



The international criminal court. The legislation of Italy on the statute and on cooperation with the ICC

La cour pénale internationale. La législation de l'Italie sur le statut et la coopération avec la CPI

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Abstract: After 20 years from its entry into force, the Statute of the International Criminal Court (ICC), approved in Rome in July 1998, returned to the attention of the international community. The spirit of the ICC, i.e. an international judge, pre-established by the United Nations' Law, able to prosecute and bring to justice the most serious crimes of concern to the international community as a whole, is recalled when war scenarios return to be close and concrete. At the same time, the status of ratifications of the Rome Statute, of its implementation, and of cooperation with the Court is far from being fully effective. When establishing the ICC, the international community affirmed that genocide, war crimes, crimes against humanity and the crime of aggression must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, In EU Member States, including Italy, a comprehensive legislative framework is established with a view to cooperating with the ICC. However, current scenarios suggest checking its efficiency and to further strengthen cooperation with ICC

Keywords: International Criminal Court (ICC), Rome Statute, national implementation, aggression, judicial cooperation

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Résumé : 20 ans après son entrée en vigueur, le Statut de la Cour pénale internationale (CPI), approuvé à Rome en juillet 1998, est revenu à l'attention de la communauté internationale. L'esprit de la CPI, c'est-à-dire d'un juge international, préétabli par le droit des Nations Unies, capable de poursuivre et de traduire en justice les crimes les plus graves qui préoccupent la communauté internationale dans son ensemble, est rappelé lorsque les scénarios de guerre redeviennent proches et concrets. Dans le même temps, l'état des ratifications du Statut de Rome, de sa mise en œuvre et de la coopération avec la Cour est loin d'être pleinement efficace. Lors de la création de la CPI, la communauté internationale a affirmé que le génocide, les crimes de guerre, les crimes contre l'humanité et le crime d'agression ne devaient pas rester impunis et que leur poursuite effective devait être assurée par l'adoption de mesures au niveau national et par le renforcement de la coopération internationale. Dans les États membres de l'UE, y compris l'Italie, un cadre législatif complet est établi en vue de coopérer avec la CPI. Cependant, les scénarios actuels suggèrent de vérifier son efficacité et de renforcer encore la coopération avec la CPI

Mots clés : Cour pénale internationale (CPI), Statut de Rome, mise en œuvre nationale, agression, coopération judiciaire

Introduction

After 20 years from its entry into force, the Statute of the International Criminal Court (ICC), approved in Rome in July 1998, returned to the attention of the international community, especially in Europe where the Russia - Ukraine conflict exploded in February 2022.

The ICC Statute entered into force on 1st July 2002, according to Art. 126.1:

“This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.”

The Rome Statute of the International Criminal Court was negotiated in its final text and approved by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held in Rome (Italy) -15 June -17 July 1998.

The spirit of the ICC, i.e. an international judge, pre-established by the United Nations' Law, able to prosecute and bring to justice the most serious crimes of concern to the international community as a whole, is recalled when war scenarios return to be close and concrete.

It is interesting to underline the Preamble of the Statute, where the State Parties to the Statute affirm, *inter alia*:

... Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,
Recognizing that such grave crimes threaten the peace, security and well-being of the world,
Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,
Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,
Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,
... **Determined** to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole
... **Resolved** to guarantee lasting respect for and the enforcement of international justice ...”
have agreed ...

The principles of peace set in the ICC Statute remain actual after 25 years and should be recalled in an historical perspective when designing a post-war scenario.

A season of international conventions

The ICC Statute was approved during an historical season where international conventions, including and especially at UN level, appeared to be a powerful instrument of peace and were agreed at a very wide level.

Following it, other main instruments of International Criminal Law were approved, which set important and widely accepted high standards of harmonisation of crimes and judicial cooperation in criminal matters.

I refer to UNTOC – the Palermo Convention (2000) and UNCAC – the Merida Convention (2003), both with a high level of signatures and ratifications.

The United Nations Convention against Transnational Organized Crime was opened for signature in Palermo, Italy, on 12-15 December 2000 and entered into force on 29 September 2003.

Currently (October 2022) it has 147 Signatories and 190 Parties.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime entered into force on 25 December 2003.

Currently it has 117 Signatories and 179 Parties.

The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime entered into force on 28 January 2004.

Currently it has 112 Signatories and 151 Parties.

The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime was opened for signature on 31 May 2001, and entered into force on 3 July 2005.

Currently it has 52 Signatories and 122 Parties.

The United Nations Convention against Corruption was open for signature from 9 to 11 December 2003 in Merida, Mexico and entered into force on 14 December 2005.

Currently it counts 189 Parties.

The Rome Statute had a narrower acceptance from the beginning of the process.

Currently 123 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 33 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western European and other States.

