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ITALY

Law reform needed to implement the Rome Statute of the International Criminal Court

I. ITALY AND THE INTERNATIONAL CRIMINAL COURT

On 18 July 1998, Italy signed the Rome Statute of the International Criminal Court (Rome Statute) and ratified it following the adoption of Law No. 232 of 12 July 1999.¹ Italy played a major role in the drafting of the Rome Statute, hosted the Rome Diplomatic Conference of Plenipotentiaries at which it was adopted and contributed significantly to the elaboration of the Elements of Crimes, an instrument designed to assist the International Criminal Court (Court) in the interpretation and application of the Rome Statute. On 1 July 2002, the Rome Statute entered into force, establishing the first permanent international court capable of investigating and bringing to justice individuals who commit some of the most serious violations of international law: genocide, crimes against humanity, war crimes and, eventually, aggression. However, despite numerous promises, nearly seven years after the adoption of the Rome Statute, Italy has failed to enact implementing legislation making it possible to investigate and prosecute these crimes under international law in its courts and providing for cooperation with the International Criminal Court in its investigations and prosecutions.

This paper is designed to encourage the Italian government to take prompt steps to draft, in a transparent manner involving close consultation at all stages with civil society, effective implementing legislation for the Rome Statute and other relevant international law. The prompt and effective implementation of the Rome Statute into domestic law is not only an obligation of Italy but it is also in its very interest: indeed, Article 17 of the Rome Statute provides that the Court has jurisdiction over a case whenever the state party which would have jurisdiction is “unwilling or unable genuinely to carry out the investigation or prosecution”. For the reasons explained below, if Italy does not implement the Rome Statute in domestic law, it will be

¹ Law No. 232 includes four articles: the first two contain the authorization for the President of the Republic to ratify and the *ordine di esecuzione*, while the third and fourth regulate financial aspects and the entry into force.

impossible for Italian courts to apply it. Italy would thus be “unwilling or unable” to prosecute Italians and foreigners found in Italy suspected of crimes under the Rome Statute, and the Court could exercise its complementary jurisdiction and prosecute them.² Such a removal of a case by the Court can be avoided only if Italy creates and enforces a legislative framework for effective investigation and prosecution for crimes under the Rome Statute.

Under the dualist approach followed in Italy to the relationship between international and national law, no treaty produces its effects in the domestic legal order if implementing legislation has not been adopted.³ In Italy, such legislation might assume one of two possible forms. It could be a law which simply contains one or two provisions ordering the domestic execution of a certain treaty, the text of which is usually annexed and which will be applied untransformed (*ordine di esecuzione*); or it could be a law which interprets and reformulates the provisions of the treaty and amends the national legislation if that this is necessary to implement them. The first method is usually preferred by the Italian Parliament and was followed also in the case of the Rome Statute. However, the *ordine di esecuzione* is an adequate way of implementing a treaty in the domestic legal order only to the extent that the treaty norms are self-executing. To the extent that they are not, additional implementing legislation needs to be formulated and adopted.⁴

The Rome Statute is largely non self-executing: it does not provide for penalties and requires states parties to establish internal procedures for cooperation with the Court. Moreover, crimes under the Rome Statute must also be defined as crimes under the domestic law of the given state for them to be prosecuted before its national courts. Indeed, Italian courts and criminal lawyers have always supported the reformulation

² See G. Werle & S. Manacorda, *L'adaptation des systèmes pénaux nationaux au Statut de Rome: le paradigme du “Völkerstrafgesetzbuch” allemand*, 58 *Revue de science criminelle et de droit pénal comparé* (2003), 506-507.

³ See, e.g., *Cassazione civile (Sezioni Unite)*, 22 March 1972, No. 867, 56 *Rivista di diritto internazionale* (1973), 586-589.

⁴ In 1963, the Court of Appeal of Bologna ruled that a German national accused of genocide could not be extradited to the Federal Republic of Germany because the 1948 Convention for the Prevention and Punishment of the Crime of Genocide had not yet been implemented in Italy, although an *ordine di esecuzione* had been passed by the Parliament (*Kröger case*, 11 January 1963, 86 *Foro italiano* (1963), Parte seconda, 151-154). See M. Pisani, *Tutela penale e processo* (Bologna: Patròn Editore, 1978), 228-230). Again, in 1979 the Italian Constitutional Court ruled that, without the adoption of further implementing legislation, Article 14 (5) of the International Covenant on Civil and Political Rights, guaranteeing the right to appeal to a higher court, was not directly enforceable in trials of the Prime Minister and other ministers (order of 6 February 1979, 24 *Giurisprudenza costituzionale* (1979-I), Supplement, 94-95).

of international criminal law conventions in domestic laws in order to include crimes and specify penalties. The prevailing view is that, in the absence of such legislation and even if the state had ratified an international criminal law convention and ordered its domestic execution, its provisions could not be directly enforced before national courts without violating the principle of legality of crimes and penalties and the principle of specificity (i.e., criminal law provisions must be as specific and as clear as possible).⁵ Therefore, the mere *ordine di esecuzione* is not enough for the substantive provisions of the Rome Statute to be invoked before Italian courts: it is necessary that the crimes under the jurisdiction of the Court are also crimes in domestic law and that the relevant penalties are expressly determined by it. Further implementing legislation is also necessary to determine the national organs competent for cooperation with the Court and the relevant procedures.

While the obligation of the states parties to ensure that procedures for all forms of cooperation under Part 9 of the Rome Statute are available in national law is expressly contained in Article 88, the obligation to ensure that crimes under the jurisdiction of the Court are also crimes under national law must be considered implicit in the Rome Statute, which establishes the jurisdiction of the Court on the principle of complementarity.⁶ Indeed, if states parties fail to fulfil this obligation, the Court will be overwhelmed with cases and will not be able to function effectively: this would be contrary to the purpose of the Rome Statute, which is, according to the Preamble, to put an end to impunity for the perpetrators of genocide, crimes against humanity and war crimes and to contribute to the prevention of such crimes.⁷ States parties not fulfilling their responsibility to ensure that the Court is able to operate effectively will also breach the duty to perform treaties in good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties. In the national legal order, the obligation to fully and effectively implement the Rome Statute derives

⁵ See F. Antolisei, *Manuale di diritto penale*, Parte generale (Milano: Giuffrè, 2003), 77; M. Pisani, *La "penetrazione" del diritto internazionale penale nel diritto penale italiano*, 13 *Indice penale* (1979), 8; F. Ramacci, *Corso di diritto penale* (Torino: Giappichelli, 2001), 84; R. Riz, *Lineamenti di diritto penale*, Parte generale (Milano: Giuffrè, 2001), 34-36.

⁶ Moreover, Article 70 (4) expressly requires the parties to "extend their criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed in its territory, or by one of its nationals."

⁷ Rome Statute, Preamble, 5th para. According to Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted, *inter alia*, in the light of its object and purpose. See also J. K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 *Journal of International Criminal Justice* (2003), 92-94. The Preamble of the Rome Statute also states "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

from the new wording of Article 117 (1) of the Italian Constitution according to which the legislative powers of the state and of the regions shall be exercised consistently with international law.⁸

Italy decided to ratify the Rome Statute and to order its domestic execution, and to enact further legislation in order to fully implement it only subsequently. This was the result of a strong political commitment to demonstrate Italy's support for the International Criminal Court and to the need to study in depth what modifications to national legislation were needed in order to adapt it to the requirements of the Rome Statute. The delegation of power from the Parliament to the government to enact promptly the specific implementing provisions was included in a separate draft law (*Atto del Senato* No. 3594-bis, *XIII^a Legislatura*, 9 February 1999), but it was felt in the relevant Parliamentary Committees that, in such a sensitive matter, guiding principles for the government to legislate would have to be discussed more thoroughly and defined more precisely than the draft did.⁹ However, although Italy played a major role in the establishment of the International Criminal Court, it has failed for nearly seven years to enact effective legislation implementing the Rome Statute and to ratify and implement the Agreement on Privileges and Immunities of the International Criminal Court, despite repeated promises to do so.¹⁰

The four ministerial commissions. Several ministerial commissions have been set up with the goal of implementing the Rome Statute and other international humanitarian law. This approach is in marked contrast to the practice in certain other states parties to the Rome Statute.¹¹ For example, the United Kingdom Foreign and Commonwealth Office participated in a meeting with members of civil society to discuss what was required to implement the Rome Statute, then circulated the draft for comment and then convened a second meeting with civil society to discuss the

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

⁹ R. Bellelli, *Come adattare l'ordinamento giuridico italiano allo Statuto della Corte dell'Aja*, 10 *Diritto penale e processo* (2003), 1302.

¹⁰ See the statements of Undersecretary for Justice Valentino before the Extraordinary Commission for the protection and promotion of human rights (quoted in *Diritto e giustizia*, 29 June 2002, <http://www.dirittoegiustizia.it>) and of Prime Minister Berlusconi at the third (http://www.npwj.org/campaigns/rome_cere/roma2.shtml) and fourth (<http://www.npwj.org/modules.php?name=News&file=article&sid=579>) anniversaries of the opening for signature of the Rome Statute in 2001 and 2002.

¹¹ Italian ministerial commissions, advisory bodies of experts convened by ministries, normally do not meet in public or consult formally with civil society. The Ministry of Justice has not submitted any draft legislation implementing the Rome Statute to Parliament.

comments before submitting the draft to Parliament. Benin, the Republic of the Congo (Brazzaville), the Democratic Republic of the Congo and Senegal all met with members of civil society in transparent processes to seek their views as part of the drafting process before submission of draft implementing legislation to Parliament.

The relevant Commissions are:

- *The 1998 Pranzetti Commission.* In February 1998, before the adoption of the Rome Statute, but probably with that adoption in mind, the Minister for Foreign Affairs, Dini, re-organized an interministerial Commission, chaired by A. Pranzetti, which had already been established in 1988 as a study group in order to identify measures necessary for adapting domestic legislation to the provisions of international humanitarian law and to review amendments to legislation needed for the repression of war crimes and other violations of international humanitarian law, as advocated by the International Committee of the Red Cross (ICRC).¹² In November 2001, the Commission completed the drafting of legislation implementing the substantive provisions of the Rome Statute and of other international humanitarian law. However, the examination of the working text by the Commission was never concluded, since the Minister of Justice had already started a new procedure to implement both substantive and cooperation obligations. The Pranzetti Commission, though, was able to complete the draft law containing delegation from the Parliament to the government elaborated by the Lattanzi Commission (see next paragraph) by inserting draft legislation implementing the substantive provisions of the Rome Statute. The Commission still exists, but it does not deal with issues related to the International Criminal Court any longer.
- *The 1999 La Greca-Lattanzi Commission.* In 1999, the Minister of Justice set up a Commission (chaired initially by G. La Greca and then by F. Lattanzi¹³) charged with updating the criminal procedure legislation (with particular reference to Chapter XI of the Criminal Procedure Code) in the light of the international conventions ratified by Italy.¹⁴ On 28 May 2001, the mandate of the Commission was

¹² Ministerial Decree No. 125 of 16 February 1998.

¹³ The La Greca Commission was dissolved because of the resignation of almost all its members and re-established in November 2001.

¹⁴ Ministerial Decree of 30 July 1999.

extended in order to include cooperation with the International Criminal Court. The Commission prepared a draft law containing delegation of power from the Parliament to the government to enact legislation and the guiding principles for the government to legislate, while the examination of draft provisions implementing the cooperation obligations with the Court was not completed. In 2002, the Commission was not renewed by the Berlusconi government.

- *The 2002 Conforti Commission.* Reportedly because of the complex character of the topic,¹⁵ in 2002 the Minister of Justice decided to establish another Commission, chaired by B. Conforti (Ministerial Decree of 27 June 2002), with a more specific mandate limited to the implementation of the Rome Statute. The Commission was composed of two sub-commissions, one (chaired by A. Fiorella) for crimes and the other (chaired by G. Pansini) for cooperation obligations, both of which completed their work in 2003 by preparing two drafts. Those drafts have not been made public yet and it appears that a decision has been made by the current government not to publish these drafts, but it is not clear why that is the case or whether it is now revising them with a view to submitting them to Parliament at some point in the future. The Conforti Commission reportedly did not draft provisions incorporating war crimes since a separate commission (described in the next paragraph) has been entrusted with drafting amendments to the Military Penal Codes of Peace and War.
- *The 2002 Scandurra Commission.* In 2002, the Minister of Defence set up a Commission (chaired by G. Scandurra) in order to review the Military Penal Codes of Peace and War: the outcome of the work of the Commission has been incorporated in a draft law which delegates the power to review the military laws of peace and war to the government and which is currently under consideration by the Parliament.¹⁶

Parliamentary initiatives. Apart from the four governmental commissions, national implementation of the Rome Statute has been pursued by some members of the Parliament. The first draft law was submitted to the Italian Chamber of Deputies on 9 May 2002 by some members of the Opposition parties (*Atto della Camera* No.

¹⁵ R. Bellelli, above note 9, 1303.

¹⁶ *Atto del Senato* No. 2493 (*XIV^a Legislatura*), passed on 18 November 2004 and currently under consideration by the other Chamber (*Atto della Camera* No. 5433).

2724, On. Kessler *e altri*, XIV^a Legislatura), while an identical draft was submitted to the Senate on 24 July 2002 (*Atto del Senato* No. 1638, Sen. Iovene *e altri*).¹⁷ It appears that none of these drafts is likely to be enacted during the current government and they have been criticized as being inconsistent in some respects with the Rome Statute or other international law. Other draft laws concerning only certain crimes (e.g., torture) are also under consideration by the Parliament: these, however, are not specifically intended as implementation of the Rome Statute, although they may serve that purpose to some extent.

¹⁷ As of July 2005, the drafts still have to be examined by the Parliament.

II. RELEVANT SOURCES OF ITALIAN LAW

No one should be acquitted of genocide, crimes against humanity or war crimes in an Italian court on the same facts that would lead to a conviction in the International Criminal Court. Each state that has ratified the Rome Statute and international human rights and humanitarian law treaties is required to bring its legislation fully into line with those treaty obligations. As far as the Rome Statute is concerned, each state party must enact national legislation which provides that crimes under the Rome Statute are also crimes under national law and which ensures full cooperation with the Court. In many instances, a state party may need to amend existing legislation to the extent of ensuring that it is consistent with the Rome Statute and other international law and standards.

The Constitution. The *ordine di esecuzione* of the Rome Statute was adopted by an ordinary law, without any previous substantive modifications to the Constitution. However, it has been suggested that some provisions of the Rome Statute might not be entirely consistent with the 1948 Constitution, in particular the irrelevance of official capacities (Article 27 (2) of the Rome Statute, with reference to Articles 68, 90, 96 and 122 of the Constitution and Article 3 (2) of Constitutional Law No. 1 of 9 February 1948),¹⁸ the obligation to surrender (Article 89 of the Rome Statute in relation to the prohibition of extradition for political crimes under Articles 10 and 26 of the Constitution),¹⁹ the exclusive competence of the International Criminal Court in the execution of sentences (Articles 105, 106 and 110 of the Rome Statute in relation to Article 87 (11) of the Constitution).²⁰

The rank of a treaty in the domestic legal system depends on the rank of the incorporating legislation. Therefore, if the *ordine di esecuzione* is contained in an ordinary law (like Law No. 232 of 12 July 1999, which contains the *ordine di esecuzione* of the Rome Statute), it (and the incorporated treaty) may be challenged before the Italian courts by means of a constitutional complaint.²¹

¹⁸ See below, Section III.1.C.

¹⁹ See below, Section III.2.D.

²⁰ See below, Section III.2.F.

²¹ A. Cassese, *Diritto internazionale*, vol. I (Bologna: Il Mulino, 2003), 279; B. Conforti, *Diritto internazionale* (Napoli: Editoriale Scientifica, 2002), 324-325. This conclusion remains valid even after the enactment of Constitutional Law No. 3 of 18 October 2001, which has amended Article 117 (1) of

However, as demonstrated below, in most instances the supposed conflict between the Italian Constitution and the Rome Statute is only apparent. In the other instances, reference can be made to Article 11 of the Constitution, according to which “Italy ... on conditions of parity with other states, agrees to the limitations of sovereignty necessary for an order that ensures peace and justice among Nations; promotes and encourages international organizations having such ends in view”.²² The International Criminal Court could be included among those organizations. Indeed, the Preamble of the Rome Statute provides that grave crimes within the jurisdiction of the Court threaten the peace, security and well-being of the world (para. 3) and that the aim of the Court is to put an end to impunity for the perpetrators of such crimes, to contribute to their prevention and to guarantee lasting respect for and the enforcement of international justice (paras. 5 and 11).²³ Furthermore, the Court can be seen as an instrument which safeguards and affirms the fundamental human rights acknowledged by the Republic (Article 2 of the Constitution).

Other legislation. Other sources of Italian criminal law which are relevant to the implementation of the Rome Statute are the Penal Code, the Criminal Procedure Code, the Military Penal Code of Peace, the Military Penal Code of War and the 1938 Italian Law of War.²⁴ The complex relationship between the Penal Code (and the Criminal Procedure Code) and the two Military Penal Codes is regulated by the principles of complementarity and speciality. This means that the provisions of the Penal Code and of the Criminal Procedure Code apply when there are no relevant provisions in the Military Penal Codes (Article 16 of the Penal Code, Article 261 of the Military Penal Code of Peace, Article 244 of the Military Penal Code of War) and that the Military Penal Code of Peace applies when there are no suitable provisions in the Military

the Constitution. T. Treves, *Diritto internazionale. Problemi fondamentali* (Milano: Giuffrè, 2005), 691-698.

²² This provision, introduced to allow Italy’s accession to the United Nations, has been employed mostly to give effect in Italy to the European Union legislation.

