

# **The crime of Torture: an in-depth analysis from its origins to the latest proposed amendment.**

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## INTRODUCTION

«Torture is the most odious of crimes against humanity. Yet for at least three thousand years its practice has been carried out in compliance with precise legal norms, regulated by most European and Asian codes»<sup>1</sup>.

Accordingly, torture is one of the oldest crimes of history, which has been able to strike humanity innumerable times. Nonetheless, there is the need to shed light on a particularly powerful contradiction concerning the heinous nature of torture and its acquiescence within several legal systems.

Before the introduction of such crime, the practice of torture was sought to be used as a method for obtaining information or for punishing alleged criminals, and was, therefore, legitimized. However, torture, as known today, refers to an abominable practice, dealing with horrific conducts. This statement begs a fundamental question: how is it possible that, in the past, such a practice was not only committed regularly but, most importantly, it was even legalized?

Millennia ago, the very concept of humanity, which in these days and age is of utmost importance, was not at the center of the attention, being rather out of focus. Thus, this was the main basis causing torture to exist: human dignity was not universally recognized, rendering it simple for the legislator to use torture for the «common good», and therefore for social and political purposes. Thankfully, the whole concept of torture was reevaluated, leading to highlight its true nature: it clearly violates core values of human dignity, justice and respect for human rights. From this point on, the community felt the need to avoid repeating the same mistakes all over again, to learn from them, and to fill the normative lacuna, which characterized the world until that very moment. Nowadays, torture is addressed and recognized as an international crime, sanctioned by various treaties, even at the European level.

When speaking about torture, specifically in Italy, it is necessary to make reference to the infamous “*Colonna Infame*” by Alessandro Manzoni or another

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<sup>1</sup> INNES, B., *La storia della tortura. Strumenti e protagonisti di una tragica epopea, dall'antichità ai giorni nostri*, 2009.

picture that comes into mind refers to witch trials<sup>2</sup>. In this stance, the prominent jurist Carnelutti argued that torture should be categorically prohibited since it provides no assurance as to the veracity of the statements and responses coerced out of the victim<sup>3</sup>. This viewpoint demonstrates a deep understanding of the inherent absurdity of using torture to further an investigation or carry out justice<sup>4</sup>. Carnelutti contends that it would be ideal if there was a way to ensure the truth without endangering the interrogated person's body: it produces unreliable and distorted results, since individuals who are subjected to torture would say anything to please their tormentors in an effort to put an end to their agony. Torture also damages people psychologically and physically, leaving both the victims' and the torturers' souls with permanent scars; it erodes the moral foundation of society, and erodes confidence in the legal system.

In 2021, the former Italian Prime Minister, Mario Draghi, released a statement, following the events taking place in the Santa Maria Capua Vetere prison, in which he clarified something of utmost importance «*Justice cannot exist where there is abuse. And there can be no rehabilitation where there is oppression*»<sup>5</sup>. He specifically cited Article 27 of the Italian Constitution, which adds a crucial clause stating that punishment cannot include any form of treatment that is hostile to humanity and must instead be directed towards the rehabilitation of the convicted individual<sup>6</sup>.

Also, the former Minister of Justice, Marta Cartabia commented on the atrocities and, referring to the same Article, said that: «*A prison is a place of pain, of suffering. A Prison is a place of punishment, indeed. But may it never be a place of violence and humiliation*»<sup>7</sup>. She continues her statement sanctioning the conducts that had taken place in that very institution, aiming at letting people understand that certain acts must not be repeated in any circumstance, and that the community shall

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<sup>2</sup> BUZZELLI, S., *Tortura: una quaestio irrisolta di indecente attualità*, in *Dir. Pen. Cont.*, 26 giugno 2013, 1.

<sup>3</sup> BUZZELLI, S., *Tortura: una quaestio irrisolta*, cit., 1 s.

<sup>4</sup> BUZZELLI, S., *Tortura: una quaestio irrisolta*, cit., 2.

<sup>5</sup> CARTABIA M., DRAGHI, M., “*Mai più violenza!*”. *Gli interventi del Presidente del Consiglio Draghi e della Ministra della Giustizia Cartabia in occasione della visita al carcere di Santa Maria Capua Vetere*, in *Sist. Pen.*, 15 luglio 2021.

<sup>6</sup> CARTABIA, M., DRAGHI, M., “*Mai più violenza!*”, cit.

<sup>7</sup> CARTABIA, M., DRAGHI, M., “*Mai più violenza!*”, cit.

learn from its past mistakes: «*We are here because the very serious events that occurred require a collective approach to the problems of our prison institutions, so that acts of violence are not repeated against detainees or against prison officers or staff. It is not enough to condemn what happened; we must remove its deeper causes and create environmental conditions so that such incidents do not recur and punishment is increasingly in line with the purpose that the Constitution assigns to it*»<sup>8</sup>.

The present dissertation will, therefore, consist in a deep analysis of the crime of torture, not only seen from a national standpoint, but even from an international and European point of view.

Its first chapter seeks to underline the absence of the aforementioned crime in the Italian legal system, the reasons behind it and Italy's necessity to adhere to the obligation arising from the Constitution as well as International and European tools. Not only in 1984 the UN Convention Against Torture had been introduced, paving the way for the criminalization of torture and requiring its Member States to comply with this obligation, but even the Italian Constitution in its Article 13 comma 4 requested so. Italy's behavior led to catastrophic consequences and various condemnations from the European Court of Human Rights. Above all, the first chapter will analyze the case *Cestaro v. Italy* and how Italy responded to it.

The second chapter deals with the consequences after the *Cestaro* case and how Italy slowly enacted Law No. 110 in 2017, introducing Articles 613-bis and 613-ter in the Criminal Code, punishing respectively torture and incitement to commit torture. Thus, this chapter will analyze these articles and their multiple commas and will lastly make reference to the repeal proposal presented at the end of 2022.

Moving on to the third chapter, it will describe torture in its International and European appearance. Primarily, torture was an international crime, and the Convention Against Torture is the only legal instrument containing a definition. The analysis will continue, looking at other international instruments, which gave their contribute in assessing the crime at hand. As for the European point of view, strictly relevant is the European Convention of Human Rights, accompanied by the

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<sup>8</sup> CARTABIA, M., DRAGHI, M., "*Mai più violenza!*", cit.

European Charter of Fundamental Rights. Once an international and European evaluation of the crime of torture is concluded, then the main differences with torture, as described in the Italian legal system, will be addressed. As stated before, under these treaties, Member States were targets of different obligations, and apart from the one which requires them to criminalize torture, this chapter will analyze the essential ones.

The fourth and last chapter is devoted to the analysis of case-law, dealing with acts of torture carried out in prisons. Firstly, it will list different acts which can amount to torture and then it will refer to two of the most important cases occurred in Italy recently. However, a line needs to be drawn: whilst the first case at hand, *Cirino and Renne v. Italy*, describes a situation in which the crime of torture was not introduced yet, and therefore Article 613-bis could not be applied, the case concerning the Santa Maria Capua Vetere detention facility describes conducts which allegedly amount to torture, and were committed after the introduction of the aforementioned provision. Nevertheless, the criminal proceedings are still being conducted, and the Court still needs to rule definitively on the events.

# CHAPTER 1

## THE ABSENCE OF THE CRIME OF TORTURE IN THE ITALIAN LEGAL SYSTEM

### 1. Preface.

The present chapter aims to shed light on the complexities surrounding the Italian legal system in the decades from 1989 to 2017, a period of time in which Italy, even though ratified the Conventions and Protocols regarding the prohibition of torture, was eager to introduce the aforementioned crime at national level. Until very recently, specifically in 2017, Italy had struggled to fulfill its International, European and, above all, Constitutional obligations. These concerned the need to introduce a specific crime concerning torture, sanctioning and punishing conducts that fall within its meaning.

The question that had been waiting to be answered for decades was the following: how come and why a conduct, prescribed by a jus cogens norm<sup>9</sup> and that is commonly described as “*delictum iuris gentium*”<sup>10</sup> cannot amount to a crime for the Italian legislator<sup>11</sup>? Indeed, just the mere and simple international treaties’ ratification and execution is not sufficient to adapt the Italian legal system to international norms, which are not sufficiently precise and complete (the so called self-executing norms)<sup>12</sup>. That is why the Italian legal system, together with all the ratifying States’, is requested to introduce *ad hoc* laws and norms<sup>13</sup>.

In addition, the chapter will analyze the motives which led the Italian legislator to avoid fulfilling the mentioned obligations, why he deemed unnecessary to introduce a specific crime of torture, and how these main reasons were not enough and were considered to be unfounded. Italy’s ignorance to the obligations had surely created some drawbacks. The Nation faced multiple condemnations by the European Court of Human Rights<sup>14</sup> for its failure to introduce such a specific

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<sup>9</sup> The term “jus cogens” describes norms from which no derogation is allowed by way of particular agreements. It is said that these norms have a preemptory character.

<sup>10</sup> Those crimes that for their cruelty and brutality allow almost every state to inflict punishment.

<sup>11</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione: anatomia di un reato che non c’è*, in *Diritto Penale Contemporaneo, Rivista Trimestrale*, 2/2014, 132.

<sup>12</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 132.

<sup>13</sup> This seems to reject the thesis embraced by many Italian authorities, who state that the prohibition of torture, as set out in the CAT, is directly applicable in the Italian legal system, thanks to the receptive referral.

<sup>14</sup> From now on ECtHR.



offence. The most important cases that are going to be fully analyzed regard the situation after the G8 Summit in Genoa in 2001, by way of which, insights into a broader evolution of the Italian legal system will be offered and Italy's path to the criminalization of torture will be addressed.

## **2. Italy's necessity to comply to the Constitutional, European and International obligations.**

### **2.1. Constitution: the only crime constitutionally protected.**

Surely, in order to comprehend the reasons behind the criminalization of torture there are a few starting points to be analyzed, one of them being States' obligations arising from the different sources of law. Although it may seem that the Italian's normative lacuna would be in connection to the ratification of the Convention against Torture<sup>15</sup>, in 1989, and therefore that Italy was in breach of the Convention itself, the problem actually dates back to the introduction of the Constitution, in 1948<sup>16</sup>. In its Article 13, the fourth comma allows for force to be used, however it rejects violence used by individuals representing the State and it clarifies that «*Any physical and moral violence against individuals subject in any way to limitations of freedom is punishable*»<sup>17</sup>. Furthermore, it constitutes the only and most prominent example of Italy's constitutional obligations regarding the criminalization of torture: it is the only article within the Italian legal system referring to «*punishment*» when there has been any «*physical or moral violence against individuals subject in any way to limitations of freedom*»<sup>18</sup>.

Bearing this article in mind, the only possible solution for the government was to access to the CAT, as this move was supposed to be seen as a fulfillment of Italy's Constitutional obligations. Therefore, the Italian government needed a law prohibiting torture, since it amounts to the only law (and crime, consequently) constitutionally requested<sup>19</sup>. Accordingly, the ratification itself was seen as a given

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<sup>15</sup> From now on: CAT.

<sup>16</sup> PUGIOTTO, A., *Repressione penale della tortura*, cit., 133.

<sup>17</sup> PUGIOTTO, A., *Repressione penale della tortura*, cit., 133.

<sup>18</sup> PUGIOTTO, A., *Repressione penale della tortura*, cit., 133.

<sup>19</sup> GONNELLA, P., *Un reato fantasma ma è l'unico chiesto nella Costituzione*, in *Il manifesto*, 2012.

act, being constitutionally imposed by Article 117 comma 1, which requires Italy to respect and observe international treaty obligations, and Article 10 comma 1, by way of which the Italian legal system needs to adhere to international customs<sup>20</sup>.

Nonetheless, the mere accession to the Convention won't simply do the trick: it is deemed necessary that the effects and obligations deriving from it will be put into practice<sup>21</sup>. The following principle cannot be stressed enough: the Constitution does not simply prohibit torture, it also requires Italy to criminalize it<sup>22</sup>. As a matter of fact, one of the most important constitutional principles in Italian penal law, which clarifies that criminalization is seen as an *extrema ratio*, and thus needs to be used only when other non-criminal tools are unavailable, does not apply when one speaks of torture, which, contrarily, needs to be explicitly and criminally sanctioned<sup>23</sup>. It is described as something extremely abominable and averse from the Italian legal system<sup>24</sup>.

However, Italy, even after introducing the specific crime under Article 613-bis of the Italian criminal code, still seemed to be in breach of its obligations, constitutionally speaking. When introducing the mentioned article, the Italian legislator should have paid more attention to what the Father Constituents wanted to express about torture, and he should have used Article 13 comma 4 as a handbook to build the crime of torture, properly<sup>25</sup>. Specifically, Article 13 does not protect one's personal generic freedom, rather it safeguards the unavailability and inviolability of one's body from public authorities<sup>26</sup>. The Constitution aims at prohibiting the so called «*State Torture*», differently from what can be drawn from the Italian criminal code, which only refers to a crime that can be committed by anyone<sup>27</sup>.

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<sup>20</sup> PUGIOTTO, A., *Una legge sulla tortura, non contro la tortura. Riflessioni costituzionali suggerite dalla l.n. 110/2017*, in *Quaderni Costituzionali*, 2018, Fascicolo 2, 390.

<sup>21</sup> PUGIOTTO, A., *Una legge sulla tortura*, cit., 391.

<sup>22</sup> PUGIOTTO, A., *Una legge sulla tortura*, cit., 391.

<sup>23</sup> PUGIOTTO, A., *Una legge sulla tortura*, cit., 391.

<sup>24</sup> LANZA, G., *Obblighi internazionali d'incriminazione penale della tortura e ordinamento interno*, in *Indice Penale*, 2011, 746 ss.

<sup>25</sup> PUGIOTTO, A., *Una legge sulla tortura*, cit., 396.

<sup>26</sup> VICARI, D., *Libertà, democrazia e derive autoritarie*, in Aa.Vv., *Tortura fuorilegge*, Udine, Forum, 2016, 32.

<sup>27</sup> PUGIOTTO, A., *Una legge sulla tortura*, cit., 396.

Moving on, Article 13 comma 4 refers to the punishment, consisting in any physical and moral violence towards individuals «*in any case*» subject to restrictions of their personal freedom<sup>28</sup>. The term quoted is intended to punish acts of torture carried out within «*any asymmetrical relationship between a strong and a weak person; not only in places of detention, but also elsewhere, such as in institutions for elderly or disabled persons, kindergartens and schools*»<sup>29</sup>.

Constitutionally speaking, the prohibition of conducts amounting to torture concerns the particular relationship between public authorities and individuals<sup>30</sup>. The legislator should have looked at the Constitution even when dealing with the crime's moment of consumption<sup>31</sup>. Indeed, it was stated that in order to have torture multiple acts of violence or threats thereof are necessary. In 2016, the Senator D'Ascola, who was also the relator to the draft of Law No. 110, stated that «The phrase "violenze o minacce gravi" implies that torture cannot be considered present if there is only a single act. The actions must be multiple, not just one». By doing so, torture transforms into a compound offense, contravening international conventions «that unequivocally forbid the crime without any room for additional normative elements equivalent to restrictions or exceptions»<sup>32</sup>. Moreover, when considering the repetition by the same agent, uncertainty arises regarding whether the requirement is fulfilled in the scenario of a series of individual actions carried out by multiple parties in collaboration<sup>33</sup>.

Specifically, it was held that «*it's not enough to spread one's fingers until the ligaments are torn, it's not enough to surround a woman and threaten to rape her after insulting her, it's not enough to prevent one from sleeping just one time: these acts need to be repeated*»<sup>34</sup>.

Moreover, unlike the Constitution, which refers to «*any violence*», Article 613-bis requires violence or threats of violence only if serious or when one acts

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<sup>28</sup> PUGIOTTO, A., Una legge sulla tortura, cit., 397.

<sup>29</sup> PUGIOTTO, A., Una legge sulla tortura, cit., 397.

<sup>30</sup> PUGIOTTO, A., Una legge sulla tortura, cit., 397.

<sup>31</sup> PUGIOTTO, A., Una legge sulla tortura, cit., 398.

<sup>32</sup> POCAR, F. (2017), *Reato di tortura, nonostante la legge l'Italia sarà criticata*, in *Guida al Diritto*, n. 31, 8.

<sup>33</sup> DI MARTINO, A., *Appunti sulla tipizzazione del fatto. Tra eredità storiche e questioni di tecnica legislativa*, in Prospero, A. e di Martino, A. (a cura di), *Tortura. Un seminario*, Pisa, Edizioni della Normale, 2017, 120.

<sup>34</sup> DI CESARE, D., *Serve più chiarezza sul reato di tortura*, in *Corriere della Sera*, 2017.

with cruelty<sup>35</sup>. Differently from the Constitution, which puts up with a physical or moral suffering, the criminal provision requires a verifiable psychological trauma<sup>36</sup>. From the legislator's perspective, one can infer that, the way torture is outlined in Article 613-bis, State Torture simply represents an aggravated variant of the crime of torture, derailing from what the Constitution and International law stated, and above all, from what Law No. 110/2017 had tried to establish from its very beginning: every point in that law refers to a failure in the state, except when describing and referring to the legal qualification of the crime<sup>37</sup>.

In reference to Law. No. 110, two points catch the reader's attention: the first one referring to the fact that the crime of torture is excluded from the list of those crimes which present no Statute of Limitations and those crimes, which Statute of Limitations' is doubled; the second one regards the exclusion of punishment when torture arises from «*suffering resulting solely from the execution of legitimate measures depriving and limiting rights*»<sup>38</sup>. In conclusion, one might say that Italy by criminalizing torture has surely fulfilled its Constitutional obligation, which had been infringed for so many decades. However, even in doing so, it introduced the offence in an inaccurate way, not paying too close attention to what the Constitution actually aimed at sanctioning.

## **2.2. European Convention on Human Rights.**

Even if, Italy's obligations arising from its Fundamental Charter are surely primary, and, therefore, Italy must comply with them, they are not the only ones. The EU should motivate States to implement efficient legislative, administrative, judicial and other measures to avoid torture and other forms of ill-treatment in any area that falls under their jurisdiction<sup>39</sup>. It must be noted that the European Convention on Human Rights<sup>40</sup> plays a prominent role, and special attention must

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<sup>35</sup> PUGIOTTO, A., Una legge sulla tortura, cit., 399.

<sup>36</sup> PUGIOTTO, A., Una legge sulla tortura, cit., 399.

<sup>37</sup> PUGIOTTO, A., Una legge sulla tortura, cit., 401.

<sup>38</sup> PUGIOTTO, A., Una legge sulla tortura, cit., 402.

<sup>39</sup> Council of the European union, *Guidelines on EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 12107/19, 2019 Revision of the Guidelines, 22.

<sup>40</sup> From now on: ECHR.

be directed towards its Article 3: «*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*».

However, this is neither the time nor place to discuss the understanding and the analysis of the present article, while chapter 3 will be. The present paragraph is intended to shed light only on the obligations arising from the Article itself.

Article 3 ECHR's fundamental traits regarding State's obligations can be traced in the imposition of positive and negative obligations to States that are parties to the Convention<sup>41</sup>.

Firstly, States have a major negative obligation, that is «*to refrain from inflicting serious harm on persons within their jurisdiction*»: this means that states are required to abstain from intentionally inflicting serious harm or engaging in treatment that is inhuman or degrading on individuals within their jurisdiction; it is a duty to avoid such actions and protect individuals from harm caused by state agents or public authorities<sup>42</sup>.

Secondly, the European Court of Human Rights has recognized the need to respect positive obligations, which are as important as the negative one. First and foremost, States must establish a legislative and regulatory framework that effectively protects individuals from inhuman or degrading treatment: this means that they should enact laws and regulations to prevent such treatment<sup>43</sup>. In this regard, Italy must introduce specific provisions in its domestic legal system, which prohibits conducts that are considered to amount to torture and inhuman or degrading treatment, or more generally ill-treatment. Furthermore, under specific circumstances, States must introduce and, thereafter, ensure the applicability of operational measures which are meant to protect specific individuals from a risk of treatment that contravenes what is set out in the provision<sup>44</sup>. States may also be obliged to carry out effective investigations when there are credible claims of

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<sup>41</sup> Guide on Article 3 of the European Convention on Human Rights. Prohibition of Torture, 1<sup>st</sup> ed., 2022, 6.

<sup>42</sup> European Court of Human Rights, 4<sup>th</sup> Section, Judgement, *Case of Hristozov and Others v. Bulgaria*, Applications No. 47039/11 and 358/12, November 13<sup>th</sup>, 2012, §111.

<sup>43</sup> European Court of Human Rights, Grand Chamber, Judgement, *Case of X and Others v. Bulgaria*, Application No. 22457/2016, February 1<sup>st</sup>, 2021, §178.

<sup>44</sup> ECtHR, *X and Others v. Bulgaria*, cit., §178.

inhuman or degrading treatment, and in case of allegation of such treatment, the appropriate court should investigate the matter thoroughly<sup>45</sup>.

As positive obligations have been outlined, it is possible to rank them in different categories. The positive obligations are categorized into “substantive” obligations related to the first two aspects (the creation of a legal framework and operational measures) and a “procedural” obligation, related to the third aspect (the effective investigation)<sup>46</sup>. In other words, it may be said that obligations laid down in Article 3 ECHR are of crucial importance since their primary purpose is to ensure that States do not engage in inhuman or degrading treatment and that they take proactive steps to prevent and respond to such treatment, thereby safeguarding individuals’ human rights within their jurisdiction, as per the ECHR.

Italy ratified the ECHR in 1955 and it is bound to the Convention, as well as to the Charter of Fundamental Rights, by way of Articles 10, 11 and 117 comma 7 of its Constitution. However, having introduced the crime of torture only in 2017, Italy hadn’t fulfilled its obligation for a very long time, for more than 60 years. By not introducing such crime, Italy could not possibly respect the obligations contained in the ECHR that followed.

Among the most important case-law concerning Italy’s violation of the ECHR, *Khlaifia and Others v. Italy* needs to be mentioned. In the present case the applicants alleged that the detention and treatment they suffered violated Articles 3 and 5 of the European Convention, and Article 4 of the 4<sup>th</sup> Protocol concerning the «prohibition of collective expulsion», which was also linked to Article 13’s guarantee of an effective remedy for every right expressed in the ECHR<sup>47</sup>. Italy observed that it was acting in respect of a secret agreement established between them and Tunisia, which required for Italy to identify migrants and expel them<sup>48</sup>. The applicants argued that Italy had deprived them of their liberty for ten days without any reasons or legal justification: they were not even offered the possibility

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<sup>45</sup> ECtHR, *X and Others v. Bulgaria*, cit., §178.

<sup>46</sup> Guide on Article 3 ECHR, cit., 6.

<sup>47</sup> GIL, A.R., *Collective expulsions in times of migratory crisis: Comments on the Khlaifia case of the ECHR*, in EU Migration Blog.

<sup>48</sup> European Court of Human Rights, *Khlaifia and Others v. Italy*, Judgement, Application No. 16483/12, September 1<sup>st</sup>, 2015, § 58.

to contest their detention<sup>49</sup>. Differently, Italy argued that migrants were accurately informed, in a language they understood, of the legal reasons behind their detention and subsequent expulsion<sup>50</sup>.

The case was brought to one of the Chambers in the ECtHR, which admitted that Italy explicitly violated Article 5 ECHR by not properly protecting migrants and by not ensuring them their procedural rights; it also stated that the Italy did not violate Article 3, as regards the applicants' detention<sup>51</sup>. However, as it did not provide migrants with appropriate remedies for the abuses of their rights under Article 3 ECHR and Article 4 of Protocol 4, it was determined that there had been a violation of Article 13 ECHR, which guarantees a remedy for every right established in the Convention<sup>52</sup>.

Later on, a request to defer the case to the Grand Chamber was presented by Italy<sup>53</sup>. First of all, in accordance with the previous ruling, the Grand Chamber noted a violation of Article 5 of the Convention, concerning the detention of migrants<sup>54</sup>. The infringement derived from the fact that these individuals could not be imprisoned in emergency accommodations (as happened in the case) without established grounds<sup>55</sup>. Specifically, the article at hand deals with *«a person's physical liberty and its aim is to ensure that no one should be dispossessed of such liberty in an arbitrary fashion»*.

In assessing whether Article 5 was infringed, the Court needs to take a look at the persons' current and concrete position, taking into account other criteria, such as type, duration, effect and manner of implementation of the measure established<sup>56</sup>. For instance, migrants were forbidden to go outside the detention center, they were confined for a very long period of time (between 9 and 12 days), circumstances that made the internment equivalent to torture<sup>57</sup>. On the other hand, Italy argued that it was trying to protect migrants by detaining them, and that the detention they were

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<sup>49</sup> GIL, A.R., *Comments on the Khlaifia case*, cit.

<sup>50</sup> ECtHR, *Khlaifia and Others v. Italy*, cit., § 113.

<sup>51</sup> GIL, A.R., *Comments on the Khlaifia case*, cit.

<sup>52</sup> WUERTH, I., *International decisions*, cit., 275.

<sup>53</sup> WUERTH, I., *International decisions*, cit., 276.

<sup>54</sup> ECtHR, *Khlaifia and Others v. Italy*, cit., § 64.

<sup>55</sup> WUERTH, I., *International decisions*, cit., 276.

<sup>56</sup> ECtHR, *Khlaifia and Others v. Italy*, cit., § 64.

<sup>57</sup> WUERTH, I., *International decisions*, cit., 276.

suffering did not amount to a crime in Italy<sup>58</sup>. However, as per Article 5 «*even measures intended for protection or taken in the interest of the person concerned may be regarded as a deprivation of liberty*»<sup>59</sup>. As a result, the Court held that Italy deprived migrants of their liberty, also by not giving them a sufficient justification and by not giving them a chance to review the lawfulness of their detention. The Court moved forward revising Article 3 of the Convention, having to assess whether the conduct the migrants were subjected to could amount to inhuman or degrading treatment<sup>60</sup>. Having to look at the specific circumstances of the case, Italy claimed that the applicants were detained in an exceptional humanitarian emergency; while the Grand Chamber expressed the need to make reference to the absolute character of the prohibition on torture and cruel, inhuman or degrading treatment or punishment, from which it can be inferred that the presence of «*a mass influx did not absolve a State of its Article 3 obligations*»<sup>61</sup>.

The Grand Chamber concluded that, in light of the circumstances, the treatment of the migrants did not exceed the degree of severity required under Article 3<sup>62</sup>. Additionally, the applicants did not provide any objective evidence to support their claims of severe unclean conditions and overcrowding in Palermo, and the confinements was only temporary<sup>63</sup>. Lastly, the applicants lacked the «*specific vulnerability inherent in that status*» since they were not asylum seekers<sup>64</sup>. The applicants were young men in good health who did not belong to any typically vulnerable classes, nor there were children or asylum seekers<sup>65</sup>. Hence, the Court did not view them as "vulnerable," notwithstanding the possibility that the sea journey had weakened them psychologically and physically<sup>66</sup>. The Court hinted that it might have come to a different conclusion if they had been in danger<sup>67</sup>. As per Article 4 of Protocol 4, the Court established that Italy's deportation did not constitute a collective expulsion, having regard to the special circumstance of the

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<sup>58</sup> WUERTH, I., International decisions, cit., 276.

<sup>59</sup> WUERTH, I., International decisions, cit., 276.

<sup>60</sup> WUERTH, I., International decisions, cit., 277.

<sup>61</sup> ECtHR, *Khlaifia and Others v. Italy*, cit., § 184 s.

<sup>62</sup> WUERTH, I., International decisions, cit., 277.

<sup>63</sup> ECtHR, *Khlaifia and Others v. Italy*, cit., § 194.

<sup>64</sup> ECtHR, *Khlaifia and Others v. Italy*, cit., §194.

<sup>65</sup> WUERTH, I., International decisions, cit., 277.

<sup>66</sup> WUERTH, I., International decisions, cit., 277.

<sup>67</sup> WUERTH, I., International decisions, cit., 277.



case<sup>68</sup>. Differently, the Grand Chamber noted a clear violation of Article 13 in conjunction with Article 3 of the Convention, due to the fact that the applicants had no remedy regarding the conditions of their confinement on the ships<sup>69</sup>. However, since the migrants had the chance to challenge decisions denying their admission before the Agrigento Justice of the Peace, Italy did not violate Article 13 in conjunction with Article 4 of Protocol 4<sup>70</sup>. In conclusion, the case *Khlaifia and Others v. Italy* was one many examples from which Italy's obligations arising from the Convention were not fulfilled, and, therefore, it stressed out the need for the Italian legislator to adhere to them and adapt its domestic legal system.

### 2.3. Charter of Fundamental Rights of the European Union.

The Charter of Fundamental Rights of the European Union sets out various obligations for EU Member States<sup>71</sup>, concerning the prohibition of torture and inhuman or degrading treatment. Article 4 of the Charter explicitly states that «*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*». That is to say that all EU Member States are obliged to prevent and, when not possible, forbid any form of torture or inhuman or degrading treatment within their soils. Another crucial provision contained in the Charter is Article 52<sup>72</sup>, concerning the scope and interpretation of its rights and principles: one can definitively assert that EU Member States must respect the fundamental rights guaranteed by the Charter itself, including the right to be free from torture and inhuman treatment<sup>73</sup>. Article 47 of the Charter concerns the right to an effective remedy and to a fair trial<sup>74</sup>: the present article concerns situations in which

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<sup>68</sup> WUERTH, I., *International decisions*, cit., 277.

<sup>69</sup> WUERTH, I., *International decisions*, cit., 277.

<sup>70</sup> WUERTH, I., *International decisions*, cit., 277.

<sup>71</sup> And, therefore, they are applicable to Italy as well.

<sup>72</sup> Article 52 comma 1 in its first period states that «*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms*».

<sup>73</sup> As outlined in article 4 of the Charter.

<sup>74</sup> Article 47 in its first comma refers to the right to an effective remedy and clarifies that «*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article*». While the second comma refers to the right to a fair trial and underlines that «*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial*

individuals believe that their rights under Article 4 of the Charter have been infringed, and consequently they are entitled to seek effective remedies at national level. In connection to obligations arising for EU Member States, it has been established that they are obliged to set up internal legal mechanisms for victims to pursue justice and reparation, when an act of torture or inhuman treatment has been carried out. Looking back to the previous obligations laid down in the Charter, one can argue that since its entry into force<sup>75</sup>, Italy has not respected its duties by not criminalizing conducts that amount to torture (in connection to Article 4), not respecting individuals' fundamental rights (Article 52), and not prescribing remedies at national level (Article 47).

#### **2.4. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).**

The UN Committee Against Torture (CAT) and the European Committee for the Prevention of Torture (CPT) continuously warned and requested the Italian government to implement in its domestic legal system a norm criminalizing torture, therefore punishing conducts that amount to degrading or inhuman treatment<sup>76</sup>. Italy failingly tried to take time with the Committees, arguing that the conducts expressly sanctioned by international treaties are, indeed, already present in the domestic criminal code, even though it lacked a specific provision; moreover, it continued arguing that multiple law proposals have been carried out in order to introduce the crime of torture<sup>77</sup>.

Individuals are granted a variety of rights-related guarantees by International Human Rights Treaties; each of these presents a corresponding governmental responsibility<sup>78</sup>. The Convention (CAT) prescribes and imposes

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*tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented».*

<sup>75</sup> The European Charter of Fundamental Rights entered into force in 2009, when the Treaty of Lisbon became legally binding.

<sup>76</sup> GRAZIANI, F., *L'adattamento dell'Italia alle norme internazionali sul divieto di tortura: una riflessione sulla proposta di legge n. 2168*, in *La Comunità Internazionale*, LXIX vol., Editoriale Scientifica, 2014, 597.

<sup>77</sup> GRAZIANI, F., *Una riflessione sulla proposta di legge*, cit., 597.

<sup>78</sup> MESKELE, K., *Interpretation of Article One of the Convention against Torture in Light of the Practice and Jurisprudence of International Bodies*, in *Beijing Law Review*, 5, 49-61, 2014, 56.

multiple obligations onto States, similar to the ones set up in the ECHR, classifying them in two different types: negative ones, such as not interfering interfering in one's right not to be tortured<sup>79</sup>; positive ones, such as criminalizing, investigating, punishing conducts seen as torture and taking measures to prevent them<sup>80 81</sup>. Above all, Article 1 gives a definition of torture and requires for States that are parties to the Convention to stick to that definition and to avert any of these kinds of acts, which may be committed by their agents, even through their participation, as well as by private individuals up on acquiescence.

In describing the Committee's role in the establishment of states' obligations, special attention must be directed towards General Comment No. 2 issued in 2008, which concerns specifically Article 2 of the Convention. The Article in its first comma 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*» and it presents a few key points. First of all, it deals with the obligation to prevent torture, placing a fundamental obligation on each State Party to take effective measures, which can be legislative, administrative, judicial or other, to prevent acts of torture within any territory under its jurisdiction<sup>82 83</sup>. Article 2 presents interrelated obligations, since the ones preventing torture and other forms of ill-treatment (cruel, inhuman or degrading treatment or punishment) under Article 16 comma 1 are strictly interconnected<sup>84</sup>. The Committee considers them indivisible and emphasizes that the means of preventing ill-treatment, as outlined in articles 10 to 13, are also relevant for preventing torture; the lines between torture and ill-treatment can be blurred, and conditions that lead to ill-treatment can facilitate torture<sup>85</sup>. The Committee underscores that the prohibition of torture and the obligations to prevent it are non-derogable, meaning that there are no

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<sup>79</sup> A state must not instigate any act of torture.

<sup>80</sup> The specific obligation to prevent acts of torture is also outlined in Article 2 of the Convention, which was meant to expand the scope of the measures required to fulfill the obligation itself.

<sup>81</sup> MESKELE, K., *Interpretation of Article 1 UNCAT*, cit., 56.

<sup>82</sup> It represents an absolute obligation which leaves no room for exceptions.

<sup>83</sup> Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No.2, 2008, 1.

<sup>84</sup> GAER, F.D., *Opening Remarks: General Comment No. 2*, in *New York City Law Review* 187, 2008, 196.

<sup>85</sup> GAER, F.D., *Opening Remarks*, cit., 196.

circumstances where a State can justify or excuse torture<sup>86 87</sup>. State Parties are obliged to remove any obstacle (with a legal nature or any other deterrent) that hinder the eradication of torture and ill-treatment: they must take positive and effective measures to ensure that such acts are effectively prevented and do not occur<sup>88</sup>. States must keep on reviewing and enhancing their national laws and their performance under the Convention, including taking into account the Committee's concluding observations and views adopted on individual communications<sup>89</sup>. If the measures taken by a State fail to effectively prevent torture, the Convention requires them to revise these measures or adopt new and more effective ones<sup>90</sup>. The Committee acknowledges that the understating of effective measures to prevent torture and ill-treatment, as well as methods used for such purposes, are in a state of constant evolution: states must adapt their approaches to align with evolving best practices and knowledge<sup>91</sup>. Moving on to Article 2 comma 2 of the Convention, it is stated 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»*. Firstly, it establishes an absolute and non-derogable prohibition against torture, explicitly clarifying that no circumstance, even if exceptional, can be used by a State Party as a justification for acts of torture<sup>92</sup>. In connection, the Committee strongly denies any efforts by States to justify torture or ill-treatment under the pretext of protecting public safety or addressing emergencies: this applies to any situation, including the aftermath of significant events, such as the tragedy that stroke the United States in 2001 on September 11<sup>th</sup><sup>93</sup>. Moreover, amnesties, or any other measure, that prevents or indicates a lack of willingness to promptly and fairly prosecute and punish perpetrators of torture or ill-treatment cannot be used as a means to shield individuals from accountability for these acts, violating the principle of non-

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<sup>86</sup> This includes situations of war, threats of war, political instability, or any other public emergency (both in international and non-international conflicts).

<sup>87</sup> GAER, F.D., *Opening Remarks*, cit., 191.

<sup>88</sup> CAT General Comment No. 2, cit., 2.

<sup>89</sup> CAT General Comment No. 2, cit., 2.

<sup>90</sup> GAER, F.D., *Opening Remarks*, cit., 196.

<sup>91</sup> CAT General Comment No. 2, cit., 2.

<sup>92</sup> GAER, F.D., *Opening Remarks*, cit., 192.

<sup>93</sup> CAT General Comment No. 2, cit., 2.

derogability<sup>94</sup>. In General Comment No. 2 the Committee stresses that certain provisions of the Convention must be observed in all circumstances, since they are non-negotiable: Article 2, Article 15 and Article 16<sup>95</sup>. Moreover, the Committee considers the obligations arising from Articles 3 to 15 of the Convention to be equally applicable to both torture and ill-treatment<sup>96</sup>. Close attention must be paid to the phrase «*any territory under its jurisdiction*», which is closely tied to the non-derogable principle and is meant to include any territory or facilities and protect all individuals (whether citizens or not), without discrimination, who are under the *de iure* (legal) or *de facto* (in practice) control of a State Party<sup>97</sup>. States have an obligation to prevent torture in cases where individuals, whether officially or unofficially, act in the name of, in conjunction with, or on behalf of the State Party, including officials in position of authority<sup>98</sup>. Moreover, States are asked to closely check on their officials and individuals acting on their behalf, having to identify and report incidents of torture or ill-treatment; they should investigate, punish and take measures to prevent further acts of torture or ill-treatment<sup>99</sup>. This General Comment reinforces the Convention's core principles, emphasizing the absolute prohibition of torture and the paramount importance of taking effective measures to prevent torture and ill-treatment in all circumstances. It underscores the dynamic nature of this commitment, requiring States to adapt to new challenges and better practices as they emerge. In summary, the Comment is meant to reinforce the unambiguous and unwavering commitment of the Convention against Torture to prevent and eradicate torture and ill-treatment under all circumstances, without exception, and without allowing justifications or impunity for those responsible. States are obligated to uphold these principles and take effective measures to ensure compliance.

Moving forward, CAT's Article 4 deals with the obligation upon all State parties to guarantee punishment for all forms of torture (even attempted torture)

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<sup>94</sup> CAT General Comment No. 2, cit., 2.

<sup>95</sup> Article 2 refers to the prohibition of torture in all circumstances; Article 15 deals with the prohibition of using confessions obtained through torture as evidence; Article 16 concerns the prohibition of cruel, inhuman or degrading treatment or punishment.

<sup>96</sup> GAER, F.D., *Opening Remarks*, cit., 192.

<sup>97</sup> CAT General Comment No. 2, cit., 3.

<sup>98</sup> GAER, F.D., *Opening Remarks*, cit., 192 s.

<sup>99</sup> CAT General Comment No. 2, cit., 3.

under domestic criminal law and to adhere to the definition entailed in Article 1<sup>100</sup>. Specifically, it states that «*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. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature*». The Committee against Torture's role is to verify whether state-adopted definitions match the Convention's criteria, to ensure that acts meeting all the components of torture are not downgraded to less severe classification of ill-treatment<sup>101 102</sup>. Additionally, the Committee emphasizes that states should not grant amnesties for crimes, including torture, as it contradicts their commitment under Article 1 of the CAT<sup>103</sup>. States' obligations deriving from UNCAT can also be drawn from Article 12<sup>104</sup>, which envisages States' duty to direct a prompt, impartial, effective and thorough investigation regarding allegation of torture<sup>105</sup>. CAT's jurisprudence was helpful in understanding the promptness of the investigation, which implied that there should be no undue delay in initiating and carrying out the investigation itself<sup>106</sup>. Surely, the term «*prompt*» varied, depending on the circumstances of each case but is generally understood to mean a reasonable and timely response<sup>107</sup>. In cases where there are significant delays between the initial report of ill-treatment and the initiation of the investigation, the state may be held responsible for violating the

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<sup>100</sup> CAT General Comment No. 2, cit., 3.

<sup>101</sup> Therefore, that these acts are prosecuted properly and that there is no space left for impunity. Impunity for torture is considered to be a grave violation of human rights and is taken seriously in the international legal framework.

<sup>102</sup> MESKELE, K., *Interpretation of Article 1 UNCAT*, cit., 56.

<sup>103</sup> MESKELE, K., *Interpretation of Article 1 UNCAT*, cit., 57.

<sup>104</sup> Article 12 states that «*Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction*».

<sup>105</sup> Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 3, 2012, § 23.

<sup>106</sup> MESKELE, K., *Interpretation of Article 1 UNCAT*, cit., 57.

<sup>107</sup> MESKELE, K., *Interpretation of Article 1 UNCAT*, cit., 57.

relevant human rights standards<sup>108 109</sup>. The victim of alleged torture has the right to be promptly informed of the outcome of the investigation, ensuring transparency and accountability in the process<sup>110</sup>. Moreover, the investigator should be impartial and unbiased, approaching the case objectively and should conduct a comprehensive and thorough investigation, which leads to the determination of both the nature of the alleged act of torture and the identity of the perpetrator<sup>111</sup>. Article 12's obligation to pursue investigations for alleged acts of torture is not contingent on the submission of a formal complaint, being sufficient the existence of a simple allegation or reasonable grounds to believe that torture may have occurred, regardless of the source of suspicion<sup>112</sup>.

The examined Article can be interpreted in accordance with article 13 of the International Covenant on Civil and Political Rights<sup>113</sup>, which states that «*An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority*». Therefore, the article provides individuals the right to file a complaint to the competent authority<sup>114</sup>.

## **2.5. Measures necessary for compliance: concluding remarks.**

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<sup>108</sup> For instance, in *Blanco Abad v. Spain* the Committee reaffirmed that “promptness” is a crucial prerequisite for shielding the victim from the purported act of torture. It found that the state violated article 12 because it took too long- 18 days- between the initial report of ill-treatment and the start of the investigation.

<sup>109</sup> In another case, *Halimi- Nedzibi v. Austria*, the appellant alleged to have been ill-treated, and an investigation was not immediately commenced. A delay of fifteen months was registered before the actual case was initiated, rendering the investigation not prompt, violating Article 12.

<sup>110</sup> WENDLAND, L., *A Handbook on State Obligations under the UN Convention against Torture*, in Association for the prevention of torture, 2002, 52.

<sup>111</sup> MESKELE, K., *Interpretation of Article 1 UNCAT*, cit., 57.

<sup>112</sup> MESKELE, K., *Interpretation of Article 1 UNCAT*, cit., 57.

<sup>113</sup> ICCPR.

<sup>114</sup> Article 13 ICCPR is the most important right for the victim of torture and is meant to establish as quickly as possible the facts by the appropriate body.

In order to understand the various obligations deriving from the multiple sources of law previously analyzed, the present paragraph will address a list of measures that States need to take in order to be in compliance with them. First of all, they shall ensure that all acts of torture are offences under domestic criminal law, including attempts, complicity and participation and these acts are punishable by appropriate deterrent penalties<sup>115</sup>. Secondly, any law that authorizes or condones torture or other forms of ill-treatment, whether explicitly or implicitly, should be repealed or amended: this is essential to eliminate any legal basis for such actions<sup>116</sup>. Thirdly, they shall guarantee, in all circumstances, that no statement, confession or other evidence obtained as a result of torture or other ill-treatment may be used in any legal proceedings: this helps prevent that the results of such practices from being utilized in court<sup>117</sup>. All forms of corporal punishment should be abolished: states should not allow to justify the use of torture or ill-treatment, under any exceptional circumstances, such as state of war or threat of war, internal political instability or any other public emergency<sup>118</sup>. They shall make sure that no national law allows for forcible transfers of any persons to any country, territory or place where there are substantial grounds for believing that he or she would be subjected to torture or other ill-treatment: this includes not only the destination country but also the potential subsequent transfers to such a country<sup>119</sup>. Establishing an effective, independent, and impartial review process before any decision to transfer individuals to potentially torturous situations is important to protect the rights of individuals<sup>120</sup>. Moreover, states shall make it clear that orders from superior officers or public authorities cannot be invoked as a justification for torture or ill-treatment: this principle is often expressed as «*superior orders are not a defense*»<sup>121</sup>. Law enforcement officials, military, medical and other relevant personnel should not be punished for refusing to obey orders that would involve acts amounting to torture

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<sup>115</sup> Council of the European union, *Guidelines on EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 12107/19, 2019 Revision of the Guidelines, 20.

<sup>116</sup> EU Guidelines on Torture, cit., 20.

<sup>117</sup> EU Guidelines on Torture, cit., 20.

<sup>118</sup> EU Guidelines on Torture, cit., 20.

<sup>119</sup> EU Guidelines on Torture, cit., 20.

<sup>120</sup> EU Guidelines on Torture, cit., 20.

<sup>121</sup> EU Guidelines on Torture, cit., 20.



or other ill-treatment: this protection encourages individuals to act ethically and in accordance with the law<sup>122</sup>. In addition, they shall enshrine in domestic law the rights of victims of torture and ill-treatment: this includes defining <<victims>> in line with international standards and ensuring their rights to redress, including effective remedies and reparations, which can include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition<sup>123</sup>.

These measures collectively reinforce the commitment to preventing and addressing torture and ill-treatment, both under domestic and international legal frameworks, and aim to ensure that individuals' fundamental rights are protected and respected.

### **3. Italy's unfounded reasons not to adhere to the specific obligation of criminalization of torture.**

CAT's State parties have responded differently to the Committee Against Torture's recommendation that a distinct, separately defined crime of torture needed to be adopted: some argue that the Convention does not require the introduction of a specific crime<sup>124</sup>; others say they are willing to follow the Committee's advice<sup>125</sup>; and others more still affirm they already introduced a specific and well-defined crime punishing torture<sup>126</sup> <sup>127</sup>. The paragraph in question will address specifically the Italian case and how it handled the Committee's recommendation. Not unexpectedly, one of the main points of contention in the discussion between the Italian government and the Committee has been the lack of a particular torture

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<sup>122</sup> EU Guidelines on Torture, cit., 20.

<sup>123</sup> EU Guidelines on Torture, cit., 21.

<sup>124</sup> For instance, Poland has always strongly rejected the idea of introducing a specific crime of torture and its negative and rejecting attitude caused the Committee to reiterate its concern with regard to the absence of a specific offence of torture.

<sup>125</sup> For instance, South Africa states that «*legislation outlawing torture as a specific act distinct from other acts such as murder, culpable homicide, assault etc..., is yet to be passed by Parliament*», however an ad hoc Bill has been prepared and it will be finalized as soon as possible.

<sup>126</sup> For instance, Norway, mentioning article 117a of the General Civil Penal Code, criminalizing torture, stated that «*the acts covered by the provision were previously covered by the more general provisions on use of force, threats, bodily injury, abuse of power etc., of the Penal Code*».

<sup>127</sup> MARCHESI, A., *Implementing the UN Convention Definition of Torture in National Criminal Law (with reference to the Special Case of Italy)*, in *Journal of International Criminal Justice* 6, Oxford University Press, 195-214, 2008, 197 s.

offence under its domestic criminal law<sup>128</sup>. One of the reasons why, and it is believed it represents the main one, Italy did not introduce the *ad hoc* criminal provision punishing torture was that this conduct, as outlined in Article 1 CAT, was already covered by different offences, which were already binding prior to Italy's CAT ratification<sup>129</sup>.

### 3.1. First reason: generic crimes and their unusability.

The first reason why Italy decided not to introduce a specific crime of torture, at least not until 2017, relied on the circumstance that its criminal code already contained generic<sup>130</sup> and specific provisions<sup>131</sup>, rendering useless the introduction of a specific crime punishing torture<sup>132</sup>. The Italian legislator seemed to think that, in fact, international obligations deriving from sources of law regarding torture do not require for a State to introduce a specific crime of torture; they simply ask for a criminal coverage of the material conduct falling within the semantic scope of the prohibited practice<sup>133</sup>. If this constitutes the correct current of thought to be followed, then it is certain that the Italian legal system is in line with it. Among the provisions in the criminal code to be mentioned, surely there is the need to point to a list of different articles, such as *Articles 581* (beating), *582* (bodily injury), *594* (defamation or insult), *605* (kidnapping), *606* (illegal arrest), *607* (undue limitation of personal freedom), *608* (abuse of authority towards arrested or detained persons), *609* (arbitrary and personal search and inspection), *610* (domestic violence), *612* (threat), *613* (state of incapacity caused by violence)<sup>134</sup>. However, these provisions concern conducts that do not amount to torture, as described by international law, since their level of intensity is definitely not as brutal as the one requested for the latter<sup>135</sup>. In this regard, there are a few

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<sup>128</sup> MARCHESI, A., *Implementing UNCAT*, cit., 202.

<sup>129</sup> MARCHESI, A., *Implementing UNCAT*, cit., 202.

<sup>130</sup> Such as articles 323 (bribery), 571 (abuse of means of correction and discipline), 581 (beatings) and 582 (bodily injury).

<sup>131</sup> Such as article 608 (abuse of authority towards arrested or detained persons).

<sup>132</sup> BARTOLI, R., PELISSERO, M., SEMINARA, S., *Diritto Penale: lineamenti di parte speciale*. Giappichelli Editore, Torino, 2021, 158.

<sup>133</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 137.

<sup>134</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 137.

<sup>135</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 137 s.

main differences to highlight. First of all, the majority of these conducts makes reference to crimes described as «*reati comuni*», whilst torture is identified as a «*reato proprio*»<sup>136</sup>. The former is a more generic crime, in the sense that it can be committed by anyone, hence any individual regardless of their subjective features. For instance, Article 581 of the Italian Criminal Code, which punishes conducts constituting beating, starts out by saying that «*Anyone who hits someone, if the act does not result in illness of the body or mind, is punished upon complaint of the offended person [...]*». Thanks to the very first word of the cited article one can infer that it refers to a «*reato comune*», stating that *anyone*, following a precise conduct, can commit it. Differently, a «*reato proprio*» can only be perpetrated by specific persons, such as, in the crime of torture, public authorities or other persons working as a public figure<sup>137</sup>. This has been strongly highlighted in International Treaty Law, above all thanks to Article 1 CAT, which gives a crucial definition of torture. Secondly, the already mentioned generic provisions do not make a specific nor implicit reference to a psychological violence<sup>138</sup>. Referring to the different crime of kidnapping, Article 605 i.c.c., only describes a conduct of deprivation of one's personal freedom. Differently, psychological violence is one of the main traits regarding torture<sup>139</sup> <sup>140</sup>. Thirdly, another topic to be addressed concerns the psychological or subjective element. Some of the generic crimes lack the willingness to inflict pain or suffering, such as article 582 i.c.c., which describes bodily injury; however, it is a typical element in torture, as described by international treaties<sup>141</sup>. Moreover, most of these crimes are meant to protect something that is entirely different from the purpose torture is directed to: for instance, Article 608 of the Italian criminal code punishes the conduct of abuse of authority towards arrested or detained persons and concerns the individual's personal freedom (which was already restricted) and does not refer to other conducts, such as beatings, injuries, sexual harassment, insults, mistreatments;

<sup>136</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 138.

<sup>137</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 138.

<sup>138</sup> MARCHESI, A., *Implementing UNCAT*, cit., 204.

