

Short Opinion from the perspective of the Italian national partner

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1. General remarks.

The JUSTICE Project aims at analyzing the content and the case law of the counterterrorism legal framework adopted by some selected European countries (Italy, France, Germany, Belgium and Spain) as an implementation of the Directive 541/2017. The main goals of the project are 1. to assess whether and how each country system is compliant with fundamental human rights and freedoms as expected by article 23 Dir. 541/2017 and 2. to identify and share best practices developed both at national and European level in order to ensure that the interpretation and application of the rules are in line with the fundamental principles mentioned by the Directive itself.

The proposed methodology is based on the efficient combination of a background analysis and field surveys involving lawyers, prosecutors, judges, CSOs and LEAs members in view of a co-creation of knowledge and life-long/high level training of all the different stakeholders involved. The extreme heterogeneity of the aforementioned profiles is the project's main asset and its added value because it is thanks to the comparison with different opinions, backgrounds and sensitivities that such a complex matter can be addressed in the most appropriate way.

I have the honor of being part of the project and I believe that the activities carried out so far achieved all the ambitious objectives planned at the moment of the submission of the proposal.

The design of an effective system for preventing and combating international terrorism is characterized by the potential conflict between security needs and the protection of fundamental freedoms (such as *inter alia* opinion, press, religion), human rights and the main procedural guarantees. International terrorism is, today, one of the most serious forms of crime because it threatens public security and democracy, is frequently the scope of criminal organizations, has a transnational structure and important impacts on the financial system (in the two-directional form of the financing towards terrorist organizations and the infiltration of terrorist groups into the legal economic system). It is also a topic seriously impacted by criminal policy choices that are able to orientate the public debate and influence the public opinion.

It is therefore crucial to ensure an acceptable balance between the protection of fundamental interests of the community and the respect of fundamental rights and guarantees in order to avoid sacrificing the fundamental principles on which the democracies and Europe itself are founded on the altar of security.

Since the very beginning of the planned activities, the ambitious goal of the project was to encourage the achievement of this difficult but necessary balance. Baseline analysis, research phases and field surveys were therefore respectively alternated involving the main stakeholders: from experts to legislators, from judges to prosecutors, from social workers to members of national and international institutions. The synergy between background and applied actions has made it possible to evaluate concretely how Directive 541/2017 has been legally and practically implemented in the selected countries.

Through the interviews conducted we were able to achieve a first important output: the identification of a sort of "lowest common denominator". More specifically, there are some characteristic figures shared by all national counterterrorism legislations, such as the anticipation of the threshold of criminal intervention to the level of the danger (or even of the mere risk) of terrorist attacks, the criminalization of any form of participation and support to terrorist group, the provision of crimes related to conducts of public instigation, apology, propaganda, recruitment, training and organization of travel for a terrorist purpose.

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Even in the face of substantially common legislative provisions, the interviews conducted on the field and the comparison between the different national systems have allowed to highlight significant differences such as the interpretation of the terrorist crime, investigative tools, prevention measures and mechanisms provided for the protection of victims and the fragile groups involved (women, minors, migrants). The debate between experts coming from different countries also made it possible to show how the counterterrorism legislation cannot be assessed only in an abstract dimension, since it is essential to take into account the social, historical and economic background of each country.

This investigation into both the legal structure and practice of the counterterrorism legislation allowed us to arrive prepared to the appointment with the key-activities of the project: the four international workshops organized to allow experts, lawyers, judges, prosecutors, representatives of CSOs and LEAs to compare and share best practices developed on a national level. In particular, the choice of topics to be dealt within the four workshops was made following, in line with the application of DG Justice, the structure of Directive 541/2017 in order to give continuity to the different topics putting them into the logical and progressive order suggested by the Directive itself.

The Pisa workshop focused on the analysis of the material and mental element of the terrorist crime with particular regard to the aforementioned issue of the anticipation of the intervention threshold to the level of the danger of terrorist attacks and the definition of the intentional element. The vivid dialogue between prosecutors and lawyers has made it possible to underline how one of the most debated issues is the definition of the elements required to be considered part a terrorist group. The Italian experience in the field of the mafia-type organized crime and the 70's political terrorism has allowed national judges to share many years of experience and to highlight the importance of requesting the proof of a material contribution to a terrorist group, as well as the awareness of contributing to achieve the group's criminal goals. The restrictive interpretation of the crime of participation in a terrorist group has proven to be fundamental to ensure the application of the other different terrorist crimes introduced in line of the Directive 541/2017 (such as aiding, recruiting, training, propaganda).

After the examination of the substantive profiles of terrorist crimes, the Hague workshop allowed us to move to the procedural issues related to the use of effective investigative tools. The main focus of the seminar was the analysis of the preventive measures in the aforementioned perspective of balancing the anticipation of the threshold of criminal intervention and the protection of fundamental guarantees.

The issue of the anticipation was also the main topic of the Madrid workshop, which focused on the freedom of opinion and on the definition of the apology of terrorism in the hard balance with freedom of religion and political dissent.

The last workshop held in Brussels, on the other hand, dealt with the question of the protection of vulnerable groups (women, children and migrants) in the common interest of a counterterrorism system not forgetting the victims of such a serious crime, in addition to fundamental human rights of the accused person.

Closely linked to the activities of training and knowledge sharing of the contents of the project with the participants in the workshops is the drafting of a Guidance able to suggest an interpretative path suitable for combining security, freedom and protection of victims and fragile groups. In line with the proposed methodology, the Guidance will be also the result of a consulting process involving the same potential recipients of the document in the aforementioned perspective of shared choices and co-creations of knowledge.

