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THE PROHIBITION OF TORTURE

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CHAPTER 1

INTRODUCTION TO THE PROHIBITION OF TORTURE

1. Outline of the crime of torture. – 1.1 History of the prohibition of torture. – 1.2 The prohibition of torture as a *jus cogens* norm – 1.3 The ticking-bomb scenario.

1. There is an almost unanimous acceptance of a general definition of what constitutes torture on a moral level: torture is an unjustified act of violence that disregards and disrespects the dignity of a person and violates his human rights.

The main issue is that, despite the fact that torture has always been a universally condemned practice¹, there is still uncertainty of what it is from a legal point of view. Defining the exact limits and scope of the crime into a single definition seems to be of particular interest for the entire international community. UN Secretary General Kofi Annan has explained that “torture is an atrocious violation of human dignity. It dehumanizes both the victim and the perpetrator. The pain and terror deliberately inflicted by one human being upon another leaves permanent scars. [...] Freedom from torture is a fundamental human right that must be protected under all circumstances. Growing awareness of international legal instruments and protection mechanisms gives hope that the wall of silence around this terrible practice is gradually being eroded”².

¹Henry Shue, *Torture*, in *Torture: a collection*, 2004. Shue, however, accepts torture in war times, based on the argument that since killing is considered to be worse than torture, and killing is permitted in a war scenario, than torture might be too.

² From the message of the former Secretary General Kofi Annan on the United Nations International Day of Solidarity in Support of Victims of Torture, Press Release SG/SM/7855, OBV/223, 2001.

Today, one of the most pressing issues of our society is to find an agreement on a universal definition of what constitutes torture. Torture is defined in different international and regional provisions, in an attempt to render it part of the national criminal system of all countries. There are various legal definitions and interpretations of the term, but there are still unclear boundaries around it. Amnesty International has openly denounced this problem in its 1973 Report on torture, by saying that “Everyone has an idea of what torture is; yet no one has produced a definition which covers every possible case”³. Along with ill-treatment and other forms of inhuman and degrading treatments, it is generally described as the infliction of pain and suffering, physical or psychological, to punish a person or to obtain confessions and information⁴. Finding a specific and sole definition of torture which is universally recognized and accepted by all States is considered to be fundamental for three main reasons⁵.

First of all, the international community has to be able to hold accountable Governments for the commission of acts of torture. If each State follows its own definition found in national laws, or has simply adhered to one of the treaties concerning torture, there is an obvious difficulty in ensuring the prevention of torture. Governments could easily work around the existing loopholes. As Amnesty International stated in its 1973 report, “[...] there is a strong tendency by torturers to call it by another name, such as ‘interrogation in depth’ or ‘civic therapy’”⁶. There could be obstacles to the prevention and punishment of torture simply because Governments are unable to reach an agreement on what should be the best and most complete definition; many of

³Amnesty International, *Report on Torture*, 1973, p.29.

⁴From the definition given by the online web site of the International Rehabilitation Council for Torture Victims, in the page *Defining Torture*.

⁵ Gail H. Miller, *Defining Torture*, Floersheimer Center for Constitutional Democracy, New York, 2005, p.1-4. Miller only lists two reasons, but for reasons of precision and completeness we will distinguish and separate them into three.

⁶Amnesty International, *Report on Torture*, 1973, p. 29-30.

them tend to restrict the definition of torture, permitting their agents to act in a way which falls under their laws, without actually crossing the line⁷.

Secondly, torture is such a serious act that it falls under the category of those crimes against humanity which are ruled by the principle of universal jurisdiction. This means that any State or international organization can claim jurisdiction over a suspect of torture, regardless of his nationality or of the territory in which the crime was committed. Therefore, if a national Court should investigate an individual beyond its usual jurisdiction, the lack of a common definition could cause disagreements between countries as to what should be the correct way to prosecute and punish the crime. The International Criminal Tribunal for the former Yugoslavia has confirmed once again that States are “entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction”⁸. Thus, it is of utmost urgency that a single prohibition be created.

Thirdly, there is a strong and growing need for a general standard that guides and frames the work of individuals, such as public officials⁹. Their methods are frequently borderline lawful, and once again the lack of a uniform prohibition to the use of torturous methods renders it easy for them to work their way around the law. The uncertainty of their acts cannot be accepted; public officials should be fully aware of the limits of their actions. In the aftermath of the 2001 attacks in the United States, the director general of the CIA came close to admitting that some of the practices used by the agency

⁷Gail Miller, *Defining Torture*, Floersheimer Center for Constitutional Democracy, New York, 2005, p.4-5.

⁸Judgement of Furundzija A., International Criminal Tribunal for the former Yugoslavia, Case No. IT-95-17/1-T, 1998.

⁹Gail Miller, *Defining Torture*, Floersheimer Center for Constitutional Democracy, New York, 2005, p.4-5.

were unlawful, by stating that there had been “some uncertainty in the past as to what interrogation techniques were specifically permitted and prohibited”¹⁰.

In spite of the tangible complexity in finding a common definition that would suit every legislation, there are certain elements which essentially and undeniably give torture a specific meaning.

In the first place, the notion of torture always assumes the infliction of pain and suffering¹¹. However, since pain and suffering are two very subjective concepts, there has yet to be a definition which encompasses all forms of them¹². That is why we must envision as complete all those definitions which do not only mention torture, but ill-treatment and other degrading treatments as well. Any kind of physical, mental or psychological pain must fall under the notion of torture and be considered as a crime. The definition of torture adopted by Amnesty International seems to fit this description: “Torture is the systematic and deliberate infliction of acute pain *in any form* by one person on another, or on a third person, in order to accomplish the purpose of the former against the will of the latter”¹³. This definition seems to comprehend an ulterior element, that of the involvement of at least two people. The scenario should involve at least a torturer and a victim, which entails the logical consequence that the victim is under the control of the torturer.

Another element that can be implicitly found in the notion of torture is that of the will of the torturer to ‘break the victim’ by inflicting pain¹⁴. The

¹⁰Douglas Jehl, *Questions are left by CIA Chief on the use of torture*, in The New York Times, 2005.

¹¹From the definition given by the online web site of the International Rehabilitation Council for Torture Victims, in the page *Defining Torture*.

¹²Aisling Reidy, *The Prohibition of Torture; a guide to the implementation of Article 3 of the ECHR*, in Human Rights Handbooks No.6, Germany, 2002, p.12.

¹³Amnesty International, *Introduction: Report on torture*, p.30-31.

¹⁴From the definition given by the online web site of the International Rehabilitation Council for Torture Victims, in the page *Defining Torture*.

voluntary disrespect of human dignity differentiates this crime from other similar crimes which cause pain, but without the intent of destroying his humanity.

Closely connected to this idea of an intentional effort on part of the torturer, is the implied concept of torture being a systematic act with a rational purpose. The accidental infliction of pain cannot be considered torture¹⁵. There necessarily has to be a premeditated scope for committing torturous acts, such as obtaining information, punishing the victim or for intimidation. Jean Pictet's Commentary on the Geneva Conventions states that "The word torture refers here above all to suffering inflicted on a person to obtain from him or a third person confessions or information"¹⁶.

By putting together all of these elements, one could create an almost complete universal prohibition of torture. Up until now, no definition has ever been entirely complete.

Another current and pressing matter regarding torture is the lack of adequate legislation, and in some cases the lack of any legislation at all, which prohibits and condemns the crime.

Amnesty International, a non governmental organization which focuses on protecting human rights, has more than once taken action to stop torture and ill-treatment. Its many reports on torture have denounced and given evidence of the use of torture in many countries, and have emphasized how torture is a widely spread phenomenon which is only increasing year after year¹⁷. In the 1970's, when human rights suffered grave setbacks all over the world, the organization had condemned the practice in numerous States by

¹⁵Gabrielle Kirk McDonald, *Substantive and Procedural Aspects of International Criminal Law*, Volume II, Part I, The Netherlands, 2000, p.212.

¹⁶Jean Pictet, *The Geneva Conventions of 12 August 1949*, commentary published under the general editorship of J.S. Pictet, International Committee of Red Cross, 1960.

¹⁷Amnesty International, *Report on Torture*, Duckworth, 1973.

publishing other reports, which entailed a strong activity on part of the United Nations bodies¹⁸. In a worldwide survey brought on in 2000, Amnesty found that torture had re-emerged and reached ‘epidemic proportions’, considering that 75% of countries were found to be still practicing torture, despite it being prohibited under international law, and despite the fact that most of them had signed the Convention Against Torture of 1987¹⁹.

Italy is one of the countries which has been frequently and strongly criticized by Amnesty International for not incorporating torture as a specific offence in the national criminal legislation²⁰. In 2012, Amnesty International wrote a report which condemned Italy on two fronts.

Firstly, it was noted how the country still lacked effective mechanisms to prevent ill treatment by public officials, considering that “authorities failed to ratify the Optional Protocol to the Convention against Torture and to establish an independent National Preventive Mechanism for the prevention of torture and other ill treatment at the domestic level”²¹. Italy was reprimanded for not ensuring proper investigation in cases where there was the suspect that police authorities had committed acts of torture, and for not enforcing the needed laws.

On the other hand, Amnesty took to the report to comment on its findings regarding the facts of the G8 in Genoa in 2001. The sentencing of the Italian Court of Cassation regarding the appeals made against the second instance verdicts, issued by the Genoa Court of Appeal, was decisive. The organization stated that the final sentence is an extremely important one, but that at the same time it results as being incomplete and tardive in respect to the

¹⁸ Antony James William Taylor, *Justice as a basic human need*, New York, 2006, p.119-120.

¹⁹ Jose Quiroga and James Jaranson, *Torture*, article in the Encyclopedia of Psychological Trauma by Reyes G., Elhai JD., Ford JD., 2008, p.654-657.

²⁰ Amnesty International, *The State of the world's Human Rights*, Report of 2012, p.192.

²¹ Amnesty International, *The State of the world's Human Rights*, Report of 2012, available at http://www.ecoi.net/local_link/217467/324090_en.html.

moment the facts took place. The positive note of the sentence was that it declared police officers and public officials as being actually guilty of violating fundamental human rights, which they should have been protecting²². However, Amnesty points out that the failure of the Italian State in giving full justice to the victims is of such great entity that these convictions are not sufficient, and that they have been given out too late²³. In particular, what has been contested by the organization is that the sanctions are not proportionate to the seriousness of the crimes committed²⁴, and that most of them will probably not even be brought on because of prescription. Moreover, the difficulties encountered during the investigative activities –which had been prevented by the police officers themselves- leave serious doubts regarding the effectiveness of the investigations²⁵.

Amnesty stated in the report that once the phase of the investigations had been concluded and the culprits had been condemned, the main priority of the authorities had to be to find out what had been the causes at the root of the G8 facts. It mainly insisted on avoiding that the same acts would be committed again, by deeply examining the system and questioning how to improve Italian legislation.

In the meantime, Amnesty continues to have high expectations of the Italian police and judicial system. In particular, the report not only requires Italian institutions to condemn publicly all violations of human rights committed by police forces and authorities in 2001, but to also introduce the crime of torture in its Penal Code, containing all the characteristics and

²²Marta Picchi, *The Condemnation of the Italian State for violation of the prohibition of torture*, in *Journal of Law and Social Science*, 2015, p.28.

²³From Amnesty International Press Release, *Sentenza della Corte di Cassazione per i fatti della scuola Diaz*, CS81, July 2012.

²⁴Amnesty International, *The State of the world's Human Rights*, Report of 2012, p.192.

²⁵Carmela Pezzimenti, *Nella scuola Diaz-Pertini fu tortura: la CEDU condanna l'Italia nel caso Cestaro*, published in *Giurisprudenza italiana*, in *Diritto Penale*, by Francesco Palazzo, 2015, p.1712.

elements of the crime prescribed by Article 1 of the UN Convention on Torture²⁶. Furthermore, it specifically requires Italy to ratify the optional Protocol to the Convention on Torture, and to set up a national independent mechanism to prevent acts of torture. Amnesty has taken care to stress how important it is for Italian authorities to go over the existing laws and dispositions which conduct the police operations, including those regarding the training and disposing of public forces, as to avoid an improper use of force.

Italy has always justified itself by contesting that the existing international conventions do not explicitly impose an obligation on contracting parties to create a specific crime of torture, but that they simply require the punishment of the single acts which constitute torture²⁷. Another reason²⁸ given by the Italian State for not having introduced the crime of torture is that the self-executing nature of the norms of the conventions make it useless to create an ad hoc norm for the implementation of the crime. Italy uses an automatic mechanism for the implementation of international provisions²⁹. By interpreting Article 10 of the Italian Constitution, it has been inferred that the entire Italian judicial system is subordinated to the international one. Thus, to give internal efficacy to self-executing international norms there would simply have to be an execution order, which can be a law or an administrative act, which incorporates the international provision into national legislation³⁰. However, Article 10 does not contain a general rule regarding this execution order, which simply constitutes an order to execute an international treaty by

²⁶Italy condemned for G8 'torture'- ECHR urges introduction of anti-torture law, in Ansa.it, Strasbourg, April 2015.

²⁸Matteo Elis Landricina, *Il crimine di tortura e le responsabilità internazionali dell'Italia*, Roma, 2008, p.15.

²⁹Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, Italia, 2012, p.286.

³⁰Alessandra di Martino, Justin O. Frosini, Carna Pistan, Francesca Polacchini, a cura di Luca Mezzetti, *International Constitutional Law*, Torino, 2014, p.154.

referencing to its text. Considering that there are different definitions of the prohibition of torture and none of them are sufficiently complete and precise³¹, Italy should create an ad hoc law that transposes a general definition of the crime.

Amnesty International has not been the only one to contest the resistance of the Italian legislator in introducing the crime of torture.

The UN Committee Against Torture has strongly criticized the slow functioning of the Italian legislative system. The principle critic that the UN Committee has always addressed to the Italian country is once again the failure to implement the prohibition of torture into national legislation³². Following the footsteps of Amnesty International's critique, the Committee has noted time after time that even though there have been efforts in elaborating various drafts of law, an actual crime of torture with the annex sanctions has yet to be created. The Committee has criticized in particular the contents of the "Pisanu decree", adopted with act. no. 155/2005, especially with regards to the duration of the restrictions of the liberty³³. The law was intended to enshrine urgent measures to combat international terrorism, and extends the autonomous power of police authorities. The Committee was concerned that this decree includes a provision which excessively extends the period of time in which the police can hold a citizen in detention, by depriving his liberty for identification purposes. Furthermore, an accused person can be held in detention up to five days without being able to contact an attorney, if a judge has allowed it. Moreover, the Pisanu Law envisions the possibility to deport a person without necessarily having being charge with a crime or

³¹Andrea Pugiotto, *Repressione penale della tortura e costituzione: anatomia di un reato che non c'è*, in *Diritto Penale Contemporaneo*, p.5.

³²UN Doc. CAT/C/ITA/CO/4, paragraph 84.8, 17 May 2007.

³³Committee against Torture, *Concluding observation (CAT/C/ITA/CO/4) of the UN Committee against Torture; Italy's follow-up*, from the Inter-ministerial Committee for Human Rights, May 2008, p.7.

having been convicted; in its Concluding Observations, the CAT recommended that Italy comply fully with Article 3 of the Convention Against Torture, with regards to refoulement³⁴.

1.1 The phenomenon of creating *ad hoc* laws against torture can be traced back to the second half of the 19th century. The prohibition of all forms of torture is today contemplated in both human rights law and humanitarian law, but it has always been part of the heritage of the first international instruments created to protect the rights of men.

The use of torture dates back to the beginning of recorded history. In Ancient Greece, the use of torture was peacefully accepted as a standard procedure towards slaves and foreigners, in order to be able to provide testimony³⁵. Greeks also frequently used punitive torture³⁶, especially against slaves, who would be frequently tortured for simple negligence. The orator Demosthenes believed that the truth could only be obtained through the torture of slaves, because while he had found that witnesses sometimes gave false evidence, statements given under torture had always proven to be true³⁷. Unlike what happened during the Roman Empire, the Greeks practiced torture both in the public space of the *polis* and in their private homes³⁸. The power to use torture inside the *oikia*³⁹ was held by the chief of the family, who could punish any violations of domestic rules by using torturous methods. Any disrespectful behavior was punished with percussions, mutilations, beatings and so on. On the other hand, public torture not only had a punitive scope, but

³⁴ Amnesty International, Amnesty International Report 2008 – Italy, 28 May 2008, available at: <http://www.refworld.org/docid/483e2795c.html>.

³⁵ George Riley Scott, *The History of Torture*, New York, 2003, p.46.

³⁶ Eva Cantarella, *La chiamavano basanos- La tortura nell'antica Grecia*, in *Criminalia*, 2012, n. 1, p.19.

³⁷ Steven G. Koven, *Responsible Governance: a case study approach*, 2014, p.157.

³⁸ Eva Cantarella, *La chiamavano basanos- La tortura nell'antica Grecia*, in *Criminalia*, 2012, n. 1, p.19.

³⁹ The *oikia* was the private home of Greek citizens.

was also extensively applied during criminal trials. However, it must be noted that the only individuals who were submitted to acts of torture were public slaves⁴⁰ and individuals who were free citizens, but did not have Athenian nationality⁴¹. There was a specific register in which all foreigners were inserted, mostly businessmen who resided in Athens. As far as the torture techniques were concerned, the worst and most humiliating one was the so called *apotympanismos*. This method consisted in tying the victim to a pole and leaving him to die of thirst, hunger or killed by wild animals.

Aristotle also confirmed the use of judicial torture in Athens, by expressing his approval⁴². In his *Rhetorica*, he describes slaves as being a “live piece of property”, and as such, lack the capacity to make rational observations; thus, torturing them would be the only way to obtain a truthful testimony⁴³. However, Greek courts believed that slaves would tell the truth only if it was necessary to save them from ulterior torture; they would instead lie to protect their masters. Aristotle too seemed sceptic about the trustworthiness of evidence obtained through torture⁴⁴. Statements made by tortured slaves were not always infallible, because “those under compulsion are as likely to give false evidence as true, some being ready to endure everything rather than tell the truth, while others are really ready to make false charges against others, in the hope of being sooner released from torture”.

⁴⁰Slaves were considered to be private property; thus, slaves who belonged to a certain family were punished by their owner.

⁴¹Eva Cantarella, *La chiamavano basanos- La tortura nell'antica Grecia*, in *Criminalia*, 2012, n. 1, p.20-21.

⁴²Aristotle was not the only one to approve torture. Most philosophers were in favour of it, since it was seen as the natural destiny of slaves. Plato, for example, in presenting his concept of Eutopia, affirms the necessity of having laws for free citizens, and laws for slaves.

⁴³Christine Horton, *Persuasive Basanos: Torture in Aristotle and the Attic Orators*, University of Waterloo, 2013, p.1, citing Aristotle, *Art of Rhetoric*, Vol. XXII.

⁴⁴Steven G. Koven, *Responsible Governance: a case study approach*, 2014, p.157.

During Roman times as well, torture was considered to be lawful under certain circumstances, and its use was widespread in Europe⁴⁵. The Romans primarily applied torture to slaves, basing this method on the practice used in Greece. Torture was used against slaves⁴⁶ in criminal and civil cases alike to ensure the veracity of their testimony. However, Roman law allowed a case to rely on slave testimony only if there was already strong evidence pointing to the defendant's guilt⁴⁷. Those who wrongly caused the torture of slaves were subjected to torture themselves. Moreover, Roman law prohibited slaves from testifying against their own master. However, Cicero in his works appears to point out the sole cases in which it was possible to put to torture slaves against their masters during criminal trials; this happened in cases of *incestum* and *coniuratio*. According to an Italian Scholar, Rotondi⁴⁸, Cicero's distinction between situations in which torture could be used or not means that there must have been some kind of statute or law which disciplined criminal law and the use of torture. However, we do not have any certain proof that any such document was ever created.

⁴⁵ During the Roman Empire, there seemed to be a strong contradiction regarding the use of torture; Roman law seemed to prohibit the use of torture only on freemen, who had to undergo a fair trial to be condemned and eventually tortured. On the other hand, slaves and the lower social classes could not enjoy the same privilege. (Mommsen T., *Le Droit Pénal Romain*, 1907) However, Italian scholar Russo Ruggeri seems to disagree; he claims that by reading thoroughly Cicero's works, one can implicitly understand that torture was regularly used on freemen too. (Annalisa Triggiano, *Teoria e Storia del Diritto Privato*, Rivista Internazionale Online)

⁴⁶ Foreigners were put on the same level of slaves, and were also subject to torture. Those whose territory had not entered into treaty relations with Rome were considered as part of the category.

⁴⁷ Matthew Lippman, *The Development and Drafting of the UN Convention Against Torture*, in the Boston College International and Comparative Law Review, Volume 17, Issue 2, Boston, 1994, p.276.

⁴⁸ Rotondi undertook various detailed studies on the leges enacted during Roman times, to understand the purpose of these statutes and the development of Roman law. His results can be found in his work, such as "Osservazioni sulla legislazione comiziale romana di diritto romano".

Gradually, torture started to be used against free citizens as well, and was frequently used towards culprits or simple suspects to make them reveal their accomplices⁴⁹. Judicial torture started to become a regular form of intervention during trials, especially when the citizen was charged with the so called *crimen majestatis*, high treason. These individuals were considered to have forfeited their rights, and interrogation under torture was considered to be an efficient way to make them confess their crimes. In the decades that followed the infliction of torture became even more widespread. During the 3rd century AD, Roman citizens were divided into two groups, *honestiores* and *humiliores*⁵⁰. The first group encompassed all privileged citizens belonging to the higher classes; the second one, on the other hand, were comprised of the poor and lower social classes. The *humiliores* were given the possibility to testify only under torture, and if convicted they would be subjected to different forms of corporal punishment. There are reliable sources confirm this widespread use of violence on citizens. In particular, Cicero denounced in his works various kinds of torture that were used for different reasons during his time⁵¹. He noted how the only way for a suspect to avoid torture was voluntary exile⁵²; however, this proved to be an easy escape only for rich Romans who could afford to relocate outside of Italy.

The use of torture was governed by a series of precise principles. First of all, a minimum age limit was established; children below the age of fourteen and women over seventy could not be subjected to torture, unless the case

⁴⁹Annalisa Triggiano, *Teoria e Storia del Diritto Privato*, in Rivista Internazionale Online, Peer reviewed Journal.

⁵⁰From the online Encyclopedia Treccani.

⁵¹ Italian philosopher and writer Pietro Verri writes about Cicero being against torture and inhuman treatments in his work, *Observations on Torture*. This oeuvre of 1777 clearly campaigns against the use of torture on innocents and culprits alike.

⁵²Janne Polonen, *Plebeians and repression of crime in the Roman Empire: From torture of convicts to torture of suspects*, Paris, 2004, p.225.

concerned treason⁵³. Moreover, pregnant women were spared from violent acts. Another principle was that investigations could not be commenced with the use of torture. Authorities could use it only once they had collected enough evidence that simply needed to be defined⁵⁴. Torture also had to be administered with moderation, even though there were no actual limits to its use. As regard to the specific methods, the standard technique of torture used by the Romans was the rack⁵⁵, which consisted in a wooden frame mounted on rails, which could be moved manually to distend the victim's joints and muscles. This method was excruciatingly painful for the victim, but it was not the only one. The use of red hot metals and hooks to tear the flesh was also sometimes resorted to.

Romans were well aware of the unreliability of testimony extracted under torture. Moreover, the value of torture was questioned time and time again during those centuries. The famous jurist Ulpian warned that interrogation under torture should not be trusted nor rejected immediately, because he believed it to be “dangerous and deceptive”. He stated that torture couldn't always be trusted, because “many persons have such strength of body and soul that they heed pain very little, so that there is no means of obtaining the truth from them; while others are so susceptible to pain that they tell any lie rather than suffer it”⁵⁶. The problem was that on one hand there were those who would send innocents to testify to avoid the suffering, and on the other there were those who would not confess under any circumstance. Torture however had expanded and had brought to the creation of an entire juridical doctrine. Ulpian himself had given a notorious and precise definition of *quaestio*, intended as the interrogation of victims for the purpose of extracting information or confessions; “By *quaestio* is to be understood the torment and

⁵³ Esther Cohen, *The modulated scream: pain in late medieval culture*, United States, 2010, p.53-54.

⁵⁴ George Riley Scott, *The History of Torture*, New York, 2003, p.48.

⁵⁵ George Riley Scott, *The History of Torture*, New York, 2003, p.48.

⁵⁶ Steven G. Koven, *Responsible Governance: a case study approach*, 2014, p.157.

suffering of the body in order to elicit the truth. Therefore, simple interrogation or incidental threats do not pertain to this edict. Since, therefore, force and torment are the features of *quaestio*, the *quaestio* has to be understood in this way”.

During the 4th century, the Emperor Constantine emancipated from Christianity and started a process to eliminate all of the brutal practices used under Roman Law⁵⁷. He issued several laws prohibiting torture and all other kinds of cruel practices, aimed at safeguarding especially slaves from their masters, children and prisoners. However, this only led to the prohibition of the use of torture on the part of private citizens; torture still remained very much part of the legal process.

The Roman Emperor Justinian too, during the 6th century, shared his reservations on the use of interrogatory torture⁵⁸. The legal basis for torture under the Roman Empire can be identified in the Justinian Code⁵⁹, and in particular in the *Digest* of Justinian. The *Digest*, an organized compilation of quotations from precedent Roman law decisions, recalls the definition of torture provided by Ulpian⁶⁰, thus stating that “by torture we mean the infliction of anguish and agony on the body to elicit the truth”. In his *Digest*, Justinian addresses the issue of torture in one particular section. He explains in detail under what conditions torture may be used, for what type of crimes and on which classes of individuals. Bishops were for example, exempt from torture, as were lawyers, doctors and noblemen. Even though he did not take a radical step to propose its abolishment, his vision of the practice seems to be more critical than the previous Christian emperors of the 4th and 5th centuries.

⁵⁷Brian W. Harrison, *Torture and Corporal Punishment as a problem in Catholic theology*, online article in Living Tradition, 2005.

⁵⁸Steven G. Koven, *Responsible Governance: a case study approach*, 2014, p.157.

⁵⁹It is the so-called *Corpus iuris civilis*, a collection of works in jurisprudence issued by order of the Emperor Justinian. This oeuvre is divided into three parts: the Code or *Codex*, the *Digest* and the Institutes or *Institutiones*.

⁶⁰Esther Cohen, *The modulated scream: pain in late medieval culture*, United States, 2010, p.53-54.

In his Digest, he clearly recognizes the difference between the existing regulations on torture, and every day practice. Justinian also envisions torture as being the last resort in a criminal investigation, thus acknowledging the severe and lasting effects of the practice⁶¹.

Thus, over time, more and more individuals began to question and doubt the reliability of information obtained through torture.

Torture was frequently used during the Middle Ages as well. This historical period was characterized by an expanded abuse of torturous methods⁶², used mainly against those who were seen as enemies of society; heretics⁶³. The Church held an important political and religious power over Europe, and had to maintain it through the suppression of heretics.

During the rise of Christianity, all individuals who rejected the Emperor's power were subjected to torture; this fate was not confined only to traitors anymore. All those who were suspected of being Christians were tortured, so that they would confess their religious crime. They were then tortured once again to force them to renounce their faith. However, with the triumph of Christianity, the Church strongly opposed torture, and in 866, Pope Nicholas I declared that torture was not admitted by either human laws or divine laws⁶⁴; he considered confession as being a spontaneous act which could not be achieved with force or be violently extorted, but had to be proffered voluntarily. This idea was maintained until the end of the eleventh

⁶¹Esther Cohen, *The modulated scream: pain in late medieval culture*, United States, 2010, p.53-54.

⁶²Before we continue, it must be noted that Edward Peters, like many others, has argued that the myth of the Inquisition has been misunderstood by historians, and that there is a widespread misconception regarding the use of torture in those centuries.

⁶³Larissa Tracy, *Torture and brutality in Medieval literature: negotiations of national identity*, Cambridge, 2012, p.48.

⁶⁴Rev. Brian W. Harrison, *The Church and Torture*, online article at CatholicCulture.org, December 2006.

and the beginning of the twelfth century, when Gratian, a Bolognese scholar, created a unique body of law out of different texts from earlier sources. His work of analyzing and arranging various sources brought to the creation of the *Decretum*, a collection of canon laws that had been applied in the past centuries. Gratian recognizes Roman Law⁶⁵, including all those laws set out by emperors against heretics; however, he seemed to reject the use of torture as a method to solve church affairs, on the basis that clerics cannot use torture⁶⁶. Furthermore, he reaffirmed the concept that confessions cannot be extorted through torture, but have to be spontaneous. He did include a few exceptions to this rule, such as the possibility of torturing an individual who had accused a bishop, or torture people belonging to the lower classes of society. Finally, he affirmed that under certain circumstances, also slaves may be tortured.

Nonetheless, torture was reintroduced in civil justice in the 12th century, and was absorbed by the ecclesiastical legislation too. The continuous battle against heretics was the main reason for the reintroduction of torture. Pope Innocent III announced in his decretum *Vergentis in senium* that heretics were considered to be traitors of God, and as such had to be subjected to a variety of new legal sanctions⁶⁷. It was during this time that the so called Medieval Inquisition was born; this was when the use of torture reached its peak, and was used in both capital cases as well as against suspected heretics. The Inquisition was a group of institutions representing the ecclesiastical Court that was part of the judicial system of the Roman Catholic Church, and was presided by permanent inquisitors⁶⁸. Its main aim was to combat heresy by using torture on those suspected of being of another religion. The term inquisition derives from the Latin *inquisitio*⁶⁹, and referred to all those court

⁶⁵Up until that moment, Canon law had permitted the practice of *inquisitio*, judicial torture, because of the influence of Roman Law.

⁶⁶Edward Peters, *Torture*, University of Pennsylvania Press, Philadelphia, 1985, p.52.

⁶⁷Edward Peters, *Torture*, University of Pennsylvania Press, Philadelphia, 1985, p.53.

⁶⁸From Enciclopedia Treccani, *Inquisizione*.

⁶⁹The term *inquisitio* literally means research.

trials which were based on Roman Law. The word itself encompasses any kind of crime and vice, such as murder, robbery, torture, treachery, deceit and so on, which meant that all crimes were trialed and punished in the same way. Most of the sentences passed from these courts contained a guilty verdict, and resulted in condemnns which led to torture or to the death penalty. The Holy See firstly appointed bishops with the task of finding and punishing heretics, but soon after decided to take it a step further by nominating official inquisitors. A professional class of judges, prosecutors and defense attorneys developed during those years and introduced Roman law principles into European jurisprudence.

In 1231, Pope Gregory IX established the Papal Inquisition⁷⁰, which was originally intended to be temporary. He issued a decree to set up a Court system that would try and punish all heresy, which was considered to be the most serious crimes towards the Church and the State⁷¹. For the first time, a convent of the Dominican Order was given the power to create an inquisitorial tribunal, whose authority derived directly from the Pope himself. The choice of the Dominican Order descended from the fact that they were known for being extremely well-educated and knowledgeable in the field of theology, and were thus fit to conduct the Inquisition⁷².

This Inquisition judged heresy alone, and its procedure was very standard. Before beginning the trial, two edicts were usually issued: the first one was an edict of faith, which imposed an obligation on all citizens to denounce heretics and their accomplices; the second one was an edict of grace, meaning that if within one month the suspect confessed, he would obtain forgiveness. Once the trial was started, the suspected heretic was summoned before the Court to be interrogated before the Inquisitor: if he failed to confess

⁷⁰ Dorling Kindersley, *History year by year*, 2011, p.142.

⁷¹ Scott Christianson, *100 Documents that changed the world: from Magna Charta to Wikileaks*.

⁷² Shanna Freeman, *How the Inquisition Worked*, online article.

spontaneously, he would be submitted to torture. Torture and prisons were a widespread reality in the criminal justice system, and were used both in the questioning phase and in the punishing phase of the trial⁷³.

In 1252 a papal bull was issued by Pope Innocent IV⁷⁴; this decree, called *Ad extirpanda*, was the first explicit authorization to the use of torture to extract a confession from heretics⁷⁵. This document did not in itself allow Inquisitors to use torture, because the 12th century attacks on the early procedures, in particular the ordeal, had laid down the idea that the clergy could not shed blood. It authorized tribunals to use torture to obtain confessions. It was only with the next pontificate, that of Alexander IV, that Inquisitors were given the authority to absolve one another if they used judicial torture in the course of their work⁷⁶.

Eventually, this use of torture was extended beyond the practice used up until that moment. Torture was used on individuals that had been convicted, to make them confess who their accomplices were. Witnesses were also tortured to obtain information and testimony. The Medieval Inquisition saw the rise of various and heinous methods of torture. The so called strappado⁷⁷ was the most widely used method of torture of those days in Europe. Other common torture devices were the leg-screw and leg-brace, or the tightening of cords around the wrists, used especially on women and children. Another well-known method of torture associated with the Inquisition was the rack; the victim's joints were tied or chained to rollers. These rollers were turned by the

⁷³Adriano Prosperi, *L'Inquisizione Romana: letture e ricerche*, Edizioni di Storia e Letteratura, 2003, p.316.

⁷⁴Robert Adams, *The Abuses of Punishment*, UK, 1998, p.40.

⁷⁵Scott Christianson, *100 Documents that changed the world: from Magna Charta to Wikileaks*.

⁷⁶Henry Charles Lea, *Torture*, USA, 1973, p.187-188.

⁷⁷The strappado method consisted in tying the accused's hands behind his/her back with a cord, which was connected to a rope attached to the ceiling. The victim was then raised off the floor and gradually lowered back on the ground. This process was repeated at a rapid rate, and caused severe pain to the victim's joints and muscles.

torturer, and the mechanism stretched the arms and legs of the subject, until they dislocated. The selection of the mode of torture was left entirely to the judge, who would decide based on the gravity of the charges pressed against the accused, and depending on the customs of the region in which the trial took place⁷⁸. Although torture was not intended to kill, most of the time these atrocious methods would leave permanent damages and injuries.

In the Late Middle Ages and Early Renaissance this concept of Inquisition was greatly expanded, as a response to the Protestant Reformation and the Catholic Counter-Reformation. Torture continued to be part of the ordinary criminal procedure of the Latin Church. Its scope was expanded to other European Countries, and brought to the creation of the Spanish Inquisition⁷⁹. The inquisitorial tribunal was a continuation of the medieval one, and was activated in Spain at the end of the 15th century⁸⁰. Once the process of territorial unification between the two kingdoms of Aragon and Castile had been completed, and the Iberian Peninsula had been unified, there was a strong will to proceed with a political and religious cohesion of the country, by eliminating all ethnic and religious minorities and establishing a single religion. To expunge the country from the Muslim and Jewish minorities, the new Christian authorities, led by King Ferdinand II of Aragon and Queen Isabella I of Castile, established the Inquisition in 1478, with the authorization of Pope Sixtus IV⁸¹. A few years later, King Ferdinand II issued the so called Alhambra Decree in 1492, ordering the expulsion of all Jews in the Spanish territories. To avoid being tortured and expelled from the country, many Jews converted to Catholicism, but still continued to practice their

⁷⁸Edward Peters, *Torture*, University of Pennsylvania Press, Philadelphia, 1985.

⁷⁹James P. Pfiffner, *Torture as public policy: restoring US credibility on the world stage*, New York, 2010, p.5.

⁸⁰Robert Adams, *The Abuses of Punishment*, UK, 1998, p.40.

⁸¹James P. Pfiffner, *Torture as public policy: restoring US credibility on the world stage*, New York, 2010, p.5.

religion; thus, they became the main targets of the Inquisition. Muslims suffered the same type of persecution, and even those who converted were targeted. On the contrary of the previous inquisitions, this one operated completely under royal Christian authority, and was staffed with clergyman. Moreover, the goal of the inquisition was to actually create unity, opposed to the aim of maintaining authority of the other inquisitions. The Spanish Inquisition also took advantage of the decree issued by Pope Innocent IV; thus, the possibility to use torture to extract a confession was a task assigned to both local authorities and to the Inquisitors themselves. However, torture could only be used if there were no other ways to obtain the needed information; if and when torture was used, the confession extracted by this means had to be verified again for it to count⁸². The accused was not granted a lawyer or any other type of legal assistance, and if he refused to testify, the Inquisitor would consider this refusal as clear proof of his guilt.

The Spanish Inquisition was abolished only in 1834, by Queen Maria Cristina, widow of Fernando VII, acting regent for the young Isabel II⁸³.

Even during the course of the 16th and 17th century, Europe witnessed a strong abuse of torture. Torture was continued to be used to bring on inquisitions and extort information from witnesses, and most of the trials ended with capital punishments, due to the evidence that was obtained using excruciating methods of torture. During this time, jurists relied heavily on confessions extracted under torture. Torture was so widespread to obtain evidence and information that it was referred to as the ‘queen of proofs’⁸⁴. Following this idea, an entire jurisprudence of torture developed. The common procedure was that authorities first showed the accused the instruments of

⁸²Robert Adams, *The Abuses of Punishment*, UK, 1998, p.40.

⁸³James Maxwell Anderson, *Daily life during the Spanish Inquisition*, London, 2002, p.83.

⁸⁴Edward Peters, *Torture*, University of Pennsylvania Press, Philadelphia, 1985, p.40.

torture, to try and convince them to confess to avoid the pain. Only if the accused did not confess was torture subjected; all the while, a judge conducted an interrogation. Usually a doctor or medical expert attended the interrogation, to safeguard the accused. Torture had to be proportionate to the amount of evidence collected, to the sex and age of the accused, and could not cause any permanent injuries⁸⁵. Any information that was extracted under torture had to be investigated on and verified. If the victim confessed, the confession needed to be repeated the following day in a courtroom in front of a judge.

These practices, originating from the methods of the Medieval Inquisition and the Spanish Inquisition, soon spread to other forms of Catholic Inquisition, such as the Roman Inquisition. The various Christian reform movements of those years wanted to create a single Inquisition which was under the direct control of the Catholic Church, and drew inspiration from the Spanish one because Spain was the greatest political power in Europe during the 16th century. The Roman Inquisition was established during the 1540's as part of the reform brought on by the Catholic Church to combat the spreading of Protestantism. It focused mainly on the persecution of all those individuals who were accused of having committed offenses related to heresy and in particular, it persecuted witchcraft and sorcery. The tribunals of the Roman Inquisition were set up across the entire Italian Peninsula by Pope Sixtus V, who established fifteen congregations of the Roman Curia.

Among the famous subjects of the Roman Inquisition there were the famous Copernicus and Galileo Galilei. Copernicus's idea of the sun being immobile and at the center of the universe, and the Earth revolving around the sun, was condemned as being heretical by the Inquisition in 1616. Galileo revised the same theories and was admonished for his heliocentric views in 1615⁸⁶. His writings were submitted to the Roman Inquisition, which came to

⁸⁵ Jules Speller, *Galileo's Inquisition trial revealed*, Germany, 2008, p.34-35.

⁸⁶ James Cunggureanu, *Myths About Science and Religion: That Galileo was Tortured and Imprisoned for Advocating Copernicanism*, online blog, 2013.

the conclusion that this theory could only be accepted as a possibility, and not as an established and certain fact. According to various sentencing documents which recounted his proceeding, Galileo was allegedly imprisoned and subjected to torture, to prevent him from discussing his ideas. There are no official documents or private statements which confirm he was tortured, but most scholars agree that he actually was subjected to ‘rigorous examination’⁸⁷. He was thus tried and condemned as a suspected heretic, and was forced to recant, remaining on house arrest for the rest of his life.

Thus, up until the 18th century the law of proof was completely dependent on confessions extorted using torturous methods⁸⁸. The great criminal codes of those centuries, such as the French Ordonnance Royal, simply perfected the process of inserting torture in the criminal procedures that had started in the medieval era.

Only with the turn of the century was there a radical change in the functioning of the judicial proceedings, and a stronger importance was given to the respect of human life. These changes were influenced by the Enlightenment ideas brought on by Voltaire, Rousseau and Montesquieu, who aimed at applying the methods learned from the scientific revolution to society. The condemnation of torture became a moral matter, and it demanded for a radical change in the legal and political area.

An important turning point happened with the work of an Italian criminologist, jurist and philosopher, Cesare Beccaria⁸⁹; his oeuvre “On Crime and Punishments” of 1764 marked the beginning of modern criminal law. The movement for the abolition of torture had already started, but the treatise had an accelerated influence on the legislative reform which saw a growing

⁸⁷Jules Speller, *Galileo’s Inquisition trial revealed*, Germany, 2008, p.36-38.

⁸⁸Edward Peters, *Torture*, University of Pennsylvania Press, Philadelphia, 1985, p.73.

⁸⁹Paul Hyland, Olga Gomez and Francesca Greensides, *The Enlightenment: A sourcebook and reader*, New York, 2003, p.216-217.

number of provisions for torture in criminal codes⁹⁰. His experience during a visit to a prison in Milan provided the basis for his protest against the use of torture as a punishment and as a way to obtain confessions⁹¹. In the introductory part, written for readers as a response to the criticism his oeuvre had suffered, Beccaria describes torture laws as being “an emanation of the most barbarous ages”⁹². He underlines the importance of the principle of respect for human rights of the people who are undergoing a trial, denouncing the use of torture for the purpose of extracting a confession and strongly criticizing the death penalty. The core of his oeuvre revolves around the idea that a criminal justice system should focus more on preventing crimes rather than punishing them with extreme penalties; punishments should aim at creating a better society, not at getting revenge. Even though he concentrates on protesting against judicial torture, his views on crimes and punishments in general envelop the idea that a society’s main goal should be to pursue the greatest happiness possible.

In the introductory note to the reader, Beccaria defines torture as “an emanation of the most barbarous ages”⁹³. He states that the reasons for using judicial torture are “ridiculous”; he questions the use of torture to resolve a crime, when the guilt of the accused has already been ascertained enough to actually warrant torture. He also notices that if torture has to be used to solve a crime, this would mean that the guilt has not yet been determined. He states that: “Either the crime is certain or it is not; if it is certain, then no other punishment is suitable for the criminal except the one established by law, and torture is useless because the confession of the accused is unnecessary; if the

⁹⁰Michelle Farrell, *The Prohibition of Torture in Exceptional Circumstances*, United Kingdom, 2013, p.211.

⁹¹Paul Hyland, Olga Gomez and Francesca Greensides, *The Enlightenment: A sourcebook and reader*, New York, 2003, p.216-217.

⁹²Cesare Beccaria, *On Crimes and Punishments*, in the introductory note to the reader, translated by David Young, 1986, p.1.

⁹³Michelle Farrell, *The Prohibition of Torture in Exceptional Circumstances*, United Kingdom, 2013, p.211.

crime is uncertain, one should not torment an innocent person, for, in the eyes of the law, he is a man whose misdeeds have not been proven”⁹⁴. He clearly stresses out that torture is useless in all cases; if the guilt of the accused is certain, interrogation under torture is not needed; if the guilt is uncertain, the use of torture risks harming the innocent victim. Thus, Beccaria points out that the main flaw of judicial torture is the use of it to extract a confession⁹⁵.

Beccaria then continues by criticizing the nature of the act of torture⁹⁶. He sustains the idea that torture is wrong because it goes against the principle of personal integrity, and goes against prohibition of self-incrimination⁹⁷. Since the pamphlet represents an important appeal against the use of torture, it pushes on the idea that, in compliance with the principle of legality, citizens must be made aware beforehand of what is lawful and what is unlawful. Beccaria cites Montesquieu, by stating that “every punishment which does not arise from absolute necessity is tyrannical”. Furthermore, he appears sceptic that torture could lead to truthful testimony. In his oeuvre he clearly states that pain could not be used as “the crucible of the truth, as though the criterion of truth lays in the muscles and fibers of a poor wretch”.

An important critique to the work of Beccaria was made by Muyart de Vouglansin 1766⁹⁸. His treatise, ‘Refutation of the Treatise on Crimes and Punishments’, is the last known defense of judicial torture in European history⁹⁹. This treatise however proved to be ineffective and did not have any

⁹⁴From the Portable Library of Liberty, Cesare Beccaria, 2009, can be found at <http://files.libertyfund.org/pll/quotes/208.html>.