However, 3 on 5 permanent members of the Security Council (China, Russia, USA) are not parties to the Statute (China never signed it, USA didn't ratify it and withdrew the signature), as well as States as India, Turkey, Israel, Iran, Ethiopia.

The ICC roots and some other experiences of international criminal jurisdiction

The great innovation of the ICC - at the end of the 20th century - is to be an international “natural” judge, i.e., a pre-established judge (not a *post factum* judge, and not a court of the winners of the war), within the (but independently) UN system.

The roots of the ICC are to be found in the International Tribunals created after WW II (Nurnberg Tribunal and Tokyo Tribunal): the Nurnberg Tribunal and Tokyo Tribunals (military tribunals) were established by a decision of the 4 allies, winners of the war (USA, USSR, UK, France for the Nurnberg Tribunal) or of the countries who signed the surrender of Japan.

In the 90s the international community established the ICTY and the ICTR by a decision of the UN Security Council. Such mechanism included a discussion on the possibility to establish a Court as a means to maintain or recover peace, which found a solution with a reference to the commitment of UN Member States to cooperate with the UN with a view to the ensure the international protection of Human Rights.

The International Criminal Tribunal for the former Yugoslavia (1993 - 2017) was a United Nations court of law that dealt with war crimes that took place during the conflicts in the Balkans in the 1990s.

The United Nations Security Council in 1995 established the International Criminal Tribunal for Rwanda to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring States, between 1 January 1994 and 31 December 1994.

The ICTR was closed on 31st December 2015.

Also, in the 90s, a number of mixed (or hybrid or internationalised) Tribunals were experienced. They have been established in post-conflict situations, being composed of local judges and international judges. Examples of such multilateral model were carried out in Kosovo, East Timor, Sierra Leone, Cambodia, mainly within UN peacekeeping missions and with different competences.

The specificity of the ICC

Not having retro-active competence, the ICC has a stronger legitimacy compared to its antecedents, rooted in the willingness of the (member) States not to leave unpunished the most serious crimes of concern to the international community and to contribute to the prevention of such crimes, as stated in the Preamble of the Statute.

Furthermore (Article 1), the ICC is established as a permanent institution, complementary to national criminal jurisdictions, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution (Article 17, Article 18).

Therefore, the meaning of the Rome Statute in the history of relationships among States within the UN System is the passage from the force to the trial, from the specific historical fact to the permanent structure, from the special judge to the pre-established from the law judge.

At the same time, the status of ratifications of the Rome Statute, of its implementation, and of cooperation with the Court is far from being fully effective.

When establishing the ICC, the international community affirmed that genocide, war crimes, crimes against humanity, and the crime of aggression must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

In EU Member States, including Italy, a comprehensive legislative framework is established with a view to cooperating with the ICC. However, current scenarios suggest checking its efficiency and to further strengthen cooperation with ICC

The ICC jurisdiction

As stated by art. 5 of the Rome Statute, the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.

The crimes within the jurisdiction of the Court in accordance with the Statute are the following:

- (a) **The crime of genocide,**
- (b) **Crimes against humanity,**
- (c) **War crimes,**
- (d) **The crime of aggression.**

For the purpose of the Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group ... (**Article 6 – Genocide**).

For the purpose of the Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack ... (**Article 7 - Crimes against humanity**).

The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes ... (**Article 8 - War crimes**).

At the time of the adoption of the Rome Statute (1998), the consensus was not reached on the definition of the crime of aggression, i.e., the crime against peace of the Nurnberg and Tokyo Tribunal.

The following provision was adopted (**Article 5.2**):

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

The Assembly of State Parties agreed later on such definition, and the Review Conference of the Rome Statute, held in Kampala, Uganda, from 31 May to 11 June 2010 adopted the amendments on the crime of aggression on 11 June 2010.

The parties to the Amendment are 43.

A new **Article 8 bis** was inserted in the ICC Statute in 2010, which reads as follows:

Crime of aggression

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations ... regardless of a declaration of war ...

The triggering mechanisms to involve the jurisdiction of the Court are:

1. Referral of a situation by a State Party (or more State parties) to the Prosecutor,
2. UNSC Referral,
3. The initiation of investigations *proprio motu* by the Prosecutor, subject to authorisation of the Pre-Trial Chamber.

The ICC and the war in Ukraine

An interesting debate is ongoing on the possibility to involve the jurisdiction of the Court on the conflict exploded in Europe. According to the ICC website (ICC-CPI.INT: 2022), the situation of Ukraine was referred to the ICC by 43 States Parties in March - April 2022.

ICC investigations were opened on 2 March 2022. The focus of such investigations is on alleged crimes committed in the context of situation in Ukraine since 21 November 2013.