Building a sustainable system to combat international terrorism without dwelling in forms, frequently experienced in other systems, of "Zero Tolerance" towards the suspected person and mitigation of guarantees is pivotal for affirming the mandatory nature of the founding values of liberty and fundamental human rights even in the most dramatic situations where even the survival of democracy and peace is at stake.

Even before the legal or procedural questions, the JUSTICE project aims at giving its contribution to this cultural and moral awareness process. It is with the sharing of the fundamental values of Europe that the international terrorism could be eradicated from its roots: intolerance and disregard towards life, fundamental rights, democracy and peaceful coexistence among human communities.

2. The case Italy.

2.1. The relevant legal framework.

The main component of **Italian Counterterrorism law** is **criminal law** and the first relevant provision date back to the 1970s when Italy firstly started to criminalize with Decree-law no. 15/80' the **promotion, organization, direction or financing a conspiracy for the purpose of domestic or international terrorism or for subverting the democratic order. (art. 270 bis)**.

With the introduction of the **article 270 sexies** by the Decree-Law no. 155/05 the notion "**terrorist conduct**" has been clarified such as a conspiracy aimed to causing serious damages, compelling, destabilizing or destroying fundamental political, constitutional, economic and social structure of a State or an international organization or intimidating population.

Moreover, with the Decree-Law no. 374/2001 have been criminalized all the conducts concerning the **assistance** given to persons involved in a conspiracy such as sheltering, providing food, communication tools or transport (**270 ter**). Assistance must be distinguished from involvement in a terroristic group: it is sufficient that assistance is provided to a single member of the association and does not directly contribute to the perpetration of a specific offence or to the existence of the association.

In the last few years Italian legislator has made some efforts in order to both neutralize the political project below conspiracies and anticipate the moment in which a conduct becomes criminally relevant.

On the first side, the Decree-law 155/05' enabled both the prosecution of the persons who **recruit** for terrorism and whom is **recruited** for such aims (**Art. 270 quater**) and the prosecution of those that **provide and receive terrorist training (Art. 270 quinquies)**.

On the second side, Decree- Law no. 43/15 and Decree-Law no. 153/16 introduced three autonomous offences: **organizing, financing, or advertising travel for the purpose of terrorism (Art. 270 quater I)** ; **collecting, providing and financing for terrorist activities (Art. 270 quinquies I)** ; **stealing seized money (Art. 270 quinquies 2)**.

On the **procedural side**, the Italian legislator has introduced a special regime shaped on the model implemented for the prosecution of mafia-like organized crime.

Firstly, Law no. 203/1991 introduced exceptions to the ordinary regime concerning the **interceptions of communications**:

- Interceptions can be authorized where there are sufficient grounds for believing that a crime has been committed, instead of serious grounds.
- Interceptions need to be necessary for investigative purpose, instead of indispensable.
- Interceptions may aim at developing new investigative paths, rather than being merely employed in the course of an already established investigation.
- Interceptions can last up to forty days, rather than fifteen.
- Interceptions can be renewable for successive periods of twenty days, rather than fifteen. The numbers of renewals are not limited.

In addition, Art. 226 of the implementing disposition regulates the **preventive interceptions** which are permitted when necessary for the prevention of terrorism offences. The Ministry of Interior has generally the competence to apply for an interception and the warrant is issued by the prosecutor of the district in which the suspect is resident or where investigative needs have emerged and the operation must be executed.

Law. No. 155/2005 established that the head of security and intelligence services - acting on the Prime Minister instructions - can apply to the prosecutor for an interception warrant. The extension of preventive interception is, in principle, offset by the limit of its use. Information acquired by preventive interceptions is not admissible as evidence at trial. On the other hand, preventive interceptions can be used both as an element of *notitia criminis* and a reason to further autonomous investigation by the police.

Secondly, Law. 155/2005 conferred to the armed forces the traditional police power to **stop and search** people or vehicles. When is necessary and urgent, the armed forces can stop vehicles and individual not only in order to prevent dangerous behavior (Law. No. 128/2011) but also to ascertain whether they are carrying weapons or explosive. A written report of the operations must be submitted to the public prosecutor within forty-eight hours, allowing for at least a minimum of judicial oversight. In addition, thanks to Law. No. 438/2001, police can **entry and search entire buildings** when there is a reasonable ground to believe that there are weapons, ammunitions or explosives. In emergency cases, such as when the delay might lead to the disappearance of significant evidence, police can entry and search without any prior judicial authorization.

Thirdly, the Italian anti-terrorism law has broadened the police power to **arrest** people, particularly **for identification purposes**.

Police have the **duty to arrest** (Art. 380 c.p.p.) anybody caught *in flagrante delicto* of crimes against the State, terrorist offences, subversion and conducts aimed to promote, organize and direct and organized crime association. The arrest is permissible when criminal conducts are punishable with a minimum of five and a maximum of ten years of imprisonment.

Police have the **discretionary power to arrest** (art. 381 c.p.p.) anybody caught *in flagrante delicto* of fabrication and possession of false identity and documents (art. 497 *bis* c.c.), when there is no involvement in any terrorism or subversive activities. Police must take into account both the seriousness of the act relating to the place, time, damages occurred and means adopted and the individual dangerousness.