<sup>139</sup> In international law torture can inflict both a physical and psychological pain. Specifically, it states that torture amounts to any act through which physical and psychological suffering or pain is inflicted willingly on an individual.

<sup>140</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 138.

<sup>141</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 138.

hence, it covers a smaller portion of conducts, and it is not able to sanction the bigger range of acts which torture describes<sup>142</sup>. Concerning the types of sanctions applicable, the generic crimes mentioned usually find themselves involved with mitigating circumstances, shrinking proportionally the amount of penalty that was supposed to be applied<sup>143</sup>. As for bribery, a specific and additional article (Article 323-bis) concerns mitigating circumstances, which determine for the penalty to be reduced when acts of bribery, characterized by a not particularly serious nature, have been carried out. Therefore, most of the times there is a balancing decision to be put into place, between the penalty that is supposed to be implemented and the particular circumstance, which is able to determine the decrease of the actual penalty to be applied<sup>144</sup>. However, referring to the specific crime of torture, the balancing approach leading to a smaller penalty does not have any relevance. The crime of torture, for the intensity of its conducts and its severity and extremeness, has been excluded from this balancing judgement, since the moment of its very introduction<sup>145</sup>. Another crucial point to discuss deals with the fact that most of the generic crimes require for a formal party complaint, instead torture is not contingent on its submission, being included in the list of crimes prosecuted *ex officio*<sup>146</sup>. The reason why the legislator wanted to adopt such a decision relies on the fact that most victims of torture think that, once they have suffered such an intensity of pain, they might suffer it again and therefore do not denounce the crime to the competent authorities, fearing for the perpetrator to harm them again<sup>147</sup>. In addition, the collocation in the *ex officio* crimes is due to the possibility that, if not doing so, spaces for impunity might be created<sup>148</sup>. Lastly, one of the points that has risen the most debates is the one putting up with the Statute of Limitations. In reference to generic crimes, such as domestic violence, Article 610 does not point out explicitly to it, however it is stated that the relevant crime will be statute barred after 6 years: one can say that it is not a very long time. Contrarily, the one concerning torture

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<sup>142</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 138.

<sup>143</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 138.

<sup>144</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 138.

<sup>145</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 138.

<sup>146</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 138.

<sup>147</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 138.

<sup>148</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 138.

needs to be, because of the victims' long times to find the courage to expose themselves and denounce the crime<sup>149</sup>. If the crime of torture was subjected to such short times for its extinction, then it would not receive the appropriate protection it, indeed, needs<sup>150</sup>. Of course, the Statute of Limitations varies from country to country and depends on the severity of the crime; hence, these limits concerning the specific crime of torture would depend on Italian law. In conclusion, the first reason elaborated by Italian authorities, as to why there was no need to introduce a specific crime sanctioning torture was deemed unfounded. This conclusion was drawn mainly from the fact that most criminal proceedings regarding torture and arising from the G8 Case in Genoa were statute-barred, needing an ad hoc crime with different characteristics, most of all, concerning the statute of limitations<sup>151</sup>.

### **3.2. Second reason: lack of confidence towards public authorities.**

The second reason why the Italian legislator did not feel the need to introduce a specific crime of torture in the penal code referred to the fact that it was believed that Italy, being a civil and democratic state, could not practice torture<sup>152</sup>. However, that could not possibly have been the case. By being civil and democratic one cannot implicitly infer that law enforcement will not carry out acts that amount to torture. In addition, law enforcement agencies believed that a specific crime of torture would restrict and limit their behavior and attitude, not being able to perform acts to protect themselves, when needed<sup>153</sup>. It was said that the criminalization of torture would represent a *«heavy Damocles' sword on police officers»* and that it would tie their hands<sup>154</sup>. The Italian Fundamental Charter mentioning in its Article 13, implicitly, torture as a crime, refers to two different things: force and violence, admitting the use of the former and prohibiting the latter<sup>155</sup>. The article in question underlined that force can be used in different situations, such as when precautionary

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<sup>149</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 139.

<sup>150</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 139.

<sup>151</sup> BARTOLI, R., PELISSERO, M., SEMINARA, S., *Diritto Penale: lineamenti di parte speciale*. Giappichelli Editore, Torino, 2021, 158.

<sup>152</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 134.

<sup>153</sup> BARTOLI, R., PELISSERO, M., SEMINARA, S., *Diritto Penale*, cit., 158.

<sup>154</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 142.

<sup>155</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 143.

measures are to be applied, in executing the sentence and when there is a mandatory medical treatment to be followed<sup>156</sup>. However, in order to understand how torture operated and why it should not constitute a real restriction for law enforcement agencies, one needs to look at things and circumstances with a different perspective: to respect laws and guarantee national security is a very difficult and complicated task, however it does not allow to exercise physical or psychological violence on individuals, whom personal freedom is already restricted<sup>157</sup>.

Moving forward, it is necessary to highlight that most instances of torture, however, take place in state prisons, where these conducts are therefore carried out by penitentiary police officers, underlying the constant worry and need to introduce the crime, and to stop the continuous justifications, which lead to think that this criminalization constitutes an act of mistrust towards law enforcement. In 2012, the Asti Criminal Tribunal dealt with conducts amounting to torture. Specifically, it was able to prove, beyond any reasonable doubt, the existence of a generalized and systematic practice of mistreatment and torture upon the most troubled detainees<sup>158</sup>. Two of them were subjected to inhuman treatments and in the Tribunal's words *«they did not only suffer from individual harassment, but real torture, which lasted for several days, and it was carried out in a scientific and systematic way»*<sup>159</sup>.

It was stated that *«the two detainees were completely stripped of their clothes and locked in a cell where the window did not have the glass, being only closed with cellophane, after one month. They had a bed, but without a mattress. The cell did not have a sink nor a chair or a stool. The prisoners were left totally naked during wintertime: the first one for a period of a month and the other for 20 days. Their food was rationed, and they had bread and water for just a week. During this brutal period, they were repeatedly insulted and beaten, particularly during the night, so as not to let them sleep. One of them suffered a particular injury: his pigtail was torn off by a cop with his bare hands»*<sup>160</sup>.

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<sup>156</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 143.

<sup>157</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 143.

<sup>158</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 134.

<sup>159</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 134.

<sup>160</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 134.

In order to underline the fact that torture does happen in Italy, even though it is a democratic and civil state, one can also mention the ordinance issued by the Bologna Tribunal, in 2013. The provision concerned the particular events leading to Federico Aldrovandi's death, in September 2005. The Tribunal qualified the conduct taking place as torture: the detainee was assaulted and attacked by four police officers<sup>161</sup>. Even when the only 18-year-old boy was laying on the floor, praying for help, the cops did not stop<sup>162</sup>. They kept on beating him, hovering him with their whole bodies, exercising such a pressure on his torso, causing for his heart to crush, which inevitably led to his death<sup>163</sup>.

Unfortunately, more of these kinds of examples could be easily mentioned for one to understand the severity of these conducts and to express the need for these acts to be properly punished under a specific provision prohibiting torture and other ill-treatment.

Nevertheless, time taught that this second reason was deemed unfounded, just like the first one: *Genova docuit*. Truthfully, by introducing such a crime one would not harm law enforcement and prohibit it to act properly, rather it would lead to its correct functioning<sup>164</sup>.

### **3.3. Third reason: the possible justification of an act of torture and the reasons why it was allowed.**

A third reason why the legislator was eager to establish such crime was based on the possibility to justify such acts, for instance when it was needed to carry out conducts that led to ill-treatment in order to save lives or for national security reasons<sup>165</sup>. The leading point concerns the *salus rei publicae*, through which it is explained that the use of violence and force can be justified when they are used for national security reasons<sup>166</sup>. Jean Paul Sartre said that «*torture can only be justified if from one's confession, hundreds of lives could be saved*»: in other words, torture

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<sup>161</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 135.

<sup>162</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 135.

<sup>163</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 135.

<sup>164</sup> BARTOLI, R., PELISSERO, M., SEMINARA, S., *Diritto Penale*, cit., 158.

<sup>165</sup> BARTOLI, R., PELISSERO, M., SEMINARA, S., *Diritto Penale*, cit., 158.

<sup>166</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 139.

was seen as an *extrema ratio*<sup>167 168</sup>. As previously noted, international treaty law imposes on states many obligations regarding torture. Among them it is prohibited, regardless of the specific circumstance, the use of torture. It is not relevant whether one finds themselves in war time, or whether there is a threat of war, an internal political tension or any other kind of emergency: conducts amounting to torture are prohibited and states are obliged to abstain from committing these acts<sup>169</sup>. Even though Italy lacked such a provision in its domestic criminal code, nonetheless, its military penal code referred to the prohibition in its Article 185-bis<sup>170</sup>. The present article clarifies that «*the soldier who, for war-related reasons, carries out acts of torture or other inhuman treatment [...] to the detriment of prisoners of war or civilians or other protected persons [...] is punished with imprisonment going from 1 to 5 years*». Hence, even though state of war is declared, knowing it represents the most renowned state of emergency, torture is not permitted. The main reason being that torture as a crime protects human dignity, which constitutes a supreme requisite for one to exercise their own rights as an individual<sup>171</sup>. «*Within the contrast between security and freedom, human dignity is the concept that must guide the decision*»: this principle must be observed in any situation; for instance, when the Prime Minister is called on to decide whether to use the tool of State secrecy or when the Constitutional Courts needs to decide upon its legitimate use<sup>172</sup>. As it was just described, the third reason why the legislator did not introduce the crime of torture until 2017 was particularly weak due to the arbitrariness inherent to the identification of the prerequisites of legitimation, but above all it was due to the objection that no one in no case was allowed to violate the law and, consequently, inflict any kind of suffering<sup>173</sup>. Particularly, one needs to mention two cases decided by the European Court of Human Rights: *Nasr and Ghali v. Italy*, regarding terrorism, and *Labita v. Italy* concerning racketeering<sup>174</sup>. The Court, in both

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<sup>167</sup> Extrema ratio is a particular extreme remedy which has extreme consequences and can only be used when other remedies are unavailable.

<sup>168</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 140.

<sup>169</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 140.

<sup>170</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 140.

<sup>171</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 140.

<sup>172</sup> PUGIOTTO, A., *Repressione penale della tortura e Costituzione*, cit., 141.

<sup>173</sup> BARTOLI, R., PELISSERO, M., SEMINARA, S., *Diritto Penale*, cit., 158 s.

<sup>174</sup> BARTOLI, R., PELISSERO, M., SEMINARA, S., *Diritto Penale*, cit., 159.



judgements, excluded the possibility to allow torture, even though it would have been used to fight torture and organized crimes<sup>175</sup>. The case *Labita v. Italy* concerns organized crimes. Particularly, the applicant was Benedetto Labita, an Italian national, who was arrested on suspicion of being a member of the Mafia, thanks to the uncorroborated allegations by a former Mafioso who had decided to cooperate with the authorities<sup>176</sup>. Mr. Labita was detained in Pianosa Prison, pending trial, for approximately two years and seven months, where he allegedly suffered ill-treatment that was systematically inflicted on prisoners<sup>177</sup>. Particularly, he had been subjected to multiple acts of violence between July and September 1992 combined with humiliation and debasement and other forms of torture<sup>178</sup>. «*He had been slapped and struck on many occasions, and had suffered injuries to his fingers, knees and testicles. He had been subjected to body searches in the shower and had remained handcuffed during medical examinations. [...] On one occasion when he had protested after his clothes had been torn by warders, he had been threatened, insulted and struck by one of the warders*». Because of the allegations, he underwent some medical tests, which showed that these conducts have caused him psychological disorders, as well<sup>179</sup>. It was proved that the government was aware of the acts of torture carried out in the prison and did nothing about it, tolerating them, since these “methods” were used as tools for intimidating detainees<sup>180</sup>. However, the European Court of Human Rights had stated, multiple times, that «*Article 3 enshrines one of the most fundamental values of democratic societies*» and that even when fighting racketeering, the use of torture is absolutely prohibited, since no exception nor derogation can be drawn from its sources of law, regardless of the victim’s conduct. Hence, in the present case, as Mr. Labita was detained on the suspicion of organized crimes, no act of torture could have been carried out against him.

Moving forward, the other case which underlines the impossibility to find any justification whatsoever for the crime of torture is *Nasr and Ghali v. Italy*. It

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<sup>175</sup> BARTOLI, R., PELISSERO, M., SEMINARA, S., *Diritto Penale*, cit., 159.

<sup>176</sup> European Court of Human Rights, Judgement, April 6<sup>th</sup>, 2000, Application no. 26772/95, 3.

<sup>177</sup> ECtHR Judgement 26772/95, cit., 4.

<sup>178</sup> ECtHR Judgement 26772/95, cit., 4.

<sup>179</sup> ECtHR Judgement 26772/95, cit., 22.

<sup>180</sup> ECtHR Judgement 26772/95, cit., 22.

concerns two different applicants: the first is Mr. Osama Mustafa Hassan Nasr, also known as Abu Omar, and the second one is Nabila Ghali; they are both Egyptian nationals<sup>181</sup>. Mr. Nasr is a member of the group Jama'a al-Islamiya, which is an Islamist movement, regarded as a terrorist organization. He lived in Italy since 1998, specifically in Milan, where he was granted political asylum<sup>182</sup>. First of all, Mr. Nasr was suspected of conspiracy to commit international terrorist acts<sup>183</sup>. In 2003 he was kidnapped and brought, via plane, first to Germany and then to Cairo, where he was interrogated by Egyptian intelligence services about his activities in Italy, but also about his family and trips abroad<sup>184</sup>. He suffered ill-treatment being detained secretly until 2004 in a cramped and unhygienic cell; he was also subjected to interrogations and to torture when he abstained from answering correctly<sup>185</sup>.

The European Court of Human Rights had no doubts in saying that Mr. Nasr had been tortured and that he had been put through emotional and psychological distress<sup>186</sup>. Moreover, it considered that Italian public authorities at the time surely knew that conducts amounting to torture were carried out and they should have acted on it, under CAT Articles 1 and 3, having the duty to take the appropriate measures<sup>187</sup>. Hence, even in cases where the applicant is suspected of having committed terrorist acts, one cannot violate the prohibition relating to torture, as no derogation can be established.

#### **4. The consequences of Italy's deliberate violation of its obligations: the Genoa G8 Cases.**

As previously outlined, Italy was in breach of multiple obligations, imposed upon it at the international, European and Constitutional level. The reason why it infringed the treaties concerning torture was, mainly, its rejection to introduce a

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<sup>181</sup> European Court of Human Rights, Press Release No. 070, The CIA's abduction and extrajudicial transfer to Egypt of the imam Abu Omar infringed the applicant's rights under the Convention, February 23<sup>rd</sup>, 2016, 1.

<sup>182</sup> ECtHR Press Release 070, cit., 2.

<sup>183</sup> ECtHR Press Release 070, cit., 2.

<sup>184</sup> ECtHR Press Release 070, cit., 2.

<sup>185</sup> ECtHR Press Release 070, cit., 2.

<sup>186</sup> ECtHR Press Release 070, cit., 4.

<sup>187</sup> ECtHR Press Release 070, cit., 5.

specific offence prohibiting and criminalizing it, at the domestic level. In 2001, the Strasbourg Court condemned Italy for the horrible facts that went down in the Diaz-Pertini School, during the G8 Summit in Genoa<sup>188</sup>. Worthy to be mentioned are, also, the cases originated in connection to the previous ones, striking in the Bolzaneto Barracks, which will be addressed in the later paragraph. Italy was condemned by the European Court of Human Rights on the basis of infringing Article 3 ECHR, due to the lack of fulfillment of the obligations therein contained<sup>189</sup>. After the decisions, the ECtHR requested Italy to implement such crime in its criminal code: the path leading to the introduction of Articles 613-bis and 613-ter began thanks to bill A.C. 2168<sup>190</sup>. Among the different proceedings opened by the Genoa Public Prosecutor, two of them were of utter importance: the case *Cestaro v. Italy*, regarding the police raid inside the Diaz-Pertini building, and the cases of *Azzolina and Others v. Italy & Blair and Others v. Italy*, concerning the Bolzaneto Barracks<sup>191</sup>. As for the brutal events that took place in the school legally occupied by the Genoa Social Forum, police officers carried out «*deliberate and gratuitous beatings*»<sup>192</sup>. The following paragraphs will address and analyze the conducts carried out by law enforcement officers during the G8 Summit in Genoa, how the Court decided to judge upon them and the consequences that arose from such rulings.

#### **4.1. The case of *Cestaro v. Italy*: What happened in the Diaz-Pertini School?**

The applicant is Mr. Cestaro, a 62-years-old man, who during the night from the 21st to the 22nd of July 2001 was sheltering inside the Diaz-Pertini school, in Genoa, which was made available for demonstrators by the municipal authorities<sup>193</sup>.

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<sup>188</sup> CAROLEI, D., *Cestaro v. Italy: The European Court of Human Rights on the Duty to Criminalise Torture and Italy's Structural Problem*, in *International Criminal Law Review*, Volume 17, Issue 3, June 2017, 567.

<sup>189</sup> CAROLEI, D., *Cestaro v. Italy*, cit., 568.

<sup>190</sup> CAROLEI, D., *Cestaro v. Italy*, cit., 568.

<sup>191</sup> ZANETTI, V., *Maybe there is a judge in Strasbourg? The European Court of Human Rights and Torture in Italy*, in *New Zealand Yearbook of International Law* 10, 2012, 153.

<sup>192</sup> ZANETTI, V., *ECtHR and Torture in Italy*, cit., 153.

<sup>193</sup> European Court of Human Rights, Judgement, *Case of Cestaro v. Italy*, Application no. 6884/11, Final judgement April 7th, 2015, 1.

He decided to bring the case before the European Court of Human Rights «*complaining that he was a victim of violence and ill-treatment, which in his submission amounted to torture*»; he was «*brutally beaten by police officers who caused him multiple fractures*»<sup>194</sup>. The applicant alleged a violation of Article 3 ECHR, having suffered ill-treatment amounting to torture, and Articles 3, 6 and 13 ECHR, considering that the individuals responsible did not undergo a proportionate and adequate penalty, in relation to the conducts carried out<sup>195</sup>. Mr. Cestaro made such a claim, on the basis that the crimes committed have been declared statute-barred and that there has been a remission of sentence<sup>196</sup>. In relation to this assertion, he highlighted that Italy did not and was not able to fulfill its specific obligations established under the Convention, to punish violence and any form of ill-treatment and to adopt the appropriate measures to prevent these crimes from happening<sup>197</sup>. Nevertheless, the case and the way the Court decided upon it, present two main topics: firstly, the precise analysis of Italian authorities' behavior and, secondly, the view taken by the Court in assessing the problem of torture<sup>198</sup>.

In July 2001 in Genoa (Italy) a mass of 200,000 people protested in the streets in anti-globalization demonstrations, and while most of the demonstrators were peaceful, others were rather violent, causing injuries and property damages, even to people not directly involved, or not involved at all, in the demonstrations<sup>199</sup>. Because of the unprecedented violence used by Italian police officers, Amnesty International argued that the events taking place therein represented «*the most serious suspension of democratic rights in a Western Country since the WWII*»<sup>200</sup>. Having considered the situation at hand, local authorities set up considerable security measures, and the area of the city where the Summit took place was designated as a «*red zone*», allowing only residents and people who worked there to enter, prohibiting the use of the port and airport<sup>201</sup>. Surrounding the red zone,

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<sup>194</sup> CAROLEI, D., *Cestaro v. Italy*, cit., 567.

<sup>195</sup> ECtHR, *Cestaro v. Italy*, cit., 1.

<sup>196</sup> ECtHR, *Cestaro v. Italy*, cit., 1.

<sup>197</sup> ECtHR, *Cestaro v. Italy*, cit., 1.

<sup>198</sup> PUSTORINO, P., *A new case on torture in Europe: Cestaro v. Italy*, in *Blog of the European Journal of International Law, EJIL:Talk!*, 2015.

<sup>199</sup> ECtHR, *Cestaro v. Italy*, cit., 1.

<sup>200</sup> ZANETTI, V., *ECtHR and Torture in Italy*, cit., 153.

<sup>201</sup> ECtHR, *Cestaro v. Italy*, cit., 3.

there was a «*yellow zone*», surrounded in turn by a «*white or normal zone*»<sup>202</sup>. People taking part in the demonstrations, which constituted different groups, were divided in a series of «*blocs*»: the non-dangerous *pink bloc*; the *yellow* and the *blue bloc*, which aimed at vandalizing property, staging blockades for both streets and railways and causing riots and fights with law enforcement officers; and, last but not least, the *black bloc*, composed of anarchists and individuals dressed in black and wearing masks and balaclavas, systematically causing chaos and disarray, even during other Summits<sup>203</sup>.

Whilst on July 19<sup>th</sup> no particular incident took place during the demonstrations, thus having a peaceful nature, the ones happening on the 20<sup>th</sup> were totally different, being characterized by total chaos and numerous clashes between protestors and police officers (for instance, when the Carabinieri fired tear gas on the *tute bianche*, causing for them to reply by throwing hard objects, armoring vehicles and driving to high speed, knocking down barriers ecc..) <sup>204</sup>. The last protest was held the next day, July 21<sup>st</sup>, and 100,000 people attended<sup>205</sup>. However, local authorities set up different special police units to stop the black bloc, taking into account that most part of the city of Genoa had been damaged and ruined, and consequently demonstrators, whether they were peaceful or not, were allowed to shelter, lawfully, at night in the Diaz-Pertini school<sup>206</sup>. «*At around twelve midnight the members of the VII Nucleo antisommossa, having arrived close to both schools with helmets, shield and tonfa-type truncheons, together with other similarly equipped officers, began to run towards the premises. A journalist and a municipal councillor standing outside the schools were kicked and struck with batons*»<sup>207</sup>. Once police officers broke their way inside the Diaz-Pertini school, they started shouting at the occupiers «*Black Bloc! Adesso vi ammazziamo*», which translates to «*Black Bloc, we are going to kill you*»<sup>208</sup>. Unfortunately, inside the school there were no anarchists, nor people belonging to the Black Bloc, but only peaceful

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<sup>202</sup> ECtHR, *Cestaro v. Italy*, cit., 3.

<sup>203</sup> ECtHR, *Cestaro v. Italy*, cit., 3.

<sup>204</sup> ECtHR, *Cestaro v. Italy*, cit., 3.

<sup>205</sup> ECtHR, *Cestaro v. Italy*, cit., 4.

<sup>206</sup> ECtHR, *Cestaro v. Italy*, cit., 4.

<sup>207</sup> ECtHR, *Cestaro v. Italy*, cit., 6.

<sup>208</sup> DAVIES, N., *The bloody battle in Genoa*, in *The Guardian*, 2008.

protestors, who were lawfully sheltering inside the building, which was made available by the municipal authorities<sup>209</sup>. Michael Gieser was the first one to understand what was actually happening: he was in line to brush his teeth and heard brutal noises coming from downstairs<sup>210</sup>. He tried communicating with the officers, looking for a way to solve the situation, but it was all in vain. He decided to run<sup>211</sup>. The police officers entering the school were supposed to be «*securing*» all the floors in the building, and minutes later they began pushing, kicking and clubbing the demonstrators, as well as threatening them<sup>212</sup>. Not unexpectedly, there were people sleeping, whom had been disturbed and woken up by the noises, and thereafter assaulted<sup>213</sup>. Some of them tried to escape, but have been, unfortunately, caught and beaten up<sup>214</sup>. Mr. Cestaro was on the ground floor and was sleeping at the time of the attack; he was woken up by the tremendous noises, and, only some moments later, police officers started beating him, causing multiple fractures: he was injured on the right ulna, the right styloid, the right fibula and several ribs<sup>215</sup>. «*Within a few minutes, all the occupants on the ground floor were reduced to helplessness. The groans of the wounded were combined with calls for an ambulance*»<sup>216</sup>. Because of the severity of the beatings, he still suffers from weakness in his right arm and leg<sup>217</sup>. Ninety-three people were taken into custody following the raid, 62 of them were hurt and had to be transported to the hospital<sup>218</sup>. The remaining individuals were brought to the Bolzaneto barracks, which was later converted into a detention center<sup>219</sup>.

Twenty-eight police officers underwent trial, initiated by the Genoa Public Prosecutor and they were differently charged with giving false information for inclusion in a document, simple and aggravated slander, misfeasance in public

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<sup>209</sup> DAVIES, N., *The bloody battle in Genoa*, cit.

<sup>210</sup> DAVIES, N., *The bloody battle in Genoa*, cit.

<sup>211</sup> DAVIES, N., *The bloody battle in Genoa*, cit.

<sup>212</sup> ECtHR, *Cestaro v. Italy*, cit., 6.

<sup>213</sup> ECtHR, *Cestaro v. Italy*, cit., 6.

<sup>214</sup> ECtHR, *Cestaro v. Italy*, cit., 6.

<sup>215</sup> ECtHR, *Cestaro v. Italy*, cit., 6.

<sup>216</sup> DAVIES, N., *The bloody battle in Genoa*, cit.

<sup>217</sup> VALENTINO, A., *Le violenze del G8 di Genova sono tortura ai sensi della Cedu: ragioni della pronuncia a ripercussioni sull'ordinamento*, in Osservatorio dell'Associazione Italiana Costituzionalisti, 2015, 3.

<sup>218</sup> ZANETTI, V., *ECtHR and Torture in Italy*, cit., 154.

<sup>219</sup> ZANETTI, V., *ECtHR and Torture in Italy*, cit., 154.

office (on account of unlawful arrest of the persons occupying the buildings), simple and aggravated bodily harm and unlawful carrying of weapons of war<sup>220</sup>. The Italian Court of Cassation, when examining the case, tried justifying the conducts *a posteriori* arguing that the crimes allegedly committed by police officers were perpetrated «*in the framework of a disgraceful whitewashing operation*»<sup>221</sup>. Mr. Cestaro decided to bring the case before the ECtHR, alleging a violation of Article 3 of the Convention<sup>222</sup>, under both its substantive and procedural aspects, hence having a dual nature, and Articles 6 and 13 ECHR<sup>223</sup>. Article 3 of the Convention states that «*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*». Accordingly, for the violation of the aforementioned provision, the applicant argued that he suffered ill-treatment and violence, which he considered amounting to torture, arguing, moreover, that the penalty imposed on the police officers deemed responsible was not adequate at all to the conducts carried out<sup>224</sup>. As for Articles 6 and 13, they refer to a reasonable length of the proceedings, which was not respected and caused many, if not all, crimes to be declared statute-barred<sup>225</sup>. The Court notes that «*the first instance and appeal judgments state that once the police officers had entered the Diaz-Pertini School, they had assaulted virtually all those present, including people who were sitting or lying on the floor, punching, kicking, clubbing and threatening them*»<sup>226</sup>.

The first-instance judgment confirmed the applicant's allegations of assault and its after-effects<sup>227</sup>. The ECtHR, considering that the violation of Article 3 of the Convention is a sufficiently serious allegation, clarifies that there is no need to analyze «*the substantiation of the applicant's other allegations*»: there is no doubt that the ill-treatment and violence suffered by Mr. Cestaro fall within the meaning and scope of Article 3<sup>228</sup>. However, the Court shall now assess whether or not it

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<sup>220</sup> ECtHR, *Cestaro v. Italy*, cit., 8; ZANETTI, V., *ECtHR and Torture in Italy*, cit., 154.

<sup>221</sup> ECtHR, *Cestaro v. Italy*, cit., 15.

<sup>222</sup> Even though domestic authorities declared that there was no violation of article 3/ that article 3 had not been infringed, since police officers benefit from impunity and no disciplinary measure had been taken.

<sup>223</sup> ECtHR, *Cestaro v. Italy*, cit., 58.

<sup>224</sup> ECtHR, *Cestaro v. Italy*, cit., 29.

<sup>225</sup> ECtHR, *Cestaro v. Italy*, cit., 29.

<sup>226</sup> ECtHR, *Cestaro v. Italy*, cit., 37.

<sup>227</sup> ECtHR, *Cestaro v. Italy*, cit., 37.

<sup>228</sup> CASSIBA, F., *Violato il divieto di tortura: condannata l'Italia per i fatti della scuola "Diaz-Pertini"*, in *Diritto Penale Contemporaneo*, Archivio online 2010-2015, 5.

constitutes torture. First of all, the Court considers that in order to comprehend the nature of the acts and whether they can be classified as torture, one needs to look at the distinction between torture and inhuman or degrading treatment and at the definition of torture as laid down in Article 1 CAT<sup>229</sup>. Firstly, the difference resides in the fact that an act of torture is characterized by the severity of the suffering, which is relative, and is based on the duration of the treatment, its physical or mental effects, the state of health of the victim, their age, sex ect.. ; in addition, one needs to consider the purposive element, since an intentional infliction of severe pain or suffering with the aim of obtaining information or inflicting punishment or intimidating is required<sup>230</sup>. The violence committed in the building had a punitive scope and aimed at humiliating and causing pain and suffering to the protestors, who were the victims of the acts<sup>231</sup>. These forms of violence have the features of real torture, as described in Article 1 CAT<sup>232</sup>. By the same token, the Strasbourg Court was not able to overlook the fact that the Italian Court of Cassation determined that the conduct carried out inside the Diaz-Pertini school could qualify as torture, adding «*the police officers kicked the applicant and struck him with tonfa-type truncheons [...] the applicant had been repeatedly hit on different parts of his body [...] the blows received by the applicant caused multiple fractures leading to a four-days stay in hospital and a further operation a few years later, all of which left him with a permanent weakness in his left arm and leg*»<sup>233</sup>. The Court, however, underlines that the applicant felt fear and anguish and that those feelings do not have to be belittled; this also derived from him seeing other officers beating other occupiers for no reason at all<sup>234</sup>. The occupiers did not only suffer from physical violence, but it was also psychological. For instance, after beating a woman, one of the police officers stood spread-eagled in front of her, making her fall on her knees: he grabbed his penis and held it close to her face; then he did the

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<sup>229</sup> ECtHR, *Cestaro v. Italy*, cit., 37.

<sup>230</sup> ECtHR, *Cestaro v. Italy*, cit., 37.

<sup>231</sup> PICCHI, M., *The condemnation of the Italian State for Violation of the Prohibition of Torture. Remarks on the Ruling passed by the European Court of Human Rights, Section IV, 7<sup>th</sup> April 2015, Application No. 6884/11, Case of Cestaro v. Italy*, in *Journal of Law and Social Sciences (JLSS)*, Vol. 4 No. 2; 2015, 28.

<sup>232</sup> CASSIBA, F., *Violato il divieto di tortura*, cit., 5.

<sup>233</sup> ECtHR, *Cestaro v. Italy*, cit., 41.

<sup>234</sup> ECtHR, *Cestaro v. Italy*, cit., 41.



same thing to the man beside her<sup>235</sup>. Another policeman interrupted a beating to take a knife and cut the hair of the victims<sup>236</sup>.

The first-instance judge even stated that the raid inside the school constituted a clear violation of the law of human dignity and of respect for the individual, while the Appeals judge stated that the conduct carried out by the law enforcement officers amounted to a level of torture so high that it could be referred to as cruel and sadistic and that they were acting like «*violent thugs*»<sup>237</sup>. On top of that, the Court expressed that the violence inflicted constituted a particularly serious act of cruelty and had a gratuitous nature: the applicant was sitting against a wall with his arms above his head, not posing any resistance or threat whatsoever; none of the other victims tried to oppose themselves<sup>238</sup>. Police officers abused their positions of power and committed a deliberate and premeditated act, devoid of any foundation<sup>239</sup>. Among the people occupying the building, there was a girl named Melanie, a 28-year-old student from Berlin: she was brutally beaten up, with such a violence that she fainted thereafter<sup>240</sup>. However, this did not stop police officers from assaulting her: they kept on kicking and beating her, leaving the girl in a bloodbath<sup>241</sup>. As a result, the Court determined that force was used in a totally disproportionate way, with no justification and when no opposition was exercised by the occupiers<sup>242</sup>. Ergo, it was certain that the violence inflicted was completely gratuitous and could not be regarded as a means used proportionately by the authorities to achieve the aim pursued<sup>243</sup>. To sum it up, one can surely argue that the ill-treatment inflicted on Mr. Cestaro, but also on the other victims, caused him severe pain and suffering, being particularly cruel and serious<sup>244</sup>. Even though most of the acts of resistance that took place originated from the demonstrators occupying the Diaz-Pertini building, the European Court underlined the pure lack

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<sup>235</sup> DAVIES, N., *The bloody battle in Genoa*, cit.

<sup>236</sup> DAVIES, N., *The bloody battle in Genoa*, cit.

<sup>237</sup> ECtHR, *Cestaro v. Italy*, cit., 41.

<sup>238</sup> ECtHR, *Cestaro v. Italy*, cit., 42.

<sup>239</sup> PICCHI, M., *The condemnation of the Italian State for Violation of the Prohibition of Torture*, cit., 28.

<sup>240</sup> DAVIES, N., *The bloody battle in Genoa*, cit.

<sup>241</sup> DAVIES, N., *The bloody battle in Genoa*, cit.

<sup>242</sup> PUSTORINO, P., *Cestaro v. Italy*, cit.

<sup>243</sup> CASSIBA, F., *Violato il divieto di tortura*, cit., 5.

<sup>244</sup> ECtHR, *Cestaro v. Italy*, cit., 42.

of a causal link between the applicant's conduct and the use of force by police officers: this goes to highlight the total lack of proportionality between the police violence and the resistance built by the persons occupying the premises<sup>245</sup>.

In addition to the particular nature of the conduct just described, it is also impossible to deny that the violence and ill-treatment were intentional and premeditated<sup>246</sup>. That is because, originally, the operation was supposed to be carried out by officers from a division specialized in anti-riots operations and the only task was, once again, to «*secure the building*»<sup>247</sup>. To underline the fact that it was premeditated and intentional, the Court stressed out that law enforcement officers did not receive any order or command whatsoever to use force or violence, therefore hurting and assaulting individuals, who were clearly harmless; they did not even try to negotiate with them or persuade them to open the main doors, preferring to break them down without a single doubt or uncertainty and to beat up the people present<sup>248</sup>. Having regard to the facts laid down by the Court and having heard and read the first-instance, appeal and cassation judgements, the ECtHR considers that «*the ill-treatment suffered by the applicant during the police storming of the Diaz-Pertini School must be classified as "torture" within the meaning of Article 3 of the Convention*»<sup>249</sup>.

As claimed by the applicant, he suffered a violation of Article 3 both in its substantial (as just described) and procedural aspects. As for this second infringement, the Court underlined that each State Party needs to carry out effective investigations in all cases of material breach of Article 3, as to identify, prosecute and punish those responsible for the inhuman or degrading treatment<sup>250</sup>. Therefore, the investigation should be initiated promptly and conducted expeditiously<sup>251</sup>. The Court in the present judgment, unsurprisingly, addresses the topic of criminal responsibility, and states that it must ensure that a State's obligation to protect the rights of those under its jurisdiction is adequately discharged, since its task is not to

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<sup>245</sup> ECtHR, *Cestaro v. Italy*, cit., 42.

<sup>246</sup> ECtHR, *Cestaro v. Italy*, cit., 43.

<sup>247</sup> ECtHR, *Cestaro v. Italy*, cit., 43.

<sup>248</sup> ECtHR, *Cestaro v. Italy*, cit., 43.

<sup>249</sup> ECtHR, *Cestaro v. Italy*, cit., 45.

<sup>250</sup> PICCHI, M., *The condemnation of the Italian State for Violation of the Prohibition of Torture*, cit., 28.

<sup>251</sup> ECtHR, *Cestaro v. Italy*, cit., 50.

understand one's criminal liability or to determine the penalty to be established<sup>252</sup>. Additionally, an investigation to be effective needs to be carried out in a State in which criminal law provisions penalizing practices that contravene what Article 3 states are enacted, and also it is necessary that an award of compensation for the applicant is made or at least the State needs to provide him the chance to obtain compensation<sup>253</sup>.

In the present case the ECtHR found numerous violations of positive obligations contained in Article 3 ECHR, and three main topics need to be raised<sup>254</sup>. First of all, one needs to underline the failure to identify those responsible for the ill-treatment, since the ones acting against Mr. Cestaro were not properly identified and remained unpunished<sup>255</sup>: this first problematic derives from the police lack of cooperation during the preliminary investigations<sup>256</sup>. Moreover, the first-instance judge was not able, on the basis of the files obtained until that very moment, to pinpoint the ones responsible, since the raid was carried out by individuals wearing scarves on their faces, as not to be recognized, and hence they were not visible nor identifiable<sup>257</sup>. Secondly, the Court addressed the most serious aspect, the one concerning impunity<sup>258</sup>, making reference to the Statute of Limitations for the crimes charged and the remission of sentence<sup>259</sup>. As previously showed, several police officers were prosecuted on the account of less serious offence, such as slander, abuse of public authority, simple bodily harm and grievous bodily harm<sup>260</sup>. However, these crimes became statute-barred before the Appeals decision, while the offence of grievous bodily harm was declared statute-barred, and therefore extinct, by the Court of Cassation<sup>261</sup>. Only convictions involving the providing of

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<sup>252</sup> ECtHR, *Cestaro v. Italy*, cit., 51.

<sup>253</sup> ECtHR, *Cestaro v. Italy*, cit., 52.

<sup>254</sup> PICCHI, M., *The condemnation of the Italian State for Violation of the Prohibition of Torture*, cit., 28 s.

<sup>255</sup> VIGANO', F., *La difficile battaglia contro l'impunità dei responsabili di tortura: la sentenza della Corte di Strasburgo sui fatti della Scuola Diaz e i tormenti del legislatore italiano*, in *Diritto Penale Contemporaneo*, 2015.

<sup>256</sup> ECtHR, *Cestaro v. Italy*, cit., 52.

<sup>257</sup> ECtHR, *Cestaro v. Italy*, cit., 53; ZANETTI, V., *ECtHR and Torture in Italy*, cit., 162.

<sup>258</sup> PICCHI, M., *The condemnation of the Italian State for Violation of the Prohibition of Torture*, cit., 29.

<sup>259</sup> ECtHR, *Cestaro v. Italy*, cit., 53.

<sup>260</sup> ZANETTI, V., *ECtHR and Torture in Italy*, cit., 162.

<sup>261</sup> VIGANO', F., *La difficile battaglia contro l'impunità*, cit.

false information, aggravated bodily harm and the unlawful carrying of weapons of war were delivered<sup>262</sup>. To sum it up, no police officer, which was identified as responsible, was convicted on the grounds of the ill-treatment perpetrated: this consequence arose from the Statute of Limitations<sup>263</sup>. The Court considers that *«the authorities' response was unsatisfactory in view of the gravity of the facts and was therefore incompatible with the procedural obligations under Article 3 of the Convention»*<sup>264</sup>. Moreover, the Court found numerous obstacles while examining the case: there were highly complex criminal proceedings against dozens of accused persons, hundreds of victims (Italians and not) which were claiming civil damages<sup>265</sup>. To that end, the ECtHR found domestic authorities to be inadequate and incompetent in their response to such serious acts<sup>266</sup>: *«The Court therefore considers that the Italian criminal legislation applied in the instant case proved both inadequate in terms of the requirement to punish the acts of torture in issue and devoid of any deterrent effect capable of preventing similar future violations of Article 3»*<sup>267</sup>. This part of the judgement is fundamental since the Court seems to dismiss the Statute of Limitations and its applicability to the present case<sup>268</sup>. This conclusion was drawn due to the particular breach that occurred: torture claims a particular status in international law, as an international crime<sup>269</sup>. Implicitly, the Court completely disregarded the norms concerning the Statute of Limitations when such an offence is committed, establishing that these violations cannot be time-barred<sup>270</sup>. Thirdly, the Court underlined some doubts and uncertainties as to the disciplinary measures taken against those responsible for the violence<sup>271</sup>: the case file has no mention whatsoever about what future holds for the police officers accused and responsible of acts of torture and other related offenses, nor does it say whether they have been suspended and if their careers tragically took a step down

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<sup>262</sup> VIGANO', F., *La difficile battaglia contro l'impunità*, cit.

<sup>263</sup> ECtHR, *Cestaro v. Italy*, cit., 54.

<sup>264</sup> ECtHR, *Cestaro v. Italy*, cit., 54.

<sup>265</sup> ECtHR, *Cestaro v. Italy*, cit., 54.

<sup>266</sup> ECtHR, *Cestaro v. Italy*, cit., 54.

<sup>267</sup> ECtHR, *Italy v. Cestaro*, cit., 55; VIGANO', F., *La difficile battaglia contro l'impunità*, cit.

<sup>268</sup> PUSTORINO, P., *Cestaro v. Italy*, cit.

<sup>269</sup> PUSTORINO, P., *Cestaro v. Italy*, cit.

<sup>270</sup> PUSTORINO, P., *Cestaro v. Italy*, cit.

<sup>271</sup> VIGANO', F., *La difficile battaglia contro l'impunità*, cit.

or not<sup>272</sup>. «Having regard to the foregoing findings, the Court considers that the measures adopted by the domestic authorities did not fully satisfy the criterion of a thorough and effective investigation as established in its case-law»<sup>273</sup>. The Court kept repeating that a simple compensation to the victims was not adequate and proportional, due to the fact that Article 3 had been infringed: it amounts to an ineffective remedy<sup>274</sup>. The Court continued stating «in cases of treatment contrary to Article 3 of the Convention, given that the requirement for compensation to remedy a breach of Article 3 at national level is imposed in addition to the requirement of a thorough and effective investigation geared to identifying and punishing those responsible and is not an alternative, purely compensatory remedies cannot be regarded as effective under Article 3»<sup>275</sup>.

A noteworthy aspect of the ruling is the frequent allusion to Italian Courts rulings, despite the apparent custom of courts reconstructing and evaluating their legal consequences from a domestic standpoint<sup>276</sup>. However, the frequency in which the Court cited the rulings issued by several Italian authorities in the case at hand is quite remarkable<sup>277</sup>. In its decision on October 2<sup>nd</sup> 2012, the Italian Supreme Court mentioned the CAT definition of torture as its foundation for rendering the judgement and added that, despite the acts in question being of unusual and absolute gravity, it could not classify them as torture because the offence itself is not criminalized in Italy<sup>278</sup>. The ECtHR continued, analyzing the specific behavior of the various Italian authorities, stating that they correctly considered the crucialness of the violations and it also criticized police officers who denied cooperation in the investigations, rendering impossible to identify the perpetrators<sup>279</sup>.

The *Cestaro v. Italy* case demonstrated that the domestic criminal legislation in Italy does not recognize torture and lacks the necessary deterrent effect to prevent other similar violations of Article 3 and Article 4 comma 1 CAT, in the future<sup>280</sup>.

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<sup>272</sup> PUSTORINO, P., *Cestaro v. Italy*, cit.; ZANETTI, V., *ECtHR and Torture in Italy*, cit., 162.

<sup>273</sup> ECtHR, *Cestaro v. Italy*, cit., 56.

<sup>274</sup> ECtHR, *Cestaro v. Italy*, cit., 56.

<sup>275</sup> ECtHR, *Cestaro v. Italy*, cit., 57.

<sup>276</sup> PUSTORINO, P., *Cestaro v. Italy*, cit. P

<sup>277</sup> PUSTORINO, P., *Cestaro v. Italy*, cit. P

<sup>278</sup> PUSTORINO, P., *Cestaro v. Italy*, cit. P

<sup>279</sup> PUSTORINO, P., *Cestaro v. Italy*, cit. P

<sup>280</sup> PICCHI, M., *The condemnation of the Italian State for Violation of the Prohibition of Torture*, cit., 29.

Unsurprisingly, it highlights the importance of having effective criminal provisions to combat torture and the duty to investigate cases of ill-treatment<sup>281</sup>. The Strasbourg Court in adjudicating the case had found an implicit duty in Article 3 which requires to enact and enforce efficient criminal provisions related to the prohibition of torture<sup>282</sup>. This obligation can be read in connection with other international norms: indeed, it is necessary to comprehend the importance of the link established between the duty to protect individuals from ill-treatment committed by other individuals and the duty to investigate cases where ill-treatment may have occurred<sup>283</sup>. In a previous case, *M.C. v Bulgaria*, the Court established that «*States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution*»<sup>284</sup>. Therefrom, when an individual claims that he has been subjected to severe and serious ill-treatment and therefore that a breach of Article 3 has occurred, the provision itself in connection with Article 1 demands that there should be an efficient official investigation<sup>285</sup>.

In other words, the criminalization of torture at domestic level is an indispensable requirement for States in order to carry out thorough investigations on the matter, otherwise, the lack of criminal provisions would render investigations on allegations of torture null and void *a priori*, creating a potential loophole for impunity<sup>286</sup>. Nonetheless, the ECtHR may be called upon to evaluate the suitability of national laws and their actual effective implementation, even when domestic criminal norms have been adopted by States to criminalize torture<sup>287</sup>. In this regard, Article 7 ECHR makes reference to the Latin brocade «*nullum crimen nulla poena sine lege*», which denies the applicability of any sentence or penalty whatsoever when no law at the domestic level has been introduced<sup>288</sup>. The current article could therefore be applicable even when one has been accused of torture,

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<sup>281</sup> PICCHI, M., *The condemnation of the Italian State for Violation of the Prohibition of Torture*, cit., 29.

<sup>282</sup> CAROLEI, D., *Cestaro v. Italy*, cit., 572.

<sup>283</sup> European Court of Human Rights, *M.C. v. Bulgaria*, Judgement, Application No. 39272/98, March 4<sup>th</sup>, 2004, §166.

<sup>284</sup> ECtHR, *M.C. v. Bulgaria*, cit., § 153.

<sup>285</sup> CAROLEI, D., *Cestaro v. Italy*, cit., 572.

<sup>286</sup> CAROLEI, D., *Cestaro v. Italy*, cit., 573.

<sup>287</sup> CAROLEI, D., *Cestaro v. Italy*, cit., 573.

<sup>288</sup> CAROLEI, D., *Cestaro v. Italy*, cit., 573.

since the Italian legal system lacks such a criminal provision. However, its second comma prescribes a fundamental exception stating that «*this article should not prejudice the trial and the punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations*». Accordingly, underlining and understanding the peremptory and absolute nature of the prohibition of torture under international law, conducts and acts amounting to the said offence, should fall within the meaning of Article 7 comma 2<sup>289</sup>.

Using the same methodology as *Soderman v. Sweden*, the ECtHR remarked that the duty to criminalize torture springs from other international instruments, such as the CAT, in a more explicit way, expressing both a negative obligation of *non-facere* and positive ones, as described in the previous paragraphs<sup>290</sup>. Likewise, the general prohibition of torture and the subsequent obligation to criminalize it is codified in Article 7 ICCPR, which is meant to be read in conjunction with Article 2 paragraph 2: the latter mandates that states take the necessary actions to adopt laws in order to give effect to the rights envisaged in the Covenant<sup>291</sup>. These international tools give emphasis to the importance of adopting laws to give effect to the rights they contain<sup>292</sup>.

Specifically, in the *Cestaro v Italy* case the European Court concluded that «*the structural nature of the problem appears undeniable*»: while one might think that Italy's problem consists in the continuous violation of the prohibition of torture, rather the root of the controversy resides in the State's systematic failure to fulfill its positive obligations to enact and enforce an adequate criminal legislation under Article 3 of the Convention and Article 4 comma 1 CAT<sup>293</sup>. Hence, the Court based its decision on the persistent lack of an *ad hoc* offence in its legislation<sup>294</sup>. The UN Human Rights Committee highlighted that «*delays continue to occur with respect to passing legislation concerning the following: the introduction into the Criminal*

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<sup>289</sup> CAROLEI, D., *Cestaro v. Italy*, cit., 573.

<sup>290</sup> European Court of Human Rights, *Sonderman v. Sweden*, Judgement, Application No. 5786/08, October 12<sup>th</sup>, 2013, §82.

<sup>291</sup> United Nations Human Rights Committee, *General Comment No. 20, Article 7 on its Forty-fourth session*, March 10<sup>th</sup> 1992, §13.

<sup>292</sup> CAROLEI, D., *Cestaro v. Italy*, cit., 576.

<sup>293</sup> CAROLEI, D., *Cestaro v. Italy*, cit., 576.

<sup>294</sup> CAROLEI, D., *Cestaro v. Italy*, cit., 576.

*Code of the offence of torture as defined in international law»*<sup>295</sup>. The Committee for Prevention of Torture also took action, overseeing the legislative process through a number of reports, which concluded that Italy should make a greater effort to include the crime of torture in its criminal code as soon as possible<sup>296</sup>. The Court once again recalls the CPT's report on the visit carried out in Italy, in 2008, from September 14<sup>th</sup> to the 26<sup>th</sup>, in which, Italian authorities were encouraged to work towards criminalizing torture, implying that Italy was urged to pass laws, specifically making torture a criminal offence<sup>297</sup>. It is noteworthy to be mentioned the CPT's report on the visit to Italy in 2012, from May 13<sup>th</sup> to the 25<sup>th</sup>, in which it was noted that despite twenty years of discussion in the Italian Parliament of nine bills, the Italian penal code still did not include provisions that explicitly sanctioned the crime of torture<sup>298</sup>. The CPT encouraged the Italian state to comply with its international obligations, which likely means implementing laws and measures that criminalize and prevent torture<sup>299</sup>. Additionally, it was suggested that measures should be taken to ensure that the crime of torture was not subject to the Statute of Limitations, which would mean that those who committed acts of torture could be prosecuted at any time in the future<sup>300</sup>. Thanks to the CPT's reports the importance of addressing torture as a crime is underscored and it is ensured that legal measures are in place to prevent and punish it, in line with international and human rights standards.

Hence, the *Cestaro v. Italy* case is an important example, thanks to which the ECHR came to the conclusion that the Italian legal system should be given the authority to ensure that those who commit acts of torture or other ill-treatment are appropriately punished under Article 3 of the European Convention<sup>301</sup>. It should

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<sup>295</sup> CAROLEI, D., *Cestaro v. Italy*, cit., 578.

<sup>296</sup> CAROLEI, D., *Cestaro v. Italy*, cit., 578.

<sup>297</sup> DE FRANCESCHI, P., *Il divieto di tortura: dai principi internazionali alla legge 110/2017*, in *Giurisprudenza Penale*, 2017, 7.

<sup>298</sup> DE FRANCESCHI, P., *Il divieto di tortura*, cit., 7.

<sup>299</sup> DE FRANCESCHI, P., *Il divieto di tortura*, cit., 7.

<sup>300</sup> DE FRANCESCHI, P., *Il divieto di tortura*, cit., 7.

<sup>301</sup> PICCHI, M., *The condemnation of the Italian State for Violation of the Prohibition of Torture*, cit., 29.



also have the authority to stop torture perpetrators from receiving relief that goes against the Court's case law<sup>302</sup>.

