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### ESTRATTO

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organized crime: a critical assessment of Italy's response to the  
obligations to criminalize stemming from the Palermo  
Convention

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Rosa Stella De Fazio

MARKING 20 YEARS OF UN CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME: A CRITICAL ASSESSMENT OF ITALY'S RESPONSE TO THE OBLIGATIONS TO CRIMINALIZE STEMMING FROM THE PALERMO CONVENTION\*

ABSTRACT

Nel ventennale dell'entrata in vigore della Convenzione delle Nazioni Unite contro la Criminalità Organizzata Transnazionale (UNTOC), l'articolo mira a fornire al lettore una valutazione critica sull'attuazione degli obblighi di criminalizzazione derivanti dalla Convenzione e dai suoi Protocolli aggiuntivi per gli Stati parte, con un focus sull'Italia. La ricerca si concentra pertanto su alcune criticità relative all'attuazione della Convenzione nel diritto interno, prima tra le quali l'incompletezza della legge italiana n. 146/2006 di ratifica e adesione dell'UNTOC, ma anche sul meccanismo di revisione della Convenzione di Palermo e delle strategie regionali per prevenire i crimini transnazionali previsto dalla risoluzione 75/196 dell'Assemblea generale delle Nazioni Unite di recente adozione.

Twenty years after the entry into force of the United Nations Convention against Transnational Organized Crime (UNTOC), the article aims at providing the reader with a critical assessment of the implementation of the criminalization obligations arising from the Convention and its Additional Protocols for States Parties, with a focus on Italy. The research therefore focuses on a number of issues related to the implementation of the Convention in the Domestic Law, at first the incompleteness of Italian Law n. 146/2006 of ratification and accession of the UNTOC, but also on the revision mechanism of the Palermo Convention and regional strategies to prevent transnational crimes provided for in the recently adopted UN General Assembly Resolution 75/196.

PAROLE CHIAVE

UNTOC – Obblighi di criminalizzazione – Risoluzione ONU 75/196

UNTOC – Obligations to Criminalize – UN Resolution 75/196

SOMMARIO: 1. Introduction – 2. Italy's Response to the Obligations to Criminalize Stemming from the Palermo Convention – 3. (Follows) The Ratification and Accession to the Palermo Convention by Law no. 146/2006: critical remarks – 4. The UN Resolution 75/196 on Strengthening the Crime Prevention and Criminal Justice Programme: the Role of Italy – 5. Final remarks.

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\* Saggio sottoposto a revisione secondo il sistema per *peer review*.

1. Over the twenty years following the entry into force of the United Nations Convention against Transnational Organized Crime («Palermo Convention»)<sup>1</sup>, this contribution is first aimed at providing the reader with a critical assessment on the implementation of the obligations to criminalize stemming from the Convention and its Additional Protocols<sup>2</sup> for the States Parties, above all in relation to Italy. The research also reveals that, although the notorious difference between the two categories of crimes<sup>3</sup>, the purpose of the Convention – the promotion of cooperation to prevent and fight transnational organized crime (art. 1) -<sup>4</sup> significantly impacted on the Italian legal discipline of counterterrorism. Indeed, the Italian legal discipline has traditionally been focused on the fight against domestic<sup>5</sup> and international<sup>6</sup> terrorism, which a recrimalized by the Italian Criminal Code, but in recent years has this discipline been

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<sup>1</sup> United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, opened for signature by Member States at a High-level Political Conference convened for that purpose in Palermo, Italy, on 12-15 December 2000 and entered into force on 29 September 2003, 190 Parties (as of 26 July 2018), [www.unodc.org](http://www.unodc.org), accessed 26 August 2021. See P. Hauck, S. Peterke, *International Law and Transnational Organised Crime*, Oxford University Press, Oxford 2016, pp. 277-279; A. Mattarella, A. Balsamo and R. Tartaglia (eds.), *La Convenzione di Palermo: il futuro della lotta alla criminalità organizzata transnazionale*, Giappichelli, Torino 2020; S. Carnevale, S. Forlati, O. Giolo (eds.), *Redefining Organized Crime - A Challenge for the European Union?*, Hart, Oxford 2017; S. Forlati, *The Palermo Convention at Twenty: Institutional and Substantive Challenges*, Brill, Leiden 2021) for an in-depth analysis of the contents of the Palermo Convention and the several issues linked to its application by the Parties over the last twenty years.

<sup>2</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children («Protocol against trafficking in persons»), adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000, entered into force on 25 December 2003, 178 Parties; the Protocol against the Smuggling of Migrants by Land, Sea and Air, adopted by General Assembly resolution 55/25, entered into force on 28 January 2004, 150 Parties; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, adopted by General Assembly resolution 55/255 of 31 May 2001 and entered into force on 3 July 2005, 120 Parties, [www.treaties.un.org](http://www.treaties.un.org), accessed 26 August 2021.

<sup>3</sup> At this regard, some preliminary remarks should be done on the political motivations underlying the crime of terrorism and the aim of «financial or other material benefit» to be obtained by an «Organized criminal group» according to Article 2(a) of the Palermo Convention (*supra* note 1). See E. Rosi, *Criminalità organizzata transnazionale e sistema penale italiano*, IPSOA, Milano 2007; M.J. Christensen, N. Boister, *New Perspectives on the Structure of Transnational Criminal Justice*, Leiden, Brill 2018; A. Balsamo, A. Mattarella, R. Tartaglia, *La Convenzione di Palermo: il futuro della lotta alla criminalità organizzata transnazionale*, Giappichelli, Torino 2020; R. Virzo, *La confisca nell'azione internazionale di contrasto ad attività internazionali*, Napoli, ESI 2020.