Outside the *flagrante delicto* cases, police have the **power to arrest** anybody **only suspected** of a terrorist offence, when there are specific and well-grounded reasons to believe that the suspected person can escape. The impossibility to identify the alleged can be a well-grounded reason to arrest. The arrest is permissible when criminal conducts are punishable with a life sentence or with a minimum of two and a maximum of six years of imprisonment. In addition, the arrest is permissible when the suspected offence meets two requirements: the use of weapons or explosives and the high probability that the offence has been committed in the light of of strong pieces of evidence.

When it is not possible to identify the person or the identity can be established with difficulties, police is empowered to hold an individual for up to twelve hours for **identification purposes** (fermo identificativo, Art. 349 c.p.p.). In this case the arrest is allowed regardless any minimum statutory penalty requirements.

The custody may last up to twenty-four hour when the identification is particularly complex or it is necessary the consular authority or the interpreter help. During the process the suspect has no access to a lawyer but they can ask to inform a relative,

even though police don't have any formal duty to notify the right to inform a relative. Police have only the duty to inform promptly the prosecutor of the arrest, indeed it is not required to receive a judicial approval either beforehand neither afterwards.

Police have the power to **gather and storage fingerprints and other non-intimate samples**. A judicial warrant is required whenever the suspect does not consent to the operation. The so obtained samples can be used exclusively for identification purposes.

Finally, when there is a serious evidence of guilt and in order to prevent the suspect from either interfering with investigation, absconding, or to prevent the suspect from committing an offence, the Italian Criminal Procedure allows the application of the **pre-trial detention** (Art. 274 c.p.p.). The pre-trial detention can be adopted only in relation to offences punishable with a minimum of four years of imprisonment (280 c.p.p.). When the law provides a maximum penalty of six years in prison, the pre-trial detention can last no more than two years. When the law provides a maximum penalty of twenty years, the pre-trial detention can last no more than four years. When the law provides a penalty of more than twenty years, the pre-trial detention can last no more than six years. (308 c.p.p.).

Art.2 Law 155/2005 enables the *questore*, upon the advice of high ranking police officials, the directors of the secret service or the public prosecutor, to grant a **residence permit** to any foreign nationals (even illegal) who provide police or judicial authorities with significant information for the investigation of terrorism offences. The information must be "*reliable, new, thorough and complete*" (Art. 9, Law no. 82/1991). A **full residence permit** is granted when the information provided helps to prevent or mitigate the effects of terrorist attacks or to identify or bring to justice terrorist offenders.

The Italian Penal Code does not define *apologie du terrorisme and/or incitement to terrorism* as a specific criminal offence. Art. 302 c.p. punishes the **direct incitement** to commit intentional offences against the State. This provisions includes the offences concerning terrorism (association ex. Art. 270 *bis* ; assistance ex. Art. 270 *ter*; attacks aimed to terrorism ex. Art 280 c.p.; kidnapping aimed to terrorism ex. Art. 289 *bis* c.p.). The conducts falling within the scope of Article 302 c.p. are punishable with the imprisonment of up to eight years.

Law no. 155/2005 introduced a new **aggravating circumstance** to the public incitement (Article 414 c.p.): when the incitement concerns terrorism offences or crimes against humanity, the sentence will be increased by half.

With respect to the position of the minors, terrorism directive solely makes references to victims Directive no. 29/2012 for the protection of victims, but it does not reference Directive 800/2016/EU on minimum standard of guarantees for children accused or charged with an offence in criminal proceedings. This directive, not differently stating, applies thus also to terrorist offences.

Italy has not yet implemented this Directive. Nonetheless, it enforced specific disciplines that recognizes child's right to be treated differently in accordance with the best interest of the child principle, both in the trial phase and in the execution of the penalty. These regulations, as we shall see below, pay consideration to educative function of the penalty, particularly important in this sector in order to harmonise the gravity of criminal conducts with child evolving personality.

Decree of the President of the Republic (D.P.R.) no. 448/1998: minors investigated or charged with an offence.

In 1998, Italy passed D.P.R no. 448/1998 that introduced criminal procedural norms tailored on children needs. Particularly, D.P.R no. 448 follows educative and re-socialising purposes, attempting to reduce the permanence of minors inside the criminal law system by privileging diversion solutions or shortcoming to end trials rapidly. This is very consistent with article 40 CRC and with the understanding of recital no. 31 of Directive 541/2017 mentioned above. This regime is indented to