⁹⁵ From the online blog Thoughts Central, *Cesare Beccaria on torture and the death penalty*, 2012.

⁹⁶Michelle Farrell, *The Prohibition of Torture in Exceptional Circumstances*, United Kingdom, 2013, p.211.

⁹⁷Beccaria states that “No man can be considered guilty before the judge has reached a verdict, nor can society deprive him of public protection until it has been established that he has violated the pacts that granted him such protection”.

⁹⁸Michelle Farrell, *The Prohibition of Torture in Exceptional Circumstances*, United Kingdom, 2013, p.211.

⁹⁹Edward Peters, *Torture*, University of Pennsylvania Press, Pennsylvania, 1985.

effect on society, because even after its publication, the wave of reform around torture continued to expand.

Beccaria's work was fundamental in starting the process of the abolition of torture throughout Europe, starting from Prussia, Austria and France, and went on to become a symbol of modern criminal law. Even though his ideas were not entirely new, he provided an intellectual justification which sped up the reform process. His ideas were adopted by the National Assembly in France, which adopted the Declaration of the Rights of Man and Citizen in 1789, a revolutionary document which contained constitutional guarantees of individual liberties¹⁰⁰. This movement had been preceded and influenced by the Magna Charta, or Great Charter, of 1215 in England, and by Thomas Jefferson's Declaration of Independence of 1776; however, it was the French Declaration that paved the way for the reception of the idea of human dignity and human rights for the European continent. Its influence, however, was not immediate, considering that the French Revolution gave rise to the return of the monarchy in 1815, and to the era of colonialism¹⁰¹. Obviously this historical wave of rationality and humanity reconciled with difficulty with the use of torture.

The 18th century witnessed a large change in the existing legislation on torture, and a new attitude towards torture and cruel punishments seemed to settle in. Judges soon asserted the right to give criminal penalties to individuals in circumstances where the evidence was not enough to ascertain their complete guilt¹⁰². Thus, the use of torture to extract confessions became

¹⁰⁰Paul Hyland, Olga Gomez and Francesca Greensides, *The Enlightenment: A sourcebook and reader*, New York, 2003, p.216-217.

¹⁰¹ Yves Beigbeder, *Judging War Crimes and Torture: French Justice and International Criminal Tribunals and Commissions*, Boston, 2006, p.5.

¹⁰²Matthew Lippman, *The Development and Drafting of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment*, in the Boston College International and Comparative Law Review, Volume 17, Issue 2, 1994, p.283.

less and less useful. The system created prisons, workhouses and others which permitted judges to abandon the rigidity of the previous system of proof. In 1740, Frederick the Great abolished torture in Prussia, and authorized conviction and punishment on less than full proof¹⁰³. In 1770, torture was abolished in Denmark too, and a few years later Poland, Austria and Belgium followed. In 1780, the use of torture to extract confessions before a sentencing was abolished by the French monarchy, under Louis XVI, and soon after the guillotine was introduced, to make the execution of the death penalty as painless as possible¹⁰⁴. By the end of the 18th century, the public opinion appeared to demand the end of judicial torture, and throughout Europe and the American colonies laws against torture were enacted. By the 19th century most European States had revised their laws of criminal procedure, and criminals were accused on the basis of full proof, rather than on confessions extracted by torture. In 1874, the French writer Victor Hugo declared that “torture has ceased to exist”¹⁰⁵.

These changes in the Western penal systems during that time were due to the spreading of Beccaria’s ideas, and shaped the work of another important French philosopher, Michel Foucault. Foucault’s most famous book, *Discipline and Punish: the birth of the Prison* of 1975, is grouped into four parts, which represent the main ideas of the book itself; torture, punishment, discipline and prison¹⁰⁶. In the first part, Foucault examines public torture used during the 18th century, viewing it as the outcome “of a certain mechanism of power” that is born out of military schemes. He criticizes the theatrical way in which torture was used publicly, to show citizens how their original crime would be

¹⁰³Steven G. Koven, *Responsible Governance: a case study approach*, 2014, p.157.

¹⁰⁴ Lynn Hunt, *The Paradoxical Origins of Human Rights*, in *Human Rights and Revolutions*, Second Edition, Edited by Wasserstrom, Grandin, Hunt and Young, 2007, p.15.

¹⁰⁵Steven G. Koven, *Responsible Governance: a case study approach*, Routledge, 2014, p.158.

¹⁰⁶Stephen Shapiro and Anne Schwan, *How to read Foucault’s Discipline and Punish*, 2011.

reflected on their own bodies. Foucault states that "it [torture] [...] made it possible to reproduce the crime on the visible body of the criminal; in the same horror, the crime had to be manifested and annulled. It also made the body of the condemned man the place where the vengeance of the sovereign was applied, the anchoring point for a manifestation of power, an opportunity of affirming the dissymmetry of forces"¹⁰⁷. Through the ritual of investigation, and annex use of torture, sovereigns could show their power to the people and create fear amongst his subjects Foucault argues how these barbaric methods were not only ineffective, but also against the changes that had happened during the past decades.

Despite the progress made on the prohibition of torture during the 18th and 18th centuries, torture continued to be widely used during the revolutions of the 20th century, especially against the enemies; this was justified for the sake of what was defined as a "higher cause". The authoritarian governments sacrificed the individual for their personal aims of unifying states and nations, and relied on terror and torture as instruments of government¹⁰⁸. Despite modern society being more aware of the prohibition of torture, many States had come up with different methods to circumvent both their legal and humanitarian duties. The justification of 'need to know' has been used by governments to engage in torturing suspected terrorists, to extract information and find accomplices. Moreover, due to State denying and hiding these practices, most of the time those carrying out these act do not face any legal consequences¹⁰⁹. Nigel Rodley, the UN Special Rapporteur for the Commission on Human Rights, has given his opinion on this issue, stating that "impunity continues to be the principal cause of the perpetuation and

¹⁰⁷Jean Foucault, *Discipline and Punish*, 1977, p.55.

¹⁰⁸Matthew Lippman, *The Development and Drafting of the UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, Boston college International and Comparative Law Review, Volume 17, Issue2, 1994, p.284.

¹⁰⁹Amnesty International, *End Impunity: Justice for the victims of torture*, 2001.

encouragement of human rights violations and, in particular, torture”¹¹⁰. The use of torture also developed into a mechanism of political control. With the development of technology, the methods of torture have changed and evolved, and the methods have become more sophisticated to emphasize the infliction of psychological pain, rather than physical. The use of Tasers and electro-shock devices in prisons is still today a very present issue. This trend towards using modern techniques of torture to neutralize political opponents found its peak in the Soviet Union.

After the Russian October Revolution of 1917, there was a seizure of State power carried out by Lenin and the Bolsheviks¹¹¹. The new regime established a Ministry of Internal Affairs, which subsequently turned into NKVD, the People’s Commissariat of Internal Affairs. However, the Russian police authorities were highly inexperienced and could not carry out their tasks, which fell on the NKVD. Since there was no capable security force, the Cheka was created, a secret political police; this was supposed to be a temporary institution, on which Lenin and the Bolsheviks could rely on until they had consolidated their power. However, the Cheka brought on a campaign of terror and violence, until it was reorganized and became the GPU, subordinated to the NKVD. As the Soviet Union fell under the rule of Stalin, this secret police gained unprecedented control and power. During the 1930’s, the NKVD was responsible for the assassination of all those who were believed to be opponents of Stalin. Around the half of the 20th century, a security agency called KGB (Committee for State Security) replaced the precedent Cheka and NKVD; it acted as internal security, intelligence and secret police at the same time. During World War II, the KGB carried out mass arrests, deportations and executions; they are remembered for the series of mass executions of Polish nationals that were carried out in 1940.

¹¹⁰Nigel Rodley, *Report on Torture and other cruel, inhuman or degrading treatment or punishment*, UN Document A/54/426, 1999.

¹¹¹*Lenin and the Bolshevik revolution*, in bbc.co.uk, Russia/URSS 1905-1941.

The methods of torture used by the Soviet NKVD were varied¹¹². Individuals were isolated inside small cells, producing great discomfort and disturbances to the victim, due to the lack of sleep and food, anxiety and continuous changes in the temperature. These practices were not considered as being torture because they only caused changes in the attitude and behavior of the victim, considering that the KGB hardly ever used chains or manacles, or inflicted physical sufferings. A physical form of torture that was largely used, and once again not considered as torture, is the practice of requiring the victim to stand during the entire interrogation, or to maintain another painful physical position¹¹³.

These techniques used by the Soviet Union were later on adopted by the United States in the aftermath of the 9/11 attacks, to interrogate prisoners at Guantanamo Bay, Afghanistan and Iraq.

In its 1973 report¹¹⁴, published to help launch its first campaign for the abolition of torture, Amnesty International found that torture had “suddenly developed a life of its own and had become a social cancer”¹¹⁵. Many countries around the world were reportedly using torture as a mode of governance. This detail emerged from the information collected by the organization, according to which torture was being carried out by military forces which had assumed responsibility in various States, and justified their acts as being necessary for internal security and domestic order. Governments explained that the extreme circumstances of their political situations required

¹¹² Scott Shane, *Soviet-style ‘Torture’ becomes ‘Interrogation’*, in the New York Times, June 2007.

¹¹³ Scott Shane, *Soviet-style ‘Torture’ becomes ‘Interrogation’*, in the New York Times, June 2007.

¹¹⁴ This constituted the very first Amnesty Report; before that moment, the organization had been more concentrated on the repression of torture on a moral level. With this first campaign against torture, lawyers were appointed on a full-time basis to actively combat torture, the most important one of them being Nigel Rodley.

¹¹⁵ Tobias Kelly, *The side of silence: human rights, torture and the recognition of cruelty*, Pennsylvania, 2012, p.36-37.

the use of force, considering that frequently the opposition was described as being a threat to the entire nation. Amnesty however did not accept these excuses, arguing that torture cannot be accepted as the only way to survive, because it must always and in every situation be condemned. According to the report, the injustice of torture rests on the fact that it “offends the notion of just punishment which is based on a fixed term of imprisonment for a specific offence”¹¹⁶. It also noted that there is no act which is “more a contradiction of our humanity than the deliberate infliction of pain by one human being on another”. In addition, Amnesty noted that history taught us that every time torture was used, it has never been limited or contained; thus, it argued that once it was used, the means inevitably corrupted the ends. The inevitable development was that firstly torture would be used against an individual who planted a bomb, and subsequently on people who might plant one or might think of planting a bomb. This would bring to an endless circle which would permit the use of torture in almost every situation.

Amnesty observed in its report that torture was used in conjunction with the disregard of the rule of law, in particular by those countries whose regimes had declared a state of emergency or a state of siege¹¹⁷.

In December 1973, Amnesty International organized the first International Conference on the Abolition of Torture. The main scope of this conference was to educate the public on torture, and to convince people about the devastating effects of torture on human dignity. The delegates which presided the conference declared that the use of torture is a violation of freedom, life and went against human dignity, and should be recognized as a

¹¹⁶Tobias Kelly, *The side of silence: human rights, torture and the recognition of cruelty*, Pennsylvania, 2012, p.36-38.

¹¹⁷Matthew Lippman, *The Development and Drafting of the UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, in the *Boston college International and Comparative Law Review*, Volume 17, Issue 2, 1994, pp.294-296.

crime by all governments¹¹⁸. Following this conference, Amnesty announced that it would start working on various drafts of proposals, such as codes of conduct for certain professions, which prohibited torture. There were certain professional areas, particularly health professions and doctors, which were notorious for their involvement in torture. By the mid-1970's the organization had made substantial progress by drafting several codes of ethic, which had to be incorporated in different curricula of training programs, to encourage individuals to abstain from using torture, even when it was demanded by their government. These codes wanted to remind professionals that they held duties and obligations towards individuals which went beyond those obligations imposed by the State. Obviously the effectiveness of these codes rested on the willpower of the single individual to maintain an ethical conduct and not get involved in torture. The basic principles of moral ethics and humanity were incorporated in the codes of conduct for lawyers, judges, enforcement officials and doctors¹¹⁹.

An ulterior critical moment for the clear development of the prohibition of torture happened after the Second World War, when the tragedy of the Holocaust functioned as a strong wake up call for the international community. The torture practiced in the Soviet Union was no comparison to the dreadful practices used by the Nazi regime in Germany. The Nazi concentration camps represented the most brutal and widespread use of torture of the last centuries, and this phenomenon was spread in Europe, the Americas and Asia during the same period of time. The Nazi rule was characterized by a "systematic rule of violence, brutality and terror"¹²⁰. Those who were

¹¹⁸From the final report of the Conference for the abolition of torture, Amnesty International publications, 1975.

¹¹⁹J. Hermann Burgers, *The United Nations Convention Against Torture: A handbook on the CAT*, The Netherlands, 1988, p.19-20.

¹²⁰From the Trial of the Major War Criminals before the International Military Tribunal, Volume 22, p.475, 1946. This 42-volume series, also known as the "The Blue Series", is the official record of the trial of the major leaders of Nazi Germany who were accused of war Crimes.

suspected of being subversive or opposed to the German rule were arrested and interrogated by the Gestapo, the secret police of Nazi Germany, and were subjected to cruel and abusive methods. The International Military Tribunal at Nuremberg found that all those who had been transported to Germany to work as slaves in the concentration camps had been “packed in trains without any food, clothing or sanitary facilities. [...] The treatment of the laborers in Germany in many cases was brutal and degrading. [...] Punishments of the most cruel kind were inflicted on the workers”¹²¹. Most of the concentration camps were equipped with gas chambers and furnaces, to kill groups of inmates at the same time and burn their bodies. According to the statistics, between 1940 and 1943 around 2,500,00 people were exterminated only at the concentration camp of Auschwitz¹²². In a 1945 report, drawn up by the United States Army to document the conditions in which inmates were kept in concentration camps, we can find a list of the specific acts that amount to torture: “Hunger and starvation, rations, sadism, inadequate clothing, medical neglect, disease, beatings, hangings, forced suicides, shootings [...] all played a major role in obtaining their object. Prisoners were murdered at random; spite killings of Jews were common, injections of poison and shooting in the neck were everyday occurrences[...]. Life in this camp meant nothing”.

Other forms of torture in concentration camps were submitted through the medical experimentations conducted by German doctors on inmates. Once they arrived at a camp, non-Germans were separated into groups according to sex, age and ability to work. Some of them were sent directly to the laboratories, where all kinds of experiments were conducted on them. Most of them died while other suffered grave and permanent injuries, due to the poor

¹²¹From the Trial of the Major War Criminals before the International Military Tribunal, Volume 22, 1946, p.489.

¹²²Matthew Lippman, *The Development and Drafting of the UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, in the Boston College International and Comparative Law Review, Volume 17, Issue 2, 1994, p.286.

attention the doctors had. Various studies conducted at Dachau, Auschwitz and Ravensbrueck revealed that victims were mutilated, ill-treated, and infected under poor hygienic conditions, treated by unqualified individuals thus suffering “great mental and physical anguish”. Inmates could not withdraw from these experiments; only if they were deemed as being no longer necessary could they be assigned to another “job” in the camp.

At this point, the protection of human rights, especially the prohibition of all kinds of ill-treatment towards human beings, was soon put at the top of the agenda of most States, pushed by human rights and humanitarian organizations. The Nazi atrocities had motivated the international community to take action, and to acknowledge that individuals enjoyed certain rights which transcended from race, ethnicity, religion or gender. International law played a major role in protecting human rights, and in pursuing the objective of imposing limits on the rights of States and governments to abuse their people. On one hand, it imposed obligations on States by creating Treaties and Conventions that could limit national sovereignty and the absolute supremacy of States; the principle of non interference in the internal affairs of States progressively lost value in the face of serious violations of human rights. On the other hand, we have witnessed an internalization of human rights, with the consequence that States were no longer the only ones who could judge the treatment reserved to citizens. The devastation brought on by the war and the horrendous sufferings inflicted on civil people called for a major reform not only of laws but of the basic ethic principles governing the various countries. This led to the adoption of different legally binding treaties and conventions during the following years, and many international organizations contributed to the creation of ad hoc laws to protect human beings against the risk of being subjected to acts of torture.

Despite the progress that has been made up until now, torture still remains a very real issue. As the former UN Special Rapporteur on Torture, Manfred Nowak, has observed, “torture is practiced in more than 90

per cent of all countries and constitutes a widespread practice in more than 50 per cent of all countries”¹²³.

1.2. Throughout the years, the prohibition of torture has come to be peacefully considered as a *jus cogens*¹²⁴ norm¹²⁵, a peremptory norm from which no derogation can be permitted¹²⁶.

There exists a strong inclination to consider certain international norms as being superior to others, because of their roles as guardians of the fundamental values of our society¹²⁷. These norms are defined as *jus cogens*, or imperative law, to indicate those provisions which are not only legally binding like other norms, but also hold certain characteristics that make them prevail on others in cases of conflict. The binding nature of *jus cogens* norms rests on moral grounds; they bind States not because States have accepted them through the ordinary legislative procedures, but because they constitute legally necessary law through other forms of consent¹²⁸. These provisions have the capacity to impose themselves on States independently from the practice followed by a country.

¹²³ Nowak discovered an alarming rate of use of torture during the course of his visits to different countries, and expressed his concern for the significant difference between the normative framework and the reality of the situation in these countries. (A/63/175, Nowak M., Interim Report of the Special Rapporteur on Torture, 2008)

¹²⁴ The term can be expressed as either *jus cogens* or *ius cogens*. The latter is the correct form in Latin, considering the the former is the modern version which emerged in the 19th century.

¹²⁵ The *jus cogens* nature of the prohibitions of torture has been widely accepted; see opinion of Lord Browne-Wilkinson, United Kingdom House of Lords: Regina Bartle and the Commissioner of Police for the Metropolis and Other Ex Parte Pinochet, 1999.

¹²⁶ Article 53 of the Vienna Convention on the Law of Treaties lists four criteria for peremptory norms: “(1) They are norms of general international law (2) They have to be accepted by the international community of States as a whole (3) They permit no derogation (4) They can be modified only by new peremptory norms.”

¹²⁷ Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, Italia, 2012, p.266-267.

¹²⁸ Robert Kolb, *Peremptory International Law- Jus Cogens*, Oregon, 2015, p.30-31.

A series of consequences arise when an international norm falls within the category of *jus cogens*. Firstly, under the law of treaties developed through the Vienna Conventions of 1969, and in particular through Article 64, which states that a treaty may be declared invalid if it conflicts with a norm of *jus cogens*¹²⁹. Furthermore, the Chamber of first instance of the International Criminal Tribunal for the former Yugoslavia has stated¹³⁰ that the higher rank of the principle of *jus cogens* means that it cannot be derogated by States through treaties or through customary international law¹³¹.

The prohibition of torture is one of the few existing human rights which does not permit any kind of limitation or restriction, not even in times of war or other public emergency¹³². Even though there are no existing articles which expressly state that its terms are absolute, it has been accepted as a prohibition without any exceptions. This observation rests on the idea that there is an implicit moral assumption that torture is inherently not only one of the worst violations of human dignity, but also a kind of objectification and forced self-betrayal. The International Tribunal for the former Yugoslavia, for example, has not only asserted that the prohibition of torture is a rule of *jus cogens*¹³³, but it has also affirmed that it meets the demands of humanity and of public conscience¹³⁴.

The peremptory status of torture can be seen by the practice held by States throughout the years, considering that violations of human rights have

¹²⁹ Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, Italia, 2012, p.270.

¹³⁰ See *Prosecutor v. Furundzija* case, IT-95-17/1-T, 1998.

¹³¹ Andrew Clapham, *The jus cogens prohibition of torture and the importance of sovereign state immunity*, in *Promoting justice, human rights and conflict resolution through international law*, by Marcelo Gustavo Kohen, 2007, p.160-161.

¹³² Michelle Farrell, *The Prohibition of Torture in Exceptional Circumstances*, United Kingdom, 2013, p.6.

¹³³ See *Prosecutor v. Furundzija* case, IT-95-17/1-T, 1998.

¹³⁴ Andrew Clapham, *The jus cogens prohibition of torture and the importance of sovereign state immunity*, in *Promoting justice, human rights and conflict resolution through international law*, by Marcelo Gustavo Kohen, 2007, p.158-159.

always been thoroughly justified or otherwise criticized by the international community, and by the fact that no State has ever contested the concept of torture being an absolute right. No State has ever argued that the use of torture should be permissible, nor has it ever repressed it out of a sense of legal obligation¹³⁵. Thus, there is a nearly universal consensus in favor of the rejection of torture and its consequent repression.

Moreover, torture has been mentioned by the UN Human Rights Committee as one of the acts which would violate *jus cogens* norm, along with arbitrary deprivations of life or liberty, and not respecting the rules on fair trials¹³⁶. A similar confirmation of the status of torture has been given by the International Law Commission, in an article on State Responsibility; the article was entitled ‘Serious breaches of obligations under peremptory norms of general international law’, and included torture as one of these imperative provisions¹³⁷.

None of the existing provisions prohibiting torture, however, contain the term “absolute”, or any kind of wording that leads to the conclusion that the enshrined prohibition is absolute. This means that any limits or implied exceptions would have to be extracted from interpretation by judges and courts. In consideration of the fact that more than once the European Court of Human Rights has interpreted other rights of the European Convention on Human Rights as being non-absolute and thus subject to proportionate and legitimate exceptions, it is only natural that the absolute nature of the prohibition of torture has been questioned.

In the case *Ireland v. United Kingdom* of 1978, when referring to the European Convention on Human Rights, the Court of Human Rights declared

¹³⁵ Andrew Clapham, *The jus cogens prohibition of torture and the importance of sovereign state immunity*, in *Promoting justice, human rights and conflict resolution through international law*, by Marcelo Gustavo Kohen, 2007, p.158.

¹³⁶ See General Comment 29, Article 4, UN Doc. HRI/GEN/Rev.6, 2003.

¹³⁷ Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, Italia, 2012, p.269.

that “The Convention prohibits in absolute terms torture and inhuman and degrading treatment or punishment, irrespective of the victim’s conduct. [...] Article 3 makes no provision for exceptions and under Article 15(2), there can be no derogation therefore even in the event of a public emergency threatening the life of the nation”¹³⁸. Thus, by reading Articles 3 and 15 of the ECHR together, one can easily see that the intention of the drafters of the Convention was to enshrine rights that are superior to others¹³⁹. The logical consequence is that those who are subjected to torture should be able to avail themselves of effective legal remedies and to obtain adequate reparation for the damages suffered, be them physical or psychological; and those who practice torture should be severely punished without any kind of exceptions.

This idea of a *jus cogens* norm, from which no derogation can be permitted, traces back to the Vienna Convention on the Law of Treaties of 1969. The Convention states that a *jus cogens* norm is a “peremptory norm of general international law [...] accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”¹⁴⁰. It binds all States, regardless of whether they have ratified the treaties that contain them, because of its status of “intransgressible principle of customary international law”¹⁴¹. This Convention, however, confined the application of *jus cogens* to unlawful international treaties. This meant that any treaty which provided for practices which constituted torture would be null and void; but where a treaty itself did not explicitly violate a peremptory norm, the only consequence was that States were relieved from giving effect to those obligations which would have such

¹³⁸Court (Plenary), Case of *Ireland v. the United Kingdom*, Application no. 5310/71, 18 January 1978.

¹³⁹Michael K. Addo and Nicholas Grief, *Does Article 3 of the ECHR enshrine absolute rights?*, in *European Journal of International Law*, 1998, p.513.

¹⁴⁰Article 53, Vienna Convention on the Law of Treaties.

¹⁴¹Christine Chinkin, *Sources*, in *International Human Rights Law*, Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, Second Edition, 2014, p.85.

an effect¹⁴². The treaty would therefore remain intact, without being voided. Obviously, the concept of *jus cogens* as it exists today was not correctly contemplated by the Convention.

This situation changed significantly after other international treaties were drawn up, and certain fundamental rights were elevated to peremptory norms. The fact that certain norms have been declared to be superior to others shows that some sort of hierarchy of norms in international law is gradually developing; national Courts seem to be accepting the overriding character of *jus cogens* norms, and thus results in torture holding a privileged position¹⁴³.

There have been, however, recent attempts to reduce this prohibition in situations of grave emergency, followed by some views in favor of torture in extreme cases, when the urgent circumstances require the use of force. Especially after the attacks of the 11th of September, 2001, a moral debate has arisen as to whether torture might be acceptable under certain circumstances, to extract urgent information¹⁴⁴.

Throughout the years, it also seems that Governments have ended up compromising the absolute prohibition of torture¹⁴⁵.

First of all, by using notions such as ‘enhanced interrogation techniques’ in the US, and ‘moderate physical pressure’ in Israel, Governments have attempted to shift the line between what is prohibited and what is permitted¹⁴⁶. Secondly, the US military forces or intelligence agencies have denied that the UN Convention Against Torture and the International Covenant on Civil and

¹⁴²Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and its implications on national and customary law*, European Journal of International Law, Vol. 15 no. 1, 2004. p.98-99, p.112-113.

¹⁴³ Robert Kolb, *Peremptory International Law- Jus Cogens*, Oregon, 2015, p.32-34.

¹⁴⁴ Martin Scheinin, *Terrorism*, in International Human Rights Law, by Moeckli, Shah & Sivakumaran, 2nd edition, 2014, p.557.

¹⁴⁵ Martin Scheinin, *Terrorism*, in International Human Rights Law, by Moeckli, Shah & Sivakumaran, 2nd edition, 2014, p.558.

¹⁴⁶ Martin Scheinin, *Terrorism*, in International Human Rights Law, by Moeckli, Shah & Sivakumaran, 2nd edition, 2014, p.558.

Political Rights apply extraterritorially, thus permitting them to cover up the fact that they were using torture. Thirdly, there have been some countries which have used and relied on information obtained through torture, justifying this for ‘operational purposes’; many of them have also cooperated with other States to circumvent the existing rules on torture. Fourth, there have been some countries who have reconsidered the rule of non-refoulement towards those countries where an individual may be at risk of been subjected to torture; instead of an absolute prohibition, a ‘more likely than not’ standard has been introduced, setting aside the consideration for the real risks of the situations. Finally, there has been a lack of investigation and accountability in all those cases in which allegations were made that suspected terrorists were practicing torture.

In a report on the role of intelligence agencies in the fight against terrorism, the Special Rapporteur on human rights stated that any form of collusion in torture or other prohibited acts by these agencies would amount to a human rights violation¹⁴⁷.

Taking into consideration the fact that the wording of the various articles prohibiting torture does not tolerate any exceptions, and that States have never claimed the right to torture, we can conclude that the prohibition is absolute and cannot be justified even in situations of emergency, such as the ticking bomb scenario. Article 2, clauses 2 and 3 of the UN Convention against Torture clearly state that “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. An order from a superior officer or a public authority may not be invoked as a justification of torture”. Article 4 of the same Convention also require that all acts of torture

¹⁴⁷See Report of the Special Rapporteur on human rights and counter-terrorism, A/HRC/10/3, February 2009.

be considered offences under its criminal law, by introducing appropriate penalties¹⁴⁸.

1.3 Despite having always constituted an absolute right, this status has wavered during the years, and has sometimes been shattered by the European Court of Human Rights itself. The motives for this debate lie in the moral assumptions at the root of the absoluteness of the prohibition. Obviously, there are no doubts whatsoever that torture is an act that inflicts terrible sufferings, and that it should be prohibited in an absolute manner; however, the moral assumptions pose different types of problems. One must consider the various angles under which torture can be seen. There are certain circumstances under which torture might be chosen by the victim itself, who chooses personal suffering for a noble cause, if it can save others from a similar fate. Moreover, the various formulations of the prohibition of torture do not contain explicit rights at all, thus making it difficult to grasp the precise understanding of the prohibition itself.

Governments have sometimes tried to justify their exceptions to human rights norms such as torture by referring to a 'war' against terrorism¹⁴⁹. Especially after the events of 9/11, there has been an unprecedented wave of special legislation all over the world, and practically all human rights have been somehow reconsidered¹⁵⁰. Obviously, no State would actually legislate to allow for torture; however, there have been a few proposals of legalized forms of torture¹⁵¹, when governments hypothetically thought of the possibility of

¹⁴⁸Article 4 of the CAT reads: "1. Each State party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State party shall make these offences punishable by appropriate penalties which take into account their grave nature".

¹⁴⁹Sam Harris, *In defense of torture*, in The Huffington Post, 2011.

¹⁵⁰Martin Scheinin, *Terrorism*, in International Human Rights Law, by Moeckli, Shah & Sivakumaran, 2nd edition, 2014, p.557.

¹⁵¹Israel has been the only country to actually legalize torture in 1987; the Landau Commission legislated on the possibility to use torture as an interrogation method under a ticking-bomb scenario, when the use of force was unavoidable.

empowering courts to issue the so-called “torture warrants” in times of emergency.

The contemporary and ongoing debate on torture seems to be less concerned on the actual elimination of the crime, and more fixated on finding the possible exceptions. It has been pointed out that “much ink has been spilled on the question of whether torture is ever justified¹⁵² and, as a result, inadequate attention has been paid to the actual practice of torture in the various criminal justice systems. The question of whether torture is ever justified is generally posed in the form of the so-called ticking-bomb scenario, of which different variations exist¹⁵³. The scenario consists of a hypothetical situation in which an individual, suspected of being a terrorist, is kept in custody. The authorities are certain that this individual has the necessary information to prevent an imminent attack, but the terrorist refuses to reveal the location of the time bomb, which will soon detonate and kill innocent people. This scenario operates on the basis of the emotional reactions of the audience, evoking feelings of empathy for the torturer, to try and morally justify him for his acts¹⁵⁴. The various proponents of the ticking-bomb scenario have always argued that torture is indeed morally wrong at all times, but that mass murder is worse, so the former must be tolerated to prevent a greater infliction of pain¹⁵⁵. Hence, the unavoidable moral dilemma; how does one choose between the lesser of the two evils? Should torture be permitted under circumstances of extreme danger, for the greater good?

Using torture in the setting of the ticking-bomb scenario seems to be justified under the principle of utility envisioned by philosopher Jeremy

¹⁵²Frank Ledwidge and Lucas Oppenheim, *Preventing Torture: Realities and Perceptions*, 2006.

¹⁵³Michelle Farrell, *The Prohibition of Torture in Exceptional Circumstances*, United Kingdom, 2013, p.7.

¹⁵⁴Association for the Prevention of Torture, *Defusing the ticking-bomb scenario: Why we must say no to Torture, always*, June 2007.

¹⁵⁵Jessica Devlin, *The Ticking-Bomb Scenario and the Justification of Torture*, in E-International Relations Students, 2012.

Bentham¹⁵⁶. According to his utilitarian principle, “the greatest happiness of the greatest number that is the measure of right and wrong”; he states that mankind is governed by pain and pleasure, and that society’s purpose should be to maximize the community’s total happiness. Thus in a ticking-bomb scenario, it would be permissible to allow one single individual to suffer pain, if thousands of lives could be saved.

Alan Dershowitz, an American lawyer and jurist, was one of the first pioneers of the ticking-bomb scenario; after the terrorist attacks of 9/11, he published an article entitled “Want to torture? Get a Warrant”. In this article, Dershowitz advocates the practice of issuing warrants that permit the use of torture on terrorism suspects, under circumstances of extreme urgency, when there is the need to immediately obtain information. His reasoning revolves around the question of whether police authorities or intelligence agencies should be allowed to torture a suspect they believe has knowledge of a bomb, which is about to go off soon. Would it be moral to torture one person, to make him reveal the location of the bomb, to save many other lives? The central idea of his article is that national authorities should be permitted to use non-lethal forms of torture to obtain important and urgent information, for a greater purpose¹⁵⁷. According to Dershowitz, the use of torture in this ticking-bomb scenario should be put under the control of law, as to be able to pinpoint the accountability of the authority which has gone beyond what is strictly necessary to obtain the essential information. Rules and minimum standards are needed to avoid torture becoming a common police practice.

Dershowitz’s ticking-bomb scenario and his torture warrant proposal have encountered many criticisms and disapprovals, considering that it seems

¹⁵⁶Chanterelle Sung, *Torturing the Ticking Bomb Terrorist: an analysis of judicially sanctioned torture in the context terrorism*, in the Boston College Third World Law Journal, Volume 23, Issue 1, 2003, p.197.

¹⁵⁷Chanterelle Sung, *Torturing the Ticking Bomb Terrorist: an analysis of judicially sanctioned torture in the context terrorism*, in the Boston College Third World Law Journal, Volume 23, Issue 1, 2003, p.194.

that what is really being proposed is not a rare exception to the prohibition of torture, but a new rule altogether that permits it¹⁵⁸. Criticism was made especially by the Executive Director of Amnesty International, William F. Schulz. According to Schulz, before arguing if torture is acceptable under the threat of losing thousands of lives, one has to take a step backwards. The justification of torture as being the only way to prevent a tragedy falls or stands on the basis of the actual plausibility of this ticking-bomb scenario. What Schulz argues is that this scenario is based upon a merely hypothetical and unrealistic event, and as such cannot be used to form a basis for the permission of torture¹⁵⁹. It may be morally justified to torture a person if there are strong suspects that he has hidden a bomb or nuclear device somewhere, and will probably cause the deaths of many people¹⁶⁰. However, Schulz is highly sceptic of the possibility that authorities actually “know that a bomb has been planted somewhere; know it is about to go off; know that a suspect in their custody has the information they need to stop it; know that the suspect will yield that information accurately in a matter of minutes if subjected to torture; and know that there is no other way to obtain it”. There is a huge question mark over this possibility, considering that no situation is ever straightforward: there will never be the absolute certainty that by torturing one person, you will save many others.

The scenario presents ulterior flaws¹⁶¹. It makes a series of assumptions that are very unlikely to occur in reality, or are at least unlikely to occur simultaneously. The scenario makes the assumption that torture is always

¹⁵⁸Association for the Prevention of Torture, *Defusing the ticking-bomb scenario: Why we must say no to Torture, always*, June 2007.

¹⁵⁹William F. Schulz, *Is the ticking bomb case plausible?*, in *The Phenomenon of Torture: readings and commentary*, Chapter VI, Reading 8, Pennsylvania, 2007 p.260-261.

¹⁶⁰To this end, Schulz points out that Henry Shue defends torture, saying that it is morally justified if there is a fanatic who has hidden a nuclear device that will kill thousands of people. Shue, however, allows torture only “in a case *just like this*”.

¹⁶¹Jessica Devlin, *The Ticking-Bomb Scenario and the Justification of Torture*, in *E-International Relations Students*, 2012.

successful and that it “not only makes people talk, but makes them speak the truth”¹⁶². It implies that the captured terrorist will provide the truth and the needed information when subjected to torture; realistically, the person might give falsified information, or may have been trained to withstand torture and thus does not impart any information at all¹⁶³.

An ulterior problem with the ticking-bomb scenario that must not be underestimated is that no government will ever actually confess to permitting its intelligence agencies or military forces to using force or torture¹⁶⁴. Even though some occasions where torture has been used against people suspected of terrorism have been revealed after 9/11, there is still a widely spread silence on the matter. Undoubtedly there have been States who have tried to shift the line between what is prohibited and what is lawful, by using terms and techniques such as “moderate physical pressure”, when in fact they were most probably committing acts of torture. Dershowitz himself states that if one were to ask an audience if they would support the use of torture in a ticking-bomb scenario, almost everyone would agree. The real question is to whether it would be done secretly or openly; this is why he pushes towards the establishment of a standard legal procedure for the issuance of torture warrants.

Finally, another argument against the ticking-bomb scenario is that there is a high risk that by allowing torture in exceptional circumstances, it may become routine practice. This argument can be demonstrated by analyzing the the situation in Israel in 1987. In that year, torture was legalized as an

¹⁶²John Ip, *Two narratives of torture*, in *Journal of Human rights*, Volume 7, Issue 1, 2009, p.52-54.

¹⁶³John Ip, *Two narratives of torture*, in *Journal of Human rights*, Volume 7, Issue 1, 2009, p.66-67.

¹⁶⁴Chanterelle Sung, *Torturing the Ticking Bomb Terrorist: an analysis of judicially sanctioned torture in the context terrorism*, in the *Boston College Third World Law Journal*, Volume 23, Issue 1, 2003, p.208-209.

interrogation method under the ticking-bomb scenario¹⁶⁵; it could be used only if there were no other possible ways to gain important information. This decision was legislated by the Landau Commission, which had the task of looking into the reports of torture of Palestinian captives by the General Security Service of Israel. This attempt to legitimize torture failed entirely; it was banned definitely in 1999.

The analysis of the ticking-bomb scenario leads to the conclusion that torture is never acceptable under any circumstances at all. However, this does not immediately stand out from the wording of the existing provisions prohibiting torture. Article 5 of the Universal Declaration of Human Rights states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”, while Article 7 of the International Covenant on Civil and Political Rights states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”. Article 3 of the ECHR follows almost exactly the wording of Article 5 of the UDHR. None of these provisions, however, contain the term “absolute”, or any kind of wording that leads to the conclusion that the enshrined prohibition is absolute. This means that any limits or implied exceptions would have to be extracted from interpretation by judges and courts. As we have said before, the ECtHR has interpreted other rights of the European Convention as being non-absolute and thus subject to exceptions. The same treatment cannot be held however for the prohibition of torture; to allow exceptions, and allow judicial torture to preserve national security, would be to go against the fundamental values and principles of our democracy, and would infringe the basic principle of human dignity. The threats of terrorism and similar situations should be addressed by focusing on

¹⁶⁵William F. Schulz, *The Debate in Israel*, in *The Phenomenon of Torture: readings and commentary*, Chapter VI, Readings 9 and 10, Pennsylvania, 2007, p.266.

increasing the methods of security of a State, rather than by infringing human rights.

CHAPTER 2

THE PROHIBITION OF TORTURE IN INTERNATIONAL LAW

2. Post-war developments of the prohibition of torture. – 2.1 First Declarations on human rights. – 2.2 Geneva Conventions. – 2.3 The ECHR. – 2.4 Prohibition of torture in the '60s and '70s. – 2.5 Torture in non-european regional systems. – 2.6 UN Convention Against Torture. – 2.7 Torture in the American system. – 2.8 The ICTY and the ICRR. – 2.9 Rome Statute.

2. The extent of the obligation of all States to prevent torture is mostly determined by international treaties and by the bodies that interpret these treaties. States voluntarily sign and ratify treaties, and by doing so they submit themselves to the control of different judicial bodies¹⁶⁶. With human rights treaties, the relationship between State and individuals has been governed for the first time in international law history. For the first time, States could no longer claim sovereignty over their own territory for the commission of certain acts.

¹⁶⁶*Torture in International Law: A guide to jurisprudence*, published by the Association for the Prevention of Torture and the Center for Justice and International Law, Geneva, 2008, p.2.

With human rights treaties, the prohibition of torture has come to be considered as absolute in international law¹⁶⁷. The consequence of this status is that even States who have failed to ratify any of the international treaties that explicitly prohibit torture, cannot use it against individuals. Nonetheless, the question that remains unanswered is whether under general international law one can find a coherent notion of torture. Obviously different definitions have to be conceived as applicable. On one hand, the prohibition of torture has to be fixed under international human rights law, which involves the establishment of State responsibility; on the other hand, torture has to be criminalized under international criminal law, which involves the establishment of penal responsibility of the individual¹⁶⁸. The efforts of the international community throughout the years have led to the adoption of many important law instruments. Today, the prohibition of torture can be found in various law sources, such as Article 3 of the European Convention on Human Rights, Article 7 and 10 of the International Covenant on Civil and Political Rights, Article 5 of the Universal Declaration of Human Rights and Article 5 of the African Convention on Human Rights¹⁶⁹. Torture is also enshrined in the 1949 Geneva Conventions, where it is defined as a “grave breach” of the Conventions themselves¹⁷⁰. A general notion of prohibition of torture, as accepted by international human rights law, can be defined as any

¹⁶⁷Nigel S. Rodley, *Integrity of the Person*, in International Human Rights Law, edited by Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, Second Edition, Oxford, 2014, p.176-177.

¹⁶⁸ Nigel S. Rodley, *The Definition(s) of Torture in International Law*, in *Current Legal Problems*, Oxford, 2002, p.4.

¹⁶⁹Nigel S. Rodley, *Integrity of the Person*, in International Human Rights Law, edited by Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, Second Edition, Oxford, 2014, p.176.

¹⁷⁰Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers*, Cambridge, 2005, p.85.

kind of cruel, inhuman or degrading treatment or punishment¹⁷¹. This generic definition has arisen out of the existing international criminal law instruments, and new and innovative definition have been born out of the case law of the *ad hoc* criminal tribunals, such as the International Tribunal for the former Yugoslavia¹⁷².

The first step towards the condemn of the use torture happened during the French Revolution, when the **Declaration of the Rights of Man and of the Citizen** was adopted in 1789. This document was influenced by the doctrine of natural rights; it contains rights that apply to all men without exceptions and which are defined as being “universal”. Even though the Declaration does not explicitly prohibit torture, it provides that citizens are considered to be innocent until proven guilty, and that if it proves to be necessary to arrest them, “any rigor which would not be necessary for the securing of his person must be severely reprimanded by law”¹⁷³.

The Declaration came at a time where the French Revolution had brought on the idea that France was the homeland of human rights, and that all men should be free and have equal rights¹⁷⁴. Thus the document, even though not explicitly containing a prohibition of torture, implicitly provides for an obligation to abstain from using measures that go beyond what is strictly necessary. However, in practice, torture was still widely used in royal courts, and very often citizens were convicted and sentenced without a complete and fair trial.

The Declaration of the Rights of Man and of the Citizen is considered to be one the most important precursors of human rights instruments, and

¹⁷¹The main basis for this definition stems from the one enshrined in Article 1 of the UN Convention Against Torture, which is the most universally recognized and accepted definition.

¹⁷²Nigel S. Rodley, *The Definition(s) of Torture in International Law*, in *Current Legal Problems*, Oxford, 2002, p.2.

¹⁷³La Déclaration des droits de l’homme et du citoyen, Article IX, 1789.

¹⁷⁴Yves Beigbeder, *Judging War crimes and Torture: French justice and International Criminal*, Boston, 2006, p.5.

inspired some of the more well-known Treaties and Conventions. It gave way to an evolution which took off only a couple of centuries later. In fact, during the 20th century, torture held a prominent place in the list of international crimes which had to be prohibited. The Commission on the Responsibility of the Authors of War, established in 1919 at the Paris Peace Conference to investigate war crimes during the First World War, listed the “torture of civilians” as one of the first violations of the laws of war¹⁷⁵. At the time however, the crime of torture was not codified in any international treaty, but the need for an explicit regulation of the prohibition was strongly felt.

It was only with the Second World War that the first explicit references to torture were made. A renewed interest in human rights had already developed in the 1930’s, as a reaction to the ideologies and practices of the totalitarian systems that had taken over several countries¹⁷⁶. A considerable step forward was taken with the collapse of the Third Reich; after the horrors of the Holocaust, the States who had won the war decided that the major war criminals of the German Third Reich had to be brought to justice¹⁷⁷. The Four-Power Agreement of 1945 established the International Military Tribunal for the Prosecution of Major War Criminals of the European Axis, to trial the German officials which were accused of committing crimes of peace, war crimes and crimes against humanity¹⁷⁸. The Agreement was accompanied by the Tribunal’s Statute, in which the procedure of the trials and the punishable crimes were contained. The Tribunal officially opened in Nuremberg, Germany, and after ten months of judicial hearings, issued its first important

¹⁷⁵William A. Schabas, *The Crime of Torture and the International Criminal Tribunals*, in Case Western Reserve University Journal of International Law, Volume 37, 2006, p.349.

¹⁷⁶Larry Gerber, *Torture*, United States, 2011, p.23.

¹⁷⁷Edward Bates, *History*, in International Human Rights Law, edited by Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, Second edition, Oxford, 2014, p.29.

