▶ attacking objects or persons using the distinctive emblems of the Geneva Conventions (Article 8, para. 2(b)(xxiv) and (e)(ii));
- ▶ using, conscripting or enlisting children (Article 8, para. 2(b)(xxvi) and (e)(vii));
- ▶ sentencing or execution without due process (Article 8, para. 2(c)(iv));

War Crimes in more details

Furthermore, the war crime of attacking civilian objects (Article 8, para. 2(b)(ii)) falls within the scope of the **Art. 179 of the IT WMCC** only when the attack is directed against hospitals or other similar health care places, historic monuments or buildings dedicated to art, science, religion or charitable purposes.

Articles 7–10 of Law no. 45/2009 give penal relevance to the serious violations of the 1999 Additional Protocol II to the 1954 Hague Convention for the protection of cultural property in the event of armed conflict.

Crimes against humanity (few express mentions)

- ▶ The **IT Criminal Code** “takes care”, expressly, of crimes against humanity in only two provisions:
- ✓ **Article 414, para. 4**, which criminalizes instigating the commission of such crimes and defending them;
- ✓ **Article 604 bis, para. 3**, which sets the punishment for disseminating propaganda based on the minimization or the denial of genocide, crimes against humanity or war crimes and for instigating the commission of offences based on this kind of propaganda.

Crimes against humanity (a short list)

- ▶ The **IT Criminal Code provisions cover the underlying acts** of several crimes against humanity listed in Article 7, para. 1, of the Rome Statute as ordinary offences:
- ▶ murder (Article 575);
- ▶ enslavement (Articles 600, 601 and 602);
- ▶ imprisonment or other severe deprivation of physical liberty (Articles 605, 606 and 607);
- ▶ torture (Article 613 bis);
- ▶ rape (Article 609 bis);
- ▶ sexual slavery (Article 600);
- ▶ enforced prostitution (Article 600) and sexual violence (Article 609 bis).

Genocide

- ▶ Italy became a party to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (**Genocide Convention**) in 1952 and introduced a **special legislation** with **Law no. 962/1967** that criminalizes the following conducts, when committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group:
 - acts aimed at causing serious personal harm to members of the group (Article 1, para. 1);
 - acts aimed at causing very serious personal harm or death to members of the group (Article 1, para. 2);
 - deportation of members of the group (Article 2);
 - imposing or carrying out measures intended to prevent or limit births within the group (Article 4);
 - forcibly transferring minors up to the age of 14 from the group to another group (Article 5).

As to the offences under the first 3 bullets, **the death of the victims is an aggravating circumstance** (Article 3).

CONSIDERATIONS

Genocide in more details

Law no. 962/1967 also criminalizes the following acts:

- inflicting on members of a national, ethnic, racial or religious group such conditions of life as to bring about the physical destruction, in whole or in part, of the group itself (Article 1, para. 2);
- coercing members of the group to wear distinctive marks (Article 6, para. 1)

...and proscribes **conspiracy** and direct and **public incitement** to commit the mentioned offences.

Attempt to commit any of those offences and **complicity** in them are covered by the general provisions on attempt and complicity in crimes, which are laid down respectively in Articles 56 and 110 of the Criminal Code.

Extradition for such offences cannot be refused based on any purported political nature of the crimes, in accordance with Article VII, para. 1, of the Genocide Convention. The reason is that Article 10, para. 4, and Article 26, para. 2, of the Italian Constitution prohibit the extradition for different crimes: the political ones (respectively for both, foreigners and citizens).

Crime of Aggression

As we know the crime (**Art. 8 bis** of the Rome Statute) was settled with Kampala Amendments but the statutory changes could not take effect until **30 States parties had ratified the changes** and until the Assembly of States Parties-supported by **an affirmative vote of at least two-thirds of the membership**.

On July 17, 2018 both conditions were met and the new jurisdiction was created. The path of ratifications of the Kampala Amendments did not stop including **Italy in November 2021**.



Law No. 202 of 2021

Nevertheless, **Italian legislation**, right now, **has no specific national provision on the crime of aggression**.

The Draft of an IT International Criminal Code

The Palazzo-Pocar Commissions

- ▶ After several unsuccessful draft laws substantially incorporating the Statute's provisions on genocide, crimes against humanity and war crimes, in 2012, **Law no. 237/2012** only introduced offences against the ICC's administration of justice into the Criminal Code and supplemented the Code of Criminal Procedure by setting out rules on cooperation with the Court.
- ▶ After ten years, **in 2022**, after the outbreak of the conflict between Russian Federation and Ukraine, the Government in office appointed the Minister of Justice to set up a **Commission of experts** (named Palazzo-Pocar) to draft a Code of international crimes, aiming the full alignment of domestic law with the Rome's Statute.