<sup>4</sup> Palermo Convention, cit., Article 1.

<sup>5</sup> Article 280 of the Italian Criminal Code «Attentato per finalità terroristiche o di eversione» foresees that «Anyone who, for the purpose of terrorism or subversion of the democratic order, attacks the life or safety of a person, is punished, in the first case, with imprisonment not less than twenty years and, in the second case, with imprisonment not less than six years».

<sup>6</sup> The reference is above all to Article 270 *sexies* «Condotta con finalità di terrorismo», but also to Article 270 *bis* «Associazioni con finalità di terrorismo anche internazionale o di eversione dell'ordine democratico», 270 *bis* 1 «Circostanze aggravanti e attenuanti», 270 *quater* «Arruolamento con finalità di terrorismo anche internazionale», 270 *quinquies* «Addestramento ad attività con finalità di terrorismo anche internazionale», 270 *quinquies* 1 «Finanziamento di condotte con finalità di terrorismo» of the Italian Criminal Code.



expanded and updated by the Italian Laws no. 43/2015<sup>7</sup> and 153/2016<sup>8</sup>, as well as by the Legislative Decree no. 21/2018<sup>9</sup>. The article is therefore mainly focused on the relevant enlargement of the scope of the Palermo Convention to all serious crimes<sup>10</sup> with elements of transnationality committed by organized criminal groups<sup>11</sup> (artt. 2-3) and the obligations herein contained for the State Parties to include in their domestic legislations, *inter alia*, the four typical crimes<sup>12</sup>, namely: «participation in an organized criminal group» (art. 5)<sup>13</sup>, «money laundering» (artt. 6-7)<sup>14</sup>, «corruption» (art. 8)<sup>15</sup> and

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<sup>7</sup> Law no. 43 of 17 April 2015 «Conversione in legge, con modificazioni, del decreto-legge 18 febbraio 2015, n. 7, recante misure urgenti per il contrasto del terrorismo, anche di matrice internazionale, nonché proroga delle missioni internazionali delle Forze armate e di polizia, iniziative di cooperazione allo sviluppo e sostegno ai processi di ricostruzione e partecipazione alle iniziative delle Organizzazioni internazionali per il consolidamento dei processi di pace e di stabilizzazione», 91(2015) Official Journal of the Italian Republic, [www.gazzettaufficiale.it](http://www.gazzettaufficiale.it), accessed 26 August 2021.

<sup>8</sup> Law no. 153 of 28 July 2016 «Norme per il contrasto al terrorismo, nonché ratifica ed esecuzione: a) della Convenzione del Consiglio d'Europa per la prevenzione del terrorismo, fatta a Varsavia il 16 maggio 2005; b) della Convenzione internazionale per la soppressione di atti di terrorismo nucleare, fatta a New York il 14 settembre 2005; c) del Protocollo di Emendamento alla Convenzione europea per la repressione del terrorismo, fatto a Strasburgo il 15 maggio 2003; d) della Convenzione del Consiglio d'Europa sul riciclaggio, la ricerca, il sequestro e la confisca dei proventi di reato e sul finanziamento del terrorismo, fatta a Varsavia il 16 maggio 2005; e) del Protocollo addizionale alla Convenzione del Consiglio d'Europa per la prevenzione del terrorismo, fatto a Riga il 22 ottobre 2015», 185(2016) Official Journal of the Italian Republic, [www.gazzettaufficiale.it](http://www.gazzettaufficiale.it), accessed 26 August 2021.

<sup>9</sup> Legislative Decree no. 21 of 1 March 2018 «Disposizioni di attuazione del principio di delega della riserva di codice nella materia penale a norma dell'articolo 1, comma 85, lettera q), della legge 23 giugno 2017, n. 103», 68(2018), Official Journal of the Italian Republic, [www.gazzettaufficiale.it](http://www.gazzettaufficiale.it), accessed 26 August 2021.

<sup>10</sup> A «serious crime» is defined as «conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty» at Article 2(b) of the Convention (*supra* note 1).

<sup>11</sup> According to Article 2(a) of the Palermo Convention (*supra* note 1) an «organized criminal group» means «a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit» (P. Hauck, S. Peterke, *International Law*, cit., p. 277).

<sup>12</sup> As a consequence of the entry into force of the three Additional Protocols to the Palermo Convention, this catalogue of crimes has been added with the trafficking in human beings, smuggling of migrants and offences related to the illicit manufacture and trafficking of firearms. The formulation of such crimes is relevant since it gave an impulse to the Parties to introduce them in their domestic legislation while drafting *ad hoc* laws to ratify the Convention and Additional Protocols, with some relating problems linked to the double incrimination of crimes. For a comment, see D. Luban, J.R. O'Sullivan, D.P. Stewart (eds.), *International and Transnational Criminal Law*, Wolters Kluwer Law & Business, Alphen aan den Rijn 2019, p. 493.

<sup>13</sup> Palermo Convention, cit., Article 5 «Criminalization of participation in an organized criminal group».

<sup>14</sup> Ivi, Article 6 «Criminalization of the laundering of proceeds of crime» and Article 7 «Measures to combat money-laundering». In this regard it should be noted the direct relevance of the Palermo Convention in this field since it provides an *ad hoc* tool for international cooperation (P. Hauck, S. Peterke, *International Law*, cit., p. 277; W.H. Byrnes, R.J. Munro, *Money Laundering, Asset Forfeiture and Recovery and Compliance – A Global Guide*, LexisNexis, New York 2020).