¹⁷⁸*International Military Tribunal at Nuremberg*, from the Holocaust Encyclopedia

sentencing in October 1946¹⁷⁹. The Nuremberg Tribunal was strongly criticized because of its allegedly impartial prosecution; this international tribunal was created through an agreement between States, and exercised its jurisdiction over individuals. These individuals were exclusively German officials, who were in fact trialed by judges and prosecutors of the winning countries.

The Nuremberg Trials were legally based on the **Charter of the International Military Tribunal**, commonly known as the Nuremberg Charter, which enshrined a list of crimes which could be tried, along with the criminal procedure that had to be followed. The jurisdiction of the Tribunal was defined in Article 6 of the Charter¹⁸⁰. This article provided that the Tribunal had the power to try and punish individuals, and made a distinction between three categories of crimes: crimes against peace, war crimes and crimes against humanity. It contained however no explicit reference to torture, either as a war crime or as a crime against humanity.

The only indirect references to torture can be found in the 1946 judgment of the Tribunal, which explained the inadmissibility of the mitigating circumstance of having followed superior orders¹⁸¹. The latter was based on Article 7 of the Charter, which provided that the official position of the accused could not be taken into consideration by the Tribunal, either as an exempt from responsibility nor as a mitigating circumstance of the punishment. The judges of the Tribunal stated: “That a soldier was ordered to kill or torture in violation of the international law of war has never been

¹⁷⁹ Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, Italia, 2012, p. 876-877.

¹⁸⁰ From the web site of the International Law Commission, *The Charter and Judgment of the Nuremberg Tribunal: History and Analysis*, Memorandum submitted by the Secretary-General, New York, 1949, p.4.

¹⁸¹ William A. Schabas, *The Crime of Torture and the International Criminal Tribunals*, in Case Western Reserve University Journal of International Law, Volume 37, 2006, p.351.

recognized as a defense to such acts of brutality”¹⁸². Moreover, the judgment declared that “prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well established rules of international law, but in complete disregard of the elementary dictates of humanity”¹⁸³. The Charter of the International Military Tribunal at Nuremberg also included “ill-treatment” of civilians and prisoners of war as a war crime¹⁸⁴.

A reference to torture was inserted in the Control Council Law No. 10, adopted by the so called Control Council¹⁸⁵ in 1945. After the victory over the German Nazi’s, a government of occupation was established under the name of Control Council; through the issuing of Law No. 10, the Council provided for a legal framework to carry out further trials against the other members of the leadership of Nazi Germany that had not been tried before the International Military Tribunal. Law No. 10 not only makes torture a crime that should be prosecuted as a crime against humanity¹⁸⁶, but also expands its definition by enumerating other acts which fall under the notion of torture, such as rape and imprisonment. On the basis of the definition of torture contained in Control Council Law No. 10, the United Nations Security Council adopted the Statute of the International Criminal Tribunal for the former Yugoslavia in 1993.

2.1 The world’s first international human rights instrument of a general nature was drafted in the post-war period, when the **American Declaration of**

¹⁸² In the *Yearbook of the International Law Commission*, Volume II, Part II, published by the United Nations, New York and Geneva, 2000, p.24.

¹⁸³ Gabrielle Kirk McDonald, *Substantive and Procedural Aspects of International Criminal Law*, Volume II, Part I, The Netherlands, 2000, p.663.

¹⁸⁴ William A. Schabas, *The Crime of Torture and the International Criminal Tribunals*, in Case Western Reserve University Journal of International Law, Volume 37, 2006, p.351.

¹⁸⁵ Encyclopedia of Genocide and Wars against Humanity, *Control Council Law No. 10*, The Gale Group Inc., 2005.

¹⁸⁶ Andrew Clapham and Paola Gaeta, *The Oxford Handbook of International Law in Armed Conflict*, Oxford, 2014, p.402.

the Rights and Duties of Men was adopted in April 1948¹⁸⁷. The Declaration is very concise and comprises only twenty-eight short articles; this is because it was meant to help interpret the Charter of the Organization of American States, drafted at the same conference in Bogotá, Colombia¹⁸⁸. Thus, the Declaration is not strictly binding, even though it becomes so once it integrates the Charter.

The General Assembly of the OAS has recognized that the Declaration constitutes a source of international obligations for member States of the Organization¹⁸⁹. States have also recognized that the provisions found in the Declaration contain and define better the fundamental human rights which are enshrined in the Charter. This entails that the Inter-American Court of Human Rights, whose creation is envisioned by the Charter, will have the competence to interpret the American Declaration as well¹⁹⁰.

Article 1 of the Declaration states that “every human being has the right to life, liberty and security of his person”. It protects the liberty and security of the individual, intended as the right to physical and mental integrity; one can draw that it implicitly entails the right to not be tortured and to not suffer any other ill-treatment.

Article 5 goes on to state that “every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life”. Even though the explicit prohibition of torture

¹⁸⁷ Jo Pasqualucci, *The Americas*, in *International Human Rights Law*, edited by Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, Second Edition, Oxford, 2014, p.399.

¹⁸⁸ Diego Rodriguez-Pinzon and Claudia Martin, *The Prohibition of Torture and Ill-Treatment in the Inter-American*, Geneva, 2006, p.33.

¹⁸⁹ Francisco Forrest Martin, Stephen J. Schnably, Richard Wilson, Jonathan Simon and Mark Tushnet, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis*, United States, 2006, p.275.

¹⁹⁰ Sarah Joseph and Adam Fletcher, *Scope of Application*, in *International Human Rights Law*, edited by Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, Second Edition, Oxford, 2014, p.132.

cannot be found in this article either, one can infer that the provision bans any conduct that may constitute an abusive attack on the person.

Obviously the Declaration at hand seems to offer an undeveloped form of prohibition of torture, which is still at its early stages, considering it does not contain an explicit prohibition nor an absolute protection.

Soon after, inspired by this new wave of interest towards the protection of human rights, the United Nations decided to adopt a document that would constitute the foundation of human rights. The Economic and Social Council had already set up a Commission on Human Rights in 1946¹⁹¹, with the purpose of creating an international bill which enshrined rights and obligations for States¹⁹². The creation of this bill was viewed as a three-step process. First of all, a document had to be created that contained the description of the rights that had to be safeguarded¹⁹³. In the second step, these rights had to be inserted in an ulterior document under the form of legal obligations for States; this resulted in the drafting of the International Covenant on Civil and Political Rights. The final step would be to ensure the implementation of these obligations by the States, through a monitoring system; the International Covenant on Economic, Social and Cultural Rights.

The first step was achieved in relatively short time. On the basis of a text prepared by the Commission on Human Rights, the United Nations General Assembly adopted the **Universal Declaration of Human Rights** (UDHR) on

¹⁹¹From the official website of the United Nations, *Drafting of the Universal Declaration of Human Rights*, can be found at <http://research.un.org/en/undhr/ecosoc/2>.

¹⁹²J. Hermann Burgers, *The United Nations Convention Against Torture: A handbook on the CAT*, The Netherlands, 1988, p.6.

¹⁹³J. Hermann Burgers, *The United Nations Convention Against Torture: A handbook on the CAT*, The Netherlands, 1988, p.7.

December 1948¹⁹⁴. This declaration, too, arose from the experiences of the Second World War, and represented the first global expression of rights to which all human beings are entitled to. It represents one of the most important soft law instruments in the international scenario¹⁹⁵, and the thirty articles contained in it have been subsequently elaborated in other international treaties.

Thus, the Universal Declaration and the two International Covenants together form the International Bill of Rights¹⁹⁶.

The various articles of the UDHR were drafted between 1947 and 1948 by a Drafting Committee, established by the first United Nations Commission on Human Rights¹⁹⁷. Article 5 of the Declaration has constituted the main sample on which the subsequent international instruments have based their definitions of torture. On the basis of this article, the UN Convention Against Torture was born in 1984. The article expressly states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”¹⁹⁸. The preparatory works were characterized by various disagreements, especially regarding the juridical nature of the Declaration. A compromise was found, and the Declaration is not binding; it simply constitutes an invite to States to act accordingly with its principles¹⁹⁹. Article 5 has been the only one to have been drafted without any controversies, since it

¹⁹⁴ *Claiming Human Rights: Guide to international procedures available in cases of human rights violations in Africa*, a joint project of the National Commissions for UNESCO of France and Germany.

¹⁹⁵ Tullio Treves, *Diritto Internazionale: Problemi fondamentali*, 2005, pp.191-195.

¹⁹⁶ From Encyclopaedia Britannica, *United Nations*, can be found at <https://www.britannica.com/topic/United-Nations/Human-rights#ref750868>.

¹⁹⁷ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, drafting and intent*, Philadelphia, 1999, p.11.

¹⁹⁸ *Torture in International Law: A guide to jurisprudence*, jointly published by the Association for the Prevention of Torture and the Center for Justice and International Law, Geneva, 2008, p.6.

¹⁹⁹ Antonio Cassese, *I diritti umani oggi*, Roma, 2009, p.32.

was the result of a straightforward choice made by the Member States of the United Nations, who all agreed on the principle stated in the article²⁰⁰.

John Peter Humphrey, a Canadian jurist and human rights advocate, contributed significantly to the creation of the first draft of the Declaration²⁰¹. He had just been appointed as Director of the Division of Human Rights within the United Nations Secretariat when he produced the first draft of a list of rights. These rights formed the basis of the first draft of the Declaration. The underlying structure of the UDHR was however introduced only in its second draft, which was prepared by René Cassin, on the basis of the Humphrey draft. Cassin was a jurist and judge who played a key role in the deliberations during the three sessions of the Commission on Human Rights, as well as the sessions of the Commission's Drafting Committee. The structure of the second draft was strongly influenced by the Code Napoleon, since it envisioned a preamble and general introductory principles²⁰². Cassin compared this structure to a Greek temple, with Articles 1 and 2 constituting the foundation, the preamble being the steps, the main body representing four columns and the last three articles providing the pediment which binds the structure together²⁰³. The final draft enshrined thirty articles, and its preamble states that "The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations".

The Cassin draft was submitted to the Commission on Human Rights, and further amendments were made by the Commission itself, the Economic and Social Council and the General Assembly of the United Nations. The General Assembly ultimately adopted the Declaration in 1948, after being

²⁰⁰ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, drafting and intent*, Philadelphia, 1999, p.12.

²⁰¹ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, drafting and intent*, Philadelphia, p.5.

²⁰² O.P. Dhiman, *Understanding Human Rights*, India, 2011, p.100.

²⁰³ From an online article by Andrea Mann, *December 10, 1948: United Nations adopts Universal Declaration of Human Rights*, 2015.

adopted unanimously, with forty-eight votes in favor, non against, and eight abstentions²⁰⁴.

Cassin expressed his opinion in particular on the drafting of Article 5 of the Declaration, and stated that the boundaries of the word torture were too vague. Also, he thought that the First Session of the Drafting Committee “ought to take into consideration such questions as: Do some human beings have the right to inflict suffering upon other human beings without their consent, even for ends that might appear good?”²⁰⁵. The authors of the Declaration gave a negative answer, by creating Article 5.

2.2The various Declarations that had been drafted up until that moment were useful in addressing the prohibition of torture to States in general. It was noted, however, that from a legal point of view, despite their strong moral and political value, declarations are simple recommendations; they do not impose mandatory duties on the States to which they are addressed. This analysis brought to the conclusion that the protection of human rights would benefit most from the conclusion of a convention, because of the binding nature of the obligations it imposes on States.

Torture was then inserted in one of the most important Conventions on international humanitarian law; rules against torture were inserted in the **Geneva Conventions of 1949**²⁰⁶. These Conventions contain provisions on humanitarian law of armed conflicts, to provide minimum protection and standards of humane treatment towards individuals who are victims of armed conflicts. In particular, they lay down rules for the treatment of the wounded,

²⁰⁴From an online article on the Universal Declaration of Human Rights, on Information Platform, 2011, can be found at <http://www.humanrights.ch/en/standards/udhr/>.

²⁰⁵Johannes Morsink, *The Universal Declaration of Human Rights: Origins, drafting and intent*, Philadelphia, 1999, p.45.

²⁰⁶From the Legal Information Institute of Cornell University Law School, an online article on the Geneva Conventions, last updated by Jonathan Kim in 2016.

sick or shipwrecked combatants, prisoners of war and civilians in occupied territories²⁰⁷.

The first Geneva Convention was created by the International Committee for Relief to the Wounded in 1864, and simply enshrined a series of rules to protect those who were wounded on the battle field²⁰⁸. This Convention, which was made up of only ten articles, represented the starting point in international humanitarian law. A few years later, a similar treaty was drawn up to protect soldiers who were shipwrecked. It was only in 1949 that two new Conventions were added to the two original ones, and all four were ratified by a series of countries. The four Conventions, along with the Additional Protocols of 1977, are still in force today.

The Geneva Conventions, along with their Additional Protocols, contain various provisions which prohibit any form of torture and other cruel or inhuman treatment²⁰⁹; in particular, torture is prohibited by Article 3 (common to the four Geneva Conventions), by Article 12 of the First and Second Conventions, and by Articles 17 and 87 of the Third Convention. In international armed conflict, torture constitutes a grave breach under Articles 50, 51, 130 and 147 respectively of these Conventions.

Article 3 of the Geneva Conventions prohibits “cruel treatment and torture” and “outrages upon personal dignity, in particular humiliating and degrading treatment” of civilians and persons involved in a war²¹⁰. It expressly states that those who do not participate in armed conflicts cannot be subjected

²⁰⁷ J. Hermann Burgers, *The United Nations Convention Against Torture: A handbook on the CAT*, The Netherlands, 1988, p.12.

²⁰⁸ Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, 2012, p.522-523.

²⁰⁹ From the official website of the International Committee of the Red Cross, *What does the law say about torture?*

²¹⁰ Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers*, Cambridge, 2005, p.1142.

to torture²¹¹. Those who do not participate directly in the battle, either because they are civilians or because they are soldiers who have temporarily ceased fire, cannot be subjected to ill-treatment and have to be treated with humanity and dignity. Moreover, “torture or inhuman treatment” and “wilfully causing great suffering or serious injury to body or health” constitute grave breaches of the Geneva Conventions. Article 3 constituted an innovation at the time, considering it was the first ever provision to cover acts which were committed outside of the scenario of an armed conflict²¹². It establishes a series of fundamental rules from which no derogation is permitted.

Article 12, common to the First and Second Convention, prohibits all acts of torture committed towards specific categories of individuals. It provides that those who are sick, hurt and shipwrecked cannot be subjected to torture or to biological experiments; they cannot be left intentionally without medical cures.

As far as the questioning of prisoners of war is concerned, Article 17 of the Third Convention provides that “no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind”. Article 87 of the same Convention handles the penalties that can be applied to prisoners of wars, stating that “collective punishment for individual acts, corporal punishment imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden”²¹³.

²¹¹Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, 2012, p.535.

²¹²*Geneva Conventions*, from the Legal Information Institute online, last updated by Jonathan Kim in July 2016.

²¹³From the Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949.

Article 50 of the First Convention of Geneva and Article 51 of the Second Convention²¹⁴ deem as grave violations both torture and inhuman treatments, if they are committed against individuals protected under the Conventions; the articles position on the same level of gravity all those acts that intentionally cause great sufferings.

Also Article 130 of the Third Geneva Convention and Article 147 of the Fifth Convention have a very similar contents. They respectively concern the protection of prisoners of war and of civilians in war times.

In conclusion, in 1949 has seen the creation of a system of Conventions that have covered the phenomenon of torture and ill-treatments in a very detailed way, demonstrating an ever-growing awareness of the international community towards these issues, at least in reference to situations of war emergencies. Therefore, in times of war, torture is prohibited in all its forms; this proves that torture is such a grave breach, that it cannot be accepted in exceptional circumstances either.

In June 1977, the contents of international humanitarian law based on the four Geneva Conventions was renewed through the adoption of of **two additional Protocols** on the protections of victims of international and national armed conflicts²¹⁵.

Article 75 of the First Additional Protocol provides a list of acts which are considered to be prohibited at any time and under any circumstances, whether committed by civilians or military agents. This list includes any form

²¹⁴ The two articles have the same contents: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".

²¹⁵ From an online article *What does the law say about torture?*, in online website of the International Committee of the Red Cross, 2011

of torture, whether physical or mental, corporal punishments, mutilations and all offences to an individual's personal dignity. Article 4 of the Second Additional Protocol, on the other hand, envisages as a fundamental guarantee the fact that "all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person [...]". The second paragraph of the article goes on to state a variety of acts which are prohibited under any circumstances, such as violence, whether mental or physical, torture and other ill-treatments, punishments, acts of terrorism, and threats²¹⁶.

Thus, the prohibition of committing acts of torture and other cruel, inhuman or degrading treatments which was already provided for in the Geneva Conventions, was reaffirmed and strengthened in the Additional Protocols.

2.3 The process of protecting human rights at an international level did not develop only in the context of the United Nations. It expanded to a regional level as well, especially in the European and American continents. The various human rights law instruments that were created at a local level strengthened the guarantees that were contained in the UN Declaration of 1948.

²¹⁶Article 4, second paragraph, states that, "[...]the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever;

- (a) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) Collective punishments;
- (c) Taking of hostages;
- (d) Acts of terrorism
- (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) Slavery and the slave in all their forms;
- (g) Pillage;
- (h) Threats to commit any of the foregoing acts."

An extended system of protection of the rights of men was born in Europe in 1949, after the wounds inflicted by the Second World War, with the establishment of the Council of Europe; one of the main aims of this body was to safeguard and protect human rights and the fundamental liberties of men²¹⁷. Two extremely important Conventions were born out of this organization; the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987²¹⁸. Both of these Conventions have strongly influenced the further development of the prohibition of torture on the international scene.

In 1950, the Council of Europe adopted a series of acts for the protection of human rights, the most significant being the Convention for the Protection of Human Rights and Fundamental Freedoms, which was later called the **European Convention on Human Rights**²¹⁹. It constitutes the most important European document that protects human rights, and is currently in force for all forty-six States of the Council of Europe. The ECHR was surely inspired by the UN Declaration of 1948, but it appears to have amplified its guarantees, transforming the rights of individuals in mandatory duties for all States.

The second part of the Convention envisages the creation of a jurisdictional body to guarantee the compliance with the Convention itself; the European Court of Human Rights, which replaced the two original institutions,

²¹⁷ The Statute of the Council of Europe, in Article 1, letters a) and b), provides that its objective is to realize unity between States, aimed at “realizing the ideals and principles which are their common heritage [...] through the realization of human rights and fundamental freedoms”.

²¹⁸ Aisling Reidy, *The Prohibition of Torture; a guide to the implementation of Article 3 of the ECHR*, in Human Rights Handbooks No.6, Germany, 2002, p.8.

²¹⁹ From an online article by Donna V. Artusy, *The Evolution of human rights law in Europe: Comparing the European Court of Human Rights and the ECJ, ICJ and ICC*, featured in Inquiries Journal, Volume 6, No.11, 2014.

the European Court and the Commission on Human Rights²²⁰. This Court has the difficult task of establishing common human rights standards, and at the same time preserving national particularities²²¹. Its case law has greatly contributed to the development of the principles enshrined in the Convention.

Torture is explicitly prohibited by Article 3, which is one of the shortest provisions of the Convention, and constitutes the first treaty provision to incorporate a general prohibition of torture²²². The Article clearly provides that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”. The wording of Article 3 follows almost exactly the terms used in Article 5 of the Universal Declaration of Human Rights, except for the use of the word “cruel”, which was abolished. Despite the short formulation of the article, the principle enshrined in it constitutes the basis of great part of the jurisprudence on torture; the on going work of the Strasbourg judges has been able to define the penalties and punishments for the prohibited acts, the fixation of a minimum standard of severity, and the procedural requisites of the prohibition of torture.

Article 3 of the Convention has to be read together with Article 15 of the European Convention²²³, from which we can conclude that it constitutes an absolute prohibition²²⁴. Article 15 grants the possibility to State Parties to

²²⁰Luzius Wildhaber, *The European Court of Human Rights: The Past, the Present, the Future*, in the American University International Law Review, Volume 22, Issue 4, Washington, 2007, p.523-524.

²²¹From an online article by Donna V. Artusy, *The Evolution of human rights law in Europe: Comparing the European Court of Human Rights and the ECJ, ICJ and ICC*, featured in Inquiries Journal, Volume 6, No.11, 2014.

²²²Antonio Cassese, *The Human Dimension of International Law: Selected Papers*, Oxford, 2008, p.338.

²²³Michael K. Addo and Nicholas Grief, *Does Article 3 of the ECHR enshrine absolute rights?*, in the European Journal of International Law, 1998, p.510.

²²⁴Debra Long, *Guide to Jurisprudence on Torture and ill-treatment: Article 3 of the European Convention for the Protection of Human Rights, Association for the Prevention of Torture*, Geneva, 2002, p.9.

derogate from the obligations of the Convention in times of emergency²²⁵; however, the second paragraph expressly states that no derogation from Article 3 can be made, thus confirming the mandatory nature of torture. Due to its status of peremptory norm, Contracting States cannot derogate from it, even in cases of public emergencies or wars. Thus Article 3 constitutes one of those so called ‘intangible’ articles, since the prohibition is absolute and can never be excused²²⁶. The European Court of Human Rights has often emphasized the absolute terms of the scope of the article, from which no exceptions or limitations can be accepted, even though neither the Court nor the Commission has ever given a definition of the notion of absolute right²²⁷. Initially, when it first started applying the article, the Court held a restrictive view on which acts could constitute torture, but it has recently been more open to finding States guilty of torture and inhuman treatments.

In the case *Khashiyev and Akayeva v Russia*, settled in 2005, the ECHR observed that “article 3 enshrines one of the most fundamental values of democratic societies”. Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment²²⁸.. Unlike most of the substantive clauses of the Convention and its Protocols, Article 3 makes no provision for exceptions. The same reasoning was used in subsequent cases, such as the 1997 cases *Aydin v Turkey* and *H.L.R. v France*.

²²⁵Article 15 of the ECHR reads: “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation [...]”.

²²⁶Matteo Fornari, *L’art. 3 della Convenzione europea sui diritti umani*, in *La Tutela Internazionale dei diritti umani*, di Laura Pineschi, 2006, pp.352-353.

²²⁷ Michael K. Addo and Nicholas Grief, *Does Article 3 of the ECHR enshrine absolute rights?*, in the *European Journal of International Law*, 1998, p.513.

²²⁸See *Khashiyev and Akayeva v Russia*, Case Nos. 57942/00 and 57945/00 of February 2005. In the present case, two Russian citizens had summoned Russia before the ECHR, complaining the alleged use of torture on their family members.

Both the European Commission and the European Court of Human Rights have repeatedly stated that torture is considered to be an aggravated form of inhuman treatment; it consists in an act inflicting physical or psychological punishments with the purpose of obtaining information or confessions. The Court has pointed out that Article 3 uses the term torture to indicate a specific act distinct from inhuman and degrading treatment, because a “special stigma” attaches to it²²⁹; in particular, that of deliberately causing very serious and cruel suffering through inhuman treatments. Torture obviously includes a more serious or grave crime, that causes greater suffering, and is inflicted for a specific purpose²³⁰. The European Commission and the Court have immediately felt the need to give a definition not only of torture, but also of the other two acts contemplated by Article 3. The category of inhuman treatment literally includes more general punishments than torture. The Commission has stated that it “covers at least such treatment as deliberately causes severe suffering, physical or mental, which in the particular situation is unjustifiable”²³¹. From this description we can draw the three main elements that are required for an act to fall under the scope of Article 3; there has to be an actual intent to ill-treat, the ill-treatment has to cause severe physical or psychological suffering and there has to be a lack of any justification for causing the suffering²³².

Given the difficulty in finding a common way to locate these three elements in specific instances, the Court has reached the conclusion that each

²²⁹Aisling Reidy, *The Prohibition of Torture; a guide to the implementation of Article 3 of the ECHR*, in Human Rights Handbooks No.6, Germany, 2002, p.11.

²³⁰Christian M. De Vos, *Mind the Gap: Purpose, pain and the difference between torture and inhuman treatment*, in the Human Rights Brief, Washington, 2007, p.4.

²³¹Aisling Reidy, *The Prohibition of Torture; a guide to the implementation of Article 3 of the ECHR*, in Human Rights Handbooks No.6, Germany, 2002, p.16.

²³²Debra Long, *Guide to Jurisprudence on Torture and ill-treatment: Article 3 of the European Convention for the Protection of Human Rights, Association for the Prevention of Torture*, Geneva, 2002, p.13.

case has to be analyzed individually²³³, to evaluate the presence of the different factors.

The infringement of Article 3 can involve various acts, which can range from humiliating the victim to acts which involve extreme physical brutality. Even though the European institutions have taken care of giving separate definitions of torture, inhuman and degrading treatment, all three acts are equally prohibited²³⁴.

The preparatory works that brought to the creation of this article confirm the challenges facing its interpretation and concrete application. The wording of article 3 was first proposed by the Consultative Assembly in a draft text; this draft referred expressly to article 5 of the Universal Declaration of Human Rights, which follows almost the exact wording of the article itself. In the first session of the Consultative Assembly in 1949, there was a proposal heavily influenced by the previous atrocities committed by the Nazis during the war, to avoid a repetition of what had been one of the most extended slaughters of mankind. This proposal consisted in adding the following text to Article 1: “The Consultative Assembly takes this opportunity of declaring that all forms of physical torture, whether inflicted by the police, military authorities, members of private organizations, are inconsistent with civilized society, are offences against heaven and humanity and must be prohibited. It declares that this prohibition must be absolute and that torture cannot be permitted for any purpose whatsoever, either for extracting evidence, to save life or even for the safety of the State”²³⁵.

Furthermore, another specification was suggested to be added to Article 2: “In particular no person shall be subjected to any form of mutilation or

²³³ Michael K. Addo and Nicholas Grief, *Does Article 3 of the ECHR enshrine absolute rights?*, in the European Journal of International Law, 1998, p.522.

²³⁴ Aisling Reidy, *The Prohibition of Torture; a guide to the implementation of Article 3 of the ECHR*, in Human Rights Handbooks No.6, Germany, 2002, p.11.

²³⁵ Antonio Cassese, *The Human Dimension of International Law: Selected Papers*, Oxford, 2008, p.536.

sterilization or to any form of torture or beating, nor shall be forced to take drugs nor shall the be administered to him without his knowledge and consent. Nor shall he be subjected to imprisonment with such an excess of light, darkness, noise or silence as to cause mental suffering”²³⁶. Obviously these two proposed provisions are more in the form of political declarations rather than legal provisions in the stricter sense. However, they constitute important innovations for the time, considering that they define torture as a crime against humanity, that encompasses different actions and that can never be justified under any circumstances. All the attempts to introduce more stringent requirements to identify the specific forms of torture were strongly objected, and it was decided to leave the text of Article 3 as a general and broad provision, so as to embrace all possible forms of torture.

Despite all the hard work put into the preparatory works, this article has always proven to be one of the hardest to apply and interpret for two main reasons; first of all, because it not only prohibits torture, but it also prohibits two other types of misbehavior, which are hard to distinguish²³⁷. Secondly, the article itself does not provide for a definition or indication of which specific actions fall within the scope of torture and are thus prohibited²³⁸.

Given the difficulty in identifying the exact scope and meaning of the crime contained in article 3, today it is hard to find a similar or comparable definition of torture and inhuman or degrading treatments. This has obviously made it challenging for the European Commission and the European Court of Human Rights to apply this article in concrete cases set before them. Not

²³⁶Council of Europe, *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights*, Volume II, The Netherlands, 1975.

²³⁷Debra Long, *Guide to Jurisprudence on Torture and ill-treatment: Article 3 of the European Convention for the Protection of Human Rights*, Association for the Prevention of Torture, Geneva, 2002, p.41.

²³⁸Aisling Reidy, *The Prohibition of Torture; a guide to the implementation of Article 3 of the ECHR*, in Human Rights Handbooks No.6, Germany, 2002, p.11.

rarely there have been disagreements between the two, even though they have gradually come to agree on an expanded interpretation of the article.

By examining the various and complex definitions arising from the case law of the Commission and the Court and the various legal provisions, the distinction between the three prohibited acts emerges. The distinction between acts of torture, inhuman and degrading treatment or punishment is based mostly on a certain threshold of severity²³⁹. First of all, a minimum level of severity has to be attained for an act to fall within the scope of Article 3; once this requisite has been satisfied, the Court has to evaluate different other elements, such as the duration of the treatment, the physical and mental effects of the treatment and the generalities of the victim. These three prohibited acts have been distinguished in two leading cases of the European Commission and the Court, the *Greek Case* and *Ireland v UK*²⁴⁰.

The *Greek Case* was a 1967 case brought before the European Commission of Human Rights²⁴¹. The case involved fifty-three individuals, along with three Governments acting on behalf of their citizens, alleging torture and ill-treatment during detention in Athens, Piraeus, Salonica and Crete²⁴². The complaint brought before the ECHR was based on Article 3 of the European Convention of Human Rights. Considering that from the literal wording of article 3 ECHR no legal consequences arise from it, the Commission, called to apply the article, decided to analyze the article in its single parts; first it gave a definition of “inhuman treatment”, describing it as a “treatment as deliberately causing severe suffering, mental or physical, which,

²³⁹Aisling Reidy, *The Prohibition of Torture; a guide to the implementation of Article 3 of the ECHR*, in the Human Rights Handbooks No.6, 2002, p.10.

²⁴⁰Debra Long, *Guide to Jurisprudence on Torture and ill-treatment: Article 3 of the European Convention for the Protection of Human Rights, Association for the Prevention of Torture*, Geneva, 2002, p.13.

²⁴¹See *The Greek Case*, Resolution DH(70)1 adopted by the Committee of Ministers, Applications No.3321/67, No.3322/67, No.3323/67 and No.3344/67.

²⁴²From *The Greek Case*, Year Book of the European Convention on Human Rights, 1969, cited in Gail H. Miller, *Defining Torture*, Occasional Paper #3, Floersheimer Center for Constitutional Democracy, 2005, p.6.

in the particular situation is unjustifiable”. The Commission then went on to define torture as an “inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment”. Finally, the Commission defined “degrading treatment” as being an ulterior element of torture, viewing it as an act which “grossly humiliates a person before others or drives him to act against his will or conscience”. So not only did the Commission distinguish torture from the other forms of ill-treatment, but it also implied that inhuman and degrading treatment could be distinguished from each other based on a threshold of severity.

In its final decision of 1969, the Commission elaborated on what distinguished torture from inhuman or degrading treatment, by dividing the overall prohibition of Article 3 into a three-part typology²⁴³. It stated that “It is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation is unjustifiable”²⁴⁴. This progression of severity which is described creates a hierarchy of different harms, with torture being the most atrocious and extreme. Nonetheless, in the *Greekcase* in particular, the European Commission gave priority to the purpose of the act rather than the severity of it; even though it defined torture as an aggravated form of inhuman and degrading treatment, it stated that this was not the distinguishing element of the crime. Thus, a special consideration was given to the purposive element of the crime, element which was later on marginalized in other decisions. The approach held by the Commission heavily influenced the drafters of the UN

²⁴³Christian M. De Vos, *Mind the Gap: Purpose, pain and the difference between torture and inhuman treatment*, in the Human Rights Brief, Washington, 2007, p.4.

²⁴⁴Michael K. Addo and Nicholas Grief, *Does Article 3 of the ECHR enshrine absolute rights?*, in the European Journal of International Law, 1998, p.511.

Declaration against Torture when creating Article 1; consequently, Article 1 influenced the European Convention, where the only difference was that the drafters omitted the use of the word “cruel”.

Only in a second case of 1978, *Ireland v the United Kingdom*²⁴⁵, was the minimum level of severity considered²⁴⁶. This case regarded the treatment of individuals, suspected of being part of the Irish Republican Army (IRA), by UK troops in Northern Ireland. The Irish Government accused the UK of using methods of interrogation that went against the prohibition of Article 3. The European Commission of Human Rights found the interrogation techniques to be acts that fell under the definition of torture, and that there had been a combined use of five techniques which constituted inhuman treatment and torture, in breach of Article 3²⁴⁷. In particular, these five techniques included forcing the detainees to stand for long hours against the wall with their legs spread apart, putting dark leather bags over their heads during interrogation, keeping them in rooms with loud noises, depriving the detainees of sleep and depriving them of food and drink²⁴⁸. To evaluate the type of offences that had

²⁴⁵See *Ireland v the United Kingdom*, 18 January 1978, Series A No. 25

²⁴⁶Matteo Fornari, *L'art. 3 della Convenzione europea sui diritti umani*, in *La Tutela Internazionale dei diritti umani*, di Laura Pineschi, 2006, pp.355-358.

²⁴⁷Debra Long, *Guide to Jurisprudence on Torture and ill-treatment: Article 3 of the European Convention for the Protection of Human Rights, Association for the Prevention of Torture*, Geneva, 2002, p.13.

²⁴⁸*Ireland v. UK*, para. 96, where the five techniques were described as consisting of:

- (a) wall-standing: forcing the detainees to remain for periods of some hours in a 'stress position', described by those who underwent it as being 'spread-eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers';
- (b) hooding: putting a black or navy colored bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;
- (c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
- (d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep;
- (e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.

been inflicted, the Court based itself on a minimum level of severity that the ill-treatment has to reach; it stated that “in order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. In the Court’s view, this distinction derives principally from a difference in the intensity of the suffering inflicted”. Once it has been established that a certain treatment has to go beyond a certain threshold of pain, the intensity of the pain is the criterion to distinguish torture from inhuman treatment, thus establishing a sort of hierarchy between the prohibited acts²⁴⁹.

In the case at hand, the European Court of Human Rights held that most of the committed acts were only to be considered as inhuman and degrading acts. In particular, the Court drew a distinction between torture, inhuman and degrading treatment, stating that to fall under the definition of torture a certain act had to cause “serious and cruel suffering” and had to attain a minimum level of severity²⁵⁰. The Court latched on to the use of the word “aggravated” in Article 1 of the UN Declaration, without taking into consideration the definition provided for in the Greek Case. It held that the physical and mental sufferings caused by the English troops were degrading since they caused humiliation and inferiority feelings in their victims, without taking into account the particular intensity and cruelty of the acts, which would have made them torturous acts.

Moreover, the Court made it clear that the assessment of the minimum level of severity is relative²⁵¹. In other words, it depends on all the

²⁴⁹Matteo Fornari, *L’art. 3 della Convenzione europea sui diritti umani*, in *La Tutela Internazionale dei diritti umani*, di Laura Pineschi, 2006, p.358.

²⁵⁰Debra Long, *Guide to Jurisprudence on Torture and ill-treatment: Article 3 of the European Convention for the Protection of Human Rights*, Association for the Prevention of Torture, Geneva, 2002, p.14.

²⁵¹Michelle Farrell, *The Prohibition of Torture in Exceptional Circumstances*, United Kingdom, 2013, p.61.

circumstances of the case, such as the duration of the treatment, the physical and mental effects of it, and in some cases the age, sex and health state of the victim²⁵². This idea has been repeated frequently in the case-law of the Court. In the 1989 case *Soering*, for example, the Court added that the minimum level of severity not only depends on the above mentioned factors, but also on “all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of execution, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim”²⁵³. This criterion of relative evaluation has not been defined as static by the Court. In some cases, the Court has clarified that the Convention is a living instrument, that had to be interpreted in the light of present situations.

Another important case in which this threshold of severity was reiterated was the 1997 case of *Aydin v Turkey*²⁵⁴. The case concerned a young woman who had been held in detention by the Turkish police, because she was suspected of being involved with the Worker’s Party of Kurdistan. Whilst in detention, the victim alleged that she had been subjected to humiliating acts, such a being stripped of her clothes, beaten, blindfolded and raped. The Court, having states the the allegation met the minimum threshold of severity to fall under the scope of Article 3, held that: “The rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment, given the ease with which the offender can exploit the vulnerability ad weakened resistance of the victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence”. The act of

²⁵²Aisling Reidy, *The Prohibition of Torture; a guide to the implementation of Article 3 of the ECHR*, in the Human Rights Handbooks No.6, Geneva, 2002, p.10.

²⁵³See *Soering v the United Kingdom*, judgment of 7 July 1989, Series A No. 161.

²⁵⁴See *Aydin v Turkey*, Council of Europe, 57/1996/676/866, European Court of Human Rights, September 1997, available at <http://www.refworld.org/docid/3ae6b7228.html>.

rape was considered cruel enough to amount to torture in breach of Article 3, considering the level of suffering it brought to the victim.

Even though the final sentencing of the *Ireland v the United Kingdom* case has been followed in other subsequent decisions of the Court and the Commission, the European judicial system has never drawn an express list of acts that are automatically considered as torture. The Court has always maintained a certain degree of discretion in judging, considering that it has defined the European Convention of Human Rights as being “a living instrument which must be interpreted in the light of present-day conditions”. This means that when the Court is evaluating if an act constitutes a breach of Article 3, it holds some level of flexibility, as to judge the situation in the view of the current events.

During the recent years, there have been important developments in the scope of application of Article 3²⁵⁵. In the above mentioned *Greek case* and *Ireland v UK* case, the Court and the Commission had stated that other than a certain threshold of severity, an act could be considered as a violation of article 3 only if it was supported by proof “beyond reasonable doubt”²⁵⁶. An ill-treatment had to be endorsed by strong evidence to be punishable as torture. However, the issue with this reasoning was that it failed to take into account the difficulty for victims to obtain this kind of evidence, especially in cases where the evidence of torture could only be seen temporarily on the victim’s body. Only in the *Ireland v UK* case did the Court appear to take into account this problem. In this instance, even though it restated that the burden of proof was “beyond reasonable doubt”, it also agreed that to assess the evidence, proof may follow from “the coexistent of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this

²⁵⁵Debra Long, *Guide to Jurisprudence on Torture and ill-treatment: Article 3 of the European Convention for the Protection of Human Rights*, Association for the Prevention of Torture, Geneva, 2002, p.31.

²⁵⁶Gabriella Venturini e Stefania Bariatti, *Diritti individuali e Giustizia Internazionale*, Milano, 2009, p.435-436.

context, the conduct of the Parties when evidence is being obtained has to be taken into account”²⁵⁷. This standard of proof has nonetheless left a grey area, which has led the Court to impose a fundamental obligation on State authorities; they are now obliged to carry out an effective investigation, to evaluate the victim’s allegations²⁵⁸. The Court has stressed out that the investigation should “be capable of leading to the identification and punishment of those responsible”. Without such a duty imposed on States, the Court noted that “the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity”²⁵⁹.

This notable development of the duty to investigate has arisen out of a famous 1995 case, *Ribitsch v Austria*²⁶⁰. The applicant alleged that he had been subjected to ill-treatment and injuries when taken in police custody. Even though the Austrian Government stated that it was impossible to establish culpable conduct of the policemen “beyond reasonable doubt”, the Court still found a violation of Article 3 because in the case at hand recourse to physical force was unnecessary, and the State had not provided a plausible explanation for the injuries. Considering that the applicant had been taken into custody in good health and released injured, the Court had stressed that there was a duty on the State to conduct an effective investigation and give sufficiently detailed explanations for how the injuries had been caused. The failure in providing such an explanation would result in a violation under Article 3.

²⁵⁷ See *Ireland v United Kingdom*, ECHR, Series A, No. 25, 1978.

²⁵⁸ Debra Long, *Guide to Jurisprudence on Torture and ill-treatment: Article 3 of the European Convention for the Protection of Human Rights*, Association for the Prevention of Torture, Geneva, 2002, p.31.

²⁵⁹ Alastair Mowbray, *Cases, Materials and Commentary on the ECHR*, Oxford, 2012, p.156.

²⁶⁰ See *Ribitsch v Austria*, ECHR, Series A, Application No. 18896/91, December 1995.

The second Convention that was born in the context of the European process for protecting human rights is the aforementioned **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**²⁶¹. Taking inspiration from the growing interest in abolishing torture, a convention was created specifically and solely for the crime of torture. It was adopted by the member states of the Council of Europe in November 1987, and was subsequently amended by two additional Protocols.

This Convention differs from other sectorial conventions because it does not pursue the aim of giving a definition of torture, but rather wants to amount to a statute for a new organ, the European Committee for the Prevention of Torture. The drafters of the ECHR wanted to complete the system established by the Convention with an ulterior mechanism, aimed at strengthening the protection granted to detainees or individuals deprived of their liberty²⁶² through the creation of the Committee. The latter has the task of overseeing compliance with the Convention. The Council of Europe also published an explanatory report on the Convention, containing the basic guidelines for members of the Committee on how to interpret the provisions of the Convention²⁶³.

Originally, the Convention was born out of the idea that individuals held in detention could be better protected from torture and other forms of ill-treatment through a non-judiciary system having a preventive nature²⁶⁴. In

²⁶¹Konrad Ginther, *The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, in the European Journal of International Law, Austria, 1990, p.123.

²⁶²Matteo Fornari, *La Convenzione europea per la prevenzione della tortura e delle pene o trattamenti inumani e degradanti*, in La Tutela Internazionale dei Diritti Umani, di Laura Pineschi, 2006, p.571.

²⁶³The draft of this report was first prepared by the Committee on Human Rights, and was then sent to the Committee of Ministers of the Council of Europe.

²⁶⁴Malcolm N. Shaw, *International Law*, Fifth Edition, United Kingdom, 2003, p.338.

fact, the Convention envisions the creation of a group of international inspectors, entrusted with the task of conducting surveys to control the practice of torture. It constitutes the first ever case of a prior control to protect human rights. The Committee is granted the power to visit “all places of detention” in the various member states of the Council of Europe, to identify situations where there is a risk of torture or where torture is indeed practiced²⁶⁵. Small teams of Committee members can carry out unannounced visits to prisons, jails, police cell or other institutions in which people are withheld, to gather information. At the end of these visits, a report is drawn up containing the suggested recommendations, and sent to the Government in question. Usually these reports are confidential, but at times they can be published to exercise pressure on States to make them comply with the minimum standards of humane treatment.

The system envisaged by the Convention appears to be an efficient way to combat torture and other ill-treatments in Europe²⁶⁶. If compared with other similar mechanisms of protection, such as the one envisioned by the UN Convention Against Torture, it appears that a regional instrument is more likely to succeed in its aim, considering that it binds States that, for geographical contiguity and historical affinities, meet the same demands.

2.4A few years later, in December 1966, the United Nations General Assembly unanimously adopted the **International Covenant on Civil and Political Rights**²⁶⁷. This was the first universal human rights treaty to explicitly include a prohibition of torture along with other cruel, inhuman or

²⁶⁵ Antonio Cassese, *I diritti umani oggi*, Roma, 2009, p.189.

²⁶⁶ Matteo Fornari, *La Convenzione europea per la prevenzione della tortura e delle pene o trattamenti inumani e degradanti*, in *La Tutela Internazionale dei Diritti Umani*, di Laura Pineschi, 2006, p.586.

²⁶⁷ *Torture in International Law: A guide to jurisprudence*, jointly published by the Association for the Prevention of Torture and the Center for Justice and International Law, Geneva, 2008, p. 7.

degrading treatment. It aims at protecting both the dignity of the person and the physical and mental integrity of the individual²⁶⁸.

The United Nations Commission on Human Rights²⁶⁹ dedicated itself to the drafting of the Covenant, along with the International Covenant on Economic, Social and Cultural Rights, immediately after the issuing of the Universal Declaration on Human Rights²⁷⁰. The two Covenants, which together with the UN Declaration form the International Bill of Human Rights, constitute the result of a process started in 1948 to render the prohibition of torture mandatory between States. On the contrary of the Declaration, in fact, the ICCPR is binding for signatory States, considering that it envisions mostly duties to abstain. The binding character of the Covenant is set forth not only by its being explicitly compulsory, but also by the fact that Articles 28 and 39 envisage the establishment of a specific body; the Human Rights Committee. The Committee acts as a monitoring system, supervising the compliance of States with the ICCPR, by examining reports and individual petitions.

In its entirety, the ICCPR contains principles and provisions which recall the ones enshrined in the Universal Declaration of 1948 and the European Convention of 1950. The latter has been an important influence, as an example of document that contains rights of men that are formally mandatory for States²⁷¹.