#### **4.2. The ECtHR's judgments on the events in the Bolzaneto Barracks: the cases of *Azzolina and Others v. Italy* & *Blair and Others v. Italy*.**

Together with the brutal raid on the Genoa Social Forum Premises, the Genoa Public Prosecutor opened other proceedings, such as the ones concerning the Bolzaneto Barracks.

Following the incidents in Genoa during the G8 Summit, and hence, after the case *Cestaro v. Italy*, it is of utter importance to proceed with the analysis of the cases of *Blair and Others v. Italy* and *Azzolina and Others v. Italy*, being presented to the ECtHR, respectively in 2014 (the former) and 2009 and 2010 (the latter)<sup>303</sup>. The applicants complained the violation of Article 3 ECHR, having been subjected to a conduct tantamount to torture and having suffered an ineffective, and thus inconclusive, investigation<sup>304</sup>. The Court held, with no doubt, that the acts suffered by the applicants amounted to torture as in physical, verbal and psychological abuse<sup>305</sup>. However, as for the case *Cestaro v. Italy*, all the acts of violence have been statute-barred and none of the persons found to be responsible had received adequate punishment<sup>306</sup>. As previously described, in July 2001 the city of Genoa was characterized by a large number of demonstrations, many of which led to clashes between police officers and protestors. Several demonstrators, as well as police officers, got injured and seriously harmed; additionally multiple neighborhoods were severely damaged, or even destroyed<sup>307</sup>. Because of the chaos originated, many demonstrators were brought to two different temporary centers for

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<sup>302</sup> PICCHI, M., *The condemnation of the Italian State for Violation of the Prohibition of Torture*, cit., 29.

<sup>303</sup> European Court of Human Rights, *Press Release No. 318, Shortcomings in the official investigation into the police violence against demonstrators who were held following the 2001 G8 Summit in Genoa*, October 26<sup>th</sup>, 2017, 1.

<sup>304</sup> ECtHR Press Release No. 318, cit., 1.

<sup>305</sup> ECtHR Press Release No. 318, cit., 1.

<sup>306</sup> ECtHR Press Release No. 318, cit., 1.

<sup>307</sup> European Court of Human Rights, *Azzolina and Others v. Italy*, Judgement, Applications No. 28923/09 and 67599/10, October 26<sup>th</sup>, 2017, 2.

detention: the San Forte and Bolzaneto Barracks<sup>308</sup>. People were taken there after being arrested, and later on they would be transferred to various prisons<sup>309</sup>. The applicants were transferred after one or two days and were subjected to violence at the hands of policemen and the medical personnel<sup>310</sup>. As people arrived at the detention facility, they were marked with a sharpie on their cheeks, and forced to walk next to police officers, who at the same time started beating and kicking them<sup>311</sup>. Some prisoners were brought to huge cells (which usually would hold thirty individuals), where they were forced to stand still in front of a wall with their arms up and their legs apart<sup>312</sup>. In particular, there was one detainee who had an artificial leg and could not maintain that precise position, causing him to collapse<sup>313</sup>. He was later subjected to two bursts of pepper spray and a particularly grave beating<sup>314</sup>. They said to have sustained bodily injury and insults, they had been sprayed with irritant gas and had their personal effects destroyed<sup>315</sup>. The violence was non-stop and, apart from the acts just described, they had been subjected to other forms of ill-treatment<sup>316</sup>. Even though they suffered extremely severe injuries, they had not been provided with appropriate treatment at any stage, and, unsurprisingly, the violence continued even during the medical examinations<sup>317</sup>.

The proceedings were initiated against 145 individuals<sup>318</sup>. Among them, fifteen of the accused were sentenced to a period of imprisonment between nine months and five years and were temporarily barred from holding public office<sup>319</sup>. However, ten of them were granted stays of execution of sentence, three were granted complete remission of sentence and two of them obtained a 3-year remission of sentence<sup>320</sup>. To this end, the Court held that the process became extremely complicated, due to the many difficulties with the identification of the

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<sup>308</sup> ECtHR, *Azzolina and Others v. Italy*, cit., 2.

<sup>309</sup> ECtHR, *Azzolina and Others v. Italy*, cit., 3.

<sup>310</sup> ECtHR, *Azzolina and Others v. Italy*, cit., 3.

<sup>311</sup> DAVIES, N., *The bloody battle in Genoa*, cit.

<sup>312</sup> DAVIES, N., *The bloody battle in Genoa*, cit.

<sup>313</sup> DAVIES, N., *The bloody battle in Genoa*, cit.

<sup>314</sup> DAVIES, N., *The bloody battle in Genoa*, cit.

<sup>315</sup> ECtHR, *Azzolina and Others v. Italy*, cit., 3.

<sup>316</sup> ECtHR Press Release No. 318, cit., 2.

<sup>317</sup> ECtHR Press Release No. 318, cit., 2.

<sup>318</sup> ECtHR, *Azzolina and Others v. Italy*, cit., 12.

<sup>319</sup> ECtHR, *Azzolina and Others v. Italy*, cit., 12.

<sup>320</sup> ECtHR, *Azzolina and Others v. Italy*, cit., 12.

perpetrators and the fact that domestic law lacked a specific provision criminalizing torture, even though inhuman and degrading treatment had been inflicted<sup>321</sup>. Not unexpectedly, the cases were brought before the Appeals Court, which judged them overturning the aforementioned judgement in part, on the grounds that a number of offenses had become statute-barred<sup>322</sup>. Even the Italian Court of Cassation, in 2013, upheld that judgment, having reiterated what the Appeals judgement stated<sup>323</sup>.

The applicants alleged that they suffered a violation of Article 3 ECHR: they, firstly, claimed that the violence and ill-treatment suffered in the detention center amounted to torture<sup>324</sup>; secondly, that the following investigation had not been properly and appropriately conducted; lastly, that the ones responsible had not been adequately sanctioned<sup>325</sup>. Regarding the «*non-punishment*» applied, the applicants complained about the rules established in the Italian legal system as to the Statute of Limitations, the remission of sentence granted and the absence of disciplinary sanctions<sup>326</sup>.

Particularly, in the *Azzolina and Others v. Italy* the Court recognized only partially the violations alleged and granted compensation in the form of damages<sup>327</sup>. In this regard, the applicants could not claim victim status anymore and the Court also assessed that they did not exhaust all domestic criminal remedies<sup>328</sup>. The ECtHR concluded that the abuses (both verbal and physical), which the applicants claimed they were subjected to, and the after-effects had, indeed, occurred; moreover, it established that the place of detention where they were brought to was in fact a place of «*lawlessness*», where their fundamental rights had been infringed<sup>329</sup>. By saying that, the Court encountered a violation of Article 3 ECHR. As for the impossibility to individuate the police officers responsible, the Court acknowledged that the applicants, during the time they were ill-treated, could not look at their faces, since it was forbidden to do so: as a result, the perpetrators went

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<sup>321</sup> ECtHR Press Release No. 318, cit., 2.

<sup>322</sup> ECtHR Press Release No. 318, cit., 2.

<sup>323</sup> ECtHR Press Release No. 318, cit., 2.

<sup>324</sup> ECtHR, *Azzolina and Others v. Italy*, cit., 16.

<sup>325</sup> ECtHR Press Release No. 318, cit., 2.

<sup>326</sup> ECtHR, *Azzolina and Others v. Italy*, cit., 16.

<sup>327</sup> ECtHR Press Release No. 318, cit., 3.

<sup>328</sup> ECtHR Press Release No. 318, cit., 3.

<sup>329</sup> ECtHR Press Release No. 318, cit., 3.

unpunished<sup>330</sup>. On account of this, the Court noticed that, while some forty-five persons underwent trial, only eight of them were actually punished, while the others were either granted a remission of sentence or a stay of execution<sup>331</sup>.

As its predecessor, in the case *Cestaro v Italy*, the Court asked Italy to introduce a specific crime of torture in order to sanction properly such conducts. In the case at hand, the Court was invested with the same question, thankfully one might say, after the enactment of the law introducing the *ad hoc* offence of torture in the Italian Criminal Code<sup>332</sup>. Hence, the Court needed to carefully examine the provision. Regarding disciplinary actions, the Court noted that the police officers responsible had not been placed on leave during the trial, and it was unclear from the Government's remarks if they had been subjected to disciplinary action or not<sup>333</sup>. The Court emphasized that in cases where State agents were accused of mistreatment-related offenses, it was crucial that they be removed from their positions while the matter was being looked into or prosecuted, and that they should be fired if found guilty<sup>334</sup>.

## 5. Concluding remarks.

As elaborated in the Chapter at hand, Italy faced numerous difficulties regarding the specific crime of torture, which, in particular, were linked to the absence of an *ad hoc* offence in its domestic legal system. The controversies originated firstly when the Constitution entered into force in 1948, introducing the only crime constitutionally guaranteed; secondly, Italy ratified different international and European treaties requesting the introduction of such crime in the Criminal Code. Decades passed by, and still there was no crime, having Italy found many reasons why such introduction was not needed. However, every single one of these reasons was then proved unfounded. It even received multiple condemnations by the European Court of Human Rights, on the basis of the infringement of Article

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<sup>330</sup> ECtHR, *Azzolina and Others v. Italy*, cit., 27.

<sup>331</sup> ECtHR Press Release No. 318, cit., 3.

<sup>332</sup> ECtHR Press Release No. 318, cit., 4.

<sup>333</sup> ECtHR Press Release No. 318, cit., 4.

<sup>334</sup> ECtHR Press Release No. 318, cit., 4.

3 ECHR. However, Italy did not comply with any of these obligations, until 2017, when Articles 613-bis and 613-ter were finally introduced in the Criminal Code.

## CHAPTER 2

### **The excessive delay in the introduction of the crime of torture in the Italian Criminal Code and the unpredictable repeal proposal.**

#### **1. Preface.**

The present chapter will address a few focal points concerning torture, as outlined in the Italian legal system, therefore it will not regard the international or European points of view.

Firstly, as precisely highlighted in the previous chapter, Italy needed the introduction of a provision criminalizing torture, in order to adhere to the multiple obligations, set forth towards it. However, even after the longest wait and a very twisted process of law-making, the Italian Government was not able to introduce a crime which was seen as appropriate or adequate in any way, not even being in line with article 1 CAT.

Multiple concerns were brought forth, concerning most of all its nature, the conducts relevant, the Statute of Limitations, which was deemed incorrect, and the nature of its second comma.

Of course, a few proposals were pointed out in order to assess the problems, and maybe solve them, even if it would take ages. However, in doing so, and by stressing out all the problems and critiques, the only solution reached was a proposal to repeal the crime and to make it an aggravating circumstance, in November 2022. Surely, it is something that will create more problems than the ones to be solved.

#### **1.1. The ever-lasting silence on the crime of torture after Italy's ratification of the CAT.**

As previously stated in the first chapter, for decades, Italy had been violating its obligations, arising mostly from International treaties, relating to the introduction of an *ad hoc* crime punishing torture, and therefore sanctioning such conducts<sup>335</sup>. Thankfully, after the longest thirty years, on July 14<sup>th</sup> 2017, it decided

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<sup>335</sup> BUZZELLI, S., *Tortura: una legge tanto per fare*, in *Ristretti orizzonti*, ed. on-line del settembre 2017, 1.

to introduce such crime, with Law No. 110. However, Italy was considered to be guilty of a purely unjustified delay; aggravating the circumstances, the new article presented various problematics, leaving individuals unsatisfied due to its particularly ambiguous wording<sup>336</sup>. This everlasting silence was foreseen as a concealment, as a complete denial of truth, or even as an internal annihilation regarding the person subject to torture<sup>337</sup>. As for the first hypothesis, it specifically refers to the extensive or widespread hiding regarding acts of torture<sup>338 339</sup>. One of the main reasons for such a delay could be traced back to 2016, when the Jihadist massacre stroke Nice, on July 14<sup>th</sup>: the law-making process was therefore interrupted, as it was believed that such a crime would inhibit police officers to act and work properly, and that, thus, it would have been a law made just to militate against them<sup>340</sup>.

One of the focal points concerning torture regards its nature. Thus, as one tries to understand what torture can amount to, it was stated that it can be described as purely feral or even beastly<sup>341</sup>. This interpretation cannot be taken into account, since torture does not belong to animals *per se*, in so far as they are subject to it<sup>342</sup>. However, the current thesis can be differently interpreted, since it can be said that such conducts have an inhuman nature, being able to strike on an individual's dignity: it brings people such a high level of suffering, causing them a particular state of unhappiness and pain; it represents one of the worst evils and it may be even said that torture is worse than death<sup>343</sup>.

The newly made Law states that torture is prohibited under any circumstance, constituting every individual's right to be free from the conducts that fall within its definition: it is a non-derogable right<sup>344</sup>. Once Law No. 110 was

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<sup>336</sup> BUZZELLI, S., *Tortura: una legge tanto per fare*, cit., 1.

<sup>337</sup> LALATTA COSTERBOSA, M., *La tortura tra illegalità, menzogna e alienazione*, in *Il Mulino-Rivisteweb*, in Rivista di filosofia del diritto, Fascicolo 2, 2015, 253 s.

<sup>338</sup> As for the relevant cases to be mentioned: *El-masri v. Macedonia*, *Al Nashiri v. Poland* and *Husayan (Abu Zubayah) v. Poland*.

<sup>339</sup> LALATTA COSTERBOSA, M., *La tortura tra illegalità, menzogna e alienazione*, in *Il Mulino-Rivisteweb*, in Rivista di filosofia del diritto, Fascicolo 2, 2015, 253 s.

<sup>340</sup> ZAMPERINI, A., MENEGATTO, M., VIANELLO, F., *La questione tortura in Italia*, Studi sulla questione criminale, in *Rivisteweb*, Il Mulino, 2018, 13.

<sup>341</sup> BUZZELLI, S., *Tortura: una legge tanto per fare*, cit., 2.

<sup>342</sup> BUZZELLI, S., *Tortura: una legge tanto per fare*, cit., 2.

<sup>343</sup> BUZZELLI, S., *Tortura: una legge tanto per fare*, cit., 2.

<sup>344</sup> ZAMPERINI, A., MENEGATTO, M., VIANELLO, F., *La questione tortura in Italia*, cit., 13.

introduced in 2017, it was immediately and largely criticized. In 2018, the magistrate Enrico Zucca made a clarification of utmost importance, while considering the horrors taking place in 2001, during the Genoa G8 Summit<sup>345</sup>. He asserted that the new Law is definitely not able to sanction them for two main reasons<sup>346</sup>. Above all, his critique is connected with the UN Convention Against Torture and how the Law itself does not resonate with the torture definition contained in the International treaty: the main difference relates to the Statute of Limitations, specifically the fact that Law No. 110 introduces a strict provision relating to it, making reference to the possible risk that the sanctions against the crime of torture could be deemed ineffective<sup>347</sup>.

In conclusion, torture can be described as something that has been present and that has been committed since the beginning of times, even though there had been quite a few trials, which, failingly, tried to hide it or disguise it<sup>348</sup>.

## **2. The path towards Law No. 110/2017 and the introduction of articles 613-bis and 613-ter in the Italian Criminal Code.**

### **2.1. From Italy's CAT ratification to the first draft of a poorly made new law introducing torture.**

As stated in the previous Chapter, Italy's CAT ratification in 1989 played a prominent role in the introduction of the Crime of Torture. The first step towards the criminalization can be awarded to Senator Nereo Battello, who introduced a specific Bill on April 4<sup>th</sup> 1989, aiming at sanctioning conducts tantamount to torture, as outlined in the UN Convention: however, the Bill did not go through<sup>349</sup>.

Later on, specifically on March 28<sup>th</sup>, 2013, another Bill was drafted by Senator Luigi Manconi in introducing the new Bill, saw a complete overlap with the definition contained in the 1984 UN Convention: torture was therein described as a «*reato proprio*», hence it could only be committed by a public official or a

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<sup>345</sup> ZAMPERINI, A., MENEGATTO, M., VIANELLO, F., *La questione tortura in Italia*, cit., 14.

<sup>346</sup> ZAMPERINI, A., MENEGATTO, M., VIANELLO, F., *La questione tortura in Italia*, cit., 14.

<sup>347</sup> ZUCCA, E., *Chiamatela come volete: è sempre tortura. La legge italiana, tra cattivi maestri e principi delle Convenzioni*, in Studi sulla questione criminale, Fascicolo 2, maggio-agosto 2018, 6.

<sup>348</sup> ZUCCA, E., *Chiamatela come volete: è sempre tortura*, cit., 6.

<sup>349</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura: il difficile iter parlamentare*, in Rivisteweb, Il Mulino, Fascicolo 2, 2018, 35.



person representing a public service<sup>350</sup>; secondly, an act of violence was seen as a specific requirement for torture, thus a *condicio sine qua non* for the configuration of the crime; third of all, when torture is deemed to be committed the victim or victims need to suffer either a psychological or a physical suffering<sup>351 352</sup>.

The *mens rea* is a particularly important aspect, relating to the intention and knowledge of the wrongdoing: torture needs to pursue an ulterior motive: the current aspect is referable to as specific intent or *dolo specifico*<sup>353</sup>. Manconi requires for the specific crime to have effective punishment and remedies and an adequate provision regarding the Statute of Limitations<sup>354</sup>. Article 1 of the Bill imposes detention from years 4 to 10 and the sanction is doubled when death occurs<sup>355</sup>. When the Bill was presented to the Italian Senate, different senators made multiple proposals, which aimed at changing the crime, as it was previously configured<sup>356</sup>.

Among the main points, it was requested that the crime of torture needed to be addressed to as a *reato comune*, which can be committed by anyone, despite the perpetrator's qualification as public official<sup>357</sup>. Many senators were not satisfied with it, above all Enrico Buemi, who rejected the proposal, due to its distance to the UN Convention: even though he maintained its role as relator to the Bill, he decided not to participate, not being able to accept the advanced proposals<sup>358</sup>. His substitute was the lawyer Nico D'Ascola, who presented a different Bill<sup>359</sup>, which was the result of a common debate<sup>360</sup>.

However, the new Bill contained two main aspects which were in total contradiction to the UNCAT but were rather needed in light of a few circumstances:

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<sup>350</sup> The Senator underlined that, without such a qualification, torture could not be implemented to the relevant case.

<sup>351</sup> Both are relevant.

<sup>352</sup> VIGANO', F., *Sui progetti di introduzione del delitto di tortura in discussione presso la camera dei deputati, Parere reso nel corso dell'audizione svoltasi presso la Commissione giustizia della Camera dei Deputati il 24 settembre 2014*, in *Diritto Penale Contemporaneo*, Archivio Online 2010-2019, 2014, 18.

<sup>353</sup> VIGANO', F., *Sui progetti di introduzione del delitto di tortura*, cit., 18.

<sup>354</sup> GUADAGNUCCI, BARTESAGHI, *La legge sulla tortura*, cit., 36.

<sup>355</sup> GUADAGNUCCI, BARTESAGHI, *La legge sulla tortura*, cit., 36.

<sup>356</sup> GUADAGNUCCI, BARTESAGHI, *La legge sulla tortura*, cit., 36.

<sup>357</sup> GUADAGNUCCI, BARTESAGHI, *La legge sulla tortura*, cit., 36.

<sup>358</sup> GUADAGNUCCI, BARTESAGHI, *La legge sulla tortura*, cit., 36.

<sup>359</sup> Bill of Law No. 2168.

<sup>360</sup> GUADAGNUCCI, BARTESAGHI, *La legge sulla tortura*, cit., 37.

first of all, the crime of torture could not be only addressed to police officers, in so far as it could be seen as an attack towards them<sup>361</sup>; moreover, the bill aimed at enlarging the conducts to be sanctioned and could therefore be applied to torture committed by private individuals<sup>362</sup>; another delicate point concerned the conducts amounting to torture, and whether there was the need of multiple acts or a single one was deemed sufficient<sup>363</sup>.

In March 2014, the Senate was able to approve the Bill, reaching unanimity, which described torture as a *reato comune* needing acts of violence or grave threat, and the penalty applicable regarded detention from 3 to 10 years<sup>364</sup>. It also introduced an aggravating circumstance: if the crime was to be committed by a public official or an individual in charge of a public service the penalty would increase, from 5 to 12 years<sup>365</sup>.

After being approved by the Senate, the Bill needed to be accepted by the Deputies Chamber as well. However, while it was maintained as a *reato comune*, the Deputies did not agree with the formulation of multiple acts and with bringing back the terms «*act of violence and threat*»<sup>366</sup>. Moreover, the intention of the acts was considered, indeed, needed, adding that the victim is someone that finds themselves under the care, authority or custody of the torturer<sup>367</sup>.

Even though a few changes were purported, the text did not seem right yet. From a political standpoint, the «*Movimento 5 Stelle*», an Italian political movement, underlined a few concerns, suggesting more changes<sup>368</sup>. The crime of torture, as outlined in the approved text, was considered to be extremely broad and general, whilst what Italy needed was a specific provision criminalizing such conducts, shrinking the area of applicability<sup>369</sup>.

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<sup>361</sup> VIGANO', F., *Sui progetti di introduzione del delitto di tortura*, cit., 6.

<sup>362</sup> GUADAGNUCCI, BARTESAGHI, *La legge sulla tortura*, cit., 36.

<sup>363</sup> VIGANO', F., *Sui progetti di introduzione del delitto di tortura*, cit., 9.

<sup>364</sup> GUADAGNUCCI, BARTESAGHI, *La legge sulla tortura*, cit., 38.

<sup>365</sup> GUADAGNUCCI, BARTESAGHI, *La legge sulla tortura*, cit., 38.

<sup>366</sup> GUADAGNUCCI, BARTESAGHI, *La legge sulla tortura*, cit., 38.

<sup>367</sup> GUADAGNUCCI, BARTESAGHI, *La legge sulla tortura*, cit., 38.

<sup>368</sup> GUADAGNUCCI, BARTESAGHI, *La legge sulla tortura*, cit., 39.

<sup>369</sup> GUADAGNUCCI, BARTESAGHI, *La legge sulla tortura*, cit., 39.

## 2.2. Time for changes: how the case *Cestaro v. Italy* contributed to the promptness of the law-making process.

Precisely a year later, in March 2015, the law-making process underwent an unexpected acceleration. Truthfully, the main reason behind it derived from yet another condemnation<sup>370</sup>. Specifically, the ECtHR decided to accept the appeal brought by Arnaldo Cestaro, subject to torture during the G8 Summit in 2001<sup>371</sup>. The Court held that Italy, lacking a specific norm criminalizing torture, was found guilty of not having adhered to its obligations, both international and European: it was not able to apply adequate and appropriate remedies and could not even avoid similar acts to be committed in the future<sup>372</sup>. Matteo Renzi, Prime Minister at the time, intervened in the present debate, stressing out the need for the introduction of such crime, and that in doing so it would silence out the problems arising from the lack thereof<sup>373</sup>. Therefore, approving the Bill would be the only solution to the problem.

On April 9<sup>th</sup>, the Bill was finally approved. It described torture as a *reato comune*, which needed an act of violence or a threat thereof; it also contained that torture needed to pursue specific purposes for its configuration and that the victim must be entrusted to the torturer or subjected to his authority, supervision, or surveillance<sup>374</sup>. As for the penalty, it could go from 4 to 10 years, or 5 to 15 years, when committed by a public official or a person in charge of a public service<sup>375</sup>. Moreover, the Statute of Limitations was not the ordinary one, but it was successfully doubled<sup>376</sup>.

In conclusion, thanks to the *Cestaro v. Italy* and *Bartesaghi, Gallo and Others v. Italy* cases, the Parliament was able to introduce the final Bill punishing torture<sup>377</sup>. Specifically, if Italy hadn't fulfilled its obligations arising from Article

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<sup>370</sup> CANCELLARO, F., Tortura: nuova condanna dell'Italia a Strasburgo, mentre prosegue l'iter parlamentare per l'introduzione del reato, in *Diritto Penale Contemporaneo*, Archivio online 2010-2019, 2017, 322.

<sup>371</sup> CANCELLARO, F., Tortura: nuova condanna per l'Italia, cit., 322.

<sup>372</sup> CANCELLARO, F., Tortura: nuova condanna per l'Italia, cit., 322.

<sup>373</sup> GUADAGNUCCI, BARTESAGHI, *La legge sulla tortura*, cit., 40.

<sup>374</sup> GUADAGNUCCI, BARTESAGHI, *La legge sulla tortura*, cit., 40.

<sup>375</sup> GUADAGNUCCI, BARTESAGHI, *La legge sulla tortura*, cit., 40.

<sup>376</sup> GUADAGNUCCI, BARTESAGHI, *La legge sulla tortura*, cit., 40.

<sup>377</sup> DI TERLIZZI, V., *Tortura e contesto carcerario: tra criticità e prospettive di riforma dell'art.613-bis c.p.*, in *Archivio Penale*, 2023, n.2, 7.

46 ECHR<sup>378</sup> it would have faced other possible condemnations in the future: however, the Court in ruling the cases was able to prevent them<sup>379</sup>.

### **2.3. Back to the origins: Italian Senate decides to go back to the original formulation of the crime.**

Even though the crime outlined in the Bill was accepted, it did not lack obvious critiques and limits<sup>380</sup>. The debate brought the Senate back to its starting point. As previously stated by Alessandro Pansa (Head of police), the present configuration of the crime would tie police officers' hands from doing their job, feeling awfully criminalized<sup>381</sup>. Pansa was not the only one being content with the previous wording of the crime: Rodolfo Sabelli, president of the Magistrates National Association, felt that the way the crime was described by the Senate in 2014 was more consistent with the definition provided for by the UNCAT, and that it would definitely not limit police officers from acting under their duties<sup>382</sup>. Thanks to Nico D'Ascola the previous configuration of the crime was brought back: the new text refers to multiple and repeated conducts, therefore acts of violence or threats of violence; even more, he added the element of cruelty and the «*verifiable psychological trauma*»; he also eliminated the requirement of specific purposes<sup>383</sup>.

The text reached the Senate's approval, and the vote was unexpectedly unanimous<sup>384</sup>. It seemed as if a settlement was reached, but not everyone felt content with the definition. Antonio Marchesi, the President of Amnesty International, was one of them: he clarified that, although the text was finally

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<sup>378</sup> Paragraph 1 of Article 46 states that «*The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties*». In its paragraph 5 it refers to the violation of the precedent paragraph and declares that «*If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken*».

<sup>379</sup> DI TERLIZZI, V., *Tortura e contesto carcerario: tra criticità e prospettive di riforma dell'art.613-bis c.p.*, in *Archivio Penale*, 2023, n.2, 9.

<sup>380</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura: il difficile iter parlamentare*, in *Rivisteweb*, Il Mulino, Fascicolo 2, 2018, 41.

<sup>381</sup> Agenzia Ansa, *Sul reato di tortura scontro forze di polizia-giudici. Vertici Ps.Cc-Gsf, avremo mani legate. Anm, non è vero*, 12 maggio 2015.

<sup>382</sup> Agenzia Ansa, *Sul reato di tortura*, cit.

<sup>383</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura*, cit., 42.

<sup>384</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura*, cit., 42.

approved, it was not consistent with the Convention definition, being actually incompatible with it<sup>385</sup>.

#### **2.4. The slowdowns and setbacks in 2016 & the political pact reached in 2017.**

The critiques expressed mainly concerned the term «*repeated conducts*»<sup>386</sup>. In order to reach a definition which could be considered generally appropriate and could satisfy every need, D'Ascola decided to eliminate the term and, then, he corrected the text, adding that the acts of violence or threats of violence could only amount to torture if they were committed with multiple conducts<sup>387</sup>. However, this slight change was not able to make the law-making process go any faster, and the pause only resumed months later<sup>388</sup>.

A political pact was reached in 2017, which brought to a new Bill<sup>389</sup>. The recently approved text underlined some elements which were considered necessary for a conduct to be classified as torture: acts of violence or threats of violence; the author needed to act with cruelty; the psychological trauma needed to be verifiable; the conducts needed to be multiple; the torturer and the tortured were connected, since the latter needed to be under the former's surveillance, care or custody; the concept of impaired defense was added; as for the *mens rea*, the ulterior motives requirement was eliminated; the maximum penalty was reduced from 15 to 12 years, when the crime was committed by a public official<sup>390</sup>.

The Bill reached the Senate approval in 2017, on May 17<sup>th</sup>, with 195 approving votes and 8 votes against the bill, whilst 34 people abstained<sup>391</sup>. Among the dissenting votes there was Luigi Manconi, who expressed his concerns stating that «*All this means once again that there is no serious desire to pursue the*

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<sup>385</sup> *Reato di tortura, Amnesty International: testo peggiorato, ora incompatibile con la Convenzione Onu*, 10 luglio 2015, <https://www.amnesty.it/reato-di-tortura-amnesty-international-testo-peggiolato-ora-incompatibile-con-la-convenzione-onu>.

<sup>386</sup> *Reato di tortura, Amnesty International: testo peggiorato, ora incompatibile con la Convenzione Onu*, 10 luglio 2015, <https://www.amnesty.it/reato-di-tortura-amnesty-international-testo-peggiolato-ora-incompatibile-con-la-convenzione-onu>.

<sup>387</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura*, cit., 43.

<sup>388</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura*, cit., 43.

<sup>389</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura*, cit., 43.

<sup>390</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura*, cit., 43.

<sup>391</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura*, cit., 43.

*intentional violence of public officials and those in charge of public service (...) to comply with corporate requests that want to safeguard the worst, tarnishing the dignity of the best among the members to the police forces, who would never dream - in the vast majority - of using violence against the people under their custody»<sup>392</sup>.*

Even Amnesty International and Antigone manifested their clear dissent, stating that the approved law was unrepresentable *«We regretfully note that the desire to protect, at any cost, members of the state apparatus, even when they commit serious violations of human rights, continues to come before a law on torture in line with international standards that truly responds to the commitments undertaken 28 years ago with the ratification of the Convention»<sup>393</sup>.*

#### **2.5. The creation of a new law setting potential loopholes for impunity.**

Nils Muiznieks, the Commissioner for Human Rights of the Council of Europe, expressed his concerns noting the main differences between the newly approved text and what UNCAT aimed at: the provision that torture is committed through «multiple conducts», which would help in differentiating torture from other kinds of crimes, such as bodily injury<sup>394</sup>; the restriction of psychological torture to cases in which the trauma is «verifiable»; the use of «and», rather than «or», when referring to «inhuman and degrading treatment»: this concerns mainly the slight difference between inhuman and degrading treatment, since it has been stated that what is inhuman can also be degrading, and *vice versa*<sup>395</sup>; moving on to the verifiability of the psychological trauma, it is requested that this element is ascertained thanks to a psychiatric counselling or expertise<sup>396</sup>.

Muiznieks also refers to the failure to provide for a specific compensation for victims of torture and the risk that those convicted of torture may benefit from

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<sup>392</sup> Senato della Repubblica XVII Legislatura – Assemblea seduta n° 824 del 17 maggio 2017 – Fascicolo Iter DDL S. 10-362-388-395-849-874-B – Introduzione del delitto di tortura nell’ordinamento italiano, <http://www.senato.it/service/PDF/PDFServer/BGT/01022751.pdf>, 55 ss.

<sup>393</sup> *Il Senato approva la legge sulla tortura*, 17 maggio 2017, <https://www.amnesty.it/senato-approva-la-legge-sulla-tortura-amnesty-international-italia-antigone-si-conferma-un-testo-impresentabile-distante-dalla-convenzione-delle-nazioni-unite/>.

<sup>394</sup> DE FRANCESCHI, P., *Il divieto di tortura: dai principi internazionali alla legge 110/2017*, in *Giurisprudenza Penale*, 2017, 13.

<sup>395</sup> DE FRANCESCHI, P., *Il divieto di tortura*, cit., 14.

<sup>396</sup> DE FRANCESCHI, P., *Il divieto di tortura*, cit., 14.

clemency measures such as amnesty and pardon<sup>397</sup>. He kept arguing that, in doing so, and if no changes were to be put into place, the bill if completely approved, would create potential loopholes for impunity<sup>398</sup>. He later stated «*I strongly encourage the Italian Parliament to pass a law prohibiting torture or other inhuman or degrading treatment that fully complies with international human rights standards*»<sup>399</sup>.

Before the Commissioner expressed his dissent for the Bill, a public conference took place in Rome, where Deputies were asked to reject the proposal<sup>400</sup>.

On June 26<sup>th</sup> it was stated that if the Bill was finally approved, it would not be able to appropriately punish the conducts that took place during the G8 Summit, and that, therefore, they would remain unpunished<sup>401</sup>. The main reasons for this to happen would reside in the serious conduct committed with a single act, which would not be punishable; the various outcomes experienced by individuals as a result of acute mental distress; the non-existence, for many episodes that occurred at the Diaz-Pertini school, of the requirement of deprivation of liberty by the police forces or of the condition of «*impaired defense*»<sup>402</sup>.

Having passed a very large amount of time, Italy received yet another condemnation from the ECtHR, relating to the Diaz-Pertini events<sup>403</sup>. When tackling the concerns, Franco Vazio, the rapporteur for the Bill, highlighted that they could be addressed through an accurate interpretation of the provisions, without necessitating any modifications to the body of the text<sup>404</sup>.

#### **b-2.6. July 14<sup>th</sup> 2017: Law No. 110 introduced articles 613-bis and 613-ter in the Italian Criminal Code.**

Finally, after 30-odd years of trying to introduce a Law criminalizing torture, Law No. 110 was approved in 2017, and was published in the «*Gazzetta Ufficiale*»

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<sup>397</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura*, cit., 45.

<sup>398</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura*, cit., 45.

<sup>399</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura*, cit., 45.

<sup>400</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura*, cit., 46.

<sup>401</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura*, cit., 46.

<sup>402</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura*, cit., 46.

<sup>403</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura*, cit., 46.

<sup>404</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura*, cit., 46.

on July 18<sup>th</sup><sup>405</sup>. Article 1 of Law No. 110 introduced in the Italian legal system two main provisions: articles 613-bis and 613-ter in the criminal code, punishing respectively, torture and incitement of a public official to torture<sup>406</sup>. Its article 2 modified article 191 of the criminal code of procedure, introducing comma 2-bis, which concerns elements of proof which were illegally obtained<sup>407</sup>. Precisely, it prohibited to use any information or statement which was obtained through torture<sup>408</sup>. Article 3 affected article 19 of the decree No. 286, 1998 (the general law on Immigration), which deals with the non-refoulement principle and immigrants' expulsion<sup>409</sup>. Article 4 puts up with immunity, and the fact that foreigners who are part in a criminal proceeding or that are condemned for torture in another State cannot benefit from it<sup>410</sup>. Even though, the original Bill drafted in 2015 placed torture in the list of article 157 of the criminal code, which admits the possibility for the crimes therein contained to benefit from a doubled Statute of Limitations, when the Bill was passed on to the Senate and later modified, Law No. 110, as approved by the Parliament, was unable to do so<sup>411</sup>. Therefore, the crime of torture is subject to the ordinary Statute of Limitations, even when the crime is committed by a public official<sup>412</sup>. However, the elimination of such a provision was also due to a recent reform, the so-called «*Riforma Orlando*», which concerned the topic of the Statute of Limitations, modifying the suspensive and interruptive terms pursuant to articles 159 and 160 of the criminal code<sup>413</sup>.

Italy finally adhered to its obligations, at the international, European and Constitutional level. In spite of the passing of the law, not everyone felt satisfied with it.

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<sup>405</sup> RACCA, A., *Riflessioni sul delitto di tortura introdotto dalla l. 14 luglio 2017 n.110*, in *Il diritto penale della globalizzazione*, Pacini Giuridica, 2018.

<sup>406</sup> RACCA, A., *Riflessioni sul delitto di tortura*, cit.

<sup>407</sup> MARCHI, I., *Il delitto di Tortura: prime riflessioni a margine del nuovo art. 613-bis c.p.*, in *Diritto Penale Contemporaneo*, Archivio Online 2010-2019, Fascicolo del 7-8, 2017, 2.

<sup>408</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 2.

<sup>409</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 2.

<sup>410</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 2.

<sup>411</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit.; AMATO S., PASSIONE M., *Il reato di tortura. Un'ombra ben presto sarai: come il nuovo reato di tortura rischia il binario morto*, in *Riv. Dir. Pen. contemporaneo*, Archivio online, 18 febbraio 2022, 19.

<sup>412</sup> AMATO, S., PASSIONE, M., *Come il nuovo reato di tortura rischia il binario morto*, cit., 19 s.

<sup>413</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 2.



In December 2017 the new Law on torture was subjected to a first examination: a few discrepancies were revealed between the definition of the Convention and that incorporated into domestic law, which would be able to create real or potential spaces for impunity<sup>414</sup>. The Committee feels the need to ask Italy to «bring the content of article 613-bis of the Penal Code in line with article 1 of the Convention, eliminating all superfluous elements and identifying the perpetrator and the motivating factors or reasons for the use of torture»<sup>415</sup>. According to the United Nations Committee, Law No. 110 needs to be changed<sup>416</sup>.

### **2.3. Specific features of articles 613-bis and 613-ter: essential traits of the crime of torture.**

Before the introduction of Law No. 110, torture as a crime was punished by the military penal code of war in its article 185-bis and was seen as a war crime<sup>417</sup>. However, the mentioned article had a very narrow applicability<sup>418</sup>. The crime of torture is now outlined in article 613-bis of the Italian criminal code. The text addresses a common crime based on a control-subjugation relationship that is capable of inflicting significant suffering on the victims, who find themselves in a state of substantial powerlessness<sup>419</sup>. The offence, therefore, implies the presence of a relational dynamic in which one individual exercises coercive control over another, resulting in an experience of considerable suffering for the weaker party, which is in a condition of significant vulnerability and inability to defend itself<sup>420</sup>. For its configuration it does not require any subjective qualification of the perpetrator, punishing situations which fall within the scope and meaning of already punished and pre-existing crimes<sup>421</sup>.

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<sup>414</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura*, cit., 48.

<sup>415</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura*, cit., 48.

<sup>416</sup> GUADAGNUCCI, L., BARTESAGHI, E., *La legge sulla tortura*, cit., 48.

<sup>417</sup> VITALI, M., *Il reato di tortura e il reato di istigazione del pubblico ufficiale a commettere tortura*, in *Diritto.it*, 18 febbraio 2022, 1.

<sup>418</sup> VITALI, M., *Il reato di tortura e di istigazione del pubblico ufficiale*, cit., 1.

<sup>419</sup> CALIRI, V., *Il delitto di tortura. Riflessioni a margine del nuovo art. 613-bis c.p.*, in *Cammino Diritto*, Rivista di Informazione Giuridica, 18 dicembre 2020, 18.

<sup>420</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 18.

<sup>421</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 18.

Many critiques derived from the collocation of the article in the section concerning offences against moral freedom<sup>422</sup>. Many argued that, as the crime of torture mainly concerns bodily harm, the relative criminal provision should have been placed at the very end of the section concerning crimes against life and personal safety<sup>423 424</sup>. This could be simply explained by the etymology of the word «*torquere*», which the word torture comes from: it refers to «*the act of forcefully breaking the body of the tortured subject in order to bend his will*»<sup>425</sup>. The placement in one section rather than in a different one refers to specific practical, legal and political elements: for instance, torture describes a particularly degrading and inhuman nature of the conducts committed, that being the reason for its setting in the crimes against moral freedom<sup>426</sup>. Moreover, thanks to the penalty to be applied, the crime's collocation in the section concerning moral freedom seems excessive, in respect to the other sanctions applied to different crimes, which are quite mild<sup>427</sup>. Irrespective of the article's collocation, Italy finally adhered to the obligations it had been violating for innumerable years<sup>428</sup>.

The first comma of article 613-bis deals with the requirements in order for the crime of torture to be configured: it concerns the perpetrator and the victim(s), the kind of conduct which is able to amount to torture, the event needed for such a crime to be committed, the *mens rea*, the moment for the commission of the crime, and, lastly, it establishes the penalty to be applied. It states that «*anyone who, by violence or serious threats, or by acting with cruelty, causes acute physical suffering or a verifiable psychological trauma to a person deprived of personal liberty or entrusted to his custody, authority, supervision, control, care or assistance, or who is in conditions of impaired defense, is punished with prison*

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<sup>422</sup> GRAZIANI, F., *L'adattamento dell'Italia alle norme internazionali sul divieto di tortura: una riflessione sulla proposta di legge n. 2168*, in *La Comunità Internazionale*, LXIX vol., Editoriale Scientifica, 2014, 599.

<sup>423</sup> Which is chapter I, title XII.

<sup>424</sup> GRAZIANI, F., *L'adattamento dell'Italia al divieto di tortura*, cit., 600.

<sup>425</sup> GRAZIANI, F., *L'adattamento dell'Italia al divieto di tortura*, cit., 599.

<sup>426</sup> GRAZIANI, F., *L'adattamento dell'Italia al divieto di tortura*, cit., 600.

<sup>427</sup> LANZA, G., *Verso l'introduzione del delitto di tortura nel codice penale italiano: una fatica di Sisifo. Un'analisi dei "lavori in corso" anche alla luce della pronuncia della Corte Edu sul caso Cestaro c. Italia*, in *Diritto Penale Contemporaneo*, Archivio Online 2010-2019, 28 febbraio 2016, 8.

<sup>428</sup> MARCHI, I., *Il delitto di Tortura: prime riflessioni a margine del nuovo art. 613-bis c.p.*, in *Diritto Penale Contemporaneo*, Archivio Online 2010-2019, Fascicolo del 7-8, 2017, 1.

*detention for four to ten years if the act is committed through more than one conduct or if it involves inhuman and degrading treatment for the dignity of the person».*

### **3.1. Perpetrator and victim.**

The crime of torture was introduced as a common crime (*reato comune*), which means that it can be committed by anyone, not being necessary that the author of the crime detains a specific qualification<sup>429</sup>. The configuration of torture as a common crime, however, does not conflict with the provision contained in the Convention against torture: nothing prohibits contracting states to adopt a higher standard of protection<sup>430</sup>. Even the European Court classified as torture a series of acts which were far graver and more serious than the ones outlined in the Convention, causing a much broader application<sup>431</sup>. Nevertheless, the fact that torture was configured as a common crime could cause an essential problem: it can divert its scope, losing sight of the relationship between the authority and the private individual<sup>432</sup>.

The term «*in anyway*», which was originally foreseen for the relationship of submission to the torturer was eliminated, therefore, taking out situations prior to the establishment of one individual's own authority or power over the other<sup>433</sup>. However, the configuration as a common crime lifts some concerns relating to moral contest, psychic causality and liability for omission<sup>434</sup>. The first kind of problematics may arise when torture is inflicted upon multiple individuals<sup>435</sup>. However, the legislator might be able to overcome them, not being insuperable, by simply introducing specific provisions relating to how moral contest applies and introducing criteria for psychic causality<sup>436</sup>. Relating to liability for omission, a more specific definition on torture might help, establishing when a certain

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<sup>429</sup> GRAZIANI, F., *L'adattamento dell'Italia alle norme internazionali sul divieto di tortura: una riflessione sulla proposta di legge n. 2168*, in *La Comunità Internazionale*, LXIX vol., Editoriale Scientifica, 2014, 601.

<sup>430</sup> PELISSERO, M., *Tortura: una norma scritta male al banco di prova della prassi applicativa*, 12 giugno 2021, 8.

<sup>431</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 8.

<sup>432</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 8.

<sup>433</sup> AMATO S., PASSIONE M., *La legge italiana: un profilo giuridico*, in *Studi sulla questione criminale*, Il Mulino, Rivisteweb, Fascicolo 2, 2018, 53.

<sup>434</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 19.

<sup>435</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 19.

<sup>436</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 19.

individual is considered to be responsible for not having prevented acts of torture to be committed from third parties<sup>437</sup>. Specifically, the conduct of a public official, who tolerated acts of torture committed by a private individual, could find punishment thanks to the introduction of a «*punishability extension clause*»: the public official would give his consent or acquiescence or would simply tolerate these acts to be carried out, and should be, therefore, punished for it, given that the private individuals should still answer for the crime itself<sup>438</sup>.

Differently, the different choice to configure torture as a *reato proprio* can be drawn from how the crime was outlined in article 1 CAT, which aimed at punishing public officials<sup>439</sup>.

Originally, some asked to introduce two different provisions: one punishing torture committed by any private individual, and one punishing torture committed by public officials or individuals in charge of a public service<sup>440</sup>.

As for the victim of the crime, hence the tortured individual, the article at hand refers to three different categories: the one deprived of personal freedom, the one under the care, authority or custody of the torturer, or the one in a situation of impaired defense<sup>441</sup>. As for the first individual pointed out, one can definitively comprehend the legislator's will to adhere to what the Constitution outlined in its article 13 comma 4, therefore the Constitutional obligation to criminalize torture<sup>442</sup>. On the other hand, the element of impaired defense element is quite ambiguous, as it alludes to exceptionally broad scenarios, providing excessive leeway for discretionary interpretation<sup>443</sup>. The notion of impaired defense refers to the condition of the victims, specifically when they are unable to react to the violence or threats posed against them<sup>444</sup>. This is generally due to their internal condition of vulnerability or to conditions of time and place<sup>445</sup>. Nonetheless, the term presents some doubts regarding its nature: it is described by article 61 comma 5 of the

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<sup>437</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 19.

<sup>438</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 19.

<sup>439</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 20.

<sup>440</sup> GRAZIANI, F., *L'adattamento dell'Italia al divieto di tortura*, cit., 601.

<sup>441</sup> GRAZIANI, F., *L'adattamento dell'Italia al divieto di tortura*, cit., 605.

<sup>442</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 3.

<sup>443</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 3.

<sup>444</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 31.

<sup>445</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 31.

criminal code as an aggravating circumstance, and not as an element of the crime<sup>446</sup>. This definition comprises a relevant risk: the possible creation of regulatory gaps for cases involving victims who do not fall into the generic categories identified by the legislator<sup>447</sup>. Therefore, if impaired defense is correctly understood as an aggravating circumstance, rather than an element of the crime, as outlined in the Italian criminal code, there may be a risk that some particular situations are not adequately covered by the law<sup>448</sup>.

### **b.3.2. Conduct and event of the crime.**

As for the material element, the article gives a very broad concept of conducts integrating torture, when referring to inhuman and degrading treatment. In order to have the crime of torture, it is necessary that one carries out either acts of violence or grave threats thereof, or even acts with cruelty<sup>449</sup>. The legislator underlined that the conducts described are seen as alternative modes of committing the crime<sup>450</sup>. He configured a two-level structure<sup>451</sup>. The first one is characterized by the presence of violence and threat and then, cruelty: when the acting individual decides to carry out one of these two conducts, the second level arises: this last one deals with multiple conducts and the concept of inhuman and degrading treatment<sup>452</sup>. Essentially, the crime of torture can only be integrated if the conducts described at the first level are put into place with multiple acts or when they result in inhuman and degrading treatment<sup>453</sup>. Because of the structure of this two-level crossed system, one finds it hard to interpret it in an appropriate manner and to locate the sanctioned conducts, differently from what the Constitution aimed at with its article 25 comma 2, which describes the principle of precision<sup>454</sup>.

What the legislator really intended when introducing the element of «multiple conducts» was not controversial at all: he wanted to stress out the fact

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<sup>446</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 31.

<sup>447</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 31.

<sup>448</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 31.

<sup>449</sup> AMATO S., PASSIONE M., *La legge italiana: un profilo giuridico*, in *Studi sulla questione criminale*, Il Mulino, Rivisteweb, Fascicolo 2, 2018, 55.

<sup>450</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 26.

<sup>451</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 26.

<sup>452</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 26.

<sup>453</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 7.

<sup>454</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 26.

that these conducts did not only amount to episodes repeated over time, but it also included the perpetration of multiple violent behaviors in the same chronological context<sup>455</sup>.

Therefore, in comprehending the conduct needed, and since the specific one described represents a *condicio sine qua non* for the crime, torture definitively represents an offence characterized by a restricted form<sup>456</sup>. This kind of offence denotes a transgression or wrongdoing that possesses specific limitations or confined parameters: there are particular constraints, conditions or criteria that define and confine the actions or elements associated with the commission of the offence. However, the term «*act of violence or threat*» can refer to a singular act and still integrate torture, if from it the described events take place<sup>457</sup>. For this specific reason, the legislator felt obliged to classify the crime of torture as a habitual offender (*reato abituale*), in need of multiple conducts (*reiterazione delle condotte*)<sup>458</sup>. It is, therefore, distinct from a permanent and continued crime, in so far as it calls for the presence of minimum series of conducts, which in light of their quantity and intensity, can cause a *vulnus*<sup>459</sup> of the protected legal asset<sup>460</sup>. A different analysis makes reference to the difficulty of pointing out the exact number of acts necessary to integrate the criminally relevant case<sup>461 462</sup>. This is due to the lack of specific regulatory parameters<sup>463</sup>. Accordingly, another interpretation is forwarded towards the nature of an instantaneous offence with prolonged consummation (*illecito prolungato a consumazione prolungata*): torture is perpetrated through the first intentional act of violence, and the reiteration is only fundamental in assessing the gravity of the penalty to be applied<sup>464</sup>. Having generally established that torture is, indeed, a habitual offence, there is the need to understand whether it can be classified as proper or improper<sup>465</sup>. First and foremost,

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<sup>455</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 27.

<sup>456</sup> AMATO, S., PASSIONE, M., *La legge italiana*, cit., 55.

<sup>457</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 7.

<sup>458</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 7.

<sup>459</sup> Injury to a right.

<sup>460</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 20.

<sup>461</sup> This is due to the lack of specific regulatory parameters.

<sup>462</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 20.

<sup>463</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 20.

<sup>464</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 20.

<sup>465</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 25.

the concept of habitual offence refers to an individual's habitual criminal behavior, where the commission of criminal acts becomes a regular practice. The application of this concept may vary depending on the specific legal context. When an act of violence or threat is being committed, it has been established that torture can be categorized as an improper habitual offence, while when one acts with cruelty it can constitute a possibly habitual crime (*reato eventualmente abituale*), originating from both a single conduct or from multiple conducts, which singularly do not amount to a crime<sup>466</sup>.

Within the topic of the conducts relevant for the crime at hand, torture can even be committed, as already stated, when one acts with cruelty. The Supreme Court, in one of its recent rulings, underlined the prominence of this concept, providing an essential definition<sup>467</sup>. Cruelty is described as *«a conduct exceeding causal normality, which causes additional suffering and expresses a particularly reprehensible internal attitude, which must be investigated in the same way as the methods of conduct and all the circumstances of the concrete case, including those relating to the impulsive notes of the intent»*<sup>468</sup>. In other words, what the Court wanted to highlight was that cruelty does not only imply suffering, but it is characterized by a particularly relevant degree of wickedness, ruthlessness or insensitivity, underlining the importance of the quality of the suffering inflicted, in addition to its quantity<sup>469</sup>. It amounts to unmotivated aggression, prevaricator and rude behavior, which seems to get past the infliction of physical pain: its main purpose is to terrorize the victims placing them in a state of subjection<sup>470</sup>.