²³ However, limitations to Italian sovereignty are admitted only as long as the core principles of the Constitution and inalienable human rights are preserved. Among these principles, one can mention the Republican form of state (Article 139) and other principles on which the Constitution itself is based, such as the right to democracy and to jurisdictional protection. This doctrine is supported by the Constitutional Court (*see*, recently, Judgment No. 73 of 22 March 2001 on the *Baraldini* case, 46 *Giurisprudenza costituzionale* (2001), 446) and by Italian legal scholars (*see*, e.g. A. Bernardini, *Norme internazionali e diritto interno – Formazione e adattamento* (Pescara: Libreria dell’Università, 1989), 243). It is unlikely that such principles could conflict with the provisions of the Rome Statute.

²⁴ The Law of War was approved by Royal Decree No. 1415 of 8 July 1938.

Penal Code of War (Article 19 of the Military Penal Code of Peace, Article 47 of the Military Penal Code of War).²⁵

Regarding members of armed military operations abroad (as well as military personnel with command, control and support functions with regard to the expeditionary forces abroad, wherever they are located), Article 9 of the Military Penal Code of War provides that the Code applies, even in time of peace.²⁶ However, until Operation Enduring Freedom in Afghanistan, the laws which authorized or extended the participation of Italian soldiers in military operations abroad contained a provision which derogated from Article 9 of the Military Penal Code of War and provided that the Military Penal Code of Peace would apply, on the assumption that peacekeeping operations do not imply the use of force except in self-defence.²⁷ As a matter of fact, the application of the Military Penal Code of Peace was due to the reticence to use the words “war” or “armed conflict”, and to avoid criticism in the light of Article 11 of the Constitution, which bans the recourse to war as a means of resolving international disputes. Another reason was that, until 1994, the Military Penal Code of War provided for the death penalty. The Military Penal Code of Peace was not, however, adequate, because it contains only few crimes (thus leaving room for the application of the Penal Code), it does not deal with the protection of sick, wounded, civilians and prisoners of war, and it requires the presence of the accused on Italian territory and the request of the Minister of Justice for Italian jurisdiction to be established.

²⁵ D. Brunelli & G. Mazzi, *Diritto penale militare* (Milano: Giuffrè, 2002), 12-14, 505-506. However, when the Military Penal Code of Peace is applied instead of the Military Penal Code of War, penalties can be increased (Article 47 of the Military Penal Code of War).

²⁶ Article 9 (as amended by Law No. 6 of 31 January 2002): “*Sino all’entrata in vigore di una nuova legge organica sulla materia penale militare, sono soggetti alla legge penale militare di guerra, ancorché in tempo di pace, i corpi di spedizione all’estero per operazioni militari armate, dal momento in cui inizia il passaggio dei confini dello Stato o dal momento dell’imbarco in nave o aeromobile ovvero, per gli equipaggi di questi, dal momento in cui è ad essi comunicata la destinazione alla spedizione.*”

Limitatamente ai fatti connessi con le operazioni all’estero di cui al primo comma, la legge penale militare di guerra si applica anche al personale militare di comando e controllo e di supporto del corpo di spedizione che resta nel territorio nazionale o che si trova nel territorio di altri paesi, dal momento in cui è ad esso comunicata l’assegnazione a dette funzioni, per fatti commessi a causa o in occasione del servizio.”

²⁷ N. Ronzitti, *Una legge organica per l’invio di corpi di spedizione all’estero?*, 85 *Rivista di diritto internazionale* (2002), 139.

The coercive features of Operation Enduring Freedom and the fact that it could hardly be seen as a traditional peacekeeping operation led to the application of the Military Penal Code of War to such operation, as provided by Article 3 of Law No. 6 of 31 January 2002. However, in the subsequent legislation authorizing or extending the participation of Italy in international operations, a two-pronged regime has been introduced, according to which the Military Penal Code of War applies only to Italian military personnel in Operation Enduring Freedom in Afghanistan and Operation *Antica Babilonia* in Iraq, while the Military Penal Code of Peace applies to all other operations.²⁸ The different regime is largely arbitrary and could lead to discriminatory results for victims and suspects only on the basis of where the soldier was operating, even though the crimes were exactly the same.²⁹

²⁸ See Article 6 of *decreto legge* (d.l.) No. 461 of 28 December 2001 (enacted by Law No. 15 of 27 February 2002); Article 16 of d.l. No. 165 of 10 July 2003 (enacted by Law No. 219 of 1 August 2003) and Article 12 of Law No. 231 of 11 August 2003; Article 12 of d.l. No. 9 of 20 January 2004 (enacted by Law No. 68 of 12 March 2004); Article 10 of d.l. No. 160 of 24 June 2004 (enacted by Law No. 207 of 30 July 2004) and Article 7 of Law No. 208 of 30 July 2004; Article 13 of d.l. No. 3 of 19 January 2005 (enacted by Law No. 37 of 18 March 2005) and Article 9 of Law No. 39 of 21 March 2005.

²⁹ R. Rivello, *Ingiustificata la disparità di trattamento per chi deve affrontare situazioni identiche*, *Guida al diritto*, 30 March 2002, No. 12, at 31.

III. THE NECESSITY TO IMPLEMENT THE ROME STATUTE AND TO AMEND THE PRESENT ITALIAN LEGISLATION

Amnesty International has some major concerns about the consistency of the Italian legislation with the Rome Statute.³⁰ The organization believes that the review of Italian law in this paper will assist the relevant ministries, Parliament, academics, the press and the general public to understand what Italy should do to fulfil its obligations under the Rome Statute and other international law. The first part addresses the principle of complementarity and the second part discusses cooperation obligations.

Part 1: Complementarity

A. Definition of crimes

Unlike the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR), the International Criminal Court has no primacy over national courts. The Rome Statute makes clear that the Court may investigate and prosecute only when states parties are unable or unwilling to do so, and provided that the case is of sufficient gravity (Article 17 (1) (d) of the Rome Statute). The Court has limited human and financial resources and it will only be able to try a small number of those suspected of crimes under the Rome Statute. It is thus of paramount importance that all states ensure that they can fulfil their responsibility under international law and that national courts are able to bring those responsible for genocide, crimes against humanity and war crimes to justice. Therefore, Italian legislation implementing the Rome Statute should provide that all crimes in the Rome Statute are crimes under national law. However, crimes under international law include not only those listed in the Rome Statute but also other war crimes, which have not been included as part of the political compromise during the Rome Conference. The definitions of crimes should be as broad as the definitions in the Rome Statute, but whenever international treaties (such as the 1949 Geneva Conventions and their 1977 Additional Protocols,

³⁰ For further background about what states parties should do to implement the Rome Statute and other international law, see Amnesty International, *The International Criminal Court: Checklist for Effective Implementation*, AI Index: IOR 40/11/00, July 2000, available in English, French and Spanish at <http://www.amnesty.org/icc>.

which Italy has ratified) or customary law contain stronger definitions than those in the Rome Statute, these definitions should be preferred.

1. Genocide

Italy ratified the 1948 Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention) on 4 June 1952, but only implemented it by Law no. 962 of 9 October 1967 (1967 Genocide Law). The 1967 Genocide Law is largely consistent with Article 6 of the Rome Statute and Article II of the Genocide Convention, but is broader, since it also includes deportation and the obligation to wear distinguishing marks, which would have punished those implementing the German legislation requiring Jews to wear the Star of David, one of the first steps taken leading to the Holocaust. Article 1 (2) of the 1967 Genocide Law is broader than Article 6 (c) of the Rome Statute, since the infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part is not required to be “intentional”.³¹ However, Article 1 of the 1967 Genocide Law does not fully implement Article II of the Genocide Convention and Article 6 (b) of the Rome Statute, since it does not include *mental* harm. The failure of Italy to implement fully this *jus cogens* prohibition in national law is a serious flaw. Furthermore, Article 5 of the 1967 Genocide Law limits its scope to the transfer of children under age of 14 years, while neither Article II of the Genocide Convention nor Article 6 (e) of the Rome Statute contains such a limit, and in the Elements of Crimes the age limit is 18 years.

The 1967 Genocide Law also incorporates acts which are committed not only by the principal offender, but also - as in Article III of the Genocide Convention - those committed by others in the form of complicity, conspiracy and attempt, as well as public incitement to commit genocide, whether or not the principal crime has been committed. Unlike Article III of the Genocide Convention, Article 8 of the 1967 Genocide Law also criminalizes public defence (*apologia*) of genocide.³²

Article 1 of the 1967 Genocide Law criminalizes acts which are only *aimed* at causing injuries or the death of members of the group. This provision advances the threshold of criminal responsibility well beyond the attempted crime (which, under

³¹ See N. Ronzitti, *Genocidio*, XVIII *Enciclopedia del diritto* (Milano: Giuffrè, 1969), at 587.

³² On the scope of the crime of public defence of genocide in Italian law, see *Cassazione penale* (Sezione I), 29 March 1985 (109 *Foro italiano* (1986), Parte seconda, 19-23).

Article 56 of the Penal Code, requires the conduct intended to commit an offence to be able (“idoneo”) and unequivocal) and might include any act which is potentially aimed at genocide even if preliminary. In contrast, Article 6 of the Rome Statute requires the killing, the causing serious bodily or mental harm, the infliction of certain conditions of life, the imposition of measures intended to prevent births and the forcible transfer of children to take place for criminal responsibility to arise. It is widely accepted that if efforts to prevent genocide are to be effective, they must be taken at the earliest possible stages. However, these steps can be taken through the application of Article 56 of the Penal Code.

As to the extradition of a person accused of genocide, Constitutional Law No. 1 of 21 June 1967 has amended Articles 10 and 26 of the Constitution, providing that the prohibition of extradition for political crimes does not apply to the crime of genocide. For the reasons explained below, restrictions in national law on extradition do not apply to surrender of a person to the International Criminal Court, but they impede or prevent states from fulfilling their obligations to enforce international law.

Amnesty International recommendations:

⇒ Genocide as a crime in Italian law should include the causing of serious mental harm to members of the group;

⇒ Article 1 of the 1967 Genocide Law, which criminalizes acts which are only *aimed* at causing injuries or the death of members of the group, should be amended or interpreted consistently with Article 56 of the Penal Code.

2. Crimes against humanity

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

physical liberty in violation of fundamental rules of international law by Articles 605, 606 and 607, forced disappearances by Articles 606 and 607.³³

Although the crime of enslavement, as defined in the new text of Article 600, is broader than the corresponding definition in Article 7,³⁴ other definitions in the Code fall short of those included in the Rome Statute and other international law and will require amendment. In particular, the crime of forced disappearances only includes arrest and detention performed by public officials, and not also those committed with the authorization, support or acquiescence of a State or a political organization. The above mentioned crimes are also subject to all the restrictions (statutes of limitation, immunities, defences, etc.) applicable to ordinary crimes, but impermissible with regard to crimes under international law.

Apartheid as a crime is not included in Italian legislation (Italy has not yet ratified the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid). Furthermore, there is no provision in the Penal Code which provides for the crimes against humanity of extermination, deportation and forcible transfer of population, torture, persecution and other inhuman acts. The crime of murder does not reflect the enormity of the crime against humanity of extermination, which involves mass killing, as evidenced by the second element of this crime.³⁵

³³ For the scope of these crimes, see A. Cassese, *Crimes Against Humanity*, in A. Cassese, P. Gaeta & J.R.W.D. Jones (eds), *Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press 2002), 353-377; M. Boot, R. Dixon & C.K. Hall, *Article 7 (Crimes Against Humanity)*, in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos, 1999), 117-172 (second edition forthcoming).

³⁴ Apart from the exercise of the powers attaching to the right of ownership over a person, Article 600 (as amended by Law No. 228 of 11 August 2003) also forbids keeping someone in a state of continuing subjection by means of violence, threat, deception, abuse of authority or by taking advantage of a situation of physical or mental inferiority or of a state of necessity, or by means of promising or giving an amount of money or other advantages to those who have authority over the person.

³⁵ Elements of the crime against humanity of extermination:

“1. The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of the population.

2. The conduct constituted, or took place as part of, a mass killing of members of a civilian population.

3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

4. The perpetrator knew that that conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”

Rape as an ordinary crime, as well as other forms of sexual violence, are covered by Articles 609-*bis et seq.* of the Penal Code. However, Article 609-*bis* does not fully appear to be consistent with the most recent international jurisprudence concerning the elements of this crime against humanity, because the definition of rape is based on the presence of violence, threats or abuse of authority rather than on the lack of consent of the victim.³⁶ The crimes of sexual slavery and enforced prostitution are covered by the new text of Article 600 of the Penal Code. As to the other sexual crimes listed in Article 7 (1) (g) of the Rome Statute (forced pregnancy, enforced sterilisation), there are currently no corresponding provisions in the Penal Code or elsewhere in the Italian legislation. Given the enormous number of victims of crimes against humanity of sexual violence in past decades in neighbouring countries and around the world, the failure of the Penal Code to include all of the crimes of sexual violence in the Rome Statute or to define them as broadly is a matter of the deepest concern. As Amnesty International pointed out in its 2004 report, *It's in Our Hands - Stop Violence Against Women*, AI Index: ACT 77/001/2004, "states are under an obligation to take effective steps to end violence against women. ... If a state fails to act diligently to prevent violence against women - from whatever source - or fails to investigate and punish such violence after it occurs, the state can itself be held responsible for the violation".³⁷

Implementing legislation should, therefore, include all crimes against humanity listed in Article 7 of the Rome Statute. Crimes against humanity are not codified as such in Italy. Most crimes contained in Article 7 of the Rome Statute are already

³⁶ See A. Cadoppi, *Article. 3*, in A. Cadoppi (ed), *Commentari delle norme contro la violenza sessuale e della legge contro la pedofilia* (Padova: CEDAM, 2002), 125. The definition of the crime against humanity of rape in national law should reflect the most advanced international principles, including some of the better aspects of recent jurisprudence, and not simply incorporate the definition in the Elements of Crimes. In particular, the elements of the crime of rape as a crime against humanity in the Italian Penal Code should include the following two elements:

(i) a physical invasion of a sexual nature (*Prosecutor v. Akayesu* (ICTR-96-4), Judgment, Trial Chamber I, ICTR, 2 September 1998, para. 688. Amnesty International believes that this approach is preferable to the more mechanical, and, possibly, more restrictive one, adopted by the ICTY jurisprudence (*Prosecutor v. Furundžia* (IT-95-17/1-T), Judgment, Trial Chamber II, 10 December 1988, para. 174) and partially incorporated in the Elements of Crimes); and

(ii) the lack of consent of the victim (*Prosecutor v. Kunarac* (IT-96-23), Judgment, Appeals Chamber, ICTY, 12 June 2002, paras. 129-133. Amnesty International is concerned that the more restrictive approach adopted in this respect in the Elements of Crimes does not take into account the central question whether the victim gave free and voluntary consent. National legislation should ensure that the circumstances mentioned by the Appeals Chamber in *Kunarac* will negate any apparent consent, unless freely given).

³⁷ At 73.

addressed in part by domestic criminal provisions. Definitions should ensure that all crimes are defined consistently with the Rome Statute and, when other international law provides greater protection, with that law. The legislation should also contain a more general clause which defines as crimes all other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health (Article 7 (1) (k) of the Rome Statute). Implementing legislation should ensure that national courts will use the generally accepted international definition of gender used by the United Nations (UN), rather than the definition in the Rome Statute, which, although consistent with this definition, is awkwardly worded and could be misinterpreted by national courts as more restrictive than the UN definition.³⁸

Amnesty International recommendations:

- ⇒ Crimes against humanity should be defined as such in Italian legislation, and not prosecuted as ordinary crimes;

- ⇒ Definitions should ensure that all crimes are defined consistently with the Rome Statute and, when other international law provides greater protection, with that law;

- ⇒ The crimes against humanity of apartheid, forced pregnancy, enforced sterilisation, extermination, deportation and forcible transfer of population, torture, persecution and other inhuman acts should be included in Italian law;

³⁸ The most authoritative statement of UN usage is: “Gender: refers to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age”. Website of the Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI), <http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>. A leading commentary on the Rome Statute has concluded that the definition in Article 7 (3) is in accord with UN usage. See M. Boot, *Article 7 (3)*, in O. Triffterer (ed), above note 33, at 172.

⇒ The crime against humanity of forced disappearances should also include arrest and detention performed by individuals with the authorization, support or acquiescence of a state or political organization.

3. War crimes

As recommended in Amnesty International's *International Criminal Court: Checklist for effective implementation*³⁹ and *International Criminal Court: the failure of states to enact effective implementing legislation*,⁴⁰ Italy should ensure that definitions of war crimes in the domestic legislation are consistent with the strongest possible protections, whether these are contained in the Rome Statute or other international humanitarian law.

Two-tier system of implementation. Italy's decision to implement war crimes separately from crimes against humanity and genocide will result in a two-tier system of implementation. The latter will be included in the law implementing the Rome Statute, while war crimes will be dealt with in the future comprehensive revision of the Military Penal Code of War. The Military Codes and the Italian Law of War were adopted, respectively, in 1941 and 1938 during the Mussolini era. They were progressive at that time, but now fail to meet the standards of international humanitarian law set out in international instruments. For example, in their original version, they did not include sexual crimes and other war crimes provided in the Geneva Conventions and the 1977 Protocols, nor did they cover crimes committed in non-international armed conflicts. The Military Penal Code of War was partly amended by Law No. 6 of 2002, which repealed provisions not consistent with international humanitarian law (see former Article 183, which permitted the immediate execution of spies in certain cases, in contravention of Article 85 (4) (e) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977) (Protocol I). Law No. 6 has also criminalized certain acts that were not included in the earlier Italian legislation, notwithstanding the ratification of the 1949 Geneva Conventions and of the 1977 Protocols.

³⁹ Above note 30, at 5.

⁴⁰ *International Criminal Court: the failure of states to enact effective implementing legislation*, AI Index: IOR 40/019/2004, 1 September 2004, 14-19.