<sup>15</sup> Palermo Convention, cit., Article 8 «Criminalization of corruption». With regard to corruption, it should be noted that more specific legal provisions have been established in separate documents to the

«obstruction of justice» (art. 23)<sup>16</sup>. At the same time, the analysis includes the development – alongside the Criminal Law measures and those aimed at repressing the codified illicit behaviors – of protection and assistance measures in favor of victims of transnational crimes, qualified by the Palermo Convention<sup>17</sup> and the Protocol against trafficking in persons subjects of crimes to be protected and assisted «with full respect of their human rights»<sup>18</sup>. In addition, the research is focused on the relevance of the Palermo Convention to the cooperation among law enforcement bodies<sup>19</sup> and to the request to the Parties of mutual legal assistance when taking evidence or statements, the service of official documents, searches, seizures, freezing of assets, examining objects and sites, and providing information and evidence<sup>20</sup>. However, the limitations existing in the Domestic Law of the requested Party<sup>21</sup> makes it difficult to achieve this, since any action of law enforcement that is not provided for in the current police procedure of the requested Party may be refused<sup>22</sup>.

In the last part of the present contribution, the research is finally focused on exploring the recently adopted UN Resolution 75/196<sup>23</sup>; the new emphasis placed by it on the mechanism for the review of the implementation of the Palermo Convention and its Additional Protocols<sup>24</sup>; the legal implications of its adoption for Italy and the consequent impact on the response to the obligations to criminalize.

2. The analysis leads to some remarks on the legal consequences - and some related critical issues - of the obligations to criminalize stemming from the Palermo Convention for the Italian legislator<sup>25</sup>. In this regard, it should be recalled that the

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Palermo Convention, such the United Nations Convention against Corruption (UNCAC), adopted by General Assembly resolution 58/4 of 31 October 2003, entered into force on 14 December 2005, [www.unodc.org](http://www.unodc.org), accessed 26 August 2021. The Convention's far-reaching approach and the mandatory character of many of its provisions make it a unique tool for developing a comprehensive response to a global problem. However, UNCAC does not go beyond the rules established in UNTOC, but focuses on the several requirements of the fight against corruption, such as preventive measures (Chapter II «Preventive measures»), criminalization (Chapter III «Criminalization and Law Enforcement»), international cooperation (Chapter IV «International Cooperation») and asset recovery (Chapter V «Asset Recovery») (V. Mitsilegas, S. Hufnagel, A. Moiseenko, *Research Handbook on Transnational Crime*, Edward Elgar Publishing, Cheltenham 2019, pp. 35-36).

<sup>16</sup> Palermo Convention, cit., Article 23 «Criminalization of obstruction of justice».

<sup>17</sup> Palermo Convention, cit., Article 25 «Assistance to and protection to victims».

<sup>18</sup> Protocol against trafficking in persons, cit., Article 2(b) «Statement of purpose».

<sup>19</sup> Indeed, it foresees at Article 18 that «Parties are required to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to offences covered by the Convention».

<sup>20</sup> Palermo Convention, cit., Article 18(3) (a)-(e).

<sup>21</sup> Ivi, Article 18(3) (i).

<sup>22</sup> V. Mitsilegas, S. Hufnagel, A. Moiseenko, *Research Handbook*, cit., p. 36.

<sup>23</sup> UN General Assembly Resolution 75/196 of 28 December 2020, Un Doc. A/RES/75/196 (2020).

<sup>24</sup> Ivi, para. 6.

<sup>25</sup> Italy has ratified the Palermo Convention and its Additional Protocols by the Italian Law no. 146 of 16 March, 2006 «Ratifica ed esecuzione della Convenzione e dei Protocolli delle Nazioni Unite contro il crimine organizzato transnazionale, adottati dall'Assemblea generale il 15 novembre 2000 ed il 31

obligations to criminalize requires the commitment of the Parties to treat the aforementioned cases as *crimes* in their domestic legislation, with the consequent approximation of legislations and the desirable resolution of the problems of double criminalization<sup>26</sup>, which hinders the judicial cooperation. This process also involved Italy, where it is all the more important to adopt advanced and specialized legal tools to improve judicial cooperation, as well as to provide for a correct and uniform criminalization of the associative conduct. In this process, the delayed ratification by our Country of the Palermo Convention<sup>27</sup> has had a negative impact, with the result of consolidating the refractoriness to a prompt adaptation process typical of the Italian system, already observed with regard to the European obligations in criminal matters<sup>28</sup>.

One of the reasons for this slowdown can probably be traced back to the previous substantial extraneousness of “transnational crime” in the Italian legal system and the variegation of the cases contemplated by the Palermo Convention and its Additional

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maggio 2001», 85(2006) Official Journal of the Italian Republic, [www.gazzettaufficiale.it](http://www.gazzettaufficiale.it), accessed 26 August 2021. In addition to the ritual provisions of authorization for ratification (Article 1) and order of execution (Article 2), the law contains a series of necessary rules for implementing the Convention and the Protocols, e.g. Article 5 that determines the “central authority” for mutual assistance operations, pursuant to Article 18, paragraph 13, of the Convention; Article 10 on the liability of legal persons and Article 14, which modifies the offense referred to in Article 377 of the Criminal Code, renamed «Intralcio alla giustizia» (see G. Michelini, *La Convenzione di Palermo/2. Il ruolo dell'Italia nella redazione del testo finale*, into *Rivista di Studi e Ricerche sulla Criminalità Organizzata*, 5(2), 2019, p. 21 ss.).