However, the term seems to overlap with inhuman and degrading treatments, which are described as cumulative elements, therefore needing them both for the crime to find applicability<sup>471</sup>. The Italian legal system has always referred to cruelty as an aggravating circumstance, while inhuman and degrading treatments, as outlined by Article 3 ECHR cannot be interpreted as cumulative, but

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<sup>466</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 25.

<sup>467</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 28.

<sup>468</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit.;

<sup>469</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit.;

<sup>470</sup> MARTURANO, L., *La configurazione del reato di tortura*, in *Diritto.it*, 27 novembre 2020, 15.

<sup>471</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 8.

rather alternative, being differentiated by the intensity of suffering they purport<sup>472</sup>. Above all, torture for the Strasbourg Court finds itself at the peak, when speaking about human rights violations<sup>473</sup>.

Moving on to the event of the crime, article 613-bis reveals two different and alternative events, being separated by the term «*or*». It is clarified that the event can be integrated when the victim suffers from a physical or psychological acute suffering (event concerning the body), or when he suffers from a verifiable psychological trauma (event concerning the mind)<sup>474</sup>. They are described as particularly violent and dehumanizing<sup>475</sup>. However, the term «*acute suffering*» was highly and unfoundedly criticized: the main reason being that the adjective «*acute*» would indeed require a subjective examination of the suffering itself, being closely related to the victim's emotions<sup>476</sup>.

Moving on to the second event, the term «*verifiable*» can have slightly different meanings depending on the context in which it is used<sup>477</sup>. Generally speaking, the concept of verifiability begs for the possibility of providing objective and tangible evidence or proof to support a statement or fact: hence, in the legal context, verifiability refers to the ability to present concrete and documentable evidence in court, thus, items to be objectively evaluated by third parties, such as witnesses, documents, recordings and other evidence<sup>478</sup>. Referring to torture, and the applicability of the verifiability element to cases of personal disorder resulting from moral violence, the former is quite fundamental in establishing the validity and severity of the trauma suffered<sup>479</sup>. The suffering arising from torture can lead to a structured psychological trauma syndrome (PTSD) and can even be temporary, threatening the «*mental cohesion*» of the victim<sup>480</sup>. As for the verifiability of the trauma, the Court stresses that there is no need that the suffering be evaluated by an expert nor that, in the Court's words, «*it must be classified according to predefined*

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<sup>472</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 8.

<sup>473</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 8.

<sup>474</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 8.

<sup>475</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 9.

<sup>476</sup> AMATO, S., PASSIONE, M., *La legge italiana*, cit., 56.

<sup>477</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 9.

<sup>478</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 9.

<sup>479</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 9.

<sup>480</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 9.



*nosographic categories*»<sup>481</sup>. Hence, in order to pinpoint the symptoms, the victims' behavior after the event or even the manners used to carry out those acts of torture are critically relevant<sup>482</sup>.

The need for verifiable evidence could be crucial to support an accusation or defense in a legal proceeding, especially when it comes to establishing the cause and effect between an act of moral violence and personality disorder<sup>483</sup>. Essentially, verifiability takes on a central role in the legal context to ensure that claims made in relation to a personality disorder are supported by objective evidence and are more robust and credible in the procedural context<sup>484</sup>. In interpreting the verifiability of the trauma, two different interpretations can be drawn. The first one relates to the recognition of conceptual autonomy of the terms used, which opens the door to a more extensive application of the case, also considering situations in which a single threat could be relevant<sup>485</sup>. This approach could provide a solution to evidentiary problems associated with difficulties in gathering sufficient evidence, especially when the time elapsed between the event and the finding is considerable<sup>486</sup>. In doing so, there is a specific risk of losing specificity in the crime of torture if the definition becomes too broad<sup>487</sup>. Reversing the burden of proof regarding the existence of the event could introduce ethical and legal complications, particularly in relation to fundamental rights of individuals<sup>488</sup>. Furthermore, it is essential to consider the balance between the need to protect victims and respect for the rights of alleged perpetrators<sup>489</sup>. Balancing a broader application of the case and preserving the specificity of the crime of torture is a crucial challenge for the Italian legal system<sup>490</sup>. Moving on to the second interpretation, there is the need to address verifiability in the stance of medically verifiable disorders, understood as diagnosable alterations of the psychological sphere of the passive individual, or

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<sup>481</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 9.

<sup>482</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 9.

<sup>483</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 9.

<sup>484</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 9.

<sup>485</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 9.

<sup>486</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 9.

<sup>487</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 9.

<sup>488</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 9.

<sup>489</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 9.

<sup>490</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 9.

even actual illnesses<sup>491</sup>. This second interpretation may seem to be more restrictive, in so far as it would not make reference to modern torture techniques, which are defined as «*no-touch*»<sup>492</sup> <sup>493</sup>. These techniques are capable to inflict temporary disturbs on the victims or to originate mere states of anxiety<sup>494</sup>. Accordingly, Italy would not completely fulfill its international obligations, needing internal laws which are able to punish these conducts as well<sup>495</sup>. Moreover, the debate could extend to the need for broader and updated definitions of torture, reflecting the new challenges presented by techniques that act primarily on a psychological or emotional level<sup>496</sup>. This could involve a more detailed exploration of the subjective and objective elements that constitute torture, including psychological effects and level of intent associated with such practices<sup>497</sup>.

Having said so, it is time to address the motives behind the dissenting opinions and why they were deemed to be rather unnecessary. Article 613-bis explicitly refers to article 3 UNCAT, when dealing with the event of the crime, and above all, it seems to better it, describing the event of the crime in a more appropriate manner, being able to include those conducts which purport an increasingly strong physical pain or an intense feeling of panic or terror<sup>498</sup>. The legislator makes a reference to multiple conducts and to inhuman and degrading treatment for a person's dignity, establishing that they are alternative conditions and when present, punishment must be applied: they constitute an objective requirement for culpability<sup>499</sup>. These treatments need to be distinguished from torture, and the element that allows to do so is the so-called *minimum threshold for gravity*, referring to the intensity of the suffering<sup>500</sup>: in order to reach and overcome the gravity limit, the treatment must humiliate or mortify the victim, showing a lack of respect for his dignity; it must belittle him or cause him a state of anguish or

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<sup>491</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 10.

<sup>492</sup> These are also referred to as «torture without contact», rendering particularly difficult to individuate psychological consequences on the victims.

<sup>493</sup> LANZA, G., *Introduzione del delitto di tortura nel Codice penale italiano*, cit., 15.

<sup>494</sup> CALIRI, V., *Il delitto di tortura*, cit., 30.

<sup>495</sup> CALIRI, V., *Il delitto di tortura*, cit. 30.

<sup>496</sup> CALIRI, V., *Il delitto di tortura*, cit., 30

<sup>497</sup> CALIRI, V., *Il delitto di tortura*, cit., 30.

<sup>498</sup> AMATO, S., PASSIONE, M., *La legge italiana*, cit., 56.

<sup>499</sup> AMATO, S., PASSIONE, M., *La legge italiana*, cit., 56.

<sup>500</sup> AMATO, S., PASSIONE, M., *La legge italiana*, cit., 56.

inferiority, undermining his moral and physical resistance<sup>501</sup>. When the minimum threshold has been overcome and, additionally, the acts were carried out voluntarily, only then torture exists, while one cannot be talking about inhuman and degrading treatment<sup>502</sup>.

### **3.3. Psychological element and time of commission of the crime.**

As for the *mens rea*, therefore the psychological element, when the Bill was still in process of being approved, the term «*intentionally*» was taken out, together with the requirement of the specific intent (*dolo specifico*)<sup>503</sup>. The main reason for this exclusion was due to a particularly relevant problem: the intent of the perpetrator was seen as something so difficult to individuate, that it would cause the scope of application of article 613-bis to be decisively narrower<sup>504</sup>. Therefore, the desire to inflict suffering on the victims does not represent the perpetrator's final aim, rather being a secondary parameter, carried out to acquire certain information or statements, or even aimed at further and different purposes, provided for by the law<sup>505</sup>. The legislator chose the form of general intent (*dolo generico*), for torture as outlined both in first comma and the one described in the second.

However, the Senate chose to introduce the contingent intent (*dolo eventuale*)<sup>506</sup>. As one can vividly infer from reading article 1 CAT, the *mens rea* is completely different from the one outlined in the Italian criminal code, since in the former, the specific intent is required<sup>507</sup>.

### **3.4. State torture: aggravating circumstance or autonomous type of offence?**

Article 613-bis in its second comma refers to the so called «*State Torture*», and underlines that in the presence of the elements described the penalty is aggravated. To be precise, the paragraph states «*if the facts referred to in the first*

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<sup>501</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 33.

<sup>502</sup> AMATO, S., PASSIONE, M., *La legge italiana*, cit., 56.

<sup>503</sup> AMATO, S., PASSIONE, M., *La legge italiana*, cit., 57.

<sup>504</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 21.

<sup>505</sup> CALIRI, V., *Riflessioni sul nuovo delitto di tortura*, cit., 22.

<sup>506</sup> AMATO, S., PASSIONE, M., *La legge italiana*, cit., 57.

<sup>507</sup> AMATO, S., PASSIONE, M., *La legge italiana*, cit., 57.

comma are committed by a public official or by a person in charge of a public service, with abuse of powers or in violation of the duties inherent to the function or service, the penalty is imprisonment from five to twelve years». Thus, in order for state torture to be committed, the conducts from the first comma must be carried out by a public official or a person in charge of a public service, abusing his powers or violating duties relating to his function or service. In this context, the penalty is definitely increased<sup>508</sup>. Truthfully, the whole debate for the introduction of the law criminalizing torture was initiated to punish those responsible for the conducts outlined in this very second comma<sup>509</sup>. The particular link to article 1 CAT is impossible not to detect: the Convention refers to a particular structure based on hierarchy, between the torture victim and the torturer, who must be a «*public official or any other person acting in his official capacity, or at his instigation, or with his express or tacit consent*»<sup>510</sup>. Regardless of the specificity of the definition included in the second comma, one can look at article 1 paragraph 2 CAT to widen its applicability<sup>511</sup>. The Convention gives State parties the possibility to adopt a broader definition, not being strictly bound by article 1 paragraph 1<sup>512</sup>.

### **e.3.5. Article 613-bis comma 3: limiting punishability.**

Article 613-bis in its third comma refers to the same conducts as in the first and second, but its scope is to limit their applicability<sup>513</sup>. Therefore, they do not amount to torture in any way whatsoever: it relates to pain and suffering inflicted through the execution of a prison sentence, precautionary measures, security measures and legitimate sanctions<sup>514</sup>. Its scope was to render legitimate the use of force, and not its abuse<sup>515</sup>. Accordingly, it raised an essential problem, which related to the thin boundary between the use and abuse of force, in specific and delicate circumstances<sup>516</sup>. Because of its exceptional character, it is only applicable when

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<sup>508</sup> PIATTI, L., *La cd. "Tortura di Stato": analisi dell'art. 613-bis c.p. alla luce della recente giurisprudenza di legittimità*, in *Iusinitinere*, 27 maggio 2022.

<sup>509</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 4.

<sup>510</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 4.

<sup>511</sup> LANZA, G., *Introduzione del delitto di tortura nel codice penale italiano*, cit., 20.

<sup>512</sup> LANZA, G., *Introduzione del delitto di tortura nel codice penale italiano*, cit., 20.

<sup>513</sup> LANZA, G., *Introduzione del delitto di tortura nel codice penale italiano*, cit., 22.

<sup>514</sup> GRAZIANI, F., *L'adattamento dell'Italia al divieto di tortura*, cit., 14.

<sup>515</sup> LANZA, G., *Introduzione del delitto di tortura nel codice penale italiano*, cit., 22.

<sup>516</sup> LANZA, G., *Introduzione del delitto di tortura nel codice penale italiano*, cit., 22.

the conducts are carried out by public officials or individuals in charge of a public service, hence it only refers to the conducts sanctioned in the second comma<sup>517</sup>. It aims at limiting and restricting culpability, creating, however, many doubts<sup>518</sup>.

### **3.6. Aggravating circumstances engraved in the subsequent commas.**

The aggravating circumstances are outlined in the fourth and fifth commas. The fourth comma concerns an aggravating circumstance with generic effect (*circostanza aggravante ad effetto comune*), and states that «*if personal injury results from the facts referred to in the first comma, the penalties are increased; if a personal serious injury results, they are increased by a third and if a very serious personal injury results, they are increased by half*». Differently, the fifth comma, describing an aggravating circumstance with a special effect (*circostanze aggravante ad effetto speciale*), clarifies «*if death results as an unwanted consequence from the facts referred to in the first comma, the penalty is thirty years' imprisonment. If the guilty party voluntarily causes death, the penalty is life imprisonment*». The first paragraph refers to the possibility that, when the conducts described in the first comma are carried out, the victim suffers a personal injury or a grave or extremely serious personal injury: in the first case, the penalty to be applied can increase up to a third, in the second case, it increases sharply by a third, and in the third case, it increases by half<sup>519</sup>. The fifth comma, differently, puts up with a different and more serious situation: when from the conducts, as described in the first comma, death occurs<sup>520</sup>. Here, the way to correctly establish the penalty to be applied differs, due to the willingness or unwillingness to cause the event<sup>521</sup>. If the torturer voluntarily causes the death of the victim, the penalty is life sentence<sup>522</sup>, while, in the opposite case, therefore when there is no such intent, a 30-year-detention is to be applied<sup>523</sup>.

<sup>517</sup> AMATO, S., PASSIONE, M., *Come il nuovo reato di tortura rischia il binario morto*, cit., 14.

<sup>518</sup> MARCHI, *Prime riflessioni sul delitto di tortura*, cit., 5.

<sup>519</sup> AMATO, S., PASSIONE, M., *Come il nuovo reato di tortura rischia il binario morto*, cit., 15 s.

<sup>520</sup> AMATO, S., PASSIONE, M., *Come il nuovo reato di tortura rischia il binario morto*, cit., 16.

<sup>521</sup> AMATO, S., PASSIONE, M., *Come il nuovo reato di tortura rischia il binario morto*, cit., 16.

<sup>522</sup> However, life imprisonment seems to be a rather excessive penalty, which would contrast a clear sense of humanity, which characterizes the Italian legal system.

<sup>523</sup> AMATO, S., PASSIONE, M., *Come il nuovo reato di tortura rischia il binario morto*, cit., 16.

### **g.3.7. Article 613-ter: incitement to commit torture.**

Article 613-ter refers to the crime committed by a public official of incitement to commit torture, and it clearly states «*the public official or the person in charge of a public service who, in the exercise of his functions or service, incites in a concretely suitable way another public official or another person in charge of a public service to commit the crime of torture, when the incitement is not accepted or if it is but the crime is not committed afterwards, is punished with imprisonment from six months to three years*». The article at hand was highly criticized. Firstly, it only refers to the incitement carried out by a public official or a person in charge of a public service, and it never mentions as author of the crime a private individual, in so far as it would not configure the crime itself<sup>524</sup>. Thus, it leaves the possibility for private individuals to commit such crime (incitement of torture), and yet remain unpunished<sup>525</sup>. Secondly, a previous version of article 613-ter presented a clause which referred to article 302 of the Italian criminal code, concerning incitement or defense for crimes of terrorism or crimes against humanity, which was later eliminated<sup>526</sup>. Therefore, article 613-ter constitutes an exception to article 115 of the criminal code, which does not refer to instigation as a crime, stating its unpunishability<sup>527</sup>. The examined provision refers to a crime of concrete danger, causing that the criminal act itself cannot be punished, if it is not committed through conducts which aim at provoking the commission of the crime<sup>528</sup>.

### **3.4. Problematic aspects concerning its application and the absurd repeal proposal.**

The language and structure of article 613-bis contribute to a lack of clarity, making it susceptible to varied interpretations. Furthermore, it exhibits inconsistencies with legal frameworks at the supranational level, introducing additional complexities and challenges in ensuring harmonization with broader

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<sup>524</sup> AMATO, S., PASSIONE, M., *Come il nuovo reato di tortura rischia il binario morto*, cit., 17.

<sup>525</sup> TUNESI, S., *Il delitto di tortura. Un'analisi critica*, in *Giurisprudenza Penale Web*, 2017, 14.

<sup>526</sup> AMATO, S., PASSIONE, M., *Come il nuovo reato di tortura rischia il binario morto*, cit., 17.

<sup>527</sup> TUNESI, S., *Il delitto di tortura. Un'analisi critica*, cit., 14.

<sup>528</sup> TUNESI, S., *Il delitto di tortura. Un'analisi critica*, cit., 14.

legal standards. The law on torture which led to the introduction of articles 613-bis and 613-ter in the Italian criminal code has a false name, speaking of something else or even about others<sup>529</sup>. Accordingly, it seems as though the newly introduced crime is not actually worthy of a modern democracy, begging for a fundamental question: is this the crime that Italy has been waiting for about 30 years, the crime that would help the legal system to finally fulfill its obligations under international, European, and above all, constitutional law<sup>530</sup>?

The UN Committee on torture could not abstain from criticizing the newly added article<sup>531</sup>. It clarified that it is not what was hoped for, being extremely incomplete, narrow and repetitive<sup>532</sup>. This analysis was mainly based on the assumption that the law itself was not coherent with the Convention, presenting superfluous elements, which were able to create gaps for impunity<sup>533</sup>. The Committee in its conclusive observations, decided to address Law. No. 110 as a subject of concern, and therefore, was not seen as something positive, which would make the Italian legal system better and more coherent with its obligations<sup>534</sup>. The UN Committee strongly criticized the choice to classify torture as a common crime, and consequently, it stated that the nature of aggravating circumstance of the conducts carried out by public officials does not resonate well with what CAT's will was<sup>535</sup>. The Committee was not content with the legislator's choice to eliminate the link to a specific purpose and the addition of foreign elements to the CAT definition of torture, referring to the multiple conducts and inhuman and degrading treatment<sup>536</sup> <sup>537</sup>. Therefore, it was declared that, on the basis of the multiple requirements posed by article 613-bis, a higher threshold for the commission of the crime of torture has been set, compared to the one provided for by the UN

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<sup>529</sup> AMATO, S., PASSIONE, M., *Come il nuovo reato di tortura rischia il binario morto*, cit., 2.

<sup>530</sup> AMATO, S., PASSIONE, M., *Come il nuovo reato di tortura rischia il binario morto*, cit., 2.

<sup>531</sup> AMATO, S., PASSIONE, M., *La legge italiana*, cit., 52.

<sup>532</sup> AMATO, S., PASSIONE, M., *La legge italiana*, cit., 52.

<sup>533</sup> AMATO, S., PASSIONE, M., *La legge italiana*, cit., 52.

<sup>534</sup> ANTONIAZZI, C.T., *Comitato contro la Tortura: le osservazioni conclusive del comitato contro la tortura ai rapporti periodici congiunti quinto e sesto dell'Italia*, in *La Comunità Internazionale*, 2018, 168.

<sup>535</sup> ANTONIAZZI, C.T., *Comitato contro la tortura*, cit., 168.

<sup>536</sup> As for this unwanted addition, the legislator had in mind to narrow down the applicability of the crime itself.

<sup>537</sup> CANCELLARO, F., *Pubblicate le osservazioni del Comitato ONU Contro la tortura sulla situazione italiana*, in *Diritto Penale Contemporaneo*, Archivio online 2010-2019, 2018, 302.

Convention<sup>538</sup>. Hence, the Committee in its final observations, requested Italy to modify the article and make it coherent to article 1 CAT, by eliminating what was deemed unnecessary<sup>539</sup>. Another relevant factor which was highly criticized concerned the lack of the so-called National Human Rights Institution (NHRI), which creation was necessary: it is an independent public body which aim is to promote the protection of human rights at national level<sup>540</sup>. Lastly, what the Committee wanted to highlight, concerned the education and formation of personnel inside prisons, as well as judges and the medical staff: these individuals need to be trained for whatever concerns torture, for instance to understand when it had taken place<sup>541</sup>.

Even the Magistrates working for the Genoa G8 case strongly criticized the newly added provision and stated that article 613-bis was not able to punish the conducts committed by police officers those days<sup>542</sup>. The reasons why it was seen as an inadequate article were multiple: some of the most serious conducts carried out at the time were committed with a single act; the acute mental suffering to which many of the victims were subjected to, caused different consequences for each of them, due to their different personality and not to the level of severity of the conduct; the greater severity or intensity of the suffering, when a psychological torture is inflicted, does not depend on the duration or results, being therefore disconnected from the «verifiability»; the need to frame the relation between the perpetrator and the victim comes from the configuration of the crime as a common one, however, in doing so, its application is excluded when referring to particular acts carried out in the Diaz-Pertini school; cruelty preserves its psychic content, which is not easily recognizable in the actions of a public official, and therefore was not applicable to the G8 case; when one's conduct does not amount to torture but it is described as a sanctionable behavior, it is classified as inhuman and degrading treatment; the failure to provide a rule that outlines the statute of limitations of the crime or that avoids granting benefits of any kind; the lack of a rule that entails the

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<sup>538</sup> ANTONIAZZI, C.T., *Comitato contro la tortura*, cit., 168.

<sup>539</sup> UN Committee against Torture, *Concluding Observations on the combined fifth and sixth periodic reports of Italy*, 2017, 2.

<sup>540</sup> UN CAT, *Concluding observations on 5th and 6th periodic reports*, cit., 3.

<sup>541</sup> ANTONIAZZI, C.T., *Comitato contro la tortura*, cit., 170.

<sup>542</sup> DE FRANCESCHI, P., *Il divieto di tortura*, cit., 16.



suspension from service of public officials found guilty of acts of torture or in any case falling within the prohibition of article 3 ECHR<sup>543</sup>.

In light of the many critiques expressed, one might find easy to establish that the new law purported many problematic aspects to the crime of torture, as outlined in article 613-bis: the interpretation of torture, the relevance of the public qualification, the relationship with the crimes of bodily injury and murder, and the complicity in the crime<sup>544</sup>.

#### **a.4.1. The dubious interpretation of the act of torture: multiple conducts, cruelty & inhuman and degrading treatment or punishment.**

As for the act of torture, it presents a rather complex structure. It indicates too many descriptive elements, rendering it to be of a much difficult interpretation<sup>545</sup>. This difficulty can also be inferred from the conduct described, which results in the creation of a crossed system, as outlined in the previous paragraph<sup>546</sup>. The crime of torture can be configured in four different circumstances: in the presence of acts violence or threat which cause multiple conducts<sup>547</sup>; when the same acts cause an inhuman and degrading treatment<sup>548</sup>; when one acts with cruelty resulting in multiple conducts; lastly, when cruelty brings to the establishment of inhuman and degrading treatments<sup>549</sup>. Even the element of cruelty raises some concerns<sup>550</sup>. Two important rulings addressed the issue. Firstly, decision no. 58/2021 ruled by the judge of preliminary investigations of Siena, which refers to a particularly high level of reprehensibility of the action; secondly, decision no. 11/2021 by the preliminary investigations' judge of Ferrara, who affirmed that the term requires, on one hand, further violence compared to normality, which brings suffering described as brutal, insensitive and gratuitous, on

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<sup>543</sup> DE FRANCESCHI, P., *Il divieto di tortura*, cit., 16.

<sup>544</sup> PELISSERO, M., *Tortura: una norma scritta male al banco di prova della prassi applicativa*, 12 giugno 2021, 1.

<sup>545</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 2.

<sup>546</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 2.

<sup>547</sup> However, the plurality of conducts does not seem to add anything to the description of the conduct, as the plurality itself was already implicit in the terms «acts of violence or serious threats».

<sup>548</sup> Even this specification is not necessary, in so far as the previous general hypothesis was definitively sufficient.

<sup>549</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 3.

<sup>550</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 4.

the other hand, it is a means of coercion, not otherwise permitted<sup>551</sup>. Nonetheless, demonstrating an excess beyond what is considered normal is a complex undertaking in a particular case, especially when cruelty is a pivotal factor, and there is a lack of a fundamental reference point to measure the additional suffering. (in which cruelty consists)<sup>552</sup>. Accordingly, the fundamental aspect will be found in the subjective profile of the notably condemnable internal attitude<sup>553</sup>.

Concerning the events caused by acts of torture, the legislator seemed to be excessively convoluted in describing inhuman and degrading treatments<sup>554</sup>. In light of this, the two judges intervened, tried to clarify the relevant notion. The Siena judge highlighted that the legislator did not differentiate inhuman treatments from degrading ones and torture<sup>555</sup>. Differently, the European Court did. It stated that while the treatment is inhuman and violates human dignity, it results in emotional consequences for the victim, differently, a treatment can be deemed degrading when there is a strong physical or mental suffering<sup>556</sup>. Torture is, however, something more, requiring the infliction of very severe and cruel suffering<sup>557</sup>. Therefore, torture can be classified as inhuman or degrading treatment, but not *vice versa*<sup>558</sup>. In this context, the introduction of inhuman and degrading treatments in the definition of torture only created more interpretative problems and was rendered useless<sup>559</sup>. Without it the relative criminal provision would have been easier to understand<sup>560</sup>.

#### **b.4.2. Relevance and legal nature of article 613-bis second comma: how is the notion of public authority outlined and used?**

Since its very introduction in 2017, there has been an ongoing dispute concerning the nature of the facts described in the second comma, relating to State torture: whether they amount to an aggravating circumstance or if they constitute

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<sup>551</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 4.

<sup>552</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 4.

<sup>553</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 4.

<sup>554</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 5.

<sup>555</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 5.

<sup>556</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 5.

<sup>557</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 5.

<sup>558</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 5.

<sup>559</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 6.

<sup>560</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 6.

an autonomous type of crime<sup>561 562</sup>. The most accredited interpretation is in line with the latter<sup>563</sup>. This decision was drawn from many factors: first of all, classifying it as an aggravating circumstance would contrast with provisions on torture deriving from both the Constitution and what international obligations actually stated and requested; secondly, if categorized as a circumstance, it would definitely be inserted in the balancing judgement with other circumstances, causing the penalty to diminish<sup>564</sup>; even more, in this line of thought, the public official or person in charge of a public service would be punishable under the first comma, even if the cause of exclusion of punishability existed<sup>565 566</sup>. Nonetheless, many authors strongly criticize this choice, establishing that it should amount to an aggravating circumstance.

Particularly relevant to this topic were the positions of the Siena and Ferrara judges.<sup>567</sup> The first judge strongly criticized the nature of aggravating circumstance, stating that the second comma needs to be classified as an autonomous type of offence; the Ferrara judge, disagreed, and welcomed the nature of circumstance<sup>568</sup>.

The two judges presented many arguments to support their thesis. Starting from the judge from Ferrara, he stated that the examined provision needs to be addressed as an aggravating circumstance because of many reasons: firstly, as the Supreme Court already stated, the provision has been built *per relationem*, which means that it is strictly connected with the first comma, and it has been constructed in relation to it, not presenting autonomous elements, but only accidental ones; secondly, he refers to the *favor rei* principle<sup>569</sup>. However, these arguments were deemed to be fallacious<sup>570</sup>. The solidity of the first one has been dismantled in relation to the special relation between articles 640-bis and 319-ter of the criminal code, which are built *per relationem*: the first one punishes aggravated fraud, which

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<sup>561</sup> DI TERLIZZI, V., *Tortura e contesto carcerario*, cit., 16.

<sup>562</sup> DI TERLIZZI, V., *Tortura e contesto carcerario*, cit., 16.

<sup>563</sup> DI TERLIZZI, V., *Tortura e contesto carcerario*, cit., 16.

<sup>564</sup> DI TERLIZZI, V., *Tortura e contesto carcerario*, cit., 17.

<sup>565</sup> Such a solution would be illogical and it would go against the intentions of the legislator.

<sup>566</sup> MELONE, C., *Il delitto di tortura*, in *Rivista il diritto vivente*, 11 giugno 2023, 10.

<sup>567</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 9.

<sup>568</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 9.

<sup>569</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 9.

<sup>570</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 9.

is, indeed, an aggravating circumstance, while the second one, which sanctions judicial corruption, is an autonomous type of offence, even though it refers to the crime of corruption<sup>571</sup>. The argument based on the *favor rei* principle is deemed fallacious because it can only be seen as an *extrema ratio*, and it can only be used when other elements cannot be used to interpret the will of the legislator (*voluntas legis*)<sup>572</sup>.

Differently, the Siena judge based its argument on a more precise analysis<sup>573</sup>. Firstly, he referred to the perpetrator's particular qualification and the conduct: however, even the aggravating circumstance enlisted in article 61 no. 9 presents the same structure, and yet it does not amount to a typical offence<sup>574</sup>. Secondly, he addressed the method of determining the sentence through an independent editorial framework, which is considered weak for the presence of the so-called autonomous circumstances<sup>575</sup>. Thirdly, he referred to the conduct's multi-offensive nature: it hits both dignity and moral freedom together with the distorted exercise of public powers and functions<sup>576</sup>. This particular nature of the conduct would not be guaranteed if the provision constituted an aggravating circumstance<sup>577</sup>. Lastly, he mentioned article 613-ter, which makes a reference to the conducts outlined in the second comma of article 613-bis<sup>578</sup>.

#### **e.4.3. Bodily injury, murder and torture: the special connection with the more generic criminal provisions described in the criminal code.**

Particularly relevant is the connection between torture and other offences, such as bodily injury and murder.

As for the crime of murder, its particular relation to torture has been addressed by the legislator in the fifth comma of article 613-bis<sup>579</sup>. Different penalties are applied due to the *mens rea*: as already stated, when death is

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<sup>571</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 9.

<sup>572</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 9.

<sup>573</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 9.

<sup>574</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 9.

<sup>575</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 9.

<sup>576</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 10.

<sup>577</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 10.

<sup>578</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 10.

<sup>579</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 11.

voluntarily inflicted, the penalty is life imprisonment, instead, when there is no intention in causing the death of the victim, the penalty is imprisonment for 30 years<sup>580</sup>. The first case describes a complex crime which excludes the application of the crime of murder, the second one amounts to torture aggravated by the event of death<sup>581</sup>.

The relation between torture and bodily injury is far more complex. The Siena and Ferrara judges took part, once again, in assessing the problem and rendered two different solutions<sup>582</sup>. The case at hand presented all the elements necessary in order to configure the crime of aggravated malicious bodily injury<sup>583</sup>. The judge in Siena chose to recognize the complicity of crimes between torture pursuant to the fourth comma and aggravated malicious bodily injury, as to article 585 of the criminal code; differently, the Ferrara judge opted for the complicity between the crime of torture, article 613-bis comma 1 and malicious bodily injury, pursuant to article 582<sup>584</sup>. The only thing left to do is to understand which argument is the correct one. The Supreme Court, in applying the specialty principle (*principio di specialità*), established the presence of a formal conspiracy to commit crimes (*concorso formale di reati*): articles 582 and 613-bis of the criminal code<sup>585</sup>. Their elements are so heterogenous that do not allow to locate overlapping fields<sup>586</sup>. In this context, it is necessary to assess how these two crimes can compete with each other<sup>587</sup>. An easy answer would be to totally exclude the application of the fourth comma of article 613-bis, which describes three different crimes aggravated by the event, which is not wanted under any circumstance (*reati aggravate dall'evento a struttura preterintenzionale*)<sup>588</sup>. In this case the perpetrator would answer by fault. Differently, when the crime of bodily injury is malicious, therefore integrating article 582, possibly aggravated under articles 583 or 585 of the criminal code, they contribute to the basic configuration of the crime of torture, as outlined in article

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<sup>580</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 11.

<sup>581</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 11.

<sup>582</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 11.

<sup>583</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 11.

<sup>584</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 11.

<sup>585</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 12.

<sup>586</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 12.

<sup>587</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 12.

<sup>588</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 12.

613-bis, first comma<sup>589 590</sup>. On the grounds just established, the view adopted by the Siena judge was not convincing and, most of all, it was considered to be wrong<sup>591</sup>. He violated the *ne bis in idem* principle, in its substantial form, on the basis of which, the apparent concurrence of rules is applied: bodily injury is counted twice, firstly as an aggravating circumstance, and secondly, as an autonomous crime<sup>592</sup>.

#### **4.4.4. Possible proposals to overcome the aforementioned problematics concerning article 613-bis.**

Having examined the problems arising from the interpretation and application of article 613-bis of the criminal code, a few proposals to change it have been forwarded. Firstly, it was stated that it would be necessary to maintain the structure of the article itself, since it is deemed coherent with the preemptory principle (*principio di tassatività*)<sup>593 594</sup>. However, some aspects require change, in so far as they tend to compromise the crime's purpose and clarity<sup>595</sup>. The changes proposed are quite a few: to remove from the first comma the reference to the victim's situation of impaired defense and the particular relation between the perpetrator and the victim; to take away the adjective «verifiable» when referring to the psychological trauma; to eliminate the third comma and refer to the second comma as an autonomous type of offence, and not an aggravating circumstance; to implement the specific intent, as requested by article 1 CAT; to add article 613-bis to the list contained in article 157 sixth comma, in order to double the Statute of Limitations; to remove the aggravating circumstance concerning bodily injury and increase the penalty when they are serious or grave; to take away the provision

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<sup>589</sup> Therefore, there would be no appeal to the fourth comma, which is deemed structurally incompatible with malicious bodily injury.

<sup>590</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 13.

<sup>591</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 13.

<sup>592</sup> PELISSERO, M., *Tortura: una norma scritta male*, cit., 13.

<sup>593</sup> The principle of preemptory nature in criminal law refers to the need for criminal laws to be clear, precise and defined, in order to guarantee legal certainty and predictability of legal consequences. In other words, the principle of preemptoriness establishes that no one can be punished for a conduct that is not expressly prohibited by law.

<sup>594</sup> LEVATI, A., *La riforma della tortura*, in *Programma Volt 2020- Il reato di tortura*, 2020, 12.

<sup>595</sup> LEVATI, A., *La riforma della tortura*, cit., 12.

which applies life imprisonment as aggravating circumstance; and finally, to add the possibility for incitement to commit torture even by a private individual<sup>596</sup>.

#### **2.5.4.5. The shortest crime ever existed: the repeal proposal in November 2022.**

As previously described, torture was no perfect crime, being criticized by many under multiple aspects. Therefore, at the end of 2022, a repeal proposal arose. The starting point can be traced into an important condemnation from the European Court to Georgia, regarding torture inflicted upon a detainee, and hence the violation of article 3 ECHR<sup>597</sup>. The victim, Mr. Ochigava, was subject to various horrific conducts, between June 2011 and January 2014, inside the Gladi detention facility, in Tbilisi<sup>598</sup>. As for the ECHR violation, the Strasbourg Court made reference to a number of serious restrictions, which the victim underwent: for instance, there were systematic practices of beating prisoners when entering the facility for the first time, the detainees were subject to arbitrary isolation in inadequate spaces, or even they were prohibited food or banned from going to the bathroom, if outside the cell<sup>599</sup>. Mr. Ochigava, in particular, suffered a spinal injury, after a horrific and brutal beating, rendering him unable to walk properly<sup>600</sup>. The Court, firstly, underlined a violation of Article 3 in its procedural aspect. Accordingly, the State did not respect its obligation to carry on effective investigations, thanks to which the responsible parties could be punished. As already stated, these acts of violence were perpetrated between 2011 and 2014, but only after 2016 actual investigations were held: there had been an extremely long period of inaction<sup>601</sup>. Therefore, the Court held that the investigation had not been effective at all. It definitely lacked an in-depth, objective and impartial analysis of all relevant elements: it was ineffective, irrespective of the result reached<sup>602</sup>. However, the Court was not done with addressing the violation: it stated that these

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<sup>596</sup> LEVATI, A., *La riforma della tortura*, cit., 12.

<sup>597</sup> TACCONI, C., *Abrogare il delitto di tortura? Riflessioni a margine di una recente sentenza della Corte di Strasburgo*, in *Sistema Penale*, 2023.

<sup>598</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.

<sup>599</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.

<sup>600</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.

<sup>601</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.

<sup>602</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.

conducts even violated the substantial aspect of article 3 ECHR<sup>603</sup>. Any use of physical force, which is not imposed because of the detainee's behavior, is able to undermine human dignity and constitutes, therefore, a violation of the aforementioned article<sup>604</sup>. In the detention facility, the prisoners suffered both systematic and systemic abuse, *«with the aim of instilling fear in them and to obtain their complete submission and therefore control of the prison»*<sup>605</sup>.

These kinds of conducts did not just strike Eastern countries, however they were also registered in Italy, where the use of force in detention facilities is becoming a bigger problem, day by day<sup>606</sup>. The EU Committee for the prevention on Torture decided to address these conducts in its last Rapporteur, needing to visit prisons and face the problem itself<sup>607</sup>. As the situation does not seem good at all, the Committee received many news of mistreatment, violence and intimidation by prison police personnel, stressing out the need to address the situation immediately and urgently, as a top-notch priority<sup>608</sup>.

This is the main reason why, the repeal proposal seemed absurd: why eliminate from the legal system such a crime, when the relevant conducts are carried out every single day? Therefore, the proposal was seen as rather confusing. Anyway, it aimed at repealing articles 613-bis and 613-ter from the Italian criminal code and transform the sanctioned conducts in aggravating circumstances under article 61 no. 11-novies<sup>609</sup>. What would be created is a circumstance containing the same definition outlined in article 1 CAT, therefore the crime would be aggravated, and the penalty would increase, when it would be committed in a certain way. Precisely when *«inflicting acute pain or suffering, whether physical or mental, on a person, with the aim of obtaining information or confessions from that person or a third person, to punish him for an act which he or a third person has committed or is suspected of having committed, to intimidate the victim or a third person or put pressure on him or a third person, or for any other reason based on any form of*

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<sup>603</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.

<sup>604</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.

<sup>605</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.

<sup>606</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.

<sup>607</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.

<sup>608</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.

<sup>609</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.



*discrimination, if such pain or suffering is inflicted by a public official or any other person who is acting in his official capacity, or at his instigation, or with his express or tacit consent»<sup>610</sup>.*

The proposal's aim was to reduce the criminalization of public officials or individuals in charge of a public service, above all when they act legitimately, and therefore without violating the obligations connected to their functions<sup>611</sup>. Hence, a differentiation is rather needed: the distinction between, on one hand, legitimate actions and, on the other hand, abuses of power<sup>612</sup>. The proposal seems to focus on protecting public officials or, more particularly, law enforcement officers from possible excessive consequences, without adequately considering the need to address cases in which acts of torture are committed with abuse of power or in violation of their duties, deriving from their functions or service<sup>613</sup>. This way of thought is of utmost importance, since laws or law proposals which concern police officers or other public officials, and their behavior must strike a balance between protecting them when carrying out their legitimate duties and holding them accountable when they act beyond the limits provided for by the law itself<sup>614</sup>. Therefore, article 613-bis on torture would only apply when they act not accordingly with their duties and functions<sup>615</sup>. Moreover, the repeal proposal was presented because of the particularly chaotic nature of article 613-bis, having raised a vastity of concerns: first of all, it has an extremely broad application, being regarded as a common crime, and secondly, the nature of the second comma is still uncertain<sup>616</sup>.

However, before approving the repeal proposal, one should make an in-depth analysis, trying to understand what the actual penalty would be, if conducts of torture, as described in the Ochigava case, and therefore particularly serious and grave, would be committed<sup>617</sup>.

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<sup>610</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.

<sup>611</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.

<sup>612</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.

<sup>613</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.

<sup>614</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.

<sup>615</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.

<sup>616</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.

<sup>617</sup> TACCONI, C., *Abrogare il delitto di tortura?*, cit.

## CHAPTER 3

### **The already established crime of torture at the International and European level.**

#### **1. Preface.**

As established in the previous chapters, the crime of torture was introduced in the Italian legal system with a noticeable delay. It can be said that Italy was in breach of many obligations deriving from both the International and European worlds.

The present chapter is meant to address the various sources, of international and European law, thanks to which Italy was able to introduce in its domestic criminal code a provision sanctioning torture. Therefore, it will analyze, firstly, from an international point of view, the most important treaties and Conventions regarding the prohibition of torture, such as the Convention Against Torture and the Universal Declaration on Human Rights; secondly, it will base its analysis on the European Convention on Human Rights as well as the jurisprudence which arose from its interpretation.

However, Italy in order to comply to the definition of torture outlined in the many sources, just mentioned, was also the receiver of many obligations. It did not only have a duty to enact and enforce a provision criminalizing torture, but it also needed to respect other duties, such as the duty to investigate allegations of ill-treatment, or even the obligation not to use any kind of information or any statement that was obtained through torture.

#### **2. The international point of view & legal tools imposing an unconditional ban on torture.**

The Geneva Conventions (GCs), together with their Additional Protocols (APs), the Convention Against Torture (CAT) and other international tools, such as the International Covenant on Civil and Political Rights (ICCPR), are crucial components of international humanitarian law (IHL) and human rights law (IHRL),

aiming to protect individuals from torture and cruel, inhuman, or degrading treatment<sup>618</sup>.

The Geneva Conventions, adopted in the aftermath of World War II, set forth rules and standards for the treatment of individuals during armed conflicts, establishing the principle of humane treatment for all persons who are not or are no longer taking part in hostilities, including prisoners of war and civilians<sup>619</sup>. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations in 1984, complements the Geneva Conventions by specifically addressing the prohibition of torture and other forms of ill-treatment: it defines torture and imposes an obligation on states to take effective measures to prevent torture within their jurisdictions<sup>620</sup>.

The prohibition against torture and cruel, inhuman, or degrading treatment is considered absolute and peremptory, meaning it is non-derogable and cannot be justified under any circumstance<sup>621</sup>. This reflects a recognition in international law of the inherent dignity of the human person and the fundamental principle that certain rights are so fundamental that they cannot be compromised or waived<sup>622</sup>.

However, both in IHL and IHRL, in order for a conduct to be recognized as torture, one needs to look at three necessary elements: the act itself must cause severe pain or suffering, physical or mental; the act must be intentionally inflicted; the act must have a specific purpose<sup>623</sup> <sup>624</sup>. This last aspect is essential, having been used to draw the line between torture and other cruel, inhuman or degrading treatment<sup>625</sup>. Generally speaking, since it is a topic that will be specifically addressed in a later paragraph, inhuman and cruel treatment is characterized by the

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<sup>618</sup> International Committee of the Red Cross (ICRC), *Advisory service on international humanitarian law, Prohibition and punishment of torture and other forms of ill-treatment*, June 2014, 1.

<sup>619</sup> ICRC, *Advisory service on IHL*, cit., 1.

<sup>620</sup> ICRC, *Advisory service on IHL*, cit., 1.

<sup>621</sup> ICRC, *Advisory service on IHL*, cit., 1.

<sup>622</sup> ICRC, *Advisory service on IHL*, cit., 1.

<sup>623</sup> For instance, it could be used to obtain from the individual or a third person information or a confession; it could be used to punish him/her for an act he/she or a third person committed or is suspected of having committed; it could serve the purpose of intimidating him/her or a third person, or even to coerce him/her or a third person. It can even be used for any other reason based on discriminatory grounds.

<sup>624</sup> ICRC, *Advisory service on IHL*, cit., 1.

<sup>625</sup> ICRC, *Advisory service on IHL*, cit., 1.

infliction of severe physical or mental pain or suffering, going beyond mere degradation or humiliation, emphasizing the gravity of the harm inflicted<sup>626</sup>. Differently, outrages upon personal dignity encompass acts that humiliate, degrade, or otherwise violate a person's dignity to a particularly high degree<sup>627</sup>. Unlike torture, there is no requirement that these acts be inflicted for a specific purpose. This distinction is important as it broadens the scope of prohibited actions<sup>628</sup>.

The distinction between the applications of IHL and IHRL must be understood. The former, also referred to as the laws of war or the law of armed conflict, is a body of regulations that apply to all parties involved in an armed conflict, regardless of their position or the legitimacy of their cause<sup>629</sup>. Its goal is to safeguard civilians and prisoners of war (POWs) who are not participating in the fighting<sup>630</sup>. Regarding IHRL, it is applicable solely to States and concentrates on safeguarding and advancing human rights during both peaceful and armed situations<sup>631</sup>. In essence, while IHL applies to all parties involved in an armed conflict, IHRL treaties, like the CAT, focus on the obligations of states and the actions of their officials<sup>632</sup>. Furthermore, this difference accomplishes another objective by reflecting the various settings and goals of these bodies of law<sup>633</sup>. While IHRL places a strong emphasis on the defense of human rights under all conditions, including peacetime, IHL aims to balance military necessity with humanitarian considerations during armed conflicts<sup>634</sup>. These two categories even apply different sources of international law. The relevant IHRL sources are the Universal Declaration on Human Rights (UDHR), the ICCPR and the CAT<sup>635</sup>. Differently, for IHL, worthy to be mentioned, as they are torture-related, are the GCs and their Additional Protocols, the International Criminal Court (ICC) Statute,

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<sup>626</sup> ICRC, *Advisory service on IHL*, cit., 1.

<sup>627</sup> ICRC, *Advisory service on IHL*, cit., 1.

<sup>628</sup> ICRC, *Advisory service on IHL*, cit., 1.

<sup>629</sup> International Committee of the Red Cross, *IHL and Human Rights Law*, Article, 2010.

<sup>630</sup> International Committee of the Red Cross, *What is the difference between IHL and human rights law?*, Article, 2015.

<sup>631</sup> ICRC, *IHL and IHRL*, cit.

<sup>632</sup> ICRC, *Difference between IHL and IHRL*, cit.

<sup>633</sup> ICRC, *Advisory service on IHL*, cit., 1.

<sup>634</sup> ICRC, *Difference between IHL and IHRL*, cit., PAG

<sup>635</sup> ICRC, *Difference between IHL and IHRL*, cit., PAG

and even customary IHL, such as Rule 90 of the ICRC study on customary IHL<sup>636</sup>  
<sup>637</sup>.

Shifting the analysis on jurisdiction over acts of torture, there is a distinction to be made. IHL underlines that States must exercise universal jurisdiction in cases of serious violations of the GCs and APs, including as when they engage in behavior during IACs that could be construed as torture or other cruel treatment<sup>638</sup>. Therefore, States are expected to find and prosecute those who are accused, regardless of their nationality or the location of the alleged violation<sup>639</sup>. Under Rule 157 of the ICRC research on customary IHL, states also have the right to award their national tribunals universal jurisdiction for war crimes, including torture and other forms of ill-treatment perpetrated in non-international armed conflicts<sup>640</sup>.

As for IHRL, the CAT underscores that, State Parties shall establish jurisdiction over any act of torture that takes place on any territory within their jurisdiction, or even if the accused person or the victim is a national of one of the States<sup>641</sup>. Moreover, article 5 §2 CAT makes it clear that a State may acquire universal jurisdiction when the crime of torture has been committed, when the perpetrator is found on any of the territories under its control. These two clauses are consistent with the Convention's object and purpose<sup>642</sup>.

Hence, various international treaties under the United Nations framework explicitly prohibit torture and other forms of cruel, inhuman, or degrading treatment or punishment<sup>643</sup>. States that have ratified these treaties are legally bound by their provisions<sup>644</sup>. Often, they establish Committees or bodies, known as *treaty bodies*, tasked with overseeing and monitoring the compliance of State Parties with their obligations<sup>645</sup>. These bodies play a crucial role in ensuring that the provisions, contained therein, are upheld. Treaty bodies regularly issue General Comments or

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<sup>636</sup> Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited.

<sup>637</sup> ICRC, *Difference between IHL and IHRL*, cit., PAG

<sup>638</sup> ICRC, *Advisory service on IHL*, cit., 2.

<sup>639</sup> ICRC, *Advisory service on IHL*, cit., 2.

<sup>640</sup> ICRC, *Advisory service on IHL*, cit., 2.

<sup>641</sup> ICRC, *Advisory service on IHL*, cit., 2.

<sup>642</sup> ICRC, *Advisory service on IHL*, cit., 2.

<sup>643</sup> Center for Justice and International Law (CEJIL), Association for the prevention of torture (APT), *Torture in International Law: A guide to jurisprudence*, 2008, 6.

<sup>644</sup> CEJIL, *Torture in international law*, cit., 6.

<sup>645</sup> CEJIL, *Torture in international law*, cit., 6.

Recommendations<sup>646</sup>. These documents offer detailed interpretations and guidance on specific aspects of the treaties<sup>647</sup>. Specifically, they help clarify the scope of obligations and provide guidance to States Parties on how to implement and adhere to the provisions of the treaties effectively<sup>648</sup>. In doing so, they assist State Parties in understanding their obligations and facilitate the consistent and effective implementation of international human rights standards related to the prohibition of torture and other forms of ill-treatment<sup>649</sup>. This mechanism is crucial in promoting compliance and accountability among State Parties<sup>650</sup>. Apart from the treaties already mentioned above, of utter importance are the interconnected treaty bodies: the respect for the International Covenant on Civil and Political Rights is granted by the *Human Rights Committee* (HRC) and the UNCAT's compliance is guaranteed by the *Committee Against Torture*.

As for the Committee Against Torture, Article 17 UNCAT refers to its members. Specifically, it clarifies that the Committee is composed of ten experts, elected by Member States<sup>651</sup>. These individuals must have high morals and a recognized competence in the field of human rights<sup>652</sup>. The Committee operates based on a mandate that encompasses four primary activities, described in the UNCAT<sup>653</sup>. Firstly, Article 19 concerns the Committee's power to review periodic reports submitted by State parties, detailing their efforts and progress in implementing the Convention's provisions<sup>654 655</sup>. This particular power derives from the fact that, within a year from the Convention's entry into force, State Parties agree to submit to the Committee an initial report detailing the steps they have taken to give effect to it<sup>656</sup>. Furthermore, every four years, they also agree to submit

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<sup>646</sup> CEJIL, *Torture in international law*, cit., 6.

<sup>647</sup> CEJIL, *Torture in international law*, cit., 6.

<sup>648</sup> CEJIL, *Torture in international law*, cit., 6.

<sup>649</sup> CEJIL, *Torture in international law*, cit., 6.

<sup>650</sup> CEJIL, *Torture in international law*, cit., 6.

<sup>651</sup> Office of the United Nations High Commissioner for Human Rights, *Human Rights Fact Sheets*, Fact Sheet No.4, Combating Torture, May 2002, 11.

<sup>652</sup> UNOHCHR, *HRs fact sheet No.4*, cit., 11.

<sup>653</sup> UNOHCHR, *HRs fact sheet No.4*, cit., 11.

<sup>654</sup> It allows the Committee to assess compliance and provide recommendations.

<sup>655</sup> WENDLAND, L., *Handbook on state obligations*, cit., 17.

<sup>656</sup> WENDLAND, L., *Handbook on state obligations*, cit., 17.

supplementary reports, making reference to any additional steps they have taken, as well as any other reports the Committee may request<sup>657</sup>.