Excessively high threshold. According to the new text of Article 165 (1) of the Military Penal Code of War, as amended by Law No. 6 of 2002, Section IV of Chapter III of the Code now applies to all armed conflicts regardless of a declaration of war. In order to implement this provision, Law No. 15 of 27 February 2002 introduced two new paragraphs to Article 165. The first paragraph defines an armed conflict as a conflict in which at least one of the parties uses weapons in an organized and protracted manner against the other party for the conduct of military operations. This definition does not appear in the Rome Statute, the Geneva Conventions or their Additional Protocols. The Commentaries on the Geneva Conventions define armed conflict under Article 2 as including “[a]ny difference arising between two States and leading to the intervention of armed forces”, when isolated and sporadic, such as a border incident.⁴¹ Accordingly, at least as far as international armed conflicts are concerned, the definition contained in Article 165 (2) is more restrictive in scope, since it requires the use of weapons to be organized and protracted.⁴² Although the definition contained in Article 165 (2) seems to be consistent with the threshold provided in Article 1 (2) of Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to Protection of Victims of Non-International Armed Conflict (1977) (Protocol II), and with Article 8 (2) (d) (f) of the Rome Statute with regard to non-international armed conflicts, that threshold is simply a jurisdictional threshold to determine which war crimes would fall within the Court’s jurisdiction; it is not a threshold determining what is a war crime that should be investigated and prosecuted by national courts.

Problems with new crimes in Law No. 6 of 2002. The “new” crimes introduced by Law No. 6 of 2002 include: the taking of hostages (Article 184-*bis*),⁴³ torture or other inhuman treatment, unlawful transfers and other acts prohibited by international conventions, including biological experiments and medical treatment not justified by the state of health (Article 185-*bis*). Article 185-*bis* includes several different forms of conduct with the same penalty, from two to five years of military imprisonment (in the original version of the text, as provided in Law No. 6 of 2002, the minimum

⁴¹ The Commentaries go on saying that “[i]t makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbersome machinery. It all depends on circumstances.” Commentaries on the Geneva Conventions, available on the ICRC website (<http://www.icrc.org/ihl.nsf/WebCOMART?OpenView>).

⁴² Therefore, a military invasion which does not meet armed resistance might not fall within the definition. R. Rivello, above note 29, at 32.

⁴³ Nonetheless, Article 219 of the MPCW and Article 99 (4) of the 1938 Law of War, which equates hostages with prisoners of war, have not been explicitly repealed.

penalty was one year, but was extended to two by Law No. 15 of 2002). Amnesty International notes that this penalty is less than that provided for ordinary assaults.⁴⁴ However, this Article applies only when conduct does not constitute “a more serious crime”: conduct that could be qualified as “torture” might, therefore, fall under the scope of provisions dealing with ordinary crimes, such as Article 582 of the Penal Code (bodily harm), Article 609-*bis* (sexual violence), Article 605 (kidnapping), since the penalties for these crimes are more severe. Furthermore, Amnesty International notes that rather than referring to “any violations of the international conventions”, it would have been preferable to list each crime specifically.⁴⁵ Amnesty International is also concerned that, on a narrow interpretation of Article 184-*bis* of the Military Penal Code of War, the crime of taking hostages is limited to international armed conflicts. This is in direct contrast to Article 8 (2) (c) (iii) of the Rome Statute, which includes this crime as a war crime when committed in non-international armed conflicts.⁴⁶

Rome Statute war crimes in the Military Penal Code of War. The Military Penal Code of War already includes some of the war crimes in international armed conflicts included in Article 8 (2) (a) and (b) of the Rome Statute, such as compelling a national of a hostile party to take part in operations of war directed against his or her own country (Article 182⁴⁷), pillaging (Article 186) and extensive destruction and appropriation of enemy property not justified by military necessity and carried out unlawfully and wantonly (Articles 186, 187, 188, 191, 193 and 224). Articles 174 and 175 of the Military Penal Code of War provide that a commander or other person who authorizes, orders or employs the use of methods and means of war prohibited by

⁴⁴ If the person were sentenced to two years’ imprisonment, he or she might be accorded the benefit of the suspension of the sentence. Further, the relatively lenient sentences which could be imposed pursuant to Article 185-*bis* might persuade the Court to exercise its jurisdiction over individuals already convicted by Italian tribunals: indeed, under Article 17 (2) (a) of the Rome Statute, a state is unwilling to prosecute if “[t]he proceedings were or are undertaken or the national decision was made for the purposes of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5.” See A. Lanzi & T. Scovazzi, *Una dubbia repressione della tortura e di altri gravi crimini di guerra*, 87 *Rivista di diritto internazionale* (2004), at 689-690, 694.

⁴⁵ See D. Brunelli & G. Mazzi, above note 25, at 523.

⁴⁶ Military Penal Code of War, Article 184-*bis*: “*Il militare che viola i divieti della cattura di ostaggi previsti dalle norme sui conflitti armati internazionali è punito con la reclusione militare da due a dieci anni. La stessa pena si applica al militare che minaccia di ferire o di uccidere una persona non in armi o non in atteggiamento ostile, catturata o fermata per cause non estranee alla guerra, al fine di costringere alla consegna di persone o cose. Se la violenza è attuata si applica l’articolo 185.*”

⁴⁷ Article 182 does not apply when the person also has the Italian nationality or is otherwise obliged to do his or her military service in Italy.

Italian law or international conventions incurs criminal responsibility.⁴⁸

This reference to “international conventions” is too vague to implement satisfactorily Article 8 (2) (b) (xvii), (xviii), (xix) and (xx) of the Rome Statute. First, the different international law instruments which Italy has ratified may be inconsistent: for example, Article 8 (2) (b) (iv) of the Rome Statute, as a result of intense pressure, primarily from the United States of America (USA), prohibits a much narrower range of conduct than the corresponding provision in Additional Protocol I (Article 57 (2) (a) (iii)).⁴⁹ Articles 174 and 175 do not make it sufficiently clear which international law instrument should be applied in such a situation. Second, under the dualist approach followed by Italy (see pp. 2-3 above) a reference to international conventions may be insufficient to enforce these international law instruments directly before national courts, especially if there is no legislation implementing these instruments. This reference also omits war crimes under customary international law.

Rome Statute war crimes omitted in the Military Penal Code of War. Amnesty International is also concerned that a number of war crimes listed in Article 8 (2) (a) and (b) of the Rome Statute are not expressly included in the Military Penal Code of War (such as those included in Article 8 (2) (a) (vi) and (b) (iii), (vii), (xiv) and (xxvi)). Some, but not necessarily all, of these crimes might be implicitly covered in part by existing provisions; for example, the war crime of enforced sterilization might be covered by Article 185-*bis*, which criminalizes unjustified medical treatment. However, the penalty would be relatively lenient: for the above mentioned reasons, this would leave room for the application of other norms, such as Articles 582 and 583 of the Penal Code. Amnesty International recommends the addition of specific provisions to take into account the particular gravity of crimes such as enforced sterilization and the circumstances under which they are committed. All war crimes

⁴⁸ Article 175 defines the same conduct as a crime when committed by a person who is not a commander.

⁴⁹ Article 8 (2) (b) (iv) of the Rome Statute: “Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.” This provision has been interpreted by some US military experts as meaning a military advantage in an entire theatre of operations, such as the Pacific Theatre or the European Theatre in the Second World War, not just an advantage in a local battlefield, as under Protocol I.

Article 57 (2) (a) (iii) of Additional Protocol I: “With respect to attacks, the following precautions shall be taken: ... (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

should be defined in a manner that is fully consistent with the Rome Statute or, where other international law provides greater protection, with that law.

Such omissions could lead the International Criminal Court to exercise its jurisdiction over these crimes, since without satisfactory legislation defining them as crimes under Italian law, Italy would be “unwilling or unable genuinely to carry out” an investigation or prosecution within the meaning of Article 17 if they were committed under Article 17. Italy also omits rape and other sexual crimes as war crimes from the Military Penal Code of War, which would result in the application of the relevant provisions of the Penal Code.⁵⁰ As noted above, the definition of rape may not be fully consistent with international law as interpreted in the recent jurisprudence of the ICTY and ICTR. Amnesty International strongly recommends that in order to avoid doubt and to be consistent with the principle of legality, Italian legislation implementing the Rome Statute should explicitly define every war crime contained in Article 8 of the Statute, as well as war crimes recognized in other treaties and under customary law, as a crime in domestic law.

Law of War of 1938. Amnesty International notes that other war crimes under Article 8 (2) (a) and (b) of the Rome Statute are included in Articles 35 and 36 of the pioneer Law of War of 1938 (applicable, however, only in international armed conflict), and welcomes the fact that some of these war crimes are defined more broadly under these provisions. The 1938 Law of War prohibits employing poison and poisoned weapons (Article 8 (2) (b) (xvii) of the Rome Statute); killing and wounding treacherously (Article 8 (2) (b) ((xi));⁵¹ declaring that no quarter will be given (Article 8 (2) (b) (xii)); killing or wounding combatants who, having laid down their arms and having no longer means of defence, have surrendered at their own discretion (Article 8 (2) (b) (vi)); employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions (Article 8 (2) (b) (xix)); pillaging (Article 8 (2) (b) (xvi)); and destroying or seizing the enemy’s property, unless such destruction be imperatively demanded by the necessities of war (Article 8 (2) (b) (xiii)). The 1938 Law of War defines the war crime of making improper use of the distinctive emblems of the Red Cross more broadly than Article 8 (2) (b) (vii) of the Rome Statute by also prohibiting improper use of the parliamentary flag, the emblems of other humanitarian organizations, hospital ships and medical aircraft. Amnesty International welcomes the omission of the restrictive requirement in the Rome Statute that improper use must result in death or serious personal injury to be a crime. The 1938 Law of War also

⁵⁰ See comments above, Section III.1.A.2.

⁵¹ This crime is also incorporated in Article 177 of the Military Penal Code of War.

contains provisions which deal specifically with bombardment, prohibiting such action when it is aimed at a civilian population or civilian objects (Article 42), or at buildings dedicated to religion, arts, science or charitable purposes, historic monuments, civilian hospitals and places where the sick and wounded are collected (Article 44, which implements Article 8 (2) (b) (i), (ii) and (ix) of the Rome Statute).⁵² Amnesty International also welcomes the reference in Article 51 of the 1938 Law of War to international provisions that cover the use of bacteriological and chemical weapons. When no rule of customary international law or treaty provision exists, or if the enemy is not a party to international treaties, such weapons are prohibited by way of reciprocity, providing that the enemy declares that it intends not to use them and does not actually use them (Article 52), but, of course, prohibitions in international humanitarian law should not depend on reciprocal observance by parties to an armed conflict.

Broader definitions of war crimes in Italian legislation. Amnesty International welcomes provisions where Italian legislation is broader than the Rome Statute. Articles 213 and 214 of the Military Penal Code of War provide for the protection of the rights of prisoners of war to freedom of religion and worship, and also prohibit appropriation of their valuables.⁵³ Article 212 provides that prisoners of war cannot be compelled to give information or to carry out prohibited works. Article 37 of the 1938 Law of War prohibits compelling prisoners of war to participate in hostile actions against their own country, and also prohibits them being compelled to serve as guides or give information on military issues or in any other way. However, Amnesty International recommends that this provision be extended to apply to persons who have dual Italian-foreign nationality or to foreigners who have to perform their military service in Italy. The 1938 Law of War is also broader than Article 8 (2) (a) and (b) of the Rome Statute in that it also prohibits the shooting of those wrecked at sea as the result of shipwreck or the destruction of aircraft (Article 35 (3) (3)), employing explosive or incendiary weapons which weigh less than 400 grams (Article 35 (3) (5)) and employing flags, emblems or uniforms other than the national ones (Article 36 (2) (2)). These broader provisions are all to be welcomed.

⁵² Consistently with customary international law, the protection ceases if such buildings are not used for civilian purposes (Article 45).

⁵³ The same provision is included in Article 106 of the 1938 Law of War, which also prohibits the employment of prisoners of war in excessive works or works not suitable for their rank and provides their right to receive payment for such work and to keep their personal objects (with the exception of weapons, horses, equipment and military documents). Money and valuables can be temporarily appropriated under Article 106.

Provisions in Italian legislation that are defined more weakly than in the Rome Statute. However, Amnesty International is concerned that other provisions of the Italian legislation are weaker than the corresponding articles in the Rome Statute and in other international law. For example, Article 185 of the Military Penal Code of War provides that a member of the armed forces who uses violence, for reasons related to the war, against *enemy* private individuals who do not take part in military operations is criminally responsible if he does so without necessity or justified reason. This is inconsistent with Article 8 (2) of the Rome Statute and with other international humanitarian law instruments which safeguard *all* protected persons involved in armed conflicts, not just nationals of the enemy states.⁵⁴ The limited relevance of the nationality of protected persons was confirmed by the ICTY in the *Tadić* judgment of 15 July 1999.⁵⁵ Amnesty International is also concerned that the reference to “necessity or justified reason” contained in Article 185 seriously weakens this provision.⁵⁶ This reference should thus be deleted.

War crimes in non-international armed conflict. As already noted, Law No. 6 of 2002 has amended Article 165 of the Military Penal Code of War, which now states that Section IV of Chapter III of the Code applies to all cases of armed conflict (the Law of War of 1938, however, continues to apply only in international armed conflict).⁵⁷ In the absence of a distinction between international and non-international armed conflict, the crimes included in Section IV could thus be prosecuted even when committed in an armed conflict not of an international character, providing that the conflict satisfies the definition contained in Article 165 (2).⁵⁸ Amnesty International welcomes this amendment, which allows Italy to define all war crimes as such, regardless of whether they are committed in international or non-international armed conflict, and which is thus broader than the Rome Statute which artificially distinguishes between war crimes in international and non-international armed conflicts.

However, Amnesty International is concerned that the Military Penal Code of War fails to include some of the war crimes contained in Article 8 (2) (c) and (e) of the Rome Statute, such as passing sentences and carrying out executions without a

⁵⁴ See, e.g., Article 4 (1) of the IV Geneva Convention.

⁵⁵ *Tadić* (IT-94-1-A), Judgment, Appeals Chamber, 15 July 1999, paras. 168-169.

⁵⁶ M. Fumo, *Il sistema penale militare bellico alla luce delle Convenzioni di Ginevra del 1949 e della Carta costituzionale*, 36 *Archivio penale* (1985), 560.

⁵⁷ D. Brunelli & G. Mazzi, above note 25, at 516-518.

⁵⁸ See earlier criticism of this definition at p. 19.

previous judgment (Article 8 (2) (c) (iv)). This is a particularly shocking omission since this prohibition is part of common Article 3 of the Geneva Conventions, which, according to the International Court of Justice, reflects “elementary considerations of humanity” and is thus applicable in all armed conflict.⁵⁹ In addition, the Military Penal Code of War omits intentional attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance or peacekeeping missions in accordance with the Charter of the United Nations (Article 8 (2) (e) (iii)), and also omits conscripting or enlisting children under the age of 15 years into armed forces or using them to participate actively in hostilities (Article 8 (2) (e) (vii)). Moreover, as mentioned above, the crime of taking of hostages appears to apply only to international armed conflicts. The same could be said of Articles 185 and 187 (which implement Article 8 (2) (c) (i) and (e) (xii) of the Rome Statute, respectively), and Articles 177, 190 and 192 of the Military Penal Code of War, which all refer to “enemies” and “enemy state”, terms normally applicable only to international armed conflict. Amnesty International recommends that legislation should be amended to include Article 8 (2) (e) (iii) and Article 8 (2) (e) (iv), although Italy should define children as persons under 18 years of age, in order to meet its obligation under the Optional Protocol to the Convention on the Rights of the Child.⁶⁰ Amnesty International also recommends that all war crimes, both in the Rome Statute and in other international law should be defined as such in Italian legislation, regardless of whether they are committed in international or non-international armed conflict, with any modifications that are strictly necessary to take into account the differences between such conflicts (such as changing prisoners of war to persons detained in connection with the armed conflict).

Prohibited weapons. The Rome Statute envisages the prohibition of using certain “weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering”, and, although an Annex was envisaged to provide an agreed list of such weapons, no text has yet been agreed upon. The ICRC has called upon states enacting legislation implementing the Rome Statute to take the opportunity simultaneously to incorporate the specific provisions on prohibited and restricted weapons that are included in other treaties that they have ratified. Amnesty International recommends that all states should follow the approach taken by Brazil in its implementing legislation (available at <http://www.amnesty.org/icc>) and incorporate provisions on prohibited and restricted

⁵⁹ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v US) (Merits), ICJ Reports (1986), para. 218.

⁶⁰ Italy ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict on 9 June 2002.

weapons, even though these prohibitions have not yet been included in the Rome Statute.

War crimes under Protocols I and II omitted in the Rome Statute. Italy should define as crimes under Italian law certain grave breaches and other serious violations of Protocol I and serious violations of Protocol II, as well as certain other serious violations of international humanitarian law in non-international armed conflicts. For example, the Rome Statute does not include as a war crime unjustified delays in repatriating or freeing prisoners of war or interned civilians once active hostilities have ceased, although this conduct has been defined as a “grave breach” and thus a war crime under the provisions of Article 85 (4) (b) of Protocol I. Similarly, the prohibition of an attack on demilitarized zones is not expressly defined as a crime in the Rome Statute, but such conduct is prohibited in Article 85 (3) (d) of Protocol I. Italy is a party to both Protocols I and II: it should, therefore, include all definitions of war crimes under these Protocols, in addition to those defined in the Rome Statute.

Stronger definitions in other international law. There are also a number of definitions in the Rome Statute which are much weaker than in other international humanitarian law instruments. For example, Article 57 (2) (a) (iii) of Protocol I prohibits “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”. The definition of this crime in Article 8 (2) (b) (iv) of the Rome Statute is much weaker because — at the insistence of the USA — it replaces the narrow term “concrete and direct military advantage” with the broader term “concrete and direct *overall* military advantage”.⁶¹

Penalties. Amnesty International welcomes the elimination of the death penalty under the Military Penal Codes of War and Peace (Law no. 589 of 13 October 1994) and its replacement with life imprisonment. This is consistent with the Rome Statute, the Statutes of the ICTY and of the ICTR, the Regulation establishing the East Timor Special Panels for Serious Crimes, the Statute of the Special Court for Sierra Leone and the Law establishing the Extraordinary Chambers in Cambodia, as well as the worldwide trend to abolish this cruel, inhuman and degrading punishment.⁶² However, Article 27 (4) of the Italian Constitution still contains the qualifier that the death

⁶¹ Emphasis added.