<sup>26</sup> See, for example, the issue of double criminality for extradition purposes, relating to the indication of the fact put in place by the extradition with the same *nomen iuris* in the legal system of the two States, on which the Italian Court of Cassation, II Criminal Section, case 26 April 2016 no. 17172 recalling a principle stated in the previous case 18 June 2009 no. 36038, *Hogea*, Rv. 245589 on the European arrest warrant (evidently also valid for extra-conventional extradition). In this ruling, the Court specified that «for the purposes of delivery abroad, the requirement of double punishment must be satisfied, if not through the full correspondence of the foreign regulatory scheme to the national one, at least in terms of concrete punishment of the case in both jurisdictions» (for a comment see G. Della Volpe, *Il principio della doppia incriminabilità nell'applicazione provvisoria di misure cautelari a fini estradizionali*, [www.giurisprudenzapenale.com](http://www.giurisprudenzapenale.com), accessed 26 August 2021).

<sup>27</sup> *Supra* note 1.

<sup>28</sup> With reference to criminal matters and specifically to the transposition of European Union acts that have an impact on the protection of victims of crimes, it should be recalled the delay of the Italian authorities in implementing the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, which establishes minimum standards on the rights, assistance and protection of victims of crime and which replaces the framework decision 2001/220/JHA, which took place by means of the Italian Legislative Decree no. 212 of 15 December 2015, 3(2016) Official Journal of the Italian Republic, [www.gazzettaufficiale.it](http://www.gazzettaufficiale.it), accessed 26 August 2021. Similarly, it should be taken into consideration the failure of the Italian legislator to transpose by the deadline of 1 January, 2006 the Council Directive 2004/80/EC, of 29 April 2004, on the compensation of victims of crime, Official Journal L 261 of 6 August 2004, [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu), accessed 26 August 2021; indeed, in this case the interplay between European Law and Domestic Law was realized by issuing the Italian Legislative Decree n. 204 of 9 November 2007, 261(2007) Official Journal of the Italian Republic, [www.gazzettaufficiale.it](http://www.gazzettaufficiale.it), accessed 26 August 2021 (on this issue see R. Mastroianni, *Un inadempimento odioso e persistente: la Direttiva comunitaria sulla tutela delle vittime dei reati*, into *Quaderni costituzionali*, 28(2), 2008, p. 406).

Protocols<sup>29</sup>, although the criteria of entrenched national jurisdiction allowed in many cases to criminalize conducts that could be defined as “transnational”. Another critical issue is the exclusion of many of the investigative techniques foreseen by the Convention<sup>30</sup> from the crimes for which criminalization was imposed, although these were known to the Italian system, followed by the introduction of the institution of criminal liability of legal persons in the national system.

3. The analysis of the mentioned issues leads to consider that Italian Law no. 146/2006<sup>31</sup>, issuing the ratification and accession of the Palermo Convention - although in the delayed fulfillment of the obligations of implementation by Italy of the criminalization obligations imposed by the Convention itself – had been drafted with the aim of giving the Italian legislator the opportunity to introduce relevant changes in the Domestic Law. The introduction of the examined Law, substantially in response to the will expressed by the United Nations in the Palermo Convention, became all the more necessary since the Italian Law no. 206/2004<sup>32</sup> has a rather sectorial aspect, namely the protection of victims but limited to domestic terrorism. In addition to that, the effectiveness of Law no. 206/2004 is compromised by the failure of the Italian authorities to allocate adequate economic resources for the compensation of the victims of terrorism and their families<sup>33</sup>.

The intention of the Italian legislator to give a definition of “transnational crime” first emerges from Italian Law no. 146/2006<sup>34</sup>, at the same time improving the domestic legislation on extradition and judicial assistance and for confiscation purposes<sup>35</sup>. With

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<sup>29</sup> *Supra* notes 1 e 2.

<sup>30</sup> Article 20 «Special investigative techniques» of the Palermo Convention (*supra* note 1) provides for the Parties «to allow for [...] the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory for the purpose of effectively combating organized crime».

<sup>31</sup> *Supra* note 25.

<sup>32</sup> Italian Law 3 August 2004, no. 206 «Nuove norme in favore delle vittime del terrorismo e delle stragi di tale matrice», 187(2004) Official Journal of the Italian Republic, [www.gazzettaufficiale.it](http://www.gazzettaufficiale.it), accessed 26 August 2021.

<sup>33</sup> Indeed, Law 204/2006 recognizes «to whoever suffers or has suffered a permanent invalidity of any entity and degree as a result of acts of terrorism [...] an increase of the law in fact recognizes to anyone who suffers or has suffered a permanent invalidity of any entity and degree as a result of acts of terrorism an increase of pensionable earnings of a share of 7,5» (Article 1(1)) and «a 10-year hypothetical increase in contribution payments intended to increase, for an equal duration, the length of pension, the extent of pension, as well as termination or equivalent treatment» (Article 3(1)) (*see* R.S. De Fazio, *La tutela e la memoria delle vittime del terrorismo internazionale*, into *Ordine Internazionale e Diritti Umani*, 2017, p. 57).