Secondly, Article 20 states that the Committee has the authority to conduct confidential inquiries when there are credible indications suggesting that systematic torture<sup>658</sup> is occurring within the territory of a State Party<sup>659</sup>: these inquiries aim to investigate and address reported instances of torture<sup>660</sup>. Thirdly, Article 22 maintains that the Committee considers communications from individuals claiming to be victims of a violation of the Convention by a State party<sup>661</sup> <sup>662</sup>. Lastly, the Committee has the power to consider inter-state complaints<sup>663</sup>. However, this is contingent upon the involved State parties, having declared their recognition of the Committee's competence to receive and consider such complaints<sup>664</sup>. Additionally, the Committee submits an annual report on its activities to State parties and the United Nations General Assembly (UNGA)<sup>665</sup>. This report typically highlights the Committee's activities, findings, and recommendations concerning the implementation of the CAT<sup>666</sup>.

As stated before, there is another treaty body, empowered of ensuring the compliance of the ICCPR: the Human Rights Committee. The Human Rights Committee, in its General Comment No. 20 (1992), emphasizes the obligation of State Parties to provide protection against acts prohibited by Article 7 ICCPR, which regards the ban of torture and cruel, inhuman or degrading treatment<sup>667</sup>. It highlights that this protection must be extended to all individuals, regardless of

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<sup>657</sup> WENDLAND, L., *Handbook on state obligations*, cit., 18.

<sup>658</sup> The Committee has established that torture is practiced systematically when «*when it is apparent that the torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the country in question*». Torture can be systemic even when it doesn't derive from a government's deliberate aim. Its presence may suggest a mismatch between central government policy and local government execution of it, or it could be the result of circumstances that the government finds difficult to monitor.

<sup>659</sup> A confidential inquiry cannot be initiated when the State involved did not recognize the Committee's competence in that ambit, pursuing article 28 UNCAT.

<sup>660</sup> WENDLAND, L., *Handbook on state obligations*, cit., 18.

<sup>661</sup> These communications can involve alleged instances of torture or cruel, inhuman, or degrading treatment.

<sup>662</sup> WENDLAND, L., *Handbook on state obligations*, cit., 18.

<sup>663</sup> WENDLAND, L., *Handbook on state obligations*, cit., 18.

<sup>664</sup> UNOHCHR, *HRs fact sheet No.4*, cit., 11.

<sup>665</sup> WENDLAND, L., *Handbook on state obligations*, cit., 19.

<sup>666</sup> WENDLAND, L., *Handbook on state obligations*, cit., 19.

<sup>667</sup> UNOHCHR, *HRs fact sheet No.4*, cit., 16.

whether the acts were committed when they were acting in their official capacity, outside their official capacity, or even in a private capacity<sup>668 669</sup>. Moreover, the Committee specifies that this prohibition extends to corporal punishment, including excessive chastisement, whether ordered as a punishment for a crime or as an educative or disciplinary measure<sup>670</sup>. This is meant to emphasize the absolute prohibition of any form of punishment or treatment that constitutes torture or cruel, inhuman, or degrading treatment, even within educational or disciplinary contexts. Additionally, State Parties are obliged not to expose individuals to the risk of torture or cruel, inhuman, or degrading treatment or punishment when considering extraditing, expelling, or returning individuals (refoulement) to another country<sup>671</sup>. This principle underscores the responsibility of States to ensure that individuals are not sent to situations where they may face such mistreatment, highlighting the *principle of non-refoulement* as a crucial aspect of preventing human rights violations<sup>672</sup>.

A clear analysis of the aforementioned treaties and Conventions will follow.

## **2.1. Universal Declaration on Human Rights (UDHR).**

In order to comprehend the essential character of the Universal Declaration on Human Rights, specifically its Article 5, in regards to the context of torture and other ill-treatment, an historical overview is, indeed, required. Torture, historically termed as "*the question*", had a long-established presence in legal systems influenced by Roman law and the practices of the Catholic Inquisition<sup>673</sup>. It was considered a permissible method to extract confessions from individuals during criminal pre-trial proceedings for centuries<sup>674</sup>.

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<sup>668</sup> JOSEPH, S., CASTAN, M., *The international Covenant on Civil and Political Rights: Cases, Materials and Commentary*, in Oxford Public International Law, 3<sup>rd</sup> edition, 2013, 12.

<sup>669</sup> This means that States have an obligation to prevent and prohibit such acts regardless of the perpetrator's status or role.

<sup>670</sup> UNOHCHR, *HRC General Comment No.20*, cit., §5.

<sup>671</sup> UNOHCHR, *HRC General Comment No.20*, cit., §9.

<sup>672</sup> UNOHCHR, *HRs fact sheet No.4*, cit., 16.

<sup>673</sup> ETIENNE, H., *Article 5: 'No one should be subjected to Torture or to Cruel, Inhuman or Degrading Treatment or Punishment'*, in *Legal Studies Research Paper Series*, Australian National University College of Law Research Paper No. 18-22, 18 luglio 2022, 1.

<sup>674</sup> ETIENNE, H., *Article 5*, cit., 1.



However, during the 18<sup>th</sup> and 19<sup>th</sup> centuries, various European nations began to enact prohibitions against the use of torture: for instance, in France, Louis XVI abolished torture in 1780; even in Russia, the *Nakaz* of Catherine II the Great in 1767 officially prohibited the practice of torture<sup>675</sup>. This shift away from the acceptance of torture within national legal systems marked a significant milestone in the recognition of human rights and dignity within legal procedures. Yet, it wasn't until the post-World War II era that this prohibition against torture was explicitly elevated to the international level, thanks to the Universal Declaration on Human Rights (UDHR), changing the dynamics of the world and making it a different place<sup>676</sup>. The declaration was adopted by the United Nations General Assembly in 1948, and in its Article 5 it explicitly enshrined the prohibition against torture and cruel, inhuman, or degrading treatment or punishment. This marked a pivotal moment, formally declaring the universal right to be free from torture and recognizing it as a fundamental violation of human rights on an international scale. Subsequently, this principle has been reinforced and expanded upon in various international treaties and conventions, culminating in the absolute prohibition of torture under international law.

The development of an explicit prohibition against torture and cruel, inhuman, or degrading treatment or punishment within the Universal Declaration of Human Rights (UDHR) was a debated topic during its drafting process. Even though, there was the need to introduce a provision which would not allow for the atrocities committed during World War II to be carried out again, no unanimous consensus was reached initially on explicitly mentioning torture and cruel treatment within the UDHR<sup>677</sup>. The Secretariat of the Human Rights Commission included an explicit prohibition of torture in Article 4 of the Draft Outline of an International Bill of Human Rights, referencing to the necessary recognition of this issue within the broader framework of human rights<sup>678</sup>. During discussions at the Drafting Committee, since there were varying opinions and criticism regarding the proposed

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<sup>675</sup> ETIENNE, H., *Article 5*, cit., 2.

<sup>676</sup> BROWN, G., *A living Document in a changing world*, in *The Universal Declaration of Human Rights in the 21<sup>st</sup> century*, Global Citizenship Commission, 1<sup>st</sup> edition, Volume 2, 2016, 1.

<sup>677</sup> ETIENNE, H., *Article 5*, cit., 3.

<sup>678</sup> ETIENNE, H., *Article 5*, cit., 4.

wording of the provision, the Committee opted to create a new article specifically focusing on «*physical integrity, torture, and cruel punishments*»<sup>679</sup>. This decision reflected the Committee's recognition of the significance of explicitly addressing torture and cruel treatment as a standalone issue within the UDHR, underscoring the commitment to safeguarding human dignity and rights by prohibiting such practices<sup>680</sup>. After a long debate, Article 2 was proposed, which read «*No person shall be subjected to: a) torture in any form; b) any form of physical mutilation or medical or scientific experimentation against his will; c) cruel or inhuman punishments*»<sup>681</sup>. The discussions held during the negotiations also provided an opportunity to touch on some basic issues, like the need for a definition of «*torture*», the inclusion of «*mental*» torture, the suffering brought on by forced medical experiments, and the challenges associated with «*suffering upon other human beings without their consent, even for ends that may appear good*»<sup>682</sup>.

However, the drafting history of provisions related to torture within human rights instruments reveals a tension between two approaches<sup>683</sup>. One approach aimed at a broad prohibition against torture and ill-treatment, emphasizing protection against a wide spectrum of unacceptable treatment without specific reference to the purpose of inflicting such treatment<sup>684</sup>. In this context, the intent was to encompass various forms of ill-treatment that undermine human dignity without restricting the definition based on the intent or purpose behind their infliction<sup>685</sup>. In sum, this approach sought to offer extensive protection against all forms of mistreatment<sup>686</sup>. Conversely, another perspective suggested a more restrictive and «*purposive*» definition of torture, associating it closely with specific contexts, like criminal investigations or punitive measures<sup>687</sup>. The creation of a dedicated provision extending beyond torture to encompass other forms of cruel,

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<sup>679</sup> ETIENNE, H., *Article 5*, cit., 4.

<sup>680</sup> ETIENNE, H., *Article 5*, cit., 4.

<sup>681</sup> ETIENNE, H., *Article 5*, cit., 4.

<sup>682</sup> ETIENNE, H., *Article 5*, cit., 5.

<sup>683</sup> Drafting Committee to the Commission on Human Rights, Report No. 13, *Annex D: Suggestions submitted by the representative of France for articles of the International Declaration of Human Rights*, 1948, 53.

<sup>684</sup> Drafting Committee to the CHR No. 13, cit., 53.

<sup>685</sup> Drafting Committee to the CHR No. 13, cit., 53.

<sup>686</sup> Drafting Committee to the CHR No. 13, cit., 53.

<sup>687</sup> Drafting Committee to the CHR No. 13, cit., 53.

inhuman, or degrading treatment or punishment within human rights instruments demonstrates a preference for the broader notion<sup>688</sup>. This approach acknowledges that protecting individuals from all types of ill-treatment, irrespective of the intent or context, aligns more comprehensively with the goals of safeguarding human rights and dignity<sup>689</sup>.

Because of the lack of a specific provision criminalizing torture or any other kind of ill-treatment, the International Military Tribunal (IMT) in Nuremberg continuously ruled cases concerning torture, where *«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. Civilian populations in occupied territories suffered the same fate»*<sup>690</sup>. Therefore, there was an express need for an explicit prohibition of torture<sup>691</sup>.

Moving forward to a clear analysis of Article 5 UDHR, it states that *«No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment»*.

When it was introduced, the International Court of Justice revealed its customary nature, stating that *«the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on States in all circumstances, even apart from any treaty commitments»*<sup>692</sup>. Even the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Inter-American Court of Human Rights (IACtHR) and the African Commission of Human and Peoples' Rights (ACHPR) confirmed its *jus cogens* character<sup>693</sup>. The prohibition is absolute and has a non-derogable nature, meaning that no circumstances, including emergencies or threats to national security (such as terrorist activities), can justify or excuse any infringement or deviation from this prohibition<sup>694</sup>. Additionally, circumstances that might typically preclude wrongfulness in certain situations, such as consent or the state of necessity, are not considered justifications or excuses for

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<sup>688</sup> ETIENNE, H., *Article 5*, cit., 5.

<sup>689</sup> ETIENNE, H., *Article 5*, cit., 5.

<sup>690</sup> International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946*, vol I, 1947, 227.

<sup>691</sup> ETIENNE, H., *Article 5*, cit., 7.

<sup>692</sup> ETIENNE, H., *Article 5*, cit., 10.

<sup>693</sup> ETIENNE, H., *Article 5*, cit., 10.

<sup>694</sup> ETIENNE, H., *Article 5*, cit., 11.

acts that violate Article 5 of the UDHR<sup>695</sup>. Therefore, it can be said that not even these circumstances, which might apply in other legal contexts, can provide a valid basis for any infringement of the absolute prohibition against torture and cruel, inhuman, or degrading treatment or punishment as articulated in the UDHR and supported by international instruments and customary international law.

However, it may seem as though Article 5 is characterized by a rather imprecise wording, leaving spaces for doubts, as for what is allowed and what is not allowed<sup>696</sup>. However, there is a fundamental reason behind this lack of precision: it resides in the goal to prevent the potential risk of loopholes or interpretations that might allow for the acceptance or use of other unlisted methods<sup>697</sup>. By refraining from providing a detailed list of prohibited techniques, the HRC aims to ensure that the prohibition against torture remains comprehensive and unambiguous<sup>698</sup>. Instead of specifying a finite list of techniques, the Committee emphasizes the broader prohibition of torture and cruel, inhuman, or degrading treatment or punishment<sup>699</sup>. This approach allows for a more expansive interpretation, covering a wide range of actions or methods that might be used to inflict torture or ill-treatment. It prevents the possibility of evading the prohibition by simply using methods not explicitly listed<sup>700</sup>. Therefore, one might say that the HRC has deliberately avoided creating an exhaustive list of specific techniques of torture within its interpretations or statements regarding the prohibition of torture.

As for «*cruel, inhuman or degrading*», during the drafting of Article 5, the Committee's will was to eliminate the term «*cruel*», even though the motives behind this request were unknown<sup>701</sup>. Moreover, the ECtHR established that a treatment could be qualified as inhuman «*especially if it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering*»<sup>702</sup>. The term «*degrading*» constitutes an attack on

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<sup>695</sup> ETIENNE, H., *Article 5*, cit., 11.

<sup>696</sup> ETIENNE, H., *Article 5*, cit., 11.

<sup>697</sup> ETIENNE, H., *Article 5*, cit., 12.

<sup>698</sup> ETIENNE, H., *Article 5*, cit., 12.

<sup>699</sup> ETIENNE, H., *Article 5*, cit., 12.

<sup>700</sup> ETIENNE, H., *Article 5*, cit., 12.

<sup>701</sup> ETIENNE, H., *Article 5*, cit., 19.

<sup>702</sup> European Court of Human Rights, Judgement, *Case of Labita v. Italy*, April 6<sup>th</sup> 2000, Application no. 26772/95, 131.

an individual's dignity. The HRC clarified that *«for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty»*<sup>703</sup>. It continued *«degrading treatment is such as to arouse in their victims' feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance»*<sup>704</sup>.

To sum it up, one might argue that this article is fundamental in safeguarding the inherent dignity and rights of every individual. It explicitly prohibits the use of torture and any form of cruel, inhuman, or degrading treatment or punishment; it reinforces the absolute prohibition of torture and emphasizes the need to protect individuals from any form of mistreatment that undermines their dignity or causes severe physical or mental suffering.

## **2.2. International Covenant on Civil and Political Rights (ICCPR).**

The International Covenant on Civil and Political Rights (ICCPR), adopted in 1966, holds significant importance as one of the first universal human rights treaty to explicitly incorporate provisions prohibiting torture and other forms of cruel, inhuman, or degrading treatment<sup>705</sup>. The ICCPR is a foundational document aiming to safeguard a range of civil and political rights, and within it, Articles 7 and 10 specifically address the prohibition of torture and inhumane treatment<sup>706</sup>. The former unequivocally prohibits torture, cruel, or inhuman treatment, protecting the dignity and physical as well as mental integrity of individuals by expressly forbidding any form of torture or cruel, inhuman, or degrading treatment or punishment; article 10 safeguards the inherent dignity of individuals deprived of their liberty<sup>707</sup>. These provisions in the ICCPR set out clear standards for State Parties, obligating them to prevent and prohibit torture and any form of cruel, inhuman, or degrading treatment or punishment. They underline the fundamental principle that every individual should be treated with dignity and respect.

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<sup>703</sup> ETIENNE, H., *Article 5*, cit., 21.

<sup>704</sup> ETIENNE, H., *Article 5*, cit., 22.

<sup>705</sup> CEJIL, *Torture in international law*, cit., 7.

<sup>706</sup> CEJIL, *Torture in international law*, cit., 7.

<sup>707</sup> CEJIL, *Torture in international law*, cit., 9; TAYLOR, P. M., *A commentary on the International Covenant on Civil and Political Rights*, in *Cambridge University Press*, 2020, 172.

Article 7 ICCPR expressly 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»*.

The second sentence of Article 7 expands the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment: it explicitly incorporates protection against any medical or scientific experimentation carried out without the free and informed consent of the individual<sup>708</sup>. The Committee overseeing the implementation of the ICCPR has emphasized the need for special protection for individuals incapable of providing valid consent, especially those deprived of their liberty: such persons should not be subjected to any medical or scientific experiments that could be detrimental to their health<sup>709</sup>. This specific addition to Article 7 was a direct response to the horrendous actions perpetrated by doctors in Nazi concentration camps during World War II, where prisoners were subjected to atrocious medical experiments without their consent<sup>710</sup>. The intention behind this inclusion is to prevent such atrocities from happening again, ensuring that individuals have the right to refuse participation in any medical or scientific experimentation unless they provide their free and informed consent<sup>711</sup>. In this paragraph, Article 7's aim is to underscore the importance of ensuring the protection and rights of vulnerable groups, particularly those who may not have the capacity to provide consent or advocate for themselves in such situations.

Moving forward to Article 10, its first paragraph states that *«All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person»*. It concerns the prohibition of torture and ill-treatment towards individuals who have been deprived of their liberty. Therefore, it has a very broad ambit of application, covering forms of treatment which do not even amount to cruel, inhuman or degrading treatment under Article 7<sup>712</sup>. In this context, the HRC, responsible for overseeing the implementation of the ICCPR,

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<sup>708</sup> CEJIL, *Torture in international law*, cit., 172.

<sup>709</sup> CEJIL, *Torture in international law*, cit., 172.

<sup>710</sup> CEJIL, *Torture in international law*, cit., 172.

<sup>711</sup> CEJIL, *Torture in international law*, cit., 172.

<sup>712</sup> TAYLOR, P., *A commentary on the ICCPR*, cit., 174.

applies and interprets article 10 in a distinct manner, from article 7: the former primarily addresses the general conditions of detention, focusing on ensuring that individuals deprived of their liberty are treated with humanity and respect for their inherent dignity<sup>713</sup>. The Committee often uses Article 10§1 to assess and address issues such as overcrowding in detention facilities, access to medical care, food, sanitation, and the overall treatment of detainees within the broader context of their confinement<sup>714</sup>. In contrast, Article 7 is typically invoked when there are specific attacks or instances of severe and targeted mistreatment directed at an individual's personal integrity: this might involve acts such as torture, inhumane treatment, or degrading treatment inflicted on a particular person<sup>715</sup>. The Committee tends to apply Article 7 when an individual can demonstrate that they have been subjected to treatment worse than what others in similar circumstances have experienced<sup>716</sup>. For instance, in the case *Pinto v. Trinidad and Tobago*, the author constantly complained about the horrific conditions he was subjected to, while detained, however he was not able to provide any kind of evidence or detail about it<sup>717</sup>. Therefore, the Committee maintained that there had been no violation of article 7<sup>718</sup>.

This individualized focus emphasizes the severity and direct impact on the person's personal integrity. In the *Kennedy v. Trinidad and Tobago* case, the Committee found that beatings suffered by the author, while in police custody, constituted a violation of Article 7 due to the specific attacks on the individual's personal integrity<sup>719</sup>. However, the overcrowded conditions during remand and solitary confinement on death row were considered violations of Article 10§1 as they pertained to the general conditions of detention<sup>720</sup>. Overall, the distinction lies in the targeted nature of mistreatment under Article 7, requiring a showing of worse

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<sup>713</sup> CEJIL, *Torture in international law*, cit., 9.

<sup>714</sup> Committee on Civil and Political Rights, *Concluding Observations on Argentina*, third periodic report, November 15th 2000, §11.

<sup>715</sup> CEJIL, *Torture in international law*, cit., 9.

<sup>716</sup> Human Rights Committee, *Pinto v. Trinidad and Tobago*, Communication No. 512/1992, July 16<sup>th</sup> 1996, §8.3.

<sup>717</sup> HRC, *Pinto v. Trinidad and Tobago*, cit., §8.3.

<sup>718</sup> HRC, *Pinto v. Trinidad and Tobago*, cit. §8.3; CEJIL, *Torture in international law*, cit., 10.

<sup>719</sup> NOWAK, M., *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edition, 2005, 250.

<sup>720</sup> Human Rights Committee, *Kennedy v. Trinidad and Tobago*, Communication No. 845/1998, March 26<sup>th</sup> 2002, §7.7.

treatment compared to others, while Article 10§1 addresses broader conditions of detention affecting all individuals held in custody.

Therefore, it can sometimes be argued that, in cases where an individual deprived of their liberty experiences a violation of Article 7, it can often lead to an automatic violation of Article 10§1: the reason behind this argument lies in the interconnected nature of these rights and the broader implications of individual mistreatment within the context of detention conditions<sup>721</sup>. The case of *Linton v Jamaica* exemplifies this connection. The Committee found that the physical abuse inflicted on the individual, including a mock execution by prison warders and the denial of adequate medical care after sustaining injuries during an escape attempt, amounted to cruel and inhuman treatment under Article 7<sup>722</sup>. The Committee explicitly mentioned that such actions, categorized as violations of Article 7, inherently also constituted a breach of Article 10§1 of the Covenant<sup>723</sup>. This acknowledgment demonstrates the Committee's view that when an individual is subjected to severe mistreatment or specific attacks on personal integrity within a detention setting (Article 7), it automatically encompasses a violation of the broader rights encompassed in Article 10§1 concerning the overall treatment and conditions of detention<sup>724</sup>.

### **2.3. Declaration on the Protection of all Persons from being Subjected to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.**

The condemnation of torture and other forms of cruel, inhuman, or degrading treatment has been an ongoing effort within the international community's framework of human rights<sup>725</sup>. Even though the Universal Declaration of Human Rights, adopted in 1948, marked a pivotal moment in establishing fundamental human rights principles, firmly denouncing torture and cruel, inhuman, or degrading treatment, in 1975, in response to growing advocacy and

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<sup>721</sup> CEJIL, *Torture in international law*, cit., 10.

<sup>722</sup> Human Rights Committee, *Linton v. Jamaica*, Communication No. 255/1987, October 22<sup>nd</sup> 1992, §8.5.

<sup>723</sup> HRC, *Linton v. Jamaica*, cit., §8.5.

<sup>724</sup> HRC, *Linton v. Jamaica*, cit., §8.5.

<sup>725</sup> UNOHCHR, *HRs fact sheet No.4*, cit., 3.



pressure from non-governmental organizations (NGOs), the United Nations General Assembly adopted, with Resolution number 3452, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which consists of twelve articles<sup>726</sup>. This Declaration further reinforced the global commitment to preventing and prohibiting torture and other forms of ill-treatment, outlining principles and guidelines for protecting individuals from such abuses<sup>727</sup>.

Article 1 gives a definition of torture, while Article 3 highlights the non-derogable nature of the prohibition<sup>728</sup>. More specifically, Article 1 states that torture represents *«any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It 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»*. It continues by clarifying that torture *«constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment»*<sup>729</sup>. Differently, Article 3<sup>730</sup> reaffirms an absolute prohibition, stating that regardless of any situation, including states of war, threats of war, internal political instability, or public emergencies, there can never be a justification or excuse for the use of torture or other forms of cruel, inhuman, or degrading treatment or punishment<sup>731</sup>.

The goal of the declaration is to create a logical framework of guidelines and actions that will help ensure that the ban against torture and other cruel,

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<sup>726</sup> BURGERS, J.H., DANELIUS, H., *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Volume 9, 1988, 17.

<sup>727</sup> BURGERS, J.H., DANELIUS, H., *The United Nations Convention against Torture*, cit., 17.

<sup>728</sup> BURGERS, J.H., DANELIUS, H., *The United Nations Convention against Torture*, cit., 17.

<sup>729</sup> BURGERS, J.H., DANELIUS, H., *The United Nations Convention against Torture*, cit., 17.

<sup>730</sup> *«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 or other cruel, inhuman or degrading treatment or punishment»*.

<sup>731</sup> UNOHCHR, *HRs fact sheet No.4*, cit., 5.

inhuman, or degrading treatment of people who are deprived of their freedom is actually followed<sup>732</sup>.

#### **2.4. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT).**

The General Assembly's request in December 1977 to the Commission on Human Rights marked a significant step towards creating a binding Convention against Torture, building upon the groundwork laid by the 1975 Declaration<sup>733</sup>. Following this directive, the Commission delegated the task to an informal, inter-sessional Working Group in February 1978<sup>734</sup>. Even before this formal delegation, both the International Association of Penal Law (IAPL) and the Swedish Government had already formulated draft texts proposing innovative concepts in the realm of international human rights law<sup>735</sup>. These draft texts likely contributed to the discussions and eventual formulation of the Convention against Torture, reflecting forward-thinking ideas that aimed to address the complexities and nuances of preventing and prohibiting torture at an international level<sup>736</sup>.

The IAPL draft, of 1978, mirrored the approach taken in other significant international conventions, such as the Genocide Convention of 1948 and the Apartheid Convention of 1973<sup>737</sup>. It placed a strong emphasis on the obligation of states to criminalize torture and to take legal action against perpetrators and sought to declare torture as a punishable crime under international law<sup>738</sup>. By establishing clear obligations for states to enact legislation that specifically criminalizes torture and to prosecute those responsible for committing such acts, the draft aligned with the intent of holding individuals accountable for grave human rights violations<sup>739</sup>.

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<sup>732</sup> BURGERS, J.H., DANIELIUS, H., *The United Nations Convention against Torture*, cit., 18.

<sup>733</sup> NOWAK, M., BIRK, M., MONINA, G., *The United Nations Convention Against Torture and its Optional Protocol: a commentary*, Oxford University Press, 2<sup>nd</sup> edition, 2019, 3.

<sup>734</sup> NOWAK, M., MCARTHUR, E., *The United Nations Convention Against Torture*, cit., 3.

<sup>735</sup> NOWAK, M., MCARTHUR, E., *The United Nations Convention Against Torture*, cit., 3.

<sup>736</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 3.

<sup>737</sup> NOWAK, M., MCARTHUR, E., *The United Nations Convention Against Torture*, cit., 3.

<sup>738</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 3.

<sup>739</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 3.

The original Swedish Draft from January 18, 1978, closely aligned with the principles outlined in the 1975 Declaration against Torture<sup>740</sup> <sup>741</sup>. While sharing a focus on the criminalization of torture, it introduced innovative concepts, notably the principle of universal jurisdiction coupled with the «*aut dedere aut iudicare*» principle, similar to earlier treaties addressing issues like hostage-taking and terrorism<sup>742</sup>. Therefore, the Swedish draft, by introducing the principle of universal jurisdiction, it proposed that states should have the responsibility to prosecute alleged torturers within their own jurisdiction or, if they refuse or fail to do so, the obligation for any state to extradite the accused to face trial elsewhere<sup>743</sup>. Specifically, it aimed at ensuring that there would be no safe havens for perpetrators of torture and that justice could be pursued regardless of where the crime occurred or the nationality of the perpetrator or victim<sup>744</sup>. Moreover, the Swedish Draft included provisions not only for the prosecution of individual perpetrators but also for the prevention of torture<sup>745</sup>. It suggested establishing mechanisms for international monitoring, proposing that the Human Rights Committee take on specific responsibilities such as reviewing state reports, handling individual and interstate complaints, and conducting investigations as needed<sup>746</sup>. Given its comprehensive approach and innovative suggestions regarding both prevention and prosecution, the Swedish Draft was selected as the primary foundation for the Working Group's discussions<sup>747</sup>. Its incorporation of preventive measures and international monitoring alongside the emphasis on prosecution and universal jurisdiction contributed significantly to shaping the eventual content of the CAT.

The 1980 proposal from Costa Rica to the Human Rights Commission introduced a draft for an Optional Protocol (OP) to the evolving Convention against Torture<sup>748</sup>. This proposal was influenced by the experiences of the International

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<sup>740</sup> In 1975, the UN General Assembly adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading treatment or Punishment (“the declaration”). It has a non-binding character and aimed at preventing torture.

<sup>741</sup> NOWAK, M., MCARTHUR, E., *The United Nations Convention Against Torture*, cit., 3.

<sup>742</sup> NOWAK, M., MCARTHUR, E., *The United Nations Convention Against Torture*, cit., 3.

<sup>743</sup> BURGERS, J.H., DANELIUS, H., *The United Nations Convention against Torture*, cit., 35.

<sup>744</sup> NOWAK, M., MCARTHUR, E., *The United Nations Convention Against Torture*, cit., 35.

<sup>745</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 3.

<sup>746</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 3.

<sup>747</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 3.

<sup>748</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 3.

Committee of the Red Cross (ICRC) and a private proposal from Jean-Jacques Gautier, a Geneva-based banker<sup>749</sup>. The *Costa Rica Draft*, supported by entities like the International Commission of Jurists and the Swiss Committee against Torture, aimed to establish a mechanism for preventive and unannounced visits to places of detention: it reflected a proactive approach<sup>750</sup>. This mechanism would involve international monitoring by allowing visits to detention facilities without prior notice, aiming to prevent torture and other forms of ill-treatment<sup>751</sup>. Drawing from the experiences and practices of the ICRC, which had a long-standing role in visiting places of detention to monitor conditions and ensure compliance with international humanitarian law, the Costa Rica Draft sought to formalize and expand this practice within the framework of the Convention against Torture<sup>752</sup>.

Finally, between 1978 and 1984 the Committee Against Torture was created by the Working Group: such a decision was taken in the view of prohibiting the Human Rights Committee (HRC) to carry out such an important task: monitoring compliance with the UNCAT<sup>753</sup>.

In March 1984, the HRC adopted the draft Convention of the Working Group and transmitted it to the UNGA<sup>754</sup>. However, the draft presented some problems, which raised two controversial questions, remained left to be answered until the very end of negotiations<sup>755</sup>. These points of contention revolved around the scope of authority granted to the Committee Against Torture. One debated issue was whether the Committee against Torture should have the competence to issue country-specific comments and suggestions in response to State reports under Article 19 of the Convention<sup>756 757</sup>. The other contentious matter centered on the mandatory character of the inquiry procedure under Article 20 of the CAT<sup>758</sup>. This issue involved whether the Committee should have the authority to conduct

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<sup>749</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 3.

<sup>750</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 3.

<sup>751</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 3.

<sup>752</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 3.

<sup>753</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 3.

<sup>754</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 4.

<sup>755</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 4.

<sup>756</sup> This involved whether the Committee could provide detailed feedback or recommendations concerning individual countries' compliance with the Convention based on their reports.

<sup>757</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 4.

<sup>758</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 4.

inquiries into allegations of torture in a State, even if that State had not recognized the competence of the Committee for such investigations<sup>759</sup>. During negotiations, the desire among most states to swiftly adopt the Convention revealed the necessity for compromises, leading to the inclusion of what is referred to as the *opting-out clause* in Article 28 of the CAT<sup>760</sup>. This clause allows states to declare that they do not recognize the Committee's competence regarding inquiries or specific comments, limiting the Committee's authority in those regards<sup>761</sup>. Additionally, Article 19§3 CAT<sup>762</sup> contains a provision on *general comments* on specific State reports, but the language used in this section is somewhat ambiguous<sup>763</sup>. This ambiguity leaves room for interpretation regarding the extent to which the Committee can make general comments on individual State reports<sup>764</sup>. These compromises and the inclusion of the *opting-out clause* and the ambiguous provision about general comments were concessions made to accommodate opposite perspectives among states and expedite the adoption of the Convention, even though they left certain aspects open to interpretation and potential limitations on the Committee's authority<sup>765</sup>.

Finally on December 10<sup>th</sup> 1984, the Convention Against Torture was adopted with Resolution No. 39/46 and by October 2007 a total of 145 States ratified or acceded to it<sup>766</sup>.

As previously established, the Costa Rica draft Optional Protocol presented the goal of establishing a system of preventive visits to places of detention, which was not adopted when CAT was drafted<sup>767</sup>. As soon as the Cold War ended, new opportunities and perspectives were brought within the ambit of international human rights<sup>768</sup>. The UN Commission on Human Rights revisited Jean-Jacques

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<sup>759</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 4.

<sup>760</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 4.

<sup>761</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 4.

<sup>762</sup> «Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee».

<sup>763</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 4.

<sup>764</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 4.

<sup>765</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 4.

<sup>766</sup> DANELIUS, H., *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, in United Nations Audiovisual Library of international Law, 2008, 1.

<sup>767</sup> Jean-Jacques Gautier's idea.

<sup>768</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 4.

Gautier's idea (previously mentioned) and tasked another inter-sessional Working Group with the development of an *Optional Protocol to the CAT*<sup>769</sup>. This Working Group, chaired by Elizabeth Odio Benito (former Minister of Justice of Costa Rica) centered its discussions and deliberations on a revised draft submitted by Costa Rica<sup>770</sup>. This revised draft was likely built upon the earlier proposal put forth by Costa Rica in 1980, aiming to establish an Optional Protocol that would supplement and enhance the measures outlined in the CAT<sup>771</sup>. The focus of this initiative was to further strengthen preventive measures against torture<sup>772</sup>. The Optional Protocol sought to create additional mechanisms for international monitoring, aligning with the original intentions of Jean-Jacques Gautier's concept of unannounced visits to places of detention<sup>773</sup>. The OP was later adopted on December 18<sup>th</sup> 2002, and exactly 30 days later, it entered into force<sup>774</sup>.

Moving on to the interpretation of the prohibition of torture contained in the Convention Against Torture, relevant in this matter is Article 1. It was regarded as the first provision to ever establish a precise definition of torture. It stated that *«For the purpose of this convention the term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on person for such purpose as obtaining from him or a third person information or a confession, punishing him for an act he or third person has committed or is 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 officials or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions»*. However, this definition did not seem appropriate. Even so, the International Criminal Tribunal for the former Yugoslavia's (ICTY) perspective highlights an important aspect: while the UNCAT definition of torture in Article 1 might not be universally binding in all contexts as customary law, there is a significant alignment between various international

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<sup>769</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 5.

<sup>770</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 5.

<sup>771</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 5.

<sup>772</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 5.

<sup>773</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 5.

<sup>774</sup> NOWAK, M., BIRK, M., MONINA, G., *UNCAT and OPs Commentary*, cit., 5.

instruments and jurisprudence<sup>775</sup>. This alignment indicates a general acceptance of the fundamental elements outlined in Article 1 of the Convention against Torture<sup>776</sup>. The debate around whether certain definitions in international treaties automatically become customary international law applicable to all nations, regardless of their ratification status, can be intricate<sup>777</sup>. The ICTY's view is of fundamental relevance, in so far as it likely emphasizes the need to consider broader international legal practices and court decisions alongside treaty provisions when assessing the status of a legal definition<sup>778</sup>.

Regardless, when analyzing the definition at hand, one might note four core elements: the nature of the act, the intention of the perpetrator, the purpose and the involvement of public officials<sup>779</sup>.

As for the nature of the act, Article 1 makes reference to «*any act*», which means that torture is not only committed in the presence of an act of commission, but also an omission: a wide interpretation of Article 1 is preferable in this case, being highlighted even by the fact that both omission and commission can inflict physical and mental pain, at the same intensity<sup>780</sup>. In order to comprehend this concept better, various international decisions and human rights monitoring bodies have emphasized the notion that both physical and mental pain or suffering, whether caused by acts of commission or omission, can be considered a violation of the prohibition against torture and ill-treatment. This broad interpretation underscores the idea that torture is not solely confined to explicit physical harm but also encompasses mental anguish and suffering resulting from deliberate actions or negligence<sup>781</sup>. For instance, in assessing the Greek Case, the European Commission of Human Rights ruled that deprivation of essential items, like food, could constitute an act of torture: «*the failure of the Government of Greece to provide food, water, heating in winter, proper washing facilities, clothing, medical and*

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<sup>775</sup> MESKELE, K., *Interpretation of Article One of the Convention against Torture in Light of the Practice and Jurisprudence of International Bodies*, in Beijing Law Review, 5, 2014, 50.

<sup>776</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 50.

<sup>777</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 50.

<sup>778</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 50.

<sup>779</sup> NOWAK, M., *What practices constitute torture?: US and UN Standards*, in Human Rights Quarterly, Volume 28, No. 4, November 2006, 817.

<sup>780</sup> NOWAK, M., *What practices constitute torture?*, cit., 819.

<sup>781</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 51.

*dental care to prisoners constitutes an 'act' of torture in violation of Article 3 ECHR»*<sup>782</sup>. This demonstrates the recognition that certain acts, even if they do not involve direct physical violence, can inflict severe suffering and fall within the scope of torture or ill-treatment under international human rights law<sup>783</sup>. This expansion of the understanding of torture to encompass various forms of suffering, whether physical or mental, aims to ensure a more comprehensive protection of human rights and dignity, acknowledging that harm can manifest in diverse ways beyond physical abuse<sup>784</sup>. By excluding acts of omission from the legal definition, which sanctions torture, one horrific consequence would rise: State Parties would definitely not respect their obligations, and they would not even find themselves in a position of breach of Article 1 UNCAT<sup>785</sup>. This principle was highly established by the Committee in one of its Concluding Observations, stating that the government would breach the Convention whenever it would not provide health care assistance to individuals who needed it<sup>786</sup>.

Moving forward to the second necessary factor, torture is configured when an act is committed intentionally to the victim, in order to cause physical or mental pain or suffering<sup>787</sup>. In the context of intent, the long-standing question is whether negligent infliction of pain and suffering amounts to torture<sup>788</sup>. This constitutes a nuanced aspect within the realm of international law and, while it is clear that a detainee suffering severe pain due to neglect or omission experiences a grave human rights violation, there is a debate about whether such treatment meets the threshold for torture, primarily due to the absence of intent<sup>789</sup>. Many scholars argue that negligence alone might not be sufficient to categorize an act as torture under international law<sup>790</sup>. Instead, they suggest that recklessness<sup>791</sup>, which involves a conscious disregard for known risks or consequences, might meet the threshold for

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<sup>782</sup> European Commission of Human Rights, *the Greek case*, Applications No. 3321/67, 3322/67, 3323/67, 3344/67; NOWAK, M., *What practices constitute torture?*, cit., 819.

<sup>783</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 51.

<sup>784</sup> WENDLAND, L., *Handbook on state obligations*, cit., 26.

<sup>785</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 51.

<sup>786</sup> WENDLAND, L., *Handbook on state obligations*, cit., 27.

<sup>787</sup> NOWAK, M., *What practices constitute torture?*, cit., 830.

<sup>788</sup> NOWAK, M., *What practices constitute torture?*, cit., 830.

<sup>789</sup> NOWAK, M., *What practices constitute torture?*, cit., 830.

<sup>790</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 52.

<sup>791</sup> It refers to the conduct of acting with conscious disregard or indifference to the consequences.



torture<sup>792</sup>. Intent, or the deliberate purpose to cause suffering, is often seen as a crucial element in defining torture<sup>793</sup>. The Committee Against Torture finds itself at the center of this debate: there was an exceptional instance in 2007 during a discussion forum on Denmark's report where the Committee sought clarification regarding the exclusion of negligence<sup>794</sup>. They questioned why negligence was omitted considering it's a well-established subjective component in criminal liability<sup>795</sup>. However, since torture is characterized by the need to achieve a specific purpose, and by acting with negligence is impossible to do so, and to respect such requirement, then negligence is not a component able to suffice for the configuration of the crime of torture<sup>796</sup>.

In sum, UNCAT encompasses not only deliberate acts but also omissions within its definition of torture: both actions committed with the intent to cause severe pain or suffering and the deliberate failure to prevent or stop such actions can fall within the scope of torture under UNCAT. Regarding the intention element, various interpretations suggest that recklessness could satisfy the requirement for intent under UNCAT's definition of torture. In contrast, mere negligence<sup>797</sup>, as stated above, might not meet the threshold for establishing intent under UNCAT<sup>798</sup>. This distinction between recklessness and negligence underscores the significance of a higher level of awareness and deliberate disregard for the consequences when evaluating whether an action or omission meets the criteria for torture under international law. Assessing the severity of physical or mental pain and suffering involves both objective and subjective elements<sup>799</sup>. While there are general criteria for what constitutes severe pain or suffering, the individual circumstances, including the victim's particular sensitivity, can influence whether an act crosses the threshold to be considered torture<sup>800</sup>. If a state agent inflicts pain or suffering or allows it to happen and is aware that the victim has a particular sensitivity—whether

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<sup>792</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 52.

<sup>793</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 52.

<sup>794</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 52.

<sup>795</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 52.

<sup>796</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 52.

<sup>797</sup> It involves a lack of awareness or failure to foresee the consequences of one's actions.

<sup>798</sup> CEJIL, *Torture in international law*, cit., 12.

<sup>799</sup> CEJIL, *Torture in international law*, cit., 12.

<sup>800</sup> CEJIL, *Torture in international law*, cit., 12.

due to physical, psychological, or other factors—actions that might not otherwise reach the threshold of severity to constitute torture might indeed do so<sup>801</sup>. This acknowledgment of the victim's specific vulnerabilities and sensitivities highlights the nuanced nature of determining whether an act qualifies as torture under UNCAT.

The third element which was deemed necessary for an act to classify as torture, is the pursue of a specific purpose<sup>802</sup>. This requirement seems to help in drawing the line between torture and other forms of ill-treatment<sup>803</sup>. The wording in Article 1 of UNCAT, specifically «*for such purpose as*», indicates the intended goals for which torture might be inflicted<sup>804</sup>. These purposes (extracting confessions, obtaining information, punishment, intimidation, coercion, and discrimination) are explicitly mentioned but are understood to be illustrative rather than to be forming part of an exhaustive list<sup>805</sup>. The phrase «*for such purpose as*» leaves room for interpretation regarding the reasons behind the infliction of torture<sup>806</sup>. While the listed purposes serve as guidance, they are not meant to limit the potential reasons that might lead to the use of torture<sup>807</sup>. Therefore, the phrase seems to have an *open-ended nature*, allowing for a broader consideration of motives, apart from the specifically enumerated ones<sup>808</sup>. Nonetheless, there is a point of contention in the interpretation of this phrase: on one hand, some argue that torture might be inflicted for reasons not explicitly related to one state's actions<sup>809</sup>; however, this perspective might seem paradoxical when juxtaposed with the idea of torture as outlined in the UNCAT<sup>810</sup>. Although the term «*for such purpose as*» does not limit the possible motives strictly, many experts argue that it primarily invites consideration of purposes similar to those expressly listed<sup>811</sup>.

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<sup>801</sup> CEJIL, *Torture in international law*, cit., 12.

<sup>802</sup> CEJIL, *Torture in international law*, cit., 12.

<sup>803</sup> CEJIL, *Torture in international law*, cit., 12.

<sup>804</sup> CEJIL, *Torture in international law*, cit., 12.

<sup>805</sup> WENDLAND, L., *Handbook on state obligations*, cit., 28.

<sup>806</sup> WENDLAND, L., *Handbook on state obligations*, cit., 28.

<sup>807</sup> NOWAK, M., *What practices constitute torture?*, cit., 831.

<sup>808</sup> CEJIL, *Torture in international law*, cit., 12.

<sup>809</sup> For instance, the HRC, in one of its Concluding Observations, suggested just that: torture could be inflicted for reasons unrelated to state actions.

<sup>810</sup> CEJIL, *Torture in international law*, cit., 12.

<sup>811</sup> For instance, the HRC, in one of its Concluding Observations, suggested just that: torture could be inflicted for reasons unrelated to state actions; WENDLAND, L., *Handbook on state obligations*, cit., 28.

The last requirement enlisted in Article 1 UNCAT refers to the involvement of public officials and, therefore, to the qualification of the perpetrator. The Convention explicitly requests that an act of torture shall be committed by a public official or another individual acting in official capacity: therefore, for an act to qualify as torture the pain or suffering needs to be inflicted by instigation or with the consent or acquiescence of these individuals<sup>812</sup>. CAT's jurisprudence has clarified that the term «*public official*» typically pertains to individuals or entities under *de jure* (by law) government control<sup>813</sup>. This understanding implies that those officially recognized or designated as part of the government machinery, whether through appointment, election, or formal status, fall within the scope of «*public officials*», as defined by the Convention<sup>814</sup>. However, the CAT has also recognized that *de facto* control, or control in practice, despite lacking official legal recognition, might be acknowledged in situations where there is an absence of *de jure* control<sup>815</sup>. This extension acknowledges scenarios where individuals or entities effectively exercise governmental authority or control, even without the formal legal recognition or status typically associated with public officials.

Still in this context, it is of utmost importance to analyze State responsibility for acts of torture. As previously established, public officials are liable when the act of torture has been committed and suffering inflicted with the public officials' consent, by his instigation, or when there has been acquiescence. First of all, the concept of State responsibility concerning torture under Article 1 often arises when State agents, directly or indirectly, participate in or facilitate acts of torture: this involvement includes scenarios where public officials engage in actions such as incitement, inducement, or solicitation of torture<sup>816</sup>. International bodies' jurisprudence has established this situation as a clear violation of the Convention against Torture<sup>817</sup>. In various cases involving political interests or conflicts between states, there have been mentions and evidence suggesting that States have resorted

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<sup>812</sup> WENDLAND, L., *Handbook on state obligations*, cit., 29.

<sup>813</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 53.

<sup>814</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 53.

<sup>815</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 53.

<sup>816</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 53.

<sup>817</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 53.

to instigating torture against opponents or individuals perceived as threats<sup>818</sup>. This unfortunate practice has been observed in different contexts and has unfortunately persisted, especially in the aftermath of the war on terror<sup>819</sup>. The involvement of state actors in instigating torture, alongside with its direct perpetration, represents a grave violation of human rights and is a clear contradiction to the obligations set forth in international treaties, including the Convention against Torture<sup>820</sup>. Therefore, it may be established that, the understanding of state responsibility, under the Convention against Torture, extends beyond the traditional concept, encompassing not just acts directly perpetrated by public officials but also those executed with their active or passive agreement, as well as those instances where officials fail to intervene when they have the capacity to do so<sup>821</sup>. The CAT has elaborated on the concept of consent or acquiescence by public officials in cases like *Dzemajl et al. vs Yugoslavia*<sup>822</sup>. In this particular stance, the police, as public officials, failed to take appropriate measures to prevent the destruction of a Roma settlement, despite being aware of the risks faced by the victims<sup>823</sup>. The Committee, in its decision, affirmed that police's inaction constituted *acquiescence* under Article 16 of the Convention<sup>824 825</sup>. The understanding is that when public officials, aware of the risk of torture or ill-treatment, fail to take necessary steps to prevent such acts by private individuals or neglect to prosecute those responsible for such acts: this failure can be deemed as acquiescence under Article 1 of the Convention<sup>826</sup>. This broader understanding of state responsibility emphasizes the obligation of states not just to refrain from directly engaging in torture but also to prevent and address torture even when committed by non-state actors.

The Committee Against Torture (CAT) reiterated the concepts of «consent» or «acquiescence» in its General Comment No. 2, clarifying them. In this commentary, consent or acquiescence «*is equated with the failure of due diligence*

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<sup>818</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 53.

<sup>819</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 53.

<sup>820</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 53.

<sup>821</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 53.

<sup>822</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 54.

<sup>823</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 54.

<sup>824</sup> This position has been reiterated by the Committee in several other cases as well.

<sup>825</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 54.

<sup>826</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 54.

by a state to prevent, investigate, or punish acts of torture or ill-treatment committed by non-state or private actors»<sup>827</sup>. Therefore, under General Comment No. 2, the understanding of consent or acquiescence extends to encompass instances where states, through their failure to act with due diligence, effectively allow or condone acts of torture or ill-treatment committed by non-state actors.

Another relevant topic, still in the ambit of State responsibility, concerns the conduct of private individuals, and whether it can amount to torture under Article 1 CAT. While purely private matters that do not involve official sanction generally might not fall directly under Article 1 of the Convention, states can, indeed, be held responsible for acts of torture by private individuals if they fail to respond effectively or take necessary measures to prevent such acts<sup>828</sup>. State responsibility can be established if the state acquiesces to these actions by not adequately responding or taking preventive measures<sup>829</sup>. The question then becomes: how is it determined when state responsibility is proven in cases involving torture by private actors due to state acquiescence?<sup>830</sup> As already indicated by the Committee, *acquiescence* by state agents, leading to state responsibility under Article 1, occurs when state authorities are aware or have reasonable belief that impermissible acts, such as torture, are being committed by private individuals, yet they fail to prevent, prosecute, or punish these acts<sup>831</sup>. Therefore, the failure of due diligence at the state level, involving the authorities' failure to protect individuals known to be at risk, becomes a critical factor in establishing state responsibility for acts of torture by acquiescence.

Fundamentally essential is the distinction operated between torture and other cruel, inhuman and degrading treatment, which are conducts divided by a very fine and blurred line.

The Committee against Torture was not able to provide for a definition of acts amounting to cruel, inhuman or degrading treatment and the features differentiating torture from them are not always clear<sup>832</sup>. The current distinction is

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<sup>827</sup> CAT, *General Comment No.2*, cit., §18.

<sup>828</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 54.

<sup>829</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 54.

<sup>830</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 54.

<sup>831</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 55.

<sup>832</sup> CEJIL, *Torture in international law*, cit., 11.

a rather nuanced and complex issue. On the topic, the UN Special Rapporteur on Torture intervenes, analyzing Articles 1 and 16 UNCAT<sup>833</sup>. It emphasizes that, while the intensity of pain or suffering is a factor, the primary criteria for distinguishing between the two, lies in the purpose of the conduct and the powerlessness of the victim<sup>834</sup>. Torture, as defined in the United Nations Convention against Torture (UNCAT), involves intentionally inflicting severe physical or mental pain or suffering for specific purposes such as obtaining information or punishment. On the other hand, cruel, inhuman, or degrading treatment may not necessarily have the same explicit purpose or level of severity but still constitutes unacceptable treatment under international human rights law<sup>835</sup>. The emphasis on the purpose of the conduct and the vulnerability or powerlessness of the victim suggests that actions can be classified as torture even if the level of pain or suffering inflicted might not be extremely intense<sup>836</sup>. This interpretation underscores the importance of considering the broader context and intent behind an action when determining whether it constitutes torture or falls within the category of cruel, inhuman, or degrading treatment. The Special Rapporteur's view emphasizes the absolute prohibition of torture under all circumstances, while also delineating the conditions under which other forms of treatment can be classified as cruel, inhuman, or degrading within the framework of the UNCAT<sup>837</sup>. In general, force would not be considered as a cruel, inhuman, or humiliating treatment if it is used lawfully, in accordance with domestic laws, for a legitimate purpose, and where it is not excessive or disproportionate in relation to the intended objective<sup>838</sup>. This suggests that there is a difference between acts that cross legal boundaries into forbidden treatment and legitimate use of force within those bounds<sup>839</sup>. However, the situation changes when individuals are under detention or similar direct control<sup>840</sup>. In such cases, any form of physical or mental pressure or coercion,

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<sup>833</sup> NOWAK, M., Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, December 23rd, 2005, §39.

<sup>834</sup> Report of the Special Rapporteur on torture, cit., §39.

<sup>835</sup> Report of the Special Rapporteur on torture, cit., §39.

<sup>836</sup> CEJIL, *Torture in international law*, cit., 11.

<sup>837</sup> CEJIL, *Torture in international law*, cit., 11; NOWAK, M., What practices constitute torture?, cit., 833.