⁶² See Amnesty International, *The Death Penalty Worldwide. Developments in 2003*, AI Index: ACT 50/007/2004, April 2004, and A. Marchesi, *La pena di morte. Una questione di principio* (Roma-Bari: Laterza, 2004).

penalty may be imposed for *cases provided by the military laws of war*. Amnesty International strongly recommends that this provision should be repealed.

Amnesty International recommendations:

⇒ The Italian implementing legislation should include all war crimes defined under the Rome Statute and other international humanitarian law that have so far been omitted from Italy's military legislation (including enforced sterilization, sexual crimes and certain crimes committed in non-international armed conflicts, such as the use of child soldiers);

⇒ All definitions of war crimes should be fully consistent with the Rome Statute or, where the definition is stronger in other international law, with that law;

⇒ Penalties should be amended so as to adequately reflect the gravity of the crimes and of the circumstances under which they are committed;

⇒ Crimes in domestic law (in particular Article 179 and Article 185 of the Military Penal Code of War) should be as widened to incorporate the broader definitions of the Rome Statute;

⇒ The definitions of war crimes in Articles 177, 184-*bis*, 185, 187, 190 and 192 of the Military Penal Code of War should be extended to include these crimes when they are committed in non-international armed conflicts;

⇒ Article 27 (4) of the Constitution should be repealed where it states that that the death penalty may be imposed when provided for by the military laws of war.

4. Torture

The crime of torture has been recognized by the international community as a separate crime under international law under the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), independently of the crime against humanity of torture and the war crime of torture (see discussion above). As a state party to this Convention since 12 January 1989, if Italy chooses not to extradite an alleged torturer found on its territory, it is required to investigate and prosecute the alleged offender itself.⁶³ However, although Italy is a party to the Convention against Torture, to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and to the 1966 International Covenant on Civil and Political Rights (all of which prohibit torture), at present Italy expressly and specifically criminalizes torture only if it is committed in the context of an armed conflict (Article 185-*bis* of the Military Penal Code of War).⁶⁴

Some conduct amounting to torture, but far from all such conduct,⁶⁵ could be covered by various articles of the Penal Code, including Articles 581 (beating), 582-583 (bodily harm), 610 (criminal coercion), 606 (illegal arrest), 607 (unlawful restriction of personal freedom), 608 (abuse of authority against people arrested or detained), 609 (arbitrary search and personal inspection), 612 (threatening) and 605 (kidnapping). However, such provisions do not adequately take into account the gravity of the crime of torture, the mental element and the circumstances under which it is committed.⁶⁶

⁶³ Article 5 (2) of the Convention against Torture states that “[e]ach State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.” Article 7 (1) of the Convention provides: “The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution”.

⁶⁴ See above, Section III.1.A.3.

⁶⁵ For example, psychological and moral torture are not covered. A. Marchesi, *L’attuazione in Italia degli obblighi internazionali di repressione della tortura*, 82 *Rivista di diritto internazionale* (1999), 467-468).

⁶⁶ Committee against Torture, Considerations of Reports Submitted by States Parties under Article 19 of the Convention, Second periodic reports, 1994, Italy, UN Doc. A/50/44 no. 157.

Amnesty International is pleased to note that a draft law to include the crime of torture in the Penal Code is currently under discussion in the Italian Parliament. Amnesty International recommends, however, that Italian law should also define cruel, inhuman and degrading treatment as crimes. Italy should adopt the definition of torture as set forth in Article 1 of the Convention against Torture for all instances of torture that are not also crimes against humanity or war crimes.

In addition, Amnesty International would draw the Italian government's attention to the ICTY ruling in the *Furundžija* case, which stated that "international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition", and that, accordingly, "in the case of torture, the requirement that States expeditiously institute national implementing measures is an integral part of the international obligation to prohibit this practice."⁶⁷ Amnesty International recommends that Italy fulfils its obligations under international law by immediately defining torture in accordance with Article 1 of the Convention against Torture, as well as ancillary crimes of torture, as required by Article 4 of the Convention, for all instances not also amounting to a crime against humanity or a war crime. In addition, as recent events have demonstrated, it is essential to define cruel, inhuman or degrading treatment as crimes under national law as well.

Amnesty International recommendations:

- ⇒ The crime of torture should be introduced in the Penal Code as defined in Article 1 of the 1984 Convention against Torture to ensure that all cases of torture not also amounting to crimes against humanity or war crimes are covered;
- ⇒ All ancillary forms of torture, including those listed in Article 4 of the Convention against Torture, should be defined as crimes in the Penal Code;
- ⇒ Cruel, inhuman and degrading treatment each should be defined as crimes in the Penal Code.

⁶⁷ *Furundžija* (IT-95-17/1), Judgment, Trial Chamber II, 10 December 1998, paras. 148-149.

5. Offences against the administration of justice

The offences against the administration of justice contained in Article 70 (1) of the Rome Statute are already included in the Penal Code (Articles 317-322 and 367-379). However, Amnesty International is concerned that such provisions do not make specific reference to the International Criminal Court, its members or witnesses who appear before it.⁶⁸ The implementing legislation should include a provision which, as provided for in Article 70 (4) of the Rome Statute, extends domestic criminal provisions criminalizing offences against the integrity of national investigative or judicial process to offences against the administration of justice by the Court, when these are committed in Italy or by its nationals. There should be no statute of limitation for such offences. The legislation should also provide effective assistance to the Court by applying also to offences against the administration of justice by the Court when committed outside Italy by non-nationals so that Italy will not continue to be a safe haven for persons who have impeded bringing to justice persons responsible for genocide, crimes against humanity or war crimes.

Amnesty International recommendations:

⇒ National criminal provisions criminalizing offences against the integrity of national investigative or judicial process should be extended to offences against the administration of justice by the International Criminal Court, regardless of where these offences were committed, who committed them or when they were committed.

B. Enforcement of international law through universal jurisdiction

As documented in Amnesty International's study of state practice at the international and national level in more than 125 countries around the world, *Universal Jurisdiction: The duty of states to enact and implement legislation*, all states may exercise universal jurisdiction over any crime under international law, as well as ordinary crimes,

⁶⁸ Article 322-*bis* of the Penal Code (introduced by Article 3 of Law no. 300 of 29 September 2000) has extended to officials of "public international organizations" the scope of application of Articles 321 (Penalties for the corrupter) and 322 (Incitement to corruption) only.

without any requirement that the suspect be in the state at the time the investigation is opened or up until a time sufficiently before the trial to prepare a defence.⁶⁹ For more than half a century, the Geneva Conventions of 1949 have provided that states parties, with no link to a suspect, but able to make out a *prima facie* case, may seek the extradition of those suspected of grave breaches of the Conventions, if the states in which they are present are unable or unwilling to investigate or prosecute.

Amnesty International recommends that the Italian implementing legislation provide for the broadest possible jurisdiction under international law. The following provisions can be said to provide some elements of universal jurisdiction in current Italian legislation:

- Article 10 (2) of the Italian Penal Code expressly provides for custodial universal jurisdiction over non-political crimes committed abroad by foreigners against foreigners or the European Community or foreign states if the crime is one for which the penalty is no less than three years. However, the prosecution must be requested by the Minister of Justice, a political official, and the accused must be present on Italian territory, although it is not clear at what stage of the proceedings presence is required. In addition, extradition must not have been granted or accepted by the territorial state or the state of nationality of the accused.

- Article 7 (5) of the Penal Code provides that Italian courts have jurisdiction over a foreign national for crimes committed abroad when there is a specific law or treaty which establishes the applicability of Italian criminal law (such as the Geneva Conventions and Protocol I (but only for “grave breaches”) and the Convention against Torture). In this case, there is no requirement that the accused be present in the territory at the time an investigation is opened and the accused may be tried *in absentia*. However, it is not entirely clear to what extent Italian courts can exercise universal jurisdiction under Article 7 (5), since, according to some commentators, this provision cannot be applied directly and courts may apply the jurisdictional provisions of a treaty only when they have been enacted in Italian law. The reference to “international treaties [which] establish that Italian criminal law shall apply” prevents Italy from exercising universal jurisdiction over genocide,⁷⁰ crimes against humanity and war crimes that are not grave

⁶⁹ See, generally, Amnesty International, *Universal Jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/002-018/2001, September 2001.

⁷⁰ See Amnesty International, above note 69, Chapter Seven.

breaches of the Geneva Conventions and of Protocol I;⁷¹ over crimes under international law over which universal jurisdiction is established only under customary law; and over those crimes that are not prohibited by a treaty. Article 7 (5) of the Penal Code has not yet been applied by Italian tribunals.

▪ Article 8 of the Penal Code provides for protective jurisdiction over “political crimes”.⁷² As used in Article 8, this term can be interpreted in a way which would include crimes under international law. Indeed, according to the jurisprudence, Article 8 must be read in the light of Article 10 (1) of the Constitution and of the international conventions protecting human rights, relying on a broader concept of state political interest which includes the protection of the rights of the citizens.⁷³ The Minister of Justice, a political official, must however authorize a prosecution based on Article 8 and, in some cases, prosecution must be requested by the victim.⁷⁴

▪ Article 3 (2) of the Penal Code provides that Italian criminal law is binding on every citizen or foreigner who is abroad when provided by Italian law or by international law. This provision is reinforced by Article 10 (1) of the Constitution, according to which the Italian legal order conforms to the generally recognized norms of international law (i.e., customary international law).

⁷¹ Article 49 of the I Geneva Convention; Article 50 of the II Geneva Convention; Article 129 of the III Geneva Convention; Article 146 of the IV Geneva Convention; Article 86 (1) of Additional Protocol I.

⁷² Penal Code, Article 8 (3): “*Agli effetti della legge penale, è delitto politico ogni delitto, che offende un interesse politico dello Stato, ovvero un diritto politico del cittadino. E’ altresì considerato delitto politico il delitto comune determinato, in tutto o in parte, da motivi politici.*” The concept of “political crime” under Article 8 of the Penal Code should not be confused with that employed in Article 10 (4) of the Constitution: see below, Section III.2.D. On the concept of political crime” in the Penal Code, see G. Fiandaca & E. Musco, *Diritto penale*, Parte generale (Bologna: Zanichelli, 2004), 121-122.

⁷³ See the decision of the *Corte d’Assise d’Appello* of Rome of 17 March 2003 in the appeal of the convictions of some Argentine military officers charged with crimes committed against Italian citizens during the military regime, as confirmed by the *Corte di cassazione (Cassazione penale (Sez. I)*, 17 May 2004, No. 23181, 245 *Rivista penale* (2004), 829-832). According to the Appellate Court, such crimes were undeniably political crimes under Article 8, since it was clear that their motivations were political and that the Italian state had a political interest to repress actions in violation of the fundamental rights of its citizens. On 6 December 2000, the *Corte d’Assise* of Rome had sentenced General Carlos Guillermo Suarez Mason after a trial *in absentia* to life, plus three years, in prison; General Santiago Omar Riveros to life, plus one year, in prison; the other military officers were each sentenced to 24 years in prison; and all were ordered to pay substantial monetary damages. *Correspondents’ Reports, 3 Yearbook of International Humanitarian Law* (2000), 538.

⁷⁴ Article 13 of the Military Penal Code of War also establishes the jurisdiction of Italian courts over certain crimes committed by members of the enemy armed forces against Italy or an allied state or their nationals.

▪ Article 17 of the Military Penal Code of Peace provides for a limited universal jurisdiction over crimes committed by the armed forces in occupied, transit or sojourn territory, as provided by international conventions and customs (according to Article 18, for other crimes committed abroad by the military the request of the competent minister is necessary).⁷⁵

▪ Article 1080 of the Naval Code provides that the Code applies to Italian nationals or foreigners on duty on an Italian ship or aircraft if he or she commits a crime abroad provided in the Code.

▪ Article 3 of Law no. 498 of 3 November 1988 on the ratification and domestic execution of the Convention against Torture provides that Italian courts have jurisdiction, even if the conduct amounting to torture under Article 1 of the Convention is committed abroad by a foreigner, provided that the accused is present in Italy and extradition has not been granted. However, the authorization of the Minister of Justice, a political official, is necessary. As noted above, Article 3 of Law no. 498 is useless in practice without a domestic provision which introduces the crime of torture in domestic law. In the absence of such a provision, a court would apply rules applicable to ordinary crimes, and, therefore, would hold that it was unable to exercise universal jurisdiction pursuant to Law no. 498.⁷⁶

Amnesty International recommends that the implementing legislation include a provision expressly providing for Italy to exercise universal jurisdiction over crimes under the Rome Statute, regardless of whether the crimes were committed abroad or by a foreigner, and without a presence requirement requiring the suspect to be present on Italian territory when the investigation is opened (provided that an accused be present at his or her trial and be provided with adequate time to prepare for trial). Amnesty International also recommends that this provision should exclude any requirement to obtain the authorization of the Minister of Justice or any other political authority. The absence of an effective universal jurisdiction provision covering all crimes under international law undermines Italy's ability to fulfil its responsibilities as a member of the international community under the Geneva Conventions and other international law in holding to account those who commit the worst crimes known to

⁷⁵ "Armed forces in occupied, transit or sojourn territory" under Article 17 of the Military Penal Code of Peace are only organized troops stationed abroad with the consent of the host state. In contrast, the other crimes committed abroad, to which Article 18 of the Military Penal Code of Peace applies, are those perpetrated by members of the armed forces who are in isolated service (such as military attachés to diplomatic or consular missions) or who are abroad in an unofficial capacity. G. Laudi, V. Veutro, F. Stellacci, P. Verri, *Manuale di diritto e di procedura penale militare* (Milano: Giuffrè, 1981), 153-154).

⁷⁶ A. Marchesi, above note 65, at 473.

humanity, as recognized in the Preamble of the Rome Statute which recalls “that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes”.

Amnesty International recommendations:

⇒ Italy should amend the Penal Code to include a provision which expressly states that Italy has jurisdiction over crimes under the Rome Statute, as well as other crimes under international law, regardless of whether the crimes were committed abroad or by a foreigner, and without a requirement that a suspect be present until a sufficient time before trial to prepare a defence;

⇒ This jurisdiction should not be subject to the authorization of the Minister of Justice.

C. Principles of criminal responsibility, defences and other bars to prosecution

Principles of criminal responsibility. Amnesty International is concerned that Italian law defines some principles of criminal responsibility more narrowly than the definitions in the Rome Statute and other international law. Under Article 17 of the Rome Statute, the International Criminal Court has the ability to declare Italy unable to prosecute crimes under the Rome Statute and to exercise its own jurisdiction. The Italian implementing legislation should define all principles of criminal responsibility at least as strictly as those in Part 3 of the Rome Statute. However, certain principles of criminal responsibility in the Rome Statute are not in accordance either with customary or conventional international law or jurisprudence of international or internationalized courts (specifically Articles 28, 33 and 98 (1)). These principles should be defined in national law in accordance with customary or conventional international law.

Most general principles of criminal responsibility contained in Part 3 of the Rome Statute are already defined in similar terms in the Italian legislation. The *nullum crimen sine lege* and *nulla pœna sine lege* principles (Articles 22 and 23 of the Rome Statute) are contained in Article 25 (2) of the Constitution, Article 1 of the

Penal Code⁷⁷ and Article 37 of the Military Penal Code of Peace.⁷⁸ The principle of the non-retroactivity of criminal law (Article 24 of the Rome Statute) is contained in Article 25 (2) of the Constitution and Article 2 of the Penal Code.⁷⁹ The principle of the individual character of criminal responsibility (Article 25 of the Rome Statute) is contained in Article 27 (1) of the Constitution.⁸⁰ However, Article 65 of the 1938 Law of War, which implements Article 50 of the Regulations Respecting the Laws and Customs of War on Land annexed to the 1907 (IV) Hague Convention Concerning the Laws and Customs of War on Land, provides that collective sanctions can be inflicted on a population on account of the acts of individuals if it can be regarded as collectively responsible: this provision violates one of the most basic principles of criminal responsibility, codified in Article 33 of the Geneva Convention III, Article 75 (2) (d) of Additional Protocol I and Article 25 of the Rome Statute.⁸¹

⁷⁷ Penal Code, Article 1: “Nessuno può essere punito per un fatto che non sia espressamente preveduto come reato dalla legge né con pene che non siano da essa stabilite.”

⁷⁸ Military Penal Code of Peace, Article 37: “Qualunque violazione della legge penale militare è reato militare.

E' reato esclusivamente militare quello costituito da un fatto che, nei suoi elementi materiali costitutivi, non è, in tutto o in parte, preveduto come reato dalla legge penale comune.

I reati preveduti da questo codice, e quelli per i quali qualsiasi altra legge penale militare commina una delle pene indicate nell'articolo 22, sono delitti.”

⁷⁹ Constitution, Article 25: “No one may be removed from the regular judge pre-established by law.

No one may be punished except on the basis of a law already in force before the offence was committed.

No one may be subjected to security measures except in those cases provided for by law.”

Penal Code, Article 2: “Nessuno può essere punito per un fatto che, secondo la legge del tempo in cui fu commesso, non costituiva reato.

Nessuno può essere punito per un fatto che, secondo una legge posteriore, non costituisce reato; e, se vi è stata condanna, ne cessano l'esecuzione e gli effetti penali.

Se la legge del tempo in cui fu commesso il reato e le posteriori sono diverse, si applica quella le cui disposizioni sono più favorevoli al reo, salvo che sia stata pronunciata sentenza irrevocabile.

Se si tratta di leggi eccezionali o temporanee, non si applicano le disposizioni dei capoversi precedenti.

Le disposizioni di questo articolo si applicano altresì nei casi di decadenza e di mancata ratifica di un decreto-legge e nel caso di un decreto-legge convertito in legge con emendamenti (dichiarato illegittimo dalla Corte Costituzionale 'nella parte in cui rende applicabili alle ipotesi da esso previste le disposizioni contenute nei commi secondo e terzo dello stesso art. 2 del codice penale').”