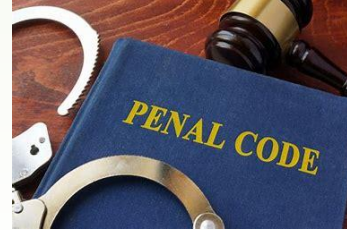
The two attempts



- ▶ In May 2022, the **first Palazzo-Pocar Commission** submitted a draft Code of international crimes, with the goal of replacing the existing legislation on war crimes and genocide and of proscribing the crimes against humanity, as well as the crime of Aggression.
- ▶ The universal jurisdiction over all the aforementioned crimes was provided for, on condition that the alleged perpetrator were present in Italian territory and, for the crime of aggression only, that prosecution were requested by the Minister of Justice.
- ▶ After the fall of that Government, **at the beginning of 2023**, the newly elected one, took the draft Code into consideration. **A second ad hoc working group with the same co-Presidents Palazzo-Pocar** was tasked by the Minister of Justice in office.
- ▶ The present speaker gave his modest support to the Military General Prosecutor of Cassation, Maurizio Block (member of this second Commission).



The Italian perspective (DE LEGE FERENDA)



- ❖ The outline of the Code of International Crimes, has been published on the institutional website of the Ministry of Justice, but have **not** been **submitted**, yet, **to the Parliament**. The Government is conducting specific regulatory insights.
- ❖ The official draft is illustrated in an articulate Final Report, dated June 20, 2022, of the first Palazzo-Pocar Commission. In particular, with regard to the formulation of war crimes, the plurality of existing normative sources at both the national and international levels and the need for their coordination was highlighted.
- ❖ The **draft Code of international crimes**, in the published text, represents **a commendable effort** to provide a unitary and coherent set of rules on all core crimes, following the example of the German Code of Crimes Against International Law.

...let's see some main points...

The project of an International Criminal Code

- ▶ The outline of the IT International Criminal Code Draft make a division between **crimes against protected persons** and **crimes related to prohibited means and methods of combat** and also try to amalgamate as much as possible the terminology used in the Statute with that adopted by the Italian laws, using as much as possible Italian criminal law legal terms.
- ▶ The express **applicability of the war crimes provisions to international missions** deem to be in line with the United Nations directives indicating the basic principles and rules of international humanitarian law applicable to Forces under the auspices of the United Nations engaged in peacekeeping operations.



The element of the «context»

Genocide:

- the aim of destroying, in whole or in part, a national, ethnic, racial, religious or linguistic group as such, acting in a context of conduct aimed at the same end or with conduct in itself suitable for the purpose...

Crimes against humanity:

- ...for crimes committed as part of a widespread or systematic attack against a civilian population carried out in execution or in support of a program of a State or a non-State organized group.

War crimes:

- ...for conducts committed during an international or non-international armed conflict and linked to such conflict.

Aggression:

- ...the reference is to whoever, having the effective power to direct the political or military action of a State or to exercise control over it, plans, prepares, initiates or executes an act of aggression whose character, gravity and dimensions are such as to constitute a clear violation of the United Nations Charter. Moreover, the use of armed force directed against the sovereignty, territorial integrity or political independence of another State or in any other way incompatible with the Charter of the United Nations constitutes an act of aggression.

One main point

- ▶ Another expressed objective of the Commission was to describe **rules that would also be applicable to future situations without the need for further legislative intervention**, such as for the crime of “use of prohibited means of combat” for which the wording makes it possible to include in a single provision all means of combat (weapons, weapon system or platforms employed in the conduct of hostilities) currently prohibited by international conventions, without resorting to an analytical listing that could leave gaps in protection (as on the other hand is currently provided by Articles 174 and 175 of the IT WMCC).



see Art. 36 of AP I to Geneva Conventions

About the universal jurisdiction



- While other major European States have established criminal proceedings based on the principle of universality of jurisdiction for international crimes, *Italy hasn't jet this possibility*.
- In general, the Project Code also remedies this deficiency by providing for the universal extension of Italian criminal jurisdiction for international crimes (even in absence of connecting elements):
 - ✓ when the offender is present in the territory of the State;
 - ✓ if the “condition of prosecutability” (constituted by the request of the Minister of Justice) is also met (for the case of the crime of aggression only).

The jurisdiction in more details

The project of the IT International Criminal Code for **crimes committed**:

❖ **by Italian citizens:**

- **in Italy**, establish the principle that “anyone who commits in the territory of the State a crime provided for in this code shall be punished according to Italian law”.
- **in foreign territory** establish the provision that they are always punished “according to Italian law”, regardless of the nature of the crime and the request of the Minister of Justice.

❖ **by foreigners:**

- **in foreign territory** establish that a crime is always punished “according to Italian law,” if the crime is “against the Italian State or one of its citizens”, (regardless of the nature of the crime, his presence in the territory, or the request of the Minister of Justice);
- **in Italy** provide that they are punished according to Italian law, in all other cases as well, but only if they are present on the Italian territory.
- ✓ Peculiar is only the discipline provided for the “crime of aggression”, with respect to which it has been established that the foreigner is punished according to Italian law if there is, in addition, the request of the Minister of Justice.

Immunity

The orientation of the Italian jurists who worked on the project is that:

- **functional immunity does not apply** to crimes under the Code.
- **the personal immunity of Heads of State, Heads of Government, and Foreign Ministers while in office**, as well as other persons to whom international law expressly grants immunity in connection with qualification, **shall also apply** with respect to the crimes provided for in the Code, subject to obligations to cooperate with the International Criminal Court and other international criminal tribunals.

It's mandatory to represent that it's (now) a political issue....



A blue rectangular box with the words "The End" written in a red, white, and blue cursive font.

The End

Many thanks for the attention!