<sup>838</sup> NOWAK, M., *What practices constitute torture?*, cit., 833.

<sup>839</sup> CEJIL, *Torture in international law*, cit., 11.

<sup>840</sup> NOWAK, M., *What practices constitute torture?*, cit., 833.

irrespective of whether it aligns with domestic laws or purposes, would at least qualify as cruel, inhuman, or degrading treatment<sup>841</sup>. This stringent stance in controlled settings highlights the heightened responsibility to safeguard individuals' rights, especially in situations where they lack autonomy or freedom, such as detention scenarios<sup>842</sup>. However, there is one common element between torture and other forms of ill-treatment: these acts need to be committed by a public official or an individual acting in an official capacity<sup>843</sup>.

Article 1 UNCAT makes reference to a particular exception: the *lawful sanction clause*, which maintains that torture is excluded when the pain or suffering inflicted derives from, is inherent or incidental to lawful sanctions<sup>844 845</sup>. The exclusion of lawful sanction typically refers to practices that are widely accepted as legitimate by the international community, such as deprivation of liberty through imprisonment, which is a common practice in most criminal systems worldwide<sup>846</sup>. However, it is crucial to note that even if a sanction is procedurally correct, it may still fall under the scope of Article 1 of UNCAT: for example, the administration of punishments like flogging, stoning, or amputation cannot be considered lawful solely because they are authorized through procedurally legitimate means<sup>847</sup>. In the case of *Osborne v Jamaica*, the HRC highlighted that the lawfulness of a sanction should be determined by reference to both national and international law<sup>848</sup>. This implies that practices deemed lawful in a domestic legal system might still be scrutinized under international law, and their conformity with international human rights standards matters.

Another essential provision enlisted in the CAT is its Article 2, which 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. 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*

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<sup>841</sup> NOWAK, M., *What practices constitute torture?*, cit., 833.

<sup>842</sup> CEJIL, *Torture in international law*, cit., 11.

<sup>843</sup> Report of the Special Rapporteur on torture, cit., §38.

<sup>844</sup> However, this concept has not been further explained by UNCAT.

<sup>845</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 55.

<sup>846</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 55.

<sup>847</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 55.

<sup>848</sup> MESKELE, K., *Interpretation of Article 1 CAT*, cit., 55.

*justification of torture. An order from a superior officer or a public authority may not be invoked as a justification of torture».* Article 2 of the UN Convention against Torture presents an absolute and unconditional prohibition on torture. Unlike many other human rights treaties, that include clauses allowing derogations or exceptions in specific circumstances, Article 2 does not contain any such provisions<sup>849</sup>. This absolute language aims to create an unequivocal and universal standard against torture and cruel, inhuman, or degrading treatment or punishment<sup>850</sup>. The absence of derogations or safety clauses in Article 2 signifies the unwavering commitment of State parties to prohibit and prevent torture under all circumstances, sending a clear message that torture is considered an absolute violation of human rights and is not justifiable or permissible under any pretext or circumstance, including national security concerns or emergencies<sup>851</sup>. However, some individuals might present arguments or justifications for the use of torture in specific circumstances, claiming it is necessary for the greater good or, for instance, for extracting crucial information that could save lives<sup>852</sup>. These arguments often suggest that in extreme cases, where there is a perceived urgency or where individuals are seen as a grave threat, the use of torture might seem justifiable<sup>853</sup>. Moreover, research and empirical evidence show that the use of torture is not only unethical and morally wrong, but also often ineffective and counterproductive: it can lead to false confessions, increased hostility, and a breakdown of trust in authorities<sup>854</sup>.

The debate surrounding torture is complex and multifaced, encompassing arguments from various points of view, such as security, ethics and human rights. On one side of the debate, individuals proposing the use of torture in certain circumstances often base their arguments on national security concerns or the need to protect communities from threats: in extreme situations, such as dealing with terrorism or insurgency, there might be a perceived necessity to use extreme measures, including torture, to obtain vital information or protect the greater

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<sup>849</sup> CHERNEVA, I., *The drafting history of article 2 of the Convention Against Torture*, in *Essex Human Rights Review*, Volume 9, No.1, June 2012, 1.

<sup>850</sup> WENDLAND, L., *Handbook on state obligations*, cit., 32.

<sup>851</sup> WENDLAND, L., *Handbook on state obligations*, cit., 32.

<sup>852</sup> WENDLAND, L., *Handbook on state obligations*, cit., 32.

<sup>853</sup> WENDLAND, L., *Handbook on state obligations*, cit., 32.

<sup>854</sup> CHERNEVA, *The drafting history of Article 2 CAT*, cit., 1.



good<sup>855</sup>. Moreover, proposals like the «*torture order*» suggest seeking legal authorization for extreme measures in exceptional circumstances, aiming to prevent arbitrary or unchecked use of torture<sup>856</sup>. Opposing views, on the other hand, categorically denounce torture in all its manifestations and highlight how it is expressly forbidden by international law as well as by human rights standards<sup>857</sup>. They contend that using torture, even for security purposes, damages a society's moral foundation, erodes public confidence in institutions, and can set off a vicious cycle of violence and fear<sup>858</sup>. They also caution against the possible «*slippery slope*» of legalizing torture, which may ultimately result in abuse of defenseless people<sup>859</sup>. The opposing views in this discussion represent divergent stances on the moral, legal, and practical ramifications of applying torture<sup>860</sup>. While some support special exceptions, others maintain that this concept should never be compromised because doing so could jeopardize the fundamental principles of democracy and human rights<sup>861</sup>. However, it is rather essential to recognize that the absolute prohibition of torture in international law remains a fundamental principle, and efforts to justify or authorize torture have been strongly rejected within the framework of human rights and ethical considerations.

Particularly relevant is the drafting of Article 2. The original bill was a Swedish proposal, which purported two different articles (article 2 and article 3)<sup>862</sup>. The former stated «*Each State Party undertakes to ensure that torture or other cruel, inhuman or degrading treatment or punishment does not take place within its jurisdiction. Under no circumstances shall any State Party permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. 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 or other cruel, inhuman or degrading*

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<sup>855</sup> CHERNEVA, *The drafting history of Article 2 CAT*, cit., 3.

<sup>856</sup> CHERNEVA, *The drafting history of Article 2 CAT*, cit., 3.

<sup>857</sup> CHERNEVA, *The drafting history of Article 2 CAT*, cit., 4.

<sup>858</sup> CHERNEVA, *The drafting history of Article 2 CAT*, cit., 4.

<sup>859</sup> CHERNEVA, *The drafting history of Article 2 CAT*, cit., 4.

<sup>860</sup> CHERNEVA, *The drafting history of Article 2 CAT*, cit., 4.

<sup>861</sup> CHERNEVA, *The drafting history of Article 2 CAT*, cit., 4.

<sup>862</sup> CHERNEVA, *The drafting history of Article 2 CAT*, cit., 5.

*treatment or punishment*». Differently, article 3 read «*Each State Party shall, in accordance with the provisions of the present Convention, take legislative, administrative, judicial and other measures to prevent torture or other cruel, inhuman or degrading treatment or punishment from being practised within its jurisdiction*». When negotiations were still open, an important debate arose: whether article 2 would only apply to torture or also to cruel, inhuman or degrading treatment or punishment<sup>863</sup>. Additionally, the United States decided to include an important change: the two mentioned articles were put together to create a brand-new provision<sup>864</sup>. The scope of torture was limited, eliminating any reference to cruel, inhuman or degrading treatment (CIDT), and no justification whatsoever could be imported<sup>865</sup>. Nevertheless, given that CIDT is not included in the final version of Article 2 §2, it appears that the drafters ultimately adopted the US proposal<sup>866</sup>.

Next to the Swedish proposal, the IAPL submitted a draft, on the grounds of customary international law, which prohibited torture and ill-treatment at all times<sup>867</sup>. However, this draft was not even taken into consideration, due to the fact that the US proposal was seen more successful<sup>868</sup>.

The most debated point concerned the absolute nature of the phrase «*no exceptional circumstances whatsoever*»<sup>869</sup>. A proposal to delete such a phrase was presented; however, it would definitively constitute a justification to the prohibition of torture: for this main reason, it was instantly rejected<sup>870</sup>.

## **2.5. Geneva Conventions & Additional Protocols (GCs and APs).**

The Geneva Conventions and their Additional Protocols represent fundamental sources of IHL that explicitly address the prohibition of torture and other forms of ill-treatment, particularly concerning armed conflicts<sup>871</sup>. These

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<sup>863</sup> CHERNEVA, *The drafting history of Article 2 CAT*, cit., 6.

<sup>864</sup> CHERNEVA, *The drafting history of Article 2 CAT*, cit., 6.

<sup>865</sup> CHERNEVA, *The drafting history of Article 2 CAT*, cit., 6.

<sup>866</sup> CHERNEVA, *The drafting history of Article 2 CAT*, cit., 6.

<sup>867</sup> CHERNEVA, *The drafting history of Article 2 CAT*, cit., 6.

<sup>868</sup> CHERNEVA, *The drafting history of Article 2 CAT*, cit., 6.

<sup>869</sup> CHERNEVA, *The drafting history of Article 2 CAT*, cit., 7.

<sup>870</sup> CHERNEVA, *The drafting history of Article 2 CAT*, cit.

<sup>871</sup> ICRC, *Advisory service on IHL*, cit., 2.

Conventions and their Protocols establish crucial provisions, which aim at safeguarding individuals and setting clear responsibilities for both states and individuals involved in armed conflicts: States are obligated to enact legislation prohibiting torture and other forms of ill-treatment; they must also take measures to prosecute and punish individuals responsible for committing or ordering such acts; individuals can be held criminally responsible for committing war crimes related to torture or other cruel treatment during armed conflicts<sup>872</sup>. This responsibility is outlined in various articles across the Geneva Conventions and their Additional Protocols<sup>873 874</sup>. The Geneva Conventions and their Additional Protocols establish legal accountability for individuals involved in perpetrating or ordering such acts: military leaders have a duty to intervene and stop acts of torture or cruel treatment during armed conflicts, and furthermore, they are responsible for preventing and suppressing such behavior among their subordinates<sup>875</sup>. Additionally, they should take appropriate measures, including punishment, against individuals violating these prohibitions<sup>876</sup>. Relevant provisions outline these responsibilities, such as Articles 49, 50, 129, 146 of GC I-IV and their Common Article 3(1)(a), AP I Articles 86 and 87, AP II Article 4(2)(a), and Rules 151-153 and 156 of the ICRC study on customary IHL<sup>877</sup>. These provisions collectively reinforce the imperative of preventing and prohibiting torture and other forms of ill-treatment during armed conflicts, placing obligations on states, individuals, and military leaders to uphold and enforce these fundamental principles of international humanitarian law<sup>878</sup>.

The four Geneva Conventions (1949) contain a prohibition of torture against protected persons<sup>879</sup>. Common Article 3 §1 lett.a and c might be more important, and it clarifies that «*violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture*» as well as «*outrages upon personal dignity, in particular humiliating and degrading treatment*» count among the acts that «are

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<sup>872</sup> ICRC, *Advisory service on IHL*, cit., 2.

<sup>873</sup> Articles 50,51,130,147 of GC I-IV and their Common Article 3(1)(a), Article 85 of AP I, Article 4(2)(a) of AP II, Article 8(2)(ii) of the ICC Statute, and Rule 90 of the ICRC study on customary IHL.

<sup>874</sup> ICRC, *Advisory service on IHL*, cit., 2.

<sup>875</sup> ICRC, *Advisory service on IHL*, cit., 2.

<sup>876</sup> ICRC, *Advisory service on IHL*, cit., 2.

<sup>877</sup> ICRC, *Advisory service on IHL*, cit., 2.

<sup>878</sup> ICRC, *Advisory service on IHL*, cit., 2.

<sup>879</sup> ETIENNE, H., *Article 5*, cit., 8.

*and shall remain prohibited at any time and in any place whatsoever with respect' to 'persons taking no active part in the hostilities»<sup>880 881</sup>.*

## **2.6. The Statute of the International Criminal Court (ICC Statute or Rome Statute).**

The Rome Statute was adopted on July 17<sup>th</sup> 1998 by a United Nations Diplomatic Conference of Plenipotentiaries. It establishes an International Criminal Court, which jurisdiction concerns crimes of genocide, crimes against humanity and war crimes. Particularly relevant is its Article 7, which addresses crimes against humanity (CAH)<sup>882</sup>. It contains a list of crimes which can amount to CAH when committed as part of a widespread or systematic attack directed against a civilian population<sup>883</sup>. The relevant portion concerning torture<sup>884</sup> defines it as *«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»<sup>885</sup>*. However, it also specifies that torture shall not include pain or suffering that arises solely from lawful sanctions<sup>886</sup>.

Additionally, the Rome Statute enumerates *«other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health»* as a separate category of crimes against humanity<sup>887</sup>. These acts are of a similar nature to torture but might not fall strictly within its the definition<sup>888</sup>. The intentional infliction of severe suffering, causing serious physical or mental harm, can be prosecuted as a crime against humanity under this broader category<sup>889</sup>.

What differentiates the definition contained in the Rome Statute from the one enlisted in the UN CAT concerns the fact that while the suffering required needs to be severe, the former source of law makes no reference at all to the relativity of

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<sup>880</sup> ETIENNE, H., *Article 5*, cit., 8.

<sup>881</sup> This provision appears to overlap with Article 5 UDHR, and it has customary character.

<sup>882</sup> UNOHCHR, *HRs fact sheet No.4*, cit., 10.

<sup>883</sup> UNOHCHR, *HRs fact sheet No.4*, cit., 10.

<sup>884</sup> Article 7(2)(e) ICC Statute.

<sup>885</sup> UNOHCHR, *HRs fact sheet No.4*, cit., 10.

<sup>886</sup> UNOHCHR, *HRs fact sheet No.4*, cit., 10.

<sup>887</sup> UNOHCHR, *HRs fact sheet No.4*, cit., 10.

<sup>888</sup> UNOHCHR, *HRs fact sheet No.4*, cit., 10.

<sup>889</sup> UNOHCHR, *HRs fact sheet No.4*, cit., 10.

the pain or suffering<sup>890</sup>. No reference was made to the purpose of the conduct either<sup>891</sup>. As a matter of fact, the Preparatory Commission for the ICC stated that «no specific purpose need be proved for this crime»<sup>892</sup>. The crime was seen as a common offence, since no reference to the particular qualification of the perpetrator<sup>893</sup> was made<sup>894</sup>.

### **3. European point of view concerning the criminalization of torture.**

Alongside the international sphere, equally important is the European point of view. Most importantly, the ECHR, while it prohibits torture and other forms of ill-treatment, lacks a definition of torture. For this main reason, its roots can be traced back into International treaties: specifically, the definition of torture adopted at the European level relies on the one already established in International tools. The European Union Charter of Fundamental Rights, in its Article 4, presents the same prohibition as Article 3 ECHR. It has the exact same wording and guarantees the same rights. That is the reason why this paragraph will deeply analyze only one of these two provisions: Article 3 ECHR.

#### **3.1. European Convention on Human Rights.**

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is a cornerstone in safeguarding human rights across Europe: it outlines a range of fundamental rights and freedoms, encompassing civil, political, economic, social, and cultural rights<sup>895</sup>. The Convention not only establishes these rights but also imposes obligations on the states that are parties to it, which include both positive and negative responsibilities<sup>896</sup>. State's duties deriving from the ECHR will be addressed in a

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<sup>890</sup> RODLEY, N.S., *The definition(s) of torture in international law*, in Current Legal Problems, Oxford University Press, 3.

<sup>891</sup> RODLEY, N.S., *Definitions of torture in international law*, cit., 3.

<sup>892</sup> United Nations, Report of the Preparatory Commission for the International Criminal Court. Addendum II, Finalized draft text of the Elements of Crimes, Art. 7(1)(f), 2000, note 14.

<sup>893</sup> The status of public official.

<sup>894</sup> RODLEY, N.S., *Definitions of torture in international law*, cit., 3.

<sup>895</sup> LONG, D., *Guide to Jurisprudence on Torture and Ill-treatment, Article 3 of the Convention for the Protection of Human Rights*, in Association for the Prevention of Torture (APT), 2002, 9.

<sup>896</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 9.

later paragraph. Among the rights and freedoms enshrined in the Convention, Article 3 plays a prominent role, being at the center of an extremely heated debate since its very introduction. It reads «*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*». Among its features, worthy to be mentioned are: the necessity to read the provision in conjunction with Article 15 ECHR, which precludes any possibility to derogate from the ban, due to the absolute character of the prohibition; Article 3 does not give an exact definition of torture, basing itself on International treaties and the extensive jurisprudence which rose from cases of violation of the Article itself<sup>897</sup>.

In understanding whether a certain conduct, characterized as ill-treatment, can fall within the scope and meaning of Article 3, a minimum level of severity shall be overcome<sup>898</sup>. This is the so-called «*entry level threshold*» which can be assessed by looking at several factors: the duration of the treatment, since longer periods of ill-treatment can contribute to it being classified as reaching the required level of severity; the physical effects of the treatment, since when severe, they can amount to an Article 3 violation; the mental effects of the treatment, such as trauma or even severe distress can contribute to the severity threshold; other relevant factors such as sex, age and state of health of the victim, which can amplify the impact of ill-treatment<sup>899</sup>. Once the Court determines that the treatment or punishment surpasses this minimum level of severity, it then distinguishes between two different categories: torture and inhuman or degrading treatment or punishment<sup>900</sup>. Torture represents the most severe category and involves deliberate and intentional infliction of severe physical or mental pain or suffering by a public official or with their consent or acquiescence; on the other hand, inhuman or degrading treatment or punishment are less severe or grave compared to torture, but still violate Article 3<sup>901</sup>. The distinction between these categories is crucial in determining the gravity of the violation and the corresponding responsibilities and repercussions for the state responsible.

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<sup>897</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 9.

<sup>898</sup> WENDLAND, L., *Handbook on state obligations*, cit., 26.

<sup>899</sup> WENDLAND, L., *Handbook on state obligations*, cit., 26.

<sup>900</sup> WENDLAND, L., *Handbook on state obligations*, cit., 26.

<sup>901</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 13.

As established before, Article 3 lacks a specific definition of torture, and even of inhuman or degrading treatment or punishment. For this main reason, one of the basis for the definition can be found in the many rulings by the ECtHR. Specifically, the two leading cases in assessing the difference between the three ill-treatments are the *Greek case* and *Ireland v. UK*<sup>902</sup>.

The Greek Case holds significant importance in shaping the interpretation and understanding of the distinctions between torture, inhuman, and degrading treatment or punishment, under Article 3 of the European Convention on Human Rights<sup>903</sup>. The ruling in this case initially emphasized the purpose behind the act as the defining characteristic of torture<sup>904</sup>. The European Commission's position in the Greek Case suggested that, while torture might encompass an aggravated form of inhuman treatment, the key distinguishing factor was the purposeful use of such treatment<sup>905</sup>. In essence, torture was considered as the intentional use of inhuman treatment for a specific purpose: «*it deliberately causes severe suffering, mental or physical, which, in the particular situation is unjustifiable*» and as for the specific purpose, it can be described as inhuman treatment with 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*»<sup>906</sup>. However, with the increasing of the jurisprudence, the perspective shifted: while the purposive element remains significant in identifying acts of torture, the focus has expanded to consider a sliding scale of severity among the prohibited acts<sup>907</sup>. This evolution implies that the severity of the treatment or punishment has gained prominence as a determining factor in distinguishing between torture, inhuman, and degrading treatment or punishment. As a result, the Court's approach has evolved to consider a more comprehensive set of criteria, incorporating both purpose and severity in determining violations of the Convention<sup>908</sup>. Additionally, the ECtHR established in the case at hand that, the concept of inhuman treatment serves as an intermediary

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<sup>902</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 13.

<sup>903</sup> RODLEY, N.S., *Definitions of torture in international law*, cit., 4 s.

<sup>904</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 13.

<sup>905</sup> NOWAK, M., *What practices constitute torture?*, cit., 820.

<sup>906</sup> RODLEY, N.S., *Definitions of torture in international law*, cit., 5.

<sup>907</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 13.

<sup>908</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 13.

category between torture and degrading treatment: it accommodates acts that do not reach the severity threshold for torture but still exceed the threshold of what can be considered as degrading treatment<sup>909</sup>. The Court's approach to defining inhuman treatment can indeed be broad and somewhat open to interpretation.

The *Campbell and Cosans v UK* case illustrates this nuanced approach to inhuman treatment. In this instance, the case involved the threatened use of corporal punishment against two schoolboys<sup>910</sup>. Although the punishment did not actually occur, the Court acknowledged that a mere threat of conduct prohibited by Article 3 might, in some circumstances, itself conflict with the provision, potentially constituting at least «*inhuman treatment*»<sup>911</sup>. However, in this specific case, despite recognizing the potential conflict with Article 3 due to the threatened punishment, the Court concluded that the threatened punishment was not severe enough to qualify as either torture or inhuman treatment<sup>912</sup>. Additionally, the punishment did not humiliate or debase the boys to the extent required for a finding of degrading treatment<sup>913</sup>. Differently, degrading treatment has been subject to a more extensive consideration, consisting in the baseline for acts to be categorized as violations of Article 3<sup>914</sup>. To be thorough, it should be mentioned that the Commission defined "degrading treatment" as any action that «*grossly humiliates him before others or drives him to act against his will or conscience*»: this is why it was deemed to be a component of torture<sup>915</sup>.

The Greek Case initially implied that degrading treatment involved a level of «*gross humiliation*»<sup>916</sup>. Therefore, for an act to breach Article 3 under the category of degrading treatment, it must meet a certain level of severity and interfere with an individual's dignity<sup>917</sup>. This understanding of degrading treatment has been refined in subsequent cases, particularly those involving corporal

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<sup>909</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 17.

<sup>910</sup> European Court of Human Rights, *Campbell and Cosans v. The United Kingdom*, Judgement, Applications No. 7511/76 and 7743/76, February 25th 1982; LONG, D., *Guide to jurisprudence on torture*, cit., 17.

<sup>911</sup> ECHR, *Campbell and Cosans v. UK*, cit., §26.

<sup>912</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 17.

<sup>913</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 17.

<sup>914</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 17.

<sup>915</sup> RODLEY, N.S., *Definitions of torture in international law*, cit., 5.

<sup>916</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 18.

<sup>917</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 18.



punishment<sup>918</sup>. *Tyrer v UK* is a notable case that showcases the European Court of Human Rights' approach toward degrading treatment<sup>919</sup>. In this case, the Court examined the imposition of a judicial sentence of birching on a fifteen-year-old boy on the Isle of Man after being convicted of unlawful assault<sup>920</sup>. After determining that the treatment was not severe enough to qualify as torture or inhuman treatment, the Court shifted its focus to assess whether the birching amounted to degrading treatment<sup>921</sup>. The Court emphasized that for punishment to be considered "degrading" and breach Article 3, it must result in humiliation or debasement reaching a particular level<sup>922</sup>. In addition, the Court offered standards for determining the degree of humiliation or debasement in question, stressing that this evaluation is subjective and contingent upon a number of factors, such as the type and context of the punishment in question as well as the way in which it was carried out<sup>923</sup>.

Furthermore, the Court has noted that lack of intent may be taken into consideration when considering the circumstances and harshness of the treatment, even though it does not necessarily mean that a breach has not occurred<sup>924</sup>. The Court's stance in *Price v. UK* elucidates this perspective: despite no evidence of a deliberate intention to humiliate or debase the applicant, the conditions in which she was kept were deemed inappropriate and constituted degrading treatment<sup>925</sup>. Therefore, the Court's approach is comprehensive and contextual, considering various elements, including the nature of the treatment, its impact on human dignity, the specific circumstances, and the intent behind the actions<sup>926</sup>. While lack of intent might not prevent a finding of a violation, it can influence the assessment of the severity of the treatment and potentially impact the determination of damages, as seen in the *Price* case<sup>927</sup>.

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<sup>918</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 18.

<sup>919</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 18.

<sup>920</sup> European Court of Human Rights, *Tyrer v UK*, Communication 5856/72, 25 April 1978, § 31 ss.

<sup>921</sup> ECHR, *Tyrer v. UK*, cit., §31.

<sup>922</sup> ECHR, *Tyrer v. UK*, cit., §31.

<sup>923</sup> ECHR, *Tyrer v. UK*, cit., §31.

<sup>924</sup> ECHR, *Tyrer v. UK*, cit., §31.

<sup>925</sup> European Court of Human Rights, Decision of Admissibility, *Price v. The United Kingdom*, Application No. 33394/96, September 12<sup>th</sup>, 2000, §34.

<sup>926</sup> ECHR, *Price v. UK*, cit., §34.

<sup>927</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 19 s.

As established before the second leading case is the *Ireland v. UK case*. It marked a significant milestone in delineating the distinctions between torture, inhuman, and degrading treatment or punishment<sup>928</sup>. The case revolved around the interrogation methods employed by UK troops against IRA suspects in Northern Ireland<sup>929</sup>. The European Court of Human Rights, in this case, acknowledged that the methods used during interrogations, known as the «*five techniques*» (which included practice of sleep deprivation, stress positions, deprivation of food and drink, subjection to noise, and hooding), crossed the *entry level threshold* of severity required for considering a potential violation of Article 3<sup>930</sup>. They caused intense physical and mental suffering, and even led to physical disturbances during the interrogation itself<sup>931</sup>. However, they did not reach the level of severity necessary to be classified as torture<sup>932</sup>. In its decision, the Court emphasized the need of drawing a line between these groups and noted that torture carries «*a special stigma*»<sup>933</sup>. It determined that an act had to produce «*serious and cruel suffering*» in order to be considered torture<sup>934</sup>. This precedent became essential in defining the boundaries between torture and inhumane and degrading treatment or punishment, depending not only on the intention behind the conduct but also on the degree of severity with which the act was carried out<sup>935</sup>. By focusing on the level of suffering inflicted, the Court set a benchmark, specifying that torture involves a higher degree of severity, implying more intense and severe suffering compared to inhuman or degrading treatment<sup>936</sup>. Thanks to this decision, one is able to highlight the meticulous assessment undertaken by the ECtHR when evaluating whether a particular act of ill-treatment crosses the threshold set by Article 3.

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<sup>928</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 14.

<sup>929</sup> RODLEY, N.S., *Definitions of torture in international law*, cit., 6.

<sup>930</sup> NOWAK, M., *What practices constitute torture?*, cit., 820; European Court of Human Rights, *Case of Ireland v. the United Kingdom*, III Section, Judgement, September 10<sup>th</sup>, 2018, Application No. 5310/71, §96.

<sup>931</sup> RODLEY, N.S., *Definitions of torture in international law*, cit., 6.

<sup>932</sup> RODLEY, N.S., *Definitions of torture in international law*, cit., 6.

<sup>933</sup> NOWAK, M., *What practices constitute torture?*, cit., 820.

<sup>934</sup> RODLEY, N.S., *Definitions of torture in international law*, cit., 6.

<sup>935</sup> RODLEY, N.S., *Definitions of torture in international law*, cit., 6.

<sup>936</sup> RODLEY, N.S., *Definitions of torture in international law*, cit., 6.

As it can be perceived, Article 3 is a particularly ambiguous and vague provision: the ECtHR did not even list the acts which can amount to torture or inhuman or degrading treatment, leaving a certain flexibility to the Article itself.

Particularly relevant is also the case *Selmouni v. France*, thanks to which an explicit reference to the more detailed Article 1 UNCAT was made. In doing so, the purposive element of torture was highlighted: this approach has been followed even in later cases. Therefore, this decision was in clear contrast with the Greek case, in which, as already established, the ECtHR highlighted that the factor used in distinguishing inhuman and degrading treatments concerned the severity of the pain and suffering inflicted<sup>937</sup>. However, it continues ruling, declaring that, differently, the line between torture and cruel, inhuman and degrading treatment is drawn thanks to a different element, which is represented by the purpose of the conducts committed<sup>938</sup>.

Obviously, everything is under constant evolution, and so is the law. For this main reason, the ECHR needs to be interpreted in light of the present-day conditions<sup>939</sup>. Therefore, what constituted torture or cruel, inhuman or degrading treatment in the past might not have the same nature and characterization nowadays<sup>940</sup>. The European Court, in the present judgement, stated that it *«considers that certain acts which were classified in the past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies»*<sup>941</sup>.

In this stance, the ECtHR in ruling the *Selmouni v. France* case, stated that this reevaluation aligns with the evolving nature of international human rights law, aiming for increasingly stringent standards in the protection of human rights and

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<sup>937</sup> RODLEY, N.S., *Definitions of torture in international law*, cit., 12.

<sup>938</sup> RODLEY, N.S., *Definitions of torture in international law*, cit., 12.

<sup>939</sup> UNOHCHR, *HRs fact sheet No.4*, cit., 8.

<sup>940</sup> UNOHCHR, *HRs fact sheet No.4*, cit., 8.

<sup>941</sup> European Court of Human Rights, *The case of Selmouni v. France*, Judgement, July 28<sup>th</sup> 1999, Application No. 25803/94, §10.

fundamental liberties<sup>942</sup>. Moreover, this evolving interpretation reflects the Court's dedication to ensuring a more robust and stringent safeguarding of fundamental rights<sup>943</sup>.

The prohibition enshrined in Article 3 has an absolute nature, and allows for no derogation whatsoever, that is why it needs to be read in conjunction with Article 15 §2<sup>944</sup>. This second article renders impossible for the prohibition to be derogated from even in situations of public emergency threatening the life of the nation<sup>945</sup>.

The case of *X v Germany* indeed presents a nuanced and somewhat exceptional scenario within the context of Article 3 of the European Convention on Human Rights. It involves the force-feeding of a person on a hunger strike while in prison, raising the question of whether such an act constitutes a violation of Article 3<sup>946</sup>. The European Commission acknowledged that force-feeding does carry degrading elements that, under certain circumstances, could be seen as prohibited by Article 3<sup>947</sup>. However, the Commission in this case weighed the situation differently. It noted that the authorities acted solely in the best interests of the individual, faced with a choice between respecting the person's will not to accept nourishment (which could risk lasting injuries or death) and taking action to ensure survival, albeit potentially infringing on the individual's human dignity<sup>948</sup>. This case differs from others, such as *Ireland v UK*, which established that there can be no justification for acts in violation of Article 3<sup>949</sup>. In *Ireland v UK*, the Court ruled against the UK's use of certain interrogation methods, considering them a violation of Article 3, without accepting any justification based on exceptional circumstances or national security<sup>950</sup>. In the case of *X v Germany*, the unique aspect lies in the justification for the violation being aimed at saving the life of the person who would otherwise be considered a victim of a breach of Article 3<sup>951</sup>. The authorities' primary

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<sup>942</sup> UNOHCHR, *HRs fact sheet No.4*, cit., 8.

<sup>943</sup> UNOHCHR, *HRs fact sheet No.4*, cit., 8.

<sup>944</sup> *Guide on article 3 of the European Convention on Human Rights. Prohibition of torture*, 1<sup>st</sup> ed., August 31<sup>st</sup> 2022, 6.

<sup>945</sup> *Guide on Article 3 ECHR*, cit., 6.

<sup>946</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 24.

<sup>947</sup> European Commission of Human Rights, *X v. The Federal Republic of Germany*, Decision, Application No. 4445/70, April 1<sup>st</sup> 1970, § 153 s.

<sup>948</sup> ECHR, *X v. Germany*, cit., §153.

<sup>949</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 24.

<sup>950</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 24.

<sup>951</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 24.

objective was to prevent harm or possible death to the individual on hunger strike, rather than administering ill-treatment to protect others or for national security reasons<sup>952</sup>. While this case indeed presents a distinctive circumstance where an act contrary to Article 3 might be justified based on the need to save an individual's life, it remains somewhat exceptional and does not set a precedent for justifying violations of Article 3 in broader terms, especially in cases not directly involving preserving the life of the individual subjected to ill-treatment<sup>953</sup>.

#### **4. Obligations concerning torture arising from both international and European instruments.**

The present paragraph will address the multiple obligations imposed upon States, arising from international tools, such as the ICCPR and the UNCAT, and European ones. These obligations were deemed of utmost importance and concern the duty to protect individuals from any kind of ill-treatment performed by private actors, the duty to investigate allegations of torture or cruel, inhuman or degrading treatment, the duty to exclude statements which have been obtained through ill-treatment, the duty to train personnel, most of all in detention facilities, and last but not least, the duty to grant redress and compensate victims. Among them, the very first chapter of this dissertation, already discussed in depth States' duty to enact and enforce legislation criminalizing torture, therefore, it will not be addressed a second time.

##### **4.1. Duty to protect from ill-treatment by private actors.**

The ICCPR's ban on torture and other ill-treatment describes something very general and wide, which means that it entails a prohibition that applies regardless of the particular qualification of the perpetrator<sup>954</sup>. Torture or ill-treatment can be committed by a «*public official*» or «*other persons acting on behalf of the State*», or «*private persons*», and can still be prohibited<sup>955</sup>. The ICCPR creates two opposite obligations: a negative obligation on State agents or public

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<sup>952</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 24.

<sup>953</sup> LONG, D., *Guide to jurisprudence on torture*, cit., 24.

<sup>954</sup> CEJIL, *Torture in international law*, cit., 13.

<sup>955</sup> UNOHCHR, *HRC General Comment No.20*, cit., §13.

officials not to carry out these conducts, and a positive one which concerns the protection of individuals from ill-treatment committed by private actors<sup>956</sup>.

UNCAT, differently, highlights that States are not to be considered liable for acts beyond their control, since for an act to qualify as torture or cruel, inhuman or degrading, «*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*»<sup>957</sup>. Yet, States might be held accountable for private citizens' actions if they do not take appropriate action to stop them or do not react to them in a timely manner<sup>958</sup>. In this context, one might take into account the case *Dzemajl and Others v. Yugoslavia*, in which the police abstained from intervening from the destruction of a Roma settlement<sup>959</sup>. This inaction was considered as acquiescence to the acts carried out, and therefore violates Article 16 UNCAT, prohibiting cruel, inhuman or degrading treatment<sup>960</sup>. This ruling affirms that a State's inability to take action against private individuals who commit acts of torture or cruel, inhuman, or degrading treatment, or to stop such actions altogether, may be construed as acquiescence and result in culpability under the UNCAT<sup>961</sup>. The CAT went even further, with a clarification in its General Comment No. 2: «*where State authorities or others acting in official capacity or under color of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with [the] Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts*»<sup>962</sup>. Therefore, torture and other cruel treatment may be encouraged or even given *de facto* approval by the State when it comes to apathy or inactivity<sup>963</sup>.

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<sup>956</sup> Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, May 26<sup>th</sup>, 2004, §8.

<sup>957</sup> CEJIL, *Torture in international law*, cit., §8.

<sup>958</sup> CEJIL, *Torture in international law*, cit., 14.

<sup>959</sup> CEJIL, *Torture in international law*, cit., 14.

<sup>960</sup> Committee Against Torture, *Dzemajl and Others v Yugoslavia*, Decision on Merits, Communication No. 161/2000, November 21st, 2002, §9.2.

<sup>961</sup> CEJIL, *Torture in international law*, cit., 15.

<sup>962</sup> CAT, *General Comment No.2*, cit., §18.

<sup>963</sup> CAT, *General Comment No.2*, cit., §18.

As for the European point of view, the relevant provision is Article 3 ECHR, which, as already seen, prohibits torture and other cruel, inhuman or degrading treatment or punishment. In this regard, there is the need to comprehend whether there could be State's liability when these conducts are committed by private actors. Generally speaking, a State could be deemed responsible only for acts violating of Article 3 when committed by individuals holding an official position, such as public officials, and therefore, not by private actors<sup>964</sup>. Nonetheless, one might interpret the provision at hand in conjunction with Article 1: from this combination derives a positive duty for states to take action to guarantee that private actors do not torture or subject people under their jurisdiction to cruel or degrading treatment<sup>965</sup>. This principle was one of the focal points in *A v. UK*, which concerned the caning of a boy by hand of his stepfather<sup>966</sup>. In this case, the latter was arrested and later on acquitted, since it was stated that the conduct was not to be considered a criminal offence<sup>967</sup>. The conclusion was that, even if the State may be connected to the conduct committed in some way, it cannot be held liable for violence occurring in the private sphere, and therefore by a private actor<sup>968</sup>. However, the connection mentioned concerned the state's failure «to provide adequate protection to the applicant against ill-treatment because, despite the fact that the child had been subjected to treatment of sufficient severity to fall within Article 3, the jury had acquitted the stepfather who had administered the treatment»<sup>969</sup>. This crucial connection was established in *Z and Others v. UK*, when the Court emphasized, by citing the previous case, that States have a fundamental duty to take action to guarantee that people are not the victims of maltreatment by private actors<sup>970</sup>. Even more so, local authorities acknowledged the fact that ill-treatment was occurring, and did nothing to prevent it or fix the situation, therefore the Court found a violation of article 3 ECHR<sup>971</sup>.

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<sup>964</sup> CEJIL, *Torture in international law*, cit., 63.

<sup>965</sup> CEJIL, *Torture in international law*, cit., 63.

<sup>966</sup> CEJIL, *Torture in international law*, cit., 63.

<sup>967</sup> CEJIL, *Torture in international law*, cit., 64.

<sup>968</sup> European Court of Human Rights, *A. v. The United Kingdom*, Judgement, Application No. 25599/94, September 23<sup>rd</sup> 1998, §22.

<sup>969</sup> European Court of Human Rights, Judgement, *Case of Z. and Others v. the United Kingdom*, Application No. 19392/95, May 10<sup>th</sup> 2001, §73.

<sup>970</sup> ECHR, *Z. and Others v. UK*, cit., §73.

<sup>971</sup> CEJIL, *Torture in international law*, cit., 64.

In conclusion, from these two past rulings one can draw a particularly important obligation to impose on States: they have a duty of protection against inhuman and degrading treatment, even when such conducts are perpetrated by private individuals<sup>972</sup>.

#### **4.2. Duty to investigate.**

Starting with UNCAT, its Article 12<sup>973</sup> maintains that when there are reasonable grounds to suspect that an act of torture has been committed in a territory under its jurisdiction, the State party involved must carry out an impartial and effective investigation<sup>974</sup>. This provision may be interpreted in accordance with Article 13 UNCAT, which ensures every individual the right to complain to the appropriate and competent authorities, and in doing so, the relevant State is requested to protect the complainant and other witnesses against retaliation<sup>975</sup>. Both these articles apply to acts of cruel, inhuman and degrading treatment<sup>976</sup>. In regard to the features for the investigation, it needs to be noted that, it must be impartial, prompt and effective. As for its promptness, the Committee against Torture addressed the relevant topic in *Blanco Abad v. Spain*. It clarified when an investigation can be considered prompt: a period of 18 days between the initial report of ill-treatment and the initiation of an investigation may be too long<sup>977</sup>. Even more, the promptness and impartiality of the investigation do not depend, whatsoever, on the submission of a formal complaint: it is merely sufficient that the victim alleged that acts of torture have been carried out or the presence of reasonable grounds to suspect it<sup>978</sup>. As for the effectiveness of the investigation, it must be carried out by qualified individuals in an appropriate manner, and it should

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<sup>972</sup> CEJIL, *Torture in international law*, cit., 65.

<sup>973</sup> «Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction».

<sup>974</sup> DANELIUS, H., *Convention Against torture*, cit., 3.

<sup>975</sup> WENDLAND, L., *Handbook on state obligations*, cit., 53.

<sup>976</sup> CEJIL, *Torture in international law*, cit., 16.

<sup>977</sup> Committee Against Torture, Twentieth session, *Blanco Abad v. Spain*, Communication No. 59/1996, §8.2.

<sup>978</sup> CEJIL, *Torture in international law*, cit., 16.



«seek both to determine the nature of the circumstances of the alleged acts and to establish the identity of any person who might have been involved therein»<sup>979</sup>.

Moving forward, the ICCPR addresses the duty to investigate acts of torture or cruel, inhuman or degrading treatment in its Article 2<sup>980</sup>. Specifically, Article 2§1 only constitutes a premises to §3, since the former ensures the application of the rights encompassed in the Covenant to all individuals who find themselves within the State involved's territory and subject to its jurisdiction; the latter (§3), consequently, ensures an effective remedy to those individuals whose rights have been infringed<sup>981</sup>. These two paragraphs analyzed in accordance with Article 7 bring to a particular statement «complaints about ill-treatment must be investigated promptly and impartially by competent authorities»<sup>982</sup>. However, in order for an individual to benefit from these provisions, the specific domestic law of its State must recognize the right to lodge complaints against ill-treatment<sup>983</sup>. In accordance with UNCAT, ICCPR requires for the investigation to be effective<sup>984</sup>, and applies even to acts of a prior regime, as happened in the case *Rodriguez v. Uruguay*<sup>985</sup>. Here, regardless of whether a statute offering amnesty exists, the State violated Article 7 in connection with Article 2§3 of the Covenant by neglecting to look into claims that the applicant had been subjected to torture by the secret police of the outgoing military dictatorship<sup>986</sup>.

Moving forward to the duty to investigate in European law, the article to refer to is, unsurprisingly, Article 3 ECHR. In the case *Ribitsch v. Austria*, the victim was taken into custody while he was in good health, but at the time he was released, he was surprisingly injured: the question to be answered here, is who harmed him and whether Article 3 was violated<sup>987</sup>. In order for these questions to find an appropriate solution, an important duty arises: it becomes imperative that the State

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<sup>979</sup> CAT, *Blanco Abad v. Spain*, cit., §10.5.

<sup>980</sup> CEJIL, *Torture in international law*, cit., 17.

<sup>981</sup> CEJIL, *Torture in international law*, cit., 17.

<sup>982</sup> CEJIL, *Torture in international law*, cit., 17.

<sup>983</sup> CEJIL, *Torture in international law*, cit., 17.

<sup>984</sup> In *Fuenzalida v. Ecuador*, the criminal court rejected the investigation commenced, deeming it insufficient, not disposing of sufficient evidence.

<sup>985</sup> CEJIL, *Torture in international law*, cit., 17.

<sup>986</sup> CEJIL, *Torture in international law*, cit., 17.

<sup>987</sup> European Court of Human Rights, Judgement, *Ribitsch v. Austria*, Application no. 18896/91, December 4<sup>th</sup> 1995, §108 ss.

involved carries out a thorough inquiry into the allegations of mistreatment<sup>988</sup>. This constitutes the main requirement. Furthermore, in the ruling *Assenov and Others v. Bulgaria*, the Court strictly emphasized this obligation once again. Specifically, it was alleged that the victim (a 14-year-old boy) was either ill-treated by police officers or by his father<sup>989</sup>. Either way, the Court maintained a violation of Article 3 ECHR, read in conjunction with Article 1, since the relevant State was not able to conduct an effective investigation, which would have led to a correct analysis of the case at hand<sup>990</sup>. However, the present obligation requires for some elements to be considered: whilst it needs to be effective, it does not depend on the submission of a complaint; effective access to the investigatory procedure is required for the complainant, and timely and diligent investigation is required; the investigators and the subjects of the investigation need to be separate entities<sup>991</sup>.

#### **4.3. Duty to exclude statements obtained by torture or other ill-treatment.**

This particular obligation imposed on State Parties requires them not to use any statement or confession obtained through torture or other form of ill-treatment, since it is expressly prohibited by law. The provisions concerning this ban are contained in article 15 UNCAT and 14 §3 letter g ICCPR.

As for the Convention against Torture, its article 15<sup>992</sup> entails an absolute prohibition, which, firstly, applies to statements and declarations resulting from cruel, inhuman or degrading treatment, and secondly, it does not only concern the victim, but it even deals with statements about third parties<sup>993</sup>. Thirdly, when a state has been called upon to assess whether a statement or evidence have been obtained through torture, it does not have to consider the actual place where those acts have been committed, becoming rather irrelevant<sup>994</sup>. Therefore, it is not important if the

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<sup>988</sup> CEJIL, *Torture in international law*, cit., 66.

<sup>989</sup> CEJIL, *Torture in international law*, cit., 66.

<sup>990</sup> European Court of Human Rights, *Assenov and Others v. Bulgaria*, Decision on the admissibility, Application NO. 24760/94, June 27<sup>th</sup> 1996, §102.

<sup>991</sup> CEJIL, *Torture in international law*, cit., 67.

<sup>992</sup> «Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made».

<sup>993</sup> CEJIL, *Torture in international law*, cit., 23.

<sup>994</sup> CEJIL, *Torture in international law*, cit., 23.

ill-treatment had been committed in a territory over which the state can exercise jurisdiction or not. Its only task is to prohibit for those statements to be used<sup>995</sup>.

The ICCPR in its article 14§3 lett. g maintains that «*everyone has the right not to be compelled to testify against himself or to confess guilt*». The Human Rights Committee states that it is of utmost importance to stress out and underline the prohibition of statements obtained through torture or other prohibited conducts<sup>996</sup>. Moreover, the HRC may find a violation of article 7 ICCPR only when ill-treatment is committed by the author or the subject of the complaint<sup>997</sup>.

Article 6 §1 ECHR<sup>998</sup> concerns the specific obligation to exclude evidence or statements obtained through torture or other ill-treatment. In the ruling *Jalloh v. Germany*, the Court declared that when evidence obtained through torture is used during proceedings, article 6§1 is automatically violated<sup>999</sup>. However, a long-standing question is whether there would still be a violation of Article 6 even if the act that qualified as inhuman or degrading treatment—rather than torture—was used to collect the evidence used in the proceedings<sup>1000</sup>. In determining the violation and in ruling the case, the Court would need to assess the presence of some elements, such as «*the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put*»<sup>1001</sup>. Moreover, it stated that «*it cannot be excluded that on the facts of a particular case the use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial*»<sup>1002</sup>. To put it in other words, while the severity of the alleged offense, the significance of the evidence, and the victim's opportunities to challenge

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<sup>995</sup> CEJIL, *Torture in international law*, cit., 23.

<sup>996</sup> UNOHCHR, *HRC General Comment No.20*, cit., §12.

<sup>997</sup> CEJIL, *Torture in international law*, cit., 24.

<sup>998</sup> «*In the determination of... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*».

<sup>999</sup> European Court of Human Rights, *Case of Jalloh v. Germany*, Judgement, Application No. 54810/00, July 11<sup>th</sup> 2006, §105.

<sup>1000</sup> CEJIL, *Torture in international law*, cit., 69.

<sup>1001</sup> ECHR, *Jalloh v. Germany*, cit., §101.

<sup>1002</sup> ECHR, *Jalloh v. Germany*, cit., §106.

it are factors, the ECtHR acknowledges that even if evidence is not classified as torture, its use could still compromise the fairness of a trial. The circumstances of each case matter and might impact how such evidence affects the trial's integrity.

#### 4.4. Duty to train personnel and provide procedural safeguards.

Articles 10<sup>1003</sup> and 11<sup>1004</sup> UNCAT concern personnel's training. Among the staff, Article 10 mentions «*law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment*»<sup>1005</sup>. It requires for every state that is party to UNCAT to educate these individuals and inform them of the absolute ban on torture and any other provision regarding such treatment<sup>1006</sup>. Differently, Article 11 is strictly connected with Article 15, concerning the prohibition to use information obtained through torture<sup>1007</sup>. The former requires every state party to review interrogation rules, instructions, methods and practices, with the sole aim of preventing torture<sup>1008</sup>. In doing so, it mandates adherence to global norms, such as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Standard Minimum Rules for the Treatment of Prisoners<sup>1009</sup>. The HRC's General Comment on Article 7 also touches on the specific duty at hand, emphasizing the need of conducting regular reviews of interrogation protocols and providing training<sup>1010</sup>. Furthermore, procedural guarantees need to be considered in the scope of preventing ill-treatment<sup>1011</sup>. For instance, it was stated that «*provisions*

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<sup>1003</sup> «*Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person*».

<sup>1004</sup> «*Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture*».

<sup>1005</sup> CEJIL, *Torture in international law*, cit., 25.

<sup>1006</sup> WENDLAND, L., *Handbook on state obligations*, cit., 49.

<sup>1007</sup> CEJIL, *Torture in international law*, cit., 49.

<sup>1008</sup> WENDLAND, L., *Handbook on state obligations*, cit., 50.

<sup>1009</sup> WENDLAND, L., *Handbook on state obligations*, cit., 51.

<sup>1010</sup> CEJIL, *Torture in international law*, cit., 26.

<sup>1011</sup> CEJIL, *Torture in international law*, cit., 26.

*should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings»*<sup>1012</sup>. Even more, it was established that prisoners may have access to the outside world, that they receive medical and legal advice and that use of force by police officers is allowed only when strictly necessary for the circumstances at hand: in order for these rules to be respected, an impartial system of supervision must be established<sup>1013</sup>.

Concerning the topic of training personnel and the one of guaranteeing procedural safeguards, the relevant provisions are articles 5, 6§2 and 6§3 ECHR<sup>1014</sup>. Article 5 outlines fundamental rights related to liberty and security. It guarantees that everyone has the right to liberty and security of person, emphasizing that no one shall be deprived of their liberty except in accordance with procedures established by law. Therefore, this article encloses several key protections: firstly, it refers to lawful detention, claiming that any deprivation of liberty (arrest or detention) must follow procedures established by law, thus needing a legal basis; secondly, anyone who is arrested must be informed promptly and in detail about the reasons for their arrest; thirdly, it declares that detainees have the right to be brought promptly before a judge or other judicial authority to review the lawfulness of their detention; lastly, individuals who are deprived of their liberty have the right to challenge the lawfulness of their detention through legal proceedings<sup>1015 1016</sup>. Thanks to these provisions, States cannot arbitrarily deprive individuals of their liberty and any deprivation thereof must be done accordingly to legal procedures, with the possibility for the detainee to challenge the lawfulness of their detention

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<sup>1012</sup> UNOHCHR, *HRC General Comment No.20*, cit., §11.

<sup>1013</sup> Office of the High Commissioner for Human Rights, *CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of their Liberty)*, 1992, §5.

<sup>1014</sup> CEJIL, *Torture in international law*, cit., 70.

<sup>1015</sup> They are entitled to a speedy decision by a court, and if the detention is found to be unlawful, they should be released.