⁸⁰ Constitution, Article 27: “Criminal responsibility is personal.

The accused is not considered guilty before the definitive judgment is rendered.

Punishment cannot consist in treatment contrary to human dignity and must aim at rehabilitating the condemned.

The death penalty is not admissible, except in cases provided by the military laws of war.”

⁸¹ According to a commentator, Art. 33 of the Geneva Convention III has partly repealed Art. 65 of the

All crimes of accessory criminal responsibility, such as aiding, abetting and direct and public incitement as contained in Article 25 of the Rome Statute should also be punishable under national law. The Penal Code should make clear that accessory forms of criminal responsibility include concealment of the crime, such as the destruction of grave sites and other evidence.

Command and superior responsibility. International law requires that all persons - commanders and superiors, whether military or civilian - in positions of responsibility are obliged to prevent their subordinates committing crimes under international law. In most cases, senior officials will not have participated personally in the commission of crimes. They should, of course, be prosecuted if they actually ordered the crime (this is provided for by Article 51 (2) of the Italian Penal Code). Article 28 of the Rome Statute provides that anyone who was responsible for his or her subordinates, and who knew or should have known that these subordinates were about to commit a crime, but who did not attempt to prevent this crime or to report it to the competent authorities is also criminally liable. Amnesty International is concerned that Article 28 of the Rome Statute, which is applicable only in trials before the Court, departs from customary international law by introducing different degrees of responsibility for military and civilian superiors in trials before the Court. Article 86 (2) of Additional Protocol I, Article 6 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, Article 7 (3) of the Statute of the ICTY, Article 6 (3) of the Statute of the ICTR, Article 6 (3) of the Statute of the Special Court for Sierra Leone, Section 16 of the United Nations Transitional Administration in East Timor (UNTAET) Regulation 2000/15 for the Special Panels in East Timor and Article 29 of the Law establishing the Extraordinary Chambers for Cambodia all impose a single standard of criminal responsibility for military and civilian superiors. It is regrettable that the Rome Statute - at the insistence of the USA - included a separate, weaker standard for civilian superiors, in derogation of customary and conventional international law. Amnesty International strongly recommends that no state should include this distinction in its own legislation. As Italy is a party to Protocol I (which it ratified on 27 February 1986), it is obliged to implement that treaty, which contains a single standard for command and superior responsibility into national law.

Law of War, where it provides for collective sanctions (R. Venditti, *Il diritto penale militare nel sistema penale italiano* (Milano: Giuffrè, 1985), 305-309). Be that as it may, the Turin Military Tribunal has interpreted the notion of collective penalties under Article 65 as limited to pecuniary and property sanctions (*Engel* case, Judgment of 15 November 1999, 3 *Foro ambrosiano* (2001), 335).

It appears that Article 28 of the Rome Statute could be implemented by the broad provision contained in Article 40 (2) of the Italian Penal Code (“*Non impedire un evento, che si ha l’obbligo giuridico di impedire, equivale a cagionarlo*”) and by the provisions on complicity (*concorso*: Articles 110 *et seq.* of the Penal Code), although there is a considerable advantage in having a provision expressly clarifying the duty of commanders and superiors.⁸² Neither of these provisions distinguishes between military and civilian superiors. Furthermore, Article 230 of the Military Penal Code of War provides for the criminal responsibility of any member of the armed forces who, because of fear or other inexcusable reason, does not employ all means to prevent the commission of certain crimes.⁸³ However, Amnesty International is concerned that Article 230 is narrower than Article 28 of the Rome Statute in that it only applies to the commission of certain crimes.⁸⁴ Amnesty International recommends that the provisions in Article 230 should be widened to apply to all crimes under the Rome Statute.

Defences. Amnesty International recommends that defences in national legislation should be no broader than those permitted in the Rome Statute and, in some cases, should be narrower to be consistent with international law. No one tried in an Italian court for crimes under international law should be able to escape criminal responsibility where in the same situation he or she would be convicted in the Court.

The Italian legislation provides for the defences of self-defence (Article 52 of the Penal Code and Article 42 of the Military Penal Code of Peace), necessity (Article 54 (1) (2) of the Penal Code), duress (Article 54 (3) of the Penal Code), mental incapacity (Articles 88 and 89 of the Penal Code) and intoxication (Article 91 *et seq.* of the Penal Code⁸⁵) under conditions similar to those set out in Article 31 of the Rome Statute, and also provides for the defence of physical coercion (Article 46). However, the Italian legislation is more restrictive than Article 31 with regard to intoxication, since it provides that intoxication cannot be used as a defence when a

⁸² On complicity for omissions, see F. Antolisei, *Manuale di diritto penale*, Parte generale (Milano: Giuffrè, 2003), 565-566.

⁸³ Article 138 of the Military Penal Code of Peace only deals with the failure to prevent the commission of crimes against military obedience and defence, and rebellion and mutiny, and not of crimes against the laws and customs of war.

⁸⁴ In particular, the crimes set out in Articles 186 (pillage), 187 (arson, destruction and serious damage to enemy state), 192 (ill-treatments of ill, injured or shipwrecked persons), 193 (dispossession of ill, injured or shipwrecked persons), 202 (collective rebellion) and 203 (collective indiscipline) of the Code.

⁸⁵ However, Article 91 provides that intoxication can be invoked as a defence only if it derives from a fortuitous event or *force majeure*.

person has become unintentionally intoxicated through his or her own carelessness or negligence (Article 92 (1) of the Penal Code).

The defence of self-defence is set out in Article 42 of the Military Penal Code of Peace, which provides for self-defence against existing (“attuale”) and unlawful violence. This provision is narrower than Article 52 of the Penal Code (which also envisages the mere threat of an offence being committed as a ground for self-defence) and Article 31 (1) (c) of the Rome Statute (which allows for self-defence where the use of force is “imminent”). However, the Italian Constitutional Court has interpreted Article 42 of the Military Penal Code of Peace as including self-defence in response to the threat of an offence being committed.⁸⁶ Furthermore, under the Rome Statute and the Military Penal Code of Peace, self-defence can be invoked only against an unlawful use of force, while the Penal Code (which employs the more generic word “offence”) also provides for self-defence in the face of non-violent or passive conduct.⁸⁷ Article 3 of the Draft Law Containing Delegation to the Government to Review the Military Penal Law of Peace and War provides for the repeal of Article 42.

Article 47 of the Penal Code provides that mistake of fact excludes criminal responsibility (providing, in some cases, that it is non-negligent), while Article 32 (1) of the Rome Statute provides for this defence only if it negates the mental element required by the crime. Article 47 (3) is also broader in that, it includes mistake of law other than criminal law which has caused a mistake of fact as a ground for excluding criminal responsibility.⁸⁸ Mistake of law does not exclude criminal responsibility according to Article 5 of the Penal Code and Article 39 of the Military Penal Code of Peace. However, the Italian Constitutional Court has ruled that Article 5 and Article 39 are not consistent with the Constitution where they do not provide for an “unavoidable” mistake of law as a ground for excluding criminal responsibility.⁸⁹ It appears that this interpretation is narrower than Article 32 (2) of the Rome Statute, according to which a mistake of law can be grounds for excluding criminal responsibility if it negates the mental element required by the crime, without being necessary that the mistake be “unavoidable”, or even that it not be negligent (with occasional exceptions in the Elements of Crime and in Article 33 (1) (c)). Article 3 of

⁸⁶ Constitutional Court, (3) 11 June 1987, No. 225, 32 *Giurisprudenza costituzionale* (1987-II), 1703-1707. See D. Brunelli & G. Mazzi, above note 25, at 90-91.

⁸⁷ F. Antolisei, above note 5, 300-301.

⁸⁸ See F. Antolisei, above note 5, 424-428.

⁸⁹ Judgments no. 364 of 23-24 March 1988 (111 *Foro italiano* (1988), Parte Prima, 1385-1412) and no. 61 of 24 February 1995 (35 *Cassazione penale* (1995-II), 1754-1761), respectively. The mistake is “unavoidable” when it is due to a fortuitous event or *force majeure*.

the above mentioned draft Law on the review of the military penal law provides for the repeal of Article 39 of the Military Penal Code of Peace.

Amnesty International is concerned that several articles of the Military Penal Code of War (for example, Articles 172, 185, 187 and 188) and Article 44 of the Military Penal Code of Peace provide for the defence of military necessity. Amnesty International recommends that these provisions should be amended to omit this defence, except in the narrow circumstances permitted by international law. The implementing legislation should also clarify that Article 31 (1) (c) and (d) of the Rome Statute, which apply only to trials in the Court, must be interpreted strictly in accordance with other international law. For example, it would not be consistent with international law for implementing legislation to permit action taken to defend military property to be a defence to genocide since such acts would not be reasonable.⁹⁰

The defence of superior orders for war crimes and other crimes under international law has consistently been rejected in customary international law and in international instruments since 1945 (see Article 8 of the Nuremberg Charter, Article II (4) (b) of Allied Control Council Law No. 10, Article 6 of the Tokyo Charter, Article 5 of the 1996 International Law Commission's Draft Code of Offences against the Peace and Security of Mankind, Article 7 (4) of the Statute of the ICTY and Article 6 (4) of the Statute of the International Criminal Tribunal for Rwanda (ICTR), Section 21 of the UNTAET Regulation 2000/15, Article 6 (4) of the Statute of the

⁹⁰ Article 31 (1): "In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct: ...

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person's control."

Special Court for Sierra Leone and Article 29 (4) of the Law establishing the Extraordinary Chambers for Cambodia).

Regrettably, however, a narrow exception was included in Article 33 of the Rome Statute at the insistence of the USA, the United Kingdom (UK) and a few other states. That narrow exception applies solely with respect to trials in the Court. Article 33 of the Rome Statute provides that an order of a government or of a superior, whether military or civilian, shall not act as a defence to criminal responsibility for genocide and crimes against humanity. It also provides that it shall not be a defence to war crimes, unless the subordinate person was under a legal obligation to obey orders of the government or the superior, the person did not know that the order was unlawful and the order was not manifestly unlawful.

Article 51 of the Italian Penal Code has an even broader defence of superior orders. It provides that compliance with a *lawful* order or provision can act as a defence to criminal responsibility, while a person who obeys an *unlawful* order is not responsible if he or she believed due to a mistake of fact that the order was lawful, or if he or she could not challenge the lawfulness of the order.⁹¹ However, Article 4 of Law no. 382 of 11 July 1978, which contains the principles governing military discipline, states that a subordinate has a duty not to carry out an order which is manifestly directed against the institutions of the state or which is manifestly unlawful: the latter part of this article seems to be consistent with the Rome Statute, but it goes further by expressly imposing a duty to disobey manifestly unlawful orders.⁹² Amnesty International recommends that the lawfulness of an order should be established in the light of international law rather than only in the light of national legislation, so that an order to carry out genocide, crimes against humanity or war

⁹¹ Penal Code, Article 51: “*L’esercizio di un diritto o l’adempimento di un dovere imposto da una norma giuridica o da un ordine legittimo della pubblica Autorità, esclude la punibilità.*”

Se un fatto costituente reato è commesso per ordine dell’Autorità del reato risponde sempre il pubblico ufficiale che ha dato l’ordine.

Risponde del reato altresì chi ha eseguito l’ordine, salvo che, per errore di fatto, abbia ritenuto di obbedire a un ordine legittimo.

Non è punibile chi esegue l’ordine illegittimo, quando la legge non gli consente alcun sindacato sulla legittimità dell’ordine.” By Law no. 382 of 11 July 1978 (which has repealed former Article 40 of the Military Penal Code of Peace), Article 51 also applies to military crimes. Art. 59 of the MPCP, which can also be applied to war crimes under Art. 47 of the MPCW, provides that superior orders may constitute a ground for reduction of sentence.

⁹² On the concept of a “manifestly unlawful order”, see Tribunale Militare di Roma, 1 August 1996, in *Rassegna di giustizia militare*, no. 1, 2, 3, January-June 1999, 27 ff.

crimes could never be a lawful order, even if such conduct were not criminalized under national law.

According to Article 8 (1) of the 1938 Law of War, compliance with obligations arising from international law may be suspended as a reprisal, if the enemy does not comply with such obligations.⁹³ At the moment of the ratification of Additional Protocol I, Italy issued a declaration according to which “Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation”. Taking reprisals is therefore lawful under Italian law, but only within the limits established by international law.⁹⁴ Although international law permits certain reprisals that would otherwise be wrongful under international law to press states that were committing wrongful acts under international law as a measure to induce that state to comply with international law, such reprisals can no longer involve conduct that is criminal under international law. For example, a state could not execute prisoners of war as a measure to persuade another state that was killing prisoners of war to stop doing so.

Immunities of officials from prosecution. Article 27 of the Rome Statute recognizes the irrelevance of official capacity as far as criminal responsibility is concerned for crimes under international law. Amnesty International recommends, therefore, that states parties should amend their national legislation, if necessary, to rule out any claims of immunity from jurisdiction where crimes under the Rome Statute or other crimes under international law have been committed, both in proceedings before domestic courts and in the execution of an order of the Court for arrest and surrender.⁹⁵ Indeed, if bars to prosecution for such crimes, such as immunities, were provided in national law, the conditions laid down in Article 17 of the Rome Statute would be fulfilled and the Court would be able to exercise its jurisdiction. The failure to investigate or prosecute a government official solely on the ground that the official enjoyed immunity in his or her own country would demonstrate an inability or unwillingness of the state to act.

⁹³ With the exception of international conventions which expressly prohibit reprisals (Article 8 (3)).

⁹⁴ N. Ronzitti, *Diritto internazionale dei conflitti armati* (Torino: Giappichelli, 2001), 183.

⁹⁵ Article 27: “This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or government, a member of a government or Parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

It has been suggested that the implementation of Article 27 of the Rome Statute in Italy requires a constitutional law. According to Article 90 of the Italian Constitution, the President of the Republic (and the President of the Senate when he acts as President of the Republic under Article 86 (1) of the Constitution) cannot be held responsible for his official acts, with the exceptions of an attack on the Constitution or high treason.⁹⁶ An “attack on the Constitution”, which is defined neither in the Penal Code nor in the Constitution itself, includes any conduct aimed at subverting the state institutions or at deliberately violating the Constitution.⁹⁷ Furthermore, members of Parliament cannot be held responsible for opinions expressed and votes given while carrying out their duties. Members of Parliament cannot be prosecuted or deprived of their freedom in the absence of authorization by the Chamber to which they belong, unless they have been convicted or have been caught in the act of committing a crime for which obligatory arrest *in flagrante delicto* is provided (Article 68 of the Constitution, as amended by Constitutional Law no. 3 of 29 October 1993).⁹⁸ Moreover, under Article 122 of the Constitution, members of regional councils (*consiglieri regionali*) cannot be held responsible for opinions expressed and votes given while carrying out their duties. Finally, the Prime Minister and Ministers can be held responsible for crimes committed while carrying out their duties but can be prosecuted only upon authorization by the Parliament (Article 96, as amended by Constitutional Law no. 1 of 16 January 1989).

However, it may be that the President of the Republic, Prime Minister, ministers, members of Parliament and members of regional councils can be held criminally responsible for genocide, crimes against humanity and war crimes under Article 10 (1) of the Constitution, as long as customary international law provides for the irrelevance of any official capacity in relation to such crimes. Traditional immunities for foreign heads of state, government officials and diplomats were designed to protect officials abroad from civil suits and criminal prosecutions in foreign courts for ordinary crimes. They were not designed to give such officials immunity with respect to crimes under international law – crimes that undermine the entire framework of international law itself. The irrelevance of any official capacity for crimes under international law has long been recognized as part of general international law and has been contained in

⁹⁶ For these crimes, the President of the Republic must be impeached by the absolute majority of the members of the Parliament (Article 90 (2) of the Constitution).

⁹⁷ T. Martines, *Diritto costituzionale* (Milano: Giuffrè, 2003), 293.

⁹⁸ A member of the Parliament might for example submit to the Parliament a draft law authorising conduct amounting to a crime under international law, such as the use of methods amounting to torture during interrogations, or could give a speech inciting racial hatred.

international instruments since Nuremberg.⁹⁹ This principle has also been affirmed by several courts and legal scholars.¹⁰⁰

It has been suggested that the apparent contradiction between Article 27 of the Rome Statute and Articles 68, 90, 96 and 122 of the Italian Constitution might be solved in the light of Article 11 of the Constitution, according to which “Italy ... agrees, on conditions of parity with other states, to the limitations of sovereignty necessary for an order that assures peace and justice among Nations” and “promotes and encourages international organizations having such ends in view”.¹⁰¹ Be that as it may, Amnesty International recommends that Italian law make clear that such official immunities do not apply to genocide, crimes against humanity, war crimes or other crimes under international law. Amnesty International also recommends that, in relation to the President of the Republic the commission of crimes under the Rome Statute should be interpreted as amounting to an attack on the Constitution (and in

⁹⁹ See the Charter of the Nuremberg International Military Tribunal (Article 7), the Charter of the International Military Tribunal for the Far East (Article 6), the Control Council Law no. 10 of the UN Control Council for Germany (Article II (4) (a)), the 1948 Convention for the Prevention and Punishment of the Crime of Genocide (Article IV), the 1950 Principles of Law Recognized in the Charter of the Nuremberg Tribunal and Judgment of the Tribunal (Principle III), the 1954 UN draft Code of Offences against Peace and Security of Mankind (Article 3), the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid (Article III), the 1993 Statute of the ICTY (Article 7 (2)), the 1994 Statute of the ICTR (Article 6 (2)), the 1996 Draft Code of Crimes against the Peace and Security of Mankind (Article 7). The principle articulated in these instruments was intended to apply in national courts as well as in international courts.