<sup>34</sup> Italian Law no. 16 March 2006, no. 146 «Ratifica ed esecuzione della Convenzione e dei Protocolli delle Nazioni Unite contro il crimine organizzato transnazionale, adottati dall'Assemblea Generale il 15 novembre 2000 ed il 31 maggio 2001», 85(2006) Official Journal of the Italian Republic, [www.gazzettaufficiale.it](http://www.gazzettaufficiale.it), accessed 26 August 2021.

<sup>35</sup> UN General Assembly Resolution 75/196, *cit.*, Article 6. The discipline of the cooperation for confiscation purposes was previously based on the disposal of Article 745 C.C.P. «Richiesta di misure

regard to this topic, it should be remarked that Law no. 146/2006 defines more exhaustively both the special cases of compulsory confiscation and confiscation for equivalent<sup>36</sup> and the investigation activity for the purposes of confiscation<sup>37</sup>. However, Law no. 146/2006 is deficient in introducing into the Italian Domestic Law many of the obligations to criminalize foreseen by the Palermo Convention. With regard to counter money laundering<sup>38</sup>, regulated by Article 6 of the Palermo Convention<sup>39</sup> and in the absence of an impact on this discipline by the Law Decree no. 350/2001<sup>40</sup>, Law no. 146/2006 might have contained some disposals aimed at making the economic activities absolutely transparent and identifiable in the interested parties (above all, under a substantial point of view) as well as at making traceable the paths of money flows<sup>41</sup>. Nevertheless, Law no. 228/2003<sup>42</sup> is in line with the first Additional Protocol<sup>43</sup> to the Palermo Convention and its scope, namely the regulatory discipline of the fight against human trafficking.

Law no. 146/2006 is therefore limited to pursuing the scope of adapting the national legal system more coherently to the needs of preventing and fighting transnational crime<sup>44</sup> set out in the Convention and its Additional Protocols, in any case by bringing changes to the previous *corpus* of substantive and procedural provisions in order to influence (hopefully by facilitating) the activities of the police forces and the investigating judiciary in the fight against crime.<sup>45</sup> This task is accomplished above all through the introduction of a specific aggravating circumstance sanctioning the «crime

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cautelari all'estero», providing that «When requesting the execution of a confiscation (240 C.C.), the Minister has the right to request the confiscation» (c. 2).

<sup>36</sup> Italian Law 206/2004, cit., Article 11 «Ipotesi speciali di confisca obbligatoria e confisca per equivalente».

<sup>37</sup> Ivi, Article 12 «Attività di indagine a fini di confisca».

<sup>38</sup> For a comment, see M. Sciarba, *Anti Money Laundering State Mechanisms. International Experiences, Current Issues and Future Challenges*, Edition Faust, Frankfurt am Main 2018.

<sup>39</sup> *Supra* note 1.

<sup>40</sup> Italian Law Decree 25 September 2001, no. 350 «Disposizioni urgenti in vista dell'introduzione dell'euro», 224(2001) Official Journal of the Italian Republic, [www.gazzettaufficiale.it](http://www.gazzettaufficiale.it), accessed 26 August 2021.

<sup>41</sup> See the Report of the discussion held on the draft law for ratification and execution of the United Nations Convention and Protocols against transnational organized crime (AS 2351), released by the Commission in the session of 23 March 2004 of the Parliamentary Commission of Investigation on the Phenomenon of Mafia or Similar Organized Crime of the Italian Parliament, March 2004, [www.parlamento.it](http://www.parlamento.it), accessed 26 August 2021, p. 6.

<sup>42</sup> Italian Law 11 August 2003, no. 228 «Misura contro la tratta di persone», 195(2003) Official Journal of the Italian Republic, [www.gazzettaufficiale.it](http://www.gazzettaufficiale.it), accessed 26 August 2021.

<sup>43</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, *supra* note 2.

<sup>44</sup> For a definition, see Italian Law no. 146/2006, cit., Article 3 «Definizione di reato transnazionale».

<sup>45</sup> On this issue, see F. Pakes, *Comparative Criminal Justice*, Routledge, London 2018.

of a transnational nature»<sup>46</sup> to be considered as «serious»<sup>47</sup> pursuant to Article 2(b) of the Palermo Convention: the most severe punishment of crimes attributable to a transnational criminal context underlies the reference to the notion of «transnational offence» stemming from Article 3 «Scope of application» of the Palermo Convention<sup>48</sup>.

In addition to the critical issues stressed with regard to the partial introduction of the obligations to criminalize into the Italian Domestic Law there is the question of the assistance provided to victims of crimes, introduced into the Italian legal system by Law no. 206/2004. Also, with regard to Law no. 206/2004, its difficult implementation has *de facto* left incomplete this discipline, foreseen by the Palermo Convention<sup>49</sup> in relation to the victims of transnational crimes and by its Additional Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children<sup>50</sup> in relation to the victim of human trafficking<sup>51</sup>. This is a matter that required (and still requires) to be introduced into the Italian legal system with the aim of regulating psychological, social and legal assistance suitable for guaranteeing the full and free exercise of the rights attributed to victims of crimes<sup>52</sup>. Neither the provision of State compensation and restitution interventions pursuant to the Palermo Convention<sup>53</sup>, suitable for guaranteeing the exercise of rights, has been introduced into the Italian Domestic Law. This lack also relates to the failure to introduce into the Italian legal system the most adequate guarantees of participation in the trial according to the Palermo Convention<sup>54</sup>, as well as the insurance for the victims of the crime and for the

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<sup>46</sup> Palermo Convention, cit., at Article 2 «Use of terms» defines «Serious crime» as «[...] a conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty».