There are two particularly relevant provisions in the ICCPR; Articles 7 and 10.

²⁶⁸General Comment No. 20, Human Rights Committee, *Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment*, UN Doc. HRI/GEN/1/Rev.7, 1992.

²⁶⁹The UN Commission on Human Rights was established under Article 28 of the ICCPR.

²⁷⁰Claudio Zanghi, *La Protezione Internazionale dei diritti dell'uomo*, Giappichelli, 2006, p.84.

²⁷¹Claudio Zanghi, *La Protezione Internazionale dei diritti dell'uomo*, Giappichelli, 2006, p.85, 99-100.

Article 7 reads: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”²⁷². The phrasing of its contents is very similar to Article 3 of the ECHR, and not unlike the latter, Article 7 does not contain a definition of the prohibited acts. The Human Rights Committee, in its General Comment on Article 7, stated that there was no necessity to expressly draw a list of the prohibited acts, or to make precise distinctions between torture and other forms of ill-treatment. To assess whether a certain act constitutes a violation of Article 7, the Human Rights Committee has stated that it depends on the “circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim”²⁷³. The evaluation of these elements could constitute an aggravating circumstance of the crime.

The second part of Article 7 ensures that the prohibition is extended to any medical or scientific experimentation that may be conducted without the explicit consent of the subject. This part of the article was created as a reaction of the aftermath of the Nazi concentration camps during the Second World War, when the German doctors experimented on the prisoners of the camps. In particular, the Human Rights Committee has stated that its aim is to protect all those who are incapable of giving their valid consent and those who have been deprived of their liberty²⁷⁴.

On the contrary of what is stated in the UN Convention Against Torture, the ICCPR does not require the involvement or the acquiescence of a State official for an act to be qualified as torture or ill-treatment. Rather, “it is the

²⁷²*Torture in International Law: A guide to jurisprudence*, jointly published by the Association for the Prevention of Torture and the Center for Justice and International Law, Geneva, 2008, p.9.

²⁷³From the case *Vuolanne v Finland*, Human Rights Committee, Communication No. 265/1987.

²⁷⁴*Torture in International Law: A guide to jurisprudence*, jointly published by the Association for the Prevention of Torture and the Center for Justice and International Law, Geneva, 2008, p.8.

duty of the State Party to afford everyone protection through legislative and other measure as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity”²⁷⁵.

Article 10, on the other hand, states: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”. This article complements Article 7 in prohibiting torture. It adds a positive right for detainees to be treated with respect²⁷⁶, thus covering all acts and treatments that are not severe enough to qualify as cruel, inhuman or degrading. The jurisprudence of the Human Rights Committee shows us that Article 10 is usually applied to general conditions of detention²⁷⁷, and that Article 7 applies to all those situations where a person is subjected to specific attacks.

Under the ICCPR, State parties have the duty to investigate any complaints of torture or ill-treatment²⁷⁸. Article 2, paragraph 1 requires that States ensure the rights enshrined in the Covenant to all individuals within their territory. The article is complemented by Article 2, which provides in paragraph 3 that all individuals whose rights have been violated have to be granted an effective remedy. By reading these articles together with Article 7, we can understand that “complaints about ill-treatment must be investigated promptly and impartially by competent authorities”. Furthermore, the right to

²⁷⁵See General Comment No. 20, Human Rights Committee, *Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment*, UN Doc. HRI/GEN/1/Rev.7, 1992.

²⁷⁶ See Human Rights Committee, General Comment No. 21, *Humane treatment of persons deprived of their liberty*, UN Doc. HRI/GEN/1/Rev.7, 1992.

²⁷⁷ Despite the lower threshold of severity held for Article 10, and the fact that it is not included in the list of inderogable rights in Article 4 ICCPR, the Human Rights Committee has arrived to the conclusion that Article 10 expresses a norm of general international law and therefore no derogation can be made from it.

²⁷⁸*Torture in International Law: A guide to jurisprudence*, published by the Association for the Prevention of Torture and the Center for Justice and International Law, Geneva 2008, p.17.

lodge a complaint should be found and recognized in the State's domestic law. The Human Rights Committee has stated that an investigation should be started as soon as there are grounds to believe that there has been an act of torture or ill-treatment, independently from the receipt of a formal complaint.

The State's obligation to start an investigation under the aforementioned articles extends also to acts which have been committed by a prior regime than the one governing the country at a present time²⁷⁹. The Human Rights Committee, in its General Comment on Article 7, stated that "Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible"²⁸⁰.

Furthermore, the prohibition of torture appears to be absolute and not subject to limitations in the system outlined by the ICCPR. Article 4 of the Covenant grants all States the possibility to make exceptions to the duties imposed by the document, in cases of public danger that menaces the existence of the nation. However, the second paragraph of the same article specifies that no derogation can be made with regard to several articles, including Article 7.

A broader definition of torture was used in the 1975 **Declaration of Tokyo**, which concerned the participation of medical professionals in acts of torture²⁸¹. This Declaration, despite enshrining only seven articles, constituted

²⁷⁹*Torture in International Law: A guide to jurisprudence*, published by the Association for the Prevention of Torture and the Center for Justice and International Law, Geneva 2008, p.17-18.

²⁸⁰See General Comment No. 20, Human Rights Committee, *Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment*, UN Doc. HRI/GEN/1/Rev.7, 1992.

²⁸¹Henri Colt, Silvia Quadrelli and Friedman Lester, *The Picture of Health: Medical Ethics and the Movies*, New York, 2011, pp.316-317.

a landmark event in medical ethics. Even though numerous nongovernmental organizations had previously tried to enforce national and international legal instruments to prevent the medical professions from committing acts of torture, medical complicity with the crime still remained a common issue in many countries. Thus, the need to address the conflict faced by health professionals was strongly felt, and resulted in the adoption of the Declaration during the 29th General Assembly of the World Medical Association.

In the preamble, it is stated that “For the purpose of this Declaration, torture is defined as the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the order of any authority, to force another person to yield information, to make a confession, or for any other reasons”²⁸². This general definition of torture does not, however, identify the types of events that are included in the definition of torture²⁸³. By interpretation, one can conclude that a wide variety of traumas could fall under the definition of torture experiences. Physicians have always been considered as having the privilege of practicing medicine and alleviating the pain and suffering of their patients; consequently, doctors should refuse to participate or to give permission for acts of torture, or other cruel treatments. The participation of physicians in acts of torture is prohibited not only by international human rights protocols, but also by the Hippocratic Oath; medical physicians swear to respect the doctor-patient relationship and to do no harm²⁸⁴. They fully abide to these commitments by refusing to participate in torture and also to be an active voice in the combat against torture, to help raise awareness. The Declaration also clearly states physicians cannot

²⁸²World Medical Association, *Declaration of Tokyo-Guidelines for Physicians concerning torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment*, adopted by the 29th World Medical Assembly, October 1975 and revised by the 173rd WMA Council Session, 2006.

²⁸³*Resilience in Torture Survivors: The moderating effect of coping style on social support, cognitive appraisals and social comparisons*, ProQuest, 2007, p.7.

²⁸⁴Henri Colt, Silvia Quadrelli and Friedman Lester, *The Picture of Health: Medical Ethics and Movies*, New York, 2011, p.316-317.

provide any instruments or ways to facilitate the practice of torture, and that they “shall not be present during any procedure during which torture or any other forms of cruel, inhuman or degrading treatment is used or threatened”²⁸⁵.

In the past, it has been frequent that some physicians have assumed personal risks to assist prisoners and save them from torture, frequently becoming victims themselves. Article 7 of the Declaration of Tokyo aims at protecting these individuals who refuse to take part in torture, by providing that “The World Medical Association will support, and should encourage the international community, the National Medical Associations and fellow physicians to support the physician and his or her family in the face of threats or reprisals resulting from a refusal to condone the use of torture”. This last provision of the Declaration helps protect those professionals who have committed to safeguarding their patients from harm and injustice.

When the Declaration was editorially updated in France in 2005 and 2006, its content was slightly modified and it now states that torture is “contrary to the laws of humanity”.

In the same year, the United Nations General Assembly adopted²⁸⁶ the **Declaration on the Protection of All Persons from being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment**²⁸⁷, a non-binding instrument against torture, which strongly inspired the adoption of the UN Convention Against Torture on the same

²⁸⁵ Declaration of Tokyo, Article 4, adopted by the World Medical Association, Japan, October 1975.

²⁸⁶ It is interesting to note that the Declaration was adopted with Resolution No. 3452 by the UN General Assembly, without any voting; this demonstrates the widespread consent that the principles enshrined in it had gathered.

²⁸⁷ From an article of the World Health Organization, *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, in the Health and Human Rights section.

subject-matter²⁸⁸. The declaration²⁸⁹ was built on Article 5 of the Universal Declaration of Human Right and Article 7 of the International Covenant on Civil and Political Rights.

This decision followed a major lobbying by non governmental organizations, who had brought on an intensive campaign to combat torture since 1972. In 1973, the Conference for the Abolition of Torture convened in Paris explicitly suggested that some kind of ethics code be formulated, to serve as a guideline for those professions that might incur in acts of torture²⁹⁰.

The entire Declaration consists of only twelve articles. The first article explains the meaning of the term ‘torture’ in this particular instrument; it is intended as any act by which severe pain or suffering is intentionally caused, whether physical or mental pain²⁹¹. The pain has to be inflicted by or at the instigation of a public official, for the purpose of either obtaining information or a confession, to punish the victim for an act he has committed or is suspected of having committed, or for purposes of intimidation. The article then adds that pain or sufferings arising from lawful sanctions is not included²⁹². The definition is rather precise and contains several elements, both subjective and objective. Since the definition of torture enshrined in Article 1 of the UN Convention Against Torture is expressed in almost exactly the same terms, for the analysis of the single elements of the crime we will refer to the paragraph 2.7.

²⁸⁸ J. Hermann Burgers, *The United Nations Convention Against Torture: A handbook on the CAT*, The Netherlands, 1988, p.1.

²⁸⁹ On 9 December 1975, the UN General Assembly passed resolution A/RES/30/3452, containing the Declaration.

²⁹⁰ The main objective of Amnesty International was to create codes directed at those people, such as doctors, lawyers, prison officers or police offers, who might be involved in situations in which torture may occur.

²⁹¹ Dr. Behnam Rastegari, *Violation of Fundamental liberties in counter-terrorism measures: a human rights approach*, 2014, p.90.

²⁹² Article 1 provides that torture “does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners”.

As regards to the concept of cruel, inhuman or degrading treatment or punishment, the second paragraph provides no explicit explanation of these acts²⁹³. It appears that the drafters of the Declaration did not think that these concepts could be explained with the same precision as torture, mostly because they were not considered as being on the same level of gravity. However, the second paragraph of Article 1 states that torture is an aggravated form of cruel, inhuman or degrading treatment or punishment²⁹⁴. This second part of the article was not transposed in the drafting of the CAT; during the preparatory works, there were disagreements on the threshold of gravity between torture in the stricter sense and other forms of ill-treatment. There were some States who wanted to discipline only torture, others who wanted to envisage also minor ill-treatments. In the end, the second paragraph of Article 1 of the 1975 Declaration was reiterated in the 1984 CAT.

Besides Article 1, there are only a few other articles which relate directly to torture alone. Article 7, for example, provides that each State shall ensure that all acts of torture are offences under their criminal law²⁹⁵. According to Article 9, if there are reasonable grounds to think that an act of torture has been committed, the authorities of the State have to start an impartial investigation. Finally, Article 10 establishes that a criminal proceeding has to be started against the offender, when there is enough evidence to ascertain his guilt.

All the other provisions enshrined in the Declaration apply both to torture and to cruel, inhuman or degrading treatment or punishment. According to Article 3, exceptional circumstances, such as public emergency,

²⁹³ Article 1, paragraph 2 of the Declaration reads: "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment".

²⁹⁴ J. Hermann Burgers, *The United Nations Convention Against Torture: A handbook on the CAT*, The Netherlands, 1988, p.17.

²⁹⁵ Carmelo Danisi, *Divieto e Definizione di tortura nella normativa internazionale dei diritti dell'uomo*, <http://www.diritto.it/archivio/1/28401.pdf>, p.4.

cannot be invoked as a justification for any of the above mentioned acts; thus, each State has to take the necessary measure to avoid and prevent these acts. To accomplish this, the Declaration provides that public officials have to be trained accordingly, as to learn the adequate treatment that has to be reserved to individuals in custody and under interrogation. If an individual alleges an ill-treatment on part of a public official, he will have the right to have his case impartially examined, and to obtain compensation for the damages suffered. From this description of the contents of the Declaration, we can infer that it was aimed at creating a set of rules and measures that ensure the compliance with the prohibition of torture.

Despite the efforts of the international to create a satisfactory document, be it a declaration or a convention, that could thoroughly prohibit torture, the results seemed to be unsatisfactory. Therefore, in 1977, the International Association of Penal Law proposed the creation of a draft convention to declare torture as a crime under international law²⁹⁶. A first draft text was drawn up by the International Commission of Jurists, a human rights organization; subsequently, it was submitted to UN Commission on Human Rights, to be considered for production of the eventual UN Convention²⁹⁷.

2.5 During the 1980's and 1990's, great progress was made in the development of both legal standards and instruments to prohibit torture. As we have seen, since the mid 1970's the attention of the international community on the crime of torture had greatly evolved. The consensus of the member States of the United Nations on the prohibition of torture gave way to the

²⁹⁶J. Hermann Burgers, *The United Nations Convention Against Torture: A handbook on the CAT*, The Netherlands, 1988.

²⁹⁷M. Cherif Bassiouni, *International Criminal Law: Sources, Subjects and Contents*, Third Edition, The Netherlands, 2008, p.632.

approval of new documents, containing detailed provisions for the combat of torture on an international level²⁹⁸.

In 1981, for example, the United Nations Voluntary Fund for Victims of Torture was established to fund all those organizations which provided assistance to the victims of torture and to their families²⁹⁹. The fund's main objective was to provide immediate and accessible assistance through medical, psychological and legal assistance.

The subject of human rights started being at the center of interest in the Islamic world as well. The Islamic Council for Europe³⁰⁰ took the initiative and organized a conference on human rights in Paris³⁰¹. During this conference, an important attempt at codifying human rights was made, when the prohibition of torture was included in the **Universal Islamic Declaration of Human Rights** in 1981. This Declaration was the result of an effort on part of various Islamic countries, such as Egypt, Pakistan, Saudi-Arabia and the Islamic Council³⁰². It is viewed as the first ever statement of Muslims on the area of human rights under Islam.

As with the Universal Declaration, it constitutes a non-binding document, even though it has been important for the understanding of the evolution of human rights according to the Islamic thought³⁰³.

The main issue with the declaration at hand is that the most radical Islamic countries took part in its drafting³⁰⁴. Thus, it is based on a certain

²⁹⁸Carmelo Danisi, *Divieto e Definizione di tortura nella normativa internazionale dei diritti dell'uomo*, <http://www.diritto.it/archivio/1/28401.pdf>, p.1-2.

²⁹⁹From the official website of the UN Human Rights Office of the High Commissioner.

³⁰⁰The Islamic Council for Europe is a private organization that aims at representing the interests and views of conservative Muslims.

³⁰¹Jean Jacques Waardenburg, *Islam: historical, social and political perspectives*, Berlin, 2002, p.171.

³⁰²The Islamic Council is an international non-governmental organization based in Saudi Arabia.

³⁰³Susan C. Breau, *Religion, Human Rights and International Law: A critical examination of Islamic State practices*, The Netherlands, 2007, p.160-162.

interpretation of Shari'a law (Islamic law), dictated more by religion than by actual impartial provisions of law. We must take into account that human rights in Islam are based on the belief that only God is the source of all laws and of all human rights³⁰⁵. This entails that no government or ruler can violate these rights, and it is mandatory for a society to implement them. Nonetheless, there has always been a strong contrast between the dictatorial political regimes and the Islamic idea of protection of human rights; the former has always interpreted Shari'a laws to best accommodate their own political regimes, frequently distorting the real meaning behind certain laws. The Taliban regime in Afghanistan, for example, refuses to educate women, even though Islam encourages woman to get an education. It is not uncommon for these regimes to put aside human rights in the name of political gain. Moreover, the new regimes that were created to combat these violations of human rights have never agreed on a unique political structure, rendering it more difficult to encompass the Western tradition of human rights into Islam. A new interpretation of Shari'a scripts has been proposed, to try and eliminate the existing conflict between Islam and human rights.

Another major problem with the Declaration is that it exists in only two official languages, English and Arabic; there is a very significant discrepancy between the English version and the Arabic one³⁰⁶. The former is more neutral, while the latter seems to convey a different message, since it has been read and interpreted on the basis of Shari'a law.

Nonetheless, the preamble states that "by terms of our primeval covenant with God, our duties and obligations have priority over our rights". This entails that the Declaration somehow rejects any independent and secular

³⁰⁴Simona Amadini, *Dalla Dichiarazione dei diritti umani nell'Islam alla nuova Carta araba dei diritti umani*, in *La Tutela Internazionale dei diritti umani*, di Laura Pineschi, 2006, p.699.

³⁰⁵George Hunsinger, *Torture is a moral issue: Christians, Jews, Muslims and People of Conscience speak out*, Wm. B. Eerdmans Publishing, 2008, p.158.

³⁰⁶Eva Brems, *Human Rights: Universality and Diversity*, The Netherlands, 2001, p.242.

interpretations of its provisions, and that there appears to be no separation between religion and human rights. Moreover, the English version uses the word 'law' throughout every article, even though the explanatory notes of the Declaration have underlined that "the term 'law' denotes the Shari'ah, i.e. the totality of ordinances derived from Qur'an and the Sunnah and any other laws that are deduced from these two sources by methods considered valid in Islamic jurisprudence"³⁰⁷.

The right to life and the prohibition of torture and inhuman treatment are confirmed by contemporary Islamic human rights law. Article 1 of the Declaration affirms that "human life is sacred and inviolable and every effort shall be made to protect it". The right to life is one of the most basic rights that are protected under Islamic law; killing a human being is seen as one of the biggest sins an individual can commit, and it is expressly prohibited in Islam. The Qur'an clearly states that "whoever kills a human being –except as a punishment for murder or for spreading corruption in the land- shall be regarded as having killed all mankind"³⁰⁸. It is Article 7 of this Declaration, however, that directly concerns the right to protection against torture. It provides that "No person shall be subjected to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him"³⁰⁹.

An ulterior step forward was made by the **African Charter on Human and People's Rights**, which also contains a provision directly referred to the prohibition of torture.

³⁰⁷Explanatory Notes of the UIDHR, (1b).

³⁰⁸The Quran, translated by Maulana Wahiduddin Khan, The Table (Al-Ma'idah), 5:32.

³⁰⁹From the Universal Islamic Declaration of Human Rights, adopted by the Islamic Council of Europe on 19 September 1981/21 Dhul Qaidah 1401.

In 1963, the Organization of African Unity was created in the African region, to complete the process of decolonization: it was subsequently replaced by the African Union.

The Charter was born out of the African system for the protection of human rights, which is the youngest of the three existing regional systems³¹⁰. In particular, the Charter was thought of at the 1979 Assembly of Heads of State and Government of the then Organization of African Unity. During this assembly, a proposal was made to adopt a resolution which set up a committee of experts, called to draft a human rights instrument for the African continent, similar to those existing in Europe. The committee produced a draft that was unanimously approved in 1981; the Charter came into effect in October 1986, and as of today fifty-three States have ratified it³¹¹.

Compliance with the Charter and interpretation of its norms is entrusted to the African Commission on Human and People's Rights, set up in 1987. However, unlike other regional systems, a provision for a Court is not made by the Charter itself, but is rather found in an additional Protocol which entered into force in 2004. The main flaw of the African system is that there is no enforcement mechanism for the Commission's decisions and recommendations, which have been frequently ignored by States. The decisions of the Commission do not carry the same binding force of decisions that come from other courts of law, mainly because it is a quasi-judicial body³¹². As the Commission has noted, the main aim of a procedure before the Commission itself should be to start a positive dialogue with a State and find

³¹⁰*Torture in International Law: a guide to jurisprudence*, jointly published by the Association for the Prevention of Torture and the Center for Justice and International Law, Geneva, 2008, p.126.

³¹¹Ronli Sifris, *Reproductive Freedom, Torture and International Human Rights*, New York, 2013, p.47.

³¹²Frans Viljoen and Chidi Odinkalu, *The Prohibition of Torture and Ill-treatment in the African Human Rights System*, World Organisation Against Torture, Geneva, 2006, p.27-28.

an amicable solution; however, this would require the good faith of the parties concerned, which has been absent in the majority of cases.

Article 5 of the ACHPR provides that “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment or treatment shall be prohibited”³¹³.

In this article, unlike what we have found in other systems, there is no explicit prohibition of torture³¹⁴. Torture and other forms of ill-treatment are listed as mere examples, under a more general prohibition of exploitation and degradation. Thus, two different though interrelated aspects can be found; the duty to respect human dignity and the prohibition of exploitation and degradation. The right to not be subjected to torture is inserted as a positive right to have one’s dignity respected. It must be noted that the right to human dignity is guaranteed separately from the prohibition of torture³¹⁵; if a State or any of its agents breach the obligation of respecting human dignity, the prohibition of torture and other forms of ill-treatment is almost unavoidably also breached.

In a number of its decisions, the African Commission has interpreted the term ‘dignity’ broadly, covering covering also the physical and mental sufferings that could be caused to the victim. According to the Commission, “Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination. It is therefore an inherent right, which every

³¹³Ronli Sifris, *Reproductive Freedom, Torture and International Human Rights*, New York, 2013, p.48.

³¹⁴Carmelo Danisi, *Divieto e Definizione di tortura nella normativa internazionale dei diritti dell’uomo*, p.3.

³¹⁵Frans Viljoen and Chidi Odinkalu, *The Prohibition of Torture and Ill-treatment in the African Human Rights System*, World Organisation Against Torture, Geneva, 2006, p.37.

human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right”³¹⁶.

Article 5 goes on to complicate things even further, and torture appears to be included in the same category as slavery, which is considered to be just as serious a crime under international law³¹⁷. What must be stressed out is that the different approach the ACHPR has towards torture derives from the historical context in which it was born.

The African Commission has never expressly made a distinction between the failure to respect a person’s dignity, cruel, inhuman or degrading treatment, and torture³¹⁸.

Considering that Articles 60 and 61 of the ACHPR provide that when interpreting the Charter, the Commission has to draw inspiration from other sources of international law, the latter has sometimes adopted the definition of torture contained in the CAT; moreover, it has also taken into consideration the provisions on torture contained in international humanitarian law. However, no clear distinction and categorization has ever been made between the various forms of ill-treatment contained in the article. Only in one particular case, *Ouko v Kenya*, a distinction is drawn between ‘dignity and freedom from inhuman or degrading treatment’ on one hand, and ‘freedom from torture’ on the other.

From the case-law of the Commission, we can draw that it considers torture to be an aggravated or particularly serious form of ill-treatment. In the case *International Pen and Others v Nigeria*, the Commission held that “Article 5 prohibits not only torture, but also cruel, inhuman or degrading

³¹⁶See case *Purhoit and Moore v The Gambia*, African Commission on Human and People’s Rights, Communication No. 241/2001, 2003.

³¹⁷Frans Viljoen and Chidi Odinkalu, *The Prohibition of Torture and Ill-treatment in the African Human Rights System*, World Organisation Against Torture, Geneva, 2006, p.37.

³¹⁸*Torture in International Law: a guide to jurisprudence*, jointly published by the Association for the Prevention of Torture and the Center for Justice and International Law, Geneva, 2008, p.127.

treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience”³¹⁹. This statement suggests that to fall under the notion of torture, the act has to cause serious suffering, and that there has to be evidence to support the allegations of physical and mental abuse; any allegations made in general terms, without proof, will not be sufficient³²⁰. On the other hand, when defining cruel, inhuman and degrading treatment, the Commission adopted the reasoning of the European Court, and stated that these acts must attain a minimum level of severity. Once again, the assessment of the threshold of severity has to be evaluated along with the circumstances of the case, such as the age, sex and state of health of the victim, as well as the duration of the treatment and its mental and physical effects³²¹.

As part of the requirements to give effect to the rights found in the Charter, State parties have an obligation to investigate allegations of torture or ill-treatment³²². However, this duty to investigate has been interpreted more restrictively by the African Commission than it has been by other regional bodies. In fact, an ineffective investigation will not automatically lead to a violation of the Charter; rather, it is seen by the Commission as a test to establish how seriously a State takes his duties under the Charter. Moreover, the Commission does not expect a State to investigate every allegation that is made, but merely expects it to take the appropriate measures to deal with the situation.

³¹⁹See case *International Pen and Others v Nigeria*, African Commission on Human and People’s Rights, Communications Nos. 137/94, 139/94, 154/96 and 161/97, 24th session, 1998.

³²⁰See case *Ouko v Kenya*, African Commission on Human and People’s Rights, Communication No. 232/1999, 28th session, 2000.

³²¹See case *Huri-Laws v Nigeria*, African Commission on Human and People’s Rights, Communication No. 225/1998, 28th session, 2003.

³²²*Torture in International Law: a guide to jurisprudence*, jointly published by the Association for the Prevention of Torture and the Center for Justice and International Law, Geneva, 2008, p.132.

Article 1 of the Charter, read together with Article 5, imposes a duty on States to criminalize torture and other ill-treatment. Article 1 reads: “The Member States of the Organization of African Unity, parties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them”. The Commission has confirmed the States have a positive obligation under the Charter to prosecute and punish those who commit abuses. Any allegations of torture and ill-treatment can be brought before the African Commission through an individual communication or an inter-State communication³²³. The former has been used more frequently than the latter.

2.6 The major issue, however, was that up until that time there were various law provisions which prohibited torture, but all failed to define it³²⁴. The United National General Assembly finally gave meaning to the term torture on December 10, 1984, when it adopted the **Convention Against Torture**³²⁵. Finally, a legally-binding instrument on torture had been adopted, on the thirty-sixth anniversary of the adoption of the Universal Declaration of Human Rights. It represented a significant achievement, and the then President of the UN General Assembly Paul Lusaka defined it as being “a major step towards creating a more humane world”³²⁶. The Convention entered into force in June 1987, and was ratified by 158 countries³²⁷; today, it is considered to be

³²³ Frans Viljoen and Chidi Odinkalu, *The Prohibition of Torture and Ill-treatment in the African Human Rights System*, World Organisation Against Torture, 2006.

³²⁴ Gail H. Miller, *Defining Torture*, Occasional Paper #3, Floersheimer Center for Constitutional Democracy, 2005, p.5.

³²⁵ Lyal S. Sunga, *The Emerging system of international criminal law: developments in codification and implementation*, The Netherlands, 1997, p.132.

³²⁶ UN GAOR, 39th Session, 93d plen., UN Doc. A/39/PV.93, 1984.

³²⁷ When ratifying the Convention, the United States added a reservation that the definition of “cruel, inhuman or degrading treatment or punishment” had the meaning of “cruel, unusual and inhuman treatment or punishment” that was already prohibited by the fifth, eighth and fourteenth Amendments to the

part of the customary law of most countries, and has gained the status of a *jus cogens* principle of law. It has been proclaimed as a “guideline for all States and other entities exercising effective power”³²⁸.

The UN Convention was the result of precise political and historical circumstances of the time, specifically the historical events that occurred in Latin America in the late 1970’s³²⁹. In particular, the 1973 Chilean coup d’état prompted the adoption of the Convention; the reports on mass killings and practices of torture brought on during the Chilean regime, and in other Latin American countries too, pushed States to take action. In 1973, the UN General Assembly adopted a resolution³³⁰ that condemned the practice of torture and of other inhuman and degrading treatments, asking States to ratify the existing international instruments that prohibited these acts. The following year, the General Assembly required States to submit a report on the measures they had adopted to protect victims of torture within their jurisdictions³³¹. This resolution marked the starting point for the adoption of the Declaration on the Protection of of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment, which brought to the adoption of the UN CAT in 1984.

The peculiarity of the CAT is that it contemplates the coexistence of two distinct systems; on one hand, a system to repress acts of torture; on the other hand, a system of control over the application of the Convention, through an

Constitution of the United States. (Yee S., *International Crime and Punishment: selected issues*, University Press of America, Footnote 18, 2004).

³²⁸Matthew Lippman, *The Development and Drafting of the UN Convention Against Torture*, in the *International and Comparative Law Review*, 1994, p.301.

³²⁹Matteo Fornari, *La Convenzione delle Nazioni Unite contro la tortura e altre pene o trattamenti crudeli, inumani e degradanti*, in *La Tutela Internazionale dei Diritti Umani*, Laura Pineschi, 2006, p.203.

³³⁰ See Resolution No. 3059, November 1973.

³³¹See Resolution No. 3218, November 1974: with this resolution, the General Assembly asked States “information relating to the legislative, administrative and judicial measures, including remedies and sanctions, aimed at safeguarding persons within their jurisdiction from being subjected to torture and other cruel, inhuman or degrading treatment or punishment”.

ad hoc body. In fact, the Convention represents the first ever instrument to contemplate a monitoring mechanism for the protection of individuals, an innovation that had not been included in any other international instrument. To ascertain that State Parties effectively proceeded to implement the Convention, the United Nations established a Committee against Torture in 2002, an independent body which supervises the creation of adequate criminal laws in national legislation. This treaty body, on the contrary of the Committee of Human Rights established by the Covenant on Civil and Political Rights, has a more sectorial competence, since it can only handle cases on the right to not be tortured³³².

The Committee's most important task is to examine complaints coming from States or from individuals. We must point out, however, that this competence is not automatic; the States who ratified the Convention have to explicitly accept the Committee's competence.

State parties to the Convention have the duty to submit regular reports, the first one within one year of ratifying the Convention, and after that every four years³³³. The Committee can consider individual or inter-state complaints, or it can start its own inquiries on the basis of simple suspicion of violation of the CAT. Once it has examined a report, the Committee make recommendations to the State and addresses its concerns in the form of "concluding observations"³³⁴. Under the CAT, it is allowed to conduct inspections in prisons and places of detention in countries, with the help of national authorities. Notwithstanding the potentiality of the Committee, its first

³³² Undoubtedly, the International Covenant on Civil and Political Rights of 1966 constituted an important starting point in the creation of the Committee against Torture; from a procedural point of view, articles 21 and 22 of the CAT trace respectively articles 41 and 42 of the Covenant.

³³³ Matthew Lippman, *The Development and Drafting of the UN Convention Against Torture*, in the *International and Comparative Law Review*, 1994, p.320.

³³⁴ M. Cherif Bassiouni, *International Criminal Law: Sources, Subjects and Contents*, Third Edition, The Netherlands, 2008, p.643.

years of work were not impressive³³⁵. In the first four years it was active, the Committee received and examined only three individual petitions, and apparently, when examining the State reports, was more concerned with the form than the substance.

Many people have assumed that the main scope of the Convention Against Torture is to outlaw torture and other cruel, inhuman and degrading treatment or punishment³³⁶. On the contrary, however, the Convention is entirely based on the assumption that these acts are already prohibited under international law, and thus aims at merely strengthening the existing prohibition. Nonetheless, despite all the obligations imposed on contracting parties by the various international instruments, and despite the fact that in some countries torture is prohibited by the Constitution itself, police and military forces in many countries still use torture.

The UN Convention gives a different and more detailed definition of the crime of torture, in comparison with the definitions given up until that moment. The fact that it enshrines a clear definition of the prohibited acts prevents States from taking advantage of it by giving a more flexible interpretation of the terms³³⁷. However, the definition contained in Article 1 is extremely rigid, which requires the presence of multiple elements at the same time for there to be a violation of the Convention³³⁸.

Article 1 states that “the term torture means an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is

³³⁵ Matthew Lippman, *The Development and Drafting of the UN Convention Against Torture*, in the *International and Comparative Law Review*, 1994, p.321.

³³⁶ J. Hermann Burgers, *The United Nations Convention Against Torture: A handbook on the CAT*, The Netherlands, 1988, p.1.

³³⁷ Lyal S. Sunga, *The Emerging system of international criminal law: developments in codification and implementation*, The Netherlands, 1997, p.13.

³³⁸ Antonio Cassese, *I diritti umani oggi*, Roma, 2009, p.178.

suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”³³⁹.

Article 1 does not provide a definition of what these acts are, and the Committee against Torture has recognized that “In practice, the definitional threshold between cruel, inhuman or degrading treatment or punishment and torture is often not clear”³⁴⁰. By analyzing the preparatory works of the article, one can conclude that the distinction can be made on the basis of the purpose of the act and the powerlessness of the victim, rather than on the basis of the intensity of the pain or of the suffering inflicted³⁴¹.

Distinguishing torture from other cruel, inhuman or degrading treatment is also important considering that, under customary international law, torture is a peremptory norm from which no derogation is ever permissible. This principle is reaffirmed in the CAT when stating that “no exceptional circumstances whatsoever...may be invoked as a justification of torture”³⁴²; however, the same cannot be said for other ill-treatments, which do not hold the same special status.

Thus, we can infer that the definition of torture given by the Convention against Torture comprises a series of elements³⁴³.

³³⁹A/RES/39/46, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, un.org.

³⁴⁰Convention Against Torture, General Comment No.2, Implementation of article 2 by State Parties, UN Doc. CAT/C/GC/2/CRP.1/Rev.4, November 2007.

³⁴¹From the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. E/CN.4/2006/6. December 2005.

³⁴²See Article 15, paragraph 2, of the CAT.

³⁴³Gail H. Miller, *Defining Torture*, Occasional Paper #3, Floersheimer Center for Constitutional Democracy, 2005, p.6.

Firstly, torture seems to require an “act” that causes severe pain or suffering, whether physical or mental. Defining the outline of what constitutes an act is important to determine the exact scope of torture. If one were to consider an act as an active behavior, excluding omissions which cause pain and suffering, the definition of torture would be significantly narrowed³⁴⁴. Thus, the provisions on torture apply to sufferings cause by omissions as well. Some countries, when implementing the prohibition of torture into their national legislation, have avoided any confusion by explicitly containing both acts and omissions. Other signatories of the Convention, however, have enacted laws which do not require an “act” as a necessary element of torture.

Secondly, the definition entails that the harm brought onto the victim has to cause “severe pain or suffering” in order to be considered as torture. Considering that pain is a very subjective feeling, the Convention does not elaborate on the term severe³⁴⁵. Torture obviously falls at the extreme end of the spectrum of pain-inducing acts given this definition. The pain or suffering which can be both mental and physical; the Convention however does not delineate a boundary between the two³⁴⁶, even though the Commission Against Torture has acknowledged the existence of a difference between the two types of pain. There are some countries, like Croatia, who have failed to prohibit mental torture, thus restricting the number of acts which can be punished at torture. Other countries have on the other hand given a detailed description of the acts. The definition of torture contained in US law is probably the most detailed in describing what constitutes mental harm. We must note that the United States, as a condition for ratifying the CAT, requested the introduction of a precise definition of mental torture; “Mental

³⁴⁴Maxime E. Tardu, *The UN Convention Against Torture*, in *Nordic Journal of International Law*, 1987, p.304.

³⁴⁵Gail H. Miller, *Defining Torture*, Occasional Paper #3, Floersheimer Center for Constitutional Democracy, 2005, p.6.

³⁴⁶*Torture in International Law: a guide to jurisprudence*, jointly published by the Association for the Prevention of Torture and the Center for Justice and International Law, Geneva, 2008, p.12.

pain or suffering refers to prolonged mental harm caused by or resulting from³⁴⁷:

- (1) The intentional infliction of threatened infliction of severe physical pain or suffering;
- (2) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (3) The threat of imminent death or;
- (4) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality.”

Even though this definition of mental pain seems to include physical pain as well, and it defines it using the source of pain as a general standard, it seems to narrow the options by confining the acts to a series of enumerated actions.

Another fundamental element of torture under the CAT is that the suffering be “intentionally inflicted”³⁴⁸. This would technically entail that if the suffering was not intended to cause pain, the act would not amount to torture and thus not be punished. The European Court of Human Rights has made the requirement of intent easier to be satisfied by simply shifting the burden of proof from the victim to the Government. In the 1999 case *Selmouni v France*³⁴⁹, the Court found a violation of Article 3 of the European Convention and noted that “where an individual is taken into police custody in

³⁴⁷Michael John Garcia, The UN Convention Against Torture: Overview of US Implementation Policy Concerning the removal of aliens, Congressional Research Service, Report for Congress, CRS-6, April 2006.

³⁴⁸Gail H. Miller, *Defining Torture*, Occasional Paper #3, Floersheimer Center for Constitutional Democracy, 2005, p.6.

³⁴⁹See Case of *Selmouni v France*, Application No 00025803/94, July 1999.

good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused”³⁵⁰. The applicant’s ill-treatment suffered while in police custody was deemed as being sufficiently severe to amount to intentionally committed torture. If there is no proof that there was the intention of causing sufferings, the act does not amount to torture but to inhuman and degrading treatments, which are not included in the definition of Article 1.

An ulterior element, closely connected to the one mentioned in the previous paragraph, is that the acts of torture be carried out for a specific purpose³⁵¹. Article 1 lists three possible purposes; to obtain information or confessions, to punish and to intimidate. During the preparatory works for the article, there was a debate on whether or not to insert this list of specific aims of the act. The risk was that a list would be interpreted as being peremptory, leaving acts of torture committed for different reasons unpunished. To avoid this, the sentence “or for any other reason based on discrimination of any kind” was inserted in the final draft. Nonetheless, the element of purpose seems to strongly narrow the protection from torture; it appears in fact that the Convention is limited to conscious acts of torture, excluding all the subconsciously driven reasons, such as feelings of inferiority, alienation or jealousy³⁵².

One of the most controversial elements of the definition is that the pain or suffering must be inflicted at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity. Article 1 seems to exclude the possibility of torture committed by private individuals. Undoubtedly the violation of the prohibition of torture is

³⁵⁰Aisling Reidy, *The Prohibition of Torture; a guide to the implementation of Article 3 of the ECHR*, in Human Rights Handbooks No.6, Germany, 2002, p.14-15.

³⁵¹*Torture in International Law: a guide to jurisprudence*, jointly published by the Association for the Prevention of Torture and the Center for Justice and International Law, Geneva, 2008, p.12.

³⁵²Maxime E. Tardu, *The UN Convention Against Torture*, in Nordic Journal of International Law, 1987, p.305.

considered to be aggravated when committed by a State official; however, it is unclear why the infliction of torture by a private citizen should be tolerated and not punished. By reading the wording of the article, it apparently refers only to public officials and officials of the State. Even though States are generally not responsible for acts which go beyond their control, according to the horizontal efficacy of international human rights treaties they can be held responsible for acts of torture committed by private individuals, if they are unable to prevent them³⁵³. This would mean that any act of torture, no matter how cruel and abusive, would not be considered as such unless the State was somehow involved. The reason for this wording might be that torture committed by private individuals is generally already criminalized under national law, which led the CAT drafters to consider unnecessary an international prohibition.

There is a marked difference between the definition enshrined in Article 1 of the CAT and the one given by the Universal Declaration of Human Rights of 1948, on which it is based; specifically, in the former torture is not defined as an aggravated form or as an ill-treatment. It simply delineates the legal and political responsibilities of governments and seems to restrict the scope of the prohibition, by applying it only to government-sponsored torture, or torture committed by a person holding an official position in the state³⁵⁴. One can implicitly draw that there may be other definitions of torture that widen its scope, rather than narrowing it.

The International Criminal Tribunal for the former Yugoslavia, in its case law of the 1998 *Delalic* and *Furundzija* cases, considered the definition of torture enshrined in Article 1 to be part of the customary law applicable in

³⁵³ Giovanni Conso e Andrea Saccucci, *Codice dei diritti umani*, Padova, 2001, p.310.

³⁵⁴ James Jaranson, one of the most eminent experts in torture rehabilitation, seems to think that the definition given by the UN Convention on Torture should be broadened to include all forms of violence, not only politically motivated torture. (Jaranson J., *The Science and Politics of Rehabilitating Torture Survivors*, in *Caring for Victims of Torture*, edited by Popkin M., American Psychiatric Press, Inc., 1998).

armed conflict. However, in its subsequent case law of 2001, in the *Kunarac* case, the Tribunal seemed to change opinion by stating that the definition of torture under international humanitarian law does not comprise the same elements as the definition usually applied under human rights law.

By ratifying the Convention Against Torture, States have taken on a series of precise duties and obligations, all of which are directly referred to the offence of torture.

Article 2 of the Declaration is an extremely important provision in this regards, because it requires each country to establish its own internal legislation to prevent torture. The article states that “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”. Thus it requires all State Parties to prohibit and criminalize the use of torture under any circumstances, and to prosecute every person who is suspected of having committed acts of torture, regardless of the the territory in which these acts took place. The article also excludes the possibility of invoking exceptional circumstances or a superior order as a justification for acts of torture³⁵⁵. Furthermore, Article 3 declares that a State party may not expel, return or extradite a person to another State, if there are probable grounds for believing that the person will be tortured in that country³⁵⁶. Thus, to ensure that acts of torture do not go unpunished, Article 5 of the Convention goes on to establish a mechanism of universal jurisdiction in respect to this crime. This entails that jurisdiction is given to both the State in whose territory the torturous act was committed, and the State whose national citizens have been victims of torture. The latter State can ask for the extradition of the alleged offender. Thus, if a State discovers a

³⁵⁵Maxime E. Tardu, *The UN Convention Against Torture*, in Nordic Journal of International Law, 1987, p.310-311.

³⁵⁶Matteo Fornari, *La Convenzione delle Nazioni Unite contro la tortura e altre pene o trattamenti crudeli, inumani e degradanti*, in La Tutela Internazionale dei Diritti Umani, Laura Pineschi, 2006, p.211.

suspected offender on his territory, it can either extradite the individual towards the State who has made the request, or exercise directly its criminal jurisdiction³⁵⁷.

The Convention clearly imposes a duty of incrimination on States. It explicitly requires States to enact and enforce criminal legislation to prohibit and punish torture.

Article 4 reads: “Each State Party shall ensure that all acts of torture are offences under its criminal law”. The same has to be ensured for all attempts at committing torture, and to acts that constitute involvement in acts of torture. Thus, national authorities not only have to adopt the necessary measures to punish the authors of the prohibited acts, but they also have to provide for adequate sanctions for those offences, which “take into account their grave nature”³⁵⁸. However, Article 4 only applies to acts of torture, since it is not listed in Article 16 amongst those articles which apply to other forms of ill-treatment too. The Commission has more than once stressed that States must incorporate in their domestic law the crime of torture, and that they have to provide a definition of torture which covers all of the elements contained in Article 1 of the Convention. This requirement also applies to those States, like Italy, which have a legal system where international law norms have a direct effect, and technically do not need the creation of an ad hoc law

Under the CAT, State parties have the duty to investigate and prosecute any allegations of torture or cruel, inhuman or degrading treatment³⁵⁹. The distinction between torture and the other forms of ill-treatment will be considered further on in the chapter. The obligation to investigate is stated in Article 12 of the Convention, which states that “Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation,

³⁵⁷Antonio Cassese, *I diritti umani oggi*, Roma, 2009, p.179.

³⁵⁸CAT, Article 4, paragraph 3.

³⁵⁹*Torture in International Law: A guide to jurisprudence*, published by the Association for the Prevention of Torture and the Center for Justice and International Law, 2008, p.18-19.

wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction”. This mandatory duty to investigate is also complemented by Article 13 of the Convention, which provides that individuals have the right to complain to the competent authorities; consequently, States have to take the necessary steps to protect the victim. From what we can infer from the wording of Article 16, Articles 12 and 13 not only apply to torture, but to acts of cruel, inhuman or degrading treatment as well. The task to monitor the implementation of the CAT belongs to the Committee Against Torture, to which all State parties are obliged to submit regular reports on how rights are being implemented. The Committee has not given any guidance regarding the time limits for completing an investigation, once a suspicion of ill-treatment has arisen. However, in the 1998 case *Blanco Abado v Spain*, the Commission has stated that “promptness is essential both to ensure that the victim cannot continue to be subjected to such acts and also because in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear.”³⁶⁰ Thus, the State has an obligation not only to ensure a prompt investigation, but also an impartial one³⁶¹; the investigation phase must be effective and carried out by qualified individuals. According to the Commission, the main aim of this kind of investigation should be to “seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person

³⁶⁰See case *Blanco Abado v Spain*, Merits UN Doc CAT/C/20/D/59/1996, Communication No 59/1996, IHRL 2883. In the case at hand, the Commission had considered a period of eighteen days between the initial report of ill-treatment and the initiation of an investigation as being too long.