derogate from the general criminal law procedural code, unless this latter provides with more favourable norms (as established by Constitutional Court, judgment no. 323/2000). Furthermore, according with article 1 of the D.P.R. no. 448/1998, in case of aspects not regulated by this latter, general provisions apply under the condition that they must be in accordance with child's personality and educative needs (this is called the principle of "applicative adequacy"). Following the same educative *ratio*, article 1.2 D.P.R. no. 448/1998 sets an obligation upon judges to make the culprit aware about the meaning of procedural activities undertaken and the reasons underpinning the decision, even in ethical and social sphere, in order to enhance the educative function of the trial. Article 2 institutionalises specialised organs of juvenile justice system, by conferring them exclusive competence in dealing with minors. Namely, these organs are the procurator for children, specialised sections in tribunal (juvenile Courts) competent for each phase of the proceeding (investigations, preliminary hearing, main proceeding, appeal, execution). Alongside this norm, article 12 establishes that during all the procedural phases minor should enjoy psychological assistance, through the presence of parents and/or another person specifically indicate by the minor itself, in order for him to better understand the reason of the process. In addition, minors are ensured assistance through minor specialised services appointed to evaluate minor's personality and to assist him through all the proceeding (art. 9). In this regard, D.P.R. no. 448/1998 requires that personnel operating in trials involving children should develop a high level of expertise in tackling this vulnerable category. Therefore, in each juvenile court there must be a specialised section of judiciary police and a specific register for specialised lawyers. Juvenile civil services should assist children and judicial personnel during any phase of the proceeding. Regular specialisation and updating courses are foreseen for prosecutors, judges, etc. Juvenile courts are competent to judge persons until the age of 25 in case of offences committed before age of 18. Article 9 requires public prosecutors and judges to ascertain the personality of minors in order to take the best choice regarding them. This evaluation should take into account family as well as social and environmental context in which minor has lived and develop his personality. Legal aid is provided by specialised lawyers for children related issues (article 12). This is in compliance with article 40 of the CRC. Any information regarding child involvement in the trial is sensitive, thereby being prohibited to unveil them for minor not to be identified. Arrest in flagrancy and pre-trial custody are never compulsory, but left to the discretion of public authorities in cases in which they are foreseen as compulsory for crimes committed by adults. In such cases, public prosecutors and parents are immediately informed and minors are led in specialised community centres. If temporal custody measures are deemed not to be appropriate, minors are immediately released. For terrorist crimes, it is possible to dispose custodial precautionary measures (article 23.2, let. C). In any case, assistance by specialised services is always provided. Of particular relevance in case of terrorist related offences is article 32, which allows judges to impose security measures to children less than 14 years old when concrete danger of conducts involving arms or other violent means against community and national security is at stake. In such cases, juvenile courts could dispose security measures, whose content is determinate by magistrate for the execution in concert with juvenile services.

Cost. Court. judgment no. 49/1973, §2: "*the juvenile proceeding is characterized by the specific function to rehabilitate minor, such function rose as "peculiar interest-duty of the State, in principle prior to the fulfilment of punishment"*". This statement is important for the purpose of the present work, since it establishes that educative purposes could not be completely dismissed by security reasons, even in cases in which these latter prove to be prevalent.

In the light of this rationale, article 28 D.P.R. no. 448/88 is of great relevance since it introduces innovative procedure of probation, which presuppose the suspension of the trial in order to start a rehabilitative programme with the culprit. The innovation lies in the fact that this procedure could be triggered since the beginning of the trial (preliminary hearing and trial itself) without waiting for the sentence of condemn. Another unique feature is that the choice to initiate such part depends uniquely on the assessment of the personality of the child, without being precluded neither by the type and gravity of the crime committed nor by previous criminal records. This is because the rationale of this institute is to re-educate children's personality which is still developing so as a single criminal conduct could not be symptomatic of a delinquency attitude. In short, it should be concluded that even when

child is the author of crimes, he/she is also the victim of conditions that have influenced his/her conducts but not his/her nature which is still open to rehabilitation. The choice is therefore based only on the assessment of his personality, if there could be a perspective of rehabilitation and on the consent and volunteer involvement of the minor in the programme. In this regard, the probation could also set duties to repair the consequences of crime and to promote the reconciliation with persons offended by crime. In accepting such prescription, the child is expected to understand the wrong committed and to achieve awareness of his/her accountability. This norm thus paves the way to restorative justice approaches.

In this regard, Italian Court of Cassation (sez. I, 18/01/2019, no. 11909) states that the interruption of probation period is lawful in case minor proves himself not to voluntarily accomplish with the rehabilitation programs. Such refuse could be inferred even by a single but univocal act, such as the escape from the community and the following attempt to emigrate clandestinely abroad. This decision reaffirms then the educative and restorative purpose of this legal tool.

It should be concluded then that D.P.R. 448/88 constitutes an attempt to balance between retributive and pedagogic/educative issues when dealing with children issues.

Legislative Degree no. 121, 2018.

In case of condemn, specific guarantees for children are established based on educative and pedagogic purposes, consistently with obligations enshrined in CRC, particularly with articles 23, 29 and 39 therein.

In this respect, among the most relevant measures, article 1 rules that penalties have to facilitate solution of restorative justice and/or mediation with victims of crime in order for the child to achieve awareness of his responsibility for wrongdoing committed. The norm also prescribes that execution of penalty should involve children in educational, social and recreational activities for the purpose of granting them a normal development of their personality in order to facilitate social inclusion and prevention from committing further crimes. Accordingly, articles 2-8 discipline alternative measure to detention in prisons, to be taken in coordination with social services in order to facilitate personal development with the goal to limit as far as possible restrictions to liberty of movement. It is also established that within three months from the beginning of the detention sanction an educative programme has to be settled, taking into consideration the point of view, the aspirations and the personality of child. This is consistent with the right to be heard established under article 12.2 CRC. Psychological assistance must be provided; article 18 foresees the possibility for child to take part to training or learning courses outside the detention institute; article 22 states that execution of the penalty should be accomplished next to the usual residence of the child, so as to allow contacts with family and persons keen to the child, unless reasons of security and/or other reasons linked with those places could hamper the rehabilitation of the child. These measures should be implemented alongside children's families, unless in the concrete of the circumstances this could be detrimental for children. Considerable weight has to be accorded to such measures when implementing Directive no. 541/2017, since security reasons could not completely hamper the use of such remedies.

Lastly, article 15 requires children to be separated from adults when in custody. This norm is paramount to preserve children welfare. However, it should be assessed in the concrete of the case if this is the case or rather in exception circumstances child could be better protected sharing prison with adults, potentially from his inner circle.