<sup>47</sup> *Ibidem*;

<sup>48</sup> Palermo Convention, cit., at Article 3(2) establishes that « an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State».

<sup>49</sup> Palermo Convention, cit., Article 25 «Assistance to and protection of victims».

<sup>50</sup> *Supra* note 2, Section II «Protection of victims of trafficking in persons».

<sup>51</sup> In relation to the relevant domestic and European legislation on the fight against human trafficking, it should be recalled the Italian legislative decree no. 24/2014 «Attuazione della direttiva 2011/36/UE, relative alla prevenzione e alla repressione della tratta di esseri umani e alla protezione delle vittime, che sostituisce la decisione quadro 2002/629/GAI», 60/2014 Official Journal of the Italian Republic, [www.gazzettaufficiale.it](http://www.gazzettaufficiale.it), accessed 26 August 2021.

<sup>52</sup> In relation to the protection of the victims' rights, *see inter alia* K. Braun, *Victim Participation Rights: Variation Across Criminal Justice Systems*, Springer, Berlin 2019 and P.M. Tobolowsky, *Crime Victim Rights and Remedies*, Carolina Academic Press, Durham 2016.

<sup>53</sup> Palermo Convention, cit., at Article 25(2) foresees that «Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention».

<sup>54</sup> Palermo Convention, cit., Article 25(3) on the duty of the Parties «[...] to enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defense».

witnesses of adequate compensation measures for the expenses incurred for participating in judicial and procedural activities.

The topics treated in relation to the implementation by the Italian legislator of the obligations to criminalize definitely recall some critical remarks on the partial accomplishment of the duty imposed on the Parties of the Palermo Convention to adequate their legislation to the innovative and detailed catalogue of provision linked to the fight against transnational crimes. An issue that is strictly linked to the implementation in Italy of the obligations to criminalize, several times revealed as difficult and long lasting, definitely recalls the need for new legislative measures aimed at ensuring the effectiveness of International and European Law in practice.

In relation to the implementation of the obligations to criminalize stemming from the Palermo Convention and their transposition in the domestic legislations, it should also be considered the role played by the domestic Courts in the interpretation of the Convention and its application in case law. As for the treatment of transnational organized crimes, some legal implications have arisen from the qualification done by the Italian Court of Cassation, case no. 15107/2016, II Criminal Chamber, Judgment, 7 April 2016, of the crime of massacre as a «crime against humanity that offends transnational interests»<sup>55</sup>. The sentence of the Court of Cassation was related to the “massacre of bar Sayonara” committed in Naples on 11 November 1989 by representatives of two local camorra families, as part of a clash between rival factions. The massacre had provoked six victims, and therefore, ten of the seventeen defendants had been sentenced to life imprisonment by the Court of Naples in 2013, while the remaining seven had been sentenced to eighteen or sixteen years of imprisonment. Compared to the judgment of 2013, however, the Court of Appeal of Naples on 23 January 2015 partially overturned the previous judgment, considering that against the defendants who had used the aforementioned mitigating factor the crime would have been extinguished by prescription after 22 years and six months. Nevertheless, in case no. 15107/2016 the Court of Cassation finally adhered to the orientation according to which crimes punished in abstract with life imprisonment for being the consequence of the death of one or more people, regardless of the recourse to extenuating circumstances that determine, in concrete terms, the application of a temporary prison sentence, were to be considered imprescriptible. Indeed, according to the Court of Cassation, the principle of non-retroactivity was not be invoked in relation to the crime of massacre since it, as «a crime that offends in every time and place the interests of the Union», should be considered included among the hypotheses referred to in Article 7, para. 2 of the ECHR<sup>56</sup>.

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<sup>55</sup> For a comment see S. Bernardi, *Prescrizione e strage alla luce del diritto europeo: una nuova problematica sentenza della Cassazione*, [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it), accessed 26 August 2021 and F. Capone, *La qualificazione del delitto di strage come crimine contro l'umanità*, into *Giurisprudenza italiana*, 2016, pp. 2498-2503).

<sup>56</sup> S. Bernardi, *Prescrizione e strage*, *cit.*, para. 3.

As known, this provision endorses the principle of retroactivity of the most favorable discipline in Criminal Law, allowing the punishment - even retroactive - of actions (or omissions) that, at the time when they were committed, constituted «crimes» according to the general principles of law recognized by civil nations<sup>57</sup>. But in the interpretation of the notion of «crimes» according to Article 7.2 of the ECHR, the Court of Cassation includes the crime of massacre, as an «infringement of transnational interests», thus creating a confusion with the definition of «crime of transnational nature» given by Article 3 of the Palermo Convention<sup>58</sup>.

4. With reference to current events, particular attention seems to have been drawn once again to the fight against transnational crime<sup>59</sup> by the International Community through the adoption by the United Nations General Assembly at its 75th session, of Resolution 75/196<sup>60</sup> on «Strengthening the United Nations crime prevention and criminal justice programme, in particular its capacity for technical cooperation». The Resolution, proposed by Italy, is mainly aimed at giving particular emphasis to the Palermo Convention and its Additional Protocols, since they are considered as the most important tools of the International Community for fighting transnational organized crime<sup>61</sup>. Therefore, in the twentieth anniversary of its adoption by Resolution 55/25 of 15 November 2000<sup>62</sup>, the mechanism for the review of the implementation of the Palermo Convention and its Additional Protocols, adopted by the States Parties to the Convention in 2018, is recalled by Resolution 75/196<sup>63</sup>, urging Parties to actively participate in and support this process<sup>64</sup>.