Ukraine is not a State Party to the Rome Statute, but it has twice exercised its prerogatives to accept the Court's jurisdiction over alleged crimes under the Rome Statute occurring on its territory.

The first declaration lodged by the Government of Ukraine accepted ICC jurisdiction with respect to alleged crimes committed on Ukrainian territory from 21 November 2013 to 22 February 2014.

The second declaration extended this time period on an open-ended basis to encompass ongoing alleged crimes committed throughout the territory of Ukraine from 20 February 2014 onwards.

On 28 February 2022, the ICC Prosecutor announced he would seek authorisation to open an investigation into the Situation in Ukraine.

On 2 March 2022, the Prosecutor announced he had proceeded to open an investigation into the Situation in Ukraine on the basis of the referrals received.

It is to be recalled the fact that the ICC judges individuals and not States (Arbia: 2022).

States' responsibility for violations of the Charter are of competence of the International Court of Justice.

Furthermore, the Rome Statute is a Treaty, and cooperation with the institution by member States is needed.

On the other side, the official qualification of the defendant is not relevant (including the qualification of Head of State or member of the Government) under the ICC Statute (**Article 25** - Individual criminal responsibility; **Article 27** - Irrelevance of official capacity), and international Tribunals elaborated a specific case-law on the liability of commanders and military chiefs, and on unlawful orders.

Concerning the crime of aggression, **Article 15 bis. 5** of the ICC Statute (introduced on the occasion of the amendments introducing the definition of such crime) states that:

In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.

However, ICC is not able to try *in absentia*.

Therefore, a hypothetical judicial proceeding before the ICC would not cover the possible commitment of the crime of aggression (not Russia nor Ukraine is party to the Rome Statute).

It could arrive to the stage of *confirmation of charges before trial* - Article 61 of the ICC Statute) but would probably stop before the opening of the trial ("The accused shall be present during the trial" - Article 63).

Nevertheless, this doesn't mean that investigations will be useless (Tarfuser: 2022).

Responsible persons under a request of surrender will not be able to leave their country.

Victims can find hearing and have their experience recorded and collected.

Although considering the paralysis of the Security Council and the complex range of measure adopted at EU and State level, as well as critics on *double standards*, the ICC member States which referred the Ukrainian situation to the ICC Prosecutor have the duty to fully cooperate with a view to having effective and complete investigations on the possible war crimes and crimes against humanity occurred during the conflict (Meloni: 2022).

The intervention of the ICC would operate within the framework of an existing and legitimate UN instrument, and independent and pre-established Court, disciplined by a Treaty, and without immunities.

Other solutions proposed encompass the exercise of universal jurisdiction by the States who envisage it, or the establishment of an *ad hoc* Tribunal with specific competence for the crime of aggression. Also, it is to be taken into account that the Russian Federation ceased to be member of the Council of Europe as from 16 March 2022 and to be a party of the European Convention of Human Rights as from 16 September 2022.

² **Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe** (Adopted by the Committee of Ministers on 16 March 2022 at the 1428th meeting of the Ministers' Deputies. <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7435446-10180882&filename=The%20Russian%20Federation%20ceases%20to%20be%20a%20Part%20of%20the%20European%20Convention%20on%20Human%20Rights.pdf>

The legislation of Italy on the Statute and on cooperation with the ICC

In Italy, the ICC Statute was ratified right after its approval, with the understanding that its core principles were already incorporated within the Constitutional order of the country³. Therefore, a short Law (4 articles, followed by the text of the Statute) authorised the ratification and ordered execution of the international instrument in the territory of the Country. Issues of adaptation of internal legislation to the Rome Statute and of cooperation of national authorities with ICC organs were disciplined at a later stage⁴.

It was clarified that the Ministry of Justice is the central administrative authority responsible of the cooperation with the ICC and that the Rome Court of Appeals is the central judicial authority responsible of the cooperation with the ICC.

The Law regulates procedures of cooperation, of surrender of persons searched by the ICC and found in the national territory, execution of detention and of other sanctions.

A further Law was approved with the purpose of implementing the amendments to the ICC Statute regulating the crime of aggression, and the exercise of jurisdiction over such crime⁵.

Finally, it is currently under study the approval of a specific Code of International Crimes, separate from the ordinary Criminal Code and Code of Criminal Procedure, with a view to ensuring complete adaptation to the Rome Statute, with a specific discipline of the command responsibility.

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⁴ Legge 20 dicembre 2012, n. 237 - Norme per l'adeguamento alle disposizioni dello statuto istitutivo della Corte penale internazionale.

⁵ Legge 10 novembre 2021, n. 202 - Ratifica ed esecuzione degli emendamenti allo Statuto istitutivo della Corte penale internazionale, ratificato ai sensi della legge 12 luglio 1999, n. 232, adottati a Kampala il 10 e l'11 giugno 2010.

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