¹⁰⁰ For example, in the *Pinochet* case, a panel of the United Kingdom House of Lords established that head of state immunity does not apply to former heads of state for actions inconsistent with international law, since torture does not constitute an official function of the head of state (*United Kingdom House of Lords: Regina v Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet*, Judgment of 24 March 1999). In several decisions, the ICTY has ruled that Article 7 (2) of the ICTY Statute is “indisputably” declaratory of customary international law (*Furundžija* case, above note 67, para. 140; *Karadžić and others* (IT-95-5-D and IT-95-18), Trial Chamber I, 16 May 1995, para. 24; *Slobodan Milošević (decision on preliminary motions)* (IT-99-37-PT), Trial Chamber II, 8 November 2001, para. 28). Among the rationales advanced for the immunity of foreign heads of states are the principle of sovereign equality of states and the preservation of stability of international relations. However, such rationales do not apply to trials before international tribunals or when the head of state is no longer in office, even for crimes committed while or before taking office (see the Appeals Chamber of the Special Court for Sierra Leone, *Prosecutor v Charles Ghankay Taylor (decision on immunity from jurisdiction)* (SCSL-2003-01-I), 31 May 2004, paras. 51-52).

¹⁰¹ However, although the Court would appear to be such an international organization, the application of Article 11 would always be problematic, since - as one scholar has argued - it has been referred only to European Union law. P. Gaeta, *L'incidenza dello Statuto di Roma sulle norme costituzionali italiane in materia di immunità*, 2 *Diritto pubblico comparato ed europeo* (2000-I), 600-601.

particular on its Articles 2, 10 and 11), for which - as noted above - there is no constitutional immunity.

Amnesty International is also concerned that the recent Law no. 140 of 20 June 2003, which provides for the suspension of trials for the President of the Republic, the Prime Minister, the President of the Constitutional Court, the Presidents of the Senate and of the Chamber of Deputies while they are in office, is inconsistent with Article 27 of the Rome Statute to the extent that it permits the suspension of trials for genocide, crimes against humanity and war crimes and with other international obligations of Italy, such as the Genocide Convention, Geneva Conventions and their Protocols and the Convention against Torture. However, the Italian Constitutional Court has ruled that Article 1 of Law no. 140 is inconsistent with Articles 3 and 24 of the Constitution.¹⁰²

Statutes of limitation. Under Article 29 of the Rome Statute, crimes within the jurisdiction of the International Criminal Court shall not be subject to statutes of limitation. Where a state applies a national statute of limitation to a Rome Statute crime, this could be interpreted by the Court as being unable or unwilling genuinely to carry out an investigation or prosecution and may allow the Court to exercise its own jurisdiction under Article 17. Under Article 157 of the Italian Penal Code statutes of limitation are inapplicable only when the relevant offence would entail life imprisonment.¹⁰³ However, as mentioned above, in Italian law the maximum penalty for certain Rome Statute crimes (for example, those included in Article 185-*bis* of the MPCW) is not commensurate with the severity of the circumstances under which they are committed. Moreover, for certain crimes to be punished with life imprisonment it is necessary that aggravating circumstances are deemed to apply and that they prevail over extenuating circumstances.¹⁰⁴ Amnesty International recommends that Article 10 (1) of the Constitution of Italy, which gives effect to customary international law in the Italian legal order, should be interpreted in such a way as to exclude statutes of limitation for crimes of genocide, crimes against humanity and war crimes. Accordingly, Amnesty International welcomed the decision by the Military Court of Rome affirming the non-applicability of statutory limitations where war crimes and crimes against humanity are concerned (Judgment of 22 July 1997 in the *Priebke*

¹⁰² Judgment no. 24 of 20 January 2004 (129 *Foro italiano* (2004), Parte Prima, 321-328).

¹⁰³ Statutory limitations for crimes are addressed in Articles 157 to 161 of the Penal Code. Italy has not yet ratified the 1968 United Nations and the 1974 European Conventions on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

¹⁰⁴ See, e.g., Art. 575 *et seq.* of the Penal Code with regard to murder.

case).¹⁰⁵

Amnesty International recommendations:

- ⇒ Provisions providing for collective sanctions should be repealed;
- ⇒ Italy should adopt a single standard for civilians and military officers consistent with Protocol I for command and superior responsibility;
- ⇒ The provisions in Article 230 of the Military Penal Code of War concerning command responsibility should be widened to apply to all crimes under the Rome Statute;
- ⇒ Articles 172, 185, 187 and 188 of the Military Penal Code of War and Article 44 of the Military Penal Code of Peace should be amended to omit the defence of military necessity, except in the narrow circumstances permitted by international law;
- ⇒ Article 51 of the Penal Code should expressly prohibit the defence of superior orders with respect to all crimes under international law;
- ⇒ The provisions excluding the criminal responsibility of the President of the Republic and other state officials should be prevented from applying to crimes under the Rome Statute or other crimes under international law;
- ⇒ A provision expressly stating that crimes under international law are imprescriptible should be included in the implementing legislation.

D. Fair trials

National courts should ensure that their procedures are consistent with international law and standards for fair trials at all stages of criminal proceedings, particularly for crimes under international law in national courts. Italy has incorporated many, but not

¹⁰⁵ The text can be read in 38 *Cassazione penale* (1998-I), 689-691. See S. Marchisio, *The Priebke Case Before the Italian Military Tribunals: A Reaffirmation of the Principle of Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 1 *Yearbook of International Humanitarian Law* (1998), 351-353.

all, of these rights into its national law. To the extent that it has not yet done so, it should bring its law into line with the Rome Statute and other international law and standards, both to ensure a fair trial and that Italy can effectively cooperate with the Court in its investigation and prosecution of crimes under international law.

Relevant law and standards include Articles 9, 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) and Articles 55 and 62 to 68 of the Rome Statute. There are also a broad range of other international standards concerning the right to fair trial which all states should incorporate into national legislation if they have not already done so, including those in Articles 9, 10 and 11 of the Universal Declaration of Human Rights; the UN Standard Minimum Rules for the Treatment of Prisoners; the UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment; Articles 7 and 15 of the UN Convention against Torture; the UN Basic Principles on the Independence of the Judiciary; the UN Basic Principles on the Role of Lawyers; and the UN Guidelines on the Role of Prosecutors. The fair trial guarantees in the Geneva Conventions of August 12, 1949, and Protocols I and II should also be taken into consideration. These standards include those found in the Third Geneva Convention, Articles 129-131; Fourth Convention, Articles 54, 64-75 and 117-126; Protocol I, Article 75; and Protocol II, Article 6. In addition, regional law and standards concerning fair trials, such as the European Convention on Fundamental Rights and Human Freedoms and its Protocols, should be incorporated directly or by reference in the body of the draft implementing legislation of the Rome Statute.

Pre-trial rights. Article 55 of the Rome Statute is a mini-human rights convention for the earliest stages of criminal proceedings, not just for suspects, but also for other persons.¹⁰⁶ Without any legislation to implement them into national law,

¹⁰⁶ Article 55 of the Rome Statute reads as follows:

“1. In respect of an investigation under this Statute, a person:

- (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
 - (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
 - (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
 - (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.
2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities

Article 55 of the Rome Statute or the relevant provisions of the UN International Covenant on Civil and Political Rights could not be directly enforced in Italy.

However, Amnesty International notes that the Constitution and the Criminal Procedure Code already contain a number of important pre-trial rights, sufficiently (even though not as systematically) guaranteeing many of the rights recognized in Article 55 of the Rome Statute. The organization also notes that the Criminal Procedure Code also applies to proceedings before military courts when the law does not provide otherwise (Article 261 of the Military Penal Code of Peace, Article 244 of the Military Penal Code of War, Articles 208 and 209 of the *Norme di attuazione, di coordinamento e transitorie* of the 1988 Criminal Procedure Code).

Comparing all the provisions contained in Article 55 of the Rome Statute with the provisions contained in the Italian Constitution and Criminal Procedure Code, it is noted that: Article 63 and Article 64 (3) (b) of the Criminal Procedure Code guarantee the right to refuse to incriminate oneself to all persons who, even though not formally suspected, make statements against themselves;¹⁰⁷ Article 13 and Article 27 of the Constitution protect the rights guaranteed in Article 55 (1) (b) and 55 (1) (d) of the Rome Statute; Article 143 of the Criminal Procedure Code, in conjunction with Article 61 (1) of the Criminal Procedure Code, guarantees the right to an interpreter; Article 65 of the Criminal Procedure Code guarantees the right, before questioning begins, to be informed clearly and precisely of the acts of which the person is

pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

- (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
- (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
- (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
- (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel."

¹⁰⁷ Article 63 reads as follows:

"1. Se davanti all'autorità giudiziaria una persona non imputata ovvero una persona non sottoposta alle indagini rende dichiarazioni dalle quali emergono indizi di reità a suo carico, l'autorità procedente ne interrompe l'esame, avvertendola che a seguito di tali dichiarazioni potranno essere svolte indagini nei suoi confronti e la invita a nominare un difensore . Le precedenti dichiarazioni non possono essere utilizzate contro la persona che le ha rese.

2. Se la persona doveva essere sentita fin dall'inizio in qualità di imputato o di persona sottoposta alle indagini, le sue dichiarazioni non possono essere utilizzate".

suspected and about any evidence against him or her; Article 24 (2) (3) of the Constitution, Article 96 (1) of the Criminal Procedure Code, Article 97 of the Criminal Procedure Code and the Decree of the President of the Republic No. 115 of 30 May 2002 fully protect the right of the suspect, accused and defendant to have legal assistance of his or her choosing, to have a defence counsel assigned and to have free legal assistance if he or she does not have sufficient means to pay for it.¹⁰⁸

Rights at trial. Italy has incorporated many fair trial guarantees in its Constitution, Criminal Procedure Code and other law.¹⁰⁹ However, a number of

¹⁰⁸ As to the implementation of Article 55 in connection with cooperation provided by Italian authorities to Court investigations, see below, p. 57.

¹⁰⁹ For example, Amnesty International notes that these guarantees are included in the Criminal Procedure Code and in the Constitution, in particular by Articles 27 and 111, and that Article 111 also provides for the right to be tried by an impartial judge, to be confidentially informed of the nature and reasons of the charges, to have anything admitted as evidence in the accused's favour, and to have an interpreter if the accused does not speak the language. On the inclusion of the fair trial principles in Art. 111 of the Constitution, see G. Conso, *Introduction*, in G. Conso & V. Grevi (eds), *Compendio di procedura penale* (Padova: CEDAM, 2003), XXII-XXV.

Article 111 reads as follows:

“La giurisdizione si attua mediante il giusto processo regolato dalla legge.

Ogni processo si svolge nel contraddittorio tra le parti, in condizioni di parità, davanti a giudice terzo e imparziale. La legge ne assicura la ragionevole durata.

Nel processo penale, la legge assicura che la persona accusata di un reato sia, nel più breve tempo possibile, informata riservatamente della natura e dei motivi dell'accusa elevata a suo carico; disponga del tempo e delle condizioni necessari per preparare la sua difesa; abbia la facoltà, davanti al giudice, di interrogare o di far interrogare le persone che rendono dichiarazioni a suo carico, di ottenere la convocazione e l'interrogatorio di persone a sua difesa nelle stesse condizioni dell'accusa e l'acquisizione di ogni altro mezzo di prova a suo favore; sia assistita da un interprete se non comprende o non parla la lingua impiegata nel processo.

Il processo penale è regolato dal principio del contraddittorio nella formazione della prova. La colpevolezza dell'imputato non può essere provata sulla base di dichiarazioni rese da chi, per libera scelta, si è sempre volontariamente sottratto all'interrogatorio da parte dell'imputato o del suo difensore.

La legge regola i casi in cui la formazione della prova non ha luogo in contraddittorio per consenso dell'imputato o per accertata impossibilità di natura oggettiva o per effetto di provata condotta illecita.

Tutti i provvedimenti giurisdizionali devono essere motivati.

Contro le sentenze e contro i provvedimenti sulla libertà personale, pronunciati dagli organi giurisdizionali ordinari o speciali, è sempre ammesso ricorso in Cassazione per violazione di legge. Si può derogare a tale norma soltanto per le sentenze dei tribunali militari in tempo di guerra.

Contro le decisioni del Consiglio di Stato e della Corte dei conti il ricorso in Cassazione è ammesso per i soli motivi inerenti alla giurisdizione.”

crucial guarantees for the right to fair trial should be improved and specified to be fully consistent with the Rome Statute or other international law and standards, for example the right to a public trial (Article 64 (7) of the Rome Statute) and the obligation to ensure the accused understands the nature and consequences of an admission of guilt (Article 65 of the Rome Statute). These guarantees should be included in any national criminal justice system as essential components of the right to fair trial. The right of an accused to be tried in his or her presence is not fully guaranteed in Italian law since it permits trials *in absentia*, a procedure that is excluded from the Rome Statute, Statutes of the ICTY and ICTR, UNTAET Reg. 2000/15 (as amended by Reg. 2001/25) (Section 5), the Statute of the Special Court for Sierra Leone and the Law establishing the Extraordinary Chambers for Cambodia. As a safeguard of these rights, Article 20 (3) of the Rome Statute provides that the Court may conduct a new trial for crimes of genocide, crimes against humanity and war crimes when the trials for these crimes in national justice systems are not conducted independently or impartially.

The role of victims and witnesses in the proceedings. The protection of victims and witnesses and the participation of victims at all stages of the proceedings are widely recognized as essential components of justice and must be assured in a way that guarantees fair trials. To reflect the contemporary understanding of the proper role of victims and witnesses in criminal proceedings, Amnesty International recommends that the implementing legislation should expressly incorporate each of the provisions of Article 68 of the Rome Statute, an article which reflects the crucial contribution of the Italian delegation at the Rome Diplomatic Conference.¹¹⁰ This

¹¹⁰ Article 68 of the Rome Statute provides: “1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in Article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in Article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and

would provide national courts with greater clarity about how the rights of victims and witnesses can be assured consistently with the rights of the accused to a fair trial.

Italy protects the right of an accused to know who the witnesses are against him or her by prohibiting the use of anonymous witnesses. Protection measures are generally aimed at protecting witnesses in cases involving “terrorist” crimes or organized crime. Means such as screens, voice filters and masks, or fake names, are allowed. Amnesty International recommends that Italy should incorporate into national court proceedings other progressive provisions of the Rome Statute that apply to proceedings in the International Criminal Court that would be relevant to the participation of victims, particularly victims of crimes of sexual violence and children. For example, implementing legislation should provide for the establishment of a victims and witnesses unit within Italy’s national legal system in order to facilitate investigations and reparations where crimes within the Court’s jurisdiction are committed.

Amnesty International also recommends that to ensure the broadest possible protection of those who are victims of crimes under the Rome Statute, the implementing legislation should also contain a provision which allows criminal proceedings to be re-opened in Italy that were suspended at the request of the Prosecutor of the Court, if the Prosecutor decides not to initiate an investigation or, upon investigation, not to prosecute (Article 53 of the Rome Statute), or if the Pre-Trial Chamber declines to confirm the charges (Article 61 of the Rome Statute).

Ne bis in idem. Article 20 of the Rome Statute provides that the principle of double jeopardy (*ne bis in idem*) does not prevent the Court from exercising its jurisdiction in some cases (*i.e.*, when national proceedings were a sham). Some

a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in Article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.”

observers have contended that this provision might not be consistent with the principle of the irrevocability of *res judicata*.¹¹¹ However, Article 20 of the Rome Statute is fully consistent with international law, which makes clear that this principle applies within a single jurisdiction and does not prevent another jurisdiction from exercising jurisdiction in the same case, particularly when the proceedings in the first case were a sham designed to shield the accused from criminal responsibility. In addition, according to a distinguished Italian scholar, the exceptions to the *ne bis in idem* principle in the Rome Statute are “limited to acceptable pathological situations of unsuitability of national justice, otherwise conducive to a situation of impunity”, and “[i]t is difficult therefore to imagine a harsh conflict with the Italian Constitution”.¹¹²

Article 11 of the Penal Code (*Rinnovamento del giudizio*) states that, if the crime has been committed in Italian territory, the national or the foreigner already tried abroad can be tried again by Italian courts. If the crime has been committed abroad, the national or the foreigner, who has been tried by a foreign court, can be tried again in Italy if the Minister of Justice requests it. If the International Criminal Court were, incorrectly, characterized as a “foreign” court, Article 11 would not be consistent with Article 20 (2) of the Rome Statute, according to which “[n]o person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the Court”. The implementing legislation should thus include a provision either clarifying that Article 11 does not apply to trials at the Court or forbidding a new trial in Italy for a crime for which the person has already been convicted or acquitted by the Court.

Amnesty International recommendations:

⇒ To the extent that they are not already fully guaranteed, all pre-trial rights and rights at trial guaranteed in the Rome Statute and in other international law and standards should be guaranteed in Italian legislation;

⇒ Each of the provisions of Article 68 of the Rome Statute with regard to victims and witnesses should be incorporated;

¹¹¹ See Articles 648 and 649 of the Criminal Procedure Code.

¹¹² P. Benvenuti, *Italy, Implementation of the ICC Statute in National Legislation, Constitutional Aspects*, in C. Kreß & F. Lattanzi (eds), *The Rome Statute and Domestic Legal Orders. General Aspects and Constitutional Issues*, vol. I (Baden Baden: Nomos-Ripa di Fagnano Alto: Sirente, 2000), 132.

⇒ A victims and witnesses unit should be set up to facilitate investigations and reparations when crimes under the Rome Statute and other international law are perpetrated;

⇒ The Italian legislation should either clarify that Article 11 of the Penal Code does not apply to trials at the Court or forbid a new trial in Italy for a crime for which the person has already been convicted or acquitted by the Court.

Part 2: Cooperation

A. Basic obligation to cooperate with the International Criminal Court

Part 9 of the Rome Statute contains the main principles of the cooperation between the International Criminal Court and states parties and is divided into three parts: general provisions, provisions relating to surrender, and provisions relating to other forms of cooperation. Since the Court has no enforcement powers, the issue of cooperation is of the most fundamental importance for the repression of some of the most serious crimes under international law. States parties have, therefore, the obligation to cooperate fully with the Court in investigation and prosecution of crimes under the Rome Statute (Article 86).