The Constitutional Court (judgment no. 90, 28/04/2017) declared the constitutional illegitimacy of article art. 656, comma 9, lett. a), code of criminal procedural law since it established an automatic prohibition to suspend the execution of brief custodial sentences against children authors of serious crimes (listed therein), in contrast with articles 31,2 and 27,3 Cost. Indeed, such automatism is based on a presumption of dangerousness against children that contrasts with the case-by-case approach established by the Constitution in assessing child needs. In this way, the primary purposes for reeducation and rehabilitation are frustrated, thereby infringing article 31 Cost.

2.2. Systemic considerations.

- a) Law Decree No. 113/2018, later transposed with amendments into Law No. 132/2018 (the so-called Salvini Law Decree or Security Law Decree) innovated citizenship discipline, by amending *inter alia*, article 10-bis, Bill no. 91, 1992, establishing the automatic withdrawal of citizenship in case of definitive condemn for terrorist charge.

The norm does not distinguish between children and adults. This norm results to be unconstitutional for violation of article 117 Cost. And article 8.1 of the Convention on reduction of statelessness (1961), to which Italy is party (Bill no. 162/2015), because it is inconsistent with the Convention's purpose of statelessness reduction. Moreover, it seems not to be in compliance with article 3 Constitution (principle of equality), since the withdrawal is disposed only for acquired citizenship ex articles 4, 2, 5 e 9, Bill no. 91/1992 but not for *ius sanguinis* citizens. This discrimination contrasts with article no. 5 of the European Convention on Nationality (1997) which states "*Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently*".

Moreover, this automatism contrasts also with articles 8 and 14 of the European Convention on human rights, as interpreted by the European Court of Human Rights, and particularly with the "*Boultif criteria*" (Boultif v. Switzerland, ECHR (2001) Appl. No. 54273/00, judgment of 2 August 2001, pp. 48; recalled by Üner v. the Netherlands, ECHR (2006) Appl. No. 46410/99, judgment of 18 October 2006, (GC), pp. 57-58; Nunez v. Norway, ECHR (2011) Appl. No. 55597/09, judgment of 28 June 2011, in particular pp. 84, which expressly recall the best interest of the child, according with the CRC) which impose a fair balance to be strike between public order legitimate aims and right to private life. Furthermore, such automatism contrasts with the educative function of penal sanctions as established by art. 27 Cost., also considering that it operates three years after the final sentencing, regardless any potential rehabilitative process initiated by the condemned.

Article 10-bis is of even more concern when applied against children because it turns them into stateless, in spite of their vulnerable status, with prejudices to children rights, among which the possibility to maintain family ties and enjoyment of social and cultural rights, being these latter fundamental for their development. This norm appears thus to be in contrast with both recital 31-31 Directive no. 541/2017, which promotes strategies of social inclusion to counteract the spread of radicalisation, with articles 7 and 8 CRC and with article 2, which prohibit discriminations in children treatments.

- b) European arrest warrant and extradition.

Italy disciplines the European Arrest warrant by passing Bill no. 69/2005. Art. 18, let. i) is of relevance for our purposes, since it states that Italian authorities must deny the surrender of children when, *inter alia*:

- the person to be surrendered is a minor aged less than 14 years old;
- the person to be surrendered is a minor aged less than 18 years old and the crime for which the warrant is disposed is punished with a maximum penalty of less than 9 years;
- that restriction of liberty is inconsistent with ongoing educative processes;
- when the requesting State does not enforce prison regulation that keeps children separated from adults in jail.

The limitations on the base of educational reasons and age are consistent with the best interest of the children and with CRC prescriptions, in order not to hamper children re-socialisation processes. However, Italian Court of Cassation has specified that such processes must be effective and considered case-by-case, stating that mere domiciliary detention is not *per se* symptomatic of social inclusion, and thus it does not prevent, alone considered, the warrant to be executed. (Court of Cassation, sez. VI pen., 04/04/2018, no. 15867). With regard to extradition, limitations recognised in the framework of the European arrest warrant discipline apply by analogy to request of extradition regarding children (Court of Appeal of Milano, Sez. V, 12.1.2011, Pres. Cerqua, Est. Nova).

2.3. Swot analysis.

As highlighted in details in the Pisa workshop of April 2019, the **main gaps** identified in the **Italian substantial counterterrorism** measures lie down five grounds: the tension between the criminalization of preparatory activities and freedom of association and freedom of speech (a); the tension between individual responsibility and the elusive notion of conspiracy; (b) prosecution of children (c); discriminatory implementation of the counterterrorism provisions (d) the role of gender (e) and the exceptional procedural provisions (f).

a) Preparatory activities and freedom of association and speech

- Many of the offences in the Italian Criminal Code are victimless and they may arise concerns from the art. 15 ECHR viewpoints.
- Terrorism related offences leave room for interpretation even though they are generally modelled on the basis of well-rooted offences such as the Italian classic model of conspiracy (*associazione per delinquere*). However, judges have to assess the concrete level of danger posed by offences in relation to an international context that is often unfamiliar to Italian Courts. Indeed, norms must be modelled after the empirical characteristics of terrorism and its territorial embedding at an early stage.
- Italian Courts have adapted conspiracy offences to the structure of Al Qaeda and ISIS, however it is necessary to stress a difference between those. Indeed, Al Qaeda cells and ISIS ones are deeply different.
- Legal provisions do not identify what makes a criminal group or a violent plot a threat to international security. Article 270 *sexies* contains a general definition and a blanket provision such as “any action deemed terrorist under international law or under convention binding on Italy.” This cross-reference is open and imprecise and leaves judges with too much discretion calling into question the Italian principle of legality. Definitely, either the cross-reference is redundant itself, or such a clause aims to establish an automatic recognition into the Italian legal system of any future international provisions.
- When conducts concerning glorification of terrorism occur, prosecution is generally grounded on the aggravating circumstance ex. Art. 414 c.p rather than on Art. 303 c.p. (direct incitement). Consequently, Art. 414 c.p. turns into art. 270 *bis*, even though prosecutors often use to charge people with both offence jointly. Problems arise from the minimal requirements for participation provided, in such a way that is difficult to distinguish the apologetic or instigating speech from the real terrorism participation.