³⁶¹According to the Commission in the case *Blanco Abado v Spain*, the duty of the State to carry out a prompt and impartial investigation does not depend on the submission of a formal complaint by the victim; it is enough for the victim “simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as a tacit but unequivocal expression of the victim’s wish that the facts should be promptly and impartially investigated”.

who might have been involved therein”. The victim who has filed a complaint has the right to be informed of the outcome of the investigations.

Furthermore, in practice, all those who hold an official or authoritative position in the State must not be permitted to “avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates”, especially in cases where they knew or should have known that these acts were likely to be committed³⁶².

Cruel, inhuman and degrading treatments are covered in Article 16 of the CAT. The article provides that State parties have the duty to prevent any of these acts in territories under their jurisdiction. The wording is careful to indicate that it refers to all those acts “which do not amount to torture”. The requirement of the act being committed by or at the instigation of a public official still remains.

To establish when an act does not amount to torture, but falls under the qualification of cruel, inhuman or degrading treatment, we have to look at the principles defined by the Committee against Torture in its case law. According to the most popular opinion, the term ‘inhuman treatment’ can be distinguished from torture because of the absence of the requirement that the treatment be inflicted with a specific purpose; furthermore, the intensity of the sufferings that have been caused is a criterion that helps make the distinction³⁶³.

In 2002, an **Optional Protocol to the Convention** was adopted³⁶⁴. The Protocol entered into force only in 2006, and as of today it has seventy-five signatories and eighty-one parties. This protocol created an international inspection system, to control places of detention and how the inmates are

³⁶²See CAT, General Comment No 2.

³⁶³Carmelo Danisi, *Divieto e Definizione di tortura nella normativa internazionale dei diritti dell'uomo*, <http://www.diritto.it/archivio/1/28401.pdf>, p.6.

³⁶⁴UN General Assembly resolution A/RES/57/199, 18 December 2002.

treated³⁶⁵. The idea for this type of torture protection is modeled on the system that had been envisaged by the Swiss Committee for the Prevention of Torture, today Association for the Prevention of Torture, which was founded in 1977 in Geneva.

Until the Protocol was created, the UN Committee Against Torture did not have any strong instruments to actually combat torture, and could only analyze the self-reports coming from the different governments. The Special Rapporteur on Torture was instituted, but neither him nor the Committee Against Torture had the power to visit countries or to visit prisons to evaluate the conditions in which inmates were kept. The permission of the Government was needed, and most of the time it was not accorded. Clearly, the system set up by the Convention presented a series of limits, having the weak point of not being able to directly analyze the denounced situations³⁶⁶.

The Council of Europe first realized the idea of an inspection system at a regional level in 1987, by adopting the European Convention for the Prevention of Torture³⁶⁷. Along with the ECHR, it is considered to be one of the most important treaties drafted by the Council. Its ratification has been a precondition for those States wanting to join the Council of Europe in the past years. The European Committee for the Prevention of Torture has demonstrated that by organizing regular visits to places of detention, and by publishing the reports of the governments and responding with recommendations, the system of inspection works efficiently. This system strongly influenced the drafting of the Optional Protocol.

³⁶⁵ Manfred Nowak, *The Prohibitions of Torture and Ill-treatment today*, in *The Cambridge Companion to Human Rights Law*, edited by Conor Gearty and Costas Douzinas, 2012, p.308.

³⁶⁶ Matteo Fornari, *La Convenzione delle Nazioni Unite contro la tortura e altre pene o trattamenti crudeli, inumani e degradanti*, in *La Tutela Internazionale dei Diritti Umani*, Laura Pineschi, 2006, p.222.

³⁶⁷ The idea of adopting such an instrument was not new; in 1980, Costa Rica had brought before the UN Commission on Human Rights a project for the adoption of the Protocol. The project was however put aside, to concentrate on the negotiations of the CAT.

The main aim of the OPCAT is to ensure that State Parties to the CAT meet their obligations and that individuals kept in detention are not mistreated³⁶⁸. Under the OPCAT, States agree to international inspections of places of detention situated on their territories. These inspections are conducted by the UN Subcommittee on the Prevention of Torture, established in 2007 with a mandate to provide assistance and advice to States³⁶⁹. This body is composed by 25 independent and impartial experts, elected by State parties, who hold mandate for four years. However, the Subcommittee cannot provide legal advice or financial assistance. By ratifying the Optional Protocol, States have to grant the Subcommittee full access to any relevant information, to all places of detention, and grant the possibility to hold private interviews with detainees and inmates. The Subcommittee cannot however publish report and recommendations unless there has been a previous agreement with the State concerned; all inspections have to be conducted in confidentiality. Moreover, States are required to establish an independent National Preventive Mechanism (NPM) to conduct inside inspections of all places of detentions, such as prisons, juvenile detention, immigration detention and other facilities where people are deprived of their liberty³⁷⁰. The essential elements of a NPM, as set out in the Protocol, are expertise and independence of those who undertake visits, appropriate dialogue with competent authorities, and access to all necessary resources. On the contrary of the Subcommittee, NPMs do not necessarily have to work on a confidential basis.

³⁶⁸ From the website of the Australian Human Rights Commission, <https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/optional-protocol-convention-against-torture-opcat>.

³⁶⁹ Scott Sheeran and Nigel Rodley, *Routledge Handbook of International Human Rights Law*, New York, 2014, p.409.

³⁷⁰ Manfred Nowak, *The Prohibitions of Torture and Ill-treatment today*, in *The Cambridge Companion to Human Rights Law*, edited by Conor Gearty and Costas Douzinas, 2012, p.308.

Despite the promising provisions, the system envisioned by the UN Convention Against Torture has raised some uncertainties³⁷¹. It is obvious that the efficient functioning of the system is based solely on the will of State to implement the Convention in their national judicial systems. The lack of a coercive instrument that obliges States to carry out the recommendations made by the Committee is the main weak point. The real issue is that States have not demonstrated any promptness in implementing the obligations set out by the Convention, with the result that often the authors of acts of torture remained unpunished. The most striking example of this problem can be traced back to a case of 1990, when the President of Chad, Hissène Habré, took refuge in Senegal, after giving his deposition³⁷². In 1992 a Commission ascertained Habré's guilt for having committed acts of torture, and in January 2000 a few of the victims appealed the Senegalese Tribunals, asking for his conviction. However, Senegal had not implemented any provision against torture in its criminal code, despite it being party to the Convention and despite the fact that Article 4 of the CAT expressly requires States to criminalize torture. Thus, it did not have the competence to trial and punish the offender.

This is one of many examples that shows how the simple ratification of the Convention on part of States is not enough to guarantee the protection of human rights. An effective method of control on States should be introduced, to make sure they concretely repress torture within their jurisdictions.

2.7 Soon after the Convention Against Torture was drafted, the American region adopted a sectorial Convention too, on the same subject-matter. In December 1985 this international human rights instrument was adopted within the Organization of American States (OAS); the **Inter-American Convention**

³⁷¹Matteo Fornari, *La Convenzione delle Nazioni Unite contro la tortura e altre pene o trattamenti crudeli, inumani e degradanti*, in *La Tutela Internazionale dei Diritti Umani*, Laura Pineschi, 2006, pp.224-230.

³⁷²From the online website of the Human Rights Watch, *The case of Hissène Habré before the extraordinary African Chambers in Senegal*, last edited in May 2016.

to Prevent and Punish Torture³⁷³. The Convention entered into force in 1987 and as of today 18 nations are parties to it.

The text of the Convention evokes the one of the UN CAT of the previous year, even though with some dissimilarities.

A clear definition of torture is enshrined in Article 2 of the Convention, which reads: “For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose”³⁷⁴. The IACPPT defines torture more expansively than the UN Convention Against Torture, even though there are some common elements. Here too, an ‘act’ is necessary, intended both as a commission and an omission. Torture entails the infliction of physical or mental pain, and the element of purpose is recalled once again in this Convention too.

The second part of the first paragraph goes on to expand the definition of torture by saying that it must be understood to be “the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish”. This additional element was missing in the UN CAT; thus, it seems that the scope of the prohibition is extended to other purposes other than obtaining information, intimidation or punishment. It obviously includes all the new and sophisticated technologies and methods of interrogation that, even if causing great sufferings, do not implicate the perception of actual pain.

Finally, the second paragraph states that “The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the

³⁷³Guomundur S. Alfreosson and Asbjorn Eide, *The Universal Declaration of Human Rights: a common standard of achievement*, p.137.

³⁷⁴*Torture in International Law: A guide to jurisprudence*, published by the Association for the Prevention of Torture and the Center for Justice and International Law, Geneva, 2008, p.95-96.

consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article”. It must be noted that the Inter-American Convention, unlike the CAT, does not require a minimum threshold of pain or suffering for an act to fall under the notion of torture. The article does not make any reference to the intensity of the painor suffering, nor to the severity of the act³⁷⁵. It seems that any type and intensity of pain would be sufficient, if the other elements enlisted in Article 2 are present. Moreover, it appears that the pain does not have to be shown or proven, if the act was intended to ‘obliterate the personality of the victim or to diminish his physical or mental capacities’. This irrelevance of the severity or aggravation of any form of torture has also been confirmed by the case-law of the Inter-American Commission on Human Rights.

The identity of the author of the crime is missing from Article 2 of the Convention, but is clarified in Article 3, which states that an act can be classified as torture only if it is committed by one of the following two categories of individuals:

- a) “A public servant or employee who, acting in that capacity, orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so;
- b) A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it, or is an accomplice thereto”.

By ratifying the Convention, State members of the OAS have signed up to abide by a series of obligations.

First of all, they have accepted the absolute nature of the prohibition of torture. Article 4 clearly states that the fact that an individual has acted under a superior’s orders cannot be as a justification or exemption from punishment. Exceptional circumstances, such as war, the threat of war or political

³⁷⁵Nigel S. Rodley, *The Definition(s) of Torture in International Law*, in *Current Legal Problems*, Oxford, 2002. P.14.

instability cannot be invoked as exceptions to the prohibition either³⁷⁶. Moreover, States have taken up the duty to “take effective measures to prevent and punish torture within their jurisdiction”. Each national system has to comprise the adequate criminal and administrative provisions to prevent and punish torture. It is interesting to note how the Convention requires States to train their police officers and public officials, to teach them the correct and human methods to interrogate an individual, or to arrest or detain him. Also this Convention requires States to take effective measures to prevent torture within their territories, and establishes the possibility of extradition for individuals accused of torture. In the case *Mejia v Peru*, the Commission

Both Article 6 and the 7 of the Inter-American Convention include, in their last paragraph, the phrase “other cruel, inhuman or degrading treatment and punishment”³⁷⁷. This represents a generic duty for States to prevent and punish also ill-treatments, who’s gravity does not amount to torture. However, the victims of minor ill-treatments are not granted the same rights; the obligation to start an investigation or to obtain suitable compensation only applies to the crime of torture in the stricter sense.

During the drafting of the Inter-American Convention, the creation of an *ad hoc* organ to supervise its application was not envisaged. This control was entrusted to the already existing institutions of the Organization of American States, in particular to the Inter-American Commission for Human Rights³⁷⁸.

Article 17, paragraph 1, of the Convention explicitly require State Parties to “inform the Inter-American Commission on Human Rights of any legislative, judicial, administrative or other measures they adopt in application

³⁷⁶Inter-American Convention Against Torture, Article 5, paragraph 1.

³⁷⁷*Torture in International Law: A guide to jurisprudence*, published by the Association for the Prevention of Torture and the Center for Justice and International Law, Geneva, 2008, p.98.

³⁷⁸The Commission, along with the Inter-American Court of Human Rights, is one of the autonomous bodies that make up the Inter-American system for the promotion and protection of human rights.

of this Convention”. The Commission has to analyze the situation in the various States, to see if they comply with the provisions of the Convention to punish and prevent torture.

Thus, the Commission’s authority rests on its dual nature; on one hand, it is an organ of the OAS Charter, and its mandate is based on the American Declaration; on the other hand, it is also an organ of the Inter-American Convention³⁷⁹.

2.8 Having considered up until now the case law of human rights treaty bodies, a consideration must be given to the international criminal tribunals. As mentioned before, the **Statute of the International Criminal Tribunal for the former Yugoslavia** was adopted in 1993 on the basis of Council Control Law No.10. Both this Statute, and the one for the International Criminal Tribunal for Ruanda, view torture as a grave breach³⁸⁰.

Around 1992, Balkan Europe was at the center of various internal armed conflicts, triggered by the dissolution of the Socialist Federal Republic of Yugoslavia. During the 1990’s, the Yugoslav state witnessed ongoing wars, during which numerous crimes were committed. To shed light on these events, the UN Security Council created two international tribunals with resolutions n.827 of 1993 and n.955 of 1994³⁸¹. These ad hoc tribunals were established specifically to prosecute the crimes committed respectively in the former Yugoslavia and in Ruanda. However, their functioning has been discussed widely³⁸²; the main question was whether their legitimacy could be based on a particular provision of the Charter of the United Nations, and which one. In

³⁷⁹Diego Rodriguez-Pinzon and Claudia Martin, *The Prohibition of Torture and Ill-Treatment in the Inter-American*, Geneva, 2006, p.40.

³⁸⁰Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, New York, 2010, p.615.

³⁸¹Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell’umanità*, Seconda Edizione, 2012, p.878-879.

³⁸²Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell’umanità*, Seconda Edizione, 2012, p.879.

fact, the UN Charter does not explicitly give the Security Council the power to establish international criminal tribunals. The two Tribunals have pronounced themselves on their own legitimacy, stating that they were considered to be “measure not involving the use of armed force”, under Article 41 of the UN Charter³⁸³. Despite the various debates, the Tribunals have gone on to work without any objections.

Even though the International Criminal Tribunals deal with individual responsibility for the crime of torture and other forms of ill-treatment, they have occasionally referred to State responsibility as well. The Trial Chamber of the ICTY has stated that “States are obliged not only to prohibit and punish torture, but also to forestall its occurrence. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. It follows that international rules prohibit not only torture, but (i) the failure to adopt the national necessary measures for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition”³⁸⁴. Furthermore, the Trial Chamber has stressed out that there is a moral force behind the prohibition of torture, which serves to impose obligations that States have towards one another³⁸⁵.

The competence of the Tribunals embraces three categories of crimes: war crimes, genocide and crimes against humanity³⁸⁶. Torture is abstractly ascribable to all three categories; however, under the Statutes of both International Criminal Tribunals, the crime of torture is considered to be at the same time a war crime and a crime against humanity.

³⁸³Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, 2012, p.879.

³⁸⁴See case *Prosecutor v Furundzija*, 1998.

³⁸⁵*Torture in International Law: A guide to jurisprudence*, published by the Association for the Prevention of Torture and the Center for Justice and International Law, Geneva, 2008, p.146-147.

³⁸⁶Filiberto Trione, *Divieto e crimine di tortura nella giurisprudenza internazionale*, 2006, p.11.

As far as war crimes are concerned, both Statutes rely on the 1949 Geneva Conventions, even though they do not cover exactly the same crimes; this is due to the different historical events that occurred in the two countries. In the former Yugoslavia, the conflicts were both international and internal, while in Rwanda the issue concerned the internal situation only. This has had an important consequence; on one hand, the Statute of the ICTY gives the Tribunal jurisdiction over grave breaches of the Geneva Conventions³⁸⁷; on the other hand, the Statute of the ICTR covers violations of Article 3 of the Statute itself (which is common to the Geneva Conventions and the Additional Protocol of 1977), which applies to internal armed conflict³⁸⁸. From this we can conclude that the Statutes cover those situations that they were specifically created to address.

Articles 2 of the Statute of the ICTY expressly enshrines as ‘grave breaches’ both acts of torture or inhuman treatment, and acts which cause great suffering or serious injury to an individual’s body or health. Article 3, on the other hand, does not mention torture in its list, since the article constitutes a supplementary list³⁸⁹. Torture falls under the scope of Articles 2 and 3 when it is committed against the protected subjects listed in the Geneva Conventions. Furthermore, Article 4 of the Statute grants the Tribunal the competence to judge all those who are responsible of genocide. This crime is defined in the second paragraph as “any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group”. The article goes on to display five different ways in which genocide

³⁸⁷ Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell’umanità*, Seconda Edizione, Italia, 2012, p.880.

³⁸⁸ *Torture in International Law: A guide to jurisprudence*, published by the Association for the Prevention of Torture and the Center for Justice and International Law, Geneva, 2008, p.146-147.

³⁸⁹ Article 3 of the Statute states that “Such violations shall include, but not be limited to [...]”.

can be carried out, two of which can certainly be executed through acts of torture³⁹⁰.

From this analysis it is clear that torture can be punished by the ICTY collectively or alternatively as a war crime, a crime against humanity or as a crime of genocide, depending on the way the act is carried out.

The case law of the International Criminal Tribunal for the former Yugoslavia has been fundamental to expand the reach of international law norms concerning torture³⁹¹. First of all, it has expanded the notion of ‘armed conflict’ for purposes of the Geneva Conventions. In the *Tadic* case³⁹², the Tribunal stated that “an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”. The ICTY has also insisted that Article 3 of the Geneva Conventions grants a minimum protection, and also represents customary international law. Furthermore, in its case law, it confirmed the status of torture as a peremptory norm, and has frequently adopted the definition of torture used in the UN Convention Against Torture, to supplement the one enshrined in the Geneva Conventions.

The Security Council has slightly modified the definition of torture enshrined in the Statute of the International Criminal Tribunal for Ruanda. According to the report drawn up by the Secretary-General after the adoption of the Statute of the ICTR, the Security Council has “elected to take up a more expansive approach to the choice of the applicable law than the one underlying

³⁹⁰ Letters (b) and (c) of Article 4, second paragraph, recall the definition of torture: “b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”.

³⁹¹ John T. Parry, *Understanding Torture: Law, Violence and Political Identity*, Michigan, 2010, p.26.

³⁹² See *Tadic* case, CC/PIO/190-E, The Hague, May 1997.

the statute of the Yugoslav Tribunal”³⁹³. In the ICTR Statute, torture is enlisted as a crime against humanity, which also corresponds to the definition of torture most widely accepted under customary international law. The ICTY Statute, on the other hand, departs from customary international law by requiring that the crime of torture “be committed in armed conflict, whether international or internal in character”³⁹⁴. Even though it may seem that this requirement might restrict the scope of application of the article, it has had no practical consequences; all of the crimes submitted to the ICTY had been in any case committed during an armed conflict.

In the case *Prosecutor v Musema*, the ICTR Trial Chamber compared the provisions of Article 3 of the ICTR Statute and Article 5 of the ICTY Statute, and held that “although the provisions of both aforementioned Articles pertain to crimes against humanity [...] there is a material and substantive difference in the respective elements of the offences, that constitutes crimes against humanity. The difference stems from the fact that Article 3 of the ICTR Statute expressly requires ‘national, political, ethnic, racial or religious’ discriminatory grounds with respect to the offences of murder, extermination, deportation, imprisonment, torture, rape and other inhuman acts, whereas Article 5 of the ICTY Statute does not stipulate any discriminatory grounds with respect to these offences”³⁹⁵. Therefore, under the ICTY Statute, torture is punished regardless of the motives behind the act.

This double qualification of the crime of torture under the two Statutes has had practically no consequences, considering that the Trial Chamber of the

³⁹³ From the *Report of the Secretary General Pursuant to Paragraph 5 of the Security Council Resolution 955*, UN Doc. S/1995/134, February 1995. A few years later, a United Nations Commission of Inquiry referred to the Secretary-General’s remark, pointing out that no member of the Security Council had ever objected to the “expansive approach” that he had taken.

³⁹⁴ See Article 5, ICTY Statute.

³⁹⁵ See Case *Prosecutor v Musema*, Case No. ICTR-96-13-A, ICTR Trial Chamber I, Judgment of 27 January 2000.

ICTY has expressly stated that the definition of torture is considered to be same, regardless of the Article under which the acts have been charged³⁹⁶.

Neither of the two Statutes, however, gives a specific definition of torture. Therefore, the case law of the two Tribunals has provided helpful guidance in determining the exact content of the right to be free from torture and ill-treatment³⁹⁷.

The case law of the ICTR, in particular a ruling of the Appeals Chamber in 1995, has been extremely relevant for making torture punishable even when committed in times of peace. Up until that moment, the Nuremberg case law and the international humanitarian law treaties had seemed to imply that torture could be considered as a crime against humanity only if committed in association with an armed conflict³⁹⁸. Similarly, since torture was already partially acknowledged as being a war crime as well, there was the understanding that torture prosecutions were to be excluded with respect to civil wars. Thus, the rejection of such restrictive interpretations by the ICTR confirmed the status of customary international law of the prohibition of torture. Nonetheless, the two ad hoc tribunals of 1993 had yet to provide a judicial interpretation of the term torture.

A turning point happened in 1998, less than two months after the adoption of the Rome Statute; the International Criminal Tribunal for Rwanda issued a very important judgment in the case *Akayesu*, convicting a man for committing the crime against humanity of torture, which was listed in Article 4 of its Statute. The Trial Chamber of the tribunal found that the interrogation techniques used against the victim put him under the threat of life, thus

³⁹⁶See Case *Prosecutor v Krnojelac*, Case No. IT-97-25-T, ICTY Trial Chamber II, Judgment of 15 March 2002.

³⁹⁷Nigel S. Rodley, *Integrity of the Person*, in International Human Rights Law, edited by Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, Second Edition, Oxford, 2014, p.176.

³⁹⁸William A. Schabas, *The Crime of Torture and the International Criminal Tribunals*, in the Case Western Reserve University Journal of International Law, Volume 37, 2006, p.353.

constituting torture. When offering a definition of torture in its final sentencing, the Trial Chamber referred to the definition contained in the UN Convention Against Torture. Accordingly, to qualify as torture, an act must have been committed for one of the following purposes:

- a) To obtain information or a confession from the victim or a third person;
- b) To punish the victim or a third person for an act committed or suspected of having been committed by either of them;
- c) For the purpose of intimidating or coercing the victim or the third person;
- d) For any other reason based on discrimination.

The purpose requirement of torture therefore is considered to be a fundamental element that distinguishes torture from other forms of ill-treatment³⁹⁹. The ICTR did however state that it does not consider this list to be exhaustive, having examined other acts that fall under the notion of torture, but that were committed for different purposes than the ones mentioned. The Trial Chamber then went on to add that acts of torture could also be classified as crimes of genocide under certain circumstances. This entailed that an act could be punishable as torture if it caused bodily or mental harms to members of a national, ethnic, racial or religious group. With regards to this point, the Trial Chamber referred to the famous Eichmann case of 1961, where Israeli courts held that serious bodily and mental harms could be caused “by the enslavement, starvation, deportation and persecution and detention in ghettos, transit camps and concentration camps in conditions which were designed to

³⁹⁹*Torture in International Law: A guide to jurisprudence*, published by the Association for the Prevention of Torture and the Center for Justice and International Law, Geneva, 2008, p.150.

cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture”⁴⁰⁰.

The International Criminal Tribunal for the former Yugoslavia gave a similar judgment to its sister tribunal, in the *Delialic* case of 2001⁴⁰¹. It confirmed the importance of the purposive element, adding that some acts automatically fulfill the purpose requirement, in particular when a public official is involved. The ICTY Trial Chamber stated that “it is difficult to envisage circumstances in which rape [...] could be considered as occurring for a purpose that does not involve punishment, coercion, discrimination or intimidation”⁴⁰². After evoking once again the definition of torture enshrined in the 1948 UN Convention, stating that it “reflects a consensus which the Trial Chamber considers to be representative of customary international law”, the judgment went further⁴⁰³. A distinction was made between torture and other forms of cruel, inhuman and degrading treatment. In its reasoning, the Trial Chamber of the ICTY referred to the ruling of the European Court of Human Rights in the *Ireland v United Kingdom* case, stating that it best illustrated the difficulty in determining a precise threshold of severity beyond which an act becomes torture. The Trial Chamber concluded that “mistreatment that does not rise to the level of severity necessary to be characterized as torture may constitute another offence”⁴⁰⁴. Moreover, it specified that inhuman treatment is such “which deliberately causes serious mental or physical suffering that falls short of the severe mental and physical suffering required for the offence of torture”.

⁴⁰⁰See *Attorney General v Adolf Eichmann*, District Court of Jerusalem, Criminal Case No 40/61, December 1961.

⁴⁰¹See *Prosecutor v Delialic*, case No IT-96-21-T, 2001.

⁴⁰²See *Prosecutor v Delialic*, case No IT-96-21-T, 2001.

⁴⁰³William A. Schabas, *The Crime of Torture and the International Criminal Tribunals*, in the *Case Western Reserve University Journal of International Law*, Volume 37, 2006, p.349.

⁴⁰⁴Nigel S. Rodley, *The Definition(s) of Torture in International Law*, in *Current Legal Problems*, Oxford University Press, 2002.

The notion of purpose seems to be central to the concept of torture as understood by the International Criminal Tribunal for the former Yugoslavia. Even though the Trial Chambers have had different approaches towards which purpose is actually relevant, but they all have been consistent in requiring the element⁴⁰⁵. In the *Furundzija* case, the Trial Chamber made a distinction between being guilty as a perpetrator or as an aider based on the purpose that had moved the person to act. Moreover, the ICTY affirmed the *jus cogens* status of the prohibition of torture, acknowledging the existence in customary law of a provision having a binding effect on all States⁴⁰⁶.

2.9 The ICTY's interpretations of international law played a major role in the subsequent jurisprudence of the International Criminal Court⁴⁰⁷. In 1998, the **Rome Statute** was adopted for the purpose of setting up the International Criminal Court, which was the first ever criminal tribunal to have universal jurisdiction to prosecute individuals for various international crimes, such as genocide, crimes against humanity and war crimes⁴⁰⁸. Since the ICC is intended to complement all the existing national courts, it can exercise its jurisdiction only if certain conditions are met⁴⁰⁹. The multilateral treaty was adopted at a diplomatic conference in Rome, and since its entry into force in

⁴⁰⁵ Nigel S. Rodley, *The Definition(s) of Torture in International Law*, in *Current Legal Problems*, Oxford University Press, 2002.

⁴⁰⁶ According to the Tribunal, "the prohibition on torture is a peremptory norm of *jus cogens*. [...] It imposes on States obligations *erga omnes*, that is, obligations owed toward all the other members of the international community. [...] Clearly the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community".

⁴⁰⁷ John T. Parry, *Understanding Torture: Law, Violence and Political Identity*, Michigan, 2010, p.27.

⁴⁰⁸ Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, 2012, p.884.

⁴⁰⁹ The ICC has jurisdiction over a case when a national court is unwilling or unable to prosecute a certain criminal, or when the United Nations Security Council or an individual State has referred an investigation to the Court itself.

July 2002, there is now a permanent court whose jurisdiction is extended to a multitude of crimes⁴¹⁰.

According to the Statute of the ICC, torture is covered under the definitions of crimes against humanity and war crimes⁴¹¹. Torture is listed in Article 7 of the Statute, where it is included in the list of crimes against humanity, described as being acts “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. It provides a simple definition of torture, regarding the prosecution of war criminals.

Article 7 of the Rome Statute provides that “torture means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent or incidental to, lawful sanctions”⁴¹². What strikes about this definition is that, even though it requires that the pain and suffering be severe, it does not contain the concept of relative intensity of pain, by referencing to other forms of ill-treatment. Moreover, there is no indication of the element of purpose which can be found in Article 1 of the CAT; indeed, in the final draft text of the Elements of the Crime there is a footnote which refers to the crime of humanity of torture and explicitly affirms that: “It is understood that no specific purpose need be proved for this crime”. However, Article 7 introduces a new notion: that of custody or control of the torturer over the victim.

Torture is also found in the above mentioned Elements of Crimes for the International Criminal Court. In 2010, the Preparatory Commission for the

⁴¹⁰M. Cherif Bassiouni, *International Criminal Law: Sources, Subjects and Contents*, Third Edition, The Netherlands, 2008, p.649.

⁴¹¹See Article 7 (crimes against humanity) and Article 8 (war crimes) of the Statute.

⁴¹² Rome Statute of the International Criminal Court, Article 7, paragraph 2, letter (e).

ICC adopted a document called Elements of Crimes, replicated from the official records of the review conference in Kampala of the Rome Statute.

Article 8(2) (a) (ii)-1 of the Rome Statute lists torture as a war crime, committed thus in an international armed conflict⁴¹³. The war crime of torture seems to be composed of six elements⁴¹⁴:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons⁴¹⁵.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.
3. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
4. The perpetrator was aware of the factual circumstances that established that protected status.
5. The conduct took place in the context of and was associated with an international armed conflict.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Contrary to human rights law, the Elements of Crimes does not require that torture be inflicted by or with the acquiescence of a public official.

In addition to the international treaties that protect individuals from torture and other cruel, inhuman or degrading treatment, there are two key UN resolutions which provide further guidance⁴¹⁶.

⁴¹³ Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, 2010, p.626-627.

⁴¹⁴ *Elements of Crime*, published by the International Criminal Court, ISBN No 92-9227-232-2, 2011, p.13.

⁴¹⁵ It is difficult to ascertain precisely what threshold of pain is required.

In December 2015, the United Nations General Assembly adopted a set of rules denominated **Standard Minimum Rules for the Treatment of Prisoners**⁴¹⁷. These rules were firstly adopted back in 1955 by the UN Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva; they were subsequently approved by the Economic and Social Council in 1957, to encourage States to reach “the minimum conditions which are accepted as suitable by the United Nations”⁴¹⁸. Originally, they included detailed directives for the maintenance of discipline with regards to the treatment of detainees, applicable to prisoners who were waiting to be sentenced or trialed, and to those who were arrested or detained. They were revised only in 2015 and adopted under the name of Nelson Mandela Rules, to honor the legacy of the late President of South Africa and his battle for human rights, democracy and peace. The revision process was initiated in 2010, when it was recognized that there had been major developments in human rights and criminal justice since the first adoption. The UN General Assembly adopted resolution no. 65/230 to request that the Commission on Crime Prevention and Criminal Justice establish an expert group for the revision of the rules.

The document is made up of ninety-five articles in total, which display in detail the minimum sanitary, recreational and social conditions which have to be guaranteed to detainees. The rules, even though not legally binding, provide guidelines for international and domestic law as to how to treat individuals held in detention. They also assist in the interpretation of the more general requirements found in Article 10 of the ICCPR, which mandates the human treatment and respect for the human dignity of prisoners. The Standard Minimum Rules prohibit discrimination against prisoners based on different grounds, and also requires that all prisoners have enough information at their

⁴¹⁶ Anuradha Kumar, *Human Rights*, Sarup & Sons, 2002, p.176-177.

⁴¹⁷ From the online website of the non-profit association Penal Reform International, *UN Nelson Mandela Rules (revised SMR)*.

⁴¹⁸ Article 2, Standard Minimum Rules.

disposal to be able to judge what the prison regulations are and how they can eventually file a complaint. In particular, they prohibit “cruel, inhuman or degrading punishments” as well as “punishment that may be prejudicial to the physical or mental health of the prisoner”⁴¹⁹. Starting from the assumption that all restrictions of personal liberty are as such already severe per se, these rules want to ensure that “the prisons system shall not aggravate the suffering inherent in such a situation”⁴²⁰.

The relevance of the Standard Minimum Rules in the work of both regional and international human rights courts can be understood by the fact that the 1975 Declaration Against Torture explicitly refers to the SMR, when giving a definition of torture in the first article⁴²¹. These rules have been extensively applied or referred to by national courts too; the US Supreme Court has referred to them as “contemporary standards of decency”.⁴²² Finally, non governmental organizations have also cited these rules when expressing their criticisms towards the practice held by States.

Another soft law instrument that was established in the context of the UN Crime Prevention and Criminal Justice Program was the **Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment**⁴²³, adopted by the General Assembly in December 1988. It contains detailed provisions on the protection of persons held in any type of detention.

⁴¹⁹See UN Standard Minimum Rules for the Treatment of Prisoners, UN Doc E/3048, July 1957.

⁴²⁰Article 57, Standard Minimum Rules.

⁴²¹J. Hermann Burgers, *The United Nations Convention Against Torture: A handbook on the CAT*, The Netherlands, 1988, p.42.

⁴²²See case *Estelle v Gamble*, US Supreme Court, No.429, 1976.

⁴²³Adopted by the UN General Assembly in resolution 43/173 of 9 December 1988.

The text was originally drafted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, of the UN Commission on Human Rights⁴²⁴.

Article 6 of the resolution states that “no persons under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. No circumstance whatsoever can be invoked as a justification for these acts⁴²⁵.

CHAPTER 3

THE PROHIBITION OF TORTURE IN ITALIAN LAW

⁴²⁴Denis Abels, *Prisoners of the International Community: The legal position of persons detained at International Criminal Tribunals*, 2012, p.43.

⁴²⁵Ronli Silfris, *Reproductive Freedom, Torture and International Human Rights: Challenging the masculinisation of torture*, Routledge, 2013, p.30-31.

3 Italy's duty under International law. – 3.1 History and achievements of the Italian legislator. – 3.2 Comparison with other European legal systems. – 3.3 The Diaz case of 2001.

3. Italy has always committed to combating and repressing the crime of torture. However, by examining the various reports of Amnesty International on the situation of human rights in Italy, one can notice the lack of an *ad hoc* prohibition of torture in the Italian Criminal Code⁴²⁶. Despite the ongoing works, the Italian legislator seems to be advancing slowly in introducing the crime of torture. There have been several attempts at creating laws that encompass all the elements provided for in the definitions of the international treaties, but there is still no trace of an actual possibility of creating such a law.

Article 13 of the Italian Constitution provides for some sort of implicit duty to avoid any forms of torture or ill-treatment towards individuals. In its first three paragraphs, it is made clear that abuses against the person are not tolerated, and will be punished adequately⁴²⁷. The fourth paragraph is the most important, stating that “any sort of physical and psychological violence on persons subject to restriction of freedom is punished”⁴²⁸; however, this cannot be considered as an actual prohibition of torture, considering that the term torture itself is not expressly used.

Moreover, considering that the prohibition of torture has been recognized as a *jus cogens* norm, the breach of Italy's duties is even more serious. It is a prohibition that is valid for all States in the international community,

⁴²⁶Valentina Moine, *La mancanza del reato di tortura nell'ordinamento italiano*, in *Nomodos*, blog di commento giuridico all'attualità, 2013.

⁴²⁷The Article provides that “Personal liberty is inviolable. No form of detention, inspection or personal search is admissible, nor any other restrictions on personal freedom except by order from a judicial authority which states the reasons, and only in cases and manners provided for by law”.

⁴²⁸From the Constitution of the Italian Republic, 1948, Official Gazette Dec. 27, 1947, No.298.

regardless of its express provision through agreements⁴²⁹. The peremptory status of torture also entails that all national provisions which envision limitations to maintain public order and national security have to be considered illegitimate⁴³⁰.

Thus, internal laws which envision immunities cannot be tolerated when it comes to torture, and neither can religious or cultural traditions be used as an excuse for these practices.

The urgency to introduce the prohibition of torture is dictated by the necessity to put a stop to the common practice of using violence in a systematic way, especially by the police authorities⁴³¹. As proof of this culture, other than the striking events of the Diaz school and Bolzaneto, there are many more forgotten examples, in which individuals have been subjected to ill-treatments. Alongside this diffused practice, there is the issue of impunity; the reticence of the police authorities, and the unsatisfactory existing legislation, frequently leave the culprits unpunished.

Nonetheless, Italy seems to be continuing to abstain from introducing an actual crime of torture in its criminal law, despite what is mandated by Article 13, paragraph 4, of the Italian Constitution, and despite the international obligations which have been weighing on the country for the past thirty years⁴³².

⁴²⁹Marta Picchi, *The Condemnation of the Italian State for violation of the prohibition of torture*, in *Journal of Law and Social Science*, 2015, p.27.

⁴³⁰Lauro Zagato, *La tortura nel nuovo millennio: la reazione del diritto*, Italy, 2010, p.175.

⁴³¹Guglielmo Taffini, *L'infame crociuolo della verità; uno studio sulla tortura*, Italy, 2015, p.83.

⁴³²Andrea Pugiotto, *Repressione Penale della Tortura e Costituzione: Anatomia di un Reato che non c'è*, in *Diritto Penale Contemporaneo*, p.5.

The Italian State firstly committed to the repression of torture⁴³³ on an international level by adhering to the Universal Declaration of Human Rights of 1948, which despite not being a legally binding document, still imposes rights which have to be followed because of their moral and political value⁴³⁴. However, the very first legally binding Treaty with which Italy committed itself to introducing the crime of torture in Italian legislation⁴³⁵ was the European Convention of Human Rights of 1950, which positions the prohibition of torture as one of the very first obligations for all signatory parties. The ECHR, which imposes the jurisdiction of the European Court of Human Rights on Italy, was later on followed by the International Covenant on Civil and Political Rights adopted by the UN General Assembly in 1966; Italy ratified this pact in 1978, thus obliging itself once again to prohibiting torture.

As we have seen, an actual project to ban torture in all its forms was undertaken by the UN General Assembly only in the 1970's, in particular with a 1973 resolution which condemned torture. Soon after, the 1975 Declaration on Torture required States to disclose information regarding the legislative, administrative and judicial measures aimed at safeguarding persons within their jurisdictions from being subjected to torture. All these efforts of the General Assembly culminated in the adoption of the UN Convention Against Torture of 1984, ratified by Italy in 1989 with a law No.489 of the 3rd of November 1988⁴³⁶. Article 4 of the CAT⁴³⁷ clearly imposes an obligation on

⁴³³Matteo Elis Landricina, *Il crimine di tortura e le responsabilità internazionali dell'Italia*, Roma, 2008, p.5.

⁴³⁴*Claiming Human Rights: Guide to international procedures available in cases of human rights violations in Africa*, a joint project of the National Commissions for UNESCO of France and Germany.

⁴³⁵Matteo Elis Landricina, *Il crimine di tortura e le responsabilità internazionali dell'Italia*, Roma, 2008, p.5.

⁴³⁶Lauro Zagato, *La tortura nel nuovo millennio: la reazione del diritto*, Italia, 2010 p.174.

⁴³⁷Article 4 of the CAT reads: “each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”.

States to codify acts of torture as autonomous crimes in their criminal codes, and to provide adequate sanctions, proportionate to the gravity of the act⁴³⁸. Notwithstanding the fact that the Convention has entered into force for the Italian State in 1989, Italy has yet to fulfill its obligations.

Moreover, Italy has ratified the Additional Protocol to the ECHR, which clearly states that its aim is to create a “system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment”, by availing itself of a Committee for the prevention of torture.

The violation of these international duties has been repeatedly remarked by international bodies which specifically protect human rights. Italy, however, justifies itself by stating that torture is punishable under different offences inserted in the Criminal Code, which can be led back to the crime of torture⁴³⁹. The country has stated that even though its national legislation lacks a specific provision enshrining the crime, both the constitutional and legal framework take care of punishing acts of physical and moral violence. The Committee Against Torture, in its final conclusions in 2007, commented that “Notwithstanding the State party’s assertion that, under the Italian Criminal Code all acts that may be described as ‘torture’ within the meaning of Article 1 of the Convention are punishable [...], the Committee remains concerned that the State party has still not incorporated into domestic law the crime of torture as defined in Article 1 of the Convention”⁴⁴⁰.

Finally, Italy ratified the Rome Statute in July 1999, even though it came into force only in 2002. Article 29 of the Statute encompasses the principle

⁴³⁸*Torture in International Law: A guide to jurisprudence*, published by the Association for the Prevention of Torture and the Center for Justice and International Law, 2008, p.18-19.

⁴³⁹Tullio Scovazzi and Gabriella Citroni, *Corso di Diritto Internazionale*, Volume 3.

⁴⁴⁰UN Doc. CAT/C/ITA/CO/4, paragraph 84.8, 17 May 2007.

according to which the crime of torture cannot be subject to prescription⁴⁴¹; this derives from the gravity of this act, considering that the trials usually require extended lengths of time to be completed.

Most of the treaties ratified by Italy impose the duty on contracting parties to set up the necessary mechanisms for the prevention of torture and other ill-treatments; they also envision the creation of an independent monitoring body. Moreover, the Italian State became a member of the Human Rights Council for the triennium 2007-2010⁴⁴²; in pledging, the State committed to creating a national Commission to promote and protect human rights, to give effect to the Statute of the International Criminal Court and to ratify the Additional Protocol to the Convention Against Torture⁴⁴³. The creation of an independent organism to monitor the application of human rights and international humanitarian law was to be done according to a series of fixed models, envisioned by the Human Rights Council itself⁴⁴⁴.

Italy's delay in creating such an institution is justified by the fact that it technically already has specific bodies which deal with human rights, both in the Parliament and in the Executive spheres⁴⁴⁵. Since 1978, the Inter-Ministerial Committee for Human Rights has been functioning at the Ministry of Foreign Affairs. It has the task to prepare the periodical reports which the Italian State has to submit to the international monitoring bodies. Moreover, a decree of the President of the Council of Ministers set up a Human Rights Commission in 1984, at the Presidency of the Council of Ministers. However,

⁴⁴¹Giulia Lanza, *Verso l'introduzione del delitto di tortura nel codice penale italiano*, in *Diritto Penale Contemporaneo*, p.5.

⁴⁴²Natalino Ronzitti, *Gli strumenti di tutela dei diritti umani; la risoluzione 48/134 dell'Assemblea Generale delle Nazioni Unite e la sua attuazione nell'ordinamento italiano*, 2010, p.1-2.

⁴⁴³From the Italian Candidature to the Human Rights Council, UN Doc. A/61/863.

⁴⁴⁴Natalino Ronzitti, *Gli strumenti di tutela dei diritti umani; la risoluzione 48/134 dell'Assemblea Generale delle Nazioni Unite e la sua attuazione nell'ordinamento italiano*, 2010, p.6.

⁴⁴⁵From the Italian Yearbook of Human Rights, in *Centro per i diritti umani*, 2011.

none of these bodies seem to meet the requirements set by the United Nations⁴⁴⁶.

Italy is well-known for delaying the implementation of international laws into national legislation, considering that most of the time *ad hoc* laws are not created because it is thought that international treaties contain norms that are directly applicable. This lack of a specific norm which prohibits torture has been considered to be unacceptable by the international community more than once; many governments have come and gone during the years, but none of them have been able to fall into line with the other countries.

Italy had already been exposed to the mechanism of control of the respect of human rights by the United Nations Human Right Council between February and June of 2010. In January 2010, there had been episodes of violence between migrant workers and the local population in Bari, leading the law enforcement authorities to evacuate a great number of migrants from the city⁴⁴⁷. These episodes were one of the matters of concern during the Universal Periodic Review, which took place during the February session⁴⁴⁸. In that occasion, Italy was required to introduce the crime of torture in its criminal code⁴⁴⁹. The Italian government, however, argued that it could not take into account this recommendation, considering that it concerned an issue that was already being discussed by the Parliament. Italy repealed the recommendation by rebutting that the matter of introducing the crime of torture was not considered urgent, since torture was already sanctioned through the application of other laws, that envisioned crimes that outlined the

⁴⁴⁶Guido Tassinari, *I diritti umani: una guida ragionata*, Milan, 2003, p.57-59.

⁴⁴⁷M.N. Schmitt, Louise Arimatsu and Timothy McCormack, *Yearbook of International Humanitarian Law*, 2010, p.550.

⁴⁴⁸Human Rights Council, Universal Periodic Review- Italy, UN Doc. A/HRC/WG.6/7/ITA.