Italy currently has no legal provision authorizing cooperation with the International Criminal Court. Investigations by outside authorities can take place in Italy within the limits of mutual procedural assistance, but no direct acts of foreign jurisdiction such as those required in Part 9 of the Rome Statute are permitted. By ratifying the Rome Statute, Italy has committed itself to enact the procedural provisions necessary to assure full cooperation with the Court (Article 88 of the Rome Statute). This means, *inter alia*, that Italy cannot refuse to implement a request for surrender by the Court by simply invoking the lack of national law permitting surrender: under Article 27 of the 1969 Vienna Convention on the Law of Treaties, “[a] party may not invoke the provisions of its national law as justification for its failure to perform a treaty”.¹¹³ Legislation must be enacted in order to identify the competent national authorities and the forms of the submission of the requests,

¹¹³ See also Articles 3 and 32 of the International Law Commission Draft articles on state responsibility.

according to the criteria adopted by Italy in similar cases (although the obstacles related to extradition and inter-state mutual legal assistance should be avoided).

B. Status of the Court in national law

There is no provision in Italian legislation which recognizes the privileges and immunities of the Court, its personnel, counsel, experts and other persons whose presence is required at the seat of the Court according to Article 48 of the Rome Statute, as supplemented by the Agreement on Privileges and Immunities of the International Criminal Court. The tribunal cooperation legislation does not apply to the International Criminal Court. As of July 2005, Italy had signed, but not yet ratified, the Agreement.¹¹⁴

In addition, implementing legislation should recognize the legal personality of the International Criminal Court in Italy, as provided in Article 4 (1) of the Rome Statute. There should also be a provision stating that the International Criminal Court may exercise its functions and powers, as required by Article 4 (2) of the Rome Statute, on the territory of Italy. Among other advantages, such recognition will facilitate the International Criminal Court in entering into contracts under Italian law.

An article permitting the Court to sit in Italy should be included to be consistent with the provisions of Article 3 (3) of the Rome Statute, which permits the Court to sit outside the seat of the Court, whenever the Court considers it desirable. Such a provision is included in the South African implementing legislation.¹¹⁵ According to point 11 in the above mentioned Amnesty International *Checklist for effective implementation*, states parties should introduce provisions in their national law to facilitate the Court sitting in their territory, as well as to ensure that the Court can exercise its functions and powers effectively on the territory of the state.

¹¹⁴ The Agreement was signed on 10 September 2002.

¹¹⁵ Chapter 3 of the South African Implementation Legislation of the Rome Statute, on the Functioning, Privileges and Immunities of the Court in South Africa, provides as follows: “6. The President may, at the request of the Court and by proclamation in the Gazette, declare any place in the Republic to be a seat of the Court.” (available at <http://www.amnesty.org/icc>).

Amnesty International recommendations:

- ⇒ Italy should ratify the Agreement on the Privileges and Immunities of the Court, which it signed on 10 September 2002, and enact any legislation that may be necessary to implement it;
- ⇒ Privileges and immunities of the Court, its personnel, counsel, experts and other persons whose presence is required at the seat of the Court should be expressly provided in Italian law;
- ⇒ The legal personality of the Court in Italian law should be expressly recognized;
- ⇒ A provision allowing the Court to sit in Italy should be included.

C. Facilitating and assisting investigations by the Court

Article 93 of the Rome Statute identifies the general assistance that states parties are required to provide to the Court, with the exception of arrest and surrender. Article 93 lists several types of assistance that states parties must provide to the Court, and also envisages the possibilities of other forms, providing they are not prohibited by the law of the requested state. States have to comply with cooperation requests from the Court under Article 93, with only two exceptions: if the request concerns interests of national security, and if the type of assistance is prohibited by the law of the requested state, subject to the conditions of Article 93.¹¹⁶ Of course, both exceptions are also subject to other obligations of states parties, including the obligation recognized in the Preamble of the Rome Statute to ensure the effective prosecution of crimes under international law, to enhance international cooperation and the general obligation to implement treaties in good faith.¹¹⁷

Current Italian legislation does not provide for the possibility of compliance with all types of assistance which might be requested by the Court under Article 93 (1) of the Rome Statute. A provision should also be introduced to permit the Prosecutor to conduct independent investigations in Italy pursuant to Article 54 (2) of the Rome

¹¹⁶ K. Prost & A. Schlunck, *Article 93*, in O. Triffterer (ed), above note 33, 1104.

¹¹⁷ Vienna Convention on the Law of Treaties, Article 26.

Statute. As explained in point 17 of the *Checklist for Effective Implementation*, the organization believes that Italy should permit the Office of the Prosecutor and defence to conduct on-site investigations without hindrance in all cases. It would also facilitate the work of the Court if Italy were not to wait for a request from the Court concerning requirements of national law related to forms of cooperation with the Court (see Articles 91 (4), 96 (3) and 97 of the Rome Statute), but, instead, provided comprehensive information on current requirements and update them as they change. Such a course would improve the preparedness, speed and effectiveness of the Court.

Article 72 of the Rome Statute allows a state to decline to provide information or documents where its national security interests would be prejudiced by the disclosure of information or documents, and establishes a detailed procedure for the Court to determine whether provision or disclosure of the information or documents would prejudice a state's national security and whether such information could be provided or disclosed in accordance with mutually agreed safeguards. However, the state still has to take all reasonable steps to cooperate with the Court and the Court may take some measures to avoid open confrontation with the state. If no cooperation can be achieved, Article 72 provides a detailed procedure, which is different depending on who has control of the requested information or document.

The number of situations in which prejudice to a state party's national security interests could outweigh its obligations under international law to cooperate with investigations and prosecutions of genocide, crimes against humanity or war crimes, particularly when the Court provides effective safeguards against public disclosure, is likely be extremely limited, such as the disclosure of codes for launching nuclear weapons or planned military operations. Regrettably, a number of states continue to refuse to provide full intelligence information to the ICTY and ICTR that could be used in determining the guilt or innocence of suspects and accused, based on alleged prejudice to national security, even when the Tribunals provided effective safeguards against public disclosure. This continuing refusal has obstructed justice in certain cases. States parties should avoid adopting legislative provisions that could lead to similar obstacles for the Court in the investigation and prosecution of genocide, crimes against humanity and war crimes. Amnesty International believes that to ensure effective investigation and prosecution of cases before the Court, states parties should expressly provide that if, after the extensive consultation procedures in that article have been implemented, the Court concludes pursuant to Article 72 (7) (a) (ii) that the state is not complying with its obligations under the Rome Statute, the state shall comply with the Court's request to provide the information under the safeguards envisaged under the Rome Statute.

Italian legislation concerning mutual legal assistance to foreign courts would be an inadequate model for cooperation with the International Criminal Court for a number of reasons. First, the Minister of Justice can refuse the requests (*rogatorie*) from foreign authorities to carry out procedural acts (communications, notifications, collection of evidence) in Italy in the following cases (Article 723 of the Criminal Procedure Code):

- when the requested acts jeopardise the sovereignty, the security or other essential interests of the Italian state;
- when it is evident that the requested acts are expressly prohibited by Italian law or contrary to the fundamental principles of the national legal order;
- when there are strong reasons to believe that considerations related to race, gender, nationality, language, political opinions, personal or social conditions might negatively influence the development or the outcome of the trial, unless the accused has freely and expressly consented;
- when the request deals with the summons of a witness or an expert or an accused and the foreign state does not provide adequate guarantees as far as their immunity is concerned.

The Minister of Justice may also refuse the *rogatoria* if the requesting state does not give adequate guarantees of reciprocity. The competent Court of Appeal exercises its judicial control on the request and can refuse to authorize the *rogatoria* if (Article 724 of the Criminal Procedure Code):

- the requested acts are prohibited by law and contrary to principles of the Italian legal order;
- the conduct in relation to which the foreign authority has started legal proceedings is not a crime under Italian law and the accused has not expressly and freely consented to the request;¹¹⁸
- considerations related to race, religion, gender, nationality, language, political opinions and personal and social conditions might influence

¹¹⁸ The insertion of the double incrimination limitation is criticized by A. Gaito, *Rapporti giurisdizionali con autorità straniere*, in G. Conso & V. Grevi, above note 109, at 995.

the development or the outcome of the trial, unless the accused has expressly and freely consented.¹¹⁹

The Court of Appeal can also suspend the request if this could prejudice the investigations or the criminal proceedings in Italy. However, none of the grounds listed in Articles 723 and 724 are appropriate grounds for refusal to cooperate with the International Criminal Court and they would not be consistent with Article 93 of the Rome Statute, which does not envisage such grounds for refusing cooperation with the Court.¹²⁰

Italian authorities should apply Article 55 guarantees not only when they conduct an investigation with a view to an Italian prosecution, but also when they assist a Court's investigation. Article 725 of the Criminal Procedure Code provides that, when carrying out acts requested by foreign authorities, Italian authorities shall apply the Criminal Procedure Code, including the guarantees provided therein. A provision referring to Article 725 of the Criminal Procedure Code or reproducing its wording should be included in the implementing legislation.

Amnesty International recommendations:

⇒ Implementing legislation should require Italian courts and authorities to provide any form of assistance requested by the Court under Article 93 of the Rome Statute, as well as by other states (except where such inter-state assistance would lead to human rights violations), in connection with the investigation and prosecution of the crimes within its jurisdiction;

⇒ None of the grounds provided in the Criminal Procedure Code for inter-state mutual legal assistance to foreign courts should justify a refusal to cooperate with the Court.

¹¹⁹ A simplified procedure is provided for the summons of witnesses who reside in Italy (Articles 726 and 726-bis of the Criminal Procedure Code).

¹²⁰ One commentator has also suggested that Article 724 does not adequately safeguard the rights of the accused and is therefore not consistent with Article 24 (2) of the Constitution. F. Cordero, *Procedura penale* (Milano: Giuffrè, 2003), 1261. Subject to a time limit agreed with the Court, and the other conditions provided in Article 94, however, a state may postpone execution of a request. Nevertheless, given the nature and gravity of the crimes being investigated and prosecuted by the Court, states parties should, in all cases, give priority to requests by the Court.

D. Arrest and surrender of accused persons

According to Article 89 of the Rome Statute, states parties must comply with requests by the Court for arrest and surrender of persons. They must do so promptly. Article 59 requires states parties to take steps immediately to arrest persons pursuant to Court arrest and provisional arrest warrants, to bring them promptly before their courts and, once ordered by its courts to be surrendered, to be surrendered as soon as possible. There are no grounds for refusals: states parties can only postpone the execution of the request for surrender if an admissibility ruling is pending, or enter into consultation with the Court in case of parallel proceedings for a crime different from that for which surrender to the Court is sought. Other limitations apply when a state party receives competing requests from the Court and from another state (Article 90).

Italy has not enacted any legislation authorizing its authorities to cooperate fully with the Court in regard to demands for arrest and surrender of accused persons to the Court, as it is obliged to do under Articles 59 and 89 of the Rome Statute. Apart from provisions regulating the cooperation with the ICTY and the ICTR, domestic legislation only refers to inter-state extradition. Italy should ensure that its courts and other national authorities have no substantive grounds to refuse to surrender persons to the Court and that the procedure for the surrender of persons to the Court is simple, expeditious and less burdensome than exists for extradition. Furthermore, Italy should not sign any impunity agreement with the United States (US) that would prohibit the surrender of US nationals and others to the Court. Such agreements are contrary to international law.¹²¹

¹²¹ Article 98 (2) applies only to pre-existing Status of Forces Agreements (SOFAs) that are in force, not to any such agreements that may be established after a state becomes a signatory or party to the Rome Statute. Article 98 (2), therefore, obliges states either to investigate and prosecute or hand over persons suspected of genocide, crimes against humanity or war crimes to the Court, absent a pre-existing SOFA that would prohibit surrender. However, Italy should not extradite a person pursuant to a SOFA who has been charged in the Court with genocide, crimes against humanity or war crimes to a state that is unable or unwilling to investigate and, if there is sufficient admissible evidence, prosecute the person. For example, if the other state has not defined these crimes as crimes under national law or if it has done so, but the definitions, principles of criminal responsibility or defences are inconsistent with international law, then extradition must be denied and the case pursued by the Italian police and prosecution authorities. As emphasized by Amnesty International in two recent documents, *International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes*, AI Index: IOR 40/025/2002, August 2002, and *International Criminal Court: The need for*

It is urgent for Italy to enact legislation in order to be able to cooperate effectively with the Court. The delay might cause a situation such as that occurred in 2001, when the Italian authorities refused to implement an international warrant issued by the ICTR for the arrest of a Rwandese national resident in Italy indicted by the Tribunal on charges of genocide and crimes against humanity, on the ground that under Italian legislation there was no legal basis to proceed with the arrest and that the Italian government would have had to issue an ad hoc decree in order to carry out such arrest.¹²²

The current procedures for “traditional” extradition differ according to the nationality of the accused. As far as Italian nationals are concerned, they can be extradited if this is expressly envisaged in international conventions to which Italy is a party (Article 26 of the Constitution and Article 13 of the Penal Code).¹²³ However, despite such treaty obligations, the Minister of Justice, a political official, can refuse to extradite an Italian national even if Italian courts never investigate or prosecute that person. As far as foreigners are concerned, according to Article 10 (4) of the Constitution their extradition for political crimes is not allowed.¹²⁴ The concept of “political crime” under Article 10 (4) is different from that employed in Article 8 of the Penal Code, since in this context it is a safeguard against biased trials in the state requesting extradition.¹²⁵ According to the Court of Cassation the political character of the crime implies that the illicit conduct was determined by the purpose of fighting non-democratic regimes or of affirming fundamental freedoms.¹²⁶ It thus appears that

the European Union to take more effective steps to prevent members from signing US impunity agreements, AI Index: IOR 40/030/2002, October 2002, (both available at <http://www.amnesty.org/icc>), these agreements are contrary to the object and purpose of the Rome Statute and other international law, both customary and conventional.

¹²² The arrest was a preliminary step in his transfer to the ICTR in Arusha. Father Athenase Seromba, a Catholic priest, was accused of being complicit in the deaths of 2,000 Tutsis crushed to death with bulldozers at the Parish of Nyange in Kibuye on 16 April 1994 (Amnesty International, News Service Nr. 122, EUR 30/003/2001, 17 July 2001). The case ended only with the spontaneous surrender of the accused.

¹²³ The Minister of Justice may only extradite a person if the Court of Appeal authorises extradition or if the person concerned consents to it, but the Minister of Justice retains the discretion to refuse extradition (Article 701 of the Criminal Procedure Code).

¹²⁴ The prohibition of extradition for political crimes is also contained in Article 698 of the Criminal Procedure Code. The grounds for refusing extradition listed in Article 705 (2) of the Criminal Procedure Code do not seem relevant with regard to surrender to the International Criminal Court.

¹²⁵ *Cassazione penale (Sez. I)*, 15 December 1989 (30 *Cassazione penale* (1990-II), 1476-1477). See above, Section III.1.B

¹²⁶ *Cassazione penale (Sez. I)*, 15 December 1989 (30 *Cassazione penale* (1990-II), 1479); *Cassazione*

persons who are accused of genocide, war crimes and crimes against humanity can always be extradited, because such crimes cannot be defined as “political”.¹²⁷ Indeed, as noted above, Constitutional Law No. 1 of 21 June 1967 has amended Articles 10 and 26 of the Constitution, providing that the prohibition of extradition for political crimes does not apply to the crime of genocide. Furthermore, the rationale behind the prohibition of extradition for political crimes is the necessity to avoid biased trials against the accused in the requesting state; this situation seems unlikely to happen in a trial before the International Criminal Court, which is a *super partes* institution established by states parties that made every possible effort to ensure the right to a fair trial was fully guaranteed at every stage of the proceedings.¹²⁸

penale (Sez. I), 7 November 1990 (93 *Repertorio generale della giurisprudenza italiana* (1991-I), 1142). See F. Mantovani, *Principi di diritto penale* (Padova: CEDAM, 2002), 451-452.

¹²⁷ See A. Cassese, *Articolo 10*, in G. Branca (ed), *Commentario della Costituzione, Principi fondamentali* (Bologna-Roma: Zanichelli-Soc. Ed. del Foro Italiano, 1975), 553-554; E. David, *Principes de droit des conflits armés* (Bruxelles: Bruylant, 1999), 710-714. See also GA Res. 3 (I), 13 February 1946; 170 (II), 31 October 1947; 2840 (XXVI), 18 December 1971; 3074 (XXVIII), 3 December 1973; Article 1 of the Additional Protocol to the European Convention on Extradition, 15 October 1975 (not signed by Italy). The 1977 European Convention for the Repression of Terrorism, which Italy ratified on 18 February 1986, excludes the following acts from political offences or offences inspired by political motives: an offence under the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970; an offence under the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971; a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents; an offence involving kidnapping, the taking of a hostage or serious unlawful detention; an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons; an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence (Article 1). Article 2 also provides that “[f]or the purpose of extradition between Contracting States, a Contracting State may decide not to regard as a political offence or as an offence connected with a political offence or as an offence inspired by political motives a serious offence involving an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person. The same shall apply to a serious offence involving an act against property, other than one covered by Article 1, if the act created a collective danger for persons. The same shall apply to an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.”

¹²⁸ The same can be said about Article 698 (1) of the Criminal Procedure Code, which states that extradition is not allowed when it is likely that the accused or the convicted will be discriminated against or persecuted on grounds of race, religion, sex, nationality, language, political opinions or personal or social conditions, or submitted to cruel, inhuman or degrading treatment, or in any case to acts which constitute a violation of the fundamental rights of the person. Such concerns are not relevant

Be that as it may, as the case of the Rwandan priest demonstrates, extradition procedures cannot be used for surrender to international courts. The grounds for refusal which often exist between states in their extradition treaties - the crime is a political offence, danger of unfair trial and death penalty, the crime is not a crime in the requested state, the person has already been tried for the crime requested, or granted an amnesty or pardon - should not be raised in connection with the Court's investigations and prosecutions.¹²⁹ Amnesty International recommends that the implementing legislation contains express provisions for the surrender of accused persons to the Court, without the procedural and substantive restrictions found in current provisions applicable to extradition.