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<sup>57</sup> E. Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees*, Oxford, Oxford University Press 2015, p. 208.

<sup>58</sup> *Supra* note 1.

<sup>59</sup> In 2019, when the process of adoption of Resolution 75/196 started, the General Debate of the General Assembly clearly highlighted the commitment of Member States to tackling organized crime and dismantling terrorist networks – a goal that the growth of connectivity and mobility in the global world has made more complex. On this issue, *see* the speech addressed by Ambassador Stefano Stefanile, Deputy Permanent Representative of Italy to the United Nations, at the Meeting of the Third Commission on “Strengthening the United Nations crime prevention and criminal justice programme, in particular its technical cooperation capacity” of October 2019 ([www.italyun.esteri.it](http://www.italyun.esteri.it), accessed 26 August 2021).

<sup>60</sup> Resolution 75/196 has been adopted on the report of the Third Committee (Social, Humanitarian and Cultural Affairs) of the General Assembly (A/75/479), para. 20, after the item entitled «Crime prevention and criminal justice» had been included in the agenda of the seventy-fifth session of the General Assembly on the recommendation of the General Committee, and allocated at its 2nd plenary meeting, on 18 September 2020, to the Third Committee.

<sup>61</sup> UN General Assembly Resolution 75/196, cit., para. 6.

<sup>62</sup> *Supra* note 1.

<sup>63</sup> UN General Assembly Resolution 75/196, cit., para. 7.

<sup>64</sup> The occasion for the launch of the review process has been the tenth session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, held in Vienna from 12 to 16 October 2020 (*see* [www.unodc-organ.org](http://www.unodc-organ.org), accessed 26 August 2021).



The role of Italy in this regard is supposed to be crucial<sup>65</sup>: indeed, it has already been a pioneer in the establishment of Central Authorities and Specialized Agencies (e.g. Eurojust) that enable effective judicial cooperation at the international level - specifically in the fight against organized crime -<sup>66</sup>, also offering its expertise in this field<sup>67</sup> as a source of inspiration for other States when addressing this issue. Furthermore, the several types of crimes considered as “organized” need to be reported. As for illegal drug market, according to the statistics for Europe released by Europol<sup>68</sup> and the European Monitoring Centre for Drugs and Drug Addiction<sup>69</sup> in 2019 drug markets and organized crime groups have adapted to police enforcement, often becoming more exploitative and innovative, especially in their use of online and digital resources<sup>70</sup>. Then, human trafficking and migrant smuggling<sup>71</sup> are still on the agenda of policymakers as the main challenges facing the International Community<sup>72</sup>. At the

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<sup>65</sup> It should be remarked that Italy’s priorities in the work of the Third Committee on preventing crime and tackling illegal drugs reflects the Italian longstanding engagement in this field. The history of the fight against organized crime in Italy is mostly linked to the fight against mafia-style organizations and Italy has long promoted initiatives for fighting organized crime at UN and within the European Union and the Council of Europe (S. Carnevale, S. Forlati, O. Giolo (eds.), *Redefining Organized Crime*, cit., p. 3).

<sup>66</sup> With reference to the role of Eurojust, the Agency is considered as “[...] the main supranational judicial structure in the world promoting the coordination of investigations on cross-border crime”, whose establishment has led to models of coordination between judicial authorities of various Member States on whose territory the investigations on serious crimes are conducted (R. E. Kostoris, *Handbook of European Criminal Procedure*, Springer, Berlin 2018, p. 227). Among its main functions, there is the follow up of those cases – especially those on international transnational crime -, involving more than two Member States, in order to determine the best venue for prosecution. In addition, Eurojust coordinates meetings with all the Countries involved in one case and invites the competent authorities to transfer their proceedings to the Country that is in the position to prosecute, convict or confiscate the proceeds of the crime (W. H. Byrnes, R. J. Munro, *International Law*, cit., p. 6). For the most recent developments of the Agency see T. Rafaraci, R. Belfiore (eds.), *EU Criminal Justice: Fundamental Rights, Transnational Proceedings and the European Public Prosecutor’s Office*, Springer, Berlin 2018, pp. 183-184; V. Mitsilegas, F. Giuffrida, *The role of EU Agencies in Fighting Transnational Environmental Crime. New challenges for Eurojust and Europol*, Brill, Leiden 2017.

<sup>67</sup> See *infra* note 52.

<sup>68</sup> See [www.europol.eu](http://www.europol.eu), accessed 26 August 2021.

<sup>69</sup> See [www.emcdda.europa.eu](http://www.emcdda.europa.eu), accessed 26 August 2021.

<sup>70</sup> See [www.transformdrugs.org](http://www.transformdrugs.org), accessed 26 August 2021.

<sup>71</sup> According to UNODC, human trafficking involves the recruitment, movement or harboring of people for the purpose of exploitation - such as sexual exploitation, forced labor, slavery or organ removal. Victims can be children or adults, boys, girls, men or women, and are trafficked by the use of improper means such as the threat or use of force, fraudulent schemes, deception, or abuse of power. It can occur within a country or across borders ([www.unodc.org](http://www.unodc.org), accessed 26 August 2021). With regard to child trafficking, it is defined as «The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation» by the Protocol on Human Trafficking, cit., art. 3(c), accessed 26 August 2021.