<sup>1016</sup> CEJIL, *Torture in international law*, cit., 70.

before a Court. Article 6§2 formulates a principle of utmost importance, the presumption of innocence: everyone shall be considered innocent until proven guilty<sup>1017</sup>. This means that the burden of proof lies with the prosecution, and the accused is considered innocent unless and until proven otherwise, according to law. Elements of fair trial are enlisted in article 6§3, which constitute a minimum of rights guaranteed to the accused: the right to information, preparation of defense, legal assistance, examination of witnesses, interpreter's assistance<sup>1018</sup>. As for the right to information, it has been established that the accused ad the right to be informed promptly and in detail, in a language they understand, about the nature and cause of the accusation against them<sup>1019</sup>. Secondly, the accused has the right to have adequate time and facilities for the preparation of his defense and the right to defend himself in person or through legal assistance of their own choosing; if he cannot afford legal assistance and it is in the interests of justice, he should be provided with it for free<sup>1020</sup>. He has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against them<sup>1021</sup>. If the accused cannot understand or speak the language used in court, he has the right to have the free assistance of an interpreter<sup>1022</sup>. These rights are fundamental in ensuring that the accused has a fair and just trial, with the opportunity to defend himself adequately and challenge the case presented against him. The procedural guarantees just outlined are considered to be rather important, even in situations where certain measures like the use of restraints or other forms of treatment might not typically violate Article 3 ECHR: for instance, the use of restraints like handcuffs in connection with lawful detention, without excessive force or public exposure, usually does not raise issues under Article 3<sup>1023</sup>. However, the key point here is that even in such cases, the Court must ensure that the procedures governing the decision to impose these measures are followed and that the application of these measures

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<sup>1017</sup> CEJIL, *Torture in international law*, cit., 70.

<sup>1018</sup> CEJIL, *Torture in international law*, cit., 70.

<sup>1019</sup> CEJIL, *Torture in international law*, cit., 70.

<sup>1020</sup> CEJIL, *Torture in international law*, cit., 70.

<sup>1021</sup> CEJIL, *Torture in international law*, cit., 70.

<sup>1022</sup> CEJIL, *Torture in international law*, cit., 70.

<sup>1023</sup> CEJIL, *Torture in international law*, cit., 71.

does not surpass the severity threshold established in the Court's case law<sup>1024</sup>. This highlights the significance of adhering to proper procedures and ensuring that any measures taken, even if seemingly justified, remain within the boundaries of legality and respect for human rights. In the case *Akkoc v. Turkey*, the Court considered that «*proper medical examinations are an essential safeguard against ill-treatment of persons in custody. Such examinations must be carried out by a properly qualified doctor, without any police officer being present and the report of the examination must include not only the detail of any injuries found, but the explanations given by the patient as to how they occurred and the opinion of the doctor as to whether the injuries are consistent with those explanations*»<sup>1025</sup>. However, whilst the Court has not explicitly found a violation of Article 3 of the European Convention on Human Rights solely due to a state's failure to train its personnel, it does emphasize the significance of considering various factors in assessing the use of force by law enforcement, taking into consideration a broader context<sup>1026</sup>. This involves examining whether adequate training, planning, and oversight were in place to prevent the unnecessary or excessive use of force by law enforcement officials<sup>1027</sup>.

#### **4.5. Duty to grant redress and compensate victims.**

States Parties are required by the UNCAT and the ICCPR to offer victims of torture or other cruel treatment reparation and sufficient compensation<sup>1028</sup>.

This principle is contained in Article 14 UNCAT, which requests every state party to enact provisions in their domestic legal system concerning redress and compensation in case of the violation on the prohibition of torture<sup>1029</sup>. The Convention even deals with grave breaches, entailing specific remedies<sup>1030</sup>. However, it seems that Article 14 may only be applied in regard to acts amounting

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<sup>1024</sup> CEJIL, *Torture in international law*, cit., 71.

<sup>1025</sup> CEJIL, *Torture in international law*, cit., 71.

<sup>1026</sup> European Court of Human Rights, *Case of Akkoc v. Turkey*, Judgement, Applications No. 22947/93 and 22948/93, October 10<sup>th</sup> 2000, §118.

<sup>1027</sup> CEJIL, *Torture in international law*, cit., 71.

<sup>1028</sup> DANELIUS, H., *Convention Against torture*, cit., 3.

<sup>1029</sup> DANELIUS, H., *Convention Against torture*, cit., 28.

<sup>1030</sup> DANELIUS, H., *Convention Against torture*, cit., 28.

to torture<sup>1031</sup>. The lacuna has been fixed thanks to Article 16, which also considers different types of prohibited ill-treatment<sup>1032</sup>.

The duty to grant redress and compensation is highlighted in article 2§3 ICCPR. The HRC requests State Parties to write reports, which include information on how their legal system effectively guarantees the immediate termination of all acts prohibited by article 7 as well as appropriate redress<sup>1033</sup>. In so far as redress is concerned, it also includes the non-repetition of such violations<sup>1034</sup>.

Remedies and reparations are relevant even in regard to article 91 the first Additional Protocol to the Geneva Conventions (AP I) and Rule 150 of the ICRC Study on customary IHL<sup>1035</sup>. Article 91 of Additional Protocol I (API), indeed, addresses the responsibility of parties to armed conflicts for violations of the Conventions or Protocols, encompassing provisions relating to torture and other cruel treatment: it outlines the accountability of parties involved in armed conflicts and stipulates that violations will result in a duty to provide compensation to those affected by these violations<sup>1036</sup>. Furthermore, the ICRC study on customary International Humanitarian Law (IHL) delves into Rules 149 and 150, which are aligned with the principles outlined in Article 91 of API: these rules reiterate the responsibility of parties to an armed conflict for violations of IHL, including acts such as torture and other cruel treatment<sup>1037</sup>. They emphasize the obligation of the responsible parties to compensate victims and hold them accountable for actions carried out by their armed forces<sup>1038</sup>.

As for the European point of view concerning redress and compensation, worthy to be mentioned is the *Assanidze v Georgia* case. It highlights the extensive nature of states' obligation to provide adequate redress and compensation for victims of ill-treatment or human rights violations under the European Convention on Human Rights<sup>1039</sup>. The judgment clarifies that when the Court finds a breach of

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<sup>1031</sup> DANELIUS, H., *Convention Against torture*, cit., 28.

<sup>1032</sup> DANELIUS, H., *Convention Against torture*, cit., 28.

<sup>1033</sup> DANELIUS, H., *Convention Against torture*, cit., 29.

<sup>1034</sup> DANELIUS, H., *Convention Against torture*, cit.

<sup>1035</sup> ICRC, *Advisory service on IHL*, cit., 3.

<sup>1036</sup> ICRC, *Advisory service on IHL*, cit., 3.

<sup>1037</sup> ICRC, *Advisory service on IHL*, cit., 3.

<sup>1038</sup> ICRC, *Advisory service on IHL*, cit., 3.

<sup>1039</sup> CEJIL, *Torture in international law*, cit., 72.



the Convention, it imposes a legal obligation on the respondent state, under Article 46 of the ECHR, to not only cease the violation but also to provide reparation for its consequences<sup>1040</sup>. This reparation aims at restoring, as much as possible, the situation that existed before the breach occurred<sup>1041</sup>. Importantly, if the national law of the state in question does not allow or only permits partial reparation for the consequences of the breach, Article 41 of the ECHR empowers the Court to provide appropriate satisfaction to the injured party<sup>1042</sup>. This satisfaction is not limited to monetary compensation but can also include broader measures<sup>1043</sup>. The judgment indicates that a state found in violation of the Convention isn't only required to pay awarded sums as just satisfaction but also has the responsibility, subject to supervision by the Committee of Ministers, to implement general and/or individual measures within its domestic legal system<sup>1044</sup>. These measures aim to put an end to the violation identified by the Court and to provide all feasible reparation for its consequences, potentially requiring legislative changes or adjustments at the national level<sup>1045</sup>. This underscores the comprehensive nature of the right to compensation, extending beyond monetary reparation to encompass broader measures, including potential changes in domestic laws, to rectify the consequences of human rights violations.

##### **5. The main differences between ‘torture’ pursuant to article 613-bis of the Italian Criminal Code and according to international and European provisions.**

The crime of torture has been introduced in the Italian legal system thanks to Law No. 110 in 2017. However, the manner in which it was outlined does not seem to comply with torture at the International and European level: most of all it does not adhere to Article 1 UNCAT, which gives a rather precise definition of

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<sup>1040</sup> European Court of Human Rights, *Assanidze v. Georgia*, Judgement, Application No. 71503/01, April 8<sup>th</sup> 2004, §198.

<sup>1041</sup> ECHR, *Assanidze v. Georgia*, cit., §198.

<sup>1042</sup> ECHR, *Assanidze v. Georgia*, cit., §198.

<sup>1043</sup> ECHR, *Assanidze v. Georgia*, cit., §198.

<sup>1044</sup> ECHR, *Assanidze v. Georgia*, cit., §198.

<sup>1045</sup> ECHR, *Assanidze v. Georgia*, cit., §198.

torture. The main aspects that highlight these differences attain to the perpetrator, the specific intent and lawful sanctions.

As for the first element, therefore the individual committing the crime, whilst Article 613-bis of the Italian criminal code maintains that torture can be committed by «*anyone*», the same cannot be said for torture at the international level. Article 1 UNCAT explicitly requires that the ill-treatment be committed by an individual in an official capacity, therefore a public official, or someone who holds a public office. Differently, in the Italian domestic legal system, this feature can only be caught in the second comma of Article 613-bis, which seems to describe an aggravating circumstance.

The second aspect to address is the *mens rea*, therefore the intent. Originally, as already established, the Bill concerning the introduction of the crime of torture in the Italian legal system, required that the crime at hand had a specific intent, and hence, that it was committed for a specific purpose. However, this formulation was later on eliminated, and did not make the cut when Article 613-bis was introduced. Differently, Article 1 requires that torture have a specific intent, since it reads that it aims at «*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 suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind*».

The third aspect which concerns the difference between the international and the Italian legal worlds deals with the lawful sanctions. The UN Convention against Torture excludes pain or suffering arising from the lawful execution of penalties from the definition of torture. This exclusion is intended to recognize that the imposition of legal punishments, such as imprisonment or other lawful sanctions, may inherently involve a certain degree of deprivation of liberty or discomfort, but they are not considered acts of torture as defined by the Convention. In Italy, Article 613-bis, which addresses the crime of torture, lacks this explicit clarification regarding lawful sanctions. This absence might lead to interpretation issues or ambiguity regarding whether suffering stemming from lawful penalties constitutes torture under Italian law. To align with the UN Convention's principles and provide clarity within the Italian legal framework, an amendment or

clarification within Article 613-bis could specify that suffering, whether physical or mental, resulting from the execution of lawful penalties or security measures, including precautionary and pre-cautionary measures, does not fall within the scope of the crime of torture.

In conclusion it may be said that, even though Italy introduced a specific provision sanctioning torture, it did so not fully comply with what UNCAT outlined, back in 1984.

## CHAPTER 4

### Case law: how acts amounting to torture were considered before and after the introduction of Article 613-bis in the Criminal Code.

#### 1. Preface.

The present chapter is meant to address one of the most important issues arising when dealing with torture: conducts amounting to torture are mostly committed in detention facilities or institutions<sup>1046</sup>. While this preconception may be seen as «*justified*», because of the terrible deeds committed by individuals who find themselves subjected to detention, this situation cannot be accepted<sup>1047</sup>. One of the main reasons why this phenomenon is quite spread is that those individuals, hence detainees, find themselves in a situation of powerlessness<sup>1048</sup>. Thus, a precise analysis of the various conducts which detainees are subjected to is rather needed. Amongst these situations, the subsequent paragraphs will address their living conditions, circumstances of solitary confinement and incommunicado detention, situations of unlawful detention, when detainees are subjected to the death penalty, several types of acts of torture mainly arising in detention facilities and instances of corporal punishment.

Specifically, this chapter will provide for an in-depth analysis of two different cases: firstly, *Cirino and Renne v. Italy*, concerning the atrocities committed by public officials inside the Asti detention facility; and secondly, the case which took place in the penitentiary in Santa Maria Capua Vetere, dealing once again with the so-called State Torture. In both cases, the conducts, which amount to acts of torture, were committed by public officials or individuals acting under an official capacity. Specifically, the perpetrators are police officers who work inside the detention facilities. Moreover, in the two cases different provisions have been applied, even though for the second, a final decision has not been reached yet. This

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<sup>1046</sup> Office of the United Nations High Commissioner for Human Rights, *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies*, The United Nations Voluntary Fund for Victims of Torture, 2009, 9.

<sup>1047</sup> UNHCO, *Interpretation of Torture*, cit., 9.

<sup>1048</sup> UNHCO, *Interpretation of Torture*, cit., 9.

differentiation, however, derives from the fact that while the Cirino and Renne case concerns acts committed before the entry into force of Article 613-bis in the criminal code, the same cannot be said for the facts carried out in the Santa Maria Capua Vetere detention facility, which occurred three years later from its introduction, and will therefore be judged under that provision.

## **2. Types of acts: torture applied to prisoners and conditions of their detention.**

### **2.1. Living conditions.**

As per detainee's living conditions, among the prominent sources of law, the *UN Standard Minimum Rules for the Treatment of Prisoners* must be observed coherently. The HRC, in analyzing the previous text of law, made an explicit reference to the basic and minimum standard of human treatment and respect for dignity of individuals deprived of their liberty<sup>1049</sup>. First of all, it maintained that the principle at hand applies universally, hence, it should be respected regardless of the particular circumstances or resources available, and it is not exclusively reliant on material ones<sup>1050</sup>. Moreover, the Committee underlined that the principle of humane treatment shall be applied without any kind of discrimination, since all detainees shall be treated with fairness and equality<sup>1051</sup>. Lastly, the Human Rights Committee emphasized State's responsibility for upholding these principles across various kinds of facilities: not only detention centers, but also hospitals, detention camps or even correctional institutions<sup>1052</sup>. Violations of these principles may be found in the «*severe overcrowding and poor quality of basic necessities and services, including food, clothing and medical care*»<sup>1053</sup>.

The European Court of Human Rights, relying on Article 3 ECHR, highlighted the particular obligation imposed on State parties to ensure that prisoners are correctly detained in their cells and that they do not suffer from

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<sup>1049</sup> UNHCO, *Interpretation of Torture*, cit., 9.

<sup>1050</sup> Committee on Civil Political Rights, *General Comment No. 9 on Article 10 International Covenant on Civil and Political Rights*, July 30<sup>th</sup> 1982, §1.

<sup>1051</sup> CCPR GC No. 10, cit., §1.

<sup>1052</sup> CCPR GC No. 10, cit., §1.

<sup>1053</sup> Committee on Civil and Political Rights, *Concluding Observations on Argentina*, third periodic report, § 11.

violations of their rights. Specifically, the Court stated that each State must ensure that «*prisoners are detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured by, among other things, providing them with the requisite medical assistance*»<sup>1054</sup>. Therefore, it may be said that each State Party shall ensure the respect for human dignity, shall avoid distress or hardship on detainees, shall guarantee their health and well-being<sup>1055</sup>. The Court stresses that respect for human dignity must coexist with the conditions in which inmates are housed<sup>1056</sup>. This suggests that people ought to be treated with a minimal degree of humanity and not be subjected to cruel or dehumanizing treatment<sup>1057</sup>. Additionally, the process and approach used to carry out detention measures shall not cause inmates more misery or discomfort than is necessary for their confinement<sup>1058</sup>. This implies an understanding that while some degree of deprivation or restriction of freedom is inevitable, unnecessary suffering or hardship should be avoided; the physical requirements of incarceration shall not jeopardize the general wellbeing and health of the people held there<sup>1059</sup>. This involves giving them the medical support they require in order to take care of their health<sup>1060</sup>.

## **2.2. Solitary confinement and Incommunicado detention.**

Solitary confinement and incommunicado detention refer to two different situations: while the former is allowed in particular circumstances, the latter is strictly prohibited<sup>1061</sup>. Incommunicado detention consists of a total isolation of the detainee: he is confined in his cell and is only able to interact with authorities<sup>1062</sup>.

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<sup>1054</sup> European Court of Human Rights, *Gelfmann v France*, 14 December 2004, § 50.

<sup>1055</sup> ECtHR, *Gelfmann v France*, cit., §50.

<sup>1056</sup> UNHCO, *Interpretation of Torture*, cit., 10.

<sup>1057</sup> UNHCO, *Interpretation of Torture*, cit., 10.

<sup>1058</sup> UNHCO, *Interpretation of Torture*, cit., 10.

<sup>1059</sup> UNHCO, *Interpretation of Torture*, cit., 10.

<sup>1060</sup> ECtHR, *Gelfmann v France*, cit., §50.

<sup>1061</sup> Committee on Civil and Political Rights, General Comment 20, § 6.

<sup>1062</sup> UNHCO, *Interpretation of Torture*, cit., 10.

In other words, it may be said that it refers to the practice of suffering associated with being held indefinitely without contact with the outside world<sup>1063</sup>. Accordingly, the HRC asked, in its General Comment No. 20, for provisions able to prohibit incommunicado detention<sup>1064</sup>. The Committee recognizes that prolonged periods of detention without interaction with the outside world results in a considerable amount of distress and agony: a detainee's mental health and general well-being might be impacted<sup>1065</sup>. Moreover, particularly related to incommunicado detention was the case *Muteba v. Zaire*, serving as a precedent of example supporting the Committee's position. The case at hand established that *«incommunicado detention is directly linked to the requirements of humanity and respect for the inherent dignity of the human person»*, therefore assessing its incompatibility with these principles<sup>1066</sup>. Another important reference should be made to the case *El-Megreisi v. Libya*, in which the HRC pointed out violations of Articles 7 and 10 ICCPR<sup>1067</sup>. It underlined a prolonged incommunicado detention: it was clarified that the victim suffered from torture and cruel and inhuman treatment<sup>1068</sup>.

Of utmost importance is the assessment of torture or cruel, inhuman and degrading treatment, and when solitary confinement can amount to these conducts<sup>1069</sup>. The ECtHR stated that *«regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned. Complete sensory isolation coupled with complete social isolation can no doubt ultimately destroy the personality; thus, it constitutes a form of inhuman treatment»*<sup>1070</sup>. It continued *«on the other hand, the prohibition of contacts with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment»*<sup>1071</sup>.

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<sup>1063</sup> TAYLOR, P. M., *A commentary on the International Covenant on Civil and Political Rights*, in *Cambridge University Press*, 2020, 196.

<sup>1064</sup> TAYLOR, P.M., *Commentary on the ICCPR*, cit., 196.

<sup>1065</sup> TAYLOR, P.M., *Commentary on the ICCPR*, cit., 196.

<sup>1066</sup> Committee on Civil and Political Rights, *El- Megreisi v. Libya*, March 23rd, 1994, § 5.4.

<sup>1067</sup> CCPR, *El- Megreisi v. Libya*, cit., §5.4.

<sup>1068</sup> CCPR, *El- Megreisi v. Libya*, cit., §5.4.

<sup>1069</sup> UNHCO, *Interpretation of Torture*, cit., 10.

<sup>1070</sup> European Court of Human Rights, *G. Esslin, A. Baader and J. Raspe v. Federal Republic of Germany*, Communication 7572/76, 7586/76 & 7587/76, 8 July 1978, 4.

<sup>1071</sup> ECtHR, *G. Esslin, A. Baader and J. Raspe v. Federal Republic of Germany*, cit., 4.

However, as established before, solitary confinement can sometimes be allowed, when particular circumstances occur<sup>1072</sup>. Most of all, it has been established that in order to be consented it must be considered proportional and necessary, linking these criteria to two different factors: the duration and the severity of the confinement<sup>1073</sup>. The present derogation has been introduced thanks to the *Kröcher-Möller v. Switzerland* case. In this instance, the Commission concluded that, given the facts of the case, the periods of remand and imprisonment under safety constraints were comparatively brief<sup>1074</sup>. This suggests that in determining whether solitary confinement is appropriate in a given scenario, the Commission considers the specifics and particulars of each case<sup>1075</sup>. The Court stressed that the duration and intensity of the special isolation measures did not surpass the justifiable security requirements<sup>1076</sup>. This highlights how crucial it is to strike a balance between security considerations and the rights and welfare of those who are kept in solitary confinement<sup>1077</sup>.

As pointed out before, incommunicado detention is strictly forbidden. This prohibition was highly emphasized even by the Inter-American Court of Human Rights, which declared that long-term confinement and communication restrictions constitute cruel and inhumane forms of punishment that compromise a person's moral and psychological well-being and violate their right to be treated with regard for their inherent dignity as individuals<sup>1078</sup>. The detainee experiences moral and emotional suffering throughout his solitary confinement, which also puts him in an untenable position and enhances the possibility of violence and arbitrary behavior in detention facilities<sup>1079</sup>. Therefore, it was clarified that incommunicado detention can amount to torture or cruel, inhuman and degrading treatment in particular situations<sup>1080</sup>. The Court made reference to «*incommunicado detention, being exhibited through the media wearing a degrading garment, solitary confinement in*

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<sup>1072</sup> UNHCO, *Interpretation of Torture*, cit., 11.

<sup>1073</sup> UNHCO, *Interpretation of Torture*, cit., 11.

<sup>1074</sup> UNHCO, *Interpretation of Torture*, cit., 11.

<sup>1075</sup> UNHCO, *Interpretation of Torture*, cit., 11.

<sup>1076</sup> UNHCO, *Interpretation of Torture*, cit., 11.

<sup>1077</sup> UNHCO, *Interpretation of Torture*, cit., 11.

<sup>1078</sup> UNHCO, *Interpretation of Torture*, cit., 11.

<sup>1079</sup> UNHCO, *Interpretation of Torture*, cit., 12.

<sup>1080</sup> UNHCO, *Interpretation of Torture*, cit., 12.



*a tiny cell with no natural light, blows and maltreatment, including total immersion in water, intimidation with threats of further violence, a restrictive visiting schedule»*<sup>1081</sup>.

### **2.3. Unlawful detention.**

When speaking about unlawful detention, the picture that comes into mind refers to the situation in which a person's vulnerability is increased while they are being held illegally, leading to the risk that other freedoms they have may be infringed<sup>1082</sup>. The Inter-American Court intervened in so far as the present topic is concerned, in a series of cases, such as in 1997 with the *Loayza-Tamayo v. Peru* case<sup>1083</sup>. It made an important reference to the «*degrading point*», claiming that this element involves humiliating and degrading the victim by instilling feelings of fear, anxiety, and inadequacy<sup>1084</sup>. Moreover, it argued that the ultimate objective is to overcome the person's moral and physical resistance<sup>1085</sup>. This viewpoint is consistent with international human rights norms that stress the value of treating people with respect and dignity at all times, including while they are being detained or involved with law enforcement. Accordingly, detaining someone illegally violates their rights, but the accompanying techniques of creating fear and anxiety further worsen the victim's condition.

However, the Court did not stop here. It further stated the possible existence of torture when one is subjected to illegal or unlawful detention. In the case *Maritza Urrutia v. Guatemala*, in 2003, the IACtHR made reference to torture inflicted on the victim, Ms. Maritza, suggesting a violation of her human rights, including cruel and degrading treatment, psychological abuse, and violations of her right to personal security and freedom of expression<sup>1086</sup>. As for her physical conditions, the Court referred to the practice of wearing a hood, hence her face was totally covered,

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<sup>1081</sup> Inter-American Court of Human Rights, *Loayza-Tamayo v. Peru*. 17 September 1997. Series C No. 33, § 58.

<sup>1082</sup> UNHCO, *Interpretation of Torture*, cit., 13.

<sup>1083</sup> UNHCO, *Interpretation of Torture*, cit., 13.

<sup>1084</sup> UNHCO, *Interpretation of Torture*, cit., 13.

<sup>1085</sup> UNHCO, *Interpretation of Torture*, cit., 13.

<sup>1086</sup> Inter-American Court of Human Rights, *Maritza Urrutia v. Guatemala*, 27 November 2003. Series C No. 103, § 85.

and she was handcuffed to a bed as well<sup>1087</sup>. This points to a kind of physical constraints and sensory deprivation, which can heighten feelings of vulnerability and powerlessness<sup>1088</sup>. Moreover, she was confined in a room where the radio was turned up loud and the lights were on at all times, rendering it impossible for her to sleep<sup>1089</sup>. The goal of this type of treatment is to cause stress and disturb mental health, which is why it can be regarded as psychological torture. Maritza Urrutia was subjected to gruesome depictions of torture and death during her protracted interrogations<sup>1090</sup>. This strategy violates the right to be free from cruel, inhuman, or degrading treatment in addition to being emotionally upsetting. She was also subjected to coercion and intimidation, leading to the undermining of one's personal security and right to live free from threats and violence<sup>1091</sup>. State agents threatened her with physical torture or death, both for herself and her family if she did not collaborate<sup>1092</sup>. Against her will, Maritza Urrutia was made to record a video, which was later shown on television<sup>1093</sup>. This practice is against her right to freedom of speech and her inalienable right to refuse to be forced to make declarations against her will<sup>1094</sup>.

#### **2.4. Typology of acts of torture in detention facilities.**

Among different techniques which amount to torture, also several hanging methods can fall in the same category: the Jaguar, the Palestinian hanging or strappado, when hands or ankles are tied together resulting or not in paralysis<sup>1095</sup>. When one speaks about the *Jaguar technique*, it refers to the situation in which the victim's wrists are tied to his feet, while being suspended from a bar and kept upside down<sup>1096</sup>. When in this position, he is beaten in the soles of his feet<sup>1097</sup>.

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<sup>1087</sup> IACtHR, *Maritza Urrutia v. Guatemala*, cit., §85.

<sup>1088</sup> IACtHR, *Maritza Urrutia v. Guatemala*, cit., §85.

<sup>1089</sup> IACtHR, *Maritza Urrutia v. Guatemala*, cit., §85.

<sup>1090</sup> IACtHR, *Maritza Urrutia v. Guatemala*, cit., §85.

<sup>1091</sup> IACtHR, *Maritza Urrutia v. Guatemala*, cit., §85.

<sup>1092</sup> IACtHR, *Maritza Urrutia v. Guatemala*, cit., §85.

<sup>1093</sup> IACtHR, *Maritza Urrutia v. Guatemala*, cit., §85.

<sup>1094</sup> IACtHR, *Maritza Urrutia v. Guatemala*, cit., §85.

<sup>1095</sup> NOWAK, M., MCARTHUR, E., *The United Nations Convention Against Torture: A Commentary*, in Oxford Public International Law, 2023, 2.

<sup>1096</sup> NOWAK, M., MCARTHUR, E., *The United Nations Convention Against Torture*, cit., 2.

<sup>1097</sup> NOWAK, M., MCARTHUR, E., *The United Nations Convention Against Torture*, cit., 2.

Systematic beatings are performed on victims, with their head and kidneys being among the most vulnerable body parts<sup>1098</sup>. Using a baseball bat or metal bar denotes the use of considerable force that results in serious bodily injury<sup>1099</sup>. They may also be subjected to electric shocks on different parts of their bodies, such as on their fingers, tongue, head and genitals<sup>1100</sup>. These techniques surely bring on the victims an extreme pain and prolonged physical and psychological damage. Another particularly alarming method is the «*long nail technique*», which involves nails torturing, resulting in excruciating pain<sup>1101</sup>. One might recall the technique of «*shackling*», which limits the victims' range of motion with the use of shackles<sup>1102</sup>. Persistent brief handcuffs or shackling can aggravate pain and cause psychological anguish in addition to physical misery<sup>1103</sup>. Amongst these techniques, many involved the use of water, for instance *water-boarding* or the *submarine technique*<sup>1104</sup>. The former refers to the circumstance in which the victim is rendered unconscious while lying on their back with their head bent to the side, then, a stream of water is thrust to their face to simulate the feeling of drowning; the latter consists in submerging an individual repeatedly in a fluid, which may contain excrement, vomit, blood and pee<sup>1105</sup>. This technique has been described as demeaning, humiliating and physically dangerous. Moreover, prisoners may be exposed to bitter cold, including being left outside during the winter until their clothing freezes to their bodies and being doused in icy water<sup>1106</sup>. The person's health and well-being are seriously at danger when subjected to this type of torture.

Basic essentials including food, water, sleep, medication, and access to restrooms may be denied to prisoners<sup>1107</sup>. Individuals suffer physically when these necessities are taken away from them, and their dignity is also compromised, as well as their fundamental human rights are violated<sup>1108</sup>. Sleep deprivation is one of

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<sup>1098</sup> UNHCO, *Interpretation of Torture*, cit., 14.

<sup>1099</sup> UNHCO, *Interpretation of Torture*, cit., 14.

<sup>1100</sup> UNHCO, *Interpretation of Torture*, cit., 14.

<sup>1101</sup> UNHCO, *Interpretation of Torture*, cit., 14.

<sup>1102</sup> UNHCO, *Interpretation of Torture*, cit., 14.

<sup>1103</sup> UNHCO, *Interpretation of Torture*, cit., 14.

<sup>1104</sup> UNHCO, *Interpretation of Torture*, cit., 14.

<sup>1105</sup> UNHCO, *Interpretation of Torture*, cit., 14.

<sup>1106</sup> UNHCO, *Interpretation of Torture*, cit., 14.

<sup>1107</sup> UNHCO, *Interpretation of Torture*, cit., 14.

<sup>1108</sup> UNHCO, *Interpretation of Torture*, cit., 14.

the methods regarded as torture: intentional sleep deprivation involves methods like putting cold water on someone who is about to fall asleep or turning up the music loud<sup>1109</sup>. It is acknowledged that sleep deprivation is a type of torture, with grave bodily and psychological repercussions. Another severe form of torture is the forced prolonged standing or «*platonos*», which imposes on the victim the order to remain standing for extremely long periods of time, which results in exhaustion, muscle pain and long-term health consequences<sup>1110</sup>. Extremely painful is the method of burning captives or burying them alive, leading to an agonizing death<sup>1111</sup>.

These overviews highlight grave violations of human rights and possible transgressions of international law. Such behaviors amount to a flagrant violation of a person's fundamental dignity in addition to acts of physical assault.

Among acts of torture, psychological torture is particularly relevant, which can be defined as «*acts prepared and carried out deliberately against the victim in order to suppress their psychic resistance and force him to incriminate himself or confess certain criminal behaviors or to submit him to punishment modalities additional to deprivation of liberty itself*»<sup>1112</sup>. Therefore, several acts can be included, such as threat to be tortured, described by the IACtHR in the case *Baldeón-García v. Perú*<sup>1113</sup> and *Tibi v. Ecuador*<sup>1114</sup>; psychological impact of physical torture, explained by the Inter American Court in the case *Bàmaca-Velasquez v. Guatemala* in 2000<sup>1115</sup>; threat against the victim life or their relative's, outlined in the case *Njaru v. Cameroon* by the Committee on Civil and Political Rights<sup>1116</sup>; threat to use a syringe infected by AIDS/HIV, referred to in the case

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<sup>1109</sup> UNHCO, *Interpretation of Torture*, cit., 14.

<sup>1110</sup> UNHCO, *Interpretation of Torture*, cit., 14.

<sup>1111</sup> UNHCO, *Interpretation of Torture*, cit., 14.

<sup>1112</sup> UNHCO, *Interpretation of Torture*, cit., 22.

<sup>1113</sup> «*The threats and real danger of submitting a person to physical injuries produces, in certain circumstances, a moral anguish of such degree that it may be considered psychological torture*».

<sup>1114</sup> «*The simple threat of the occurrence of a behavior prohibited by Article 5 of the American Convention, when it is sufficiently real and imminent, may constitute in itself a transgression of the norm dealt with. To determine the violation to Article 5 of the Convention, not only physical suffering but also psychic and moral anguish must be taken into account. The threat of suffering a serious physical injury may constitute a form of "psychological torture" ».*

<sup>1115</sup> «*According to the testimonies received in this proceeding, the alleged victim was submitted to grave acts of physical and mental violence during a prolonged period of time for the said purpose and, thus, intentionally placed in a situation of anguish and intense physical suffering, which can only be qualified as both physical and mental torture*».

<sup>1116</sup> «*Repeated threats against his life by the police, often accompanied by acts of brutality, caused him grave psychological suffering*».

*Selmouni v. France* by the ECtHR<sup>1117</sup>; threat by dogs, in the Committee Against Torture's Concluding Observations on USA<sup>1118 1119</sup>. Even forcing persons to watch other individuals being tortured can be considered as torture itself<sup>1120</sup>. The Inter American Court in the case *Maritza Urrutia v. Guatemala* in 2003, referring to torture of other persons, declared that «*it has been proved that Maritza Urrutia was subjected to acts of mental violence by being exposed intentionally to a context of intense suffering and anguish, according to the practice that prevailed at that time (...). The Court also considers that the acts alleged in this case were prepared and inflicted deliberately to obliterate the victim's personality and demoralize her, which constitutes a form of mental torture, in violation of Article 5(1) and 5(2) of the Convention to the detriment of Maritza Urrutia*»<sup>1121</sup>. Moreover, it can amount to torture watching a relative being tortured, as it was stated in the case *Prosecutor v. Moinina Fofana and Allieu Kondewa*<sup>1122 1123</sup>. In assessing whether someone is to be considered a relative to the victim, some factors need to be observed: the presence of a close family connection; details of the relationship with the victim; the way the victim's next of kin witnessed the violations and their level of participation in the pursuit of justice; and the State's response to the various actions taken<sup>1124</sup>.

## 2.5. Death penalty.

Even death penalty and death row constitute torture or inhuman treatment<sup>1125</sup>.

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<sup>1117</sup> «*Following that ill-treatment, they brandished a syringe, threatening to inject me with it*».

<sup>1118</sup> «*Rescind any interrogation technique, including methods involving sexual humiliation, waterboarding, short shackling and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment*».

<sup>1119</sup> UNHCO, *Interpretation of Torture*, cit., 23.

<sup>1120</sup> UNHCO, *Interpretation of Torture*, cit., 23.

<sup>1121</sup> IACtHR, *Maritza Urrutia v. Guatemala*, cit., para. 94.

<sup>1122</sup> The ICTY stated that «*a third party could suffer serious mental harm by witnessing acts committed against others, particularly against family or friends. The Chamber is also of the opinion that the Accused may be held liable for causing serious mental harm to a third party who witnesses acts committed against others only where, at the time of the act, the Accused had reasonable knowledge that this act would likely cause serious mental suffering on the third party*».

<sup>1123</sup> UNHCO, *Interpretation of Torture*, cit., 24.

<sup>1124</sup> UNHCO, *Interpretation of Torture*, cit., 24.

<sup>1125</sup> UNHCO, *Interpretation of Torture*, cit., 20.

First of all, the HRC expressed itself on the topic of death penalty, highlighting the necessity to comply with principles of humanity and to avoid unnecessary suffering: hence, it should be carried out in a way to cause the least possible physical and mental suffering<sup>1126</sup>. Furthermore, in applying death penalty, apart from causing the least pain, some considerations arose relating to gas asphyxiation and lethal injection<sup>1127</sup>. The lethal injection, initially, was not considered a conduct in breach of Article 7 ICCPR; this suggests that, under certain circumstances, lethal injection may be deemed consistent with the prohibition of cruel, inhuman, or degrading treatment<sup>1128</sup>. The deliberate use of gas asphyxiation in the execution of capital punishment raises issues for the Human Rights Committee<sup>1129</sup>. It suggests that using this approach carries a genuine danger of cruel and inhumane treatment<sup>1130</sup>.

In conclusion, it may be said that the Human Rights Committee acknowledges that a state should apply the death penalty in a way that minimizes suffering, both mental and physical. This shows a dedication to treating people with compassion even when the death penalty is involved.

As for death row conditions, and its length, one might point out some implications on human rights, specifically relating to Article 7 and 10 ICCPR<sup>1131</sup>. Firstly, judiciary authorities have long held the view that an infraction of Article 7 of the ICCPR does not result from the length of a person's incarceration on death row<sup>1132</sup>. On the other hand, it is recognized that prolonged stays on death row may have a detrimental impact on the detainee's mental state and may even constitute torture or cruel, inhuman, or degrading treatment<sup>1133</sup>. The Human Rights Committee has provided a list of criteria to be used in evaluating whether the length of a death row inmate's incarceration violates Articles 7 and 10<sup>1134</sup>. The committee

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<sup>1126</sup> Committee on Civil and Political Rights, *Kindler v Canada*, Communication 470/1991, 30 July 1993, § 9.2.

<sup>1127</sup> UNHCO, *Interpretation of Torture*, cit., 20.

<sup>1128</sup> UNHCO, *Interpretation of Torture*, cit., 20.

<sup>1129</sup> UNHCO, *Interpretation of Torture*, cit., 21.

<sup>1130</sup> UNHCO, *Interpretation of Torture*, cit., 21.

<sup>1131</sup> UNHCO, *Interpretation of Torture*, cit., 21.

<sup>1132</sup> UNHCO, *Interpretation of Torture*, cit., 21.

<sup>1133</sup> UNHCO, *Interpretation of Torture*, cit., 21.

<sup>1134</sup> Committee on Civil and Political Rights, *Errol Johnson v. Jamaica*, Communication 588/1994, 22<sup>nd</sup> March 1996, § 8.2 s.

stresses the necessity to take into account each person's unique situation and any potential effects on mental health, but it does not establish a deadline; it emphasizes the importance of encouraging states to avoid the death penalty where possible; thus, the abolition of the death penalty is desirable, and the reduction of executions may be seen as aligning with the objectives and purposes of the ICCPR, encouraging states to consider alternative approaches<sup>1135</sup>.

## **2.6. Corporal punishment.**

Article 1 UNCAT explicitly states that in the presence of legitimate sanctions, the relative punishment is seen as lawful, and therefore is not prohibited and sanctioned by the Convention itself<sup>1136</sup>. However, neither Article 1 nor Article 16 of the UNCAT exempt a sanction from application just because it is deemed legal under domestic or even constitutional law<sup>1137</sup>. The European Court of Human Rights sets several standards for judging whether a punishment is acceptable or not; amongst them: the particulars of cruel or degrading punishment; the relative nature of the interpretation criterion; the difficulties of approving a course of action based just on its deterrent effect; the subjective character of humiliation; and the universal nature of protection<sup>1138</sup>. First and foremost, in order for a punishment to be considered degrading and in violation of Article 3, the humiliation or debasement involved must reach a particular level, beyond the usual element of humiliation<sup>1139</sup>. Determining whether a punishment is inhuman or degrading depends on a number of factors, including the specifics of the case, the nature and context of the punishment, and the way it was carried out<sup>1140</sup>. The idea that a punishment loses its degrading character because it is believed it has a deterrent effect or aid to crime control is not welcomed, hence recourse to punishments contrary to Article 3 is not permissible, regardless of their deterrent effect<sup>1141</sup>. While lack of exposure does not always mean that a punishment is not demeaning, it is nonetheless an important

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<sup>1135</sup> CCPR, *Errol Johnson v. Jamaica*, cit., §8.2 s.

<sup>1136</sup> UNHCO, *Interpretation of Torture*, cit., 27.

<sup>1137</sup> UNHCO, *Interpretation of Torture*, cit., 27.

<sup>1138</sup> ECHR, *Tyrer v UK*, cit., §30 ss.

<sup>1139</sup> UNHCO, *Interpretation of Torture*, cit., 27.

<sup>1140</sup> UNHCO, *Interpretation of Torture*, cit., 27.

<sup>1141</sup> UNHCO, *Interpretation of Torture*, cit., 27.

consideration when determining whether a punishment qualifies as such<sup>1142</sup>. It may be sufficient that the victim feels ashamed even if not in the view of others, given the subjective nature of humiliation<sup>1143</sup>. Moreover, the European Court takes into account advancements and generally recognized norms in the member states of the Council of Europe's penal policies<sup>1144</sup>. It is believed that Article 3's protection is universal in nature, and generally recognized norms have an impact on the evaluation<sup>1145</sup>. In a nutshell, this classification is meant to emphasize the difficulties and factors that must be taken into account when determining whether sanctions or other forms of punishment are permissible under international human rights law. It focuses specifically on how to interpret Article 3 of UNCAT, and the guidelines established by the European Court of Human Rights.

### **3. Italy's inability to condemn torture: *Cirino and Renne v. Italy*.**

#### **3.1. The facts.**

In December 2004, two prisoners in the Asti jail were beaten, taunted, and kept in solitary confinement without access to food, clothing, or sleep<sup>1146</sup>. Days passed while the prison police brutally mistreated the inmates<sup>1147</sup>. It was almost by accident that the matter ended up in Court because of certain facts gleaned through another inquiry<sup>1148</sup>. But the Supreme Court dismissed the lawsuit eight years after the incident<sup>1149</sup>. Although the Court acknowledged that the two men had been subjected to torture, the absence of a particular offense in the Italian criminal code prevented from holding anyone accountable for the events<sup>1150</sup>. The appeal alleging a violation of Article 3 of the European Convention was deemed admissible by the Strasbourg judges at the end of November 2015<sup>1151</sup>. Instead of waiting for the

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<sup>1142</sup> UNHCO, *Interpretation of Torture*, cit., 27.

<sup>1143</sup> UNHCO, *Interpretation of Torture*, cit., 27.

<sup>1144</sup> UNHCO, *Interpretation of Torture*, cit., 27.

<sup>1145</sup> UNHCO, *Interpretation of Torture*, cit., 27.

<sup>1146</sup> LOPEZ CURZI, C., *Ciò che è successo nel carcere di Asti è tortura*, *Tecnologie e Diritti*, in *Liberties*, 2015.

<sup>1147</sup> LOPEZ CURZI, C., *Ciò che è successo nel carcere di Asti è tortura*, cit.

<sup>1148</sup> LOPEZ CURZI, C., *Ciò che è successo nel carcere di Asti è tortura*, cit.

<sup>1149</sup> LOPEZ CURZI, C., *Ciò che è successo nel carcere di Asti è tortura*, cit.

<sup>1150</sup> LOPEZ CURZI, C., *Ciò che è successo nel carcere di Asti è tortura*, cit.

<sup>1151</sup> LOPEZ CURZI, C., *Ciò che è successo nel carcere di Asti è tortura*, cit.



decision, the Italian government put out a proposal for a peaceful resolution right away, offering the two appellants 45,000 euros apiece<sup>1152</sup>.

The case at hand regards five prison guards, who worked in the Asti prison<sup>1153</sup>. They were involved in the beating and mistreatment of two detainees: Claudio Renne and Andrea Cirino<sup>1154</sup>. In the month of December, the two prisoners were targets of what was called a «*tormenting and harassing regime*» inside the penitentiary, being ill-treated by different prison guards, who committed the horrible deeds abusing their authority and, therefore, power.<sup>1155</sup>

Claudio Renne spent two months in an isolation cell without a window, mattress, sink, chairs, or stools after being stripped of all his clothes; he was left in fully naked and given nothing but bread and water for two days<sup>1156</sup>. Renne had a ponytail which was hand-ripped off of him, also suffering other injuries from beatings, including a broken rib<sup>1157</sup>. Equally distressing is the ordeal of Andrea Cirino, another inmate in this harrowing situation<sup>1158</sup>. He endured a similar 20-day period of isolation and therapy, which included being forbidden from using the bathroom's running water<sup>1159</sup>. Every day, Mr. Cirino was beaten repeatedly, even having his head crushed; sleep deprivation methods were used on him<sup>1160</sup>.

The seriousness of these incidents cannot be underscored because they indisputably show a case of egregious human rights violations and abuses of power. Either the victims or their legal representatives must notify the appropriate authorities of these appalling abuses as soon as possible in order to guarantee that justice is done and those culpable for these abhorrent acts are held accountable: an urgent and comprehensive inquiry, hence, must be launched. Accordingly, to help them deal with the severe mental and emotional effects of the horrific experiences they have undergone, psychological support is as important as medical care for addressing the physical effects of the assaults. In order to rebuild faith in the

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<sup>1152</sup> LOPEZ CURZI, C., *Ciò che è successo nel carcere di Asti è tortura*, cit.

<sup>1153</sup> <https://www.antigone.it/76-archivio/2472-lo-scandalo-delle-torture-nel-carcere-di-asti>.

<sup>1154</sup> Ibidem.

<sup>1155</sup> Ibidem.

<sup>1156</sup> Ibidem.

<sup>1157</sup> Ibidem.

<sup>1158</sup> Ibidem.

<sup>1159</sup> Ibidem.

<sup>1160</sup> Ibidem.

integrity of the criminal justice system and the larger legal system, the pursuit of justice and the victims' well-being must take precedence.

The recordings that were intercepted have revealed extremely distressing information, exposing a culture of brutality among police officers and a disconcerting lack of concern from the jail director and medical staff<sup>1161</sup>. Accordingly, the police officers' confession of engaging in physical abuse has brought attention to institutionalized power abuses inside the prison system<sup>1162</sup>. Specifically, unsettling information was discovered during an eavesdropped conversation between two police officers on February 19<sup>th</sup>, 2005<sup>1163</sup>. Unsurprisingly, a police habit of physical brutality against detainees was confirmed when one of the officers openly admitted to having physically abused other prisoners<sup>1164</sup>. Furthermore, on February 23<sup>rd</sup>, 2006, two police guards were placed under arrest: one of them stated he had seen Renne while he was being beaten<sup>1165</sup>. His remarks revealed a culture of silence inside the jail, where detainee injuries were routinely not reported<sup>1166</sup>. His colleague went on to reveal more alarming information, emphasizing that prisoners were frequently beaten even while they were in a vulnerable condition<sup>1167</sup>. In addition to harsh physical punishment, the officers had an agreement not to feed the «punished» prisoners while they were confined<sup>1168</sup>. These disclosures provide a clear image of a group of prison guards routinely abusing their physical control over prisoners, frequently beating them for little offenses. From a detainee's testimony a disturbing picture of the prison environment has been drawn. The detainee claimed to have heard «*two inmates screaming in an inhuman way for the beatings they were receiving*» and that he could even hear the noise from his cell due to how brutal the beatings were<sup>1169</sup>. The testimony focuses on a one and a half-hour violent incident that was carried out by people wearing combat boots and camouflage clothing<sup>1170</sup>. The testimony reveals

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<sup>1161</sup> Ibidem.

<sup>1162</sup> Ibidem.

<sup>1163</sup> Ibidem.

<sup>1164</sup> Ibidem.

<sup>1165</sup> Ibidem.

<sup>1166</sup> Ibidem.

<sup>1167</sup> Ibidem.

<sup>1168</sup> Ibidem.

<sup>1169</sup> Ibidem.

<sup>1170</sup> Ibidem.

extreme disregard towards the fundamental rights of the inmates, especially those linked to food and water, necessities for survival and human dignity.

The beaten detainee's inability to breathe is revealed in the testimony, indicating a violent escalation that put everyone's lives in jeopardy. These specifics point to a high degree of violence and cruelty occurring within the jail walls, highlighting the pressing need for thorough investigations and remedial measures to put a stop to these cruel practices and guarantee the safety of the inmates.

### **3.2. The case before the Italian Courts: the Asti Tribunal and the Italian Supreme Court.**

The present paragraph will be split in two parts, firstly analyzing how the Asti Tribunal addressed the situation and secondly, how it was dealt with by the Italian Court of Cassation.

The Asti Tribunal followed a precise structure to render a judgement on the facts: it initially referred to the facts themselves, then it moved on to ascertaining the responsibility of the parties involved based on the evidence gathered, and finally, it identified the offence or offences that best legally characterized the nature of the conduct in question. Such a sequence of assessments is common in judicial proceedings, aiming to ensure a thorough and comprehensive examination of every aspect of the case.

The Tribunal held, beyond reasonable doubt, that the applicants suffered from systematic and recurrent mistreatment rather than isolated incidents of harassment and abuse<sup>1171</sup>. In particular, the Court unequivocally determined that, from December 10<sup>th</sup> to December 29<sup>th</sup>, 2004, and from December 10<sup>th</sup> to December 16<sup>th</sup>, 2004, respectively, the first and second claimants had experienced frequent physical abuse<sup>1172</sup>. The Court came to the conclusion that these violent acts happened regularly during the day, with a focus on the evening<sup>1173</sup>. Aggravating the circumstances was one of the victim's hospitalizations in the Asti's Emergency

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<sup>1171</sup> European Court of Human Rights, *Cirino and Renne v. Italy*, Judgment, October 26<sup>th</sup>, 2017- Appeals No. 2539/13 e 4705/13, 4.

<sup>1172</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 1.

<sup>1173</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 1.

Room on December 16<sup>th</sup> 2004 as a result of serious injuries<sup>1174</sup>. This additional information emphasizes the seriousness of the injuries the petitioners suffered as a result of the mistreatment they faced, adding still another level of severity to the overall examination of the case<sup>1175</sup>.

The Court, in its thorough examination, conclusively and categorically established that a pervasive pattern of mistreatment was systematically carried out within the Asti Penitentiary during the years 2004 and 2005<sup>1176</sup>. This behavior, which was described as a «*generalized practice of mistreatment*» was routinely directed towards prisoners who were thought to be problematic<sup>1177</sup>. The actions adopted went beyond the Court's definition of appropriate limits for disciplinary or preventative measures, with the dual goals of intimidating and punishing troubled prisoners and preventing any potentially disruptive behavior inside the jail<sup>1178</sup>. A major feature of this worrisome practice entailed the routine transfer of a prisoner to a cell in the isolation section<sup>1179</sup>. Custodial staff created a horrific cycle of recurrent harassment and abuse of inmates within these constraints: the majority of the abuse took the form of physical abuse, with groups of correctional staff hitting the prisoners, mostly in the dark<sup>1180</sup>. This raises grave questions about the institutional culture of the prison in addition to demonstrating a startling lack of care for the welfare of the people under custody. However, the Court emphasized that prisoners experienced a variety of systematic deprivations, which were deemed so heinous that went beyond actual physical harm, such as lack of sleep, food and water<sup>1181</sup>. The willful denial of these basic needs demonstrates the extent of the abuses that the prisoners have to face; it also exposes a systemic violation of the norms anticipated in a correctional facility and a systematic failure to protect fundamental human rights<sup>1182</sup>. The cruel treatment of the prisoners is exacerbated by their lack of access to hygienic facilities<sup>1183</sup>. According to the Court, this abhorrent practice

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<sup>1174</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 4.

<sup>1175</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 4.

<sup>1176</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 4.

<sup>1177</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 4.

<sup>1178</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1179</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1180</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1181</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1182</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1183</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

presents a troubling image of the disdain for the basic rights and dignity of the people detained at the Asti Penitentiary for the designated period of time<sup>1184</sup>.

The Court unequivocally determined that the climate in which jail personnel worked was one of widespread impunity, stemming from the cooperation of the custodial staff as well as the implicit endorsement of the prison administration<sup>1185</sup>.

In addition, the Tribunal found serious shortcomings in the detention circumstances of the Asti Penitentiary's Isolation Section<sup>1186</sup>. Several cells that were exhibited in Court were judged to be inadequate for the purpose of holding prisoners<sup>1187</sup>. Basic amenities including heating, bedding, mattresses, and sanitary facilities were missing from certain cells<sup>1188</sup>. These cells were still in use in the winter, even though some of the windows had no glass and others had windows covered with metal sheets with tiny holes in them<sup>1189</sup>. Some had no other furnishings and no running water; they were equipped only with a bed and a low toilet<sup>1190</sup>. The Court's emphasis on the apparent deficiencies in the custody conditions reveals a serious lack of care on the part of the prison administration<sup>1191</sup>. This brings up important issues about the inmates' fundamental rights being violated and the lack of minimum requirements for humane treatment in prisons. Therefore, what the Court aimed at was to shine a light on the urgent need for a comprehensive reform within the penitentiary system to ensure the provision of adequate, humane and rights-respecting conditions of detention for all detainees.