Article 90 of the Rome Statute provides that, in case of competing requests of surrender of a person from the Court and from another state, a state party shall give priority to the request from the Court if the requesting state is a party to the Rome Statute and the case has been declared admissible by the Court. If the requesting state is not a party to the Rome Statute and the requested state has no international obligation to extradite the person to the requesting state, priority shall be given to the request from the Court, if the case has been declared admissible.¹³⁰ Article 697 (2) of the Criminal Procedure Code states that in case of competing requests of extradition,

to surrenders to the International Criminal Court. Article 699 (3) of the Criminal Procedure Code, though, provides that the Minister of Justice can impose other conditions on extradition which he or she deems convenient.

¹²⁹ See Amnesty International, *International Criminal Court: Making the right choices – Part III: Ensuring effective state cooperation*, AI Index: IOR 40/01/97, November 1997.

¹³⁰ If the Court has not yet decided on the admissibility of the case, the requested state shall not extradite the person until the Court has taken its decision (if the requesting state is a party). If the requesting state is not a party, the requested state may proceed to deal with the request from the requesting state at its discretion. Article 90 reflects the principle of complementarity that it is the primary duty of states to bring persons suspected of genocide, crimes against humanity and war crimes to justice, but when they are unwilling or unable to do so, then the Court should be able to exercise jurisdiction. States parties should ensure that, to the maximum extent possible, they give priority to requests from the Court over competing requests from states, particularly when the Court has made a determination that the case is admissible because no state is willing and able to carry out an investigation or prosecution. Article 90 ensures that such a finding would take into account the situation in the requesting state. Such a state might persist in its request for a variety of reasons. For example, it might intend to undertake an investigation or prosecution with the intent to shield the person from criminal responsibility or might not be able to ensure that the accused was tried independently and impartially. States parties should also seek to avoid lengthy delays in determining whether to give priority to a request by the Court over a competing request. One way to do this would be to provide in all bilateral and multilateral extradition agreements and arrangements – both with states parties and non-states parties – that the Court requests should have priority over state requests.

the Minister of Justice establishes their priority. To this aim, he takes into account all circumstances and in particular the date of reception of the requests, the gravity and the place where the fact or the facts have been committed, the nationality and the residence of the requested person and the possibility of a re-extradition from the requiring state to another. However, Article 697 (2) only resolves questions of competing requests of extradition between states, not surrenders to international criminal tribunals. Article 697 (2) should be amended or a provision should be included in the implementing legislation to provide that priority will be given to requests for surrender by the Court over competing requests by other states, as required by Article 90 of the Rome Statute.

The Framework Decision on the European arrest warrant and the surrender procedures between member states (EAW), adopted by the Council of the European Union (EU) on 13 June 2002, replaces formal extradition procedures among member states with a simplified surrender procedure, which implies the inapplicability of the traditional rules regulating (and limiting) extradition.¹³¹ With respect to some serious crimes, among which there are “crimes falling within the jurisdiction of the International Criminal Court” (Article 2 (2)), the Framework Decision abolishes the requirement for double criminality. However, the EAW will not play a major role in the cooperation with the Court, since it only governs relations between states. The Framework Decision does not permit direct or indirect surrenders to the Court, but only facilitates extradition between member states. Indeed, the term “surrender”, as used in the EAW, means extradition within the EU or EAW states parties (while the term “extradition” is used with reference to third states), and not to international criminal tribunals such as the International Criminal Court. The EAW might then be relevant in a Pinochet type situation, i.e., in surrender from one EAW state to another for the purposes of prosecution of crimes under the jurisdiction of the Court, but not in surrenders from a EAW state to the Court itself. Therefore, the EAW does not exempt Italy from passing legislation allowing surrenders to the Court consistently with the relevant provisions of the Rome Statute.

Amnesty International recommendations:

⇒ Grounds for refusal of extradition to other states should be eliminated in connection with surrenders of accused persons to the Court;

¹³¹ Italy has implemented the Framework Decision by Law no. 69 of 22 April 2005.

⇒ A provision providing that priority will be given in all cases to requests for surrender by the Court over competing requests by other states should be included in implementing legislation;

⇒ Italy should not sign or ratify any impunity agreement with the United States.

E. Ensuring effective reparations to victims

The International Criminal Court will be able to award reparations to victims, establishing general principles for restitution, compensation and rehabilitation. According to Article 75 (1) of the Rome Statute, the Court may determine the scope and extent of any damage, loss or injury to, or in respect of, victims, even acting on its own initiative.¹³² The Court may make an order directly against a convicted person and may decide that the award for reparations be made through the Trust Fund provided by Article 79 of the Rome Statute and request states parties to proceed with seizure of proceeds, property and assets, with a view to forfeiture and restitution (Article 75 (4) and 93 (1) (k)).

As Amnesty International stated in point 27 of its *Checklist for Effective Implementation*, states should make sure that their national law permits victims to exercise all their rights under national and international law. Article 75 (6) of the Rome Statute states that “[n]othing in this article shall be interpreted as prejudicing the rights of victims under national or international law”. Article 185 of the Italian Penal Code and Article 2043 of the Civil Code provide that every crime gives rise to an obligation to provide reparations, according to civil legislation. The reparation might take place in different forms: restitution (i.e., the restoration of the *status quo ante*), compensation of the material, non-material and biological damages, and publication of the sentence at the convicted person’s expense, if this is suitable to repair non-material damage. Material damage includes loss of profit and accruing damage, while non-material damage relates to the psychological distress of the victim. Biological damage reflects the negative consequences on health deriving from non-

¹³² See D. Donat Cattin, *Article 75*, in O. Triffterer (ed), above note 33, 965-978; C. Jorda & J. de Hemptinne, *The Status and Role of the Victim*, in A. Cassese, P. Gaeta & J.R.W.D. Jones (eds), above note 33, 1399-1409; C. Muttukumaru, *Reparation to Victims*, in F. Lattanzi & W. Schabas, *Essays on the Rome Statute* (Ripa Fagnano Alto: Sirente, 1999), 303-310.

material damage, but it can also include all damage which has negative repercussions on the victim's ability to exercise his or her natural mental and physical skills.¹³³ According to Article 198 of the Penal Code, the extinction of the crime through the death of the offender, amnesty, pardon, prescription etc. does not imply the extinction of the obligation to provide reparations.¹³⁴

However, it is a matter of concern that the Italian legislation does not provide for a general system of compensation by the state for victims of crimes, but only a civil obligation limited to the individual responsible for the offence. This general system would be particularly important for victims who are not able to identify the offenders and start legal proceedings.

Principle 23 of the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Joinet Principles) provides that “[p]rescription shall not apply to crimes under international law that are by their nature imprescriptible” and that “[w]hen it does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries”.¹³⁵ Therefore, the victim's right to appropriate reparations should not be unduly restricted by statutes of limitation relating to possible civil actions which the victim could pursue against the perpetrator or any other body or entity, regardless of the gravity of the crime. This principle not only takes into account the specific needs of the victims, but also rightly reflects a doctrine recognized in other international instruments and jurisprudence.

¹³³ See Constitutional Court, 27 October 1994, No. 372 (117 *Foro italiano* (1994), Parte Prima, 3297-3307).

¹³⁴ With the exception of civil obligations for fines under Articles 196 and 197, because if the crime becomes extinct, the very object of the obligation is also eliminated.

¹³⁵ See U.N. Commission on Human Rights Res. E/CN.4/2005/L.48, 13 April 2005, adopting the Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law (Van Boven Principles) and recommending that they be adopted by ECOSOC and the General Assembly; U.N. Commission on Human Rights Res. E/CN.4/2005/L.93, 15 April 2005, endorsing the Set of Principles for the protection and promotion of human rights through action to combat impunity (Joinet Principles) and recommending that they be widely disseminated by the UN High Commissioner for Human Rights and “to take them into account in relevant United Nations activities, especially in the framework of United Nations missions, field presences, as well as human rights, institution building and capacity building activities, in cooperation with other parts of the United Nations system, States and other relevant actors.”

In addition to providing that victims and their families can obtain reparations for crimes under international law, Italy should also make sure that national procedures are available which will enable it to provide prompt and effective measures of cooperation to implement an order under Article 75, as specified in Article 93 (1) and Article 109 of the Rome Statute. The implementing legislation should also provide that Italy shall contribute to the Trust Fund established pursuant to Article 79 of the Rome Statute and, as Canada has done, establish a similar fund at the national level.

Amnesty International recommendations:

- ⇒ National procedures should be available to ensure cooperation with the Court as provided in Article 75 and other provisions of the Rome Statute;
- ⇒ Italian law should guarantee the right of victims of crimes under international law and their families to obtain all forms of reparations to which they are entitled under international law and standards;
- ⇒ Italian law should provide that statutes of limitation do not apply to civil claims for reparation in cases of crimes under international law;
- ⇒ Italy should contribute to the Trust Fund of the International Criminal Court established pursuant to Article 79 of the Rome Statute and establish a similar fund at the national level.

F. Enforcement of judgments and sentences

Having no prison, the Court relies on states parties for the enforcement of sentences of imprisonment (Part 10 of the Rome Statute). States parties “should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution” (Article 103 (3) of the Rome Statute). The Court designates the state where the penalty will be served from a list of willing states (Article 103 (1) (a)). The Court’s sentence is binding upon parties and can be reviewed only by the Court itself (Article 105).

Italy has signed agreements with the International Criminal Tribunals for the former Yugoslavia and for Rwanda which allow the enforcement in Italy of sentences handed down by these Tribunals. A similar agreement should be signed as soon as

possible with the International Criminal Court, with necessary modifications to take into account the different approach to serving of sentences in Part 10 of the Rome Statute.

Modifications by national tribunals of penalties imposed by the Court cannot be made without the Court's approval. The Italian Court of Cassation reduced the penalty imposed on Goran Jelesić, sentenced by the ICTY to 40 years' imprisonment for crimes against humanity and transferred to Italy to serve his sentence, to 30 years, thus quashing the previous judgment of the Court of Appeal of Rome which had recognized the ICTY judgment without modifications.¹³⁶ In doing so, Italy breached its obligation under international law. With regard to sentences of the International Criminal Court, such reduction of penalty by a national court would be in contrast to Articles 105 (1) and 110 (2) of the Rome Statute. In order to avoid such situations, Italy could agree to accept only sentenced persons whose penalties do not exceed the period permitted by national law.

It might be contended that there is a conflict between Article 110 (2) of the Rome Statute, according to which the International Criminal Court alone has the right to decide any reduction of sentence, and Article 87 of the Italian Constitution, which provides for the competence of the President of the Republic to exercise pardon and commutation of penalties.¹³⁷ However, Article 87 necessarily applies only to penalties imposed by Italian courts. Although it has been suggested that Article 103 of the Rome Statute leaves room for national competence with regard to pardons and commutation of penalties, this interpretation is not consistent with the express wording of Article 105 and 110 (1) and (2).¹³⁸ In any event, the Italian implementing

¹³⁶ *Cassazione penale (Sez. I)*, 5 December 2002-14 January 2003, No. 3785 (*Diritto e giustizia*, 15 March 2003, No. 10, at 14-15, commented by A. Perduca & N. Piacente, *Il "sistema" del tribunale penale internazionale per la ex Jugoslavia. Effetti ed esecuzione in Italia delle sentenze del TPJ*, *ibid.*, 10-13). The reduction of penalty was based on Article 7 (4) of d.l. No. 544 of 28 December 1993 (turned into law by Law No. 120 of 14 February 1994), according to which "[t]he Court of Appeal [of Rome], on pronouncing its recognition, shall determine the sentence to be enforced in the State. For this purpose, the Court shall convert the term of imprisonment imposed by the International Tribunal into a term of 'reclusione'. The duration of the penalty shall in no case exceed a term of 'reclusione' of 30 years". This provision is also incorporated in Article 7 (4) of Law No. 181 of 2 August 2002 on the cooperation with the ICTR.

¹³⁷ See G. Fiandaca & E. Musco, above note 72, at 780-781. As to amnesty laws, customary international law prohibits such measures with regard to crimes under international law. See Amnesty International, *Sierra Leone: Special Court for Sierra Leone: denial of right to appeal and prohibition of amnesties for crimes under international law*, AFR 51/012/2003, 1 November 2003. This principle is, therefore, in force in Italy through Article 10 (1) of the Constitution.

¹³⁸ P. Benvenuti, above note 112, at 132.

legislation should provide that Article 87 of the Constitution only applies to sentences imposed by Italian courts and not to sentences imposed by the Court.

Finally, as provided in Article 106 (3) of the Rome Statute, the implementing legislation should also permit the Court to have access to persons and places where people are serving Court sentences and that these places meet widely accepted international treaty standards for places of detention with no more or less favourable treatment for persons serving sentences arising from the same crime (Article 106 (2)).

Articles 107, 108 and 111. The implementing legislation should provide for the transfer to another state of persons who have completed their sentences and are not nationals of the state of enforcement (Article 107). It should provide that there be no prosecution, punishment or extradition of a sentenced person in Italian custody in the absence of the Court's approval (Article 108). The implementing legislation should also contain provisions where a convicted person escapes from custody, as required by Article 111 of the Rome Statute.

It is possible that Articles 107, 108 and 111 of the Rome Statute are self-executing, but Amnesty International would welcome clarification of this status in Italian law. Such clarification could be included in a legal memorandum to accompany the draft legislation when it is submitted to Parliament. If these articles are not self-executing, then they should be included in implementing legislation.

Amnesty International recommendations:

- ⇒ Italy should sign an agreement with the Court which allows Court sentences to be enforced in Italy, if it has not already done so;
- ⇒ No reduction of Court sentences by Italian tribunals should be possible without the Court's approval;
- ⇒ It should be provided that Article 87 of the Constitution only applies to sentences imposed by Italian courts and not to sentences imposed by the Court;
- ⇒ If not self-executing, Articles 107, 108 and 111 of the Rome Statute should be included in the implementing legislation.

G. Nomination of candidates

Most states, including Italy, have failed to adopt a transparent procedure for the nomination of candidates to be judges or Prosecutor of the Court in broad consultation with civil society. Amnesty International in point 14 of its *Checklist for Effective Implementation*, recommends that states ensure that when they nominate candidates, they do so in an open process with the broadest possible consultation.

The recommendations on how these consultations should be carried out are provided in the public document, *International Criminal Court: Checklist to ensure the nomination of the highest qualified candidates for judges*, AI Index: IOR 40/023/2002 (available at <http://www.amnesty.org/icc>). In this document, Amnesty International suggests, among other things, that the executive should make a public call for all possible nominations for the selection process; that the nomination of the greatest number of candidates should be encouraged; that civil society and other interested parties should have an opportunity to comment on the knowledge and experience of each of the candidates. Amnesty International sent a request to the UN Permanent Missions in New York of all states parties in August 2002 requesting information about their procedures for nomination of candidates to be judges to the Court. The organization is looking forward to a reply from Italy to this request.

Amnesty International recommendations:

⇒ Italy should ensure that the national procedures to nominate candidates to be judges or the Prosecutor of the International Criminal Court are an open process with the broadest possible consultation with civil society.

H. Training

As recommended in point 31 of Amnesty International *Checklist for Effective Implementation*, states parties should develop and implement programs for the training of judges, prosecutors, defence lawyers, police, army and court officials and foreign affairs officials concerning their respective obligations under the Rome Statute, and to proceed with the updating of their military manuals to incorporate the appropriate references of the Rome Statute. If a provision is not included in implementing legislation, Italy should ensure that effective training programs for

government officials and information materials for the general public on Italy's obligations under the Rome Statute are developed and implemented as soon as possible. Amnesty International welcomes the inclusion of the International Criminal Court among the subjects taught in the training courses organized by the *Consiglio superiore della magistratura* as a first step in implementing these recommendations.

Amnesty International recommendations:

- ⇒ A training program for officials and information programs for the general public on Italy's obligations under the Rome Statute should be developed and implemented;
- ⇒ Military manuals should be updated to incorporate the Rome Statute and other international law and standards.

IV. CONCLUSION

Amnesty International welcomes the fact that Italy has signed and ratified most of the treaties and conventions on human rights protection and international humanitarian law. These signatures and ratifications demonstrate a commitment by Italy as a part of the international community to put an end to impunity of the perpetrators of the most serious crimes. However, as the refusal to surrender Father Athenase Seromba to the ICTR demonstrates, this goal can only be achieved where effective implementing legislation for the Rome Statute with the strongest international legal standards derived from the treaties that Italy has signed and ratified, as well as from customary international law, is put in place. Effective implementing legislation would assist the Italian government in promoting the rule of law and the new system of international justice by ensuring that its territory cannot be used as a safe haven for people accused of the worst crimes known to humanity. It is thus a matter of concern that Italy, which played a leading role in the establishment of the International Criminal Court, has failed for nearly seven years to enact effective implementing legislation for the Rome Statute or to ratify and implement the Agreement on Privileges and Immunities of the Court.

To ensure that implementing legislation is as effective as possible, the implementation process should take place in consultation with civil society. This approach was followed in Benin, the Republic of the Congo (Brazzaville), the Democratic Republic of the Congo, Senegal and the United Kingdom, all of which involved civil society at the earliest possible stage of drafting and invited comments from civil society during the drafting process, leading to significant improvements in the text. The involvement of lawyers groups and other non-governmental organizations concerned with criminal justice issues, women's issues, rights of children and victims, as well as members of the general public, will not only help guarantee that all obligations are properly included in the legislation, but will help build public support for the state's commitment to international justice.

Amnesty International hopes that the Italian government's draft implementing legislation will incorporate the above recommendations and that it will be submitted promptly to Parliament for consideration and adoption. Alternatively, Amnesty International strongly recommends that the seriously flawed Opposition bills now pending in Parliament be amended in line with the recommendations contained in this paper.