<sup>72</sup> R. Väyrynen, *Illegal Immigration, Human Trafficking, And Organized Crime*, Discussion Paper 2003/072, Unu-Wider, Helsinki2003, pp 1-27. See also European Migrant Smuggling Centre/Europol, *4<sup>th</sup> Annual Report 2020*, [www.europol.europa.eu](http://www.europol.europa.eu), accessed 26 August 2021, to look back at the operations supported in 2019 by the Centre and the intelligence gathered to draw the possible evolution of these crime areas in the upcoming months.

same time, it should be noted that illegal financial flows are funding criminal and terrorist activities, taken into consideration the link between organized crime and terrorism<sup>73</sup>: definitely, organized crime poses a concrete threat to peace, security and sustainable development, requiring the double intervention - under International Law, by the full implementation and review mechanism of the Palermo Convention, foreseen by Resolution 75/196<sup>74</sup>, and under Domestic Law of the Parties to the Convention.

Furthermore, the need to fully implement the Convention already emerged with evidence from the conclusions of the General Assembly High-level Debate on «The Role of Regional Organizations in Strengthening and Implementing Crime Prevention Initiatives and Criminal Justice Responses», which took place on 6 June 2019. In this scope, also Resolution 75/196 recalls the United Nations Crime Prevention and Criminal Justice Programme<sup>75</sup>, urging States to develop national, sub-regional, regional and international strategies to prevent organized crime, with the support of relevant international organizations and other necessary measures<sup>76</sup>. These include the establishment - in accordance with Domestic Law and practice - of designated central and competent authorities and effective points of contact dedicated to facilitating the procedures related to international cooperation - including for extradition and mutual legal assistance requests - in order to effectively address transnational organized crime<sup>77</sup>.

5. From the research emerged several aspects linked to the implementation of the Palermo Convention, with particular emphasis to the obligations stemming from the Convention to criminalize *inter alia* the four typical crimes<sup>78</sup> and the (sometimes) critical issues linked to the transposition of these obligations into the Domestic Law of the Parties. This is the case of Italy, where Law no. 146/2006<sup>79</sup>, issuing the ratification and accession of the Palermo Convention<sup>80</sup>, revealed the incompleteness of the catalogue of rights to protect according to the provisions of UNTOC. At the same time, Italian Law no. 206/2004<sup>81</sup>, providing for the protection of victims of domestic terrorism, proved to be difficult because of its non-application. Nevertheless, a new

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<sup>73</sup> A. Prokić, *The link between organized crime and terrorism*, *Law and Politics* 15(1) 2017, p. 85 ss.

<sup>74</sup> *Supra* note 60.

<sup>75</sup> Ivi, para. 20.

<sup>76</sup> The United Nations Crime Prevention and Criminal Justice Programme has been accompanied by the establishment of a Network consisting of the United Nations Office on Drugs and Crime and a number of interregional and regional institutes around the world, as well as specialized centers. The network has been developed to assist the international community in strengthening co-operation in the crucial area of crime prevention and criminal justice ([www.unodc.org](http://www.unodc.org), accessed 26 August 2021).

<sup>77</sup> *Supra* note 60, para. 20.

<sup>78</sup> *Supra* notes 13-16.

<sup>79</sup> *Supra* note 25.

<sup>80</sup> *Supra* note 1.

<sup>81</sup> *Supra* note 32.

emphasis on the fulfillment by Italy - as State Party to the Palermo Convention<sup>82</sup> - of the obligations to criminalize stemming from UNTOC and its Protocols, which are core components of any crime prevention and criminal justice program, seems to have been recently placed by the adoption of Resolution 75/196<sup>83</sup>.

At this scope, the implementation of the review mechanism<sup>84</sup> of the Convention should be ensured, mainly by the closest cooperation with UNODC<sup>85</sup> and with all other relevant international institutions. The full implementation of the Palermo Convention also passes through Italy's support to Goal 16 of Agenda 2030<sup>86</sup>, an objective that could be achieved first by disseminating a culture of legality, with a focus on youth and education. Then, by enhancing access to justice, including by taking advantage of the opportunities offered by information technology. Finally, by advancing the protection of human rights for all, through a functional justice system for both victims and perpetrators of criminal actions.

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<sup>82</sup> At this regard it should be recalled the impulse given by the Conference of the Parties to the UNTOC, in its tenth session of 12-16 October 2020, to the review of the implementation of the Convention and its Additional Protocols, as well as the treatment of other serious crimes, as defined in the Convention, including new forms and dimensions of transnational organized crime (see the Provisional agenda for the eleventh session of the Conference, CTOC/COP/2020/L.2, [www.unodc.org](http://www.unodc.org), accessed 26 August 2021).

<sup>83</sup> *Supra* note 23.

<sup>84</sup> *Supra* note 60.

<sup>85</sup> UNODC is the major UN actor in the field of crime prevention and criminal justice and assists requesting Member States to enhance the capacity of key crime prevention actors and systems to operate more effectively and in accordance with human rights, with a view to reduce crime, violence and victimization ([www.unodc.org](http://www.unodc.org), accessed 26 August 2021).

<sup>86</sup> Goal 16 of Agenda 2030 recalls for «Peace, justice and strong institutions» and implies the sustainable development, the respect of human rights and effective governance, based on the rule of law ([www.undp.org](http://www.undp.org), accessed 26 August 2021). See R. Smith, *International Human Rights Law*, OUP, Oxford 2020, p. 408 for a comment on the three dimensions of sustainable development (social, environmental and economic).