b) Tension between individual responsibility and the elusive notion of conspiracy

- Article 270 *bis* requires evidence concerning the individual association with a terrorist group, rather than the evidence of the offence that the individual has committed. Information on different groups is often insufficient and the role played by each individual within the organization is also often irrelevant.
- In certain cases, ideological adherence to criminal purposes alone has been considered enough for a charge under art. 270 *bis*: it has not deemed necessary that violent activities were eventually carried out, but a mere ideological involvement has been considered enough.
- The vagueness of terrorism definition raises concerns about the legal standing of the so-called “freedom fighters”.

- It is important to stress the difference between military and civilian targets when terrorism threats may occur.
- The law punishes the recruitment and the promotion, creation, organization or financing of terrorist association ex. Art 270 *bis* with the same penalty. This choice does not seem appropriate as the provisions address different levels of involvement (and responsibility) in the terrorist association.

c) Prosecution of children

The “*best interest of the child*” principle is not codified in the Constitution (Cost.), even though articles 30 and 31 Cost recognize a strong *favor minoris* in setting forth duties upon both family and society to protect children and to remove obstacle to their development. However, following the evolution of society, the Constitutional Court has recognized children as actual subject of law by combining principles enshrined in article 2 with art. 30 and 31 of the Constitution (Corte cost., decision no. 11 of 1981). Consequently, it established that the ultimate goal of any public policy concerning children has to adopt proactive effort in order to enhance their welfare, developing personality and education.

The “*best interest of the child*” principle is nowadays part of the Italian legal framework. Indeed, Italy has ratified the UN Convention on the Rights of the Child (CRC) in December 1991, which has been implemented by Bill 27 May 1991, no. 176. Furthermore, Italy is constitutionally bound by art. 117 Constitution to be compliant with international human rights law, hence the aforementioned sources apply.

In implementing the prescriptions of Directive no. 541, Italian authorities shall have to balance the best interest children with security reasons linked with the field under regulation. In this respect, however, it should be noticed that the Italian constitutional jurisprudence does not provide with a clear standing definition of the nature of this cross-cutting principle. In other words, constitutional case law interprets the child’s interest alongside a spectrum of understandings that ranges from considering it as “*superior*”, or “*prevalent*” or “*prominent*” to defying it as “*exclusive*”, apparently suggesting to subtract minors’ needs from balance against conflicting considerations. This latter interpretation is supported by several cases about children adoption in which the Constitutional Court (Corte Cost. no. 182/1988, 536/1989 and 106/1990) pointed out that Bill no. 184/1983 on “children adoption” represented a turning point for the “interest of the child” principle to achieve public relevance by abandoning a mere civil-law view. The Court then, consistently with the new constitutional child-focus paradigm developed under articles 2 and 30 Cost., concluded for a shift of paradigm from the “prevalent” to the “exclusive” interpretation of this interest.

However, the Italian law of incorporation of the “CRC” in the national legal framework seems to endorse the “*prominent*” understanding, being the chosen wording “(...) *considerazione preminente*”.

Furthermore, when deciding on fields related to security issues, the Constitutional court has supported the relative nature of this principle. A paradigmatic example of this approach is the recent judgment no. 18 January 2020 that consistently with previous decision no. 350/2003 reaffirmed the superior interest of disable children of preserving family ties with his/her parents even when these latter are condemned for mafia related crimes and thus convicted to detective detentions (in the same fashion, decisions n. 76/2017 and no. 239 of 2014). In all of these decisions, the Court makes clear that children interest is “merely” superior, that is prevalent but yet not absolute, being possible to balance it with actual security issues related with serious crimes. To put it clearer, because of the minor’s interest, tribunals ought to evaluate the possibility to allow parents under detention custody to be able to join their children, being family the first and main place when the pupil could develop his/her own personality. However, in doing so, it has to ascertain if the conditions under which a detention penalty could be commuted into domiciliary custody are met. Only in this case, mother’s sanctions could be commuted in domiciliary custody in order for her to take care of children. And this evaluation must be ascertained through a case-by-case approach by the competent tribunal.

The wording “exclusive” thus has to be contextualised in the discipline in which it was elaborated, that is children adoption. In this regard, it was meant to “exclude” candidate adopters’ needs or will from

decisions about the adoption. Only the best interest of the child has then to be taken into consideration in this matter by judges. However, this do not allow to conclude for the absolute nature of this principle and hence there is not an interpretative uncertainty.

In any case, to give effectiveness to “the best interest of the child principle” it is necessary to properly implement article 12 CRC that codifies the right to be heard. This latter right is actually well established in the Italian jurisprudence when reaching decisions to which children are subject. For instance, the Court of Cassation in deciding on international protection requests, has confirmed that the right to be heard constitutes a specific obligation upon authorities that could be omitted only when this could be detrimental to the child itself. Therefore, the fulfilment of such right determines the validity of juvenile tribunals’ decisions (in this way, Court of Cassation, judgement, sez. I civil, no.178, on 27/01/2020; see also, no. 12018 on 07/05/2019; no. 10784 on 17/04/2019; no. 6129 on 26/03/2015).