⁴⁴⁹Lauso Zagato, *La tortura nel nuovo millennio: la reazione del diritto*, Italia, 2010, p.174.

crime in question⁴⁵⁰. The issue with this reasoning is that under Italian law, an act cannot be punished unless there exists an explicit provision which considers that act as a crime. Article 1 of the Italian Criminal Code affirms that “no one can be punished for an act that is not expressly considered as an offence by law, nor can sanctions be imposed that are not established by the law”⁴⁵¹. The Italian Constitution reaffirms this principle by stating in Article 25 that “no one can be punished if not in compliance with a law that was in force before the act was committed”.

This principle of legality is also reaffirmed in international law⁴⁵². The Universal Declaration of Human Rights gives a very structured definition of the principle stating that no one will be held liable of a criminal offence, if the act did not constitute a penal offence under national or international law at the time it was committed. A similar concept is also enshrined in the European Convention on Human Rights and in the Statute of Rome. Thus, the Italian legislator needs to introduce an ad hoc law which expressly punishes and sanctions the crime of torture, in conformity with the definition of the UN Convention Against Torture.

Notwithstanding all the attempts made by the Italian State to actually prevent torture, there have been many issues during the years regarding the abuse of force, especially by public officials or people who hold an official position in the State. There have been various episodes of crimes of torture committed on the Italian territory or against Italian citizens, which brought on

⁴⁵⁰The Italian Government stated that “la tortura è già sanzionata attraverso l’applicazione di diverse norme incriminatrici, connesse alla commissione di molteplici reati, che ne delineano una fattispecie più ampia di quella prevista dalla Convenzione delle Nazioni Unite contro la tortura”, dal resoconto dell’audizione del sottosegretario di Stato per gli affari esteri, tenutasi il 20 Maggio, 2010.

⁴⁵¹Nicola Canestrini, *Basic Principles of Italian criminal law*, from the web site of Studio Legale Canestrini, March 2012.

⁴⁵²Iulia Crisan, *The Principles of legality “nullum crimen, nulla poena sine lege” and their role*, in Effectius Newsletter, 2010, p.1-3.

a development of draft laws and propositions of bills. This process started between 1997 and 1998, with the so-called Somalia Facts, regarding the accusations moved against Italian soldiers working in peace-keeping missions in Somalia⁴⁵³. The particular evidence given by the media to these episodes of violence and inhuman treatments of civilians, especially after the publication of pictures and photographs capturing Italian soldiers torturing prisoners, gave way to an intense inquiry⁴⁵⁴. The Italian authorities concentrated on the reasons why there was no effective control over the discipline of these soldiers, and stated that there was a strong need for a better physical and moral training for troops actively involved in peace-keeping missions. Little attention was given to the actual creation of a law envisioning the prohibition of torture. The situation only worsened in the years to come, and the G8 of Genoa facts constituted a strong wake up call for Italy.

3.1 In face of the various reproaches for its failure to create an ad hoc law that prohibits torture, the Italian Government has more than once tried to justify this absence in the eyes of the international community.

The main argument advanced by the Italian State is that its judicial system already encompasses a series of laws which can be referred indirectly to the crime of torture. It appears that the Italian Criminal Code enshrines a series of provisions which punish acts that can be connected to torture, because they discipline single elements that make up the subject-matter of the offence.

First of all, the Code encompasses crimes such as the abuse of office in Article 323 and the delicts disciplined by Article 606-609, which concern the protection of personal liberty.

⁴⁵³ Matteo Elis Landricina, *Il crimine di tortura e le responsabilità internazionali dell'Italia*, Roma, 2008, p.7.

⁴⁵⁴ Marten Zwanenburg, *Accountability of Peace support operations*, The Netherlands, 2005, p.230-232.

The crime of abuse of office⁴⁵⁵, which is enshrined in Article 323, is inserted in the section of the Code dedicated to the crimes against the Public Administration. This collocation already shows its inadequacy in encompassing the element of denial of human dignity, which is proper to torture. Moreover, even though the article expressly requires the specific intent of the agent⁴⁵⁶, it has been proven difficult to concretely verify it in real life trials; the fact that a public official abuses his powers in the exercise of his functions is not an easy task. Considering that specific intent constitutes an element which is needed to integrate the subject-matter of torture, without this proof there would be no crime. Furthermore, the article requires that the perpetrator pursue a patrimonial or monetary advantage, which means that the act could not be punished as torture if it was committed for another reason.

Articles 606 to 609 of the Code are inserted in the section concerning the delicts against the person instead. They respectively punish illegal arrest, undue limitation of personal freedom, abuse of authority towards detainees and arbitrary personal search and inspection. Undoubtedly, these crimes punish various abusive forms of restriction of personal liberty and other ill-treatments towards individuals under arrest, but they fail to give relevance to the safeguard of the physical and mental integrity of the victim. Besides, Article 606 concerning illegal arrest constitutes a permanent crime, because it presumes the protraction of the conduct for a lengthy period of time; if the torture was instantaneous, it could not be punished under this article. Furthermore, none of the abovementioned articles take into consideration the

⁴⁵⁵ Art. 323 c.p. reads: "Salvo che il fatto non costituisca un più grave reato, il pubblico ufficiale o l'incaricato di pubblico servizio che, nello svolgimento delle funzioni o del servizio, in violazione di norme di legge o di regolamento, ovvero omettendo di astenersi in presenza di un interesse proprio o di un prossimo congiunto o negli altri casi prescritti, intenzionalmente procura a sé o ad altri un ingiusto vantaggio patrimoniale ovvero arreca ad altri un danno ingiusto è punito con la reclusione da uno a quattro anni".

⁴⁵⁶ Codice Penale Esplicatio, Mauro Ronco and Bartolomeo Romano, p.1714.

purpose of the agent in committing such acts. These provisions also do not entail sufficient and adequate penalties, considering that the maximum expected jail sentence is three years.

There are also other common crimes, which relate directly to acts of physical torture. In this sense, the main articles that have to be pointed out are Article 581⁴⁵⁷ on physical harm⁴⁵⁸ and Article 582 on personal injuries⁴⁵⁹. Both offences are crimes that are prosecutable only through a legal complaint brought on by the victim: this circumstance does not conform to the repression of torture, considering the difficulties that victims encounter in denouncing ill-treatments. These crimes, too, envision extremely light penalties in comparison with the gravity of the act. Moreover, the term ‘illness’ used in Article 582 entails the risk that a series of circumstances might be left out of the hypothesis of physical torture.

On the subject-matter of repression of physical torture, one can also include Article 572⁴⁶⁰, concerning ill-treatments of family or cohabitant⁴⁶¹. Nonetheless, it is positioned in the section of the Code that concerns the crimes against the family⁴⁶², which seems to be out of place in respect to the crime of torture; in fact, torture punishes acts that are committed against anyone, not only against family members. Torture does not necessitate

⁴⁵⁷ L’articolo in questione riguarda il reato di percosse.

⁴⁵⁸ Art. 581 reads: “Chiunque percuote taluno, se dal fatto non deriva una malattia nel corpo o nella mente, è punito, a querela della persona offesa, con la reclusione fino a 6 mesi o con la multa fino a euro 309”.

⁴⁵⁹ Art. 582 reads: “Chiunque cagiona ad alcuno una lesione personale, dalla quale deriva una malattia nel corpo o nella mente, è punito con la reclusione da tre mesi a tre anni”.

⁴⁶⁰ Art. 572 reads: Chiunque nei casi indicati nell’articolo precedente, maltratta una persona della famiglia o comunque convivente, o una persona sottoposta alla sua autorità o a lui affidata per ragioni di educazione, istruzione, cura, vigilanza o custodia, o per l’esercizio di una professione o di un’arte, è punito con la reclusione da due a sei anni”.

⁴⁶¹ Giulia Lanza, *Verso l’introduzione del delitto di tortura nel codice penale italiano*, in *Diritto Penale Contemporaneo* P.24.

⁴⁶² Codice Penale Esplicatio, Mauro Ronco and Bartolomeo Romano, p.2567.

the existence of a stable relationship between the torturer and the victim. Furthermore, torture requires a specific intent, which is obviously missing in this article. As regards to this aspect, the example made by Tullio Padovani deserves to be mentioned. In his comment to the draft law n.1216 of 2006, he noticed that if a parent were to ill-treat his son for a specific reason, he would be punished for torture; otherwise, if the ill-treatment were to be committed without any intent, Article 572 would apply⁴⁶³.

Thus, there are several provisions which could achieve a form of protection against physical torture, even though they are technically inappropriate. Even greater obstacles are encountered with regards to the safeguard of psychological violence; the Code encompasses the crime of injury, enshrined in Article 594, and Articles 610 and 612, concerning respectively private violence and menaces. These laws seem to be even more inadequate to prevent and repress torture.

Injury⁴⁶⁴ is a delict against the honor. Once again, this crime is only prosecutable if the victim lodges a formal complaint, and even in this case, the penalty seems to be excessively light. Even the other delicts in Articles 610⁴⁶⁵ and 612⁴⁶⁶, included as crimes against moral liberty, do not envision adequate sanctions with respect to the gravity of acts of mental torture.

To integrate the crime of private violence, Article 610 requires that the will to force someone actually reaches its purpose; an action directed to oblige someone to do something is not enough, because the perpetrator has to

⁴⁶³Tullio Padovani, *Quel progetto di legge sulla tortura dalle prospettive deludenti*, in *Guida di Diritto*, 2007, p.6-7.

⁴⁶⁴Art. 594 reads: Chiunque offende l'onore o il decoro di una persona presente è punito con la reclusione fino a sei mesi o con la multa fino a euro 516".

⁴⁶⁵Art. 610 reads: "Chiunque, con violenza o minaccia, costringe altri a fare, tollerare od omettere qualche cosa, è punito con la reclusione fino a quattro anni".

⁴⁶⁶Art. 612 reads: "Chiunque minaccia ad altri un ingiusto danno è punito, a querela della persona offesa, con la multa fino a 1.032 euro. Se la minaccia è grave, o è fatta in uno dei modi indicati nell'articolo 339, la pena è della reclusione fino a un anno e si procede d'ufficio".

succeed in his aim⁴⁶⁷. Torture, on the other hand, should be punished independently from the fact that the torturer reaches its objective.

The crime of menaces appears to be more appropriate to protect psychological torture; however, this crime too is only prosecutable on the basis of a formal complaint lodge by the victim⁴⁶⁸, which poorly adjusts to the offence of torture.

Given this variety of offences, it seems impossible that a complaint towards the Italian legislation could be made. However, by analyzing each provision attentively, one can notice the inadequacy of the system. By trying to punish torture using laws that envision similar acts, the results are highly unsatisfying. The abovementioned laws do not encompass all the possible forms of torture, thus risking to leave out other hypothesis which are not explicitly disciplined.

The Italian State has also adduced other justifications in response to the critiques received by the international bodies. Italy has argued that international conventions do not explicitly impose the obligation to create a law that enshrines the prohibition of torture⁴⁶⁹, but that they only require the punishment of the single acts that form the subject-matter of torture.

Furthermore, it objected that the self-executing nature of international norms concerning torture would make an *ad hoc* provision unnecessary⁴⁷⁰. In the Italian judicial system, international norms are translated and adapted through Article 10 of the Italian Constitution, which states that “the Italian legal

⁴⁶⁷ Francesco Antolisei, *Manuale di diritto penale*, Parte speciale, Torino, 2008, p.148-149.

⁴⁶⁸ Francesco Antolisei, *Manuale di diritto penale*, Parte speciale, Torino, 2008, p.155-157.

⁴⁶⁹ Technically this is not the case; international law does not impose on States a specific mechanism to adapt norms into national legislation, but this does not entail that they are free to choose whether or not to put into effect international provisions.

⁴⁷⁰ Matteo Elis Landricina, *Il crimine di tortura e le responsabilità internazionali dell'Italia*, Roma, 2008, p.15.

system conforms to the generally recognized principles of international law⁴⁷¹. According to the *communis opinio*, this article obliges judges to apply norms of international law by making a constant and automatic reference to them. Thus, all international laws are directly applicable and are considered as part of the Italian system as soon as they are created at an international level, without the need to create an ulterior *ad hoc* provision⁴⁷².

Technically, however, ratifying and giving execution to a treaty is not sufficient to adapt the national judicial system to international norms, especially when they are

not sufficiently precise and complete. These kind of norms require the creation of an *ad hoc* legislative provision to be fully implemented⁴⁷³. This reasoning refers especially to criminal laws, because of the constitutional principle of *nullum crimen, nulla poena sine lege*, according to which no one can be punished for an act which does not constitute a crime under Italian law⁴⁷⁴. This principle has been reaffirmed in various international human rights instruments that have been ratified by Italy, such as the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Rome Statute of the International Criminal Court⁴⁷⁵. The Universal Declaration of Human Rights, too, states that no penal action can be taken for any act, unless it is declared as offence. Thus, a specific provision that prohibits the crime of torture has to be contemplated in the Criminal Code.

⁴⁷¹Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, Italia, 2012, p.284-287.

⁴⁷²Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, Italia, 2012, p.286.

⁴⁷³Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, Italia, 2012, p.283.

⁴⁷⁴Article 25 of the Italian Constitution, in the second paragraph, expresses the principle of legality, according to which no one punishment may be inflicted except by virtue of a law in force at the time the offence was committed.

⁴⁷⁵Bineet Kedia, *Nullum crimen sine lege in International criminal law: myth or fact?*, in *International Journal of International Law*, Volume 1, Issue 2, 2016, p.1-3.

The arguments advanced by the Italian State have been declined by both the doctrine and the international bodies. The fact that none of the existing provisions that could be related to torture envision the psychological dimension of the offence, and that the sanctions appear to be extremely derisory, has been decisive in establishing the inadequacy of the current situation.

The first law proposition was made in 1989, one year after the Italian State had ratified the UN Convention Against Torture, and since then several bills have been proposed, even though none of them have been approved. This first project for the introduction of the prohibition of torture was presented by the Senator of PCI (Partito Comunista Italiano), Nereo Battello⁴⁷⁶. However, the draft law was never submitted to the approval of the Assembly and the project was soon abandoned, since a legislation on torture was still not felt as an urgent matter.

The subject of torture was then abandoned for a few years, until 1992, when the XIII Legislature⁴⁷⁷ attempted at reaching the objective of creating a law on the subject-matter of torture. The Council of Ministers, guided by Giuliano Amato, approved bill no. 7283⁴⁷⁸, contemplating norms on torture and other cruel, inhuman and degrading treatments. This project was not aimed at introducing the specific crime of torture into Italian legislation, but rather at foreseeing the aggravating circumstances for crimes committed against human beings⁴⁷⁹. Nonetheless, the bill was never examined⁴⁸⁰.

⁴⁷⁶From the online web site of Amnesty International, *Il reato di tortura in Italia-Sviluppi legislativi*.

⁴⁷⁷This Legislature took place between 1996 and 2001.

⁴⁷⁸Paolo Fantauzzi, *Tortura, 30 anni di omissioni e ritardi*, online article from L'Espresso, 2015.

⁴⁷⁹Valentina Moine, *La mancanza del reato di tortura nell'ordinamento italiano*, in *Nomodos*, blog di commento giuridico all'attualità, Maggio 2013.

The XIV legislature was characterized by the presence of seven different bills on the subject-matter of torture. After the debate within the Committee of Justice of the Senate, a single unified act was approved with the bill no. 4990. This proposition aimed at creating an autonomous crime of torture, but once again this work remained unfinished.

Some sort of step forward was taken in 2002, when the crime of torture was introduced in the Italian Military Criminal Code in Time of War⁴⁸¹. The events that led to the adoption of a law against torture took place during the 1990's, when UNOSOM⁴⁸² had accused Italy of being responsible of the mistreatment of Somalian citizens. Thus, the Italian Government established a Commission to investigate on these allegations of ill-treatments in Somalia by Italian troops⁴⁸³. The Commission was made up of five members, and was guided by a former President of the Constitutional Court. However, it failed to collect evidence in Somalia; the final report did not address the issue at all. After new allegations of ill-treatment had arisen, the Government asked the Commission to reopen an inquiry. The new report found that there had indeed been episodes of ill-treatment on part of the Italian troops, but that they were sporadic and localized. None of the superior officers were condemned for these practices⁴⁸⁴.

⁴⁸⁰ Camera dei Deputati, Documentazione per l'esame di Progetti di legge, *Disposizioni irgenti in material di introduzione del delitto di tortura nell'ordinamento italiano*, A:C: 189 e abb., n.149, Maggio 2014, p.15.

⁴⁸¹ Lauso Zagato, *La tortura nel nuovo millennio: la reazione del diritto*, Italia, 2010, p.174.

⁴⁸² United Nations Operation in Somalia, created by the UN Security Council; it represented the second phase of the United Nations intervention in Somalia from 1993 to 1995.

⁴⁸³ Marten Zwanenburg, *Accountability of Peace support operations*, The Netherlands, 2005, p.230-232.

⁴⁸⁴ Matteo Elis Landricina, *Il crimine di tortura e le responsabilità internazionali dell'Italia*, Roma, 2008, p.7.

The Committee Against Torture, in its concluding observations on Italy, was deeply concerned about the total lack in training of the military forces that were supposed to be participating in peace-keeping operations in the context of a failed State.

With regards to these events. The Commission of Justice of the Italian Senate underlined the brutality of acts on Somalian citizens, stating that military forces had to be trained both physically and morally; moreover, the Commission solicited the introduction of the crime of torture in the Criminal Code, and the reform of the Military Criminal Code as well⁴⁸⁵.

The inhuman and degrading treatments that occurred in Somalia represented a first step towards a reform in the sphere of the protection of individuals from torture. Article 2 of law no. 6 of January 31⁴⁸⁶, 2002 introduced Article 185-bis, which is entitled “Other offences against persons protected by international conventions”⁴⁸⁷. The article reads: “Except when the fact constitutes a more serious offence, the serviceman who, for reasons associated with the war, is guilty of torture or inhuman treatment, illegal transfers or other conduct prohibited by international conventions, including biological experiments or medical treatments not justified by health conditions, against war prisoners, civilians or other persons protected by international conventions, is punished with two to five years⁴⁸⁸ of military imprisonment”. The article can also be applied to expeditionary forces abroad, that are participating in military operations in times of peace.

⁴⁸⁵Matteo Elis Landricina, *Il crimine di tortura e le responsabilità internazionali dell'Italia*, Roma, 2008, p.8.

⁴⁸⁶Si tratta della legge n.6 recante “disposizioni urgenti per la partecipazione di personale militare all’operazione Enduring Freedom in Afghanistan”.

⁴⁸⁷From the official web site of the Italian Ministry of Defence, Third Book, *On military offences in particular*.

⁴⁸⁸The words “with one to five years” have been replaced by “with two to five years”.

This provision has been strongly criticized; despite the fact that it fills the existing gap in the military criminal code, it assembles a series of heterogeneous conducts, and envisions a penalty that is not proportionate to the gravity of the crime⁴⁸⁹.

Finally in 2006, during the sitting of the 13th December, there seemed to be a turning point; the Italian Chamber of Deputies approved bill n° 1216, which contemplated the introduction of the crime of torture⁴⁹⁰. However, several changes were proposed and this project too was left to fade, also due to the premature end of the legislature⁴⁹¹.

In April 2008, at the beginning of the new XVI legislature, two new law propositions were brought before the Senate; draft laws n. 256 and 264⁴⁹². These propositions mostly followed the wording of the crime of torture enshrined in the UN Convention of 1984, but they present slight differences between them. First of all, they proposed two different durations of the prison sentence, varying from 3 to 12 years to 4 to 10 years; secondly, there had been a debate on whether the crime committed by a public official constituted a particular aggravated form of the crime. Moreover, the two law propositions also differed in respect to the motivations which led to the commitment of the crimes, one contemplating generic discrimination reasons and the other one containing a more detailed list of precise reasons for torture⁴⁹³.

⁴⁸⁹Lauso Zagato, *La tortura nel nuovo millennio: la reazione del diritto*, Italia, 2010, p.175.

⁴⁹⁰Lauso Zagato, *La tortura nel nuovo millennio: la reazione del diritto*, Italia, 2010, p.175.

⁴⁹¹Camera dei Deputati, Documentazione per l'esame di Progetti di legge, *Disposizioni urgenti in materia di introduzione del delitto di tortura nell'ordinamento italiano*, A:C: 189 e abb., n.149, Maggio 2014, p.15.

⁴⁹²Matteo Elis Landricina, *Il crimine di tortura e le responsabilità internazionali dell'Italia*, Roma, 2008, p.16.

⁴⁹³Matteo Elis Landricina, *Il crimine di tortura e le responsabilità internazionali dell'Italia*, Roma, 2008, p.16.

The draft, however, was sent to the Commission of Justice of the Senate to be approved, but once again the end of the legislature entailed that the project never made it to the discussion phase⁴⁹⁴.

A similar situation occurred in 2012, with the Monti Government; the Senate had finally approved a legislative decree, when the legislature prematurely ended and the proposition was thus not approved⁴⁹⁵.

Thus, since 1996 each legislature has seen more than sixty draft law propositions which never passed through the parliamentary iter.

The most important step forward in the history of Italian legislation was taken recently in 2013, when a debate started in the Italian Senate to introduce an actual *ad hoc* law that prohibits torture. This debate ended the 5th of March 2014 with a unanimous vote to approve law text no.2168⁴⁹⁶. The draft was then sent to the Italian House of Representatives, which made some changes to the text; the clauses were raised from six to seven, and the material scope of the article was modified. This new draft made a single menace or violent act punishable, without the necessity for the act to be accompanied by other elements. On the 9th of April 2015, the House of Representatives approved this draft law and subsequently submitted it to the Committee of Justice of the Senate for approval⁴⁹⁷. Once again, changes were made to the text; the Committee reduced the clauses back to six⁴⁹⁸.

⁴⁹⁴ Camera dei Deputati, Documentazione per l'esame di Progetti di legge, *Disposizioni irgenti in material di introduzione del delitto di tortura nell'ordinamento italiano*, A:C: 189 e abb., n.149, Maggio 2014, p.10.

⁴⁹⁵ Paolo Fantauzzi, *Tortura, 30 anni di omissioni e ritardi*, online article from L'Espresso, 2015.

⁴⁹⁶ Antonio Giangrande, *Roma ed il Lazio: Quello che non si osa dire*.

⁴⁹⁷ Guglielmo Taffini, *L'infame crociuolo della verità; uno studio sulla tortura*, Italy, 2015, p.83-84.

⁴⁹⁸ Giulia Lanza, *Verso l'introduzione del delitto di tortura nel codice penale italiano*, in *Diritto Penale Contemporaneo*, p.5.

This bill is divided into seven articles and has the purpose of introducing the crime of torture into Italian legislation⁴⁹⁹. It specifically aims at introducing two new types of offences into the criminal code, through the insertion of Articles 613-bis and 613-ter; moreover, a series of changes are proposed, in particular of Article 191 of the Criminal Procedural Code, and of Article 157 of the Criminal Code⁵⁰⁰. Finally, the draft law proposes the abolishment of diplomatic immunity in cases of torture. We will proceed to analyse the single elements of the draft proposal in the following paragraphs.

On the basis of the law proposals of the House of Representatives and of the Senate, a new type of offence was envisioned in Article 613-bis, which should have been inserted in the chapter of the Criminal Code on crimes against personal freedom, and more specifically in the Second Section concerning crimes against moral freedom⁵⁰¹. Considering that torture is an act which strikes psychological integrity more than moral freedom, it would have been best to envision its insertion in the section dedicated to crimes against life.

The text of the Article reads: “Anyone who, with violence or threats or violating his/her protection duties, intentionally causes pain or suffering to someone under his/her protection or care for sexual, ethnic, political, religious reasons or with the purpose of getting information or declarations or with the purpose of inflicting a punishment, can be sentenced from 4 to 10 years of prison”. According to this text, torture does not follow the definition enshrined in Article 1 of the CAT, but is rather envisioned as being a common crime,

⁴⁹⁹XVII legislatura, *Disposizioni urgenti in materia di introduzione del delitto di tortura nell'ordinamento italiano*, A.C. 2168-A, Dossier n. 149/1- Elementi per l'esame in Assemblea, 20 Marzo 2015.

⁵⁰⁰Guglielmo Taffini, *L'infame crociuolo della verità; uno studio sulla tortura*, Italy, 2015, p.83-84.

⁵⁰¹From the official web site of the Italian House of Representative, last edited in July 2016, can be found at http://www.camera.it/leg17/522?tema=reato_di_tortura#gli_atti_internazionali.

and not a crime which is typical of public officials⁵⁰². However, according to the second paragraph, if the crime is committed by an official or a commissioned officer who abuses of his powers or violates his duties, the prison sentence increases⁵⁰³.

Pursuant to the text of the Senate, if the crime was committed by a public official, the penalty would be from five to twelve years of jail sentence, in comparison with the provision of the first paragraph which only envisions from three to ten years of imprisonment⁵⁰⁴. On the other hand, the text of the House of Representatives contemplated more burdensome penalties, respectively five to fifteen years if committed by a public official, and four to ten years if committed by an ordinary citizen.

Since the beginning, this second paragraph of Article 613-bis posed the problem of its qualification. It was unclear if it had to be considered as an aggravating circumstance or as a *reato proprio non esclusivo*. A *reato proprio non esclusivo* is a crime which is punished as one irrespective of its author. So the act is nonetheless a crime, but if the author holds a certain position or role, the consequence will be the alteration of the *nomen iuris*, of the qualification of the crime⁵⁰⁵. For example, under Italian law, illegitimately appropriating oneself of money or other material things is considered to be a crime, but if the acts is committed by a public official, it integrates another more specific crime, which is that of the so called *peculato*⁵⁰⁶.

⁵⁰² From the official web site of the Italian House of Representatives, *Diritto e Giustizia- Reato di Tortura*, last edited in July 2016.

⁵⁰³ Guglielmo Taffini, *L'infame crociuolo della verità; uno studio sulla tortura*, Italy, 2015, p.85.

⁵⁰⁴ Camera dei Deputati, Documentazione per l'esame di Progetti di legge, *Disposizioni irgenti in material di introduzione del delitto di tortura nell'ordinamento italiano*, A:C: 189 e abb., n.149, Maggio 2014, p.17.

⁵⁰⁵ Francesco Antolisei, *Manuale di diritto penale*, Parte generale, Torino, 2008, p.155-157.

⁵⁰⁶ Francesco Antolisei, *Manuale di diritto penale*, Parte speciale, Torino, 2008, p.342.

Francesco Viganò, one of the first commentators of the draft law, noticed that since the third paragraph of the article envisaged a series of aggravating circumstances, then it must be excluded that the second paragraph contained aggravating factors too⁵⁰⁷. Viganò suggested that another distinct article be created, envisioning the crime of torture committed specifically by a public official.

As far as the conduct of the crime is concerned, torture it is characterized by wilful misconduct, which entails that the offender has to have committed the crime intentionally. In the text approved by the Senate, the crime had been construed as a *reato a forma vincolata*, which entails that the prohibited conduct is already described specifically and precisely by the legislator⁵⁰⁸. In the crime at hand, the suffering has to be caused alternatively through violence and menaces, or through inhuman and degrading treatments of human dignity⁵⁰⁹.

Undoubtedly, the fact that it is envisioned as a *reato a forma vincolata* satisfies the principle of legal certainty. On the other hand, the formulation of this part of the article not only appears to be inadequate, but is also in contrast with the jurisprudence of the European Court of Human Rights. In fact, the ECHR makes a clear distinction between torture and other ill-treatments in its case law, with the former being more serious; on the contrary, the text approved by the House of Representatives, which does not contain a list of mandatory conducts, seems to better encompass all those acts which otherwise would not fall under the notion of torture.

The article seems to narrow the range of individuals which can be victims of torture and thus obtain the protection under Article 613-bis. The wording refers explicitly to individuals who have been deprived of their

⁵⁰⁷ Francesco Viganò, *Sui progetti di introduzione del delitto di tortura in discussione presso la Camera dei Deputati*, in *Diritto Penale Contemporaneo*, 2014, p.5.

⁵⁰⁸ From Edizioni Giuridiche Simone, *Dizionari Online*, definizione di reato.

⁵⁰⁹ Guglielmo Taffini, *L'infame crociuolo della verità: uno studio sulla tortura*, Italy, 2015, p.88.

liberty or who are held in detention, or who are otherwise under the custody or assistance of another person⁵¹⁰. Such a text would have left the events of the Diaz case unpunished. The Italian legislator should have encompassed the wording used in Article 1 of the UN CAT, adopting the formula of “a person”, which includes any person.

As anticipated, a variety of aggravating factors are also introduced in the third paragraph of the text law approved by the Senate, and are found in the draft of the House of Representatives in the fourth paragraph. Specifically, there are three different aggravating circumstances, depending on the entity of the suffering that is caused⁵¹¹. The offender could be sentenced to up to 30 years of prison if personal damage is caused to the victim, and in extreme cases where death is caused intentionally, a court could condemn to life sentence the aggressor. Furthermore, the crime of “instigation to commit torture” is introduced in Article 613quater, and can be punished with a prison sentence from 1 year to 6 years.

An ulterior new article proposed by the draft bill n.2168 is Article 613-ter⁵¹², to be introduced in the Criminal Code. It punishes the instigation to commit torture, by a public official or other individual holding an official position in the State⁵¹³ towards another public official. The punishment for this crime is a prison sentence from 1 to 6 years, in the text law approved by the

⁵¹⁰ Guglielmo Taffini, *L'infame crociuolo della verità; uno studio sulla tortura*, Italy, 2015, p.88-89.

⁵¹¹ Francesco Viganò, *Sui progetti di introduzione del delitto di tortura in discussione presso la Camera dei Deputati*, in *Diritto Penale Contemporaneo*, 2014, p.5.

⁵¹² The article is entitled “istigazione del pubblico ufficiale a commettere tortura” and in the original version reads: “Il pubblico ufficiale o l’incaricato di un pubblico servizio il quale, nell’esercizio delle funzioni o del servizio, istiga altro pubblico ufficiale o altro incaricato di un pubblico servizio a commettere il delitto di tortura, se l’istigazione non è accolta ovvero se l’istigazione è accolta ma il delitto non è commesso, è punito con la reclusione”.

⁵¹³ From the official web site of the Italian House of Representatives, *Diritto e giustizia- Reato di tortura*, last edited in July 2016, can be found at http://www.camera.it/leg17/522?tema=reato_di_tortura#gli_atti_internazionali.

House of Representatives, which is supposed to be applied regardless of whether the crime was actually committed or not; and from six months to 6 years in the version approved by the Senate⁵¹⁴.

It is specified, however, that the article does not apply to the cases enshrined in Article 414⁵¹⁵ of the Italian Criminal Code, which concerns whomever instigates an individual to commit one or more crimes.

The law proposal goes on to amend Article 191 of the Italian Criminal Procedure Code⁵¹⁶. A new paragraph is envisioned, in clause 2-bis, to affirm the principle that the declarations obtained through torture cannot be used in a criminal proceeding⁵¹⁷. The aim is to reaffirm the principle of legality with regards to evidence; only evidence that has been obtained in conformity with the provisions of law can be used by a judge. The new paragraph is in line with the contents of Article 15 of the ECHR; consequently, the prohibition is absolute, and the only exception accepted is when the declarations or information are used to prove the criminal liability of the torturer⁵¹⁸.

It is important to notice that other than introducing new laws, the draft bill of 2015 presented a general idea to introduce changes with regards to the way torture crimes are handled. In the third article, draft bill no. 2168 foresees the introduction of the crime of torture in the list of crimes for which the terms

⁵¹⁴ Guglielmo Taffini, *L'infame crociuolo della verità; uno studio sulla tortura*, Italy, 2015, p.92.

⁵¹⁵ Article 414 c.p. is entitled "istigazione a delinquere".

⁵¹⁶ Camera dei Deputati, Documentazione per l'esame di Progetti di legge, *Disposizioni irgenti in material di introduzione del delitto di tortura nell'ordinamento italiano*, A:C: 189 e abb., n.149, Maggio 2014, p.18.

⁵¹⁷ From the official web site of the Italian House of representatives, *Diritto e giustizia- Reato di tortura*, last edited in July 2016, can be found at http://www.camera.it/leg17/522?tema=reato_di_tortura#gli_atti_internazionali.

⁵¹⁸ Guglielmo Taffini, *L'infame crociuolo della verità; uno studio sulla tortura*, Italy, 2015, p.92.

of prescription are doubled⁵¹⁹. The acceptance and enhancement of this provision would result in the reduction of the phenomenon of impunity. Moreover, the draft law envisions alterations to Article 19 of the Unified Text on Immigration⁵²⁰. The Senate had approved the insertion of the principle of non-refoulement in clause 1-bis of the aforementioned article, according to which there is a general prohibition to expel non-European citizens who risk being subjected to torture in their own countries⁵²¹. The aim is to reduce the so-called extraordinary renditions, and to avoid all systematic violations of fundamental human rights.

These changes seem to be in line with the duty of Contracting Parties under the European Convention to ensure the physical integrity of all individuals⁵²². Although the Court has affirmed that States have a general right to control exit, entry and residence in their territories, they may be obliged to refrain from expelling a person, if that person faces treatments contrary to Article 3 ECHR in the receiving State⁵²³. Thus, the insertion of the principle of non-refoulement in the Unified Text of Immigration seems to agree with the Court's findings.

Finally, Article 4 of the Senate draft and Article 5 of the House of Representatives draft both prohibit the possibility of granting immunity to those who are undergoing an investigation for the crime of torture before a

⁵¹⁹Guglielmo Taffini, *L'infame crociuolo della verità; uno studio sulla tortura*, Italy, 2015, p.92.

⁵²⁰Giulia Lanza, *Verso l'introduzione del delitto di tortura nel codice penale italiano*, in *Diritto Penale Contemporaneo*, p.6.

⁵²¹Article 19 of the draft law approved by the Senate envisions clause 1-bis, whose original text reads: "Non sono ammessi il respingimento o l'espulsione o l'estradizione di una persona verso uno Stato qualora esistano fondati motivi di ritenere che essa rischi di essere sottoposta a tortura".

⁵²²Dr. Helmut Satzger, *International and European Criminal law*, 2012, p.158-159.

⁵²³Dr. Helmut Satzger, *International and European Criminal law*, 2012, p.158-159.

national or an international Court⁵²⁴. These subjects cannot avail themselves of the immunity that is granted to them by international law⁵²⁵. The Senate's draft refers to 'diplomatic immunity', which applies to Heads of States and Governments which find themselves in Italian territory, and only secondly applies to the employees and staff of the diplomatic mission.

The draft law proposition that has been examined constitutes the most important and elaborate attempt of the Italian legislator to introduce the crime of torture into Italian legislation. The day after the ECHR's condemn for Italy's violation of Article 3 of the Convention, the President of the Council of Ministers Matteo Renzi underlined the importance of taking further steps towards the adoption of all necessary measures to align with the Court's sentencing. However, the Italian newspaper *Il Fatto Quotidiano* had denounced the disappearance of the matter of torture from the agenda of the Parliament. In particular, Patrizio Gonnella, President of the non-governmental association Antigone⁵²⁶, contested that after the condemn for the Arnaldo Cestaro case, the Parliament had reduced the crime of torture to a generic crime, with no real value, considering that a plurality of acts are needed for an act to be punished as torture⁵²⁷.

Thus, it appeared that the obstacles encountered by the Italian legislator were not only owed to the fragmentation and discordance of the various

⁵²⁴ Camera dei Deputati, Documentazione per l'esame di Progetti di legge, *Disposizioni irgenti in material di introduzione del delitto di tortura nell'ordinamento italiano*, A:C: 189 e abb., n.149, Maggio 2014, p.18.

⁵²⁵ From the official web site of the Italian House of representatives, *Diritto e giustizia- Reato di tortura*, last edited in July 2016, can be found at http://www.camera.it/leg17/522?tema=reato_di_tortura#gli_atti_internazionali.

⁵²⁶ Antigone is a non-governmental association that protects and safeguards the rights and guarantees of the Italian criminal justice system. In particular, it monitors the development of criminal trials, to ensure they are brought on in the respect of the principle of legality.

⁵²⁷ Giorgio Velardi, *Reato di tortura: nonostante le promesse di Renzi la legge che lo introduce non c'è*, online article in *Il Fatto Quotidiano*, January 2016.

political parties on the matter, but also to a general lack of sensitivity and awareness towards the subject-matter of human rights.

The final draft that was presented and approved by the Chamber of Deputies⁵²⁸ was sent to the Senate in June 2016, but still has to obtain its approval and become an actual law⁵²⁹. The draft law was examined in July, but there were major disagreements and controversies surrounding this meeting; the discussion on the draft law was suspended at Palazzo Madama at the end of July. The suspension was proposed by the political parties of Lega Nord and Forza Italia, encountering strong protests of the Sinistra Italiana and Movimento 5 Stelle⁵³⁰. The Italian Minister of the Interior, Angelino Alfano, has defined this decision as “extremely wise”, underlining that even if Italy is against torture, there can be no ambiguity surrounding the use of force on part of the police authorities⁵³¹.

The reason behind the suspension was the request that the wording of Articles 613-bis and 613-ter be amended. There was the fear that the wording might compromise the work of police units and limit their action excessively. This reasoning of safeguarding the role of police forces has been backed up by the entire centrodestra; Italian politician Matteo Salvini declared that the wording of the draft law would complicate the job of those who are entrusted with the task of maintaining order and safety in Italy⁵³². The Prime Minister Matteo Renzi was found guilty of not fulfilling the commitment he had made

⁵²⁸XVII Legislatura, Camera dei Deputati, Proposta di legge presentata il 18 Marzo 2016, riguardante l'introduzione degli articoli 613-bis e 613-ter del codice penale e altre disposizioni in materia di tortura.

⁵²⁹ From the web site openparlamento, C.3685 EPUB Proposta di legge presentata il 18 Marzo, ultimo status: 24/06/2016 Camera assegnato (non ancora iniziato l'esame).

⁵³⁰ Annalisa Grandi, *Ddl tortura, stop all'esame in Senato*, article in Il Corriere della Sera, July 2016.

⁵³¹ Ilaria Proietti, *Tortura, palazzo Madama sospende l'esame del reato*, article in Il Fatto Quotidiano, July 2016.

⁵³² Sospeso l'esame del ddl Tortura, in Il Tempo, July 2016.

the previous April, when he had declared that a law that was in line with the condemn of the Strasbourg judges was urgently needed.

The consequence of this suspension is that once again Italy perseveres in lacking an ad hoc prohibition of torture. However, the political party Partito Democratico has stated that they will not abandon the project of tis draft law, which has been weighing on Italy for the past thirty years, and still awaits to become reality.

3.2 Italy seems to be one of the few remaining countries in Europe which still lacks a specific law provision that encompasses the prohibition of torture. Considering that every State in Europe is party to the European Convention on Human Rights of 1950⁵³³, it is only normal that they have all taken steps to implement Article 3⁵³⁴ and abide by their duties under the ECHR⁵³⁵. As of today, France, the United Kingdom, Spain, Portugal, Holland, Belgium, Austria, Norway and many others have incorporated the crime of torture into their national criminal legislation. Obviously torture is envisioned in a different way in each national provision, especially with regards to the section of the criminal code in which the crime is inserted. Some countries, such as Malta, have simply taken the definition of the UN CAT and inserted it in a national provision, while others like Austria, have made changes to the original wording.

⁵³³ John T. Parry, *Understanding Torture: Law, violence and political identity*, Michigan, 2010, p.44.

⁵³⁴ Let us recall that Article 3 of the ECHR states that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

⁵³⁵ The Convention requires member states to provide effective remedies for violations of its provisions.

In France, torture is expressly disciplined in the Code Pénal⁵³⁶, under the name *torture et actes des barbarie*. French criminal law does not give a definition of torture⁵³⁷; however, French judges frequently interpret certain acts as falling under the notion of torture according to the definition enshrined in Article 1 of the UN CAT. Article 689, paragraph 2, of the criminal procedure code refers directly to the UN Convention, when setting the procedural conditions to be able to trial an individual for acts of torture or inhuman and degrading treatment⁵³⁸. French criminal law also makes a distinction between acts of torture in a stricter sense and other forms of ill-treatment, based on the gravity of the act itself. This distinction has relevant consequences on the entity of the penalty.

Torture is expressly punished by Article 222 of the French Penal Code, and is sanctioned with up to 15 years of detention⁵³⁹. For this particular crime, the offender cannot benefit from any advantages such as the suspension or the reduction of the penalty. In cases where the crime is committed on a minor, or if it is committed by a public official in the exercise of its functions, the penalty can be raised up to 20 years of detention⁵⁴⁰. The same penalty is applied if the crime of torture is combined with sexual violence other than rape. The maximum penalty that can be issued is 30 years of detention, if the victim is a minor and the acts of torture have been committed by his/her parents or by a person who has authority over him/her; if the crime has been

⁵³⁶XVII Legislatura, AA.CC. nn. 189, 276, 588, 979, 1499, 2168- *Il reato di tortura nei principali ordinamenti europei*, Note informative sintetiche n. 11, 5 Maggio 2014.

⁵³⁷*Sur la definition de la notion de torture en droit penal francais*, from the online web site of the OCHR.

⁵³⁸Article 689, paragraph 2, reads: “Pour l’application de la convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, adoptée à New York le 10 Décembre 1984, peut être poursuivie et jugée dans les conditions prévues à l’article 689-1 toute personne coupable de torture au sens de l’article 1^{er} de la Convention ».

⁵³⁹Virginia Gullotta, *Reato di tortura nel codice penale*, from the website of L’Indro journal, February 2015.

⁵⁴⁰Paragraph 3 of Article 222 lists the aggravating circumstances of the crime of torture.

committed by an organized association or if the crime has had permanent consequences on the victim. In the extreme case in which the victim dies at the hands of the torturer, French law envisions life sentence to prison, even if there was not the intention of killing⁵⁴¹.

Germany too, like Italy, does not envision a specific prohibition of torture in its criminal code. The prohibition derives mostly from the adhesion to international convention and treaties, from its Constitution and from other provisions of law.

Germany has ratified the European Convention in 1952, so its provisions have become part of German national law. The ECHR is technically accorded the rank of an ordinary statutory law⁵⁴²; however, there is an agreement in Germany that states that it holds a somewhat higher status. Thus, all German laws have to be interpreted in conformity with the norms and requirements of the Convention. Germany has also ratified both the Convention Against Torture and the International Covenant, but has been the target of a series of reports from the Committee Against Torture, for failing to implement the definition of torture under Article 1 of the CAT in its legal order⁵⁴³.

The German Constitution provides that a person held in detention “may not be subjected to mental or physical ill-treatment”⁵⁴⁴. This obviously does not constitute an explicit provision outlawing torture, since it is phrased in general and abstract terms, but it still grants some form of protection for detainees⁵⁴⁵.

⁵⁴¹See Article 222, paragraph 2.

⁵⁴²From the Law Library of Congress, *The Impact of Foreign Law on Domestic Judges: Germany*, prepared by Edith Palmer, 2010.

⁵⁴³Dr. Joachim Herrmann, *Implementing the Prohibition of Torture on Three Levels: Unite Nations- Council of Europe- Germany*, Augsburg, p.301.

⁵⁴⁴ From the German Constitution, Chapter IX on the Administration of Justice, Article 104, paragraph 1.

⁵⁴⁵Dr. Joachim Herrmann, *Implementing the Prohibition of Torture on Three Levels: Unite Nations- Council of Europe- Germany*, Augsburg, p.299.

After the atrocities committed by the Nazi regime, a series of special provisions were added to the German Criminal Procedure Code, to avoid the use of any improper methods of interrogation. Section 136a of the Code is entitled ‘prohibited methods of examination’, and not only prohibits torture and ill-treatment as such, but also other forms of physical interference⁵⁴⁶. The first paragraph of Section 136a states that a person’s “freedom to determine and exercise his will shall not be impaired by ill-treatment, fatigue, physical interference, the administration of drugs, torment, deception or hypnosis”.