The second topic that the Court addresses in its Judgement concerns the perpetrator's liability for the ascertained conduct<sup>1192</sup>. Interestingly, the prosecution against the police officers involved was dropped because the relevant statute of limitations had run out<sup>1193</sup>. This development raises questions about how quickly and effectively the legal system can handle cases involving such extreme abuse and

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<sup>1184</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1185</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1186</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1187</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1188</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1189</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1190</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1191</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1192</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1193</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

abuses of human rights<sup>1194</sup>. However, worsening the situation is that, even though the Court acknowledged that the officers' conduct could potentially amount to torture, a legislative gap in Italy became apparent<sup>1195</sup>. It was due to the absence of a specific legal provision criminalizing such behaviors in the Italian Criminal Code that made it challenging to prosecute the perpetrators for the crime itself, despite the recognition of the gravity of their actions and the recognition at the international and European level<sup>1196</sup>.

The third and final aspect which the Asti Tribunal put up with concerned the determination of the most appropriate pre-existing offence to legally characterize the committed conduct<sup>1197</sup>. This topic was, without any doubt, a direct consequence deriving from the lack of a specific criminal provision sanctioning torture<sup>1198</sup>. The Court held that the acts committed by the two officers should be classified as an offence under Article 608 of the criminal code, which specifically deals with the abuse of authority against arrestees or detainees<sup>1199</sup>. Nevertheless, the Court determined that no procedural act could have interrupted the prescription period, hence the temporal limits necessary for the statute of limitations for this violation had expired<sup>1200</sup>. Moreover, although the Court rendered the police guards liable for the offence of personal injury, the Statute of Limitations was deemed applicable even for this crime, not altering the essence of the decision whatsoever<sup>1201</sup>. As a result, the Court granted the motion to close the case since the Statute of Limitations had run its course<sup>1202</sup>. This legal decision highlights how difficult it is to balance the need to administer justice for abhorrent crimes with the time constraints imposed by the Statute of Limitations.

It is now time to address the Judgement rendered by the Italian Supreme Court. A turning point was the appeal filed by the Italian Prosecutor on February 22<sup>nd</sup>, 2012, in which he contested the Asti Tribunal's legal classification of the

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<sup>1194</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1195</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1196</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1197</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1198</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1199</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1200</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1201</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

<sup>1202</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 5.

offense: the public prosecutor contended that the aggravated abuse offense under Article 572 of the Italian Criminal Code, in conjunction with the offense under Article 608, was the most suitable charge for the legal classification of the conduct in question<sup>1203</sup>. However, the Court of Cassation ruled on May 21<sup>st</sup>, 2012, that the public prosecutor's appeal was inadmissible<sup>1204</sup>. Although the Court acknowledged that the Statute of Limitations applied to the offense of serious abuse, it disagreed with the public prosecutor on a substantive point and stated that a ruling in favor of the prosecution would have had no real-world impact<sup>1205</sup>. The appeal's inadmissibility sheds light on how difficult it is to strike a balance between the needs for justice and the time limits set by the Statute of Limitations, thereby helping people to fully understand the difficulties that come with trying to follow the law in a way that is both just and efficient.

### **3.3. The case before the European Court of Human Rights.**

The European Court of Human Rights (ECtHR) rendered its judgment on October 26<sup>th</sup>, 2017, finding Italy guilty of torturing two inmates, Mr. Cirino and Mr. Renne, at the Quarto d'Asti Prison<sup>1206</sup>. According to the Strasbourg Court, these incidents clearly violated Article 3 of the European Convention on Human Rights, which forbids the use of torture and other cruel, inhuman, or degrading treatment<sup>1207</sup>. Furthermore, the Court emphasized the categorical nature of the ban on torture and cruel or degrading treatment by specifically citing Article 15, paragraph 2 of the same Convention<sup>1208</sup>. This Article argues that the restriction is still applicable even in cases where the actions are carried out in extremely serious situations, including acts of terrorism or organized crime<sup>1209</sup>. The ruling by the ECtHR demonstrates its dedication to highlight the outright ban on torture and inhuman treatment, stating that these acts are intolerable in any circumstances,

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<sup>1203</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 6.

<sup>1204</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 6.

<sup>1205</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 6.

<sup>1206</sup> RAMPONE, M.J., *Commento alla sentenza della Corte Europea dei Diritti dell'Uomo Cirino e Renne contro Italia del 26 ottobre 2017- Ricorsi nn. 2539/13 e 4705/13*, in *Dirittifondamentali.it*, Fascicolo 1, 2018, 1.

<sup>1207</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 1.

<sup>1208</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 3.

<sup>1209</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 3.

especially in the most dire or extraordinary ones. This statement emphasizes the need for Member States to take effective measures to prevent and penalize human rights breaches while also strengthening the protection of those rights. The European Court of Human Rights' denunciation not only makes Italy culpable for the particular abuses that occurred in the Quarto d'Asti Prison, but it also conveys a more general message about how crucial it is to protect human rights norms in all circumstances. It emphasizes the necessity of strong legal structures at the national level to stop, look into, and address cases of torture and inhumane treatment. In the end, this choice supports the continuous international initiatives to guarantee the defense and advancement of fundamental human rights.

When analyzing Article 3 ECHR, there are a few key points to be underlined. First of all, the provision can be divided in two parts: the first section deals with substantial topics, and therefore with the differentiation between torture and cruel, inhuman and degrading treatment. It even addresses the two main criteria thanks to which these conducts can be discerned: the *minimum threshold of severity* and the *deliberate intent*. Secondly, Article 3 ECHR deals with procedural aspects, such as State's obligation to prosecute cases of torture. In the current case, the ECtHR held that the conducts carried out violated both aspects of the provision. This paragraph is therefore meant to precisely analyze how the Article was infringed.

Firstly, it will make a thorough analysis on the substantive aspect, moving then on to the procedural violation.

Its particular structure highlights three different levels concerning ill-treatment, forming a fictional pyramid shape: at the peak there is torture, which is the gravest form of treatment; then one might find cruel, inhuman or degrading treatment<sup>1210</sup>. The degree of severity at which a treatment is administered determines which of the three categories it belongs to<sup>1211</sup>. For ill-treatment to be considered a major breach of Article 3 ECHR, the so-called *minimum threshold of severity* must be exceeded, according to the Strasbourg Court's consistent jurisprudence<sup>1212</sup>. Hence, not all actions that compromise physical integrity are

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<sup>1210</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 3.

<sup>1211</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 4.

<sup>1212</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 4.



considered violations of Article 3 ECHR, needing to overcome the aforementioned limit<sup>1213</sup>. The severity criterion is used to categorize the three forms of forbidden activity once the violation has been confirmed<sup>1214</sup>. Moreover, when it is exceeded, it needs to be evaluated concretely, taking into account multiple factors, such as the duration of the treatment, physical or psychological effects, and in certain situations, even gender, age, and health status of the individual subjected to ill-treatment<sup>1215</sup>. This approach is helpful in underlying the Strasbourg Court's focus on the specifics of every case and the requirement to assess the seriousness of maltreatment in certain situations. The differentiation mentioned was initially emphasized in the *Greco case* in 1969, in which the European Commission held that «every act of torture must also be considered as inhuman and degrading treatment, and every inhuman treatment must also be degrading»<sup>1216</sup>. The case presented a hierarchical framework with interconnected relationships between the different categories, like concentric circles, where the narrowest ring in the hierarchy indicates torture, inhumane treatment represents the species, and degrading treatment represents the genus<sup>1217</sup>. Crucial in distinguishing the three types of treatment is the nature of the suffering inflicted: the acts will be categorized as inhuman or degrading treatments if there is not a substantial degree of disvalue associated with them<sup>1218</sup>. The underlying goal of the norm appears to be precise: it consists of giving the term «torture», which refers to inhumane practices that intentionally cause extreme and cruel pain, a particularly harsh reputation<sup>1219</sup>. This extra component<sup>1220</sup> helps to differentiate torture from cruel or inhumane treatment, which can happen even when there is no malicious intent behind the behavior<sup>1221</sup>.

Taking into account the previously indicated factors, the judges in Strasbourg have declared that the applicants' treatment reached the necessary degree of severity to qualify the disputed behavior as covered by Article 3

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<sup>1213</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 4.

<sup>1214</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 4.

<sup>1215</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 4.

<sup>1216</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 5.

<sup>1217</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 5.

<sup>1218</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 5.

<sup>1219</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 5.

<sup>1220</sup> The deliberate intent to inflict severe suffering.

<sup>1221</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 5.

ECHR<sup>1222</sup>. The prison guards' acts were considered to be «*inhuman treatment causing serious and cruel suffering*»<sup>1223</sup>. The ECtHR precisely noted that the conducts amounted to torture under Article 3, in light of what is about to be explained<sup>1224</sup>.

The acts endured by the detainees have been classified as acts of violence and acts of deprivations. In the first category, one might find repetitive prolonged and recurring behaviors, characterized by physical violence perpetrated against the detainees who were subject to continuous beatings<sup>1225</sup>. Prison guards frequently broke into the cells, especially at night, using their numbers and the inmates' reduced resistance as advantages<sup>1226</sup>. It has been emphasized by the ECtHR that the petitioners were already in a vulnerable position when these violent actions took place<sup>1227</sup> <sup>1228</sup>. Furthermore, the victims' sense of continued isolation brought on by their confinement in isolation cells heightened their feelings of helplessness, fear, and worry<sup>1229</sup>. The victims' increasing vulnerability and isolation at this time, according to the ECtHR, exacerbated the physical and psychological repercussions of the violence they had to undergo<sup>1230</sup>. The inmates' mental and psychological health suffered as a result of the frequent access into their cells, particularly at night, which added to a climate of fear and uncertainty<sup>1231</sup>. Therefore, what the Court wanted to shed light on was the fundamentality of the circumstances surrounding the physical violence committed, including any environmental or situational elements that may aggravate the harm done to the victims. In addition, the Court's acknowledgement of the psychological and emotional burden brought about by the combination of physical abuse and seclusion complicates the evaluation of the case.

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<sup>1222</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 10.

<sup>1223</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 10.

<sup>1224</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 11 s.

<sup>1225</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 9.

<sup>1226</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 9.

<sup>1227</sup> They were in the custody of prison officials.

<sup>1228</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 9.

<sup>1229</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 9.

<sup>1230</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 9.

<sup>1231</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 9.

Different were the conducts amounting to acts of deprivation: prisoners were deprived of their food<sup>1232</sup>, sleep<sup>1233</sup> and other necessities, such as water, a sink and other sanitary facilities<sup>1234</sup>. Even in the coldest months of the year, the prisoners were frequently undressed and left in their cells, as well as in chambers without radiators or other forms of heating<sup>1235</sup>. As a result, they suffered from two types of humiliation: on one hand, the physical pain they felt from the bitter cold and the inability to protect themselves, and on the other hand, the psychological pain they suffered from having to go without clothing and being made fun of by the guards<sup>1236</sup>. Additionally, the cells were completely «barren», therefore they lacked any kind of furnishing<sup>1237</sup>. The captives were not allowed to bathe, enjoy the fresh air, or spend time with anyone other than their own guards while they were kept in isolation<sup>1238</sup>. UNCAT in its Article 1, when defining torture requires for the conducts to have been committed deliberately, therefore with intent: «*torture is defined as any act in which intentional pain or acute suffering is deliberately inflicted upon a person*»<sup>1239</sup>. However, the ECtHR gives an interpretation on a different note, not giving importance to the element of the intent<sup>1240</sup>. Judges sometimes point to the agent's intent as a contributing aspect that can increase the negative value attached to the violent behavior that is forbidden<sup>1241</sup>. However, most scholars have pointed out that a clear goal and significant gravity do not always go hand in hand<sup>1242</sup>. When the gravity is less significant, the teleological element is highlighted as an extra and replacement factor<sup>1243</sup>. In general, violating Article 3 ECHR is not impeded by the lack of a defined objective<sup>1244</sup>. Even though it is

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<sup>1232</sup> Meals were not served to prisoners for days, and sometimes for a period longer than an entire week. Occasionally, prison guards would place food in front of the prisoner's cell so that the starving and fatigued prisoner could see it and desire it, realizing he could not have it.

<sup>1233</sup> The inmates were exposed to a torch as soon as they fell asleep, and because of the intense light that pierced and diffused throughout them, it not only woke them up but also prevented them from falling back asleep because it was directed continuously and always at the eyes level.

<sup>1234</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 9.

<sup>1235</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 9.

<sup>1236</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 10.

<sup>1237</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 10.

<sup>1238</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 10.

<sup>1239</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 10.

<sup>1240</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 11.

<sup>1241</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 11.

<sup>1242</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 11.

<sup>1243</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 11.

<sup>1244</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 11.

sufficient, the teleological component is not considered necessary to classify an act as torture<sup>1245</sup>. As a matter of fact, the Court recognized the nature of torture of the committed acts and stated that rather than being exclusively linked to a structural flaw in the way the criminal justice system operates, they are instances of severe brutality and humiliation<sup>1246</sup>. Prison guards committed these deliberate acts with the objective of punishing the detainees for their deeds<sup>1247</sup>.

As stated before, Italy was condemned, in second stance, for violating the procedural aspect of Article 3 ECHR. Specifically, it infringed the particular obligation deriving from this provision which requests State parties to abstain from committing the ill-treatments described in the same provision, and to prosecute them. The Court based its ruling on the fact that States parties have violated both positive and negative obligations deriving from the usual clauses. The Strasbourg judges maintained that Italy violated the procedural aspect of Article 3 in so far as it was not able to adequately punish the police officers who carried out the ill-treatment on the detainees<sup>1248</sup>. The infringement was, however, due to the fact that Italy lacks a specific provision criminalizing torture<sup>1249</sup>.

In particular, Article 3 of the Convention, which mainly affects state agents and organs, imposes the negative constraint of abstaining from engaging in forbidden activity<sup>1250</sup>. Negative responsibilities by themselves, however, are insufficient to give individuals real, meaningful protection<sup>1251</sup>. Strasbourg jurisprudence has created a number of positive responsibilities targeted at deterring and punishing offenders in order to remedy this lack of protection<sup>1252</sup>. The national legislature bears the primary responsibility of providing criminal protection<sup>1253</sup>. It is true that each State may use the instruments it deems most suitable to safeguard traditional rights, but the protection must be sufficient<sup>1254</sup>. In order for a state to be considered compliant with the positive responsibility of criminalization, the

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<sup>1245</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 11.

<sup>1246</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 12.

<sup>1247</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 12.

<sup>1248</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 18.

<sup>1249</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 18.

<sup>1250</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 12.

<sup>1251</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 12.

<sup>1252</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 12.

<sup>1253</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 12.

<sup>1254</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 13.

criminal law remedy must be commensurate with the seriousness of the offense committed<sup>1255</sup>. The European Court of Human Rights supervises this situation to make sure that the penalty imposed deters similar offenses in the future<sup>1256</sup>. On this basis, the Strasbourg judges deemed the punishment handed out to individuals accountable for the documented offenses to be insufficient<sup>1257</sup>. Specifically, it was noted that there was no appropriate punishment for violent acts of a specific degree of severity at the time of the events in Italy, nor was there a crime of torture<sup>1258</sup>. As a result, Italy failed to take the appropriate action to stop and stop the applicants' mistreatment<sup>1259</sup>. Since the crimes were concluded and the Statute of Limitations had run its course, the judge in Asti had actually rendered a ruling of non-prosecution<sup>1260</sup>. Although numerous provisions criminalized acts that could be classified as torture, these standards were insufficient to provide effective protection for the protected legal rights in real-world situations<sup>1261</sup>. As a result, not only is a suitable punishment not guaranteed, but it is frequently not even applied<sup>1262</sup>. The Strasbourg Court claims that the first-instance judge adopted a strong and professional approach, pledging to look into the facts in order to find the people who were actually responsible for the horrible crime rather than condoning the defendants' actions<sup>1263</sup>. However, at the time of the decision, there was no provision permitting the contested treatment to be classified as torture by law<sup>1264</sup>. The European Court determined that the guilty parties' impunity stemmed not from the Asti judge's responsibility but rather from the Italian system's lack of a norm criminalizing torture<sup>1265</sup>. The Court determined that the Italian criminal legislation was insufficient in this particular case, both in terms of its ability to punish acts of torture and its ability to deter future violations of the prohibition of torture<sup>1266</sup>.

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<sup>1255</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 13.

<sup>1256</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 13.

<sup>1257</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 13.

<sup>1258</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 13.

<sup>1259</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 14.

<sup>1260</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 16.

<sup>1261</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 16.

<sup>1262</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 17.

<sup>1263</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 17.

<sup>1264</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 18.

<sup>1265</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 18.

<sup>1266</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 18.

Accordingly, the Court established a procedural violation of Article 3 of the Convention<sup>1267</sup>.

Another crucial component of the Court's ruling regards the prison guards' disciplinary actions<sup>1268</sup>. The ECtHR observed that adequate disciplinary actions were taken against the defendants, who were all prison police officers, once the criminal proceedings was concluded<sup>1269</sup>. It should be noted, nevertheless, that none of them had their employment suspended during the course of the criminal investigation and prosecution, even though this specific disciplinary action should have been applied<sup>1270</sup>.

### 3.4. The «*strange*» decision.

The Asti Tribunal, as well as the Italian Supreme Court, rendered an «obligated» judgement. On the grounds that at the time the Italian legal system lacked a specific provision sanctioning acts of torture, it was necessary to refer to similar offences, already present in the Italian criminal code: article 606, punishing unlawful arrest; Article 607, sanctioning undue limitation of personal freedom; Article 608, concerning authority abuse against arrestees and detainees; Article 609, punishing arbitrary searches and personal inspections; Article 610, which deals with private violence; Article 613, putting up with state of incapacity caused by violence; Article 572, concerning family abuse on children; Article 581, punishing conducts tantamount to beatings; Article 582, concerning injury<sup>1271</sup>. The existence of aggravating circumstances led to an increase in the prescribed penalties for the aforementioned violations<sup>1272</sup>. For instance, one may cite Article 583 of the Criminal Code, which deals with the offense of bodily harm, or Article 61, paragraphs 4 and 9 of the Criminal Code, which is a general regulation<sup>1273</sup>. Nonetheless, it is evident that the legal sanctions associated with the majority of the aforementioned transgressions are rather modest and, in any event, not

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<sup>1267</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 18 s.

<sup>1268</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 19.

<sup>1269</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 20.

<sup>1270</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 21.

<sup>1271</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 15.

<sup>1272</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 16.

<sup>1273</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 16.

commensurate with the gravity of the actions that constitute the torture behavior<sup>1274</sup>. The European Court has noted that the prescribed penalties are completely ineffective in fulfilling any kind of purpose, including retributive, preventive, or general and special<sup>1275</sup>. In fact, they are appropriate for punishing actions that are unquestionably less damaging to the psycho-physical integrity of the victim<sup>1276</sup>. However, this was not the only issue to be faced. The case at hand was subject to a long-lasting criminal proceeding. It was so long that, even the penalties for the offences recognized, could not be applied. Accordingly, such a situation arose from the fact that the relevant Statute of Limitations had run out<sup>1277</sup>. In conclusion, the Italian Judges were not able to appropriately punish those responsible.

The case was then brought to the European Court of Human Rights. The Court's evaluation states that delays or carelessness on the part of the domestic legal authorities cannot be blamed for the final result<sup>1278</sup>. The petitioners did not file complaints or present any proof of unwarranted delays by the investigating agencies, despite the Court's expressed concerns regarding the length of the criminal inquiry<sup>1279</sup>. Regarding the conduct of the domestic proceedings, the Court believes that the domestic Court cannot be criticized for incorrectly assessing the seriousness of the charges against the accused or for using legislative and punitive provisions to prevent the conviction of the prosecuted state agents<sup>1280</sup>. Rather, the Strasbourg judges believe that the domestic Court adopted a firm position and refrained from attempting to explain or minimize the contested actions<sup>1281</sup>. It endeavored firmly to ascertain the circumstances and pinpoint the persons accountable for the abuse administered to the petitioners<sup>1282</sup>. Therefore, it cannot be denied that the Court in question subjected the case to a «*scrupulous examination*», as required under Article 3 of the Convention<sup>1283</sup>. In relation to the matter of disciplinary measures, the Court accepts the Government's consideration that,

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<sup>1274</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 16.

<sup>1275</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 16.

<sup>1276</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 16.

<sup>1277</sup> RAMPONE, M.J., *Commento alla sentenza Cirino e Renne*, cit., 16.

<sup>1278</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 17.

<sup>1279</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 17.

<sup>1280</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 17.

<sup>1281</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 17.

<sup>1282</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 17.

<sup>1283</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 17.

following the completion of the criminal proceedings, disciplinary actions were taken against four prison guards<sup>1284</sup>. The Court states that depending solely on disciplinary sanctions is insufficient when dealing with acts that violate one of the core rights of the Convention, especially serious ones like the ones in this case<sup>1285</sup>. The Court acknowledges the disciplinary bodies' serious scrutiny of the prison officers' actions and notes the imposition of disciplinary measures<sup>1286</sup>. The Court highlights that in order to satisfy the criteria of Article 3 of the Convention, only criminal prosecution can provide the deterrent and preventative effect that is required<sup>1287</sup>. It emphasizes that the officers' duty status was not suspended throughout the inquiry or trial in this particular situation<sup>1288</sup>. The Court has often ruled that State agents who are accused of mistreatment should be placed on leave while their cases are being investigated or tried<sup>1289</sup>.

The Court's ruling was given on the basis of Article 41 of the Convention<sup>1290</sup><sup>1291</sup>. As a matter of fact, the Court requested the culpable parties to award each victim 80,000 euros, regarding non-pecuniary damages, due to the particular gravity of the situation<sup>1292</sup>. As for costs and expenses, the victims received each 8,000 euros<sup>1293</sup>. This was due to the fact that only insofar as it can be demonstrated that costs and expenses were genuinely and reasonably expended and, in an amount, reasonable for the applicant is the applicant entitled to repayment of costs and expenses<sup>1294</sup>.

In conclusion, the ruling in the *Cirino and Renne v. Italy* case follows European jurisprudence regarding Article 3 of the European Convention on Human Rights and comes to completely recognized results.

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<sup>1284</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 18.

<sup>1285</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 18.

<sup>1286</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 18.

<sup>1287</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 18.

<sup>1288</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 19.

<sup>1289</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 19.

<sup>1290</sup> «If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party».

<sup>1291</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 19.

<sup>1292</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 19.

<sup>1293</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 19.

<sup>1294</sup> ECtHR, *Cirino and Renne v. Italy*, cit., 19.



#### 4. The case of Santa Maria Capua Vetere.

##### 4.1. The facts.

It was the 6<sup>th</sup> of April in 2020 when tragedy struck in the Santa Maria Capua Vetere prison<sup>1295</sup>. Numerous officers and administrators working in the detention facility put into place heinous acts: they subjected over 300 prisoners to senseless acts of violence and humiliation<sup>1296</sup>. Accordingly, they were later on put through a number of security measures<sup>1297</sup>. After the dramatic and widely reported episode<sup>1298</sup>, the local prosecutor's office moved quickly to file charges<sup>1299</sup>. They succeeded in getting several public officials involved in the violent investigation to face preventive measures, such as restrictions and jail sentences<sup>1300</sup>. The main actor in the case is the Chief of the Penitentiary Police of the prison: Gaetano Manganelli<sup>1301</sup>. He was put on house arrest for a number of offences, and among them he was accused of aggravated injury and torture<sup>1302</sup>. However, it is indeed necessary to understand how and why these conducts were committed.

The previous day, April 5<sup>th</sup>, the prisoners held in the *Nilo section* had barricaded themselves<sup>1303</sup>. However, this practice was primarily overseen by the forces, under the coordination of Mr. Colucci<sup>1304</sup> <sup>1305</sup>. Despite attending the first organizational meeting, Mr. Manganelli did not take an active role in organizing the activities within the various sections or in supervising the operations as they were happening<sup>1306</sup>. Particularly, specialized personnel wearing riot gear arrived at the Santa Maria jail and were given command of the operational command structure<sup>1307</sup>. This is relevant in understanding how intricate the dynamics of

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<sup>1295</sup> BERNARDI, S., *Carcere e tortura: la Cassazione si esprime (in sede cautelare) sui fatti di Santa Maria Capua Vetere*, in *Sistema penale*, 5 aprile 2022.

<sup>1296</sup> BERNARDI, S., *Carcere e tortura*, cit.

<sup>1297</sup> BERNARDI, S., *Carcere e tortura*, cit.

<sup>1298</sup> Which was strongly condemned by high-ranking government officials.

<sup>1299</sup> FLORIO, E., “*Perquisizione e forza*”: *le violenze sui detenuti del carcere di Santa Maria Capua Vetere al vaglio della Cassazione*, in *Giurisprudenza Penale*, 2022, 1.

<sup>1300</sup> FLORIO, E., “*Perquisizione e forza*”, cit., 1.

<sup>1301</sup> Cass. Pen., Sez. 5, n. 8973/2022, November 11<sup>th</sup>, 2021, 1.

<sup>1302</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 1.

<sup>1303</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 2.

<sup>1304</sup> Another prison guard working in the Italian prison.

<sup>1305</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 2.

<sup>1306</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 2.

<sup>1307</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 2.

responsibilities during the intervention are, giving emphasis to the role played by Mr. Colucci in the tactical execution of the operation.

On April 6<sup>th</sup>, an unprecedented search was conducted against the *Nilo Section* prisoners, leading to random and mindless brutality<sup>1308</sup>. The chief of Police, Manganelli, was asked by Mr. Colucci to initiate the search, and did not pose any resistance, as he saw the possibility that new protests could be instigated by different detainees<sup>1309</sup>. The prisoners were told to face the wall, kneel, and not move<sup>1310</sup>. Having to walk through the «*human corridor*»<sup>1311</sup>, they were kicked, slapped, punched, and severely hit with batons<sup>1312</sup>. The acts of brutality were even extended to people unable to move on their own, lacking therefore autonomy, for instance individuals on wheelchairs or other who were dependent on other inmates<sup>1313</sup>. Detainees were even subjected to other demeaning acts, where no force was inflicted<sup>1314</sup>. For instance, they were obliged to drink water from the toilet, they were spitted on and forced to commit other acts which led to emotional responses like sobbing, shaking, fainting and incontinence<sup>1315</sup>. When the search was being conducted, Manganelli warned Mr. Fullone, another employee, that batons and shields were being used and that some inmates needed to be moved<sup>1316</sup>.

Consequently, fourteen prisoners were moved from the *Nilo* to the *Danubio section*: this transfer was due to fact that these individuals were recognized as instigators of the protest, which had been held the previous day<sup>1317</sup>. They were kept away from their families and put in isolation: they were left without food, water, clothing and personal hygiene supplies<sup>1318</sup>. Some of them were still wearing bloodstained shirts, and they had to sleep huddled together because they had no clothes or blankets, and it was freezing at night<sup>1319</sup>. Nonetheless, this does not mean that the detainees, who remained in the *Nilo section* went unscathed: they were

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<sup>1308</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 2.

<sup>1309</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 10.

<sup>1310</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 8.

<sup>1311</sup> A row of guards who demand to pass while physically abusing the prisoners.

<sup>1312</sup> FLORIO, E., «*Perquisizione e forza*», cit., 3.

<sup>1313</sup> FLORIO, E., «*Perquisizione e forza*», cit., 3.

<sup>1314</sup> FLORIO, E., «*Perquisizione e forza*», cit., 3.

<sup>1315</sup> FLORIO, E., «*Perquisizione e forza*», cit., 3.

<sup>1316</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 10.

<sup>1317</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 8.

<sup>1318</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 8.

<sup>1319</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 8.

subjected to cruel treatment, which included the willful humiliation of having their beards cut off<sup>1320</sup>. The aforementioned acts and conducts put into place had been tracked thanks to a WhatsApp group chat («*Uniti per Santa Maria*»), where police officers spoke to each other daily.

As stated before, Mr. Manganelli was put on house arrest for the conducts committed, thanks to an order published in July 2021 by the Review Tribunal of Naples<sup>1321</sup>. The Tribunal, therefore, confirmed the decision of the preliminary investigation judge of the Santa Maria Capua Vetere Tribunal<sup>1322</sup>. Against the review order, Mr. Manganelli filed an appeal for Cassation, presenting three different grounds<sup>1323</sup>. However, the defense's complaints are found to be both manifestly unfounded and entirely factual: the Court finds that their examination is precluded in the context of legitimacy due to the inherent difference within the «relationship between motivation and decision» and «between evidence and decision»<sup>1324</sup>. This takes into account the details that the trial judges highlighted with relation to the accused's particular position, demonstrating his deliberate involvement in and support of activities against the detainees, even in the days that followed the suppression of the uprisings<sup>1325</sup>.

Firstly, he alleges a violation of the law and a flaw in reasoning regarding the serious evidence of guilt («*gravi indizi di colpevolezza*») and Article 40 comma 2 of the criminal code, in so far as he did not have any power of decision-making whatsoever, having been stripped of authority by the chain of command for operations during those days, managed by the regional supervisory body<sup>1326</sup>. The Court's reasoning was based on the fact that he participated in the planning of the extraordinary search and informed the Superintendent of the process<sup>1327</sup>. Therefore, the applicant complained that this approach could not be deemed correct, being based on various conceptual errors that brought to a distortion of the evidence<sup>1328</sup>.

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<sup>1320</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 8.

<sup>1321</sup> FLORIO, E., «*Perquisizione e forza*», cit., 2.

<sup>1322</sup> FLORIO, E., «*Perquisizione e forza*», cit., 2.

<sup>1323</sup> FLORIO, E., «*Perquisizione e forza*», cit., 2.

<sup>1324</sup> FLORIO, E., «*Perquisizione e forza*», cit., 3 s.

<sup>1325</sup> FLORIO, E., «*Perquisizione e forza*», cit., 4.

<sup>1326</sup> FLORIO, E., «*Perquisizione e forza*», cit., 2.

<sup>1327</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 3.

<sup>1328</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 3.

When referring to the extraordinary search, he held that it was not unlawful whatsoever, being necessary after the events occurred the previous day<sup>1329</sup>. He adopted a few standpoints to support his appeal. Knowing about the search itself does not prove he absolutely and firmly knew about its commission and the unlawful manners used to carry it out<sup>1330</sup>. Even more, another key element thanks to which one can infer that Mr. Manganelli had not participated in the planning of the search, resides in the particular question to Mr. Fullone: whether riot dispersion agents<sup>1331</sup> should be used or not<sup>1332</sup>. Hence, one can observe that Mr. Manganelli, even though knew about the search, he surely could not have known about its unlawful approach<sup>1333</sup>. The thorough examination of WhatsApp group conversations proved to be a crucial element in conclusively determining that Dr. Colucci took on the role of the search's chief executor and responsible party<sup>1334</sup>. After an in-depth inquiry, it was determined that Mr. Manganelli was not even physically present when the search was conducted, since he was completely excluded from it<sup>1335</sup>. While he was heavily involved in the planning and coordination of the operations, he was not as familiar with the particular executive techniques as Colucci was<sup>1336</sup>. Regarding the following transfer of the fourteen prisoners to the *Danubio division*, a strong case was made to refute any claim that Mr. Manganelli was involved<sup>1337</sup>. This claim rested on the argument that his extended leave of absence made it unlikely that he was involved in the transfer in question<sup>1338</sup>. Moreover, supporting the claim that Mr. Manganelli was not aware that the search was illegal is the significant finding that he did not participate in the WhatsApp group conversations devoted to discussing the specifics of the search<sup>1339</sup>. This purposeful omission from the online conversation about the specifics of the search is a strong indication of his limited engagement with the operational details

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<sup>1329</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 3.

<sup>1330</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 3.

<sup>1331</sup> The so-called «*sfollagente*».

<sup>1332</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 3.

<sup>1333</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 3.

<sup>1334</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 4.

<sup>1335</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 4.

<sup>1336</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 4.

<sup>1337</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 4.

<sup>1338</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 4.

<sup>1339</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 5.

and supports the claim that he was unaware of the illegal nature of the search carried out by Dr. Colucci<sup>1340</sup>. With regard to the alleged failure to disclose responsibility under Article 40, paragraph 2 of the Criminal Code, the defense holds that the Tribunal's reasoning is faulty because there is a lack of solid proof that Manganelli was actually aware of the particular procedures used to carry out the extraordinary search operation<sup>1341</sup>. Manganelli's message to Mr. Aridino, in which he mentioned «*strong measures*» and the phrase «*today search and force*», should not be interpreted by the petitioner as evidence of any previous support for a mechanism that involves violence, nor should it be interpreted as evidence of knowledge of the illegal techniques used in carrying out the extraordinary search operations<sup>1342</sup>. It is said that Manganelli was never bothered with managing the complexities of the search process because Colucci was specifically given that task<sup>1343</sup>. The defense contends that Mr. Manganelli's lack of knowledge constitute a limit in assessing improper omission liability under Article 40 §2 of the criminal code, as suggested previously by the Tribunal<sup>1344</sup>. According to the Supreme court, the various active behaviors attributed to Mr. Manganelli led the way to the idea that the accused was liable in the stance of complicit responsibility for commission, both material and moral<sup>1345</sup>. This is in view of a causally significant contribution that was seen during the operation's planning stage as well as in the immediate aftermath, which included a number of acts of justice obstruction<sup>1346</sup>.

Moreover, the appellant contests the legal qualification of the crime of torture both in its subjective and its objective ambit: as for the former, it is contested since the ill-treatment had been carried out in order to restore peace in the detention facility after the detainees' riots; as for the latter, the conducts committed lack the habitual character, indeed requested for the offence of torture<sup>1347</sup>.

The Supreme Court established that the first ground of appeal is unfounded, taking into account the factual reconstruction that the judges in the precautionary

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<sup>1340</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 5.

<sup>1341</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 5.

<sup>1342</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 5.

<sup>1343</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 5.

<sup>1344</sup> FLORIO, E., «*Perquisizione e forza*», cit., 2.

<sup>1345</sup> FLORIO, E., «*Perquisizione e forza*», cit., 4.

<sup>1346</sup> FLORIO, E., «*Perquisizione e forza*», cit., 4.

<sup>1347</sup> FLORIO, E., «*Perquisizione e forza*», cit., 2.

procedures established<sup>1348</sup>. Manganelli's full and deliberate participation in the extraordinary search operations on April 6<sup>th</sup>, 2020, which turned into actual acts of torture, has been confirmed by a number of noteworthy factors: after Fullone gave him the order to carry out the extraordinary search, Manganelli did not only not object but instead emphasized the purpose; Manganelli took part in and supervised the search's organizational meeting, giving orders to his subordinates; in this meeting, he had already determined which detainees were to be transferred to the *Danubio section*; Manganelli also informed Mr. Fullone about the use of shields and batons and later thanked him via messages<sup>1349</sup>. That being said, it is imperative to emphasize that Manganelli's mere non-attendance at the *Nilo section* and his non-involvement in the actual acts of torture do not lessen the material and moral significance (instigation) of the contribution he made prior to and following the assaults<sup>1350</sup>.

It is necessary to make reference to the way torture as a crime is outlined, being described as a «*potentially habitual crime*» (*reato eventualmente abituale*), hence it can be committed over time by a series of violent, seriously threatening, or cruel acts, or by a single act that compromises the victim's moral and physical integrity and results in inhumane or degrading treatment<sup>1351</sup>. The reference to a plurality of behaviors does not necessarily imply a plurality of repeated episodes over time, as it is sufficient to have a «*plurality of violent behaviors within the same chronological context*»<sup>1352</sup>. It is important to remember that these acts must involve treating the subject inhumanely and degradingly, consequently weakening their dignity<sup>1353</sup>. It should also be noted that the acts of torture did not end with those carried out in the afternoon of April 6; instead, additional harassments were carried out in the days that followed, particularly against the fourteen detainees who had been moved to the *Danubio area*<sup>1354</sup>. In terms of intent, Manganelli appears to have

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<sup>1348</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 12.

<sup>1349</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 13.

<sup>1350</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 14.

<sup>1351</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 15.

<sup>1352</sup> FLORIO, E., «*Perquisizione e forza*», cit., 5.

<sup>1353</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 15.

<sup>1354</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 15.

done enough to demonstrate the unitary intent—which includes awareness and intention for every single act—that is necessary for the crime of torture<sup>1355</sup>.

Moving forward to the second reason presented by the applicant, the defense alleged a violation of the law and a lack of reasoning concerning the precautionary requirements under Article 274 of the Criminal Procedure Code, with particular reference to the risk of repetition of the crime<sup>1356</sup>. It is necessary to provide detailed reasoning on the circumstances that establish the presence of such risks in order to evaluate their immediacy and specificity, as the severity of the criminal charge alone cannot serve this purpose<sup>1357</sup>. Regarding the possibility of recurrence, the Tribunal ignores the unique conditions that resulted in a true systemic collapse in favor of reasoning pertaining to the violation of the obligation to prevent events<sup>1358</sup>. With regard to possible evidence contamination, it condemns the absence of prompt and precise confirmation of the threat, considering that the evidence has since been corrected by the acquisition of documentary evidence and victim testimonies<sup>1359</sup>. It attacks the Tribunal's seemingly insufficient reasoning, alleging that it used stylistic phrasing and ambiguous language to argue that suspending Manganelli's employment was the only practical way to manage the precautionary risk<sup>1360</sup>. Moreover, it contends that certain suspects have been subjected to a preventive measure that forbids them from leaving their home municipality in the absence of correctional facilities<sup>1361</sup> <sup>1362</sup>. It expresses dissatisfaction that Manganelli, who lives in Noia without prison amenities, did not receive a similar standard<sup>1363</sup>.

As for this second ground of appeal, the Court highlights its inadmissibility, as it is deemed generic, manifestly unfounded and based on objections related to the facts<sup>1364</sup>. Firstly, the objections about the possibility of contamination and the accompanying request for an alternative measure are not relevant in the preliminary

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<sup>1355</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 15.

<sup>1356</sup> FLORIO, E., “*Perquisizione e forza*”, cit., 2.

<sup>1357</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 7.

<sup>1358</sup> FLORIO, E., “*Perquisizione e forza*”, cit., 2 s.

<sup>1359</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 7.

<sup>1360</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 7.

<sup>1361</sup> A step deemed enough to lessen the possibility of evidence manipulation and the repeat of the offense.

<sup>1362</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 7.

<sup>1363</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 7.

<sup>1364</sup> FLORIO, E., “*Perquisizione e forza*”, cit., 5.

analysis<sup>1365</sup>. This is so because the risk of contamination is not mentioned in the Tribunal's reasoning; rather, it only addresses the necessity for precautions relating to the likelihood of recurrence<sup>1366</sup>. The inadmissibility of the complaints also challenges the reality and concreteness of the precautionary needs and the sufficiency of the measures. This is due to the fact that they are based on the false premise that the likelihood of similar offenses happening again corresponds to the recurrence of the same acts or offenses that are being contested during the procedures<sup>1367</sup>. The defendant may still repeat the contested acts despite the unusual circumstances of the incident<sup>1368</sup> <sup>1369</sup>. Therefore, it is important to stress that the chance of similar offenses occurring again should not be equated with the danger of committing the exact same crime in the context of preventative measures<sup>1370</sup>. The «*periculum*» places more emphasis on the recurrence of general acts of the same type than it does on the particular criminal act in question<sup>1371</sup>. Hence, concerning the risk of relapse, one should not confuse the risk of recurrence of offenses of the same kind with the risk of repeating the same concrete criminal act. The phrasing of Article 274, letter c of the Code of Criminal Procedure makes this plain: rather than focusing on the particular criminal act under discussion, which would not always be naturally repeated, the goal of the «*periculum*» is the repeating of abstract acts of the same sort<sup>1372</sup>.

Lastly, in the third ground for appeal, the defense alleged that the Court failed to give a justification for the house arrest measure's appropriateness, asserting a breach of Article 275 of the Code of Criminal Procedure as well as a lack of motivation with regard to the principles of proportionality and adequacy<sup>1373</sup>. The third ground of appeal is rejected because it criticizes the house arrest policy's insufficiency and disproportionality<sup>1374</sup>. The extraordinary seriousness of the

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<sup>1365</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 16.

<sup>1366</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 16.

<sup>1367</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 16 s.

<sup>1368</sup> Among them, one might mention tensions stemming from the handling of the pandemic emergency, the defendant's lack of criminal history, and the passage of time since the occurrences.

<sup>1369</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 17.

<sup>1370</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 17.

<sup>1371</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 17.

<sup>1372</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 17.

<sup>1373</sup> FLORIO, E., «*Perquisizione e forza*», cit., 3.

<sup>1374</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 18.



circumstances and Mr. Manganelli's major, organizational, and decision-making role have been explicitly cited by the Court as reasons why the interdiction measure, which is less stringent, is insufficient<sup>1375</sup>. As a result, it seems that the house arrest measure's proportionality and sufficiency have been properly considered<sup>1376</sup>. Therefore, the Supreme Court declares the third ground of appeal inadmissible, as the Tribunal has ruled out the appropriateness of a less severe measure<sup>1377</sup>. This decision was based on the seriousness of the allegations, the quantity of charges brought against the defendant and his principal involvement in the occurrence<sup>1378</sup>. It is also taken into account in light of the accused's later actions concerning fabrication and obstruction of justice<sup>1379</sup>.

The very last point addressed by the Supreme Court concerns precautionary needs. The defense asserts that they must be excluded, since the applicant has already been suspended from duty; however, this statement has been deemed incorrect by the Court by way of one of its precedents, concerning crimes committed by public officials<sup>1380</sup>. In the previous ruling, the Court affirmed that the «*periculum*» is indeed present even when the public official has already been suspended<sup>1381</sup>. This approach only works when the judge is able to provide for an appropriate and logical motivation regarding the subsequent suspension or termination<sup>1382</sup>. In the case at hand, this approach needs to be referred and tailored to the crime of torture, which is a common crime<sup>1383</sup>. For this main reason, common crimes especially violent ones, such as torture, do not need for the author to have a specific qualification<sup>1384</sup>. Therefore, its suspension cannot take away the risk of recurrence of offences of the same kind<sup>1385</sup>.

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<sup>1375</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 18.

<sup>1376</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 18.

<sup>1377</sup> FLORIO, E., «*Perquisizione e forza*», cit., 6.

<sup>1378</sup> FLORIO, E., «*Perquisizione e forza*», cit., 6.

<sup>1379</sup> FLORIO, E., «*Perquisizione e forza*», cit., 6.

<sup>1380</sup> FLORIO, E., «*Perquisizione e forza*», cit., 6.

<sup>1381</sup> FLORIO, E., «*Perquisizione e forza*», cit., 6.

<sup>1382</sup> The motivation can only be given when looking precisely at the particular circumstances of the case which are able to highlight whether the accused might commit those conducts again.

<sup>1383</sup> FLORIO, E., «*Perquisizione e forza*», cit., 6.

<sup>1384</sup> FLORIO, E., «*Perquisizione e forza*», cit., 6.

<sup>1385</sup> FLORIO, E., «*Perquisizione e forza*», cit., 6.

The Supreme Court of Cassation, with the present judgement, convicts the appellant, rejecting the appeal, and imposes on him the obligation to pay the legal costs<sup>1386</sup>.

#### **4.2. Can the acts committed in the Italian prison reach the level of gravity requested for them to be considered torture? A comparison with Article 613-bis of the Italian criminal code.**

In the judgment previously analyzed, the Supreme Court held that the crime of torture has been configured by the legislator as an offense that can be habitual, consisting of «*multiple violent, seriously threatening, or cruel acts repeated over time, or a single injurious act against the safety or personal and moral freedom of the victim*». The latter act, however, must involve inhuman and degrading treatment for the dignity of the person<sup>1387</sup>. However, for the crime to be considered habitual, two actions, even repeated over a short period, are sufficient, as stated previously by the Supreme Court in 2019<sup>1388</sup>. The expression «*through multiple actions*» refers to both a plurality of violent behaviors held within the same chronological context as well as a plurality of recurrent episodes throughout time with regard to the integration of the crime of torture under Article 613-bis, paragraph 1 of the Penal Code<sup>1389</sup>.

Regarding the subjective element, even in cases of torture where the offense assumes a habitual form, a unified intent—which consists of the initial representation and deliberate consideration of the complex set of actions to be performed—is not necessary<sup>1390</sup>. It is enough to be conscious of and willing to take each specific action at that moment<sup>1391</sup>.

In the specific case, the Supreme Court considered the crime of torture to be fulfilled concerning the serious episodes of violence and oppression committed in April 2020 against detainees in the Santa Maria Capua Vetere prison<sup>1392</sup>.

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<sup>1386</sup> Cass. Pen., Sez. 5, n. 8973/2022, cit., 20.

<sup>1387</sup> FAILLACI, G., *Tortura: il trattamento inumano e degradante dei detenuti nei fatti avvenuti nel carcere di Santa Maria Capua Vetere*, in *njus*, 2022.

<sup>1388</sup> FAILLACI, G., *Tortura nel carcere di Santa Maria Capua Vetere*, cit.

<sup>1389</sup> FAILLACI, G., *Tortura nel carcere di Santa Maria Capua Vetere*, cit.

<sup>1390</sup> FAILLACI, G., *Tortura nel carcere di Santa Maria Capua Vetere*, cit.

<sup>1391</sup> FAILLACI, G., *Tortura nel carcere di Santa Maria Capua Vetere*, cit.

<sup>1392</sup> FAILLACI, G., *Tortura nel carcere di Santa Maria Capua Vetere*, cit.

## **CONCLUSION**

The present dissertation aimed at shedding light on the Italian situation concerning torture and ill-treatment. Specifically, it went about different topics and deeply analyzed them. The subject of torture and Italy's adherence, or more correctly its lack of compliance for more than thirty decades, to its international and

European obligations is extremely complex and has drawn a lot of attention over time.

As previously established, Italy became party to most of the treaties and Conventions prohibiting torture, such as the UN Convention Against Torture, ratified in 1989, or, at the European level, the European Convention of Human Rights, in 1949. Nevertheless, the accession was not sufficient for Italy to rapidly enact a specific provision punishing conducts amounting to ill-treatment or even torture. Hence, the European Court of Human Rights saw many possibilities to condemn Italy for lack of compliance: in many instances Italy was «forced» by the Strasbourg judges to introduce such a provision. In the present dissertation, many cases were pointed out, such as *Khlaifia and Others v. Italy*.

However, it was only when the atrocities were committed in Genoa in 2001, during the G8 Summit, that Italy faced its last condemnation: *the Cestaro case*, which had a mediatic impact. The case at hand brought to light systematic shortcomings in the Italian legal and judicial system, referring to the investigation, prosecution and resolution of torture-related claims. It called for reform on a national and international level. Hence, Italy acknowledged the necessity to condemn conducts able to cause a dramatically enormous suffering.

Only in 2017 Law No. 110 entered into force, and with a poignant delay it introduced Articles 613-bis and 613-ter in the Italian criminal code. However, more problems arose when the law itself was supposed to be wrote down. There were infinite drawbacks and dissenting opinions, concerning the first drafts. Establishing common grounds for the crime of torture was no easy job, that is why it took many years to finally enact the law itself.

In sum, Article 613-bis in its first comma considers to be torture multiple acts or threats of violence committed by anyone or when one, even with a single act, acts with cruelty, causing acute suffering or a verifiable psychological trauma. Therefore, it describes a common crime, whilst its second comma sanctions the same conducts but with an increased penalty, since they are committed by a public official or an individual acting in official capacity: this second paragraph does not amount to an independent crime, but to an aggravating circumstance, even though there has been a huge debate about it.

When analyzing Article 613-bis of the criminal code and, simultaneously looking at Article 13§4 of the Constitution, many discrepancies can be highlighted. The latter is the only provision contained in the Constitution which relates to a crime and, therefore, to punishment, asking the legislator to sanction the mentioned conducts. Additionally, the criminal code was not even in compliance with torture as outlined in the UN CAT. Both the Constitution and the international Convention describe a crime which was supposed to be committed by individuals with a precise qualification: public officials or a person representing a public service. They punished the so-called State torture. It can be argued that, not even after so many years, torture at the national level did describe the conduct that was asked of Italy.

As noticed above, the two cases concerning torture in Italy's detention facilities of Asti and Santa Maria Capua Vetere were extremely important: Italy urgently has to prioritize ending torture and honor its commitments under international and European law. These incidents reveal structural weaknesses and inadequacies in Italy's criminal justice and prison systems in addition to being flagrant abuses of fundamental human rights.

As for the Asti prison, the case of *Cirino and Renne v. Italy* was addressed as a turning point for the introduction of the crime of torture, having been assessed by the ECtHR before 2017. It brought to light Italy's inability to adequately compensate victims of torture and other cruel treatment. This underscored the need for extensive legal reforms and improved accountability measures. Likewise, the documented mistreatment in Santa Maria Capua Vetere Prison revealed that often police officers go unpunished and showed contempt for human dignity that exists in certain sections of Italy's penal system and law enforcement.

Unsurprisingly, in November 2022, Bill No. 341 proposed to repeal Article 613-bis and to make torture an aggravating circumstance. Therefore, with this abrogation, torture as a crime would disappear from the criminal code. Italy's commitment to ensure freedom from torture would be negatively impacted: it sends a message that the institutions are placing less importance on the defense of the right to be free from torture<sup>1393</sup>. Most importantly, acts of torture would have to be

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<sup>1393</sup> Amnesty International Public Statement, Italy: backtracking on guaranteeing freedom from torture, November 2023, <https://www.amnesty.org/en/wp-content/uploads/2023/11/EUR3073222023ENGLISH.pdf>, 2.

prosecuted as lesser offenses with a shorter statute of limitations, like grievous bodily harm. Furthermore, the lack of a specific torture charge may lessen the deterrence effect that is required to stop such abhorrent behaviors in the future. Additionally, giving judge's discretion over the punishment of actions that qualify as torture invites inconsistent rulings and possibly lesser sentences. In the end, this proposed change runs the risk of depriving torture victims of justice and creating a climate in which those who commit crimes might avoid punishment. Respecting the ban on torture and making sure there are strong legal systems in place to punish these kinds of crimes are essential factors to protecting human dignity and encouraging social responsibility.

Italy needs to work closely with European and global human rights organizations, such as the Committee for the Prevention of Torture of the Council of Europe and the United Nations Committee Against Torture, in order to effectively monitor, report, and address allegations of torture. By doing so, it may support international efforts to end torture in all of its manifestations and reaffirm its dedication to the values of justice, equality, and human dignity.

In brief, coordinated measures at the national and international levels are necessary to completely eliminate torture, and Italy must take the initiative and contribute positively to this effort. It is only through persistent dedication, responsibility, and cooperation that Italy will be able to carry out its obligation to defend the rights and inherent dignity of every person, guaranteeing that torture has no place in the contemporary world.

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