The Italian criminal code does not offer a definition of the term “terrorist”, so as it could be concluded that a “terrorist” is who commits one of the offences listed under articles 270-bis ff. and 280 ff. of the Italian penal code. Neither article includes any specific provisions exempting children under the age of 18 implicated in terrorism related crimes from liability. As a result, these provisions apply to anyone over the age of 14 years (the age of criminal responsibility in Italy) without providing for specific safeguards in case of minors involved as authors. Children safeguards are instead established on the procedural ground.

A very important issue concerns the position of the so called **“Non-accompanied children migrants”**

Non-accompanied children migrants constitute another problem to be addressed when implementing Directive no. 541. Indeed, it is not unlikely that migrant children, who are evidently extremely vulnerable, could be targeted by recruiters in order to be radicalised as it happened in a reception centre in Florence, involving 6 children between 17 and 19 years old. In this case, children guest in that structure were approached by another young guest of the centre, who had arrived in Italy in 2016 when 17 years old and then radicalised by a national from Morocco in a non-recognised mosque. In this last case, this embryonic terrorist cell was neutralised by law enforcement authorities thanks to a constant monitoring activity started by the Juvenile Public Prosecutor’s Office of Florence¹.

It is clear then that the number of unaccompanied minors who arrive in Italy and who are not detected by authorities becomes an easy prey for organised criminality and for terrorist recruiter. It is thus essential, under security considerations at least, to reinforce national reception strategies. In this regard, the maintenance of the reception system called “*Sistema di protezione per titolari di protezione internazionale per minori stranieri non accompagnati*” (SIPROIMI), formerly called “*Sistema protezione per richiedenti asilo e rifugiati*” (SPRAR), should be welcome. This system currently involves 31.284 children, among which 4.003 are non-accompanied children, in 809 projects² in order to promote their welfare and socialisation and consequently to reduce risk of entering in criminal circles. The SIPROIMI is thus consistent with mentioned recital 31 Directive no. 541.

However, in order to be more effective, it should be implemented in order to include also young migrants aged up to 25 years old. Furthermore, these programs should be integrated with specific initiatives to address radicalisation phenomenon when detected by Italian authorities. The program “Prevent”³, enforced by British authorities could be of guidance.

In this respect, during the XVII legislature, one of the two branches of the Italian Parliament approved a national strategy to counteract terrorism and radicalization⁴. Nonetheless, this Bill did not pass due to the term of the legislature. However, this initiative is worth of mention because it pursued a proactive and preventive approach in tackling phenomenon of radicalization by a cultural and social perspective. First of all, it intended to constitute a net of “Regional Coordination Centres for Radicalisation” in each

¹ https://corrierefiorentino.corriere.it/firenze/notizie/cronaca/18_maggio_11/firenze-sospetti-terroristi-centro-minori-9cc2ebac-54e7-11e8-998a-93ce1f846824.shtml.

² <https://www.sprar.it/i-numeri-dello-sprar>.

³ <https://www.gov.uk/government/publications/prevent-duty-guidance>.

⁴ https://www.camera.it/leg17/465?tema=prevenzione_dell_estremismo_jahadista

Italian region. This net should have coordinated and promoted initiatives at the local level suitable to tackle radicalisation among generations immigrants, that is young people including minors, special provisions were foreseen in order to duly deal with children. Particularly, the plan foresaw the necessity to deploy specialised personnel able to initiate a dialogue by adopting a multicultural approach, overcoming language barriers. Personnel was intended to be formed and trained among law enforcement agencies as well as in civil society, such as selected teachers in school. In this regard, specific interventions were thought to be initiated in schools in order to prevent episodes of radicalisation by favouring intercultural and interreligious dialogue among students. Similar initiatives were thought to be ran in different institutions such as universities or local associations in order to promote programme among citizens. In the same fashions, experts were supposed to be deployed in detection centres in order to target and to prevent phenomenon of radicalisation among prison population by enhancing contacts and relations between prisoners and society. Such efforts should be restored in future policy.

Such integrated system would have proved useful in better dealing with the problem of foreign fighters. This issue is relatively marginal for Italy, given that only 144 foreign fighters are known and monitored, being nonetheless a problem to take in due consideration. In this regard, Italy has implemented a system of administrative expulsions targeting “dangerous” persons. Bill no. 155, 2005, article 3, allows expulsions of foreigner persons suspected of being components of terrorist cell or in any way involved in terrorist activities. This kind of expulsions are ordered by the minister of Interior or, on his behalf, by the prefecture, by means of not motivated decrees. Therefore, this norm derogates from the general discipline on expulsion established by article 13 of legislative decree no. 286/1998, which instead requires degrees of expulsion to be motivated to be legitimate. As a consequence, a margin of discretion characterises such measures that have to be executed immediately without the possibility to suspend their efficacy in case of appeal. However, when a minor is subject to the order of expulsion, article 31.4 legislative decree no. 286/1998, which fixes the conditions for expulsion of children for security reasons, applies. This norm requires that expulsions regarding minors have to be taken by the competent Juvenile court, by means of motivated decree, as stated by Juvenile Trib. of Sassari, 5 January 2016⁵. This interpretation is more consistent with article 31 Cost. and hence with children best interest principle, since it leaves the burden of the decision on the specialized juvenile judiciary structures and not on the executive power (Cass. pen., 2 December 2014, n. 5037).