The protection against torture, cruel, inhuman or degrading treatments is also enforced with the help of other German Criminal laws. There are various provisions in the Criminal Code that relate indirectly to the crime of torture, and provide sanctions for causing bodily and mental injuries. In particular, Articles 240⁵⁴⁷ and 343⁵⁴⁸ respectively punish the use of force or threats to cause serious harms and when a public official physically abuses or uses force (both physical and mental) towards an individual, to oblige the victim to testify or make a statement.

The United Kingdom has also taken care to provide itself with an ad hoc norm that prohibits torture. In fact, the UK has always been ahead of other European countries, since torture has been contrary to common law for several centuries⁵⁴⁹. However, even if torture was banned, the Privy Council continued to issue torture warrants until the 17th century, when the Parliament formally

⁵⁴⁶Akmal Niyazmatov, *Evidence obtained by cruel, inhuman or degrading treatment: why the CAT’s exclusionary rule should be inclusive*, in Cornell Law school library, 2011, p.27.

⁵⁴⁷Art.240 reads: “Whosoever unlawfully with force or threat of serious harm causes a person to commit, suffer or omit an act shall be liable to imprisonment not exceeding three years or a fine”.

⁵⁴⁸Art.343 reads: “Whosoever as a public official [...] physically abuses another, otherwise uses force against him, threatens him with force or abuses him mentally in order to force him to testify or to declare something in the proceeding [...]”.

⁵⁴⁹*Torture in UK law*, from the online Justice Student Network.

abolished the practice once and for all. The prohibition of torture is envisioned in Section 134 of the Criminal Justice Act of 1988, which states that any individuals who is found guilty of committing the act of torture will be punished with life imprisonment. The document states that it constitutes an offence both if the perpetrator is a public official or a person acting in an official capacity who “intentionally inflicts pain or suffering on another in the performance or purported performance of his official duties”⁵⁵⁰, or if the perpetrator is a person not falling within the category of public official. Moreover, it is not significant if the act of torture caused physical or mental suffering, or if it was caused through an act or an omission⁵⁵¹.

Notwithstanding these protections, torture is still an issue in the UK as well. Even though it is unlawful for UK officials to commit acts of torture and to send individuals to countries where they face the risk of being subjected to torture, the Government still relies on the Human Rights Act of 1988 to assess whether there is a real risk of ill-treatment, for purposes of refoulement; this act leaves significant space to British Courts and legislators to interpret European law and the ECHR⁵⁵². Furthermore, the United Kingdom has negotiated extradition treaties with countries that are known for using torture.

In 2008, the UK Secretary of State for Foreign and Commonwealth Affairs responded to the annual report on human rights by stating that the English legislation which criminalizes torture⁵⁵³, and thus implements the UN Convention Against torture, defines it as “any act which causes severe pain or suffering, whether physical or mental which is intentionally inflicted on a person. But whilst in some cases it will be clear that a certain technique

⁵⁵⁰*UK and Northern Ireland- Torture and cruel, inhuman or degrading treatment*, from the website of the International Committee of the Red Cross, Rule 90, Section B, 2016.

⁵⁵¹From legislation.gov.uk, Criminal Justice Act 1988, 134, Torture.

⁵⁵²*Human Rights Act*, in online web site of National Council for Civil Liberties.

⁵⁵³*UK and Northern Ireland- Torture and cruel, inhuman or degrading treatment*, from the website of the International Committee of the Red Cross, Rule 90, Section B, 2016.

constitutes torture, in other cases it will not be possible to determine whether the use of a particular technique is torture without taking into consideration all the circumstances of the case”.

As far as Spain is concerned, Amnesty International’s report of 2015/2016 has expressed concern over the continuation of the incommunicado⁵⁵⁴ detention regime⁵⁵⁵. The recommendation made to Spain was that it needed to amend the definition of torture in its domestic law, and conduct effective investigations regarding the existing allegations of torture and ill-treatments.

The prohibition of torture in the Spanish juridical system dates back to a law of 1978, which introduced Article 204-bis in the Spanish Criminal Code⁵⁵⁶, under crimes of interior State security. Despite the discussions and controversies surrounding the adoption of this article, it was finally approved and has constituted an important step in the fight against torture.

However, the wording of this article presented evident technical flaws, considering it did not envision any of the elements enshrined in Article 1 of the CAT; it only concerned judiciary torture, thus contemplating a narrower scope for its application⁵⁵⁷. For these reasons, the 1995 Spanish Criminal Code decided to introduce Articles 174 and 175, which concern the specific crime of torture, protecting both physical and mental attacks⁵⁵⁸. The definition enshrined in Article 174 draws its wording from the UN CAT, even though it

⁵⁵⁴ Incommunicado detention is a situation of detention in which an individual is denied access to family members, to an attorney or to a doctor or physician; in some cases, individuals are not allowed to notify anyone of their arrest. This situation is usually justified as a fight against suspected terrorists.

⁵⁵⁵ From the official report of Amnesty International, online website.

⁵⁵⁶ Chandra Lekhra Sriram, *Gloabilizing Justice for Mass Atrocities*, USA, 2005, p.132.

⁵⁵⁷ Committee Against Torture, *Consideration of reports submitted by State Parties under Article 19 of the Convention*, Spain, UN Doc. A/48/44 at 68 (1993).

⁵⁵⁸ The two articles are inserted in the Second Book, Title VII, entitled “De las torturas y otros delitos contra la integridad moral”.

appears to be broader than the Convention's⁵⁵⁹. This was confirmed by the Committee Against Torture when, in responding to Spain's third periodic report, it stated that the definition of torture "not only satisfies the definition of Article 1 of the Convention, but expands on it in important aspects [...]"⁵⁶⁰.

Article 174 of the Spanish Criminal Code reads⁵⁶¹: "The public authority or functionary, who, abusing his position, and with the objective of obtaining a confession or information from any person, or of punishing him for any offence which he has committed or is suspected of committing, commits torture when he submits that person to conditions or procedures which, because of their nature, duration or other circumstances, cause physical or mental suffering, the suppression or diminution of the person's faculties of understanding, discernment or decisionmaking, or in any manner attempt to compromise his moral integrity". However, this provision only became part of Spanish law relatively recently, and Spain ratified the Convention Against Torture only in October 1987; this entails that several acts of torture committed before this moment, such as the ones committed by the Pinochet regime, would fall outside of jurisdiction of Spanish courts.

Torture constituted a crime under Dutch law only in the 1988 Act implementing the UN Convention of 1984⁵⁶². Thus, any acts of torture that were committed before this moment could not be prosecuted, according to the principle of *nullum crimen sine lege*, that is enshrines in Article 1 of the Dutch Penal Code. So even if international customary law were to consider torture as

⁵⁵⁹ Reed Brody and Michael Ratner, *The Pinochet Papers*, The Netherlands, 2000, P.28-29.

⁵⁶⁰ Observaciones finales del Comité contra la Tortura, CAT/C/SPA, 21 Nov. 1992

⁵⁶¹ Richard J. Wilson, *Prosecuting Pinochet: International Crimes in Spanish Domestic law*, p.963.

⁵⁶² Antonio Cassese, *The Oxford Companion to International Criminal Justice*, Oxford, 2009, p.618.

an international crime, these acts could only be punished with the existing laws on ill-treatment and murder.

With the adoption of the Dutch International Crimes Act (ICA) of 2003, the Netherlands took a step further in the legislative process resulting from the signature of the Rome Statute in 2001⁵⁶³. The ICA penalises all the crimes enshrined in the Statute of the International Criminal Court, as well as torture. Moreover, it grants Dutch Courts the possibility to exercise universal jurisdiction over genocide, war crimes, crimes against humanity and torture.⁵⁶⁴ The only requirement is that the perpetrator has to be present in the Netherlands, and the crime has to be committed after the entry into force of the ICA.

The definition of torture enshrined in section 1 of the ICA follows the one contained in the CAT. The torture can be equally physical or mental⁵⁶⁵, and it has to be perpetrated by a Government official or other public authority, to extract information or a confession, or for purposes of intimidation or coercion. The victim has to be in custody or under the control of the perpetrator⁵⁶⁶.

Belgium is another country that has fallen in line with the recommendations of the Committee Against Torture, even if with a certain delay. The country ratified the UN Convention in 1999, and with a law of June 2002 two new

⁵⁶³Timothy McCormack and Avri McDonald, *Yearbook of International Humanitarian Law*, Volume 6, 2003, p.545.

⁵⁶⁴From the Library of Congress, Crimes Against Humanity Statutes and Criminal Code Provisions in Selected Jurisdictions, The Netherlands.

⁵⁶⁵From the English translation of the *Wet internationale misdrijven 2003*, Implementation of specific articles in the 1999 Second Protocol to the Hague Convention in the Netherlands through the 2003 International Crimes Act.

⁵⁶⁶From the English translation of the *Wet internationale misdrijven 2003*, Implementation of specific articles in the 1999 Second Protocol to the Hague Convention in the Netherlands through the 2003 International Crimes Act.

provisions were inserted in the Code Pénal, to explicitly prohibit torture⁵⁶⁷. These new provisions are inserted in the Second book of the code, in the first chapter.

Article 417bis⁵⁶⁸ defines torture as all inhuman treatments which deliberately cause acute pain or grave and cruel sufferings, be them physical or mental sufferings⁵⁶⁹. The Committee Against Torture noted that the definition enshrined in this article is broader than the one contained in the CAT⁵⁷⁰; moreover, it expressed its concern that the definition might not include all those actions which are committed by or at the instigation of a public officer⁵⁷¹. Belgium defended itself from this accusation, in the motivations that accompanied the draft law. It stated that the definition contained in the CAT was the result of a worldwide consensus, and thus had to be expressed in more general terms, to permit the ratification on part of all countries.

Article 417ter of the Criminal Code enshrines the punishment for committing torture or other forms of ill-treatment, imposing the penalty of ten to fifteen years of imprisonment⁵⁷². A variety of aggravating circumstances are envisioned in the second paragraph; if the crime was committed by a public

⁵⁶⁷From Actualités du droit Belge, Droit Penal, Abrégés Juridiques, *La Torture*.

⁵⁶⁸Art.417bis reads: “[...] on entend par: 1° torture: tout traitement inhumain délibéré qui provoque une douleur aigue ou de très graves et cruelles souffrances, physiques ou mentales; 2° traitement inhumain: tout traitement par lequel de graves souffrances mentales ou physiques sont intentionnellement infligées à une personne, notamment dans le but d’obtenir d’elle des renseignements ou des aveux, de la punir, de faire pression sur elle ou d’intimider cette personne ou des tiers; 3° traitement dégradant: tout traitement qui cause à celui qui y est soumis, aux yeux d’autrui ou aux siens, une humiliation ou un avilissement graves”.

⁵⁶⁹Article 417bis, 1° du Code Pénal.

⁵⁷⁰ From the Report of the Committee Against Torture, Forty-first session (3-21 November 2008); Forty-second session (27 April-15 May 2009), in United Nations Publications, 2009, p.13.

⁵⁷¹The Committee on this point stated that “the State party should consider taking the necessary legislative steps to amend article 417bis of the Criminal Code with a view to ensuring that all elements of the definition contained in article 1 of the CAT are included in the general definition [...]”.

⁵⁷²From Actualités du droit Belge, Droit Penal, Abrégés Juridiques, *La Torture*.

official, or if the victim was minor or the act caused a serious and permanent injury, then the penalty will be raised to twenty years of imprisonment.

Under these laws, however, the prohibition of using statements obtained through torture was not envisioned⁵⁷³. This kind of ban results from the combined application of the jurisprudence of the Belgian Court of Cassation and of the ECtHR. In fact, the European Court has more than once stated that information and evidence gathered through the use of torture cannot be considered valid in a criminal trial.

Until 2006, Austria was one of the countries that had not yet implemented the Convention Against Torture, despite having already ratified the Additional Protocol to the Convention and the Rome Statute. In a report of the Committee Against Torture of 2008, it was noted that the country was taking all measures to ensure the protection of rights under the Convention. Notwithstanding that Austria had asserted that all acts that may be described as torture within the meaning of Article 1 of the CAT are punishable under the Austrian Penal Code, the Committee observed that an actual provision enshrining the definition of torture was still missing from the Code⁵⁷⁴. Thus, the Committee reaffirmed its previous recommendation, asking the Austrian State to establish adequate provisions that legally defined torture.

This happened in 2013⁵⁷⁵, and was confirmed by the 2015 report of the Committee Against Torture. The new section 312a was incorporated in the Austrian Criminal Code, expressly prohibiting torture. The norm provides as a penalty up to ten years of imprisonment, which appears to be too low according to the observations made by the Committee Against Torture. For the

⁵⁷³Stephen C. Thaman, *Exclusionary Rules in Comparative Law*, USA, 2012, p.178-179.

⁵⁷⁴ From the Report of the Committee Against Torture, Thirty-fifth session (14-25 November 2005); thirty-sixth session (1-19 May 2006), A/61/44, p.8.

⁵⁷⁵ From the concluding observations on the sixth periodic report of Austria, drafted by the Committee Against Torture in December 2015 (CAT/C/SR.1388).

deterrent effect to be successful, the penalties have to be commensurated to the gravity of the crime, thus requiring Austria to amend its law as to ensure that all acts of torture are adequately punished.

In addition, it was noticed that as of January 2015, Austria had introduced additional torture offences into its Criminal Code, inserting them as war crimes; these provisions create complementary norms with the ones contained in the Rome Statute⁵⁷⁶.

Finally, the Austrian country created a national preventive mechanism under the Optional Protocol to the Convention Against Torture, known as the Austrian Ombudsman Board, which completes Austria's fulfilment of its obligations under the CAT to prevent and punish torture⁵⁷⁷.

Even though there are still a few countries which have not yet introduced an actual prohibition of torture, most European countries have banned the practice. Let us not forget that the European Union was originally conceived with the purpose of building a new Europe, free of wars and founded on the principles of freedom, democracy and the respect for human rights⁵⁷⁸. Thus, it seems only natural that the Member States collaborate to prevent and eliminate torture and ill-treatment, and to avoid the impunity of those responsible for these atrocious acts.

3.3 Italy has been frequently condemned for the violation of Article 3 of the European Convention on Human Rights⁵⁷⁹. More than once, the Strasbourg judges found that there had been indirect violations of Article 3⁵⁸⁰, especially

⁵⁷⁶From the official web site of the UN Human Rights Office of the High Commissioner, observations of the CAT on the report of Austria, November 2015.

⁵⁷⁷From the concluding observations on the sixth periodic report of Austria, drafted by the Committee Against Torture in December 2015 (CAT/C/SR.1388).

⁵⁷⁸From euinsight, *The European Union and the fight against Torture*.

⁵⁷⁹Silvia Buzzelli, *Il caso Scoppola davanti alla Corte di Strasburgo*, in *Rivista Italiana di diritto e procedura penale*, 2010, p. 396.

in cases of expulsions and extraditions of individuals towards countries where they were at risk of being subjected to torture and other forms of ill-treatment⁵⁸¹. The ONU reports have identified the various critical profiles of the Italian judiciary system, and have pointed out a series of recommendations. Other than restating the necessity to introduce the crime of torture into the Criminal Code, the Committee on Torture has reaffirmed the duty to punish the authors of acts of torture, taking into account the gravity of the conduct with adequate punishments⁵⁸².

With regards to this issue, Italy presents a very low rate of convictions for the authors of torture.

Moreover, the Committee Against Torture has frequently expressed its concerns for the excessive duration of pre-trial detention⁵⁸³; during the years, the Committee has received numerous complaints and denounces regarding the inhuman treatments reserved for those who are held in pre-trial custody, on part of the police forces. It has been noted that foreigners are more at risk than Italian citizens to be subjected to ill-treatments while in detention, and it has been suggested that Italy promote training courses for the members of police forces, to develop techniques of interpersonal communication⁵⁸⁴.

The major concern of the Committee is that if police authorities are not tried and condemned for their actions, these behaviours risk of becoming a widespread and accepted practice⁵⁸⁵. Thus, the judiciary authorities have to

⁵⁸⁰ Marta Picchi, The Condemnation of the Italian State for violation of the prohibition of torture, in *Journal of Law and Social Science*, 2015, p.27.

⁵⁸¹ See for example the case *Ben Khemais v Italy*, ECHR, February 2009.

⁵⁸² Guglielmo Taffini, *L'infame crociuolo della verità: uno studio sulla tortura*, Italy, 2015, p.59-60.

⁵⁸³ Guglielmo Taffini, *L'infame crociuolo della verità: uno studio sulla tortura*, Italy, 2015, p.65-66.

⁵⁸⁴ See Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le CPT du 21 Novembre au 3 Décembre 2004.

⁵⁸⁵ Guglielmo Taffini, *L'infame crociuolo della verità: uno studio sulla tortura*, Italy, 2015, p.68

conduct efficient investigations, in cases where there are sufficient elements to believe that ill-treatments have occurred.

Another issue detected by the Committee concerns the principle of non-refoulement. It has been noted that the Italian authorities have brought on the practice of intercepting boats carrying migrants in open sea, and sending them back towards countries where they are at risk of torture and other ill-treatments⁵⁸⁶. An important case regarding this matter was *Saadi v Italy*, of February 2008⁵⁸⁷. The case at hand concerned a Tunisian citizen, living in Italy with a residency permit. The plaintiff had been arrested under the accusation of being part of a terrorist group, and was expelled from the country. Mr. Saadi asked for political asylum, conveying that in his country of origin he would be subjected to treatments that went against Article 3 of the ECHR. According to the ECHR, the Italian authorities did not have enough proof to deem the accused as guilty, and thus believed that the expulsion was an extreme sentence.

Once again Italy was convicted for inhuman treatment in the *Scoppola v Italy* case⁵⁸⁸, since it had kept in detention an individual of more than 70 years of age, afflicted from serious illness and who was obliged to stay in bed all day because of a broken femur, in an adequate institute for his health conditions⁵⁸⁹. The ECHR found a violation of Article 3 of the Convention, which implicitly imposes a positive obligation on the State to guarantee humane conditions of

⁵⁸⁶From the Report to the Italian Government on the visit to Italy carried out by the CPT from 27 to 31 July 2009. The report concerned, in particular, the operations of rejection of migrants towards the coasts of Libya, conducted by the Italian authorities between May and July 2009.

⁵⁸⁷Angela Colella, *La giurisprudenza della Corte di Strasburgo: il divieto di trattamenti inumani e degradanti*, in *Diritto Penale Contemporaneo*, Milano, 2011, p.244.

⁵⁸⁸See case *Scoppola v Italy*, ECHR, June 2008.

⁵⁸⁹Angela Colella, *La giurisprudenza della Corte di Strasburgo: il divieto di trattamenti inumani e degradanti*, in *Diritto Penale Contemporaneo*, Milano, 2011, p.241.

every detainee, ensuring his well-being even through access to medical cures⁵⁹⁰.

An ulterior case in which the Italian country was deemed responsible for degrading and inhuman treatment was the 2011 *Sarigiannis v Italy* case⁵⁹¹; father and son, upon their arrival at the Fiumicino airport in Rome, were brought before the police authorities because of their refusal to provide identification. The two men were subjected to menaces and were beaten, and kept in separate rooms for several hours. Despite admitting that these acts were justified due to the violent reaction of the two men, the European Court of Human Rights stated that they went beyond what was strictly necessary, thus constituting inhuman and degrading treatment⁵⁹². The violation of the principle of proportionality constituted a violation of Article 3 ECHR.

In all these cases, however, the facts for which Italy had been condemned were not deemed serious enough to integrate the crime of torture. It was only with the Group of Eight (G8) summit in Genoa, held in July 2001, that Italy was condemned for torture, after the events that occurred at the Diaz-Pertini school⁵⁹³. Amnesty International defined the events as “the most serious suspension of democratic rights in a Western country since the Second World War”⁵⁹⁴. The Genoa events rekindled the debate on the failure of the Italian

⁵⁹⁰ Camera dei Deputati, Documentazione per l'esame di Progetti di legge, *Disposizioni irgenti in material di introduzione del delitto di tortura nell'ordinamento italiano*, A:C: 189 e abb., n.149, Maggio 2014, p.10,

⁵⁹¹ See Causa *Sarigiannis c. Italia*, Seconda Sezione, sentenza 5 Aprile 2011, ricorso n.14569/05.

⁵⁹² Angela Colella, *La giurisprudenza della Corte di Strasburgo: il divieto di trattamenti inumani e degradanti*, in *Diritto Penale Contemporaneo*, Milano, 2011, p.213-215.

⁵⁹³ *Italy condemned for G8 'torture' - ECHR urges introduction of anti-torture law*, in Ansa.it, Strasbourg, April 2015.

⁵⁹⁴ Monica Jansen and Inge Lanslots, *Dalla parte del noir: l'oscura immensità del G8 a Genova nel 2001*, in *Noir de noir: un'indagine pluridisciplinare*, by Dieter Vermandere and Michelangelo Monica, p.73.

government to fill the gap in its criminal legislation, as regards to the lack of a prohibition of torture. The events gave way to two major national court cases⁵⁹⁵; one for the events occurred at the barrack of Bolzaneto, and one for the vents at the Diaz school, which terminated after three appeals, going through first instance, second instance and final appeal before the Italian Court of Cassation, with most of the criminal punishments being statute-barred.

The G8 of Genoa was originally conceived as a venue for various rich and industrialized countries to resolve differences amongst them. It was also seen as an opportunity to give each other mutual help to face a series of economic decisions that had to be taken. However, this summit was characterized by a violent and dramatic protest, and drew the attention of thousands of protesters who wanted to prevent the members of G8 from attending. The protesters were guided by Vittorio Agnoletto, spokesman for the Genoa Social Forum, and had set up their centre for activities in the Diaz-Pertini school⁵⁹⁶. The building had been made available by the municipal authorities for protesters to use as a night shelter⁵⁹⁷. During the night of the 21st of July, an anti-riot police unit assaulted the Diaz school and attacked the activists present on the scene, as well as several journalists, justifying the search of premises and all the arrests on the basis of fabricated evidence⁵⁹⁸. The video footage of the events that were later brought to Court demonstrated that the use of force on part of the police forces was not only arbitrary, but also disproportionate and not necessary⁵⁹⁹. The violence, however, did not end there; after the attack, some of the protesters were detained at the police

⁵⁹⁵Guglielmo Taffini, *L'infame crociuolo della verità: uno studio sulla tortura*, Italy, 2015, p.70.

⁵⁹⁶*Italy condemned for G8 'torture'- ECHR urges introduction of anti-torture law*, in Ansa.it, Strasbourg, April 2015.

⁵⁹⁷Marta Picchi, *The Condemnation of the Italian State for violation of the prohibition of torture*, in Journal of Law and Social Science, 2015, p.28.

⁵⁹⁸Yasha Maccanico, *Italy: making sense of the Genoa G8 trials and aftermath*, in Statewatch Journal, Volume 18, n.4.

⁵⁹⁹Guglielmo Taffini, *L'infame crociuolo della verità: uno studio sulla tortura*, Italy, 2015, p.72.

barracks in Bolzaneto⁶⁰⁰, which had been turned into a make-shift prison. The 222 persons detained in Bolzaneto were subjected to treatments that were later on defined as torture by the public prosecutors⁶⁰¹. Once the protesters arrived at the police barrack, they were marked on the face with a pen, and were obliged to walk in a line between police officers who kicked them and hit them. The detainees were then obliged to stand against a wall with their arms and legs spread open, and whoever was unable to maintain that position was subjected to beatings. According to the witnesses, these brutal acts were committed not for obtaining a confession or any kind of information, but simply to exercise terror on the victims.

The then Italian government of Silvio Berlusconi defended the police action's, even though successive governments acknowledged the brutality of the events⁶⁰². In particular, the death of one of the protesters, Carlo Giuliani, was excused on the basis that it was needed to allow the maintenance of public order and public security. Several foreign governments voiced their concerns on the episodes that had occurred.

The Diaz raid represented Italy's most notorious case of police brutality. Fifteen years after the events, the exact circumstances of the case are still unclear, as well as the precise number of police officers who took part in the attack. The criminal proceedings took place in the thirteen years following the event, but they were characterized by the creation of false evidence and inadequate penalties.

⁶⁰⁰Marco Preve, *La notte dei pestaggi a Bolzaneto: il lager del gruppo operativo mobile*, in La Repubblica, 2001.

⁶⁰¹Nick Davies, *Le ferite di Genova*, published in Internazionale, April 2015.

⁶⁰²*Italy condemned for G8 'torture' - ECHR urges introduction of anti-torture law*, in Ansa.it, Strasbourg, April 2015.

⁶⁰² Monica Jansen and Inge Lanslots, *Dalla parte del noir: l'oscura immensità del G8 a Genova nel 2001*, in *Noir de noir: un'indagine pluridisciplinare*, by Dieter Vermandere and Michelangela Monica, p.73.

Soon after these atrocious events, criminal proceedings were initiated by the Italian Public Prosecutor of Genoa. During the preliminary ruling, Mr. Cestaro brought a civil action against the police officers suspected of having committed those acts⁶⁰³. At the time of the events, the applicant⁶⁰⁴ was 62 years old, and he affirmed that he was repeatedly and violently struck and beaten by the police officers, even though he had surrendered and thrown himself on the ground⁶⁰⁵. In his testimony, he recalled the atrocious measures applied to those who were inside the school, which included temporary detention in humiliating circumstances and being subjected to brutal physical violence⁶⁰⁶. Moreover, Mr. Cestaro brought on a complaint before the European Court of Human Rights in 2011, lamenting the suffering of ill-treatments by the hands of a group of policeman⁶⁰⁷.

After about three years of investigations, in 2004, twenty-eight individuals were put on trial⁶⁰⁸. In the same year, Arnaldo Cestaro brought a civil action before the Court, along with others who had been subjected to ill-treatments in the night of July 21st. The charges brought against the suspects

⁶⁰³ Carmela Pezzimenti, *Nella scuola Diaz-Pertini fu tortura: la CEDU condanna l'Italia nel caso Cestaro*, published in *Giurisprudenza italiana*, in *Diritto Penale*, by Francesco Palazzo, 2015, p.1711.

⁶⁰⁴ For reasons of simplification, we will only report the case of Arnaldo Cestaro, since it is not possible to give account of all the individuals who were subjected to violence that night.

⁶⁰⁵ Carmela Pezzimenti, *Nella scuola Diaz-Pertini fu tortura: la CEDU condanna l'Italia nel caso Cestaro*, published in *Giurisprudenza italiana*, in *Diritto Penale*, by Francesco Palazzo, 2015, p.1710.

⁶⁰⁶ Yasha Maccanico, *Italy: making sense of the Genoa G8 trials and aftermath*, in *Statewatch Journal*, Volume 18, n.4 .

⁶⁰⁷ *G8 Genova, Strasburgo condanna l'Italia per tortura*, in *Rai News*, 7 April 2015

⁶⁰⁸ From the official sentencing of the European Court of Human Rights of the 7th of April 2015, Quarta Sezione, Causa Cestaro c. Italia, Ricorso n.6884/11.

were of abuse of power, defamation, violence, falsification of documents and illegal licence to carry fire arms⁶⁰⁹.

In 2008, there was the first degree sentencing, which absolved most of the suspects with sentence n. 4252/08. Only twelve of the suspected individuals were convicted by the Court of Genoa, after they were confirmed as being part of the black block. They were given penalties that varied from two to four years of imprisonment, and they were banned from holding public office for the entire duration of the penalty⁶¹⁰. The penalties were decided on the basis of a series of mitigating circumstances taken into consideration by the Court, such as the fact that the authors of the crime did not have any criminal record, and that they had to act under a situation of stress and exertion.

The remaining suspects were acquitted; however, the same individuals were later on convicted by the Court of Appeal of Genoa, counting a total of a 100 years of prison sentence for the twenty-five police officers who were tried⁶¹¹.

The deposition of the motivations of the first degree sentence happened in 2008, stating in the opening page that it was inconceivable that those who were supposed to be the guarantors of order and legality, were the ones who had committed harmful actions⁶¹². However, the sentence excludes that the events had been organized as a punitive expedition; the Court discarded this possibility because of the lack of evidence, adding that the high number of

⁶⁰⁹ From the official sentencing of the European Court of Human Rights of the 7th of April 2015, Quarta Sezione, Causa Cestaro c. Italia, Ricorso n.6884/11.

⁶¹⁰ From the official sentencing of the European Court of Human Rights of the 7th of April 2015, Quarta Sezione, Causa Cestaro c. Italia, Ricorso n.6884/11.

⁶¹¹ Alberto Custodero, *Agenti scagionati in primo grado, poi 100 anni di carcere; ora sarebbero assolti*, in La Repubblica, March 2011.

⁶¹² Marcello Zinola, *G8 2001: violenza e senso dell'impunità*, in Secolo XIX, 2009.

police officers makes it hard to believe that it had been a premeditated conspiracy⁶¹³.

With regards to the silence of the police authorities on the matter, the Court agreed that there had been a certain indifference and detachment during the investigations. The report filed by the police authorities on the operation was found to contain a description of the events that did not correspond to the truth, considering that it failed to mention that the violent reactions of the protesters were due to the fact that they had been injured by the police unit⁶¹⁴.

The final sentence of the Genoa Tribunal was appealed in 2008 by the accused⁶¹⁵; this brought, in 2010, to the sentencing of the Court of Appeal, which partially reformed the contested sentence⁶¹⁶.

The Court of Appeal firstly affirmed that the case could not be proceeded against some of the accused, because of the statute limitation of the crimes⁶¹⁷. It went on to condemn the majority of the suspects under the accuse of having committed grave and violent acts, such as destruction and raids⁶¹⁸; they were given heavy sanctions and penalties that were more burdensome than the ones given in first degree⁶¹⁹. The Court underlined how the police forces had acted without taking into consideration any kind of physical vulnerability of the victims, such as age, sex or the fact that they were not opposing any

⁶¹³ Corte di Appello di Genova, Sezione Terza, Le motivazioni della sentenza di primo grado.

⁶¹⁴ From the official sentencing of the European Court of Human Rights of the 7th of April 2015, Quarta Sezione, Causa Cestaro c. Italia, Ricorso n.6884/11.

⁶¹⁵ Corte di Appello di Genova, Sezione Terza, Dispositivo di sentenza (art.544 e segg. C.P.P.).

⁶¹⁶ From the official sentencing of the European Court of Human Rights of the 7th of April 2015, Quarta Sezione, Causa Cestaro c. Italia, Ricorso n.6884/11.

⁶¹⁷ Carmela Pezzimenti, *Nella scuola Diaz-Pertini fu tortura: la CEDU condanna l'Italia nel caso Cestaro*, published in *Giurisprudenza italiana*, in *Diritto Penale*, by Francesco Palazzo, 2015, p.1711.

⁶¹⁸ Diaz, *la sentenza nel dettaglio*, in *Il Secolo XIX*.

⁶¹⁹ Guglielmo Taffini, *L'infame crociuolo della verità: uno studio sulla tortura*, Italy, 2015, p.72.

resistance⁶²⁰. Many of the final penalties were however reduced because of pardon, which was envisioned in law n.241/2006.

Moreover, the Court of Appeal recognized compensation for damages to those who had brought on a civil action in the first degree⁶²¹. The re-enactment of the facts seemed to be in contrast with the one carried out by the Genoa Tribunal in the first degree, thus confirming the injustice and violence of the events. The Court of Appeal noted that it was highly unlikely that the events had occurred spontaneously, considering that the police force had started beating the victims before even entering the Diaz-Pertini⁶²². On the contrary, the evidence pointed to the conclusion that the acts were brought on consciously, with the permission and consent of their superiors, who had allowed the police unit to use force to enter the building and to arrest the allegedly dangerous individuals⁶²³.

The judicial hearing in Cassation took place in June 2012. The defendants, the Attorney General of the Court of Appeal of Genoa and some of the victims brought on the appeal in Cassation against the final appeal sentence. During the various hearings, the Attorney General rejected the request of Genoa's Public Prosecutor to consider the crimes as torture, which did not exist in the Italian judicial system, instead of considering them as crimes of harm.

⁶²⁰La Corte d'Appello affermò che i poliziotti si comportarono come "teppisti violenti"; anche la Cassazione, nel confermare successivamente le condanne della sentenza d'appello, evidenziò che non si era trattato di una "manifestazione eclatante di violenza esplosa irrazionalmente [...]"; al contrario, si è trattato di fredda e calcolata condotta, cinicamente perpetrata con metodo sadico".

⁶²¹Corte di Appello di Genova, Sezione Terza, Dispositivo di sentenza (art.544 e segg. C.P.P).

⁶²²*Le motivazioni della sentenza di secondo grado*, in processig8.org, Corte di Appello di Genova, Terza Sezione Penale, Sentenza 18.05.2010.

⁶²³Massimo Calandri, *Torture e impunità nell'inferno di Bolzaneto*, in La Repubblica, 2008.

The Italian Court of Cassation essentially reconfirmed the appealed sentence, declaring that the crime of violence, for which almost all defendants had been charged with, was statute-barred⁶²⁴.

In tis reasoning, it ascertained that the violence perpetrated by the police forces was of “absolute gravity”, considering that they had been inflicted on disarmed or surrendered individuals. According to the Court, these violent acts could be defined as torture under the UN Convention Against Torture, or as inhuman and degrading treatments under the European Convention.

Finally, the Court confirmed the conclusions of the Court of Appeal regarding the various crimes that the suspects had been charged with⁶²⁵; the police reports had been misleading and deceptive as regards to real nature of the events.

With the sentencing of the case *Cestaro v Italy* of April 2015, the European Court of Human Rights was able to reassess the events of the G8 of Genoa, finding Italy guilty of contravening Article 3 of the European Convention of Human Rights⁶²⁶.

The plaintiff denounced that he had been subjected to violence and ill-treatments at the hands of the police forces, in the night between the 21st and the 22nd of July 2001⁶²⁷. He contested that the cruel and violent acts inflicted on him were completely gratuitous, since he had not posed any resistance, and

⁶²⁴ From the official sentencing of the European Court of Human Rights of the 7th of April 2015, Quarta Sezione, Causa *Cestaro c. Italia*, Ricorso n.6884/11.

⁶²⁵ From the official sentencing of the European Court of Human Rights of the 7th of April 2015, Quarta Sezione, Causa *Cestaro c. Italia*, Ricorso n.6884/11.

⁶²⁶ From the ruling passe by the ECtHR, Section IV, 7th April, Application no.6884/11.

⁶²⁷ Carmela Pezzimenti, *Nella scuola Diaz-Pertini fu tortura: la CEDU condanna l'Italia nel caso Cestaro*, published in *Giurisprudenza italiana*, in *Diritto Penale*, by Francesco Palazzo, 2015, p.1709.

thus constituted an abuse of power to commit an premeditated act devoid of any foundation⁶²⁸.

In the complaint lodged in January 2011, Mr. Cestaro had contested violations of Articles 3, 6 and 13 of the ECHR, maintaining that those who were responsible had not been punished adequately⁶²⁹, particularly because of the consequences of the statute limitation and pardon.

The Italian government contested to the plaintiff that he had appealed the Court of Human Rights before having exhausted all national remedies, which is required as a prerequisite to pledge in front of the Court. However, Mr Cestaro responded that this requirement only applies if there are efficient existing remedies that provide adequate remedies for violations of the ECHR: this was not the case. Considering that the Italian criminal code does not contain the crime of torture, the Italian courts did not have the sufficient means to provide for adequate punishment for the acts that had been committed. Even though Article 3 of the ECHR does not expressly require for Italian law to introduce an *ad hoc* criminal offence that prohibits torture, the UN Human Rights Committee has repeatedly criticised Italy's failure to introduce such a law.

However, Italy implicitly responded to the plaintiff that the Italian judiciary system was suitable per se to punish acts of torture⁶³⁰. This reasoning was based on the introduction of Article 185-bis in the Criminal Military Code in 2002.

In its final ruling, the ECtHR explained what the violation of article 3 ECHR entailed. Its decision was based on the previous case law of the Court

⁶²⁸Marta Picchi, The Condemnation of the Italian State for violation of the prohibition of torture, in *Journal of Law and Social Science*, 2015, p.28.

⁶²⁹Scuola Diaz: "Blitz della polizia fu tortura" - Corte Europea condanna l'Italia, in *Fatto Quotidiano*.

⁶³⁰Giulia Lanza, *Verso l'introduzione del delitto di tortura nel codice penale italiano*, in *Diritto Penale Contemporaneo*, p.3.

itself, and on the progressive evolution of the concept of torture. According to the sentence of the Court, adopted unanimously⁶³¹, Italy does not have suitable legislation for preventing and punishing the crime of torture, in particular in cases of violence on part of the police forces. The Court thus recognized a double violation, both substantial (concerning the acts of torture inflicted on the protesters) and procedural (for the default of the Italian authorities to conduct efficient investigations), of Article 3⁶³².

Before examining the validity of the complaint brought on by Mr. Cestaro in 2011, the ECHR evaluated its admissibility⁶³³. The Court noted that the requirement of the exhaustion of all internal remedies had to be interpreted in a more elastic way and without too many formalities, taking into consideration the circumstances of the concrete case; thus, the applicant still preserved the status of victim⁶³⁴.

The Court went on to reject all the objections that had been made by the Italian government as a justification for the events that had occurred. It's remarks on the response of the Italian government were of three kinds⁶³⁵.

First of all, in examining the substantial violation of Article 3, it defined the acts "such as to arouse in the victim feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking

⁶³¹The final sentence on the facts of the Diaz School in Cass., sezione V, 5 July 2012, n.38085; the final sentence on the facts of Bolzaneto in Cass., sezione v, sent. 14 June 2013, n.3708813.

⁶³²Guglielmo Taffini, *L'infame crociuolo della verità: uno studio sulla tortura*, Italy, 2015,p.80.

⁶³³Carmela Pezzimenti, *Nella scuola Diaz-Pertini fu tortura: la CEDU condanna l'Italia nel caso Cestaro*, published in *Giurisprudenza italiana*, in Diritto Penale, by Francesco Palazzo, 2015, p.1711.

⁶³⁴Carmela Pezzimenti, *Nella scuola Diaz-Pertini fu tortura: la CEDU condanna l'Italia nel caso Cestaro*, published in *Giurisprudenza italiana*, in Diritto Penale, by Francesco Palazzo, 2015, p.1711.

⁶³⁵See *Cestaro v Italy*, CEDU, Quarta Sezione, ricorso n.6884/11, Aprile 2015.

their physical or moral resistance”⁶³⁶. All those who were called to testify during the investigations made it easy for the judges to agree that the facts had been brought on in a systematic way, considering that all of them had been insulted, menaced, forced in an upright position for several hours without access to food and water or to medical treatments. The ECHR concluded that the acts had been committed with a punitive intent, and that they had caused serious and permanent injuries on the plaintiff⁶³⁷. The force used on Mr. Cestaro and on other individuals had elicited severe mental and physical sufferings, and was devoid of any plausible justification.

To evaluate the context of the events in which the ill-treatments were perpetrated, and to establish the intent behind the acts, the Court took into account the attempts of the police authorities to tarnish the evidence. It noted how video footages and photos had been destroyed, and how two Molotov bombs had been planted as false evidence⁶³⁸. This simulation showed the premeditation behind the acts of the police unit, who deliberately irrupted in the building without any apparent real purpose, other than a punitive intent⁶³⁹. As a result, the facts indicated that the ill-treatments were contrary to human dignity, and thus fell under the notion of torture.

Thus, according to the Court the only issue was to understand if the acts constituted torture, or if they could be qualified as mere inhuman and degrading treatments⁶⁴⁰. This problem derives from the laconic wording of Article 3, which does not give any explanation as to what the prohibited

⁶³⁶The Court had made the same reasoning in the Ireland v UK case and the Soering case.

⁶³⁷Guglielmo Taffini, *L'infame crociuolo della verità: uno studio sulla tortura*, Italy, 2015, p.78.

⁶³⁸Guglielmo Taffini, *L'infame crociuolo della verità: uno studio sulla tortura*, Italy, 2015, p.79.

⁶³⁹Marta Picchi, The Condemnation of the Italian State for violation of the prohibition of torture, in *Journal of Law and Social Science*, 2015, p.28.

⁶⁴⁰Carmela Pezzimenti, *Nella scuola Diaz-Pertini fu tortura: la CEDU condanna l'Italia nel caso Cestaro*, published in *Giurisprudenza italiana*, in *Diritto Penale*, by Francesco Palazzo, 2015, p.1711.

conducts are. The Cestaro sentence underlines that, to establish if an act qualifies as torture, it is important to evaluate the “inhumanity of the act and the capacity to cause sufferings”. This evaluation obviously depends on a series of elements, such as the duration of the suffering, the age, sex and state of health of the victim. In the case at hand, the evidence that was gathered during the investigations pointed out that there was a deliberate will of the police forces to cause the sufferings. For these reasons, the Court found that the ill-treatments endured by the plaintiff integrated the crime of torture.

Secondly, the Court found the complaint to be valid and well-founded with regards to the procedural violations of Article 3 as well⁶⁴¹. The ECtHR pointed out that one of the procedural obligations that descends from Article 3 is that States have the duty to carry out effective investigations, to be able to identify, prosecute and punish with an adequate sanction those who are found to be responsible of crimes of torture and other forms of ill-treatment.

In focusing on the problematic issues of procedural nature, the Court noted that the possibility to charge the police and law enforcement officers had been undermined by the difficulty in identifying who was responsible for each specific action that had taken place on the night of July 21st⁶⁴². These difficulties were due to the fact that the police authorities had not cooperated with the Public Prosecutor during the investigations. In fact, the material authors of the crimes had never been correctly identified by the Italian state⁶⁴³, and have therefore remained unpunished. Moreover, the only people that had been identified and convicted by the Italian Court of Cassation were punished

⁶⁴¹Carmela Pezzimenti, *Nella scuola Diaz-Pertini fu tortura: la CEDU condanna l'Italia nel caso Cestaro*, published in *Giurisprudenza italiana*, in *Diritto Penale*, by Francesco Palazzo, 2015, p.1712.

⁶⁴²Yasha Maccanico, *Italy: making sense of the Genoa G8 trials and aftermath*, in *Statewatch Journal*, Volume 18, n.4.

⁶⁴³ It must be noted that at the time of the events, the police agents that had taken part in the raid were covered by helmets and scarfs, thus making it harder for the protesters to identify them.

on the basis of a series of criminal laws that were considered to be inadequate, in comparison to the actual crimes. In this view, the Italian legislation was deemed as being unsuitable to sanction the acts of torture, and to create a deterrent effect that would avoid a repetition of the case at hand in the future.

The ECHR also underlined that the Italian government had not yet suspended from duty the police officers which had undergone the criminal proceedings, even though they had been banned from holding public office for the entire duration of the penalty in the first degree sentencing. The ECHR has affirmed that if the perpetrators are State officials, they have to be suspended during the period of both investigation and trial, and if convicted, should be permanently removed⁶⁴⁴. Italy did nothing of the sort, without giving any plausible justification for doing so.

Finally, the Court pointed out another flaw in the procedural aspect of the matter. According to the ECHR, a mere compensation was not enough to make up for the damages caused to the victims⁶⁴⁵; it was also necessary to punish those who were responsible for the acts of torture. From this perspective, Italy has been found guilty not only of lacking an express norm that prohibits torture, but also of not introducing adequate procedural requirements. In fact, each Contracting state has to carry out an effective investigation to identify, prosecute and convict accordingly all those who are found to be guilty⁶⁴⁶. Article 19 of the ECHR states that even though it is up to national judicial authorities to condemn the authors of torture, the Court has an obligation to intervene when it finds a grave discrepancy between the act and the final penalty. Moreover, if the crime is committed by a state official or

⁶⁴⁴Marta Picchi, The Condemnation of the Italian State for violation of the prohibition of torture, in *Journal of Law and Social Science*, 2015, p.28.

⁶⁴⁵Marta Picchi, The Condemnation of the Italian State for violation of the prohibition of torture, in *Journal of Law and Social Science*, 2015, p.28.

⁶⁴⁶Marta Picchi, The Condemnation of the Italian State for violation of the prohibition of torture, in *Journal of Law and Social Science*, 2015, p.28.

other public authority, amnesty and pardon cannot be granted, and the proceeding cannot become extinct through the statute of limitation.

In this part of the decision, the Court examined the applicability of Article 46⁶⁴⁷ of the European Convention to the case at hand. If a State is found responsible of a violation of the Convention or of one of its Protocols, it has the duty to adopt the general measures to end the violation. Usually it is the Court that points out to a State what these adequate measures should be; but in Italy's case, the absence of adequate legislation and the short terms of prescription would make any efforts by the authorities useless⁶⁴⁸. Thus, the Court restated the urgent necessity of the Italian judicial system to equip itself with appropriate provisions to punish the authors of torture and other forms of inhuman and degrading treatment⁶⁴⁹.

After a long and troubled trial, on April 7th 2015, the European Court of Human Rights finally condemned Italy for the violation of Article 3 of the ECHR⁶⁵⁰.

This ruling of the ECHR has not been considered satisfying by everyone. Agnoletto protested that the final sentence underlines the inability to effectively punish those who had committed acts of torture, because of the lack of specific law⁶⁵¹. He lamented that the few responsible individuals who

⁶⁴⁷Article 46 ECHR, paragraph 1, reads: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties". Moreover, paragraph 2 states that "the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution".

⁶⁴⁸Guglielmo Taffini, *L'infame crociuolo della verità: uno studio sulla tortura*, Italy, 2015, p.81.

⁶⁴⁹Guglielmo Taffini, *L'infame crociuolo della verità: uno studio sulla tortura*, Italy, 2015, p.82.

⁶⁵⁰Carmela Pezzimenti, *Nella scuola Diaz-Pertini fu tortura: la CEDU condanna l'Italia nel caso Cestaro*, published in *Giurisprudenza italiana*, in *Diritto Penale*, by Francesco Palazzo, 2015, p.1709.

⁶⁵¹*Italy condemned for G8 'torture' - ECHR urges introduction of anti-torture law*, in Ansa.it, Strasbourg, April 2015.

had actually been convicted had been given a light penalty, and most of them did not spend any time in jail at all.

⁶⁵¹ Monica Jansen and Inge Lanslots, *Dalla parte del noir: l'oscura immensità del G8 a Genova nel 2001*, in *Noir de noir: un'indagine pluridisciplinare*, by Dieter Vermandere and Michelangela Monica, p.73.

CHAPTER 4

FINAL CONSIDERATIONS

4 Overview of the functioning of the United Nations and European systems to combat torture. - 4.1 Issues with the creation of an *ad hoc* law in Italian legislation. – 4.2 *De iure condendo* prospects.

4. The aim of this dissertation has been to analyze the context in which the prohibition of torture has arisen, and to further research into the causes and consequences of torture, in order to understand the root of the reasons why there are still issues concerning its repression. The outline of the history of torture appears to be particularly important to understand the ever-changing nature of torture, and how it takes on a different role according to the time in which it is practiced.

Undoubtedly, during the centuries, the development of democracy, rule of law and the applicability of human rights instruments have helped to diminish its use, but the complexity of the underlining reasons for which it is practiced makes it difficult to find a concrete solution. It is also hard to go beyond the belief, deeply-rooted in the general social conscience, that torture is an issue that does not involve Europe and other democratic States, such as Italy. Unfortunately, the reality is that torture still remains a widespread phenomenon, and not only in those States characterized by dictatorial regimes, where torture has become a fully legalized instrument. Many formally democratic countries, in which the protection of human rights should be widely recognized and consolidated, have been found guilty of committing acts whose inhumanity has been denounced by international organs

as amounting to torture. On one hand, it is important to establish if the system for the prevention of torture created in the context of the United Nations and of the Europeanisation process, which brought to the creation of Article 3 of the ECHR, has proved to be adequate for the protection of human rights. On the other hand, a focus has to be put on the question of whether the Italian State has received and adopted the culture of human rights, considering its persistent lack in adopting an *ad hoc* provision prohibiting torture, to be able to identify the prospects of reform *de iure condendo*.

The medieval principal of *veritatis indagatio per tormentum, seu per torturam*⁶⁵² illustrated the underlining reason for which torture was perpetrated at the time. Even with the era of Enlightenment, which contributed to open the political debate on the lawfulness of torture and shook society's moral conscience, torture was not entirely abolished in the most evolved States⁶⁵³. Starting from the 19th century, torture was banned from all national legislations, and in the 20th century, in particular in the aftermath of the Second World War, the absolute prohibition of torture had been inserted in numerous international acts. In the modern age torture had resurfaced in another dimension, away from the public eye, adjusting to the new found respect for human rights. Torture came to be considered as a *delictum iuris gentium*⁶⁵⁴, a crime which is harmful and detrimental to the values shared by the entire international community.

The reasons for which torture was still and is still practiced can be found in the historical common practices and traditions. The Nazi atrocities raised awareness on the almost total lack of legislation explicitly prohibiting torture,

⁶⁵²Pietro Verri, *Osservazioni sulla tortura*, a cura di Silvia Contarini, Milano, 2006.

⁶⁵³ John D. Bessler, *Revisiting Beccaria's vision: the Enlightenment, America's death penalty and the abolition movement*, in *Northwestern Journal of Law and Social Policy*, Volume 4, Issue 2, 2009, p.198.

⁶⁵⁴The reasoning behind the repression of *delicta iuris gentium* is to be able to add the criminal liability of single individuals who have committed torture acting as organs of the State, to the international responsibility of the State itself.

and raised the moral question of whether it was time to take a step further in the protection of human rights. To add to this sentiment, during the Cold War an actual science on torture was elaborated, based not on physical but on psychological pain⁶⁵⁵. The risk was that the perpetrators of torture would remain unpunished, because of the silence that enveloped these episodes, and States started feeling the moral necessity to commit politically and legally to international human rights; this resulted in the adoption of the United Nations Charter in 1945, which subsequently led the way to the adoption of the first international human rights text, the Universal Declaration of Human Rights⁶⁵⁶. However, it must be pointed out that the use of the term commitment on part of States is extremely questionable, considering that at the time States were still reluctant to give up their sovereignty, and were not ready to be tied down by juridical commitments. Thus, it appears to be more correct to talk about moral commitment, considering that ratification of the UN Charter was discretionary and that the Universal Declaration in itself was not a legally binding document. The internal structures of States still widely abused of torture, justifying these acts on the basis of the necessity to maintain order within their territories. The possibility to punish torture independently from a specific sovereign claim was pressured after the Second World War, and followed up until the Cold War. However, this early phase of the human rights movement did not fit well with the Western ideas of State and Government, and this is reflected in the grave human rights violations which took place during the 1990's. The humanitarian crisis in Somalia in the 1990's and the NATO intervention in Kosovo in 1999 were characterized by a widespread use of torture and other ill-treatments, despite the fact that the major treaties and conventions criminalizing torture had already been drafted.

⁶⁵⁵R. Matthew Gildner, *Psychological torture as a Cold War imperative*, in *The trauma of Psychological torture*, Aldmerindo E. Ojeda, 2008, p.23-25.

⁶⁵⁶Richard Falk, *Achieving Human Rights*, New York and London, 2009, p.83.

Even with regards to the role of the International Criminal Court, there are strong doubts surrounding its functioning. The commitment made by States through the ratification of its Statute risks to be constrained by the primary and authorizing role of the United Nations Security Council. Moreover, the constraints it presents on the possibility to activate the Court⁶⁵⁷ and to initiate prosecution strongly diminish its role⁶⁵⁸. In the light of these circumstances, national courts still appear to hold a dominant role in the development of international criminal law and in the creation of *ad hoc* provisions on torture.

Another issue strongly connected with the repression of torture concerns the universal jurisdiction in criminal proceedings⁶⁵⁹. To be able to fully restrain the use of torture, States should be able to prosecute and condemn authors of the crime independently from the nationality of the offender and of the location of the crime. Domestic courts have however not responded well to the claims of universal jurisdiction⁶⁶⁰, and this has resulted in the lack of enforcement provisions in national legislations. States have been hesitant to derogate from the ordinary rules of criminal jurisdiction, seeing it as a surrender of their sovereignty⁶⁶¹. The creation of the International Criminal Court has not diminished the need for the implementation of universal jurisdiction, considering that the Rome Statute has not yet been universally

⁶⁵⁷The ICC can be activated only if a case has not already been submitted to a national court, or if the national court is unwilling or unable to effectively carry out an investigation or start a criminal trial.

⁶⁵⁸Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, Italia, 2012, p.886-887.

⁶⁵⁹*Basic facts on Universal Jurisdiction*, prepared for the Sixth Committee of the United Nations General Assembly, in Human Rights Watch, 2009.

⁶⁶⁰The concept of universal jurisdiction refers to the possibility of abilitating and obliging national Courts to investigate and prosecute war crimes, crimes against humanity, torture and genocide, irrespective of the location of the crime and of the nationality of the perpetrator.

⁶⁶¹Xavier Philippe, *The principles of universal jurisdiction and complementarity: how do the two principles intermesh?*, in International Review of the Red Cross, 2006, p.377.

ratified, and only refers to crimes committed after 2002⁶⁶². Jurisprudentially, the issue of universal jurisdiction was greatly challenged with the Pinochet case of 1999. For the first time, a former head of State was held responsible for acts of torture committed during his rule before a domestic court⁶⁶³. The various views on whether he should be held accountable before an international tribunal opened the debate on whether a global framework was needed to apply universal jurisdiction. The fact that he was arrested by British authorities, and the subsequent debate on whether he should be extradited on charges of torture and genocide to his country of origin, showed this need even more⁶⁶⁴.

The Pinochet case has thrown light on the difficulties to implement a general principle of universal jurisdiction. Since States have to grant their own courts universal jurisdiction over a certain crime as a result of a national decision, its scope varies from one country to another, and it is not applied in a uniform way⁶⁶⁵. Moreover, to be able to be implemented in national legislation, there first has to be a clear definition of the offence, and only then can there be the enforcement to allow national courts to exercise their jurisdiction over those crimes. Today, more than ever, it is necessary to insert this principle into a clear legal framework, to enable courts all over the world to punish authors of torture.

Major changes occurred after the 9/11 attacks on the United States, when a renewed emphasis on violence emerged⁶⁶⁶. Following the attack, the Central Intelligence Agency initiated a program that included methods such as secret

⁶⁶² *Basic facts on Universal Jurisdiction*, prepared for the Sixth Committee of the United Nations General Assembly, in Human Rights Watch, 2009.

⁶⁶³ Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, Italia, 2012, p.386.

⁶⁶⁴ The influence of the Nuremberg Trial on International Criminal Law, in The Robert H. Jackson Center, edited by Tove Rosen.

⁶⁶⁵ Xavier Philippe, *The principles of universal jurisdiction and complementarity: how do the two principles intermesh?*, in International Review of the Red Cross, 2006, p.379.

⁶⁶⁶ Richard Falk, *Achieving Human Rights*, New York and London, 2009, p.6.

detention or the use of enhanced interrogation techniques. During this age of terror, the United States seemed to put aside the protection of human rights, by bringing on a widespread “legalization” of torture, especially in the context of suspected detainees at Guantanamo Bay and Abu Grahیب, a prison in Iraq⁶⁶⁷. These issues had already arisen with regards to the detention and interrogation of prisoners in Afghanistan and Iraq, and were brought up once again with the establishment of a temporary detention facility in Guantanamo Bay, Cuba⁶⁶⁸. In this situation, it appeared that the US was not dealing with prisoners in conformity to the requirements prescribed by international humanitarian law. The justification for these atrocious treatments was that the prisoners were considered to be ‘combatant enemies’, and as such did not fall under the protection of the Geneva Conventions. The use of torture was also justified on the basis of the urgent necessity to obtain information relating to Al Qaeda. This issue of the so-called ticking-bomb scenario opened the discussion of whether torture might be admissible under circumstances of urgent and compelling need. A negative answer can be given by examining the evidence of abuses in prisons in Iraq and Afghanistan, when it was disclosed that the practice of torture was characterized mainly by sadism and humiliation. The need for urgent information represented an excuse to exercise unlawful practices on detainees and prisoners. The encouragement of the Government in these practices leads to question if the system that was created to combat torture is effectively an efficient one, especially in a counter-terrorist setting. In fact, it seems that the American response to the 9/11 attacks only caused the discussion on human rights to set back.

The disturbing fact about these issues is that torture is being perpetrated at a time where there is a general consensus on the absolute prohibition of torture. As of today, many Governments still continue to practice torture, or at

⁶⁶⁷ *The legal prohibition against torture*, on the online web site of Human Rights Watch, last edited in 2004.

⁶⁶⁸ Richard Falk, *Achieving Human Rights*, New York and London, 2009, p.136.

least continue to tolerate its unlawful practice. While in ancient times the practice of torture was connected with citizenship, today it is perpetrated on all kinds of victims, generally suspected of having committed crimes of terrorism, or of holding important information. It appears that the malfunctioning of the administration of justice in many countries, Italy included, is the structural reason for the widespread use of torture. Democratic States continue to sacrifice citizen's freedom from torture in the name of a higher cause, without deliberately admitting to doing so. This requires more efforts on part of the entire international community to raise awareness amongst all levels of society, such as government leaders, those who are responsible for the administration of justice, the media and the general public. As of now, the establishment of an independent National Preventive Mechanism, envisioned by the Optional Protocol to the Convention Against Torture, seems to be one of the most efficient ways to combat torture in the world⁶⁶⁹. The UN Committee Against Torture and the Special Rapporteur on torture did not have the power to conduct effective controls in prisons and other detention facilities, considering that the consent of the State was needed, thus making their reports borderline useless; these independent bodies, on the other hand, would have the power to do so⁶⁷⁰. This mechanism could provide for the gaps in the existing system prior to the adoption of the European Convention for the Prevention of Torture. However, the actual implementation of the mechanism has proven to be difficult, and States have been slow in the ratification of the Optional Protocol. The fact that the creation of these independent bodies is left entirely to the will of States, and that there is no coercive mechanism that monitors the actual implementation, obviously makes the provisions of the

⁶⁶⁹ Amnesty International, *The State of the world's Human Rights*, Report of 2012, p.192.

⁶⁷⁰ Manfred Nowak, *The Prohibitions of Torture and Ill-treatment today*, in *The Cambridge Companion to Human Rights Law*, edited by Conor Gearty and Costas Douzinas, 2012, p.308.

Optional Protocol almost worthless⁶⁷¹. An ulterior system of penalties should be envisioned to ensure the effective establishment of such a mechanism, since counting on the will of States to proceed on their own account has not proven to be a satisfying solution. Manfred Nowak, a lawyer who served as Special Rapporteur on Torture from 2004 to 2010, has also suggested that certain categories of individuals, such as judges, prosecutors, lawyers and police officer be attentively chosen and educated, to avoid abuses of power. However, the step from mere principle to reality has yet to be taken, considering that many countries, like Italy, have failed to create an independent body to monitor and prevent torture.

During the years, the system to monitor and combat torture has gotten more and more advanced. Since the creation of the first human rights bodies, the system has evolved to encompass several *ad hoc* organs and various non-governmental bodies which investigate and publicly report on the situation of torture worldwide⁶⁷². NGO's have played an important role in monitoring that Governments comply with their obligations under the UN Convention Against Torture and other legally binding treaties. Other than this, these organizations have documented all known cases of torture in the various countries and have provided information to the relevant bodies at international and national level. Without the presence of NGO's, many incidents of torture would have never been reported, considering that most torturous acts are committed in secret and with the denial of the country at hand. However, the prevention of the crime of torture depends almost entirely on the will of Governments to take the

⁶⁷¹ Matteo Fornari, *La Convenzione delle Nazioni Unite contro la tortura e altre pene o trattamenti crudeli, inumani e degradanti*, in *La Tutela Internazionale dei Diritti Umani*, Laura Pineschi, 2006, pp.224-230.

⁶⁷² Rodney Morgan and Malcolm Evans, *Combating Torture in Europe: the work and standards of the European Committee for the Prevention of Torture*, Strasbourg, 2001, p.47.

appropriate legislative and judicial measures, and to also provide the necessary support, both financial and moral, to the victims.

The issue that arises is whether the efforts of the United Nations and of the Council of Europe have led to an increased repression of the crime of torture through the mechanisms they created, or if the envisioned systems still present loopholes that are not sufficiently covered by national legislation.

In the context of the United Nations, the Convention Against Torture established the creation of the Committee Against Torture⁶⁷³. The Committee has more than once conducted controls on Italy, to monitor the implementation of the prohibition of torture into its national criminal legislation. Each time, however, its expectations have been deluded. In the last report drafted in 2012, the Committee had expressed its concern regarding the regime of impunity that surrounded torture in Italy⁶⁷⁴. This, and the fact that the country persists in not introducing an ad hoc provision, are the main reasons for ill-treatments. The Committee has carried out several routine visits to the country during the years, and four specific ad hoc visits; in 1996, to inspect the allegations of mistreatments in prisons, in 2006 and 2009 with regards to the monitoring of the treatment of foreigners, and in 2010 to verify the situation concerning suicides in jail. The CAT invited the Italian State to increase its efforts “to introduce as soon as possible the crime of torture into the Penal Code, in accordance with Italy’s longstanding international obligations”⁶⁷⁵.

The issue with the system created in 1945 with the United Nations is that there are concrete problems with the actual monitoring of Governments. Notwithstanding the several bodies that have been created to prevent and punish torture, it seems that the UN can do only so much to protect

⁶⁷³Lyal S. Sunga, *The Emerging system of international criminal law: developments in codification and implementation*, The Netherlands, 1997, p.132.

⁶⁷⁴From the Report to the Italian Government on the visit to Italy, carried out by the CAT from 13 May to 25 May 2012, p.8.

⁶⁷⁵From the Report to the Italian Government on the visit to Italy, carried out by the CAT from 13 May to 25 May 2012, p.8.

individuals. The claims of power on part of States frequently overrule the decisions made by the United Nations; it is enough to recall the cruelty and violence to which Iraq was subjected by the US troops in 2003, when the UN had not authorized the initiation of such an aggressive war⁶⁷⁶. Iraq should have been protected by the collective security system, envisioned by the United Nations, against the unlawful threats and the use of force that had been carried out for so long prior to 2003⁶⁷⁷. However, the system is known for having never been implemented, considering that the Security Council of the UN does not dispose of its own military contingents, and has to rely on States to use force to stop internal State conflicts. It becomes clear that the discussion regarding human rights at the UN, and in other arenas where the participants are Governments, is often reduced to a mere formalistic verbal communication, and that States have no actual intention of changing their behavior and their practices. International law has been used time and time again to the advantage of States, considering that the geopolitical status of countries has always prevailed over the protection of citizens from unlawful practices.

Undoubtedly, there have been efforts to work towards criminal liability for those who abuse their authority by practicing torture and other crimes against humanity. The Nuremberg Principles, associated with the punishment of Nazi leaders at the end of the Second World War, is seen as one of the greatest achievements of the last century in the development of international criminal law⁶⁷⁸. Authority was given to tribunals, either of an *ad hoc* character, such as the Tribunal for the former Yugoslavia, or of an international character, such as the International Criminal Court, created by a treaty.

⁶⁷⁶ *Torture and prison abuse in Iraq*, from the report of the Global Policy Forum, 2007.

⁶⁷⁷ Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, Italia, 2012, p.722-723.

⁶⁷⁸ *The influence of the Nuremberg Trial on International Criminal Law*, in The Robert H. Jackson Center, edited by Tove Rosen.

However, these efforts appear to have been vain at times, considering that there have been countries, such as the United States, who have tried to limit these initiatives by envisioning exemptions for themselves. Obviously these exemptions, especially in the wake of the Iraq war and with respect to the torture of prisoners, appear to be intolerable in the eyes of the international community.

The harsh truth is that the international community, intended as both UN bodies and States, lacks the means and more importantly the political mandate to protect individuals from acts of torture, which are committed in sovereign States. Countries, especially the more powerful and large ones, feel empowered to commit actions which victimize those present on their territories. Even democratic States have at times proved to be inadequate to protect citizens from ill-treatments. The idea to safeguard citizens from torture at an international level does not seem to have had satisfying results, nor does it have had a deterrent effect.

Thus, the issue of torture appears to have been better dealt with at a more regional level. Within the Council of Europe, the European Convention on Human Rights was created in 1950, enshrining rights which are set up as a catalogue that is open to continuous changes⁶⁷⁹. The European Court of Human Rights itself described the convention as a living instrument, that has to be interpreted according to the present-day conditions. This explains why Article 3, which prohibits torture and inhuman and degrading treatment and punishment, is such a brief and gaunt article, containing only the essential prohibition, without giving ulterior indications as to what the prohibited acts are. The Court has played an extremely important role in the interpretation of the article, and through its dynamic and evolutionary jurisprudence has set the basis for the application of the article itself. It must be noted how the

⁶⁷⁹From an online article by Donna V. Artusy, *The Evolution of human rights law in Europe: Comparing the European Court of Human Rights and the ECJ, ICJ and ICC*, featured in *Inquiries Journal*, Volume 6, No.11, 2014.

jurisprudence of the Strasbourg judges, not unlike common law systems, is based on a system of judicial law making, which acknowledges the authority of its own precedents. Moreover, it is based on concrete cases, considering that the Court is called to judge and establish the conformity with the Convention.

The European Union has shown a grown interest in protecting human rights. It was originally born out of economic and commercial reasons; with the passing of the years, it evolved into a community aimed at protecting its citizens through detailed provisions.

The prohibition of torture and other forms of ill-treatment has been inserted in European law under a double standard. On one hand, through the interpretation and application by the Strasbourg judges of Article 3 of the European Convention on Human Rights, and on the other hand through Article 4 of the Charter of Fundamental Rights of the European Union, which was adopted in 2000. After the failure of the project to create a European Constitution, Article 4 was created and follows the exact wording of Article 3 of the ECHR. It states that “no one shall be subjected to torture or to inhuman or degrading treatment”. By virtue of Article 52, paragraph 3, of the Charter, it has the same meaning and scope as the ECHR article⁶⁸⁰. Thus, the jurisprudence developed by the ECtHR and of the former European Commission of Human Rights represent the primary source of interpretation of Article 4 as well⁶⁸¹.

As we have examined in Chapter 2, there have been two extremely important conventions that were born in the European context; the European Convention on Human Rights of 1950 and the European Convention for the

⁶⁸⁰ From the Official Journal of the European Union, C 303/17, 2007.

⁶⁸¹ Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, *The EU Charter of Fundamental Rights: a commentary*, USA and UK, 2014, p.69-71.

Prevention of Torture of 1987⁶⁸². The two conventions are intended to complement one another, by creating a legal framework to combat torture.

The Committee for the Prevention of Torture was born out of the 1987 Convention for the Prevention of Torture, and greatly contributed to denouncing the situation on torture. The CPT avails itself of the help of intergovernmental bodies, such as the organs of the United Nations, and of non-governmental bodies, such as Amnesty International and Human Rights Watch, to obtain information on the situation of detainees and prisoners. However, the CPT is not a judicial body; moreover, it is not bound by the jurisprudence developed under the ECHR. Since it does not have the power to establish whether there has been a breach of Article 3 of the ECHR, it can only do so much to prevent torture, rather than punish it. Occasionally the Committee has drawn guidance from the jurisprudence of the European Court, and there is an on-going dialogue between the two bodies.

Although the dialogue between the European Court of Human Rights and the Committee for the Prevention of Torture has been intense and fruitful during the years, relevant divergences have emerged with regards to the distinction between torture and other forms of ill-treatment.

The Committee has made a distinction between torture and serious mistreatments, on one hand, and inhuman and degrading treatments on the other. The term torture has been used in a manner that appears to be in contrast with the usage found in the jurisprudence of the ECtHR⁶⁸³. The European Court sees torture and inhuman or degrading treatments as a continuum of the same kind of act, based on a hierarchy of severity; the Committee appears to make a firm distinction between them instead, considering them as completely

⁶⁸²Konrad Ginther, *The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, in the European Journal of International Law, Austria, 1990, p.123.

⁶⁸³Rodney Morgan and Malcolm David Evans, *Protecting Prisoners: the standards of the European Committee for the Protection of Torture in Context*, Oxford, 1999, p.38.

different acts, without taking into consideration the threshold of pain. Moreover, the latter has never used the terms inhuman and degrading to refer to physical or psychological ill-treatment; they are usually used in reference to living conditions or custodial conditions⁶⁸⁴.

The one element that is common to all case law and definitions found in the various legal instruments, is that torture should involve pain or suffering which has to be severe⁶⁸⁵. The European Court of Human Rights has insisted on the importance of the intensity of pain or suffering, which has to be an aggravated form which is serious enough to amount to inhuman treatment. However, in the Rome Statute of the Elements of Crime nothing can be found that suggests the need for an aggravation of the pain or suffering. On the contrary, as far as war crimes are concerned, the only difference between torture and inhuman treatment is the element of purpose.

After analyzing the legal framework of the United Nations and the jurisprudence of the European Court of Human Rights on the definition of torture, a series of conclusions can be drawn⁶⁸⁶.

The various international bodies have reached a uniform agreement on the elements that make up torture. Firstly, it has been agreed that the specific conduct can include either an action or an omission to fall under the notion of torture. Moreover, the event has to cause severe physical or mental sufferings. The victim can be any individual, and the perpetrator can be a State official or a citizen acting with the consent of the State.

However, as regards to the subjective element, divergent solutions have been found⁶⁸⁷. The Convention Against Torture has depicted torture as a crime

⁶⁸⁴Rodney Morgan and Malcolm David Evans, *Protecting Prisoners: the standards of the European Committee for the Protection of Torture in Context*, Oxford, 1999, p.38-39.

⁶⁸⁵Nigel S. Rodley, *The Definition(s) of Torture in International Law*, in *Current Legal Problems*, Oxford University Press, 2002.

⁶⁸⁶Guglielmo Taffini, *L'infame crociuolo della verità; uno studio sulla tortura*, Italy, 2015, p.95.

with specific intent, setting out a clear list of purposes for which torture can be punished. On the contrary, the case-law of the ECHR has not envisioned torture as requiring a specific purpose; torture is seen as an aggravated form inhuman and degrading treatment⁶⁸⁸, and an act will thus be punished as such if it has caused sufferings of a particular intensity, irrespective of the reasons for which it was committed.

In this light, the choice of the Italian Chamber of Deputies to envision torture as a crime with specific intent in bill n.2168 appears to be risky. The decision to identify a closed list of reasons for which torture has to be committed in order to be punished risks narrowing the scope of the article, making it useless for Italian legislation to include a law against torture. Nonetheless, the transposition of the empirical concept of torture into a law appears to be far from easy. The incriminating norm would need to be, on one hand, in conformity with the international duties and obligations; on the other hand, it would need to abide by the fundamental principles on which Italian criminal law is based.

4.1 Italy's failure to implement the ECHR with regards to the prohibition of torture enshrined in Article 3 does not tolerate any justifications. The Convention was ratified by the Italian state in 1955, and yet there is still no sign of a provision that might be in line with the international requirements.

The procedural violation of the prohibition of torture by the Italian State appears to be aggravated by the fact that the prohibition is provided in several other international instruments that are in force for Italy. When the UN Convention Against Torture was ratified by the Italian State, the enforcement order contained in the authorization law of 1988 was obviously not sufficient to fulfill the obligations arising from the CAT itself. The combined

⁶⁸⁷ Guglielmo Taffini, *L'infame crociuolo della verità; uno studio sulla tortura*, Italy, 2015, p.83.

⁶⁸⁸ J. Hermann Burgers, *The United Nations Convention Against Torture: A handbook on the CAT*, The Netherlands, 1988, p.17.

dispositions of Articles 1 and 4 of the Convention impose the duty on States to legislate on the subject-matter of torture⁶⁸⁹; Italy, however, has yet to conform to these duties.

The 2015 judgment of the European Court of Human Rights on the Cestaro case not only affirmed the substantive and procedural violation of Article 3 of the ECHR, but also contained a striking evaluation of the the decisions of the Italian authorities⁶⁹⁰. It is not uncommon for the Court to reconstruct the events of a case ad to assess their legal implications, but in this specific case the Court made a profound evaluation of the conflicting conduct of the Italian police forces on one hand, and the Italian Courts on the other. It also found the nature of the problem of Italian legislation to be ‘undeniable’; the Court’s reasoning was based not on the continuous violation of the prohibition of torture, but on the continuous absence of adequate legislation on torture⁶⁹¹. Considering the particular importance of the rights at stake in a democratic society, the violation of Italy appears to be even more serious.

Furthermore, according to Article 46 of the ECHR, States that are party to the Convention have to abide by the Court’s final ruling. Italy has ratified Protocol n.14, which amended this provision, with law n. 280/2005⁶⁹². Thus, there is an obligation for States to conform to the sentences of the Court. However, this obligation only concerns the final scope, leaving the means of implementation of the final judgment to the discretion of the single States. The principle enshrined in Article 46 has been reaffirmed in the Brussels

⁶⁸⁹ Massimo Pellingra Contino, *Violazione procedurale del divieto di tortura*, nota a margine della sentenza della Corte EDU *Otamendi Eguiguren c. Espagne*, 2013, p.1-2.

⁶⁹⁰ Pietro Pustorino, *A new case on torture in Europe: Cestaro v. Italy*, in *European Journal of International Law*, 2015.

⁶⁹¹ Pietro Pustorino, *A new case on torture in Europe: Cestaro v. Italy*, in *European Journal of International Law*, 2015.

⁶⁹² Parlamento Italiano, Legge 15 Dicembre 2005, n.280, Ratifica ed esecuzione del Protocollo n.14 alla Convenzione per la salvaguardia dei diritti dell’uomo e delle libertà fondamentali, emendante il istema di controllo della Convenzione, fatta a Starsburgo il 13 Maggio 2004.

Declaration of March 2015, on the “Implementation of the European Convention on Human Rights”⁶⁹³, according to which State parties have to “develop and deploy sufficient resources at national level with a view to the full and effective execution of all judgments, and afford appropriate means and authority to the government agents or other officials responsible for coordinating the execution of judgments” and “attach particular importance to ensuring full, effective and prompt follow-up to those judgments raising particular structural problems, which may furthermore prove relevant for other States”⁶⁹⁴.

The various attempts at creating adequate legislation that have been undertaken during the past decades in Italy have not brought to any concrete solution, even though great progress has been made since the first bill of 1989⁶⁹⁵.

The draft bill prepared by the Italian Council of Ministers in 2000, as we have seen, was a project aimed not at introducing the crime of torture, but rather at merely inserting aggravating circumstances for the crime⁶⁹⁶.

The draft law n.2168 of 2013 appeared to be more promising, before being blocked last July. However, by analysing its elements, it is clear that the bill does not cover all aspects of torture.

First of all, the law provision is circumscribed only to the victims of torture who were under the authority or supervision of a police officer at the

⁶⁹³Pietro Pustorino, *A new case on torture in Europe: Cestaro v. Italy*, in *European Journal of International Law*, 2015.

⁶⁹⁴ From the High level conference on the “Implementation of the ECHR, our shared responsibility”, Brussels Declaration, paragraph B.2, clauses c) and d), 27 March 2015, p.6.

⁶⁹⁵ From the online web site of Amnesty International, *Il reato di tortura in Italia-Sviluppi legislativi*.

⁶⁹⁶ Valentina Moine, *La mancanza del reato di tortura nell’ordinamento italiano*, in *Nomodos*, blog di commento giuridico all’attualità, Maggio 2013.

time of the crime⁶⁹⁷; thus, it would fail to punish acts of torture that go beyond this specific scenario. It would exclude the possibility to recognize the existence of the offence of torture, perpetrated by any other citizen, not holding an official position in the State. With this wording, the provision would have failed to recognize the allegations of torture in the Diaz-Pertini case, considering that the acts committed in that occasion were recognized as torture only once the ECtHR classified them as such. Furthermore, it would mean that Italy would still be falling short of the expectations of its international responsibilities, considering that the proposed solution would be inconsistent with Article 1 of the UN Convention on torture, which does not require the victim to be under the authority or supervision of a police officer.

Secondly, the specific conduct which is described appears to narrow the scope of the crime⁶⁹⁸. The provision expressly requires the use of ‘violence or threats’, not considering that at times torture can be committed without these two elements. The general structure of the offence outlined in Article 3 of the ECHR seems to be preferable, leaving space for a judge to address a wide range of situations as constituting torture. Similarly, the provision also requires a specific intent in the commission of the offence, which would rule out the possibility of punishing acts of torture which are committed without any apparent reason, for example out of pure cruelty and sadism.

Thirdly, the draft does not specifically and openly exclude the possibility of exonerating a person from being prosecuted because of his status, nor does it exclude the applicability of amnesty or pardon or of the statute of limitation. This appears to be in contrast with the case law of the European Court of

⁶⁹⁷ From the official web site of the Italian House of Representatives, *Diritto e Giustizia- Reato di Tortura*, last edited in July 2016.

⁶⁹⁸ Guglielmo Taffini, *L'infame crociuolo della verità: uno studio sulla tortura*, Italy, 2015, p.88-89.

Human Rights, which has repeatedly stated the importance of including these details in national law provisions. Considering that the prohibition of torture should be absolute, a national criminal law should allow no exceptions, derogations or limitations.

The problems with the creation of an ad hoc norm are not only limited to the normative form of the prohibition. If a prohibition of torture were to be laid down in Italian legislation, it would have repercussions on the entire judicial system; it would be sufficient to think about the impact it would have on the laws regarding immigration, especially in this extremely delicate period, characterized by a grave humanitarian emergency.

4.2 In conclusion, a hypothetical law that enshrines the prohibition of torture should be as detailed and at the same time as open as possible. It should introduce a wider configuration of the crime than that envisioned by the various international treaties; next to the most serious offence committed by a public official, the commission of the crime by a private citizen should be contemplated. This would be the only way to obtain a satisfactory solution, fully respecting both the obligations under the Convention Against Torture and the European Convention of Human Rights. Furthermore, the fact that the offence is committed by a public official should be seen as an aggravating circumstance, accompanied by the appropriate sanctions. The legislation should not include extenuating circumstances, permitting public officials to benefit from reduced sentences; this would be in strong contrast absolute nature of the prohibition of torture.

With regards to the description of the conduct, it would be preferable to follow an open structure, such as the one enshrined in Article 1 of the CAT⁶⁹⁹. Torture can be perpetrated in several ways, and they should all be envisioned, as to avoid impunity at all costs. It is not wrong to insert a list of the

⁶⁹⁹ Lyal S. Sunga, *The Emerging system of international criminal law: developments in codification and implementation*, The Netherlands, 1997, p.13.

prohibited conducts, to guide the judge in its decision, but it should be as ample as possible, to avoid loopholes that could lead to impunity. Similarly, the requirement of specific intent cannot be tolerated; all behaviors, irrespective of the underlining purposes, have to be repressed and punished.

Finally, the provision should expressly envision the preclusion of the statute of limitation and the applicability of pardon or amnesty, in conformity with the case law of the ECtHR. Italian law should be clear about the condemnation of torture as an absolute and imperative value, that does not tolerate any kinds of justification, not even political instability. In the Italian judicial system, not only is there no space for the Dershowitz proposal to introduce a warrant to torture, but the application of any exculpatory circumstances has to be excluded because incompatible with the structure of torture.

The insertion of a prohibition of torture into Italian legislation should not be a symbolic intervention to mend the long delay. To fully fill the gap in its judicial system and efficiently repress and contrast torture, Italy has to take into consideration the legal context in which such a law would have to operate⁷⁰⁰. The subject-matter of the offence of torture should enshrine both the elements required by international treaties, and which conforms to the existing Italian legislation. For such a law, we will have to attend the verdict of the Italian Government.

It appears that with the development of international instruments to protect individuals, the international community has witnessed a sort of inversion of values: the guarantee of freedoms and fundamental rights, at times, is seen as an obstacle to the protection of other values that are considered to be more important, such as security. Ensuring security is no longer understood as functional to the protection of fundamental rights. On the

⁷⁰⁰Giulia Lanza, *Verso l'introduzione del delitto di tortura nel codice penale italiano*, in *Diritto Penale Contemporaneo*, p.29.

contrary, it is used to explain the recent debate on the legalization of torture. The interests of sovereign States seem to be reacquiring prevalence over the founding principles of democracy and of the rule of law. This is probably one of the reasons why draft bill n.2168 was blocked by the right and center political parties at Palazzo Madama. Angelino Alfano had explicitly expressed his concerns regarding the fate of police authorities in the country⁷⁰¹. It was made clear that the power given to police forces to safeguard our country holds such a dominant role in the Italian society that it overrules the necessity to create an *ad hoc* provision that prohibits torture. The law would change the policy choices made by the Italian State in the past years. Moreover, the provision of the offence of torture would be capable of eroding the impunity still enjoyed by some officials and public officers, and the current penitentiary system would also need to be reviewed.

Nevertheless, in a Constitutional State of Law, the dignity of each individual has to be considered as the highest value, meaning that they cannot be treated as a means to achieve an end that goes beyond them⁷⁰²: thus, torture and inhuman or degrading treatment can never be justified, considering that they dehumanize both the victims and the perpetrators. Torture is a brutal and disturbing reality, and even if it is often ignored, it is an issue that must be addressed in the social, political and legal spheres, and has to be accompanied by a public campaign to inform on its associated risks. The repression of torture on part of domestic and international courts is vital to prevent human rights from being eroded. It is essential that the principles of inviolability of the person and of human dignity are instilled in cultural and social consciousness; only when this happens will torture and inhuman or degrading

⁷⁰¹Ilaria Proietti, *Tortura, palazzo Madama sospende l'esame del reato*, article in *Il Fatto Quotidiano*, July 2016.

⁷⁰²Marta Picchi, *The Condemnation of the Italian State for violation of the prohibition of torture*, in *Journal of Law and Social Science*, 2015, p.28.

treatment be perceived as acts that cannot be justified under any circumstances.

This is why the inclusion of the prohibition of torture at a Constitutional level would be extremely important to ensure that torture does not occur within the territory of a certain State. In Italy, where the debate on a law on torture has once again come to a halt last July, ensuring the prohibition of torture in the Constitution appears to be the most effective way to avoid impunity.

Never less, the issues with this reasoning have proved to be of different nature.

Firstly, the Italian Constitutional Court is known for having always rejected the idea that the provisions of the European Convention of Human Rights have the same rank as constitutional laws⁷⁰³. Before the reform of the *Titolo V* of the Italian Constitution, which took place with constitutional law n. 3/2001, the Court had always affirmed that the ECHR, like other international treaties, held the same rank as the legislative norm which implemented it⁷⁰⁴. Considering that the ECHR had been implemented in Italy through an ordinary law of 1995, it meant that any subsequent ordinary laws which were in contrast with it could abrogate the provisions of the Convention. This obviously minimized the role of the ECHR in the Italian judicial system, an issue which has been thoroughly criticized. Italy has justified itself by stating that its legal order already contains provisions which give the same guarantees as the ECHR, even though this has proven to be far from enough, considering that the issue of impunity is still wide-spread.

A different approach has been provided by the Italian Constitutional Court itself, in a judgment of 2007. In 2001, Article 117 of the Italian

⁷⁰³ Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, Italia, 2012, p.291-293.

⁷⁰⁴ Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, Italia, 2012, p.291-293.

Constitution was amended by constitutional law n.3, providing that the legislative power is exercised by States and regions, in compliance with the constraints deriving from European law and international obligations. Given this wording, the rank of treaties in the Italian judicial system was questioned. The Italian Constitutional Court provided an answer with sentences n. 348 and 349⁷⁰⁵. The Court was called to judge the compatibility of two Italian laws with Additional Protocol n.1 of the ECHR; it found that treaties, even if made executive through an ordinary law, have a superior rank to ordinary law, and thus always prevail in cases of conflict. The Court has defined treaties as *norme interposte*, which means they are positioned at an intermediate level between Constitutional laws and ordinary laws. The logic consequence is that treaties have an inferior rank than the Constitution. The Constitutional Court also affirmed in its sentencing that the provisions of the ECHR cannot be considered as *norme interposte* if they are in contrast with a constitutional law.

However, even though this reasoning might seem relatively straightforward, it has arisen a series of doubts and contradictions. The twin sentences of 2007 provide that the norms of the ECHR limit the discretion of the legislator, but that they are still not exempt from a constitutional control⁷⁰⁶. This statement seems to be in contrast with the dualistic theory, which has always been seen with favor by the Italian jurisprudence; according to this theory, the Italian judicial order and the international order are two distinct and separate systems⁷⁰⁷. This entails that international norms do not have a

⁷⁰⁵Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, Italia, 2012, p.291-293.

⁷⁰⁶F. VIGANO', *Convenzione Europea dei diritti dell'uomo e resistenze nazionalistiche: Corte Costituzionale italiana e Corte di Strasburgo tra guerra e dialogo*, in *Diritto Penale Contemporaneo*, Milano, 2010-2014, p.10.

⁷⁰⁷S.M. CICCONE, *Creazione indiretta del diritto e norme interposte*, 2008.

self-executing⁷⁰⁸ nature and do not apply directly in the Italian judicial system; thus, they cannot be declared constitutionally illegitimate.

It must be noted, furthermore, that human rights treaties, such as the ECHR, hold a special place in Italian legislation according to the Constitutional Court⁷⁰⁹. Given their particular contents, they can never be modified or abrogated by subsequent ordinary laws; thus, they are positioned at the same level of Constitutional laws, complementing them. The jurisprudence has been oriented to interpret constitutional norms in the light of international provisions on human rights, as being directly applicable in the Italian judicial system.

Thus, given this reasoning, the prohibition of torture could be enshrined in the Constitution as one of the fundamental principles, along with the first fundamental freedoms. This way, it would avoid all issues regarding the ranking and hierarchy in the Italian legislative system.

Another solution to the issue of the ranking of the provisions of the ECHR in the Italian judicial system might be to read Article 2 of the Italian Constitution as an open clause. Article 2 states that “the Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed”. This might create the regulatory basis to give full implementation to the ECHR in the Italian legal system. By recognizing the provisions enshrined in the European Convention as inviolable rights, they would be raised at a constitutional rank.

Another way to resolve this problem could be based on Article 11 of the Italian Constitution, with regards to the part where it states that Italy accepts the necessary limitations to its sovereignty to ensure peace and justice between nations. One could read Article 11 as if implying that by ratifying the ECHR,

⁷⁰⁸It must be noted that when defining a treaty as self-executing, it does not mean that its clauses directly apply in the national judicial system; it means that the order of execution is sufficient by itself, without having to resort to parallel legislation.

⁷⁰⁹Carlo Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, Italia, 2012, p.292-293.

the Italian State has accepted limitations to its sovereignty, and thus, incorporates its provisions as part of its judicial system. However, the judges of the Constitutional Court have states that this article cannot discipline the relationship between the Italian national order and the ECHR, because by adhering to the Convention the Italian State has not agreed to any limitations of sovereignty.

Secondly, the principles expressed by the European Court should be integrated in each legal system by the legislator himself. Italy in particular has been reluctant to give execution to the judgments of the Court. The Italian country has to find a way to recognize the Court as the judge of last instance, when it comes to protecting human rights; moreover, the European Convention has to be accepted as part of Italian law, that judges are called upon to interpret and apply.

Thirdly, the ECHR theoretically limits the discretion of the national criminal legislator, by imposing the duty to incriminate the unlawful acts under the Convention. These positive obligations for States to create adequate legislation to implement the provisions of the ECHR are accompanied by negative obligations of abstention, requiring States to abstain from holding unlawful conducts. The fact that these obligations exist under the European Convention, to guarantee the respect for human rights, entails that there is an actual constitutional duty to criminalize certain conducts, by virtue of the mechanism envisioned by Article 117 of the Italian Constitution, as interpreted by the two sentences of the Constitutional Court of 2007.

Torture is the disease of a democratic State, and as such, has to be adequately repressed and punished. Italy has failed to fulfill its duties for a long time, and it is now time for the Government to take an active stand to close the existing gap in the Italian legislation. It is not acceptable to continue

tolerating the widespread impunity that has been dominating the country for over two decades, especially with regards to such a crucial right; the right to be free from torture.

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