However, when such expulsions target parents of children, national authorities have to take into due considerations obligations enlisted under articles 9 and 10 CRC, thereby setting operational tools to permit contacts between parents and their children.

With regard to children of foreign fighters brought in war zones such as Syria, without or in contrast with their consent, it should be said that it constitutes a relatively secondary issue for Italy. Indeed, only 5 Italian national children are recorded in Syrian camps, among whom it was the case of Alvin. Alvin is a eleven years old child, Italian national, who was kidnapped by his radicalized mother when he was six years old and brought to Syria. Here, the mother died in war conflict, leaving Alvin alone. He was therefore led in the refugee Camp of Al Hol, in the north of Syria. Italian authorities managed to bring him back through a cooperation between Ministry of Foreign Affairs, Interpol, and the Red Cross and Red Crescent organizations, which operate that refugee’s camp. However, other four Italian children remain there⁶. This represents the first case of an European child who returns in Europe from that camp and thus this experience should offer guidance to operationalize European plans to bring back abandoned children from Al Hol.

d) Discriminatory implementation of the counterterrorism provisions

⁵ www.immigrazione.it

⁶ <https://www.ispionline.it/it/pubblicazione/siria-il-problema-dei-foreign-fighters-jihadisti-24175>

- The citizenship stripping provided by Art. 14 of Decree Law. No 113/2018 is related to quite wide range of terrorism-related offences. More important, this provision is based on the citizenship's acquisition: apparently, there's no compelling ground to justify such a decision.
- A recurring risk is that authorities resort to racial profiling and end up targeting racial minorities.
- Administrative measures like deportation and citizenship stripping are only admissible for third country nationals (TCNs).

e) The role of gender

The gender dimension of counterterrorism criminal law is limited, even though women play a significant role in activities such as the travel organizations and the terrorist assistance. This kind of participation should be indictable even in the absence of a direct link to terrorist attacks.

- f) The role of gender:** Some concerns raised also from the **exceptional procedural provisions** introduced by the Italian Counterterrorism legislation.

f.1) Interception communications

The list of offences for the application of the special regime of interception is too long, calling into question both the right to freedom and secrecy of personal correspondence (art. 15 of the Italian Constitution) and the right to privacy (art. 14 of the Italian Constitution).

The use of interceptions in cases of assistance to terrorist group (art. 270 *ter* c.p.) could be disproportionate.

The vagueness of "organized crime" and "terrorism" may entail a further extension by case law of the scope of such derogations.

Such an intrusive special regime is now available even when it does not represent the ultimate resort due to necessary investigation purposes.

f.2) Preventive interceptions

The legitimate purpose justifying the use of preventive interceptions is very vaguely defined, calling into question both the right to freedom and secrecy of personal correspondence (art. 15 of the Italian Constitution) and the right to privacy (art. 14 of the Italian Constitution).

Law enforcement authorities might find the law inadequate for their purposes because preventive interceptions cannot be used as investigative elements to ground an application for preventive wire-tapping.

The legislator has broadened the circumstances enabling the relevant authority to implement preventive interceptions. In doing so, legislators have attributed to an important role to the political coordination between the executive and the intelligence activities, at the expense of judicial scrutiny.

f.3.) Powers of arrest, stop and search

The great power of police to arrest, stop and search calls into question the Italian constitutional principle of the inviolability of personal freedom until final conviction (Art. 27 Cost.).

The discretionary power to arrest whoever fabricate or possess false identity documents (Art. 381 c.p.p.) stresses the legislator's will to equalize the possession of false documents with the terrorism involvement offence.

The discipline regarding the arrest for identification purposes (Art. 349 c.p.p.) significantly enhances police to operate *motu proprio*. There is the risk that police could abuse this measure and interview the person under custody in order to bypass the limitations legally imposed for the ordinary interviews cases.

The provisions about the discretionary power to arrest outside the *flagrante delicto* cases represent a radical change from the previous legislative trends which had attempted to limit both the police power to arrest and the cases in which police could proceed without a prior public prosecutor's authorization.

f.4) Stop and search powers of armed forces

The law refers to vague definitions of "necessity" and "urgency" and is based upon the existence of mere suspicions.

f.5) Gathering and retention of fingerprints and non-intimate samples

The provision does not mention whether the samples can be further used as evidence in the proceedings.

The provision is potentially applicable to all offences because Article 10 of Law No. 191/1978 does not specify the cases or the manners in which samples may be taken.

Paradoxically, police can use such a measure whereas judges cannot within a criminal proceeding by ordering the recourse to an expert.

f.6) Pre-trial detention

The Italian judicial process is known for being long and tortuous. 42% of prison population is made up of detainees on remand (the Europe average is of the 20-25%). Defendants often must be released before the trial because they have already spent the maximum time in custody on remand. Italy has been repeatedly condemned by the Strasbourg Court for failures to respect the pre-trial detention limits.

f.7) Simple and full residence permits for investigative purposes

The provisions might encourage unreliable testimonies in exchange for a residence permit. Paradoxically, the law grants a permit to whom able to provide significant investigative information and evidence thanks to a terrorist activity involvement but it doesn't grant a permit to all the illegal immigrants who have only been victims or witnesses of terrorist acts cannot be granted a permit.

3. Final remarks.

In light of the analysis of the case Italy, it is very important that the implementation of the JUSTICE project regards my country. The dialogue with international colleagues makes it possible to detect, revise and address the aforementioned shortcomings in the perspective of a holistic approach involving theoretical and applied research, advocacy and field activities, background reports and future proposals so that to set milestones able to survive to the conclusion of the project.